



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

E.L.C CASE NO. 31 OF 2020

KENYA FARMERS ASSOCIATION.....PLAINTIFF

VERSUS

QUASAR LIMITED.....1ST DEFENDANT

ABDUL SULTAN RAJWANI.....2ND DEFENDANT

PRIME BANK LIMITED.....3RD DEFENDANT

OSHWAL SUPERMARKET LIMITED.....4TH DEFENDANT

THE LAND REGISTRAR, KISII COUNTY.....5TH DEFENDANT

ATTORNEY GENERAL.....6TH DEFENDANT

RULING

INTRODUCTION

1. This ruling in respect to three applications; the first one is the 1st Defendant's Chamber Summons dated 29th October 2020 seeking orders that the 1st Defendant be struck out from this suit. The second application which is a Notice of Motion dated 26th November 2020 seeks orders that the 4th Defendant be struck out from this suit. Both applications are anchored on the grounds stated on the face of the applications and the respective supporting affidavits. I will touch on the third application later in this ruling.

2. In support of the Chamber Summons dated 29th October 2020, Azim Lufatali Rajwani, a director of the 1st Defendant/Applicant filed an affidavit sworn on the 29th October 2020 in which he depones that the 1st Defendant bought the suit property from the 2nd Defendant at arm's length basis as an innocent purchaser for value and caused the title to be registered in the 1st Defendant's name on 20th June 2002. The 1st Defendant then procured a series of loans from the 3rd Defendant between April 2003 and April 2004 which were secured by a charge against the suit property. He avers that owing to the 1st Defendant's inability to repay the loan the suit property was sold to the 4th Defendant thus extinguishing the 1st Defendant's interest therein. It is therefore his contention that the 1st Defendant has no interest in the suit property nor was he involved in any fraud with respect to the same and thus he is not a necessary party to the suit.

3. The application is opposed by the Plaintiff through its Grounds of Opposition dated 20th November 2020 in which it states that the application is incurably defective and that it is frivolous, vexatious and misconceived. The Plaintiff adds that the suit raises triable issues and that the 1st Defendant is a necessary party to the proceedings. The Plaintiff further states that there is another matter pending in this court where the Plaintiff has sued another party and it will be necessary to consolidate the said suit with this one. The Plaintiff contends that the application lacks merit, is bad in law and it is an abuse of the court process.

4. The application dated 26th November 2020 is based on the grounds that the Plaintiff does not disclose any cause of action against the 4th Defendant and that the 4th Defendant was an innocent purchaser for value without notice. It is also contended that the suit is time-barred as the alleged fraud took place in 2002 while the suit was filed in 2020.

5. The application is further supported by the affidavit of Prinalkumar Bwangwanji Chanderia sworn on the 25th November 2020. In the said affidavit, he elaborates the aforesaid grounds and depones that the 4th Defendant acquired title to the suit property at a valuable consideration of Kshs. 25 million on 3.5.2011 as indicated on the extract of the Register in respect of the suit property, which is annexed to the deponent's affidavit as annexure "PBC 1" and was therefore a bona fide purchaser for value without notice. It is his further averment that

the suit is statute-barred as the alleged fraud took place in 2002 while the suit herein was filed in 2020 after a span of 18 years.

6. In response to the application dated 25.11.20, the Plaintiff filed Grounds of Opposition dated 25.1.21 raising the same grounds as those raised in respect of the application dated 29.10.20 save that it added that the striking out of **Civil Case No. Kisii CMCC No. 927 of 2002** instituted by the 1st Defendant against the Plaintiff herein, for want of jurisdiction on 3rd April 2019 opened up the issues and the period of limitation.

7. On 16th March 2021, the case against the 2nd Defendant was withdrawn upon the Plaintiff's application as counsel for the Plaintiff informed the court that the 2nd Defendant had died.

8. The 3rd, 5th and 6th Defendants did not file any response to the applications. However, the 3rd Defendant filed a Notice of Motion dated 25.1.2021 seeking to be struck out from the suit on the grounds that the 3rd Defendant was not involved in the process of extension of lease or allocation of the suit property to a person other than the Plaintiff. The Plaintiff filed its Grounds of Opposition dated 16.2.21 to the said application. However, no directions were given in respect of this application.

