



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC NO. 762 OF 2015

RUTH WAMBUI NGANGAAPPLICANT

VERSUS

NGONG BUTCHERS CO-OPERATIVE LIMITED.....RESPONDENT

RULING

1. This miscellaneous suit was filed vide a Notice of Motion dated 15th June 2015, where the applicant seeks leave to file a suit for recovery of land from the Respondent. The application is supported by a Supporting Affidavit wherein the Applicant averred that she bought **Plot Number 33721/33** from Ngong Butchers Co-operative Limited on 14th June 1986. The Respondents issued her with receipts for the money paid, and they signed a sale agreement on 10th May 2004 to that effect.

2. She averred that in 2005, following a change of leadership in the Respondent's society, the new officials sued the old officials for purported forgery and fraudulently dealing with the Respondents' assets. She and seven other purchasers were included in the suit. She deponed that the Respondent delayed in the prosecution of the suit while negotiating out of court settlements with other parties, and the matter was dismissed for want of prosecution. This left her rights over the land undetermined. She deponed that the Respondents deliberately abandoned their suit and caused it to be dismissed, compromising her claim against them. She thus seeks leave to file suit against the Respondents.

3. The Respondents filed Grounds of Opposition dated 25th July 2015 on the grounds that the application was incompetent and an abuse of the court process; that it was bad in law and premised on grounds not known in law; that it was frivolous, vexatious and misplaced; that the Application and Plaintiff's Supporting Affidavit were vague and lacking in law and substance and that the application was misconceived and lacked any merits whatsoever.

Submissions

4. The Plaintiff filed written submissions dated 15th June 2021 wherein she stated that she bought the suit property, she duly executed a sale agreement and paid a consideration of Kshs. 150,000/-, constituting a valid contract. The Applicant relied on the case of **Kitiri Farmer's Co-operative Society Ltd vs Chief Land Registrar and 3 others [2020] eKLR** where the court held that the 3rd and 4th Defendants in that suit had legally acquired the property as bona fide purchasers for value.

5. The applicant also submitted that the Co-operative Society's actions constituted a breach of contract and on this point, she relied on the case of **Solomon Ndegwa Kuria vs Peter Nditu Gitau [2019] eKLR** where the court held that the Defendant was in breach of the contract and ordered that they refund the purchase price to the plaintiff, pay a penalty of 25% of the purchase price as indicated in the contract and general damages of Kshs. 500,00/-.

6. She stated that the application should be allowed as she has suffered during the pendency of this matter which relates to a sale agreement dating back to 2004.

7. The Respondents filed Submissions dated 22nd September 2021 wherein they submitted that this court lacks jurisdiction as the suit property is located in Kajiado, hence the suit should be heard at the Environment and Land Court in Kajiado or in Ngong Magistrates Court. They also submitted that the Application is vague and lacking in law and substance. Further, the Applicant has been indolent as she has failed to prosecute this application since it was filed six years ago.

8. The Respondent's advocate submitted that this suit is time barred as it was instituted 29 years after the purported cause of action arose as the Applicant purchased the property in 1986. They stated that as limitation goes to jurisdiction, the court lacks jurisdiction to determine this matter and can consequently not grant the remedies sought herein. They relied on the case of **Margaret Warimu Magugu vs Karura Investment Ltd and 4 other [2019] eKLR** where the Court of Appeal ruled that an appeal was devoid of merit as it was time barred. They also relied on **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** where the court emphasized that

jurisdiction is everything.

9. The respondent quoted **Section 7** of the **Limitation of Actions Act, Cap. 22**, which provides a statutory limit of twelve years from when the right of action accrues in matters land. To this end, reference was made to the case of **Nelson Machoka Keraro vs Land Registrar Kisii & 3 others [2019] eKLR** where the court referred with approval to **Iga -vs- Makere University [1972] EA 65**:

“the Court of Appeal for Eastern Africa while considering the application of the Limitation Act (Uganda) which is similar to our own Limitation Act held that “a plaint barred by limitation is barred by law and must be rejected. The Judges further in the same case stated as follows:-

...The Limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for, and when the suit is time barred, the Court cannot grant the remedy or relief.”

10. It was submitted that the purported transaction between the Applicant and the Respondents did not follow due procedure as provided under **Section 27 and 28 of the Co-operative Societies Act Cap 490**, as no Annual General Meeting was held in either 1986 and 2004 concerning the sale of land to the Applicant, and no resolution was passed by the members to that effect. To this end, the respondent relied on the case of **Mary Wanjiru Kihugu & 6 others vs Regency Cooperative Savings and Credit Society Limited [2021] eKLR**.

