



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 502 OF 2011

AARON TAFARI OUKO.....1ST PLAINTIFF

ROSALYN DOLA OUKO.....2ND PLAINTIFF

(Suing as the Administrators of the Estate of the late Jason Atinda Ouko)

VERSUS

JOHN MWORIA.....DEFENDANT

RULING

The Defendant brought the application dated 8/5/2019 seeking to have the plaint struck out on the basis that it was an abuse of court process having been filed more than 3 years after accrual of the right to sue in tort in violation of Section 4 of the Limitation of the Actions Act and for being filed 12 years after accrual of the right to sue for recovery of land in violation of Section 7 of the Limitation of Actions Act. In the alternative, the Defendant sought to have the suit dismissed for want of prosecution and for the Plaintiffs to pay the costs of this application.

The application was made on the grounds that being an action for eviction based on trespass, the suit was time barred. Additionally, that since it is an action for recovery of land, the suit was time-barred because the Defendant took possession of the suit land in 1998 and had been openly and continuously in occupation for 13 years before this suit was filed. The Defendant contended that for more than a year the Plaintiffs had failed to set down the case for hearing or take any action towards preparing the suit for hearing.

The Defendant swore the affidavit in support of the application on 8/5/2019 in which he averred that this suit was instituted against him on 19/9/2011 and that by that time he had been in possession of the Suit Property for more than 13 years after purchasing the land on 15/12/1998 from Nashon Omwenga and Marcella Omwenga (“the Omwengas”) on behalf of their children. He annexed a copy of the sale agreement. He averred that on execution of the sale agreement he took immediate possession of the land and began constructing his matrimonial home on it. He added that he applied for and obtained water connection on 8/6/1999 and annexed the receipt for the water deposit issued by the City Council of Nairobi. He claimed that by 3/8/1999 he had completed construction of his house and applied for connection of electricity. He produced a copy of the letter dated 16/8/1999 from the Kenya Power and Lighting Company Limited (KPLC). The court notes that the plot number in KPLC’s letter was corrected by hand.

The Defendant therefore asserted that this suit was filed 12 years and 10 months after he had taken possession of the suit land. He stated that the Plaintiffs alleged in the plaint that he was a trespasser and that he took possession of the Suit Property in 2007. He asserted that going by the pleadings the suit would be time barred since that would be an action in tort. He added that upon filing this suit the Plaintiffs obtained orders against him and had not taken any steps to prosecute the suit for the last 7 ½ years. He claimed that the Plaintiffs had no interest in pursuing the suit as they had literally abandoned it. He urged the court to dismiss the suit for want of prosecution.

Aaron Tafari Ouko swore the replying affidavit in opposition to the application. He deponed that he was a co-administrator in the Estate of the late Jason Otinda Ouko and was authorised to swear the affidavit on behalf of Roselyn Dola Ouko, his co-administrator. He contended that the Defendant’s application was intended to delay the resolution of this dispute. He averred that the late Jason Atinda Ouko was the sole registered owner of the entire suit land measuring approximately 87.5 acres and that he was aware that the Defendant laid claim to a portion of land reference number (L.R. No.) 3589/6 allegedly on account of a purchase from the Omwengas. He averred that the alleged transaction between the Defendant and the Omwengas was not sanctioned by the family of the late Jason Atinda Ouko and that the family was not informed of that transaction.

Mr. Ouko deponed that the Defendant was a senior advocate of the High Court of Kenya and that he was engaged in a scheme intended to defraud the Estate of the late Jason Atinda Ouko of its property. He annexed a copy of the Forensic Document Examiner’s report to demonstrate that the documents used to facilitate the Defendant’s transaction with the Omwengas were found to be forgeries including the documents of transfer which the late Jason Atinda Ouko is alleged to have signed. He conceded that there was an agreement entered into in

1993 vide which the late Jason Atinda Ouko agreed to sell 5 acres of his land to the Omwengas but that the purchase price was never paid in full and that the Omwengas therefore did not therefore have any proprietary interest in the suit land which they could possibly have transferred to the Defendant.

Mr. Ouko deponed that when his father died on 2/2/1996, the family was rocked by numerous disputes which made the estate ungovernable, unmanned and extremely divided as a result of which many people including the Defendant took advantage of the situation to invade the vast piece of land. He stated that it was not until 22/5/2006 that a grant of letters of administration was issued for his father's estate. He averred that between February 1996 and May 2006, the estate of his late father was in shambles with no one having the capacity to protect its interest. He averred that a year after the grant was issued, the Defendant forcefully entered into the portion of land in dispute without the authority or consent of the family. He explained that their attempts to stop the Defendant's invasion of their land were frustrated by the fact that the Defendant who is a senior advocate, used his connections within the administration circles to curtail their efforts. Further, that they could not file suit until October 2011 due to the financial challenges the family was facing.

