



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 38 OF 2019

MOHAMED YUNIS & ANOR..... PLAINTIFF

VERSUS

ABDALLA SWALEH RENGWA & 3 OTHERS..... DEFENDANTS

RULING

(Preliminary objection to veracity of suit and an application; plaintiffs filing suit claiming that they held title to the suit land but that the defendants through fraud procured title to the same; plaintiffs stating that they purchased the land in the year 1980; suit filed in 2019; argument that suit is time barred; time would start running from the time plaintiffs' title was allegedly cancelled or the time they became aware of the alleged fraud; determination whether or not suit is time barred can only be made after hearing the evidence and not through preliminary objection; other arguments that suit and application are defective disallowed; preliminary objection dismissed)

1. This suit was commenced through a plaint which was filed on 7 March 2019. The plaintiffs aver that they purchased the land parcel Kwale/Msambweni 'A'/2909 (the suit land) from one Swalehe Mohamed in the year 1979 and the property became registered in favour of the 2nd plaintiff on 28 February 1980. They plead that thereafter they took possession of the land, but that in the year 2016 while doing a routine check in the land registry, they found that the land records are missing. The records were eventually availed to them in the year 2018 and they discovered that title to the suit land is now with the 3rd defendant. Upon investigation, they aver that they found that the Land Registry had commenced a process of rectification of the title but contend that due process was not undertaken as they were never notified. Title was thereafter registered in the name of Swalehe Mohamed, who it is claimed had died in the year 1998. Following this, the 1st and 2nd defendants filed a succession matter for the estate of Swalehe Mohamed and they became registered as proprietors through transmission in the year 2016. They then sold the property to the 3rd defendant who is now the registered proprietor of the suit land. The plaintiffs aver that all the above transactions were fraudulent. They thus inter alia seek orders that they are the lawful owners of the suit land and seek title to be reinstated to them.

2. Together with the plaint, the plaintiffs filed a notice of motion brought pursuant inter alia to the provisions of Order 40 of the Civil Procedure Rules. The same is an application seeking orders of injunction to have the defendants stopped from dealing with the suit land pending hearing and determination of this suit.

3. Upon service of the summons and the application, the defendants filed defence and replying affidavits to the application for injunction. The 3rd defendant also raised a preliminary objection titled "preliminary objection to the applicant's application dated 4th March 2019" in the following fashion :-

(i) The 3rd defendant is the legally registered proprietor of the Land Reference Number Kwale/Msambweni 'A'/2909 measuring 1.10 Ha bearing a Certificate of Title issued on the 2nd day of May 2018 by the Land Registrar Kwale which is the subject of the suit herein.

(ii) The said application and the suit herein are in flagrant and incurable breach of Section 7 and 26 of the Limitation of actions Act, Chapter 22 Laws of Kenya.

(iii) The action for the plaintiffs/applicants is time barred and the plaintiffs/applicants have no course of action against the 3rd defendant.

(iv) The 1st plaintiff does not have capacity to sue as a trustee or on behalf of the 2nd plaintiff as neither a trust deed nor a power of attorney has been provided to this effect.

(v) *The supporting documents to the pleadings are incurably defective as they have not been sealed by a commissioner of oaths or notary public as provided for under Rules (sic) 9 of the Oaths and Statutory Declaration Rules.*

(vi) *The plaintiffs'/applicants' prayers as sought in the said application and suit herein are frivolous, vexatious and an abuse of the court process.*

4. Mr. Nyanchoka, learned counsel for the 3rd defendant submitted on the above points whereas Ms. Adala, learned counsel for the plaintiff opposed the preliminary objection. I have taken note of their submissions.

5. It is now trite that a preliminary objection ought to be an objection of law and ought not to be based on facts that are contested. When I look at the first ground of the preliminary objection, it merely states that the 3rd defendant is the legally registered proprietor of the suit land, which doesn't help much, because it is that very title which is said to have been procured through fraud and is the subject of these proceedings.

6. The second ground contends that this suit is in breach of Sections 7 and 26 of the Limitation of Actions Act. The third ground, which avers that this suit is time barred, is more or less an extension of the second ground. Sections 7 and 26 of the Limitation of Actions Act, provide as follows :

Section 7 - 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.

Section 26 -

26. Extension of limitation period in case of fraud or mistake

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:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

7. I appreciate that Section 7 does prescribe that a suit for recovery of land needs to be filed within 12 years from the time the cause of action ensued. In his submissions, Mr. Nyanchoka submitted that since the plaintiffs aver that they obtained title in the year 1980, their cause of action arose in 1980 and they had 12 years from 1980 to file suit. That argument to me does not wash. The cause of action would arise from the time their title was cancelled or from the time they became aware of the fact that they no longer hold title to the suit land. The plaintiffs in their pleadings aver that they became suspicious in the year 2016 and that it was in the year 2018 that they were supplied with the land title documents indicating that they no longer hold title to the suit land. All these claims can of course only be tested at the hearing of the suit and are matters of evidence. I cannot therefore hold at this point in time that the plaintiffs' suit is time barred. That, as I have said, will have to await a full hearing of the suit for the evidence on when the alleged fraud occurred, and when the plaintiffs became aware of it, can be tested. I therefore dismiss grounds 2 and 3 of the preliminary objection.

8. The 4th ground contends that the 1st plaintiff has no capacity to sue as trustee on behalf of the 2nd plaintiff. Again, I do not see the need of saying much on this ground. Whether or not the 1st plaintiff has capacity or not is a matter of fact that can only be tested at the hearing of the suit. It would be premature at this stage of the proceedings, and within the confines of this preliminary objection, for this court to go into an elaborate investigation of whether or not the 1st defendant is a trustee of the 2nd plaintiff. That again will need to await a hearing.

9. The 5th ground is that the supporting documents to the pleadings are incurably defective for reasons that they have not been sealed by a Commissioner of Oaths or Notary Public. The objection talks of "pleadings" and strictly speaking "pleadings" here can only refer to the plaint. A plaint is generally signed by the plaintiff, if acting in person, or by his advocate, where he is represented. A plaint does not need commissioning by a Commissioner of Oaths or Notary Public. There is a verifying affidavit annexed to the plaint and I can see that the same is notarised. I therefore see no issue on the claim that the pleadings are not sealed. In his submissions, Mr. Nyanchoka seemed to move away from commissioning of the pleadings to commissioning of the supporting documents in the application for injunction. That to me is a departure from what is stated in the preliminary objection, which talks of commissioning of pleadings. In any event, if the position of the 3rd defendant is that the documents annexed to the affidavit are not proper, that can be raised when the application itself is being heard, as it is a

point directed at the competency of the application.

10. The last ground of the preliminary objection is that the prayers sought in the application and suit are frivolous, vexatious and an abuse of the court process. First, I do not see how that can be categorised as a preliminary objection, but even then, I do not see how it can be alleged that this suit is frivolous. As far as I can see, the suit raises serious issues of fraud and dispossession of title which cannot be categorised as frivolous. There is nothing frivolous or vexatious when one comes to court alleging that his/her title has been fraudulently transferred to another person.

11. I have addressed all the grounds raised in this preliminary objection and it will be seen that I do not find merit in the same. The preliminary objection is hereby dismissed with costs to the plaintiffs.

12. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 5th day of February 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Ms. Mwainzi holding brief for Ms. Adala for the plaintiff.

Mr Oluga holding brief for Ms Shamalla for the 3rd defendant.

No appearance on the part of the 1st & 2nd defendants.

Court Assistant ; David Koitamet.