9. The court directed that the applications dated 29.10.2020 and 25/11/2020 be canvassed by way of written submissions and the 1st and 4th Defendants filed their respective submissions. Interestingly, the 4th Defendant also filed its submissions in respect of its application dated 25th January 2021 while the Plaintiff filed its submissions in respect of all the three applications.

10. In furtherance of the overriding objective under sections 1A and 1B of the Civil Procedure Act and to void a multiplicity of rulings, I will determine all the three applications in this ruling.

11. Before delving into the merits of the three applications, it is necessary to give a brief background of the case. The Plaintiff's case is that prior to the 30th November 2001, it was the registered owner of land parcel No. KISII MUNICIPALITY/BLOCK 111/143 and it was granted, a lease for a term of 33 years from 1st January 1963. Sometime in June 1999 the Plaintiff discovered that one Anil Tailor had been registered as the proprietor of the suit property. After raising its concerns with the Commissioner of Lands, the name of Anil Tailor was struck out and the Plaintiff applied for extension of lease in its name as it had carried out substantial developments on the suit property. However, despite having received approvals from the relevant Government offices and the Municipal Council of Kisii (now defunct), the Commissioner of Lands and Municipal Council of Kisii erroneously allocated the suit property to Abdul Sultan Rajwani (2nd Defendant who is now deceased).

12. Upon realizing their mistake, the Commissioner of Lands wrote a letter dated 18th November 2002 to the Municipal Council of Kisii to identify an alternative plot for allocation to the 2nd Defendant. In the meantime, the Commissioner of Lands recommended that a restriction be placed on the title to stop any further dealings until the matter is resolved. The said restriction was placed on the title by the Land Registrar on 28th November 2002. However, on 23rd December 2002, the said restriction was removed pursuant to a court order issued on an interlocutory application in Kisii CMCC No. 927 of 2002.

13. Subsequently, the title issued to the 2nd and 1st Defendants was charged to the 3rd Defendant to secure loan facilities amounting to Kshs. 27 million advanced to the 1st Defendant. The 1st Defendant was unable to service the loan and the suit property was sold to the 4th Defendant.

14. It is the Plaintiff's contention that the manner in which the suit property was allocated to the 2nd and 1st Defendants was fraudulent and unlawful. The Plaintiff claims that the Defendants acted jointly and severally in transacting in the suit property which had wrongfully been allocated to the 1st and 2nd Defendants thus putting it beyond the reach of the Plaintiff. The Plaintiff therefore prays for judgment against the Defendants jointly and severally for an order of restitution of the restriction placed by the 5th Defendant at the instance of the Commissioner of Lands on 28th November 2002, until the process of renewal of the lease is completed, an order of eviction, general, special and exemplary damages as well as costs of the suit.

15. The 1st, 3rd and 4th Defendants filed their Defences denying the Plaintiff's claim against them and thereafter filed separate applications seeking to be struck out from the suit. The 5th and 6th Defendants neither entered appearance nor filed any defences.

ISSUES FOR DETERMINATION

16. Having carefully considered the applications filed by the 1st, 3rd and 4th Defendants, the Plaintiff's Grounds of Opposition and the rival submissions, the issues for determination are twofold:

i. Whether the 1st, 3rd and 4th defendants should be struck out from the suit.

ii. Whether the suit herein is statute-barred.

ANALYSIS AND DETERMINATION

17. I will first deal with the question as to whether the suit herein is statute-barred as this goes to the jurisdiction of the court. It is common ground that the Plaintiff's suit is founded on fraud. The Plaintiff contends that the manner in which the suit property was allocated to the 1st and 2nd Defendants was unprocedural and fraudulent as the Plaintiff who was the registered owner of the suit property had obtained

approvals for extension of lease from the Commissioner of Lands and the Municipal Council of Kisii. At paragraph 13 of the Plaintiff, the Plaintiff sets out the particulars of fraud and unprocedural acts as follows:

