



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 181 OF 2019

MKAMENYI FARMERS COOPERATIVE SOCIETY LIMITED.....PLAINTIFF

VERSUS

THE MINISTRY OF LANDS AND PHYSICAL PLANNING & 8 OTHERSDEFENDANTS

RULING

(Preliminary objection raised that the suit is time barred and that it raises issues of historical injustice for which this court has no jurisdiction; plaintiff arguing that what it contests is a grant of lease issued in the year 2011 and subsequent dispositions and that the case is not one of historical injustice; nothing in the plaint to suggest that the case is seeking for any declaration of historical injustice; plaintiffs themselves claiming that what they wish to contest are dispositions from the year 2011 meaning that they are within the 12 year limitation period; premature to hold at this stage of the proceedings, before having heard the case, that the objections raised are valid; benefit of doubt at this stage of the proceedings must be given to the plaintiff; preliminary objection dismissed)

1. This ruling is in respect of a preliminary objection filed on 30 October 2019 by the 9th defendant and another filed by the 8th defendant on 31 October 2019. The objection raised by the 8th and 9th defendant is the same and I will only copy that of the 9th defendant which is worded as follows :-

(i) The plaintiff's claim is statute-barred by virtue of the provisions of Section 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya, as the alleged historical injustice, if any, occurred on the 1st January 1923.

(ii) That this Honourable Court lacks jurisdiction to investigate alleged historical injustices which is the reserve of the National Land Commission pursuant to Section 5(1) (e) of the National Land Commission Act, 2012.

(iii) This Honourable Court lacks jurisdiction by virtue of the provisions of Section 15 (3) (ii) that reserves the jurisdiction to determine historical injustices to the National Land Commission.

2. The preliminary objection is opposed by the plaintiff.

3. To put matters into context, this suit was commenced through a plaint which was filed on 11 October 2019. The plaintiff has described itself as a cooperative society comprising of more than 3,000 members who are residents of Mkamenyi Village, which is situated in the South Western part of Voi Town in Taita Taveta County. It is pleaded that the members have always resided in Mkamenyi Village which is located within the 1953 Ha of the parcel of land LR No. 28683 (the suit land). It is pleaded that prior to the establishment of the Kenya colony the land was owned by the forefathers of the plaintiff's members. It is pleaded that during the colonial period the colonial government allocated the suit land to a white settler known as Major Lezen for a period of 99 years from the year 1920 which period ended in the year 2019. The original allottee established a sisal plantation and it is contended that in doing so, he breached some of the conditions of the lease. It is pleaded that before the end of the lease period, Major Lazen surrendered the lease to the Government sometimes in the 1980s, and that the land effectively became public land. It is pleaded that the land was then allocated to Voi Sisal Estate Limited, the 6th defendant, which then transferred the lease to Voi Plantation Limited, the 7th defendant, on 23 February 2012. The land was then transferred to Voi Point Limited, the 8th defendant, on 13 February 2019 and charged to Diamond Trust Bank, the 9th defendant. It is the case of the plaintiff that the transfers and charge are illegal. In the suit, the plaintiff has asked for the following orders :-

(a) A declaration that the grant of lease of the suit property to the 6th defendant was illegal and or wrong and therefore null and void.

(b) Upon grant of prayer (i) above, a declaration that the transfer of the suit property by the 6th defendant to the 7th defendant and that of the 7th defendant to the 8th defendant were also illegal and or wrong and are therefore null and void.

(c) In the alternative to prayer 2 above and upon this court upholding the grant of the lease of the suit property to the 6th defendant, a declaration that the transfer of the suit property by the 6th defendant to the 7th defendant and that of the 7th defendant to the 8th defendant is illegal and or wrong for breach of the terms of the lease.

(d) A declaration that the 8th defendant's subdivision of the suit property is illegal and or wrong and therefore null and void.

(e) A declaration that the 9th defendant's act of accepting the charge of the suit property by the 6th, 7th, and 8th defendants is illegal and or wrong as it was contrary to the conditions of the lease.

(f) A permanent injunction against the 8th defendant, its employees, agents or people authorized by it from subdividing the suit property.

(g) An order rectifying the register and cancelling the grant of the lease to the 6th, 7th and 8th defendants.

(h) An order rectifying the register and register the plaintiff as the lessee of the suit property.

(i) Costs of this suit.

