



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 2459 OF 1997

JUMA MUCHEMI.....PLAINTIFF/RESPONDENT

VERSUS

WILLIAMS & KENNEDY LIMITED.....1ST DEFENDANT/RESPONDENT

OFFICIAL RECEIVER AND PROVISIONAL LIQUIDATOR

RURAL URBAN CREDIT SERVICE LIMITED

(IN LIQUIDATION).....2ND DEFENDANT/APPLICANT

RULING

1. This Ruling relates to a Notice of Motion Application dated 1st March 2016, filed by the Plaintiff (herein “ the Applicant”), brought under the provisions of Order 2 Rule 15 of the Civil Procedure Rules, Cap 21 Laws of Kenya.

2. The Applicant is seeking for order that, the 2nd Defendant’s Defence and Counter claim dated 7th December 2015, be struck out with costs and the costs of this Application be provided for. The Application is premised on the grounds on the face of it and a supporting Affidavit dated 1st March 2016, sworn by the Applicant.

3. He deposed that on the 23rd April 1993, the Plaintiff entered into a sale agreement for the purchase of properties; namely L.R. 5989/91, L.R. 5989/68, L.R. 5989/66, L.R. 5989/5 and L.R. 5989/67, from William & Kennedy Limited. Subsequently he filed this suit against the 1st Defendant due to the issues of non-completion of the sale, in regards to the parcels of land namely; L.R. 5989/5. By 14th May 2015, the case between the Plaintiff and the parties had substantially progressed, the Plaintiff having tendered his evidence and closed his case, whereas the 1st Defendant’s first witness had testified partially. On the same date, the 2nd Defendant made an application to be enjoined in the suit, which culminated in orders for joinder issued on 24th November 2015.

4. Consequently, the 2nd Defendant filed a Defence and Counter-Claim on 10th December 2015, in which it seeks various prayers that relate to the suit property L.R. 5989/5. The Applicant argues that the Counter -Claim raises a claim for the Kshs. 2.5 Million which was lent to one Mr. Ng’ang a Director of the 1st Defendant, which is a limited liability Company which fraudulently failed to register a charge over the present suit premises as collateral for the monies advanced and does not disclose a cause of action against the Plaintiff, and even then, the Counter-Claim is statute barred, vexatious and otherwise an abuse of Court process.

5. That it is not in dispute that the suit premises is and has always been registered in the name of Williams & Kennedy Limited, which is a limited liability Company, yet the 2nd Defendant’s claim is predicated on acts allegedly committed by the said Ng’ang’a Gicharu, who is not party to the present proceedings.

6. Be that as it were, the 2nd Defendant has filed a suit HCCC No. 582 of 1995, against the said Mr. Ng’ang’a Gicharu, seeking a refund for the said Kshs. 2.5 million advanced together with interests and costs. Further, from facts stated above, it is clear that the 2nd Defendant’s alleged cause of action arose in 1983, about thirty two (32) years ago, from filing of the instant claim. It is thus statute barred by dint of operation of Section 7 of the Limitation of Actions Act (Cap 22), of the Laws of Kenya.

7. Similarly, the 2nd Defendant’s counter claim is bad for duplicity and is an abuse of the court process by filing two concurrent suits, one

against Mr. Ng'ang'a Gicharu for recovery of Kshs. 2.5million and L.R. No. 5989/5/R. Therefore, the 2nd Defendant is estopped by its conduct from seeking any orders against L.R. 5989/5, having elected to pursue a claim for recovery of the sum of Kshs. 2.5 million against Mr. Ng'ang'a Gicharu.

8. Finally, the Applicant argued that the 2nd Defendant's claim is vexatious, incompetent and otherwise an abuse of the court process that will lead to embarrassing consequences by proceeding and alluding to allegations of fraud against a person not party to the proceedings, not afforded an opportunity to defend himself and expect judicial determination on the issues raised.

