



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

HCCC NO. 7 OF 2012

SWALEH SALIM BAHAMADI (*suing as a legal administrator of the Estate of SALIM SWALEH BAHAMADI*).....PLAINTIFF

=VERSUS=

1. NURU SWALEH MOHAMED

2. COMMISSIONER OF LANDS

3. LANDS REGISTRAR, LAMU

4. THE PUBLIC TRUSTEE

5. THE HON. ATTORNEY GENERAL.....DEFENDANTS

R U L I N G

1. What is before me is the 1st Defendant's Application dated 24th May 2013 and filed on the same day. The Application is brought pursuant to the provisions of sections 1A and 3A of the Civil Procedure Act and Section 4 of the Limitation of Action Act, Cap 22.
2. The Application is seeking for the following orders:
 - a. **The court is invited to strike out suit as it is caught up by section 4 (1) (a) and section 4 (4) of Limitation of Actions Act;**
 - b. **The entire suit and other pleadings are otherwise stale; and no amount of waiting can revive the cause of action;**
 - c. **The costs of this Application, and of the suit if this application succeeds, are provided for.**
3. The Application is premised on the grounds that in so far as the cause of action is founded on contract reportedly made in 1963, it is time barred under the Limitation of Actions Act; that in so far as the cause of action is founded on a decree issued by consent of parties is barred by section 4(4) of the Limitation of Actions Act and that the leave of the court to revive the Plaintiff's cause of action, if they were revivable, was not first sought and obtained.
4. The Plaintiff/Respondent did not file a Replying Affidavit or grounds of opposition although his Advocate was served with the Application on 24th May 2013.
5. Mr. Kimani, counsel for the 1st Defendant/Applicant and Mr. Nyangolo, counsel for the Plaintiff appeared before me on 22nd July 2013 and made oral submissions.
6. Mr. Kimani, counsel for the 1st Defendant submitted that according to paragraph 6 and 9 of the

- Plaint, the Plaintiff's cause of action is founded on a purchase of land in an auction. Consequently, the said cause of action is caught up by Section 4(1)(a) of the Limitation of Actions Act.
7. If the cause of action is founded on a decree in HCCC NO. 70 of 1987, counsel submitted that the suit as framed is an abuse of the court process because it offends the provisions of section 4(4) of the Limitation of Actions Act.
 8. According to counsel, the decree in HCCC No. 70 of 1987 is more than 12 years old and the current suit intends to revive a stale action.
 9. The Plaintiff's counsel submitted that the cause of action in the Plaintiff is founded on the fraudulent issuance of the title deed dated 9th August 2011. According to counsel, the cause of action accrued on the day the title deed in issue was issued to the 1st Defendant.
 10. Counsel finally submitted that pursuant to the provisions of the Limitation of Actions Act, actions founded on fraud have a limitation period of 3 years, which should be from the date when the fraud occurred.
 11. The Plaintiff filed the Plaintiff on 24th January 2012 as the legal administrator of the Estate of Salim Swaleh Bahamadi (deceased).
 12. The Plaintiff pleaded at paragraph 6 of the Plaintiff that at all material times, the 4th Defendant (Public Trustee) was responsible with the administration of the Estate of Mohamed Khamis El-Otby who was the registered owner of parcel land number Lamu/Block IV/2 and Lamu/Block IV/13.
 13. At Paragraph 7 of the Plaintiff, the Plaintiff averred that on 13th December 1963, the deceased, Salim Swaleh Bahamadi, on behalf of Bahamadi brothers, bought the two parcels of land in a public auction conducted by the Public Trustee on behalf of the Estate of Mohamed Khamisi El-Otby; that the deceased (Plaintiff) purchased the two parcels.
 14. A civil suit between the Bahamadi brothers was filed vide suit number 710 of 1987 in respect of the estate of Salim Swaleh Bahamadi; that the suit was determined by consent and a decree issued giving ownership rights of the two parcels of land to the deceased's wife. The deceased's wife later on allocated the two parcels of land to the Plaintiff, Swaleh Salim Swaleh Bahamadi.
 15. However, according to paragraph 13, the Plaintiff tried to have the titles transferred to his name but the same did not happen because the original title was never released by the Public Trustee upon sale by public auction.
 16. According to paragraph 14 of the Plaintiff, the Land Registrar, Lamu issued to the 1st Defendant a title for Lamu/Block IV/13 under mysterious circumstances because the original titles have never been recovered.
 17. The Plaintiff contends that the registration of the 1st Defendant as the registered owner of the land known as Lamu Block IV/13 is fraudulent and punctuated by a conspiracy between the 1st Defendant and the 3rd Defendant.
 18. The Plaintiff has particularised the fraud and conspiracy that was perpetuated by the 1st and 3rd Defendants in respect to the issuance of the title document. The Plaintiff has claimed for the following reliefs in his Plaintiff.

(a) A declaration that the Plaintiff is the bona fide owner/beneficiary of all those parcels of land known as Lamu/Block IV/12 and Lamu/Block IV/13 and that the registration of Nuru Swaleh Mohamed as the registered owner of parcel number Lamu/Block IV/13 and consequential issue of title in her name on the 9th August 2011 were fraudulent, illegal, null and void ab-initio.

(b) An order directed to the Land Registrar at Lamu Land Registry to recall the title issued on 9th August 2011 to the said Nuru Swaleh Mohammed for cancellation and issue of a new title in the Plaintiff's name Swale Salim Swaleh.

19. The 1st Defendant filed his defence on 27th February 2012.
20. It is clear from the Plaintiff that the Plaintiff's cause of action as against the 1st Defendant is in respect to the fraudulent registration of Lamu Block IV/13 in the 1st Defendant's name.

21. The issue of the purchase of the suit property at a public auction by the Plaintiff's predecessor and civil suit number 710 of 1987 in my view is evidence that the Plaintiff shall be relying on to show the chronology of events of what happened in respect to the suit property.
22. The cause of action, at least on the face of the Plaintiff, is not the contract that was entered into by the Public Trustee and the late Salim Swaleh Bahamadi in respect to the suit property on 13th December 1963 or the decree that was issued in HCCC No.710 of 1997.
23. The Plaintiff introduced the issue of the public auction and the decree in HCCC no. 710 of 1987 to show how his claim over the suit property arose. Indeed, unless the Plaintiff shows by way of evidence how he acquired interests in the suit property, his claim that the suit property was transferred to the 1st Defendant fraudulently will fall on its face.
24. I therefore agree with the Plaintiff's Advocate's submissions that the Plaintiff's cause of action is founded on the issuance of title to the 1st Defendant which was effected in the year 2011. Indeed, before the title deed was issued to the 1st Defendant in 2011, the Plaintiff did not have a cause of action as against the 1st Defendant either in contract or in respect to the Decree issued in HCCC No. 710 of 1987.
25. For the reasons that I have stated above, I find that the Plaintiff's action, on the face of it as against the 1st Defendant does not offend the provisions of section 4 of the Limitation of Actions Act, Cap 22.
26. In the circumstances I dismiss the 1st Defendant's Application dated 24th May 2013 with costs.

Dated and Delivered in Malindi this **4th** day of **October** , 2013

O. A. Angote

Judge