



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 583 OF 2016

DICKSON NGIGE NGUGI.....PLAINTIFF

VERSUS

CONSOLIDATED BANK LTD

(Formerly JIMBA CREDIT CORPORATION LIMITED.....1ST DEFENDANT

MATHEW NDONGA KABAU

THE REGISTERED TRUSTEES OF THE

CATHOLIC DIOCESE OF NAKURU.....2ND DEFENDANT

RULING

1. The Plaintiff instituted the present suit vide a plaint dated 6th December 2016 filed in Court on 19th December 2016. The plaintiff inter alia sought a declaration that the charge registered in favour of the 1st defendant over **L.R No.1117/1 Elementaita** (“ the suit property”) in 1981 and the subsequent transfers to the 2nd and 3rd defendants were null and void and hence should be cancelled and the suit property reverted to the plaintiff.

2. The 1st and 3rd defendants in their respective statements of defence dated 22nd March 2017 and 2nd May 2017 respectively pleaded that the plaintiff’s suit was statute barred under the provisions of the Limitation of Actions Act, Cap 22 of the Laws of Kenya on account of the suit having been instituted after the period of limitation had expired. The 1st defendant intimated that it would raise a preliminary objection on the issue. The 1st defendant on 3rd September 2019 filed a Notice of Preliminary Objection predicated on the following grounds:-

1. This court lacks the jurisdiction to hear and determine this suit by virtue of the cause of action being time barred, having been filed after the lapse of the statutory period as set out in section 4 and 7 of the Limitation of Actions Act.

2. The suit is incompetent, bad in law and that the same should be struck out with costs to the 1st defendant/applicant.

3. The Court on 18th February 2020 gave directions that the preliminary objection be argued by way of written submissions. The 1st defendant filed its written submissions on 15th May 2020 and the plaintiff filed his submissions on 6th July 2020. The 3rd defendant did not file any submissions. However, the 3rd defendant’s counsel on 7th July 2020 informed the Court that the 3rd defendant supported the 1st defendant’s preliminary objection and would not file any submissions.

4. The Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696** laid down the principle as to what constitutes a preliminary objection. A preliminary objection to be valid must be on a point of law and must be founded on facts that are not in dispute. If evidence would require to be adduced to establish the facts, then a preliminary objection would not be sustainable. In the **Mukisa Biscuit case** (supra) Law, JA stated as follows:-

“ so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

5. In the present matter the 1st defendant has hinged its preliminary objection on the fact that the plaintiff's cause of action was time barred and that the suit was brought after the expiry or lapse of the period of limitation. The preliminary objection is on a point of law and the court is satisfied it has been properly and validly taken. The question whether or not the plaintiff's suit is barred by statute on account of limitation goes to the jurisdiction of the court to entertain the suit. If the suit is statute barred on account of limitation then the court lacks the jurisdiction to entertain the same. If the court were to proceed to hear and adjudicate the suit when it lacked the jurisdiction, its decision would be null and would be voidable.

6. Section 4 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya prescribes the limitation period for the institution of suits in regard to various causes of action. In regard to actions founded on contract the limitation period is six years whereas in regard to actions founded on tort the limitation period is three years. The limitation period in regard to an action to recover land under section 7 of the Limitation of Actions Act is twelve years. Section 7 of the Act provides as follows:-

7. 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 first accrued to some persons through whom he claims, to that person.

7. The 1st defendant contends that as per the plaint, the plaintiff has pleaded that he borrowed a sum of Kshs.300,000/= from the 1st defendant in 1981 and that the suit property was the security. The plaintiff further pleaded that the 1st defendant on or about September 1985 sold the property to the 2nd defendant by public auction in purported exercise of its power of sale conferred under the charge. The 2nd defendant sold and transferred the suit property to the 3rd defendant in 1996. The plaintiff's averment was that no consent of the Land Control Board was obtained in regard to the charge registered in favour of the 1st defendant and further no consent of the Land Control Board was procured in regard to the sale by public auction to the 2nd defendant. In consequence, the plaintiff contended the charge registered over the suit property was null and void for want of consent of the Land Control Board and hence the purported exercise of power of sale by the 1st defendant was a nullity. The plaintiff thus contended the 2nd defendant did not acquire any good title which he could have transferred to the 3rd defendant.

8. The 1st defendant for its part contended that the plaintiff admitted he had borrowed money from the 1st defendant on the security of the suit property and that the 1st defendant sold the property to the 2nd defendant by public auction in exercise of its power of sale in 1985. The cause of action, if any, on the part of the plaintiff accrued when the 1st defendant auctioned the suit property in 1985. Amongst the plaintiff's bundle of documents is a copy of the Grant No.IR31947 of LR No.1117/1 which shows the grant in favour of the plaintiff was registered on 11th April 1978. That a charge in favour of Jimba Credit corporation Ltd (now Consolidated Bank of Kenya Ltd) for Kshs 300,000/= was registered on 11th November 1981. A transfer by charge was registered in favour of Mathew Ndonga Kabau on 11th July 1989 and finally a transfer was registered in favour of the Catholic Diocese of Nakuru on 28th August 1996. A copy of the charge over the suit property dated 5th November 1981 is exhibited and is shown to have been executed by the plaintiff and the plaintiff's signature was duly attested by one Kembu Gitura advocate. The plaintiff duly acknowledged he understood the purport of section 69(1) of the Transfer of property Act 1982 of India (applied to Kenya) now however repealed as it related to the chargee's exercise of power of sale in the event of default in the payment of the loan. It is this exercise of power of sale that the 1st defendant invoked when the plaintiff defaulted in servicing of the loan and sold the property by public auction.