9. The 2nd Defendant in response to the application, filed a Replying Affidavit dated 9th March 2016, sworn by Mr. Patrick Thoithi Kanyuira, the Deputy Chief State Counsel in the office of the Official Receiver and Provincial Liquidator Rural Urban Credit Finance Limited (In liquidation). He stated that the Agreements for sale herein were null and void ab initio, because they offend the express provisions of the Companies Act and therefore of no legal effect, consequently, the issue of non-completion is irrelevant because of the same.

10. That the 2nd Defendant is not claiming the property L.R. 5989/5/R but all the shares in the 1st Defendant's and also prays that all entries made on title I.R. 35801 after the registration of the Winding up order be cancelled. Further the 2nd Defendant has challenged the legality of the title to land, which the Applicant purports to have bought which goes to the foundation of this suit. It was deposed that the 2nd Defendant's claim is based on an illegality, fraud and the resultant trust and therefore statute of limitation does not apply. That the suit HCCC No. 582 of 1995 is disclosed but the file cannot be traced to enable the 2nd Defendant to file a notice of withdrawal. Therefore, in the interest of justice, the Plaintiff who is not a party thereto should not be allowed to use the suit in the attempt to perpetuate fraud and illegality and in any event the present claim is for different orders.

11. It was argued that the 2nd Defendant does not allege any fraud on the part of the Plaintiff. The Plaintiff as a layman may be an innocent victim of fraud and incompetence of the lawyer who acted for him in the land transaction and who should have done proper due diligence before proceeding with the purchase of the illegal title.

12. Further that Mr. Ng'ang'a Gicharu the perpetrator of the fraud has come out to defend what he did thereby lifting the veil himself. The other Director involved was his mother a co-perpetrator. Finally it was submitted the Courts of law are bound by the Constitution to do justice without undue regard to technicalities and to discourage the unjust and law breakers. Therefore the Plaintiff's application should be dismissed with costs.

13. The Parties subsequently agreed to dispose of the application by filing submissions. The Applicant reiterated that the 2nd Defendant's claim is statute-barred, bad for duplicity and offends the provisions of Section 6 of the Civil Procedure Act.

14. That the claim herein is an abuse of the Court process. Reference was made to the case of; *Sarak vs Kotoye 1992 9NWLR* , adopted with approval in the case of; *Muchanga Investment Ltd vs Safaras Unlimited (Africa) Ltd CA No. 25 of 2002*, where the Court held,-

"The concept of abuse of judicial process is imprecise; it implies circumstances and situations of infinite variety and conditions. It's one feature is the judiciary powers by a party in litigation to interfere with the administration of justice....."

15. It was submitted that the said case gives illustrations of what amounts to abuse of the Court process as follows:-

"(a) instituting multiplicity of actions on the same subject matter against the same opponent on the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

(b) instituting different actions between the same parties simultaneously in different courts even though on different grounds."

16. Finally it was reiterated that, Mr. Ng'ang'a Gicharu is distinct from William & Kennedy Limited, the 1st defendant herein. Therefore to allow the 2nd Defendant to pursue the 1st Defendant, a Limited Liability Company for the purported misdeeds of a Director, would offend the doctrine of corporate identity and the dicta in *Salmon vs Salmon & Co. Ltd. (supra)* before lifting of the veil of incorporation.

17. In response, the 1st Defendant submitted that in order for the Court to determine whether or not the 2nd Defendant's claim is statute barred, it has to address itself to the following issues;-

a) what is the 2nd Defendant's claim;

b) when did the 2nd Defendant's cause of action arise;

c) against whom did the cause of action arise, if any;

d) the principles of law governing the 2nd Defendant's cause of action

18. In answer to these questions, the 2nd Defendant submitted that its Counterclaim dated 5th February 2016, seeks for orders as here below reproduced;

(a) A declaration that all shares in the 1st Defendant are in trust for the 2nd Defendant;

(b) An order directed at the Registrar of Companies to transfer all shares of the 1st Defendant Williams & Kennedy Ltd to the 2nd Defendant;

(c) An order directed at the Chief Land Registrar to cancel and delete all entries made on the register of L.R. No. 5989/5 I.R. No. 35802 entered on the register subsequent to the registration of the winding up order against the 2nd Defendant (sic);

(d) Costs of the suit and interest thereon.

