



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**ELC CASE NO. 748 OF 2016**

**CHARLES BARONGO MOMANYI.....PLAINTIFF**

**VERSUS**

**HEZRON KEBATI MOKUA.....1<sup>ST</sup> DEFENDANT**

**FRANCIS MACHUKA OBWACHO.....2<sup>ND</sup> DEFENDANT**

**RULING**

**INTRODUCTION AND BACKGROUND**

1. The Plaintiff instituted this suit against the Defendants seeking an order of injunction restraining the Defendants from trespassing on L.R No. WANJARE/BOMARIBA/1466. He also sought an order of Specific Performance directed at the 1<sup>st</sup> Defendant compelling him to execute all the necessary land transfer documents in respect of the suit property and an order cancelling the title issued to the 2<sup>nd</sup> Defendant in respect of the suit property.

2. The Defendants filed a Joint Statement of Defence dated 12<sup>th</sup> March, 2012 denying the Plaintiff's claim and stated that if any agreement was executed between the Plaintiff and the 1<sup>st</sup> Defendant, then the said agreement is incapable of conferring any rights to the Plaintiff over any portion of land parcel No. WANJARE/BOMARIBA/1466 by dint of the provisions of the Land Control Act.

3. When the matter came up for hearing on 2<sup>nd</sup> March 2021, counsel for the Defendant informed the court that he intended to raise a Preliminary Objection in terms of paragraph 10 of the Defence. The said Preliminary Objection is based on the following points of laws:

- i. That the suit discloses no cause of action.
- ii. The cause of action which is based on trespass in the year 2001 is statute-barred.
- iii. The land sale agreement dated 28<sup>th</sup> August 1985 is of no legal consequence and cannot be a basis of a cause of action.

The court directed that the Preliminary Objection be argued orally and counsel for both parties made their oral submissions.

**DEFENDANT'S SUBMISSIONS**

4. Learned counsel for the Defendant submitted that the Plaintiff's claim is for Specific Performance based on a contract dated 28<sup>th</sup> August 1985. He submitted that Section 7 of the Limitation of Actions Act provides that no claim should be brought in respect of land after the expiry of 12 years yet the Plaintiff's claim was filed after the expiry of 12 years. He pointed out that according to section 6 of the Land Control Act, there shall be no transfer of land if consent of the Land Control Board was not obtained within a period of six months from the date of the sale agreement. He contended that the Plaintiff had not disclosed whether he obtained the consent of the Land Control Board. He added that section 22 of the Land Control Act provides that if there was a contract for the sale of land and no consent was obtained within a period of six months, the contract becomes void. Consequently, the purchaser can only claim a refund of the purchase price. He relied on the case of **Reliable Electrical Engineers (Kenya) Limited v Mantrac Kenya Limited 2005 eKLR** where the court held as follows:

*“The jurisdiction of Specific Performance is based on the existence of a valid, enforceable contract “*

5. He reiterated that the contract dated 28<sup>th</sup> August 1985 was not valid and it was therefore not enforceable in law, thus Specific Performance

could not be granted.

6. He submitted that prayer (c) of the Plaint is for cancellation of the title issued to the 2<sup>nd</sup> Defendant in 1998. This is a period of more than 12 years. He submitted that the Plaintiff admits that the 1<sup>st</sup> Defendant legally and procedurally transferred the suit property to the 2<sup>nd</sup> Defendant. There was no caution or caveat in respect of the suit property to give notice to the 2<sup>nd</sup> Defendant that the suit property was encumbered. It was his submission that the 2<sup>nd</sup> Defendant bought the suit property in good faith and it was subsequently transferred to him.

7. He submitted that the Plaintiff had admitted that he never went to the suit property after buying it. He referred to the sale agreement which shows that the purchase price was Kshs. 5,000 but he only paid Kshs. 4,000 so the contract was invalid. He therefore prayed that the suit be struck out.

#### **PLAINTIFF'S SUBMISSIONS**

8. In objecting to the Defendant's Preliminary Objection, learned counsel for the Plaintiff admitted that the section 7 of the Limitation of Actions Act provides that a land claim should not be filed after the expiry of 12 years as this provision was intended to protect Defendants against unreasonable delays. He referred the court to the case of **Gathoni v Cooperative Creameries Ltd 1982 KLR 104**. It was his contention that it was the 1<sup>st</sup> Defendant's duty to obtain consent of the Land Control Board.

