



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC CASE NO. 1271 OF 2014

LILIAN NJERI MURANJA

**JOHN MURANJA MAHINDA (Suing as the Administrators of the Estate of the late
MURANJA MAHINDA (Decease).....PLAINTIFFS/APPLICANTS**

-VERSUS-

VIRGINIA NYAMBURA NDIBA.....1ST DEFENDANT/RESPONDENT

KAJIADO COUNTY GOVERNMENT.....2ND DEFENDANT/RESPONDENT

RULING

Introduction

1. The Plaintiffs commenced this action by way of a plaint filed on 15th September, 2014. Alongside the plaint, the Plaintiff also filed a notice of motion dated 15th September, 2014. The plaint sought an injunction to restrain the 1st Defendant from residing in or collecting rental income from the suit property. The plaint also sought an order, presumably directed at the 2nd Defendant, for the cancellation of the letter of allotment to the 1st Defendant. There were also prayers for mesne profits, damages and costs thrown in the mix.

2. The Notice of motion was more specific. Interim injunctive orders were prayed for by the Plaintiffs. The Defendants were to be restrained from collecting rent or further trespassing unto the suit property or intermeddling with or interfering with the Plaintiffs quiet possession of the suit property. The suit property is an unregistered parcel of land known as Plot No. 21(B) Business Kiserian even though the Plaintiffs have referred to the same as LR. No. 21(B) Business Kiserian to imply it constitutes registered land.

3. On 16th September, 2014 this court granted the Plaintiffs an exparte injunctive relief pending determination of the motion. Subsequent to a couple of court attendances, the Plaintiffs filed a Supplementary Affidavit on 8th October, 2014. The Supplementary Affidavit was filed basically in reply

to the Replying Affidavit which the 1st Defendant had filed on 30th September, 2014, when the 1st Defendant also filed a Statement of Defence as well as a Witness statement, List of documents and List of witnesses. The 1st Defendant also on the same date filed a Notice of Preliminary objection dated 29th September, 2014 which is the subject of this ruling. It is to be noted that despite service the 2nd Defendant neither filed any documents in response to the Notice of Motion nor participated at the hearing of the preliminary objection on 8th October, 2014.

The Objection and Submissions

4. The preliminary objection which was urged by Mr. Opiyo before me on 8th October, 2014 was basically to the effect that the suit is barred by dint of the provisions of Sections 7 and 8 of the Limitation of Actions Act (Cap 22) Laws of Kenya and further that the suit as well as the application are caught up with the doctrine of issue estoppel or *res judicata*. Finally, the 1st Defendant's, preliminary objection to both the suit and application is that the suit is bad in law as the provisions of Section 81 of the Law of Succession Act (Cap 160) had not been complied with.

5. The 1st Defendant's counsel who prompted the preliminary objection urged that it was pegged to the law. He submitted that the Plaintiff's cause of action, if any, accrued in the year 2002 when the 1st Defendant took possession and lay claim of ownership to the suit property. That in his view was well above the 12 year threshold prescribed for those claiming ownership to land under Section 7 of the statute of limitations. The 1st Respondent also argued that the suit is *res judicata* as the Plaintiffs had previously filed a case concerning the same subject matter. The case which was filed in 2006 was dismissed by the court on 27th January, 2012. The case originally HCC 1074 of 2006 became Civil Case No. 1701 of 2007. Finally, counsel submitted that as the Plaintiff had not complied with Section 81 of the Law of Succession Act and caused the joinder of another administrator in the deceased administrator's stead, the suit was untenable.