Analysis and Determination

11. The issues for determination in this suit are:-

a) *Whether this court has territorial jurisdiction to determine this matter;*

b) *Whether the suit is statute barred, whether the Applicant should be granted leave to file suit for recovery of land out of time.*

Whether this court has territorial jurisdiction to determine this matter

12. It is not in dispute that the suit property herein is located in Ongata Rongai, Kajiado County. The Jurisdiction of the Environment and Land Court is set out in **Section 13 (1) of the Environment and Land Court Act**, which provides that it has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other written law relating to environment and land. **Section 12 (a) of the Civil Procedure Act Cap 21**, Laws of Kenya provides that a suit should be instituted where the subject matter is situated. The court takes judicial notice that the Kajiado Environment and Land Court was not in existence as at the time the suit was filed. Further, the respondent did not raise the issue of territorial jurisdiction in its pleadings (read grounds of opposition).

13. The Respondent did however raise the issue of territorial jurisdiction of this court when the matter was mentioned on 15th June 2021. This court ruled that as this matter had been pending in the High Court and thereafter in the Environment and Land Court since 2015, the miscellaneous application would be disposed off by this court. The respondent did not challenge the order of the court, thus the matter is already settled on the issue of territorial jurisdiction.

Whether the suit is statute barred, Whether the Applicant should be granted leave to file suit for recovery of land out of time.

14. It is clear from the Applicant's pleadings that the suit is based on a claim for leave to file suit for recovery of land. This would bring this suit under the ambit of Section 7 of the Limitation of Actions Act which provides that:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

15. The Applicant claims to have bought the land in 1986, she has exhibited a sale agreement and receipts of payment of the consideration that are dated 2004. The right of action thus accrued to the Applicant in 2004 and not 1986.

16. **Section 7** of the **Limitation of Actions Act** prescribes a twelve-year limit within which a party should institute suit, from the time at which the right of action accrued. **Section 4(1)(a)** of the same **Act** also prescribes that an action founded on a contract may not be brought after the end of six years from the date on which the cause of action accrued.

17. The court in **Dickson Ngige Ngugi v Consolidated Bank Ltd (Formerly Jimba Credit Corporation Limited & another [2020] eKLR** relied on the ruling by Potter, JA in **Gathoni -vs- Kenya co-operative Cremires Ltd (1982) KLR 104** wherein the court stated the rationale of the Law of Limitation as follows:-

“The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

18. In **Joshua Ngatu v Jane Mpinda & 3 others [2019] eKLR**, the court relied on East African Court of Justice appeal case No. 2 of 2012, **Attorney General of Uganda & Another Vs. Omar Awadh & 6 Others (2013) Eklr** where it was stated as follows;

“Both justice and equity abhor a claimant's indolence or sloth. Stale claims prejudice and negatively impact the efficacy and

efficiency of the administration of justice. The overarching rationale for statutes of limitations, such as the time limit of Article 30 (2) of the EAC Treaty, is to protect the system from the prejudice of stale claims and their salutary effect on the twin principles of legal certainty and of repose (namely: affording peace of mind, avoiding the disruption of settled expectations, and reducing uncertainty about the future)”

19. With respect to the doctrine of laches, in **Abigael Barma Vs. Mwangi Theuri ELC No.393 of 2013**, the court made reference to “**Snell's Equity, 30th Edition at p 33 para 3-16 (quoting Lord Camden L.C in Smith v Clay (1767) 3 Bro. C.C. 639n. at 640n)** where it was asserted that a court of equity *“has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing.”*

20. In the matter herein, the Applicant instituted the suit in 2015 and purported to rely on a contract dating back to 2004. While she indicated that a suit was brought by the Respondents in 2005, challenging the ownership of the suit property, she has not tendered any evidence as to when this suit was dismissed for lack of prosecution. She has offered no reasonable explanation for the ten-year delay in filing this suit. The logical conclusion to make is that the Applicant has been indolent and the matter has thus been rendered stale. In accordance with **Section 4(1)(a) of the Limitation of Actions Act**, I find that this matter is statute barred as it was filed after the limitation period had expired. Thus the prayer to institute a suit for the recovery of land is declined. This miscellaneous suit is hereby dismissed and each party is to bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

RUTH WAMBUI APPLICANT PRESENT IN PERSON

NGANGA FOR THE RESPONDENT

Court Assistant: Edel Barasa