4. Together with the plaint, was filed an application for injunction, seeking to restrain the 6th, 7th, and 8th defendants from interfering with the occupation of the suit land by the members of the plaintiff, pending the hearing and determination of the suit. The 8th and 9th defendants filed replying affidavits to the application alongside the preliminary objections. What I can gather from the replying affidavits is that they dispute the history of the land as given by the plaintiff. Their position is that the suit land was previously under the title LR No. 4637 comprising of 5006 acres, which title was issued in the year 1923 for a term of 99 years, from 1 January 1923 to 1 January 2022, and that the said title was transferred to the 6th defendant (Voi Sisal Estates Limited) on 6 August 1947. It is said that the 6th defendant remained owner until 23 February 2012. In the meantime the lease was surrendered to the Government to pave way for its extension. It is averred that this was done and a grant issued in the year 2011. Copies of title have been annexed in the replying affidavits. It is stated that the suit property was then transferred to the 7th defendant (Voi Plantation Limited) on 23 February 2012, and some charges registered in favour of Diamond Trust Bank Limited (the 9th defendant). Subsequently, the property was sold to Voi Point Limited on 13 February 2019. It is averred that when consent to transfer was being given, and as a condition, the company was to cede 35 acres to the Mkaimenyi Squatters Committee, a group of 28 families recognized as legitimate squatters on the land.

5. I directed counsel to file written submissions in respect of the preliminary objection and this was done by counsel for the 8th defendant, counsel for the 9th defendant, and counsel for the plaintiff. In summary, counsel for the 8th and 9th defendants, submitted that this court lacks jurisdiction because issues of historical injustice are supposed to be addressed by the National Land Commission pursuant to Article 67 of the Constitution, and Section 5 of the National Land Commission Act, 2012. It was submitted that the claim of the plaintiff is anchored upon the plaintiff's view that there are historical injustices that resulted in their marginalisation and disentitlement to the land. It was further argued that the claim of the plaintiff arose in the year 1920 when the land was allegedly surveyed and alienated to Major Lazen, and thus such claim is barred by Section 7 of the Limitation of Actions Act.

6. For the plaintiff, it was submitted that what the plaintiff seeks is a prayer for a declaration that the grant of the lease to the 6th defendant is illegal, and since the grant was made on 23 February 2011, only 8 years have lapsed to the filing of this suit, which is within the 12 years period indicated in Section 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya. It is submitted that all actions complained of fell within this period. On the argument that this is a claim for historical injustices, counsel for the plaintiff submitted that there is nowhere in the plaint indicating that the cause of action seeks to undo actions that are considered historical injustices. He submitted that the cause of action is based on the illegal and wrongful granting of a lease to the 6th defendant which act affected the subsequent dealings. He submitted that the provisions of Section 5 and 15 of the National Land Commission Act, 2012, do not apply.

7. I have considered the preliminary objection, the rival arguments, and the authorities tendered by counsel.

8. My view of the matter is that the preliminary objections must fail.

9. First, it is premature for me to determine at this stage of the proceedings that the claim of the plaintiff is one based on historical injustices. The plaintiff's counsel himself submits that his client's case is not one based on historical injustices but on a wrongful grant of land. I cannot take this submission casually for none of the prayers in the plaint plead for any declaration that there has been a historical injustice to the members of the plaintiff. I have not heard the evidence of the plaintiff, and I cannot, at this stage of the proceedings, make a substantive conclusion that the case of the plaintiff is one of historical injustices. I will first need to hear the case before making such a determination, for as I have pointed out, historical injustices is not one of the declarations sought in the plaint. I don't see the need of saying more on the limb of the preliminary objection which contends that this is a case of historical injustices.

10. The second limb of the preliminary objection is that this suit is time barred. It is argued that the cause of action arose in the year 1923 and therefore caught up by Section 7 of the Limitation of Actions Act. Section 7 of the Limitation of Actions Act, does provide that claims for recovery of land be lodged within 12 years of the date that the cause of action arose. The plaintiff has submitted that its claim is one contesting the grant of the land to the 6th defendant, and this arose in the year 2011. From the annexures in the replying affidavits to the application for injunction, I can see that the grant to Voi Sisal Estates Limited, of LR No. 28683, which is the suit land, was actually issued in the year 2011. The plaintiff claims that it is this grant, issued in the year 2011, and the dispositions subsequent thereto, which it wishes to contest. If that is the position, then clearly 12 years have not lapsed to the time that this suit was filed. I am thus not persuaded, at least at this stage of the proceedings, that this suit is time barred.

11. It must be understood that a court has to exercise extreme caution before dismissing offhand a case that has been filed. It may be that what the 8th and 9th defendants are arguing is correct, but I warn myself that I have not heard the case, and I must exercise caution and give benefit of doubt to the plaintiff. Nothing of course bars the defendants from raising the same issues that they have raised in their preliminary objections within the hearing of the suit and a substantive determination can be made after all the evidence is tabled. For now however, I am not persuaded that the preliminary objection filed by the 8th and 9th defendants is merited. This is of course without prejudice to any decision that this court may make after hearing the suit on its merits.

12. The preliminary objections raised by the 8th and 9th defendants are dismissed with costs to the plaintiff.

13. Orders accordingly.

DATED and delivered this 29TH day of APRIL 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA