



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 234 OF 2018

CHRISTOPHER MUINDI NZIMBA.....PLAINTIFF

VERSUS

JOSEPH MUSAU KALUNDE.....1ST DEFENDANT

HOMEWARD AGENCIES LIMITED.....2ND DEFENDANT

FELIX MANUAL JOSEPH.....3RD DEFENDANT

LAMKA PROPERTIES LIMITED.....4TH DEFENDANT

BHARAT PAREKH.....5TH DEFENDANT

PRAVINCHANDRA JAMNADAS KAKAD.....6TH DEFENDANT

PRANJAL VARSANI.....7TH DEFENDANT

JOSEY NJOKI MUKIRI.....8TH DEFENDANT

RODGERS MOTURI ONGERA.....9TH DEFENDANT

NAOMI MWENDE KAISHA.....10TH DEFENDANT

HENRY OIRERE ONGONDI.....11TH DEFENDANT

PARKASH PAARAS VARSANI.....12TH DEFENDANT

ANTHONY MASOTI ONGONDI.....13TH DEFENDANT

ROSE B. ONGERA.....14TH DEFENDANT

BABU VARSANI.....15TH DEFENDANT

FREDRICK INDOKO LUBULELLAH.....16TH DEFENDANT

CHIEF LAND REGISTRAR.....17TH DEFENDANT

HON. ATTORNEY GENERAL.....18TH DEFENDANT

RECEIVERS OF UNITED INSURANCE COMPANY

LIMITED (IN LIQUIDATION).....19TH DEFENDANT

RULING

1. This Ruling is in respect to three Preliminary Objections. In the Notice of Preliminary Objection dated 7th June, 2019, the 19th Defendant has averred that the suit as against the 19th Defendant is statute barred, and filed out of time; that the 19th Defendant was not privy to the impugned Sale Agreement and transfer to United Insurance Company and that the 19th Defendant cannot be called upon to assume or indemnify the Plaintiff.
2. The 19th Defendant further averred that United Insurance Company was placed under Statutory Management in 2005; that the Statutory Manager cannot be sued without the leave of the court and that there is an existing moratorium in place staying initiation or continuation of all forms of suits against United Insurance Company issued in Nairobi HCCC No. 545B of 2006 (*now Nairobi HCCC No. 67 of 2012*).
3. In the Notice of Preliminary Objection dated 30th July, 2019, the 5th – 16th Defendants averred that the Plaintiff's suit is time barred under the Limitation of Actions Act; that the suit does not disclose a reasonable cause of action and that L.R. No. 12715/383 was transferred to the 18th Defendant more than 22 years ago.
4. In their Notice of Preliminary Objection dated 29th July, 2019, the 4th and 10th Defendants averred that the suit is statute barred and against the provisions of Section 7 of the Limitation of Actions Act and that the suit is a violation of Section 7 of the Civil Procedure Act by virtue of having been heard and determined by a court of competent and concurrent jurisdiction in Machakos ELC. Judicial Review No. 72 of 2017 and Machakos ELC Judicial Review No. 73 of 2017. All the Notices of Preliminary Objection proceeded by way of written submissions.
5. In his submissions, the 4th and 10th Defendants' counsel submitted that in the Amended Plaint, the Plaintiff has impugned the transfer of L.R. No. 12715/385 made to the Defendants vide a Gazette Notice No. 1476 of 15th March, 1996, which is the date the cause of action accrued.
6. Counsel submitted that an action for recovery of land can only be brought before the end of twelve (12) years; that the Plaintiff has acknowledged the existence of Machakos ELC. Judicial Review No. 72 and 73 of 2017, in which suits the Plaintiff was an Interested Party and that the court in those two suits prohibited the Land Registrar from revoking the 4th and 10th Respondents' title. Counsel relied on several authorities which I have considered.
7. The submissions of the 5th to 16th Defendants' advocate are similar to the submissions of the 4th and 10th Defendant's counsel, which I have summarized above.
8. The 19th Defendant's advocate submitted that the grievance against the 19th Defendant is the Sale Agreement entered into between the Plaintiff and United Insurance Company (*now under Statuary Management*) which happened in 1996 and that the suit is statute barred; that the Plaint having been founded on fraud, should have been filed within three years and that the object of the law of limitation is to avoid stale claims
9. Counsel submitted that the 19th Defendant is currently under legal moratorium which has been extended from time to time; that following the moratorium, the statutory manager obtained orders in Nairobi HCCC No. 545B of 2006 staying all proceedings of whatever nature and form against the 19th Defendant and that the failure by the Plaintiff to disclose to the court about the existence of the prevailing court orders and the moratorium, the ex parte orders issued by this court should be discharged. Counsel relied on numerous authorities which I have considered.
10. The Plaintiff's advocate submitted that the Plaintiff is the registered owner of parcel of land known as L.R. No. 12715/383 (*the suit property*); that the suit property was fraudulently transferred by the 1st and 2nd Defendants, to the 3rd Defendant; that the 3rd Defendant then transferred the suit property to the 4th Defendant who sub-divided the same into 41 parcels and that the 4th Defendant sold them off to the 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th and 14th Defendants, while retaining some.
11. Counsel submitted that the Plaintiff has brought the suit against the Defendants for a declaration that the transfer and subsequent sub-division of L.R. No.12715/383 was irregular null and void and for the cancellation of the Titles of Transfers and the subsequent sub-division.
12. The Plaintiff's advocate submitted that the issues raised in the current are not *res judicata*; that the issues in Judicial Review Application Numbers 72 and 73 of 2017 and the issues in this suit are distinct and that the Judicial Review proceedings the said two suits sought for the quashing of a Gazette Notice revoking the titles in respect to the suit property, which is not the case in the present suit.
13. The Plaintiff counsel submitted that the stay orders against the 19th Defendant was as a result of compensation for general damages arising from insurance claims and in respect of fraudulent dealings by the company.

