



HENRY CONWAY PLOUGH
PLAINTIFF

- Versus -

VALERIE ANN RAMSAY (formerly Valerie Ann Plough)
.....DEFENDANT

RULING

The Defendant seeks to have the plaint dated 20th May 2010 and the Amended Plaint dated 14th October 2011 struck out.

That application was argued on 6th June 2012 and the Court reserved its ruling for 27th June 2011. In the course of preparing its decision the Court noticed that the Amended plaint which was the subject of the application was not properly on record. As the application was a challenge to the contents and substance thereof, I invited Counsels to consider regularizing the pleading.

So on 26th June 2012 the following consent was recorded between Counsel -

- (a) *The Amended plaint dated 14th October 2011 be and is hereby deemed as properly filed.***
- (b) *There is joinder of issues between the amended plaint and the Amended statement of defence.***
- (c) *The Court do proceed to determine the application of 25th November 2011 on this basis.***

The Plaintiff and Defendant were husband and wife until sometime in October 1992 when they formally terminated their marriage by way of a divorce. It is common ground that the Defendant left Kenya for Australia and remarried there in 1993. She has settled in that country.

In the course of their marriage the two had Mombasa Block X/82 (the suit property), a freehold property, registered in their joint names. The Plaintiff avers in the plaint that he bought the suit property using a mortgage he borrowed and that the Defendant made no contribution whatsoever towards its acquisition. The Defendant contends that she contributed equally to repayment of the Mortgage.

It is against this background that the Plaintiff has sued the Defendant seeking the following orders-

“(a) An order directed to the Land Registrar

Mombasa to remove the names of Valerie Ann Plough from Title Number Mombasa/Block X/82.

(b) An Order that a new Title Deed to issue in the name of Henry Conway Plough.”

It is the Plaintiff’s case that he deserves this order because there was an arrangement between the

Defendant and her that although the Defendant would be registered as a joint owner the property solely belonged to him. That in the alternative, as the Defendant is a foreigner she cannot own freehold title by dint of Article 65 (1) of The Constitution. For this reason the Defendants name should be removed from the title to protect the Plaintiffs freehold proprietary rights.

That is the claim which the Defendant argues does not disclose any or any reasonable cause of action and is time barred under The Limitation of Actions Act Cap 23 Laws of Kenya.

It is accepted that the property was acquired in the course of the marriage of the parties. It is also common ground that the property is registered in the names of the parties as joint tenants. The Plaintiffs cause of action, as I understand it, is partly premised on a trust. His argument is that although the Defendant was registered as a co-owner, she was to hold that share in trust and to the order and benefit of the Plaintiff. This trust arrangement was entered in the course of marriage which terminated sometime in 1992. The right of the Plaintiff to recover his share of land from the Defendant accrued at the time the marriage ended in 1992. This was about 17 years prior to the date the suit was commenced. Undoubtedly then, the suit offends the provisions of Section 7 of The Limitation of Actions Act which bars the bringing of an action to recover land after the end of twelve years from the date the right of action accrued. That deals a fatal blow to that cause of action.

The alternative cause of action revealed in the plaint is novel. Article 65(1) of The Constitution reads-

“A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years.”

The property, it is agreed, is freehold. And although the Plaintiff says the Defendant is a non-citizen, the Defendant denies it. This is an issue of evidence which I cannot resolve now. For purposes of this application, however, the court presumes a position that favours the Plaintiff to enable it assess the viability of his claim. The Court proceeds on the assumption that as pleaded by the Plaintiff, the Defendant is a non-citizen.

The property is registered in the names of the parties as joint tenants. In this arrangement none of the proprietors are entitled to any separate share in the land. The shares are indivisible. If, as argued by Mr. Oddiaga for the Plaintiff, Article 65(1) of the Constitution affects the property then it would affect the entire property as the share of the citizen is inseparable from that of the non-citizen. This is what, it is submitted, this action hopes to stop.

The truth is, however, that if indeed Article 65(1) would be applicable to the property then what is hoped to be avoided happened on 27th August 2010. Section 8 of The 6th Schedule to the Constitution (Transitional and Consequential provisions) provides;

“On the effective date, any freehold interest in land in Kenya held by a person who is not a citizen shall revert to the Republic of Kenya to be held on behalf of the people of Kenya, and the State shall grant to the person a ninety-nine years lease at a peppercorn rent.”

The Plaintiffs action is futile to the extent that it seeks to stop what happened on the effective date of the Constitution 2010.

The Plaintiff argued that the only way of protecting his freehold title is by forcing out the Defendant as there is no law that apports ownership of land held jointly.

The suit property is registered under the Registered Land Act (RLA) Repealed. Under the provisions of Section 102(3) of the RLA joint proprietorship can be severed and turned into a proprietorship in common through a mutual agreement of the joint owners. Further severance of the ownership can then be achieved by the provisions on partition under Section 104 of the RLA. If the land is incapable of partitioning then the provisions of Section 105 will be invoked. If the parties were agreeable to taking this route then, by dint of Section 107 (the Savings and Transitional Section) of The Land Registration Act,

the provisions of RLA would apply notwithstanding that it has been repealed.

If however the parties cannot reach a consensual severance then equity can interpose to find a solution that is just and fair to the parties.

The Plaintiff poses what seems to be a perfectly legitimate question. Can a Citizen's freehold interest in land be adversely affected only because he/she co-owns that land with a non-citizen? This question will have to be directed to the State. Whatever the concern of the Plaintiff it cannot be addressed by simply removing the Defendants name from the title as the Plaintiff seeks, that would be an unconstitutional taking.

In the end I agree with the Defendant that neither the plaint nor the Amended Plaint discloses any reasonable cause of action against her. Whilst this Court appreciates that an order for striking out is a drastic one part of the Plaintiffs claim is time barred and the only other is a Constitutional grievance which cannot be taken out on the Defendant. The view the Court takes is that not even an amendment can prop up this suit. (Nrb Civil Appeal No. 146 of 2001 Crescent Construction Co. Ltd –Vs- Dephis Bank Ltd).

The result is that the plaint dated 20th May 2010 and the Amended Plaint dated 14th October 2011 are hereby struck out and the suit dismissed with costs to the Defendant.

Dated and delivered at Mombasa this 6th day of July, 2012.

F. TUIYOTT

JUDGE

Dated and delivered in open court in the presence of:-

Oddiaga for the Plaintiff

Oluoch for the Defendant

Court clerk - Moriasi

F. TUIYOTT

JUDGE