



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 120 OF 2019

PROF. ROBERT OBWACHA OBOKO PLAINTIFF

VERSUS

BERNARD KIPLAGAT OBOKO.....1ST DEFENDANT

MICHAH CHESEREM ROTICH.....2ND DEFENDANT

RULING

1. The plaintiff by a Notice of Motion expressed to be brought under Order 2 Rule 15 (1) (a) & (d) of the Civil Procedure Rules 2010, Section 7 of the Limitation of Actions Act and Section 3A of the Civil Procedure Act prays for:-

1. *That the defendants' statement of defense and counterclaim dated 8th November, 2019 and filed in Court on 12th November, 2019 be struck out for the cause of action raised therein is Statutory barred pursuant to provisions of Section 7 of the Limitation of Actions Act Cap 22.*
2. *That in the alternative, the Defendants' statement of defense and counterclaim as filed be struck out for the defendants have no locus standi to agitate over issues of fraud, forgery or mistaken registration of the suit parcel LR Number 13287/37 I.R 50164 North of Njoro town – Nakuru belonging to the plaintiff.*
3. *That in the result of the Defendants' Defense and counterclaim being struck out, then judgment be entered for the plaintiff as per the plaint filed on 7th October 2019.*
4. *That the costs of the suit and the application be awarded to the plaintiff .*

2. The application is grounded on the grounds set out on the body of the application and the affidavit sworn in support thereof by the plaintiff dated 23rd January 2020; it is the plaintiffs/applicants contention that the defence and counterclaim are statute barred by reason of Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya. The plaintiff avers that the defendants deceased father discovered way back in 1991 that land parcel LR No. 13287/37 had erroneously been registered in the name of Kiprotich Kibowen instead of his name. The plaintiff thus avers the defendants cause of action arose in 1991 and any claim touching on the land ought to have been initiated and/or commenced within 12 years from when the discovery of the mistake or erroneous registration was discovered. The plaintiff therefore contends the defendants claim to the land became time barred in 2003 after the expiry of 12 years. The plaintiff averred that he purchased the suit land from the initial registered owner, Kiprotich Kibowen between 2006 and 2008 for the consideration of Kshs10.4 million and had no notice of any other claim over the suit property .

3. The plaintiff further contends the defendants lack any locus standi to question the land transaction the plaintiff had with the initial registered owner of the suit property. The plaintiff thus asserts the defendants have no legitimate cause of action to be adjudicated upon by the Court and hence prays that the defendants defence and counterclaim be struck out.

4. The defendants have filed a replying affidavit sworn by the 1st defendant on 14th February 2020 in opposition. The defendants assert that they have a genuine and arguable defence which raises bonafide triable issues. The defendants further assert that it was in 2019 that they discovered the transfer in favour of the plaintiff in regard to the suit property had been effected and hence the cause of action against the plaintiff arose in 2019 and consequently Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya was inapplicable. The defendants aver that the counterclaim raises triable issues as to whether the defendants are the legitimate beneficiaries of the suit property and/or whether the plaintiff legally acquired the suit property.

5. The parties canvassed the Notice of Motion by way of written submissions. I have reviewed the pleadings and considered the filed

submissions and its apparent the issues for the court to determine is whether on the pleadings it is evident the defence and counterclaim by the defendants are statute barred and/or if the defence and counterclaim raise triable issues to warrant the Court to allow the defendants to defend and to prosecute their counterclaim.

6. It is thus essential to revert to the parties pleadings to contextualize the plaintiff's application seeking to have the defendants defence and counterclaim struck out. The plaintiff vide the plaint dated 7th October 2019 and filed on the same date states he purchased the suit property from Kiprotich Kibowen vide a sale agreement dated 8th March 2006 and paid the consideration of Kshs.10.4 million between 2006 and 2008. The transfer in his favour was executed on 14th December 2017. The plaintiff stated in April 2019 the defendants occupied a portion of 2 acres of the land and constructed some semi-permanent residential houses and cultivated thereon claiming to be heirs to the land from Rotich Kipngok (now deceased). The plaintiff claimed it took him a long period to complete his sale transaction owing to his duties at the University of Nairobi where he was a lecturer. The plaintiff further claimed he was the lawfully registered owner of the suit property and therefore entitled to exclusive possession and use of the same. He sought a declaration that the defendants were trespassers on the land and an order for their eviction and a permanent injunction against them.

7. The defendants in their statement of defence and counterclaim filed on 12th November 2019 stated that their late father Rotich Kipngok was the legal owner of LR No.13287/37 having been allocated the land by the Agricultural Development Corporation (ADC) back in 1988. They stated that during the same time one Kiprotich Kibowen was also allocated LR No.13287/144. They however stated at the time of registration, Kiprotich Kibowen was erroneously registered as the owner of land parcel LR. No.13287/37 instead of their late father, Kipngok Rotich. They stated that immediately their late father discovered the anomaly he vide a letter dated 7th November 1991 requested for rectification. The ADC acknowledged the error and set in motion the process to effect the rectification but the defendants father died in 2007 before the rectification had been completed. In the meantime the defendants stated they took possession of the land and established their family homes on the suit land from the 1990s or thereabouts. The defendants aver their late mother who died in 2003 and their father who died in 2007 were both buried on the suit land.

8. The defendants stated both their late father and the late Kiprotich Kibowen in 1995/96 signed the necessary documents to effect the rectification but the process took long and their father died before it was completed. The defendants further averred that indeed after their father's death Mr. Kiprotich Kibowen even tried to assist them (defendants) to have the land transferred to the names of the beneficiaries of their father but the land registry file relating to the suit property somehow could not be traced.