Analysis and findings:

14. The Notices of Preliminary Objections by the Defendants have raised the following issues:

- a. *Whether the Plaintiff's claim is res judicata;*
- b. *Whether the Plaintiff's claim is time barred and;*

c. Whether this suit is a nullity as against the 19th Defendant by virtue of the existing stay orders and the moratorium.

Whether the suit is res judicata

15. In his Amended Pleintiff, the Plaintiff has averred that at all material times, he was the registered owner of land known as LR No. 2715/383 (the suit property); that he took possession of the suit property on 25th October, 1989, which is the same date he was registered as the proprietor and that in the year 2013, he received a call from the department of the Criminal Investigation inquiring why he had declined to sign the transfer document in favour of an alleged purchaser.

16. The Plaintiff has averred that on inquiry, he discovered that in 1996, a provisional certificate had been issued by the Ministry of Lands in respect to the suit land; that an agreement of sale purportedly between him and the 19th Defendant in respect of the suit property had been entered into; that a forged transfer in favour of the 19th Defendant had been executed and registered and that the 19th Defendant subsequently transferred the suit land to the 2nd Defendant.

17. It is the Plaintiff's case that the 2nd Defendant transferred the suit land to the 3rd Defendant who again transferred it to the 4th Defendant. The 4th Defendant subdivided the suit land into several portions which it sold to the 5th to 15th Defendants. The Plaintiff has alleged in the Pleintiff that the Defendants, jointly and severally, fraudulently acquired the suit property, and is seeking for the cancellation of the titles which have been registered in favour of the Defendants.

18. The Defendants have alleged that the suit offends the provisions of Section 7 of the Civil Procedure Act which provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue or has been directly in issue in a former suit between the parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit which such issue has been subsequently raised, and has been heard and determined.”

19. For a matter to be *res judicata*, there must have been a previous suit between the parties, touching on similar issues, which must have been finally determined by a court of competent jurisdiction. According to the Defendants, this suit is *res judicata* Machakos Judicial Review Application numbers 72 and 73 of 2017.

20. I have perused the decisions that were rendered by this court in Machakos Judicial Review Application numbers 72 and 73 of 2017. In the said two matters, the issue that was before the court was whether the Gazette Notice that was issued by the National Land Commission purporting to cancel the titles that are registered in favour of the Defendants herein was valid.

21. In its findings, this court held that the said Gazette Notice was a nullity on the ground that the Defendants were not afforded an opportunity to be heard before the National Land Commission directed that their titles be quashed.

22. Although the National Land Commission, whose decision this court quashed, was a party in the two matters, the National Land Commission is not a party in the current proceedings. Furthermore, the issue of whether the Defendants obtained the suit property fraudulently or not was not an issue in Machakos Judicial Review Application numbers 72 and 73 of 2017.

23. Indeed, this court has never addressed the issue of how the Defendants obtained their titles, and whether the said titles were obtained fraudulently or not. The issues in Judicial Review Application numbers 72 and 73 of 2017 and the issues in this suit are distinct. This suit is therefore not *res judicata*.

Whether the Plaintiff's claim is time barred

24. The Defendants' advocates submitted that the suit land was sold to the 19th Defendant in 1996; that it cannot be believed that for all those years, the Plaintiff was not aware that the suit property had been sold to the 1st Defendant and the other Defendants and that the suit is statute barred. Counsel relied on the provisions of Section 7 of the Limitation of Actions Act which provides as follows:

“7. Actions to recover land

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.”

25. The Limitation of Actions Act also provides the circumstances that the court should consider while determining the date when the right of action accrued *vis-a-vis* the limitation period of twelve (12) years. Where a claim for recovery of land is on the ground that the said land was acquired fraudulently by a Defendant, Section 26 of the Act comes into play. The said Section provides as follows:

“26. Extension of limitation period in case of fraud or mistake

Where, in the case of an action for which a period of limitation is prescribed,

either—

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”

26. The Plaintiff has pleaded in the Plaint that he only discovered that the title in respect of the suit property had been fraudulently transferred to the Defendants in the year 2013, and that the Defendants started developing the suit property in the year 2014. The Defendants have not offered any evidence to show that the Plaintiff knew about the alleged transactions in 1996, or earlier than the period alleged in the Plaint.

