



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 60 OF 2019

JUST CHICKEN LIMITED.....PLAINTIFF

VERSUS

KIRAN MANUBHAI PATEL (Executor of the Estate of JOYCE RONI WAIGANJO)....1ST DEFENDANT

ANN KIBUTU (Executor of the Estate of JOYCE RONI WAIGANJO).....2ND DEFENDANT

RULING

The Plaintiff filed the application dated 21/2/2019 seeking an injunction to restrain the Defendants who are executors of the Estate of the late Joyce Roni Waiganjo, from dealing with the land known as land reference number (L.R. No.) 13797 (“the Suit Property”) pending hearing and determination of this suit. The application was made on the ground that the late Joyce Roni Waiganjo agreed to sell the Suit Property to the Plaintiff on 17/12/2002 after she had subdivided the land to create L.R. Numbers 13797/1 and 13797/2. The Plaintiff averred that it paid a deposit of Kshs. 500,000/= to the late Joyce out of the agreed purchase price of Kshs. 3,000,000/= and was to pay the balance within 180 days of the date of completion of registration of the transfer. The Plaintiff claimed that it took possession of the Suit Property upon execution of the sale agreement and that it had made substantial developments on the land worth over Kshs. 30,000,000/=.

Following the demise of Joyce Roni Waiganjo, the beneficiaries of her estate petitioned the court for grant of probate of her estate vide **Nairobi HC Succession Cause number 2730 of 2008** and the court issued orders on 18/1/2018 for the eviction of the Plaintiff from the original property known as L.R. No. 13797. The Plaintiff contended that the orders issued in the succession cause were in vain since L.R. No. 13797 had ceased to exist. The Plaintiff expressed its willingness to pay the balance of the purchase price to the Defendants or deposit the sum in court. The Plaintiff contended that if orders for an injunction and specific performance of the agreement dated 17/12/2002 were not granted, it would be evicted from the Suit Property making it suffer loss and damage which cannot be adequately compensated by damages.

The application was supported by the affidavit of Nancy Kavinya Kioko to which she annexed copies of the first page of the certificate of title for L.R. No. 13797/2 bearing the name of Gini Abdi Omar as Trustee of Issa Kher Mohamud Mohamed and the agreement for sale dated 17/12/2002 it entered into with Joyce Roni Waiganjo. She also attached photographs showing the development on the Suit Property. In the supporting affidavit, Ms. Kioko made reference to a suit previously filed by the Plaintiff being **HCCC No. 7 of 2007- Just Chicken Limited v Joyce Roni Waiganjo** in which the Plaintiff sought to compel the late Joyce Waiganjo to tender the completion documents. She did not provide further particulars on the outcome of the case nor did she attach a copy of the decision to her affidavit.

The 1st Defendant swore the replying affidavit in opposition to the application or injunction, which was filed in court on 15/3/2019. He urged that the suit offended Section 7 of the Limitation of Actions Act which requires actions for the recovery of land to be filed within twelve years of the date the cause of action arose. He contended that the sale agreement which was entered into on 17/12/2002 was not valid and could not be enforced. Secondly, he contended that the suit was *res judicata* having been dealt with by the court in **HCCC No. 7 of 2007 – Just Chicken Limited v Joyce Roni Waiganjo** where the court made a determination regarding the sale agreement. The Defendants also challenged the manner in which the affidavit in support of the application was sworn. The 1st Defendant contended that the Plaintiff was not in possession of the Suit Property having been evicted pursuant to the court order of 18/1/2017 issued in **Nairobi High Court Succession Cause No. 2730 of 2008** when the Suit Property was declared to be part of the assets of the estate of the late Joyce Waiganjo. He stated that the Plaintiff was evicted from the land on 16/1/2018 and added that the executors incurred extra expenses in getting the Plaintiff forcefully evicted from the suit land.

