



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO.396 OF 2017

DANIEL G. MWANGI 1ST PLAINTIFF

AGNES GATHONI GATUNGO 2ND PLAINTIFF

VERSUS

LEIYIAN TUMUTI DEFENDANT

RULING

What is before Court is a Preliminary Objection dated 16th April, 2017 by the Defendant against the Plaintiffs on the following grounds:

1. That the suit before Court is defective, incompetent, frivolous and bad in law.
2. That the suit before court offends the express provisions of the Limitation of Actions Act Cap 22 of the Laws of Kenya.
3. That the suit before court offends the express provisions of the Civil Procedure Rules 2010

On 26th September, 2017 both the Counsel for the Plaintiffs and Defendant made oral submissions on the Preliminary Objection. Moseti who is the Counsel for the Defendant submitted that in 1996 the Defendant borrowed Kshs. 200,000 from the 1st Plaintiff on security of title deed to land parcel number NGONG/NGONG/5464 and the debt was paid in full but the 1st Plaintiff failed to return the title deed. The Defendant was forced to gazette the title and the title NGONG/NGONG/5464 has since been subdivided and does not exist. He stated that the Plaintiff's application is defective because 2nd Plaintiff is stranger to the matter and Defendant does not know her as she was not in the picture when the transaction was taking place, and this offends the provisions of Order 1 rule 13 of the Civil Procedure Rules. Further, that the 2nd Plaintiff has failed to file authority from the 1st Plaintiff together with the application and this offends the provisions of Order 1 Rule 14 of the Civil Procedure Rules. He insists the transaction took place in 1996 which is 21 years ago and the suit was filed in 2017. This offends the provisions of Section 7 of the Limitation of Actions Act. He reiterates that the suit is mixed up. The 2nd Applicant is seeking recovery of money and at the same time recovery of land. The Application for injunction does not meet the threshold set in the case of **Giella Vs Cassman** to warrant the grant of an injunction.

Mr. Matundura insists the 1st Respondent bought the suit land from the Defendant in 1996 but the Defendant failed to transfer it to them and instead gazetted it alleging title deed was lost, and yet he had given it to the Plaintiffs. He submits that the Defendant's claim that there was a debt between the parties is false as this matter was even handled by the Police with the Defendant accepting to transfer suit land to the Plaintiffs when he was summoned. The Plaintiffs are in possession of the title deed. He avers that the Defendant returned Kshs. 100,000 and left a balance of Kshs. 291,000. He stated that the delay to transfer the suit land has been orchestrated by the Defendant who has failed to release the title deed. He admits affidavit is not signed and states that this should not be the reason to defeat justice, as there was a transaction between the parties with money changing hands.

Both the Plaintiff and the Defendant filed their respective submissions, which I have considered.

Analysis and Determination

Upon perusal of the Preliminary Objection, the written submissions and the pleadings filed herein, I find that the main issues for determination are the following:

- Whether this suit offends the express provisions of the Limitation of Actions Act Cap 22 of the Laws of Kenya.
- Whether this suit is defective, incompetent, frivolous and bad in law and ought to be struck out.

On the issue of Limitation of Actions Act, I note from the Plaintiff that the Plaintiff alleges fraud on the part of the Defendant who has failed to transfer the suit land to them. The Defendant insists the Plaintiff's claim is statute barred by the provisions of Section 7 of the Limitation of Actions Act.

Section 26 of Limitation of Actions Act provides that: ' **Where, in the case of an action for which a period of limitation is prescribed, either— (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or (b) the right of action is concealed by the fraud of any such person as aforesaid; or (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it: Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which— (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.**'

In relying on these provisions I find that the suit is not statute barred since there are allegations of fraud which have to be heard and determined and cannot be dismissed without viva voce evidence being adduced.

As to whether this suit is defective, incompetent, frivolous and bad in law and ought to be struck out.

I note the 2nd Plaintiff swore her statement dated the 23rd February, 2017 where she averred that she has authority to swear affidavit on behalf of the 1st Plaintiff. I note in the suit the Plaintiffs' are seeking for specific performance for the Defendant to sign the transfer form in their favour or in the alternative, to refund them Kshs. 291, 000 plus interest from 11th January, 1996 to date. A cursory look at these prayers show they are not ambiguous and are clear. According to section 19(1) of the Environment and Land Court Act it provides as follows: ' **...in any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence.**' The same position is well articulated in article 159 (2) (d) of the Constitution which provides that in exercising judicial authority, the courts and tribunals should ensure justice shall be administered without undue regard to procedural technicalities.

In the Court of Appeal in the case of **RAMJI MEGJI GUDKA LTD -Vs- ALFRED MORFAT OMUNDI MICHIRA ;& 2 OTHERS [2005] eKLR** held as follows:

"In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT DOBIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1 in which Madan J.A. at p. 9 said:-

"The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way." (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right."

In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham."

It is against the foregoing that I find that even though the Plaintiff is not perfectly drafted, it raises triable issues including breach of contract as well as fraud. It is my finding that the procedural technicalities the Defendant is alluding to, can be cured by an amendment.

It is hence my finding that the Preliminary Objection is not merited and I dismiss it.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 3rd day of July, 2018.

CHRISTINE OCHIENG

JUDGE