



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 57 OF 2017

BAYA YAA BAYA.....1ST PLAINTIFF

RICHARD MARK BINNS.....2ND PLAINTIFF

FELICITY ANN BINNS.....3RD PLAINTIFF

VERSUS

SIMEON KAZUNGU BAYA.....1ST DEFENDANT

ENGLISH VOICE REAL ESTATE LIMITED.....2ND DEFENDANT

RULING

1. By a Plaint dated 14th March 2017, the three Plaintiffs pray for Judgment to be entered against the two Defendants jointly and severally for:-

a) A declaration that the sale and transfer of Gede/Dabaso/576 and Gede/Dabaso/578 from the 1st Plaintiff to the 2nd Defendant is unlawful and fraudulent;

b) An order cancelling the titles number Gede/Dabaso/576 and Gede/Dabaso/578 in the name of the 2nd Defendant and reverting them to the 1st Plaintiff or his nominees and hence to the 2nd and 3rd Plaintiffs;

c) A permanent injunction restraining the 2nd Defendant from disposing, charging, alienating or evicting any of the named Plaintiffs from or in any way interfering with the Plaintiffs' lawful use of parcels known as Gede/Dabaso/576 and Gede/Dabaso/578; and

d) Costs.

2. The Prayers arise from the Plaintiffs' averments that in 2005 an agreement had been executed between the three Plaintiffs for the sale of the suit properties pursuant to which the 2nd and 3rd Plaintiff took possession thereof.

3. It is the Plaintiffs case that due to old age and ill health the 1st Plaintiff instructed the 1st Defendant to oversee the transfer of the properties in favour of the 2nd and 3rd Plaintiffs. However some time in 2009, the 2nd Defendant acting through the 1st Defendant fraudulently caused the 1st Plaintiff who had then lost his eye sight to execute another agreement purporting to sell the same suit properties to the 2nd Defendant. The suit properties have since been fraudulently transferred to the 2nd Defendant and hence this suit.

4. But in a Statement of Defence dated 17th April 2018, the 2nd Defendant, a limited liability company incorporated in England avers that the 2nd and 3rd Plaintiffs were not the registered owners of the suit properties. It is their case that the properties were registered in the name of the 1st Plaintiff upto 30th December 2009 when the same were transferred to the 2nd Defendant.

5. The 2nd Defendant further states that the suit herein is time barred and offends the provisions of Section 4(2) of the Limitation of Actions Act, Cap 22 of the Laws of Kenya as the same was filed out of time.

6. The 2nd Defendant asserts that if indeed the Plaintiffs entered into a sale agreement dated 20th May 2005 as alleged, the same was not reduced into writing and was never registered as required by law or brought to the attention of the 2nd Defendant who purchased the suit properties without any notice thereof.

7. Subsequent to the filing of the Statement of Defence, the 2nd Defendant took out a Notice of Preliminary Objection dated 19th October 2018 urging this Court to dismiss the Plaintiff's suit on the ground that:-

i. The suit is time barred by the provisions of Section 4(2) of the Limitation of Actions Act.

ii. The suit is an abuse of the Court process.

8. The parties herein agreed to dispose of the Objection by way of Written Submissions. I have considered the objection as well as the Written Submissions filed herein by the Learned Advocates for the parties.

9. According to the 2nd Defendant, the cause of action as disclosed in the Plaintiff falls under the tort of deceit. That being so, the 2nd Defendant submits that the Plaintiff is barred by Section 4(2) of the Limitation of Actions Act which provides that:

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

10. In that regard, the 2nd Defendant submits that the cause of action accrued in the Plaintiff's favour when the suit properties were transferred to the 2nd Defendant's name on 12th January 2010 as pleaded and that the suit ought to have been filed on or before 12th January 2013. In the alternative, the 2nd Defendant contends that based on the Plaintiff's assertion that they discovered the fact of the sale to the 2nd Defendant sometime in 2013, the suit ought to have been filed not later than 31st December 2016.

11. I have considered the 2nd Defendant's submissions vis-à-vis the pleadings as filed herein. While the Plaintiffs' pleadings appear to suggest that the Defendants were deceitful in their actions, it was clear to me that their main grievance is the recovery of the suit properties which they accuse the Defendants to have fraudulently transferred to the 2nd Defendant's name. An accusation of fraud by implication has an element of deceit and I did not think the assumption that the suit herein was based on the tort of deceit had any basis.

12. At paragraph 11 of the Plaintiff, the Plaintiffs clearly aver that the suit property had been transferred illegally, fraudulently and under misrepresentation by the 1st and 2nd Defendants. They go ahead to particularize thereunder about ten elements of misrepresentation and fraud allegedly committed by the Defendants in regard to the transfer of the suit properties to the 2nd Defendant's name.

13. As it were, Section 7 of the Limitation of Actions Act prescribes the maximum period in which an action may be brought for recovery of land as 12 years from the date on which the right of action accrued. That period is in fact extended in certain circumstances by Section 26 of the Act which stipulates 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....”

14. In the instant suit, the Plaintiffs assert that the 1st Plaintiff sold the suit properties to the 2nd and 3rd Defendant in the year 2005. Sometime in the year 2013 however, they came to discover that the properties had been transferred to the 2nd Defendant sometime in the year 2009 in a process that they claim was fraudulent.

15. This suit was filed in 2017 some four (4) years after the discovery of the alleged fraud. Even where time was to be computed from the year 2009 when the 2nd Defendant is said to have been registered as the proprietor of the suit properties, 12 years would not have elapsed by the time the Plaintiffs brought this action against the Defendants.

16. In the premises, it was obvious to me that the Preliminary Objection is devoid of merit. The same is dismissed with costs to the Plaintiffs.

Dated, signed and delivered at Malindi this 28th day of February, 2020.

J.O. OLOLA

JUDGE