9. He submitted that the fact that the Plaintiff complained that he had planted trees which were cut down by the Defendants shows that he had taken possession of the suit property. He submitted that the case had been referred to the Suneka Land Disputes Tribunal vide Tribunal Case No. 45 of 2007 and the Tribunal held that the land belonged to the Plaintiff. However, the judgment of the Tribunal was never adopted as a judgment of the court.

10. It was his contention that time began to run in 2007 when the decision of the Tribunal was made and since the suit was filed five years after the said decision, the suit was not statute-barred. He concluded that the Preliminary Objection should not be used to prevent the case from being considered on its merits as the question of the validity of the contract needs to be determined.

11. In a brief rejoinder, counsel for the Defendants submitted that this was a court of law and the court ought to consider the case of Reliable Electrical Engineers (supra). He contended that time began to run from the date the sale agreement was signed. He said the decision of the Tribunal was of no consequence as it was never adopted as a judgment of the court. He concluded that it was a waste of judicial time to hear a matter which was barred by law.

#### **ISSUES FOR DETERMINATION**

12. Having considered the pleadings, Preliminary Objection and the rival submissions of the parties, the key issue for determination is whether the Preliminary Objection should be allowed.

#### **ANALYSIS AND DETERMINATION**

13. It is common ground that the suit herein is based on a sale agreement dated 28<sup>th</sup> August 1985 between the Plaintiff and the 1<sup>st</sup> Defendant. The Plaintiff took possession of the suit property and planted some trees but the 1<sup>st</sup> Defendant did not transfer the land to him. The 1<sup>st</sup> Defendant later sold the same parcel of land to the 2<sup>nd</sup> Defendant and transferred it to him without the Plaintiff's knowledge. The 2<sup>nd</sup> Defendant subsequently entered the suit property and destroyed some of the trees planted by the Plaintiff. This prompted the Plaintiff to file a suit at the Suneka Land Disputes Tribunal in 2007 which was decided in his favour. He subsequently filed this suit and an application for injunction dated 22<sup>nd</sup> February 2012.

14. It is clear that the 1<sup>st</sup> Defendant does not deny that there was an agreement between him and the Plaintiff. His main defence is that the agreement became invalid after the expiry of six months for lack of consent of the Land Control Board. Section 6 of the Land Control Act provides as follows:

6 (1) *Each of the following transactions that is to say –*

*a. the sale, transfer, lease, mortgage, exchange, partition or other disposal or dealing with any agricultural land which is situated within a land controlled area is void for all purposes unless the Land Control the Board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with is Act.*

*Section 7 of the said Act provides that*

*If money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as s debt by the person who paid it from the person to whom it was paid but without prejudice to section 22.*

15. The effect of the above provisions of the law is that the agreement between the Plaintiff and the 1st defendant became void after six months since no consent of the Land Control Board was obtained. The law however provides that whatever consideration the Plaintiff paid to the 1<sup>st</sup> Defendant could be recovered as a debt. This means that at the time the Plaintiff filed this suit there was no valid contract upon which a claim for Specific Performance could be made and as held in e case of Reliable Electrical Engineering (supra), the jurisdiction of Specific Performance is based on the existence of a valid, enforceable contract. In the absence of a valid contract the Plaintiff has no valid claim

against the 1<sup>st</sup> Defendant.

16. The claim for trespass against the 2<sup>nd</sup> Defendant is also dependent on the validity of the contract between the Plaintiff and the 1<sup>st</sup> Defendant and it cannot succeed in isolation. Likewise, the claim for injunction would only succeed if the Plaintiff established that he is the rightful owner of the suit property. These are sound legal principles which cannot be wished away as mere technicalities. The argument by counsel for the Plaintiff that time started running in 2007 and not 1985 is not based on any law and it does not hold any water.

17. In view of the foregoing, I am constrained to agree with counsel for the 1<sup>st</sup> Defendant that this suit discloses no cause of action and the same is unsustainable. Allowing it to proceed to full hearing would only increase costs and it would be a waste of the scarce judicial time and resources.

18. The upshot is that the Preliminary Objection is merited and I uphold it and strike out the suit herein. Each party shall bear their own costs.

**DATED, SIGNED AND DELIVERED AT KISII THIS 13<sup>TH</sup> DAY OF JULY, 2021.**

**J.M ONYANGO**

**JUDGE.**