27. To the extent that the Plaintiff has alleged that he discovered about the alleged fraud in respect to the suit property in the year 2013, and in the absence of evidence to show otherwise, I find that this suit is not statute barred. The suit was filed within twelve (12) years from the period when the Plaintiff discovered that the suit property had been transferred to the Defendants. It does not matter that the Plaintiff took four years from the time he discovered about the transfer of the suit property to the Defendants to file the suit.

Whether this suit is a nullity as against the 19th Defendant by virtue of the existing stay orders and the moratorium

28. In the Plaint, the Plaintiff has described the 19th Defendant as “*Receivers of United Insurance Company Limited (in liquidation).*” The suit as against the 19th Defendant was commenced by the Plaintiff after the Plaintiff obtained the leave of this court on 5th March, 2019 in Machakos Miscellaneous Application number. 63 of 2018. The 19th Defendant was joined in this suit on 22nd March, 2018.

29. The 19th Defendant’s advocate submitted that United Insurance Company was placed under statutory management in the year 2005 and that there is an existing Moratorium in place and an order of the court in Nairobi HCCC No. 545B of 2006 staying initiation and/or continuation of all forms of suits against the United Insurance Company (UIC).

30. I have perused the Moratorium that was extended by the Statutory Manager dated 28th May, 2019. The same provides as follows:

“NOW TAKE FURTHER NOTICE that in exercise of powers conferred by section 67 (10) of the Insurance Act, the Statutory Manager hereby extends the Moratorium on payments by the said insurer to its policyholders and all other Creditors up to the hearing and determination of the preliminary objection to cause No. 22/2006.”

31. The said Moratorium was issued pursuant to the provisions of Section 67 C (10) of the Insurance Act which provides as follows:

“For the purposes of discharging his responsibilities, a manager shall have power to declare a moratorium on the payment by the insurer of its policy-holders and other creditors and the declaration of a moratorium shall—

(a) be applied equally to all classes of policy-holders and creditors, subject to such exemptions in respect of any class of insurance as the manager may, by notice in the Gazette specify;

(b) suspend the running of time for the purposes of any law of limitation in respect of any claim by any policy-holder or creditor of the insurer;

(d) cease to apply upon the termination of the manager’s appointment whereupon the rights and obligations of the insurer, its policy-holders and creditors shall, save to the extent provided in paragraph (b), be the same as if there had been no declaration under the provisions of this subsection.”

32. The above provision of the law, and the Moratorium that the 19th Defendant issued, and which was extended on 28th My, 2019 only applies to the payments by United Insurance Company (UIC) to its policy holders and creditors. The Plaintiff herein is not claiming any payment from the 19th Defendant as a policyholder or a creditor. The Plaintiff’s claim is in respect to the suit property which he claims was fraudulently acquired by the United Insurance Company, now under liquidation. To that extent, it is my finding that the existing Moratorium is not applicable to the present suit.

33. The 19th Defendant has annexed on one of his Affidavit an Order of the court in Nairobi HCCC No. 545 of 2006 dated 23rd October, 2009 and issued on 27th October, 2009. Although the said Order was signed by the Deputy Registrar, it does not indicate the name of the Judge who granted the Order. One of the orders that the court granted provided as follows:

“That all proceedings of whatever nature of form against United Insurance Company Limited (under Statutory Management) or its policy holders be barred during the currency of the Moratorium by the Statutory Manager of 15th day of July, 2005.”

34. In my view, and with respect, that Order, having been given by the High Court, is not binding on this court. Furthermore, the said order should be interpreted in line with the Moratorium that I have already alluded about. The order is therefore only applicable to claims by policyholders and creditors of the collapsed Insurance company and not in a claim like the current one.

35. To the extent that the order of the court of 23rd October, 2009 in Nairobi HCCC No. 545B of 2006 does not make reference to the Plaintiff’s claim, it is my finding that the Plaintiff has a constitutional right to approach this court and ventilate his claim. I dare say that any order of the court purporting to curtail the right of a litigant to approach the court will run afoul the provision of Article 50 of the

Constitution which provides as follows:

“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

36. The right to a fair trial is so fundamental in our constitutional dispensation, so much so that it is amongst the few other rights that cannot be limited (*See Article 25 of the Constitution*). To that extent, and in view of the fact the Plaintiff’s cause of action arose after the order of the court which stayed *“all proceedings of whatever nature against the 19th Defendant”*, it is my finding that the order of the court in Nairobi HCCC No. 545B of 2006 is neither binding on this court nor applicable in the current dispute.

37. For the reasons I have given above, I dismiss the Defendants’ Notices of Preliminary Objections with costs to the Plaintiff.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15TH DAY OF JULY, 2020.

O. A. ANGOTE

JUDGE