



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC 6 OF 2018

GILBERT OPINYA OOGA.....PLAINTIFF

VERSUS

HELLEN ADHIAMBO ODITDEFENDANT

RULING

Gilbert Opinya Ooga, hereinafter referred to as the 'Plaintiff' has come to this court against Hellen Adhiambo Odit hereinafter referred to as the defendant claiming to be the legal owner of the entire Land Parcel number Manyatta/"A"/167 hereinafter referred to as the suit land.

The Plaintiff claims to have bought the suit land from one Margaret Akilo who was lawfully registered proprietor. The Defendant illegally entered the plaintiff's land and put up structures and refused to vacate upon demand.

The Plaintiff's claim is for an order of eviction and a declaration that the land belongs the plaintiff. Moreover, a permanent injunction restricting the defendant, her agents, servants, assignees, relatives or whomsoever claiming title from occupying and constructing on the suit land.

The Defendant filed a defence stating that the plaintiff has never been the legal owner of the suit property as the same has been always registered in the names of Magret Akelo Oracha and William Onyango Weya both deceased. The Defendant further states that the plaintiff's claim has been extinguished by operation of the later. Moreover, that the proprietor of the suit land are both deceased and therefore without a grant of letters of administration. The suit is misconceived. Moreover, the defendant states that the sale made in 1989 is void for lack of consent of Land Control Board pursuant to Section 6 (1) of the Land Control Act Cap 302 Laws of Kenya.

The Defendant states that she is the widow to William Onyango Way and co-wife of Margaret Akelo Oracha both deceased. That the suit land has been her matrimonial home since 1980 and the developments on the home were erected in 1975 by her late husband and that she has no other home. She prays that the suit be dismissed with costs.

In the reply to defence, the Plaintiff states that the defendant is being sued for trespass and therefore the issue of letters of administration does not arise.

On the 19/3/2019, the defendant filed a Preliminary Objection the effect that:

- 1. The Plaintiff's claim over the suit land parcel No. Kisumu/Manyatta "A"/167 has been extinguished by operation of the law, in that the Plaintiff's cause of action having arisen on 7th September, 1989 when he claims to have purchased the suit parcel of land, that claim is barred by the stature of limitations under the provisions of Sections 4 and 7 of the Limitation Actions Act, Cap 22, since the claim has been brought more than 27 years after the cause of action first accrued to the Plaintiff.**
- 2. The agreement for sale of land parcel No. Kisumu/Manyatta "A"/167 was executed by the parties to it on 7th September, 1989 as pleaded in the Plaint and the same required the consent of the land control board, and as none was sought or obtained within the six months prescribed by Section 6 (1) of the Land Control /act, Cap 302, the alleged transaction became void for all purposes and it is now illegal and null and void and unenforceable in any court.**
- 3. The agreement for sale of land parcel No. Kisumu/Manyatta "A"/167 dated 7th September, 1989, was between Margaret Akelo Oracha (deceased) and Gilbert Opinya Ooga, and there was no privity of contract between the Plaintiff and the Defendant herein which can entitle the Plaintiff to sue the Defendant herein in relation to that transaction.**
- 4. As the suit land parcel No. Kisumu/Manyatta "A"/167 is registered in the joint names of Margaret Akelo Oracha (deceased) and William Onyango Weya (deceased), each holding an undivided ½ share as tenants in common, this**

Honourable ?Court (not being a succession court) has no jurisdiction to entertain any suit concerning the appointed by the court as administrators of the two estates, and in particular the Defendant herein has no locus standi or capacity to defend this suit without grants of letters of administration to the two estates and by reason thereof this suit is bad in law and misconceived.

I have considered the written submissions of the defendant in support of the preliminary objection and the plaintiff opposing the preliminary objection and do find that the issue of the consent of the Land Control Board requires being determined after the court receiving evidence of the parties and therefore can't be raised as a preliminary objection.

The issue of the consent of the Land control Board requires tendering of evidence and therefore cannot be raised as a preliminary objection. In the case of Mukhisa Biscuits it was stated:-

1. *The definition of a preliminary objection was well set out in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696.*

"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

This was followed up by the judgment of **Sir Charles Newbold** in the same case:

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

Likewise the issue of **privity to contract** requires tangible evidence and cannot be determined by way of preliminary objection.

However Section 7 of the Limited Actions Act Cap 22 Laws of Kenya that provides for limitation of actions on claims on land is relevant. It 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."

The Plaintiff's action is made more than 30 years after the cause of action accrued. The said action is therefore time barred and therefore I uphold the defendant's preliminary objection the claim has been extinguished with time. In conclusion, I do find the plaintiff's claim stale and is dismissed with costs.

DATED , DELIVERED and SIGNED THIS 27th DAY OF APRIL, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

This ruling is hereby Electronically delivered by email by the consent of the parties.