9. The defendants aver the transfer in favour of the plaintiff could only have been obtained fraudulently through forgery of the signature of Kiprotich Kibowen (now deceased). The defendants assert that they have since the suit property was allocated to their late father in 1988 possessed and occupied the land and that they have developed and established their homes on the land. The defendants seek the cancellation and/or nullification of the title issued in favour of the plaintiff and for the suit land to be registered in their favour.

10. The plaintiff, as the pleadings reveal, had the suit property transferred to him on 14th December 2017 and the transfer was registered on 6th June 2018. The pleadings further reveal the defendants late father, Rotich Kipng'ok was allocated LR No.13287/37 (the suit property) by ADC but the same was erroneously registered in the name Kiprotich Kibowen and that the ADC was notified of the error and efforts at rectification of the error were commenced. The defendants family took occupation of the land and established homes thereon and generally were developing and utilizing the land. The plaintiff claims he purchased the land from Kiprotich Kibowen vide an agreement dated 8th March 2006 and paid the purchase price over a period of 2 years up to 2008 and got a transfer executed in December 2017. The widow of Kiprotich Kibowen one Zipporah Jepichi Sogomo has sworn an affidavit in support of the defendants case dated 11th November 2019 affirming that her late husband was allocated LR No. 13287/144 but was erroneously registered as owner of LR No. 13287/37 allocated to Rotich Kipngok deceased father to the defendants. She denied her husband sold the land to the plaintiff and stated her late husband had willingly executed documents to facilitate the rectification of the title in favour of the defendants father. She in her affidavit affirmed Rotich Kipngok and his family have occupied and utilized the suit property from 1988 when the land was allocated. She denied her late husband, who she described as a person of integrity and a well trusted and respected member of the society, ever sold or transferred the subject parcel of land as he had no proprietary interest over the same.

11. Quite evidently the defendants defence/ and the counterclaim raises triable issues. Was there a valid sale agreement between the plaintiff and the late Kiprotich Kibowen, and if so, whether the latter had any proprietary interest in land parcel LR No.13287/37 which he could have sold and transferred to the plaintiff? Were the defendants in occupation and possession of the suit land from 1988 as alleged, and if so, whether the plaintiff ought to have had notice of such occupation and possession? The defendants further raise the issue whether or not the transfer to the plaintiff of the suit property was fraudulently procured and therefore a nullity.

12. On the issue of whether or not the defendant's counter claim is statute barred by limitation, the defendants have pleaded the transfer was effected to the plaintiff in 2019 when agents of the plaintiff visited the land for purposes of carrying out some survey. It is this transfer to the plaintiff the defendants allege was fraudulently procured. The cause of action in my view would be as from the date the defendant discovered transfer of the land that they always considered to be theirs had been effected. The time for limitation cannot be said to have started running from 1991 when the issue of erroneous registration was unearthed. The said Kiprotich Kibowen at any rate acknowledged the error and joined hands with the defendants deceased father to rectify the error. The period from 1991 upto the time the plaintiff was registered as owner could not run against the defendants and in favour of the plaintiff. Under the law the plaintiff acquired a legal interest in the suit property when the transfer was registered in his favour in June 2018. It is from the date of registration that he acquired rights to the property which he could lawfully enforce.

13. The defendants as the beneficiaries of their late father's estate and the appointed administrators of his estate, have locus to represent the estate of the deceased in any Court proceedings including the present suit.

14. The defendants were appointed as joint administrators to the estate of Kipngok Rotich (deceased) on 20th January 2014 and accordingly under section 82 (a) of the Law of Succession Act, Cap 160, Laws of Kenya how authority to sue or be sued on behalf of the estate of the deceased.

15. I am conscious that both parties have referred the court to various authorities in their submissions. My failure to make reference to them is not that they are not relevant but because the issues for consideration in this matter were rather straight forward namely:-

(i) Whether or not the defendants defence and counter claim are barred by limitation and I have held section 7 of the Limitation of Actions Act is inapplicable?

(ii) Lack of Locus Standi. I have held the defendants as administrators of their late father's estate, had the locus standi .

(iii) Whether or not the defendants defence and counter claim raises any triable issue. I have held there are multiple triable issues.

Madan, JA (as he then was) in the case of *D.T Dobie & Co (Kenya) Ltd –vs- Muchina (1982) KLR1* stated as follows in regard to summary dismissal of suits:- where he stated:-

“no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously -discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment . If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it”

16. The Court has a duty to act cautiously but judiciously in promoting, fair trial and access to justice. Parties come to court to have their disputes heard and adjudicated upon. Courts must therefore be slow to summarily strike out suits unless as madan, JA stated in the D.T Dobie (K) Ltd case (supra) that a suit is plainly hopeless and sustaining the same would be a waste of the court's valuable time. In the present suit it cannot be said the defendants counterclaim is hopeless and/or scandalous. It raises triable issues which need to be canvassed at a full trial. To strike out the defence and counterclaim would be tantamount to driving the defendants from the seat of justice. Let them have their day in court just as the plaintiff will have his day in Court.

17. The upshot is that I find no merit in the plaintiff's Notice of motion date 23rd January 2020 and I dismiss the same with costs to the defendants.

18. Orders accordingly.

Ruling dated signed and delivered virtually at Nakuru this 29th day of July 2020.

J M MUTUNGI

JUDGE