- a) *Entering Quasar Limited in the register while knowing that it was never issued with a letter of allotment.*
- b) *Purporting to transfer land from Abdul Sultan Rajwani before obtaining the mandatory consent to transfer, clearance certificate and transfer of lease from the defunct Municipal Council of Kisii.*
- c) *Conspiracy and inducement to defeat the interest of the Plaintiff to the suit land notwithstanding that they knew or ought to have known that the plaintiff had fully complied and/or done all acts and manner of things necessary to effect the extension of the lease long before approving and issuing a fresh lease to the 2nd Defendant.*
- d) *Transacting on the suit land while knowing that there was a pending litigation.*
- e) *Destroying the register containing the relevant entries of the suit land and opening a new register with intent to create disconnect of the history of the suit land*
- f) *Proceeding to transact on the suit land while knowing that the Commissioner of Lands had directed that the 2nd Defendant be re-allocated a different plot and that the Plaintiff retains its parcel of land No. KISII MUNICIPALITY/BLOCK 111/143.*
- g) *Transacting on a title which was roots were (sic) unprocedurally and unlawfully obtained and/or acquired.*

18. It is the Plaintiff's case that the 1st and 2nd Defendants having acquired their title to the suit property fraudulently, could not charge the same to the 3rd Defendant as security for a loan. The suit property was subsequently sold to the 4th Defendant as the 1st Defendant was unable to repay the loan. The Plaintiff therefore prays for the following reliefs:

- a) An order of restitution of the restriction placed by the 5th Defendant at the instance of the Commissioner of Lands and Chief Land Registrar on 28th November 2002 until the recommendations made by the Commissioner of Lands on 18th November 2002 are satisfied and/or until the process of renewal of lease in favour of the plaintiff is completed.
- b) An order of eviction Or in the alternative
- c) General damages, exemplary damages, compensatory damages and/or aggravated damages
- d) Special damages
- e) Costs and interest.

19. Section 4(2) of the Limitation of Actions Act which deals with torts including fraud provides as follows:

4(2) "An action founded on tort may not be brought after the end of 3 years from the date on which the cause of action accrued"

20. It is clear from the plaint that the fraudulent acts complained of particularly the issuance of the title to the 1st and 2nd Defendants took place in November 2002, while the charge to the 3rd Defendant was registered in April 2003. The suit property was subsequently sold to the 4th Defendant in 2011. Learned counsel for the 4th Defendant has submitted that the suit ought to have been filed in 2006. It is his contention that the suit herein having been filed in 2020 is hopelessly out of time.

21. In response to the 4th Defendant's submissions, learned counsel for the Plaintiff has submitted that time stopped running when the 1st Defendant obtained an order removing the restriction that had been placed against the suit property in **KISII CMCC 927 of 2002** which had been filed by the 1st Defendant against the Plaintiff, the Commissioner of Lands. The said suit was eventually struck out for want of pecuniary jurisdiction on 3rd April 2019. He therefore argues that time started running on 3rd April 2019.

22. Counsel has cited the case of **Karani Chepsongi v Kipsetion Chebowo (2015) eKLR** where the court held that time stopped running after the award given by the Land Disputes Tribunal was contested in the Nakuru Resident Magistrate's Court. With respect the facts in this case are different as the Plaintiff did not contest the order issued by the lower court by way of appeal or otherwise and instead waited from 2002 to 2019 when the suit was struck out for lack of pecuniary jurisdiction.

23. Counsel further contends that one can only raise a defence of limitation if he has dispossessed the owner of land for a period of more than 12 years. He adds that the Plaintiff was dispossessed of the suit property in 2014 and therefore 12 years had not elapsed.

24. The question that begs for an answer is if time stopped running when the Defendant filed suit in the lower court which lacked jurisdiction.

Section 39 of the Limitation of Actions Act provides that

(1) A period of limitation does not run if

(a) There is a contract not to plead limitation or

(b) That the person attempting to plead limitation is estopped from so doing

(2) For purposes of sub-section (1) estopped includes estopped by equitable or promissory estoppel.

25. In the case of **Donald Osewe Oluoch v Kenya Airways Limited (2017) eKLR** the Court of Appeal faced with a scenario similar to the one in the instant suit held as follows:

“Part III of the Limitation of Actions Act dealing with “extension of periods of limitation” sets out the circumstances under which periods of limitation may be extended and with fresh accrual of right of action as well as the manner for doing so. Section 31 in Part III of the Limitation of Actions Act provides that “where a period of limitation is prescribed for any action or arbitration by any other written law, that written law shall be construed as if Part III of this Act were incorporated in it.”

There is no provision in the Limitation of Actions Act or in any other statute in Kenya providing that the time when a “plaintiff has been prosecuting...another civil proceeding [in a court] against the defendant...founded upon the same cause of action” shall be excluded in computing the period of limitation. The holding by the Judge that “the entire time the matter was pending at the High Court and at the Court of Appeal, time did not run for purposes of limitation of action” does not have statutory support.

