



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

ENVIRONMENT AND LAND CASE NO. 116 OF 2015

OSHWAL SUPERMARKET.....PLAINTIFF

VERSUS

DAVID AMENYA MOTUKA.....1ST DEFENDANT

JAMES NYAKWANA ORICHO.....2ND DEFENDANT

ALICE HENRY ONGATO.....3RD DEFENDANT

JAMES ONDUKO BOSANDO.....4TH DEFENDANT

KENNEDY MOMANYI MATARA.....5TH DEFENDANT

GISEMBA ONDIEKI ISAAC.....6TH DEFENDANT

ENOCK MAUTIA MONDA.....7TH DEFENDANT

ROBERT MANYANGE.....8TH DEFENDANT

R U L I N G

1. The plaintiff, Oshwal Supermarket Ltd, by plaint dated 27th March 2015 filed in court on 30th March 2015 instituted the present suit. The plaintiff averred that it was at all times material to the suit the registered owner of land parcel **Central Kitutu/Daraja Mbili/732** (hereinafter referred to as **“the suit property”**). The plaintiff stated it had purchased the suit property from M/s Quasar Limited who had charged the same to Prime Bank Limited and that the suit property was procedurally transferred to the plaintiff following discharge by the chargee.

2. The plaintiff further averred the defendants on diverse dates as from 16th February 2010 through fraudulent transactions and forgery caused fraudulent subdivisions of the suit property to be effected and registered without the consent of and/or participation of the true owner of the suit property. The plaintiff contended that the various subdivisions and the consequent transfers registered in favour of the defendants were all fraudulently procured and were consequently unlawful and null and void *ab initio*.

3. The plaintiff further avers that consequent to the fraudulent transactions perpetrated from February 2010 the defendants have taken possession and have remained in trespass on the suit property and they have constructed temporary and permanent structures thereon and have refused, failed and/or neglected to vacate from the suit property despite demand being made to them to do so. The plaintiff inter alia seeks declaratory orders that the titles held by the defendants following the fraudulent transactions are null and void and of no legal or proprietary effect. The plaintiff further seeks orders of eviction against the defendants and an injunctive order restraining any further interference with the suit properties and damages for trespass.

4. The defendants upon being served with summons to enter appearance did not file any formal statements of defence but have each separately filed what constitutes witness statements. They have each contended to be innocent and bonafide buyers of the respective parcels of land from persons who were the duly registered owners of the properties before they purchased the same. They have essentially denied being party to any alleged fraud in the purchase of the suit properties.

5. The defendants vide a Notice of Motion dated 1st November 2017 expressed to be brought under the various provisions of the law set out on the face of the application seeks the following substantive orders:-

1. That this honourable court be pleased to declare that it has no jurisdiction to hear and determine the suit for being statute barred as the same being based on fraud ought to have been brought to court within 3 years of discovery of fraud since the plaintiff discovered the fraud in 2010 but brought the suit on 30th March, 2015.

2. That this honourable court be pleased to strike out or enter summary judgment against the plaintiff's suit dated 30th March 2015 for being casually drawn and containing only mere allegations on serious issues of fraud forgery and conspiracy and thus the suit is fatally defective, bad in law and an abuse of the court process and failure to specifically and particularly plead fraud, specifically connect with specific forgery and specific conspiracy with each and every defendant and the plaintiff's admission that the defendants titles were co-terminus with that of the plaintiff which defeats the plaintiff's suit.

3. That the plaintiff do pay the costs of the suit.

6. The application is supported on the grounds set out in the body of the application and the affidavit sworn in support of the application by the 1st defendant, David Amenity Motuka. The defendants application is principally founded on two grounds, firstly that the suit is statute barred and consequently the court has no basis to sustain the same for trial; and secondly that the suit raises no triable issue and constitutes an abuse of the court process and merits to be struck out on that account.

7. The defendants filed written submissions on 27th February 2018 in support of the application. The plaintiff did not file any submissions.

8. In determining the application by the defendants, it is necessary to outline the background as relates to the suit property as evidenced by the documents tendered by the parties.

(i) 16th March 1971 Yuvinalis Motuka Mageka adjudicated as owner of land parcel No. 348 Daraja Mbili measuring 3.4Ha.

(ii) 21st February 1974 land parcel 348 subdivided into parcels Central Kitutu/Daraja Mbili/732 and 733 measuring 1.8Ha and 1.6Ha respectively. Land parcel 732 registered in the name of Yuvinalis Mmotuka Mogaka and parcel 733 transferred to David Omenya Songoro Esaba Saw Mills.