19. It was further argued that there is no provision in the Civil Procedure Act and Rules for a Defendant to file a Counterclaim against a Co-Defendant and therefore to that extent and without much ado, the entire pleadings are misconceived, frivolous and vexatious and should have been struck out *in limine*, pursuant to the inherent jurisdiction and/or power of the Court under Sections 1A, 1B, and 3A of the Civil Procedure Act. That the 2nd Defendant ought to have joined the suit as a co-Plaintiff and not as a Defendant but, it is too late in the day to salvage the otherwise frivolous claim.

20. The 1st Respondent submitted that, if at all there is any cause of action, then the Court has to determine when this cause of action arose and according, to the 2nd Defendant, Mr. Nganga Gicharu, who was the then Managing Director of the 1st Defendant Company, in the month of March 1983, applied for a loan of Kshs 2,500,000 to purchase a house. The property purchased for and on behalf of Mr. Nganga Gicharu was to be used as security for the loan advanced to him and he was obligated to secure a loan in favour of Rural Urban Credit Finance Ltd.

21. That, Mr Nganga Gicharu did not register the charge in favour of the 2nd Defendant in the year 1984 and therefore any cause of action in the undisputed circumstances of this matter, would only have arisen in the year 1984, which is about Thirty-Four (34) years ago. Even then, not against the Plaintiff and/or the 1st Defendant. It is therefore statute barred for all intents and purposes, as it was brought more than thirty (30) years after the cause of action arose and without leave of the Court.

22. The 1st Defendant relied on the cases of; Bosire Ogero vs Royal Media Services (2015) eKLR, where Court held:-

“the issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over.....”

23. Further reliance was placed on case of; Boniface Inondi Otieno vs Mehta Electricals Ltd (2016) eKLR, where the Court stated that:-

“...the court is therefore barred by the Law from entertaining this suit and therefore, I down my tools for lack of jurisdiction. I will not even spend any efforts trying to answer the second question whether or not the suit is res judicata.....”

24. It was further submitted that, although the 2nd Defendant contends that Rural Credit Finance Ltd signed and sealed the charge documents in respect to parcel LR No. 5989/5 and gave the same to Mr. Nganga Gicharu for registration. The alleged charge instrument is not and/or has never been availed before the Court. Further, the 2nd Defendant has admitted that, it filed a suit against Mr. Nganga Gicharu, being Civil suit No. 582 of 1995: Official Receiver Rural Urban Credit Finance Ltd vs Nganga Gicharu & Others and that, it lodged a caveat against the parcel of land to wit LR No. 5989/5, on 3rd December 1985, claiming chargee's interests, whereas the same was removed by the Registrar of Lands on 15th November 1990. Yet the Registrar of Lands is not a party to these proceedings.

25. The 1st Defendant submitted that the 2nd Defendant has no cause of action against the 1st Defendant, but Mr. Nganga Gicharu who is not a party to the proceedings herein and reiterated that, the 1st Defendant is a body corporate totally different from its Directors and as such unless the corporate veil is lifted, the alleged transgressions of the Defendant's Managing Director cannot be visited upon the Company, on this ground alone other than the claim being statute barred, the 2nd Defendant's alleged claim has no legs to stand on.

26. The 1st Defendant argued that, the winding up order was made against the 2nd Defendant and not the 1st Defendant. There is no nexus in law between the two and whether or not a winding up order was made against the 2nd Defendant is totally irrelevant to these proceedings.

27. Finally the 1st Defendant submitted that, the mere fact that the Plaintiff and the 1st Defendant did not file an Application for Review and/or an Appeal against the decision of Honourable Justice Ogola delivered on 24th November, 2015, enjoining the 2nd Defendant in these proceedings, does not bar them from raising a defence that its suit is statute barred. The doctrine of estoppel as known in the law offers no assistance to the 2nd Defendant.

28. The case of; Onvollate Wacike Siboe vs Kenya Railways Corporation & Another (2017) eKLR, was cited where the Court of Appeal held that:-

“.....it is trite law, and decisions abound, including by this Court, that estoppel cannot be raised against the provisions of a statute.....”

