



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 967 OF 2017

PETER RIECHI OKARA.....PLAINTIFF

VERSUS

FRANCIS NYAMAI MWANZIA.....1ST DEFENDANT

THE LAND REGISTRAR, KAJIADO NORTH REGISTRY.....2ND DEFENDANT

RULING

What is before Court for determination is the 1st Defendant's Notice of Preliminary Objection dated the 3rd October, 2018 which is based on the following grounds:

1. That the loan agreement that is the subject of the instant suit was entered into in the year 2001 hence pursuant to the statute of limitation of actions this suit is statute barred.
2. That in any event this being a matter dealing in land and given that the transfer of the property took place in 2001, the suit is again statute barred due to the provision of the Limitation of Actions Act.
3. That in the premise the Plaintiffs' Complaint lacks an actionable cause of action and ought to be struck out.

The Plaintiff PETER RIECHI OKARA filed a replying affidavit in response to the Preliminary Objection where he averred that he was the bonafide purchaser of land parcel number KAJIADO/ OLCHORO ONYORE/ 3272 hereinafter referred to as 'suit land'. He confirms charging the suit land to the National Bank of Kenya on 11th February, 1998 and that he approached the 1st Defendant on 21st August, 2001 to repay the said loan. Further, that they drew a Sale Agreement for a soft loan of Kshs. 1 million, with the 1st Defendant in which they agreed that once the title deed to the suit land was released to him, the 1st Defendant was to keep it. He contends that the title deed was released to the 1st Defendant on 21st August, 2001 after he had paid Kshs. 1 million to the National Bank of Kenya. He confirms that on 27th September, 2001, they drew a loan agreement with the 1st Defendant to secure the debt that he owed him, and all along he knew the title to the suit land was secure. He refers to clause 1.1 of the said Agreement which indicates that the interest payment date was 31st October, 2001 and contends that the cause of action in the event of default should have fallen on 31st October, 2001. Further, that the said agreement provided for the repayment of the loan in instalments, which provision the 1st Defendant ignored. He insists that it is illogical that the 1st Defendant would accept as security, a property he allegedly sold to him way back on 21st August, 2001. Further, that as per clause 7.1 of the Loan Agreement, the 1st Defendant should have issued him with a Notice in writing before enforcing the security. He states that the notices were never issued prior to the transfer but confirms receiving them one year later, after the illegal and fraudulent transfer of the suit land in the names of the 1st Defendant contrary to clause 8.2 (a) and (b) of the Loan Agreement. He denies obtaining consent of the Land Control Board on 5th December, 2000 to transfer land to the 1st Defendant, and insists the land was still charged to the National Bank of Kenya. Further, he disputes signing the application for consent form dated the 17th August, 2000 and the transfer form dated the 3rd September, 2001 and insists they are all forgeries. He further avers that the suit land was transferred to the 1st Defendant's name on 27th September, 2001 and on realizing this, he reported the matter to the Kiserian Police Station vide OB No. 18/02/10/2014 and the matter was being investigated on a claim of forgery of title. He explains that he has always resided on the suit land to the exclusion of the 1st Defendant. He reiterates that the 1st Defendant transferred the suit land to himself on 27th September, 2001, the day they entered into a Loan Agreement.

The 1st Defendant FRANCIS NYAMAI MWANZIA filed a further affidavit where he reiterates the contents of his replying affidavit dated the 25th June, 2018 and contends that the Plaintiff's supplementary affidavit contains blatant lies and a shameless attempt by the Plaintiff to change the term of the Agreement. He states that he cleared the loan and the Bank released the title of the suit property to him and the Applicant seeks to take advantage since the Bank is not a party to the proceedings herein. He insists parties are bound by the terms of their agreement and that he notified the Plaintiff of his intention to redeem the suit land since the Plaintiff had defaulted. He reaffirms that certain

averments in the Plaintiff's replying affidavit would require viva voce evidence to be adduced. Further, that it is the Plaintiff who is trying to fraudulently wiggle out of their Agreement. He reaffirms that the cause of action arose when the Plaintiff failed to honour his obligations to the 1st Defendant herein and upon being notified by the 1st Defendant of his intention to redeem the collateral.

Both the Plaintiff and the 1st Defendant filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the Notice of Preliminary Objection dated the 3rd October, 2018, the parties pleadings, including the affidavits and submissions, the only issue for determination is whether the Plaintiff's suit should be struck out as it is statute barred.

The 1st Defendant contends that the Plaintiff's suit is statute barred as the cause of action arose in 2001. The Plaintiff insists the suit is not statute barred as the land was fraudulently transferred to the 1st Defendant contrary to their loan agreement. He has referred to various clauses in the Loan Agreement to support his argument. The 1st Defendant has relied on section 7 of the Limitation of Actions Act and various authorities including WILLIAM GATHUI MURATHE Vs GAKURU GATHIMBI (1998) eKLR and DAMARIS KONDORO vs GACHANJA GITERE & ANOTHER (2005) eKLR to support his arguments.

Section 7 of the Limitation of Actions Act provides that: **'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.'**

The provisions are clear in terms of the period within which a party can bring forth a claim to recover land and indicates it is 12 years.

However, section 26 of the Limitation of Actions Act provides an extension of time to bring an action to recover land on certain circumstances, and stipulates thus: **'Where, in the case of an action for which a period of limitation is prescribed, either—**

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or**
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or**
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:**

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

- (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or**
- (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.'**

In the current scenario, I note that the Plaintiff at paragraph 14 of the Plaintiff and in his replying affidavits alleges the suit land was fraudulently transferred by the 1st Defendant contrary to the terms of the aforementioned Loan Agreement, which fact is controverted by the 1st Defendant. From the facts presented, the Plaintiff insists he discovered the issue of the transfer in 2014 and reported the matter to the Police who are investigating the fraudulent transfer of title. The 1st Defendant has disputed the averments of the Plaintiff and admitted certain issues can only be determined once viva voce evidence is adduced.

In the case of **R. G. Patel v. Lalji Makanji [1957] EA 314** the former Court of Appeal for Eastern Africa stated thus:

"Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

I opine that the said allegations of fraud contained in the Plaintiff must be proved and this can only be done once the suit is set down for hearing on its merit. It is against the foregoing and in relying on the facts as presented, I find that the Plaintiff's claim is not statute barred in accordance with the provisions of section 7 as read together with section 26 of the Limitations of Actions Act.

In the circumstances, I will disallow the Preliminary Objection.

Costs will be in the cause

Dated signed and delivered in open court at Kajiado this 8th day of April, 2019

CHRISTINE OCHIENG

JUDGE