(iii) 14th August 1987 land parcel Kisii/Daraja Mbili/732 transferred to Lutafali Jiwa Rajwani pursuant to execution of a decree in Kisii HCCC No. 82 of 1974 as per vesting order dated 10th August 1984.

(iv) 22nd March 1990 Lutafali Jiwa Rajwani charged land parcel Central Kitutu/Daraja Mbili/732 to National Bank of Kenya Ltd to secure lending of kshs.350,000/= to Highland Tyres Ltd.

(v) 23rd May 2003 land parcel Central Kitutu/Daraja Mbili/732 transferred to Quasar Limited.

(vi) 11th November 2004 Quasar Limited charged land parcel Central Kitutu/Daraja Mbili/732 with other lands to Prime Bank Ltd to secure banking facilities of kshs. 32,000,000/=.

(vii) 8th May 2013 land parcel Central Kitutu/Daraja Mbili/732 transferred to Oshwal Supermarket Ltd upon discharge by Prime Bank Ltd.

9. The documents set out also have been included in the plaintiff's bundle of documents. However between the period 2004 and 2013 there is correspondence exchanged between the office of the Chief Land Registrar, the land registrar Kisii and advocates for Prime Bank Ltd which indicates the records at the lands office relating to land parcel **Central Kitutu/Daraja Mbili/732** were lost and/or were removed from the binder. There are documents notably a mutation form dated 24th December 2009 indicating that one, David Amenity Motuka sought the subdivision of land parcel **Central Kitutu/Daraja Mbili/732** and that subdivision was done creating land parcels **Central Kitutu/Daraja Mbili/3317, 3318, 3319, 3320, 3321, 3322 and 3323**. Some of these subdivisions were subsequently further subdivided as evidenced by some of the abstracts of title annexed to the plaintiff's bundle of documents. It is these subdivisions that the plaintiff avers were fraudulent and wants the same to be declared null and void.

10. There is evidence that the land parcel **Central Kitutu/Daraja Mbili/732** was initially owned by Yuvinalis Motuka Mogaka and was in 1987 transferred to Lutafali Jiwa Rajwani pursuant to execution of a court decree and that he charged the same to National Bank of Kenya Ltd. The land was subsequently in 2003 transferred to Quasar Limited who charged the same to Prime Bank Ltd to whom it remained charged upto 2013 when it was discharged before being transferred to the plaintiff. It is therefore not clear how the 1st defendant, David Amenity Motuka came to be registered as the owner of land parcel **Central Kitutu/Daraja Mbili/732** so that in 2009 he could seek for its subdivision. In 2009, the property as contended by the plaintiff was in the name of Quasar Limited and was charged to Prime Bank Limited. If the assertion by the plaintiff is true, then the authenticity of the defendants' titles would be put to question.

11. The defendants have through the instant application contended that the plaintiff's suit against them is statute barred as the suit is founded on fraud and therefore the suit should have been brought within 3 years from the date when the fraud was discovered. I have in the course of this ruling sought to trace the genesis of the present dispute. The plaintiff avers that it purchased the property from Quasar Limited by way of private treaty with the agreement of Prime Bank Ltd who held a charge over the property. Following discharge of the property, the plaintiff was registered as owner of **Central Kitutu/Daraja Mbili/732** on 9th May 2013. In my view, the plaintiff's cause of action as relates to the property would only arise as from 9th May 2013 and not earlier as that is the date it acquired an interest in the property. Thus, even if the plaintiff's suit was entirely founded on fraud, which it is not, the period of limitation had not accrued. The plaintiff filed the suit on 30th March 2015 which was less than 2 years since acquiring the property.

12. Besides having become registered as the owner of the suit property, the plaintiff would under Section 7 of the Limitation of Actions Act, cap 22 Laws of Kenya be entitled to seek the recovery of its land from the defendants before the expiry of 12 years. Section 7 of the Act provides:

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 it first accrued to some person through whom he claims to that person.

13. The plaintiff seeks a declaration that the defendants are trespassers on the plaintiff's parcel of land and seeks orders of eviction of the defendants from the land. The plaintiff thus seeks to recover its land from the defendants which it claims they have occupied unlawfully following fraudulent transactions on the basis whereof they acquired titles fraudulently.

14. In the premises, I find no merit in the defendants Notice of Motion dated 1st November 2017 and I order the same dismissed. As the plaintiff did not file a response to the application, I will make no order for costs.

15. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KISHI THIS 20TH DAY OF MARCH 2019.

J. M. MUTUNGI

JUDGE

In the Presence of:

Mr. Obure for Mogusu for the plaintiff

Mr. Sagwe for the 1st to 8th defendants

Ruth Court Assistant

J. M. MUTUNGI

JUDGE