6. In reply, Ms. W. G. Wambugu advocating for the Plaintiff was emphatic that the preliminary objection was not merited. Firstly, she submitted that on the issue of issue estoppel, neither the suit being Civil Suit to 1701 of 2007 nor the application filed therein was dismissed on merit. Secondly, counsel submitted that the suit was not statute barred as the Plaintiff had previously filed suit in the year 2006 with the result that time stopped to run and only started to run again when the suit was dismissed on 2012. Finally, on the issue of lack of a co-administrator, nay a co-plaintiff, Ms Wambugu submitted that the proviso to Section 81 of the Law of Succession Act envisaged a situation where there were minors and that in any event in every succession cause, any appointed administrator is a trustee. She sought for a dismissal of the preliminary objection with costs.

Analysis

7. I have considered the competing submissions. I have also read through the supporting affidavits filed by the Plaintiff and Replying Affidavit filed by the 1st Defendant as well as the main pleadings. The law on preliminary objections is now clear: see the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs– West End Distributors [1969] E.A 696** which has been constantly and unbendingly cited in these respects. It will be otiose for me to recap the same now. Suffice though to state that the doctrine of **Mukisa Biscuits** lay it clear that an objection if raised in limine must be in the nature of a demurrer. It must be “a pure point of law to be argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion” per Sir Charles Newbold, President at page 698 of the law report. In the same judgment, Law J.A. stated as follows:

“So far as I am aware, a preliminary objection consists of a point of law which has been pledged or which arose by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to jurisdiction of the court, 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”

8. The 1st Defendant does not expressly seek the exercise of my discretion as the preliminary seeks to determine the issue of limitation of the Plaintiff’s cause of action as well as whether the application and the suit herein is *res judicata* and thus an abuse of the process. Naturally, if the objection succeeds then the stretched judicially resources will also be conserved as any further proceedings herein will be unnecessary or impossible.

9. Does it however meet the second requirement in **Mukisa Biscuit’s** case (supra) that the facts must not be in dispute? I have read through the Plaint as well as the Defence. I have also read through the respective affidavits failed either in support or in opposition to the Notice of Motion dated 15th September, 2014. From these pleadings the following facts which were referred to by the parties as they argued the preliminary objection emerge.

10. The dispute herein concerns in the ownership and occupation of the property known as Plot No. 21B Kiserian. The Plaintiffs claim the property is part of the estate of the late Muranja Mahinda. The 1st Defendant claims to own the same property. She has been in occupation since 2002. To the plaintiff, she is a trespasser since 2002. The dispute took them to court in 2006. The Plaintiffs filed the suit. The 1st Defendant was the same current defendant. The Plaintiffs then also filed an application for a negative injunction. The application was apparently never disposed of. It was last to be fixed for hearing on a priority basis, or so ordered Lady Justice Aluoch on 23rd October, 2006. The suit was later dismissed for want of prosecution on 27th January, 2012. Shortly over two and a half years later the instant suit was commenced. The named first Plaintiff herein has met her demise. The two Plaintiffs were joint administrators. The current suit seeks orders cancelling the allotment of the suit property to the Defendant. The Plaintiff also seeks mesne profits at the rate of Kshs. 70,000/= per month and damages for trespass. The suit papers state that the Defendant took possession, albeit illegally of the suit premises on April, 2002 and is still currently in possession. Those are the only facts undisputed and relevant, for purposes of the preliminary objection.

The res judicata objection

11. It would be appropriate to conclude the issue of *res judicata* or issue estoppel first. As embodied under Section 7 of the Civil Procedure Act, the principle of *res judicata* applies to bar subsequent proceedings when there has been adjudication by a court of competent and concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in controversy: see **Mandavia –v- Rattan Singh 1965 E.A. 118**. There is no doubt that the principle applies to suits as well as to applications with the same force whether the application be final or interlocutory: see **Kanorero River Farm Ltd –v- National Bank of Kenya Ltd [2002]2 KLR 207**.