29. That the joinder of a party to proceedings cannot override clear provisions of the statute and therefore the doctrine of Estoppel cannot therefore override the provisions of the Civil Procedure Act and Limitations of Actions Act.

30. However, the 2nd Defendant in reply submissions argued that, it applied vide a Notice of Motion dated 4th of May 2015, to be enjoined

herein, based on facts stated therein and as aforesaid herein and on 24th November 2015, Mr. Justice Ogola allowed the Application and enjoined it as the 2nd Defendant in the suit. The Plaintiff and the 1st Defendant did not appeal the ruling.

31. Similarly, on the 22nd September 2015, Mr Justice Fred Ochieng allowed the 2nd Defendant herein to be enjoined in HCCC NO. 710 of 2009 as Interested party and on 13th of October 2015, gave further directions that the 2nd Defendant herein be enjoined in that suit as a Defendant. That, in that suit, HCCC 710 of 2009, Mr Juma Muchemi is the 3rd Defendant and Williams & Kennedy Ltd is the Plaintiff.

32. The 2nd Defendant argued that the issues the Plaintiff and the 1st Defendant are raising here were raised in the Applications for joinder and the two judges rejected their arguments and therefore it is a clear abuse of the court process and it should not be allowed by the Court. Thus the Plaintiff and the 1st Defendant are attempting to mislead this Court hoping for a different outcome in their favour. The Notice of Motion does not delve into the fact that the titles the Plaintiff purchased were illegal *ab initio*. Similarly, he does not address the Court, as to how he intends to validate them. Hence he is asking the Court to allow him to continue holding the illegal and invalid titles, because he has had them for a long time but the lapse of time cannot invalidate an illegal act and that, an illegality remains so in perpetuity unless it is legalised by an Act of Parliament which gives retroactive validation.

33. Further the Plaintiff must have had an Advocate acting for him in the land purchase transaction and must therefore be deemed to have done due diligence and therefore had knowledge of the invalidity of the titles when he entered into the Agreements of sale. That he made his bed and must be allowed to lie on it. As for the 1st Defendant, it knew of the rights of the 2nd Defendant in its affairs, knew the purchase price for the shares was paid for by Rural Urban Credit Finance Limited (in liquidation) and was under a legal duty to do the right thing after the Company went under. Mr Ngang'a should have handed all relevant documents to the 2nd Defendant with full disclosure as the law requires that, as an officer of the 1st Defendant he was obliged to act within the law. Instead he acted illegally by taking the relevant file and documents to his house, and then proceeded to illegally sub-divide the land (which was the only asset of the 1st Defendant) and to sell the resultant parcels of land contrary to law.

34. In response to the issue of lifting the veil, the 2nd Defendant submitted that, it filed a Notice of Motion dated 5th May 2016 which was strongly opposed by the Plaintiff and 1st Defendant and the Court dismissed the Application, therefore the Applicant cannot in clear conscience now claim that they have never raised the issue in Court

35. The 2nd defendant reiterated that as regards HCCC 582 of 1995, it was disclosed that, the Applications before Mr. Justice Ogola and Mr. Justice Ochieng clearly that the Court file and the Advocates file could not be traced so that, we could file a notice of withdrawal. Correspondence with the Deputy Registrar was exhibited and facts stated in the supporting Affidavit. The two judges must have considered the 2nd Defendant's situation before they allowed the two applications. The Plaintiff cannot be allowed to revisit that issue before a third judge in the hope of getting a different outcome in his favour.

36. Finally it was submitted, that this Court cannot sit on Appeal to a ruling of a Court of concurrent jurisdiction and therefore the Notice of Motion filed by the Plaintiff should fail and be dismissed with costs to the 2nd Defendant.

37. I have considered the Application and the rival arguments and/or submissions thereto and find that, the main issues for consideration herein are whether: the 2nd Defendant's claim in the Counter-claim is statute barred, the 2nd Defendant is abusing the Court process by filing two suits at the same time over the same subject matter and finally whether these two issues have already been dealt with by the two Courts that have given rulings in this matter and if so, whether the Court will be sitting on this matter without jurisdiction.

