



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL CASE NO.90 OF 2011

MUNYITE NATEMBEA.....1ST PLAINTIFF
KHAEMBA NATEMBEA.....2ND PLAINTIFF
VERSUS
AINEA OPWORA.....DEFENDANT

RULING

[1] The defendant herein raised a Preliminary objection against the suit filed herein and argued that in his written statement of defence dated 22/8/2013 paragraph 6 and 7 that he reserved his right at the hearing hereof to crave for leave of the Court to strike the suit herein for:-

- a. Disclosing a reasonable cause of action;
- b. being scandalous frivolous and vexatious;
- c. being an abuse of the process of the court;
- d. offending the limitations of actions Act Cap 21 Laws of Kenya; and
- e. being Res Judicata.

He gave a notice of his intention to raise the said points as preliminary objection on point of Law. In his defence the defendant stated that there has been previous cases in Bungoma High Court Civil Appeal No.141 of 1998, Bungoma CM CR No.2013 of 2005 and Bungoma CM C suit No.300 of 1987.

[2] Mr. Murunga learned Counsel for the defendant argued that an action in land can only be brought after 12 years. He asked the Court to peruse the certified copies of the Register pages 1,2 and 3 and note that the land was registered in the name of the defendant on 16/11/1973. From that time to now is 37 years. He submitted that the plaintiff had 12 years to file suit from 16/11/73. He submitted that the suit is time bared.

[3] Mr. Murunga on his second limb of argument, stated that, this suit is *res judicata*. That the plaintiff herein filed suit in 1987 in the CM's Court Bungoma as case No.300 of 1987 whereby the plaintiffs were asking for eviction. The suit was referred to the D.O. Kanduyi Division for arbitration. He heard the parties and forwarded to Court the proceedings and award. The findings were that the defendant bought the land legally. He found that the plaintiff did not raise an objection in the Land Control Board in 1973. It was found that the plaintiff had no right to stay on the land. That the plaintiff withdrew the suit and was ordered to pay the costs. Counsel stated, that the plaintiff herein later filed yet another case in the Land Disputes Tribunal. The said Tribunal found the land to belong to the defendant. The plaintiff appealed to the Provincial Land Appeals Tribunal in Kakamega in Appeal No.44 of 1996. That since the land was supposed to have changed hands through sale, the Appeals tribunal ordered that the finger print

expert establishes whether the signatures on the agreement and the transfer documents belonged to the plaintiff who was alleged to have signed the same and which signatures the plaintiff had denied as belonging to him.

The signatures were proved to belong to the plaintiff. The appeal was dismissed. The award was adopted as the order of the Court vide Miscellaneous Case No.91 of 1996. The plaintiffs appealed to the High Court and their appeal was dismissed by the High Court Bungoma. The plaintiffs were ordered to vacate the land. Counsel said that all the cases and orders mentioned therein were annexed to the pleadings. He further argued that even if the plaintiffs are alleging fraud, that cannot also hold, that in fraud time begins to run when it is discovered. That if it was discovered in 1987, up to the time this case was filed a period of twelve years had elapsed and the suit is still time barred.

[4] Mr. Onyango State Counsel, associated himself fully with the submissions of Mr. Murunga. He added that fraud should be treated as a tort. That section 3 of Public Limitations Act bars the filing of a suit based in tort against the government. He argued that the land registers were opened in 1973. That the proceedings of Bumula Land Control Board were conducted way back in June 21st 1988, the appeals in the Province were finalized in 1996 and that thereafter those awards were adopted vide Miscellaneous Civil Case No.91 of 1996 and that from 1996 to 2011 a period of 15 years has elapsed. That no extension of time was sought or obtained by this Court. That the suit against the 2nd defendant is time barred and should be struck out against the 2nd defendant with costs.

[5] Mr. Mugambi learned Counsel for the plaintiff argued, that the suit is based on fraud, time starts to run when fraud is discovered. He said the plaintiff discovered the fraud in 1985 after the 1st defendant moved to the tribunal and filed a case against the plaintiffs. He said that their position on resjudicatta is, that all the proceedings in Bumula Land Disputes Tribunal were a nullity. That they were commenced 12 years after the cause of action arose. And that those proceedings were null and void. He argued that the proper place for the case was the Environment and Land Court.

[6] Mr. Murunga in Reply said that if the plaintiff knew of the fraud in 1985, by the time this suit was filed it had taken 25 years. That this suit is time barred by section 7 of the Limitations Act. The plaintiff ought to have sought leave of the Court before filing the suit.

[7] Mr. Ondango in reply said that section 13 of the Land Disputes Tribunal Act had vested the tribunals with the power to determine the issue of occupation of land. That the dispute was about occupation of land. He urged the Court to find that the suit is time barred by limitation.

[8] The plaintiff and the 1st defendant have litigated on the land in dispute for a long time. The 1st defendant was registered as the owner of the suit land in 1974. The plaintiff moved from the land and came to re occupy the same in 1988. They were charged with forcible entry on land contrary to section 90 of the Penal Code as having entered the land by force on 10th July 2005. He was convicted and sentenced to a fine of Ksh.1000 in default to be imprisoned for six months.

The parties have litigated in the Lands Dispute Tribunal, the Provincial Lands Tribunal and the High Court at Bungoma. The appeal was dismissed by the High Court on 28/8/09. The procedure adopted in the proceedings was the correct one prescribed by the law. The case went to the whole hearing upto the High Court.

[9] From my perusal of the record I cannot find anywhere where the issue of limitation was raised by the plaintiff or his advocates. That was the proper forum to raise the issues the plaintiff wishes to resurrect in his current suit. He did not. The dispute therein was the same then as it is herein. The parties are the same. The same was conclusively determined by Courts of competent jurisdiction. The appeal was dismissed by this Court. This case is resjudicatta. Litigation must at some point come to an end. And this one ended in the High Court when the appeal was dismissed. Counsel for the plaintiff

argued that this suit is based on fraud. That time in cases of fraud starts to run when it is discovered. He conceded that in this case fraud was discovered in 1985. This suit was not filed until 2011, some 24 years later. By the time the suit was filed the case was barred by limitation for a period of over 12 years. Even if one was to disregard the issue of *rejudicata*, the suit is still barred by limitation.

[10] I uphold the objection by the defendants and find that this suit is

- a. *Res judicata*
- b. Is time barred by limitation.

The suit is struck out and the respondents shall have the costs of the suit.

It is so ordered.

DATED at BUNGOMA this 2nd day of December, 2015

S.N. MUKUNYA

JUDGE