12. The test to determine whether a matter is *res judicata* was well laid in the case of **DSV Silo –vs- The Owners of Sennar [1985] 2 All ER 104** and repeated in the Kenyan case of **Bernard Mugo Ndegwa –v- James Nderitu Githae and 2 others [2010]eKLR**. The applicant, alleging *res judicata*, must show that (a) The matter in issue is identical in both suits, (b) that the parties in the suit are substantially the same, (c) there is a concurrence of jurisdiction of the court (d) That the subject matter is the same and finally, (e) that there is a final determination as far as the previous decision is concerned.

13. Juxtaposing the above principles with the facts of this case, it is apparent that the antagonistic parties are the same, the subject matter as well as the claim is the same and the jurisdiction of the courts which handled and is handling the matter is concurrent. It is the same Plaintiffs who filed the previous suit who have filed the instant suit as well as the application. The subject matter is ownership of Plot No. 21B Kiserian in both suits. The claim is in trespass and for mesne profits in both instances. The two suits were commenced in the High Court and in the Environmental and land Court. Both have an even status.

14. It is however not common ground that the previous application for injunction or the suit were determined conclusively and on their merits. A perusal of the proceedings in the previous suit reveals that

the application for injunction was adjourned sine die on 23rd October, 2006. There is no evidence before me that it was ever heard and determined on its merits. Likewise the previous suit was also dismissed for want of prosecution on 27th January, 2012. It was never heard and determined on its merits. Upon dismissal of the suit though there was finality, albeit without merit, of that suit. I hasten to add that it is common knowledge that when a suit is dismissed for want of prosecution, the claimant is perfectly entitled to bring a fresh suit subject only to the law of limitations.

15. In the instant case as I have already found that the previous suit was dismissed for want of prosecution and not on its merits. The application for injunction too was never determined on its merits but on the basis of the dismissal of the suit. In such eventuality it would be wrong for this court to give effect to the policy “that parties to a judicial decision should not afterwards be allowed to relitigate the same question” as per **Miller J in Crown Estate Commissioners –v- Dorset County Council [1990] 1 All ER 19 at 23**. That is the policy that the principle of *res judicata* seeks to protect. I find that neither the suit nor the application for negative injunction is *res judicata* as all the requirements of the principle have not been satisfied. Accordingly, I reject the 1st Defendant’s contentions and answer this aspect of the preliminary issue in the negative.

Time barred action?

16. The second limb of the preliminary objection seeks an answer as to whether the Plaintiff’s suit is statute barred. The notice of preliminary objection states that both the application and the suit filed herein are time barred and are in contravention of Sections 7 and 8 of the Limitation of Actions Act (Cap 22) Laws of Kenya. The two sections of the statute read 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 the claims to that person.

8. Actions to recover rent

An action may not be brought, and distress may not be made, to recover arrears of rent or damages in respect thereof after the end of six years from the date on which the arrears became due.

17. As indicated elsewhere in this ruling, the dismissal of the earlier suit notwithstanding the Plaintiffs were entitled to bring a fresh suit subject only to the law of limitations. The question thus is: when did the Plaintiff’s right of action accrue?

18. It is beyond controversy that the 1st Defendant occupied the suit premises in April, 2002. It is also beyond controversy that the 1st Defendant purportedly acquired ownership of the suit premise in 2002 through a transfer effected by the predecessor to the 2nd Defendant on 4th April, 2002. These factual points are evident from the pleadings filed by the Plaintiffs as well as the supporting documents availed by the Plaintiffs. It is stated that the 1st Defendant occupation was unlawful and illegal, it is also stated that the acquisition of the title by the 1st Defendant was fraudulent wrongful and unlawful. When the 1st Defendant took occupation and ultimately caused the suit property to be transferred to her, albeit fraudulently in the Plaintiff’s view, the true owner was Joseph Muranja Mahinda (now deceased). In accordance with Section 13 of the Limitation of Actions Act (Cap 22), time then began to run in 2002. It goes without saying therefore that the actionable wrong against the Plaintiffs or the deceased was evident upon that alleged unlawful entry and or transfer of the suit property in April, 2002. The cause of action arose in April, 2002.