38. In relation to the 1st issue the provisions of Section 4 of the Limitations of Actions Act, Cap 22 Laws of Kenya, stipulates that:

“(1) the following actions may not be brought after the end of six years from the date on which the cause of action accrued-

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”

39. In the same vein, Section 7 of the Act, provides that:-

“any 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.”

40. As regard the 2nd issue the provisions of Section 6 of the Civil Procedure Act states that;

(6) “no court shall proceed with the trial or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom any of them claim litigating under the same title where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”

41. In relation to the third issue, I find that the 2nd Defendant made an application to the Court dated 4th May 2015 seeking to be enjoined in this matter as an Interested Party. In the ruling delivered thereto, the Court indicates at paragraph 3 that the Plaintiff opposed the application on the ground inter alia that the Interested Party's case is time bad under the Limitation of Actions Act. Similarly, the 1st Defendant is indicated under paragraph 4 thereof, as having submitted that, whatever claim and/or interest that the Applicant has over the property is statute barred as the same arose from a transaction in 1985 about thirty (30) years (sic) ago.

42. It is noteworthy that, among the issues which the Court raised for determination under paragraph 5(iii) was whether the intended cause of action is statute barred. The Court then held as follows:-

“The Respondents have submitted that the Intended Interested Party’s case is time barred, and that the application amounts to an abuse of the Court process. However, it is not for this court to make a finding at this stage whether or not the intended cause of action is time barred. At this stage, the court only needs to note that the Applicant appears to have an arguable case to enable it be joined to these proceedings so that all issues relating to the suit including the allegation of time bar, may be determined in the same suit.”

43. Subsequently, the Applicant filed another notice of motion application dated 9th and filed on 10th December 2015 seeking that the Honourable Court be pleased to enlarge the time within which to file and serve its Defence and Counterclaim, and that the Defence and Counterclaim annexed be deemed as duly filed and filed.

44. I have perused the Court record and note that when the said application came before the Court, on 2nd February 2016, the Counsel for the Plaintiff sought that the application be allowed with costs and the same was conceded by the Defendant’s Counsel whereupon, the Court entered an order based on the consent of the parties that the said application be allowed with orders that the Defence be filed and served within seven (7) days and the matter be mentioned on 11th February 2016.

45. I also noted from the Court record that, on 11th March 2016, the Court directed the parties to fully comply with the pre-trial directions ordering that, the notice of motion application dated and filed in Court on 1st March 2016 shall not be heard because it is meant to delay the proceedings. Further that, any party be at liberty to raise a preliminary point of law to be determined at the commencement of the hearing of the suit. The suit was set for hearing on 13th June 2016.

46. It follows from the foregoing that, the issue as to whether the suit is statute time barred, has been dealt with and determined by a Court of competent jurisdiction. The issue can now only be considered in the final decision in this matter. That deals with issue first and third issue raised. However, the Applicant has admitted that they have another suit pending in relation to the same subject matter of Kshs 2.5 million. The explanation advanced for the multiplicity of the suits is that, the other file is missing. However, there is no evidence that the same has been sought for and/or even an application made for reconstruction so that, that suit can be withdrawn. The Court cannot allow a litigant to pursue two (2) claims over the same subject matter at the same time. It amounts to an abuse of the Court process. In that regard, the Applicant has to forthwith withdraw that claim on or before the next hearing date of this matter or risk being barred from the hearing of this matter.

47. Finally, the issues of legal personality raised herein, will be dealt with during the hearing of the main suit. In view of the fact that the suit is part heard, it is in the interest of justice that it proceeds to finality and expeditiously so. The upshot of all this, is that, the application is dismissed with orders that the costs thereof shall abide the outcome the main suit.

48. Those then are the orders of the Court.

Dated, delivered and signed in an open Court this 11th day of October 2018.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Karanja for Mr. Mutiso for the Plaintiff/Respondent

Ms. Mwachiro for Mr. Njuguna for the 1st Defendant/Respondent

Ms. Obade for Mr. Njogu for the 2nd Defendant/Applicant

Langat.....Court Assistant