Mr. Ouko swore that prior to 2007, they were not aware of the Defendant's presence on the suit land nor did they know of his alleged interest over the suit land on account of the purported sale by the Omwengas. He maintained that this suit was filed within time and argued that the assertion that the suit is time barred pursuant to Section 4 of the Limitation of Actions Act was misplaced since the Plaintiffs do not seek damages. Mr. Ouko went to great lengths to set out the instances when this matter came up in court in 2011 and 2012.

He averred that sometime in 2012 the Defendant and other purported claimants over L.R. No. 3589/6 filed an application in **Nairobi High Court Succession Cause number 353 of 1997** in an attempt to challenge the grant of letters of administration issued to the Plaintiffs. He explained that for over 5 years this case could not proceed because of the challenge in the succession matter and that it was not until 11/4/2018 when the Honourable Lady Justice Achode affirmed the Plaintiffs as the administrators of the Estate of the late Jason Ouko. Further, that Achode J directed in the succession cause that the parcel of land known as L.R. No. 3589/6 measuring 87.5 acres would be preserved pending hearing and determination of the suits filed in the Environment and Land Court (ELC).

Mr. Ouko contended that the issues raised in this application were *res judicata* as they were raised and litigated through the application dated 3/10/2011. The Plaintiffs urged the court to dismiss the Defendants claim. They annexed copies of the title over L.R. No. 3589/6; the document examiner's report dated 26/6/2019 and the transfer purported to have been signed by Jason Atinda Ouko transferring the land to Nashon and Marcella Omwenga. He also attached a copy a grant of letters of administration issued on 22/5/2006. He annexed a copy of the order issued on 27/2/2018 in **High Court Succession Cause Number 353 of 1997** regarding the filing of summons for confirmation of grant for the entire estate of Jason Atinda Ouko except for L.R. No. 3589/6 Langata measuring 87.5 acres. He annexed a copy of the application filed by the Defendant on 3/10/2011 seeking to discharge the orders of injunction. He also annexed copies of the correspondence exchanged between the Plaintiffs' advocates and the Defendant.

Parties filed and exchanged written submissions which the court considered. The Defendant submitted that by the time this suit was filed he had been in possession of the suit land for about 13 years. He urged the court to look at Sections 4 and 7 of the Limitations of Actions Act. He submitted that it was not in dispute that by the time this suit was instituted he had been in possession of the Suit Property for about 13 years having purchased the land on behalf of his children from Nashon and Marcella Omwenga on 15/12/1998. He relied on **Dickson Ngige Ngugi v Consolidated Bank Limited (Formerly Jimba Credit Corporation Limited & Another) [2020] eKLR** in which the court underscored the fact that an action for recovery of land could not be brought after the expiry of 12 years.

The Defendant submitted that instituting a suit which was time barred like the present suit fell squarely within the four corners of abuse of court process. He cited several decisions on abuse of court process but unfortunately did not avail copies of those authorities to the court. The Defendant denied that it had acquired the suit land fraudulently and relied on Section 107 of the Evidence Act while arguing that the allegations of fraud made by the Plaintiffs must be proved to a higher standard. The Defendant contended that the Plaintiffs failed to do due diligence which would have made them aware that the Defendant was on the suit land. The Defendant relied on Order 2 Rule 15 (1) (d) of the Civil Procedure Rules which stipulates that at any stage of the proceedings, the court may order any pleading to be struck out on the ground that it is an abuse of the court process.

The Defendant contended that having taken possession in 1998 and having been in open peaceful continuous and uninterrupted occupation and in adverse possession of the suit land for a period of over 13 years before this suit was filed, he ought to be registered as the owner of the land under the doctrine of adverse possession which embodied in the Section 7 of the Limitations of Actions Act. Further, that the doctrine of adverse possession was provided for under Section 28(h) of the Land Registration Act and Section 7(d) of the Land Act which provide for acquisition of land by prescription.

The Defendant contended that for over a period of one year, the Plaintiffs had failed to set this case down for hearing or take steps to prepare the case for hearing which is enough reason for the dismissal of this case under Order 17 Rules 2 and 3 of the Civil Procedure Rules.

The Defendant argued that the instant application was not *res judicata* as it does not meet the ingredients set out at Section 7 of the Civil Procedure Act. He argued that the issues raised in this application had never been directly and substantially determined by a court of competent jurisdiction. He invited the court to peruse that application to see the differences and for the court to appreciate that the ingredients of *res judicata* had not been met. The Defendant urged the court to allow the application.

