



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
ELC CASE NO. 318 OF 2015

NTHIGA MUCHIRI.....PLAINTIFF/APPLICANT

VERSUS

MARY RUGURU NJERU.....1ST DEFENDANT/RESPONDENT

SIMON PETER NJUKI.....2ND DEFENDANT/RESPONDENT

RULING

What is before me for consideration is the defendants' Preliminary Objection dated 22nd October 2015 in which they claim that this suit is statute barred and therefore an abuse of the process of this Court.

To answer this question, one needs to examine the plaint and the remedies sought.

The plaintiff filed this suit on 28th July 2015 claiming that land parcel No. GATURI/NEMBURE/526 belonged to his deceased father NJUE MWEAMBIRI who had sub-divided it into the following portions:-

1. *Land parcel No. GATURI/NEMBURE/8154*
2. *Land parcel No. GATURI/NEMBURE/8155*
3. *Land parcel No. GATURI/NEMBURE/8156*

However, he has since discovered that the defendants have registered themselves as the proprietors of land parcels No. GATURUI/NEMBURE/8155 and GATURI/NEMBURE/8156 respectively while parcel No. GATURI/NEMBURE/8154 is still intact but in the names of NJUE MWEAMBIRI (deceased). That necessitated this suit in which the plaintiff seeks the following orders:-

1. *An order against the defendants to revert the said land parcel No. GATURI/NEMBURE/8155 and 8156 to NJUE MWEAMBIRI and the Land Registrar Embu to enforce the same.*
2. *An order be made, to file succession on the Estate of NJUE MWEAMBIRI for purposes of mode of distribution.*
3. *That the Land Registrar Embu be ordered to register prohibition or inhibition against further dealing of all parcel of land of the Estate of NJUE MWEAMBIRI until further orders from this Court, the land parcel No. GATURI/NEMBURE/526 the resultant of land parcel No. 8154, 8155, 8156 and 501 and its resultant that is GATURI/NEMBURE/8155, 8152 and 8153.*

The defendants filed a defence in which they stated that the transfer of land parcels No. GATURI/NEMBURE/8155 and GATURI/NEMBURE/8156 were lawfully executed for value and without notice of any fraud or illegality.

The Preliminary Objection was argued orally as the plaintiff is acting in person.

In arguing the Preliminary Objection, Mr. Mogusu counsel for the defendants submitted that the land parcels subject of this suit were transferred to the defendants in 1988 which is some 18 years ago and so this suit is time barred as per the Limitation of Actions Act. Further, that the land parcel No. GATURI/NEMBURE/8155 was transferred to the 1st defendant by the plaintiff's late father and this Court cannot give the plaintiff an order to file succession proceedings which is among the remedies sought in the plaint and finally, the order of inhibition sought is ambiguous.

In response, the plaintiff submitted that his late father did not transfer the land parcels No. GATURI/NEMBURE/8154, 8155 and 8156 to the defendants at all and this suit should therefore be heard.

As was held in the case of MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD 1960 E.A 696, a Preliminary Objection raises pure points of law and is argued on the assumption that all the facts pleaded by the other side are correct. It cannot therefore be raised if any facts have to be ascertained or if what is sought is the exercise of judicial discretion. The plaintiff is acting in person and as is to be expected, his pleading leave a lot to be desired. His plaint is what one would refer to as “*home made*” and clearly it does not bring out the issues that this Court has to resolve. For example, it is not clear if his plaint is premised on fraud on the part of the defendants. All he alleges is that he discovered that the defendants had registered themselves as proprietors of parcel No. GATURI/NEMBURE/8155 and 8156 while parcel No. GATURI/NEMBURE/8154 is still registered in the names of his late father. It is not clear when he discovered this and although the registration was done in 1988, time would begin to run when he made the discovery. If the defendants fraudulently registered themselves as the proprietors of the named land parcels, which is not specifically pleaded but which can be inferred from the “*home-made*” plaint, then, by virtue of the provisions of Section 26 of the Limitation of Actions Act, time would start running from the time the fraud was discovered. Parties are of course bound by their pleadings and it is obvious that this plaint could certainly have been drafted better. However, this Court is alive to the fact that there is always a right to amend pleadings. Poor drafting cannot be the basis upon which a Preliminary Objection can be raised. What is clear at this stage is that some issues need to be interrogated through evidence and I am not persuaded that the issues raised by the defendants are pure points of law that can be determined by way of a Preliminary Objection as held in the case of MUKISA BISCUIT MANUFACTURING CO. LTD case (supra).

Counsel for the defendants has also taken issue with the fact that the plaintiff is seeking an order to be allowed to file a succession cause yet he does not require such an order and further, that the claim of prohibition is ambiguous. That may be so but again, there is a whole world of difference between a claim that is ambiguous or un-sustainable and a claim that is barred by law and which is what a Preliminary Objection ought to be based on.

I am not therefore persuaded that the Preliminary Objection raised by the defendants herein is a proper Preliminary Objection as understood in law.

Having said so, Order 8 Rule 5 of the Civil Procedure Rules grants this Court powers, either on its own motion or on the application of any party to amend pleadings for purposes of identifying the real questions in controversy between the parties. I direct the plaintiff to do so in view of what I have stated above.

Ultimately however, having considered the Preliminary Objection herein, I find that it is not well founded. It is accordingly dismissed but with no order as to costs.

B.N. OLAO

JUDGE

13TH MAY, 2016

Ruling dated, delivered and signed in open Court this 13th day of May 2016.

Ms Nyamuata for Mr. Mogusu for Defendants present

No appearance for the Plaintiff.

B.N. OLAO

JUDGE

13TH MAY, 2016