The Judge however found support for that proposition in a passage extracted from a 1938 Butterworths & Co publication; **“The Law of Limitation and Adverse Possession”**, Vol 1 by K. J. Rustomji thus:

“In computing the period of limitation prescribed for any suit, the time during which the Plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of Appeal against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it.”

It would seem that it was not brought to the attention of the Judge that that passage was a verbatim reproduction of Section 14 of the Indian Limitation Act. In other words, the principle which counsel for the respondent urges us to apply, namely, that where a litigant pursues litigation with due diligence, but that litigation fails because the court refuses to entertain such litigation by reason of defect of jurisdiction and that time taken in such proceedings should be taken into account and excluded when computing the period of limitation for later proceedings, is a codified legal principle in India. That is not the case in Kenya.

Limitation of actions in this country is, in our judgment, entirely a matter of statute. It was also not demonstrated that the statutory provisions underlying the decisions from the United States Courts of Appeals to which we were referred are *in parimateria* with our statute”.

26. Further in **Lilian Njeri Muranja & John Muranja v Virginia Nyambura Ndiba & Kajiado County Council (2014) eKLR** the court held that:

“For two reasons, I would not uphold that contention. Firstly, it would be stretching the law of limitation for one to argue that once a suit is filed time ceases to run. The only rider to a plaintiff being allowed to file another suit if the original suit is dismissed for want of prosecution is if the action is still within the limitation period. Certainly, if this were not so then any suit filed would mean time begun to run on the filing of the suit. Effectively, time would never stop. Secondly, I hold the view that merely bringing a suit does not stop statutory periods from running. If the suit is prosecuted of course time stops to run as the action is complete. If the suit is withdrawn or discontinued then, a *fortiori*, the parties revert to the same position as if the suit had never been filed. The same position would obtain where a suit is dismissed for want of prosecution. That means that time never stops running by the mere filing of the suit. It was counting.”

27. From the above-cited authorities, it is clear that time for purposes of the Limitation of Actions Act does not stop running against a party merely because he has filed a case albeit in a court without jurisdiction. Limitation is governed by the provisions of the Limitation of Actions Act Cap 22 of the Laws of Kenya. It is therefore my finding that since the fraud alluded to in the Plaintiff arose in 2002, the limitation period lapsed in 2005.

28. Counsel’s submission that one can only raise the defence of limitation if he has dispossessed the owner for a period of more than 12 years, would only be correct if the Defendants were claiming the suit property by way of adverse possession. In the instant case none of the defendants has put forth a claim of adverse possession.

29. It is counsel’s further contention that there was illegal entry into the suit property in 2014. The plaintiff is not clear on which of the Defendants wrongfully entered the suit property and when. Paragraph 16 of the Plaintiff states as follows:

“The Defendants forcefully, wrongfully and illegally entered the suit land valued more than Kshs.50 million and demolished the buildings thereon after damaging and/or threw out and/or carried away the plaintiff’s goods in the shop and store Further they forcefully evicted the tenants occupying part of the buildings.”

At paragraph 17 of the *Plaint*, the plaintiff gives the particulars of damages as follows

Particulars of Damages

(a) *Destroyed or taken away stock including fertilizer, maize seed, farm inputs, crop seeds Kshs. 15,000,000*

(b) *Land parcel no. KISII MUNICIPALITY /BLOCK 111/143- Kshs. 50,000,000/=*

(c) *Hiring alternative business premises sat the rate of Kshs. 60,000/= per month from the month of April 2014 to the date of judgment*

(d) *Loss of rental income – Kshs 80,000/= per month from April 2014 until the date of judgment”.*

30. Even if I were to assume that the alleged wrongful entry and eviction took place in April 2014, in view of my finding that time did not stop running during the pendency of Kisii CMCC 927 of 2002, the claim of trespass would also be time-barred.

31. Having arrived at the finding that the suit is statute-barred, I see no need of addressing the issue of whether the 1st, 3rd and 4th Defendants ought to be struck out from the suit as I have no choice but to strike out the entire suit with costs to the 1st, 3rd and 4th Respondents.

DATED, SIGNED AND DELIVERED AT KISII THIS 30TH DAY OF SEPTEMBER, 2021.

J.M ONYANGO

JUDGE