The Plaintiff submitted that striking out a suit was a radical remedy which courts of law should be slow in resorting to except in clear and obvious cases. The Plaintiffs contended that the instant application was an abuse of the court process and was calculated to conceal the real issues and delay the determination of the suit. The Plaintiffs submitted that this application was filed at the point where parties were about to take directions on the hearing and disposal of the suit which in the Plaintiffs' view pointed to a clear intention by the Defendant to scuttle the quick determination of the dispute. The Plaintiffs submitted that the Defendant filed a similar application dated 3/10/2011 touching on the same issue which he failed to prosecute. The Plaintiffs contended that under Section 1A of the Civil Procedure Act every party is enjoined to facilitate the just, expeditious, proportionate and affordable resolution of disputes before court while Section 1B requires the court to conduct its business in a manner that realises the efficient and timely disposal of proceedings at an affordable cost. The Plaintiffs urged the court to look at the court record on the steps they had taken to progress this matter.

The Plaintiffs contended that the Defendant was a critical player in the application filed in Succession Cause number 353 of 2007 which challenged the Plaintiffs' capacity as administrators of the Estate of the late Jason Atinda Ouko. The Plaintiffs submitted that the Defendant was aware of the directions issued by the court in the succession case which led to this case being held in abeyance while awaiting resolution of the issues raised in the succession cause touching on the administrators of the Estate of the late Jason Ouko. He stated that the issues in the succession cause were resolved in April 2018.

The Plaintiffs pointed out that the sale agreement between the late Mr. Jason Ouko and the Omwengas from whom the Defendant claims to have bought the suit land, was also the subject of the dispute in **ELC No. 416 of 2018 – Nahashon Kebwaro Omwenga v Estate of Jason Atinda Ouko**. The Plaintiffs maintained that the agreement dated 15/12/1998 which the Defendant relies on was executed after Jason Atinda Ouko had died in 1996. The Plaintiffs maintained that they became aware of the Defendant's presence and claim over an acre of the land for the first time in 2007 and could only file this suit in 2011. The Plaintiffs maintained that their claim was not premised on the tort of trespass but was for recovery of land belonging to the Estate of the late Jason Atinda. The Plaintiffs contended that logically speaking, the cause of action in this case could only accrue from the date the Plaintiffs became aware of the Defendant's claim and presence over the portion of the land in issue which was in 2007. The Plaintiffs pointed out that the documents annexed by the Defendant showed that water meter was connected on 15/10/2007 which would bring into issue the initial activity by the Defendant on the suit land. They pointed out that there was no privity of contract between the Defendant and the Estate of the late Jason Ouko. The Plaintiffs submitted that the conduct of the Defendant in this case showed that he did not comply with court directions. That on 21/11/2019 the court directed him to file and serve a further affidavit and submissions within 14 days which he did not file. That again on 21/9/2020 the court directed the Defendant to file and serve submissions which direction he failed to comply with. The Plaintiffs urged the court to dismiss the application.

The issue for determination is whether the court should grant the orders sought by the Defendant and strike this suit out for being an abuse of the court process or whether the suit should be dismissed for want of prosecution.

The Plaintiffs' claim is that sometime in 2007, the Defendant forcefully entered onto part of the land which is registered and owned by the late Jason Atinda Ouko. The Plaintiffs brought the claim as administrators of the Estate of the late Jason Atinda. There is evidence that the Plaintiffs' capacity to act as administrators of the Estate of the late Jason Atinda was challenged in **High Court Succession Cause Number 353 of 1997** and that the Defendant participated in the succession cause alongside other claimants to the land the Plaintiffs seek to recover as part of the assets of the Estate of the late Jason Atinda. The Defendant did not contest the assertion by the Plaintiffs that the issue relating to the grant of letters of administration to the Plaintiffs over the Estate of the late Jason Atinda was in contention for years and that it was only resolved in 2018. The Plaintiffs could not possibly have prosecuted this case as administrators of the Estate of the late Jason Atinda until the issue of administration of the Estate of the late Jason Atinda had been dealt with.

In this court's view, one of the issues to be determined at the trial is the date when the Defendant moved into the suit land. The Defendant's claim is anchored on an agreement dated 15/12/1998 which the Plaintiffs dispute as having been executed after Jason Atinda Ouko died in 1996. Evidence will have to be led to establish when the Defendant moved into the suit land for the court to compute time and make a determination as to whether the Plaintiffs' claim is statute-barred or whether the Defendant has a claim to the suit land adverse to the Plaintiffs' interest in the land.

The application dated 8/5/2019 is dismissed. Parties are directed to take steps to have the case heard and determined expeditiously. The costs of the application shall be in the cause.

DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF MAY 2021.

K. BOR

JUDGE

In the presence of: -

Mr. C. Kagimu holding brief for Ms. F. Lukoye for the Plaintiffs

No appearance for the Defendant

Mr. V. Owuor- Court Assistant