9. The Plaintiff has further exhibited the letter from the Auctioneer dated 30th November 1984 confirming the public auction was held on the same date and that the property was sold for Kshs.450,000/= to the 2nd defendant. An application for the consent of the Land Control Board dated 17th January 1985 and a letter of consent from the Land Control Board dated 13th May 1985 granting consent to the chargee to effect the sale to the 2nd defendant is equally exhibited by the plaintiff. The documents referred to herein above affirm that the suit property was charged by the plaintiff in favour of the 1st defendant and that indeed the 1st defendant in exercise of its power of sale under the charge sold the property to the 2nd defendant.

10. The plaintiff in his submissions has stated that his cause of action is founded both on contract and on fraud and intimated that he only discovered the fraud in 2016 when he filed the suit. The plaintiff apparently based his claim of fraud on alleged lack of the consent of the Land Control Board for the charge and further argued that the consent obtained for the transfer to Mathew Ndonga Kabau dated 13th May 1985 lapsed after the expiry of 6 months and could not therefore be utilised to register the transfer by chargee on 11th July 1989.

11. The plaintiff in the plaint has not pleaded any fraud and no particulars of any fraud on the part of the defendants are given. The plaintiff definitely charged the suit property to the 1st defendant as evidenced by the instrument of charge exhibited by him and the charge was duly registered against the title on 11th November 1981. The chargee in exercise of its power of sale conferred under the charge sold and transferred the suit property to the 2nd defendant. The transfer by chargee was registered in favour of the 2nd defendant on 11th July 1989. Contrary to the assertion by the plaintiff that the consent of the Land Control Board given on 13th May 1985 for the sale to the 2nd defendant expired after the expiry of 6 months, the consent of the Land Control Board once granted has no expiry date. Probably the plaintiff is confusing this with the requirement under section 8(1) of the Land Control Act, Cap 302 of the Laws of Kenya which requires an application for consent to be made to the appropriate Land Control Board within six months of the making of the agreement for sale. Section 6(1) of the Land Control Act only requires that the consent of the relevant Land Control Board be obtained in regard to transactions affecting agricultural land in accordance with the Act. The letter of consent given on 13th May 1985 could not expire and in effect the transfer to the 2nd defendant was lawfully and validly effected.

12. Essentially therefore, the plaintiff's cause of action arose when the 1st defendant sold the suit land to the 2nd defendant by public auction on 30th November 1984.

13. After the suit property was transferred to the 2nd defendant and ultimately to the 3rd defendant, the plaintiff could only institute an action

for the recovery of the land. On the basis of the pleadings it is evident that the transactions that resulted in the land being transferred to the 2nd defendant and the 3rd defendant took place in 1984/1985 and 1996 respectively. Under the provisions of section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya, an action for the recovery of land cannot be brought after the expiry of twelve years.

14. In the case of *Gathoni –vs- Kenya co-operative Cremires Ltd (1982) KLR 104 Potter*, JA stated the rationale of the Law of Limitation as follows:-

“The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

15. Further in the case of *Rawal –vs- Rawal (1990) KLR 275* the court held as follows:-

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. See also the case of Melita –vs- Shah (1965) EA 321 cited with approval by Bosire, J in the above case.”

16. The plaintiff instituted the present case in December 2016 over 19 years after the transfer to the 3rd defendant was effected. The plaintiff has not offered any explanation as to why it took him all that time to initiate the recovery action. He having executed the charge in favour of the 1st defendant he must have been alive to the fact that the property could be sold under the provisions of the charge for default. His argument that he only discovered the sale transactions had taken place in 2016 without the requisite consents of the Land Control Board is not believable. The plaintiff had charged suit property and he was fully aware that in the event of default in payment of the loan the bank would sell the land in exercise of its power of sale under the charge. It cannot be reasonable that it would have taken the plaintiff over 19 years to discover that the 1st defendant had in exercise of its power of sale sold the property by public auction.

17. The foregoing notwithstanding the provisions of section 26 of the Limitations of Actions Act vide which the plaintiff seeks refuge cannot have any application in the circumstances of this matter. No fraud was pleaded and/or any concealment of any material facts relevant to the action. Besides the 2nd defendant and the 3rd defendants were bonafide purchasers of the suit property for value without any notice of any defect in the title they purchased. They could not have known about and were not party to any fraud affecting the suit property. The 2nd and 3rd defendants under provisio (i) and (ii) of section 26 of the Limitation of Actions Act would be absolved of any wrong doing, they having not been a party to any fraudulent dealing affecting the property. The provisio to section 26 provides as follows:-

Provided that this section

i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made

18 . In the final result I find the preliminary objection to be well founded. It is upheld and it is my determination that this suit is not sustainable on account being statute barred under the Limitation of Actions Act. I order the suit struck out and dismissed with costs to the 1st and 3rd defendants.

18. Orders accordingly

Dated signed and delivered at Nakuru virtually this 24th day of September 2020.

J M MUTUNGI

JUDGE