19. By the provisions of Section 7 as read together with section 13 of the Limitation of Actions Act, the Plaintiffs claim, to the suit property as well as any title was extinguished in April, 2014. Any claim for

rent whether unlawfully collected or due as mesne profits likewise by a virtue of the provision of Section 8 of the Limitation of Actions Act was extinguished in April, 2008. That would have been the end of this matter but for the Plaintiff's counsel's submissions that the filing of the suit in 2006 meant that time ceased to run and only started to run again in 2012 after the dismissal of the suit for want of prosecution.

20. The upshot of a review of various authorities on cases dismissed for want of prosecution is, inter alia, that the claimant can always file a fresh claim if the relevant limitation period has not expired. That is why this court suggested in the case of **Maina Karanja –v- Maina Karanja ELC 509 of 2010 (NBI)** (unreported) that the power to dismiss suits for want of prosecution should only be exercised once the relevant limitation period has expired to avoid a situation where the claimant files another suit.

21. No doubt, however, parliament has conferred a legal right on Plaintiffs to institute proceedings at any time within the relevant limitation period. The question now is whether the rather unusual point advanced by Ms. Wambugu that the filing of a suit means time ceased to run until determination of the suit is so obviously correct that no one has ever seen fit to challenge such a point or is so obviously wrong that no one has ever before thought to put it forward. Counsel for the 1st Defendant Mr. Opiyo in his oral rejoinder did not address me on this point. Counsel for the Plaintiffs, too, did not avail any decided authority to support that point.

22. For two reasons, I would not uphold that contention. Firstly, it would be stretching the law of limitation for one to argue that once a suit is filed time ceases to run. The only rider to a plaintiff being allowed to file another suit if the original suit is dismissed for want of prosecution is if the action is still within the limitation period. Certainly, if this were not so then any suit filed would mean time begun to run on the filing of the suit. Effectively, time would never stop. Secondly, I hold the view that merely bringing a suit does not stop statutory periods from running. If the suit is prosecuted of course time stops to run as the action is complete. If the suit is withdrawn or discontinued then, a *fortiori*, the parties revert to the same position as if the suit had never been filed. The same position would obtain where a suit is dismissed for want of prosecution. That means that time never stops running by the mere filing of the suit. It was counting.

23. The end result of the foregoing is that I am not convinced that the Plaintiff's suit is not statute barred. Rather, it is. Certainly, it is one thing to refuse a party to relitigate a question which has already been decided. It is quite another to deny him the opportunity of litigation for the first time on a question which has not been previously litigated and adjudicated upon. The latter is prima facie a denial of the citizen's right to access to the court conferred by common law and now guaranteed by Article 50(1) of the Constitution. That right though is currently not absolute and is currently subjected to such tests and indicators as the statute of limitation. In the instant case, the circumstances point to the cause of action as statute barred. The right to lay claim and ownership to the suit property through the court ceased in April, 2014 whilst the right of the Plaintiff to seek any compensation ceased in 2007 (trespass and damages) and in 2010 (Mesne profits)

24. Accordingly, I agree that with the 1st Defendant's counsel that the suit should be struck out. I uphold the preliminary objection and hereby strike out the suit in its entirety not because it is abusive for offending the principles of *res judicata* but as seeking to pursue claims which have no realistic chance of success as they are statute barred.

25. Having struck out the suit, I see no reason to address the issues relating to Section 81 of the Law of Succession Act (Cap 160) Laws of Kenya.

26. The Plaintiffs were litigating on behalf of the estate perhaps convinced that they had a case and a duty to protect the estate. An order as to costs can only be fetched on the estate. That would be a burden on the beneficiaries. I consequently make no orders as to costs in favour of the 1st Defendant. Each party will bear their respective costs of this suit.

27. Orders accordingly.

Dated, signed and delivered at Nairobi this 6th day of November, 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Applicant

..... for the Respondent