Further, the 1st Defendant contended that the issue of the sale agreement was determined and the court found that it could not be enforced due to effluxion of time and that it was contrary to condition 4 of the Law Society of Sale Conditions (1989 Edition). He added that the Plaintiff’s application was dismissed by the court in the succession cause and contended that the Plaintiff had wrongly approached this court.

Mr. Patel produced copies of the will of the late Joyce Ronnie Waiganjo; the judgement dated 13/3/2007 in **HCCC Misc. Appl. No. 7 of**

2007; and the rulings delivered in **Nairobi High Court Succession Cause No. 2730 of 2008** on 14/11/2018 and 29/3/2018.

The Defendants also filed a notice of preliminary objection on 13/3/2019 in which they contended that the suit offended Section 7 of the Limitation of Actions Act with regard to the period for bringing a suit for the recovery of land and that this suit was *res judicata* having been dealt with conclusively by the court in **HCCC No. 7 of 2007- Just Chicken Limited v Joyce Roni Waiganjo** where the court made a determination regarding the sale agreement dated 17/12/2002.

Parties filed submissions which the court has considered. The Plaintiff contended that it had a *prima facie* case that was more likely than not to succeed based on the documents it attached to its affidavit and stated that it was ready, willing and able to pay the balance of the purchase price for the Suit Property. It contended that the sale was not concluded because the late Joyce Waiganjo did not have the completion documents at the time hence the balance of the purchase price could not be paid to her. The Plaintiff submitted that the Suit Property was a family residential home for one of its directors and that it would suffer irreparable loss if the orders of injunction were not granted. It added that the balance of convenience tilted in its favour.

In their submissions, the Defendants reiterated their objections to the suit on the basis of it being statute barred and *res judicata* while contending that the court had already made a determination that the sale agreement was terminated by effluxion of time when the Plaintiff failed to deposit the balance of the purchase price with the advocates. They maintained that the Plaintiff was not in possession of the suit land following the orders of Farah Amin J. of 18/1/2017 and the confirmation by the police that the Plaintiff had been peacefully evicted from the Suit Property. The Defendants drew the court's attention to the concern expressed by the court over the litigation in respect of the sale agreement. The court notes that Farah Amin J directed on 29/3/2018 that the Plaintiff was only to be permitted to reopen the matter after establishing locus by filing proof of payment of an occupation charge for at least the 14 years it claimed to have occupied the Suit Property. The Plaintiff steered clear of this issue in its application for injunction. There is no evidence on the court record to show that the Plaintiff paid the occupation charge as directed by Farah Amin J on 29/3/2018.

The issues for determination in this application are whether the Plaintiff has established a *prima facie* case with a probability of success; and whether this suit is *res judicata* or statute barred. The Plaintiff entered into the sale agreement with the late Joyce Waiganjo on 17/12/2002 and paid Kshs. 500,000/= towards the purchase price leaving a balance of Kshs. 2,500,000/= which it was to pay within 180 days of the registration of the transfer. Actions to recover land must be filed within 12 years under the Limitation of Actions Act.

O.K. Mutungi J. in his judgement dated 13/3/2007 struck out the Plaintiff's suit being **HCCC Misc. Appl. No. 7 of 2007**. The judge went ahead to analyse the validity of the sale agreement which is the subject matter of this suit and found that the Plaintiff was in breach of the sale agreement when it failed to deposit the balance of the purchase price before registration. He held that the registration of the caveat by the Plaintiff against the suit land was without any legal basis. In this court's view, Judge O. K. Mutungi already determined the issue of the sale agreement in that judgement and this suit is therefore *res judicata*. The Plaintiff did not apply to review or set aside the orders made by O.K. Mutungi J in 2007.

Having found that this suit is *res judicata*, the court declines to grant the orders sought by the Plaintiff in the application dated 21/2/2019. The Defendants are awarded the costs of the application and of the suit.

Dated and delivered virtually at Nairobi this 20th day of July 2020

K.BOR

JUDGE

In the presence of:-

Mr. N. Dome holding brief for I. Mandala for the Defendants

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiff