



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 252 OF 2016

ALOICE WERE PAMBO (suing as the Administrator in the estate of

BEDETE ABOGE PAMBO (DECEASED).....PLAINTIFF

VERSUS

JOSEPH LEO OCHIENG.....1ST DEFENDANT

LUKE ODUOL OMOLO.....2ND DEFENDANT

ATTORNEY GENERAL (sued as the

legal representative of the Ministry of Lands).....3RD DEFENDANT

THE LANDS REGISTRAR, SIAYA.....4TH DEFENDANT

RULING

1. Joseph Leo Ochieng and Luke Oduol Omollo, the 1st and 2nd Defendants, seeks through the motion dated 31st July 2017 to have the suit struck out with costs for being res judicata and time barred. The application is based on the three (3) grounds that the issues herein have been decided in Judicial Review No. 47 of 2011; that the cause of action arose on 14th March 1988 and hence the suit is time barred; and that the application should be allowed in the interest of justice. The application is also supported by the affidavit sworn by the 1st Defendant on the 31st July 2017 restating the three (3) grounds and to it are annexed the motion, certificate of urgency, chamber summons, statement of facts and verifying affidavit filed in Kisumu H.C. MISC Appl. No. 47 of 2011; plus the copy of title deed for Siaya/Kurapul Ramba/318 issued on the 14th March 1988 in the name of the 1st and 2nd Defendants.

2. The application is opposed by Aloice Were Pambo, the Plaintiff, suing as the administrator of the estate of Odera Odenyo Abiero (deceased), through the three (3) grounds of opposition dated the 2nd November 2017, that the application lacks merit; is bad in law and substance; and that it is not brought in good faith; and is a blatant attempt to deny him speedy justice; is frivolous and vexatious.

3. The Court gave directions on filing and exchanging of written submissions on the 12th March 2018. The Learned Counsel for the 1st and 2nd Defendant plus that of the Plaintiff filed their written submissions dated the 21st March 2018 and 25th April 2018 respectively. The Learned Counsel for the 3rd and 4th Defendants did not file any reply or submissions to the application, but indicated that they supported the 1st and 2nd Defendants position.

4. The following are the issues for the court's determinations;

a) Whether the suit is res judicata and or time barred

b) Who pays the costs.

5. The Court has carefully considered the grounds on the motion, grounds of opposition, affidavit evidence, submissions and come to the following findings.

a) That the Plaintiff commenced this suit though the plaint dated the 19th September 2016, seeking for an order cancelling the

registration of Siaya/Karapul/Ramba/318 in the 1st and 2nd Defendants names and reverting it to Bedeta Aboge Pamba (deceased); declaration that the registration of the 1st and 2nd Defendants with the said land, and the action of 4th Defendant in the process was null and void; permanent injunction; general damages, and costs. That the basis of the suit is that the 1st and 2nd Defendants unlawfully, fraudulently and without any reasonable and or justifiable cause registered themselves as proprietors of the said land on the 14th March 1998, which belonged to Bedeta Aboge Pamba (deceased), without obtaining a confirmed grant.

b) That from the copy of the title deed attached to the 1st Defendant's supporting affidavit, and the copy of the green card filed with the plaint, both for Siaya/Karapul/Ramba/318, the suit land, it is clear that the land was registered in the name of the 1st and 2nd Defendants on the 14th March 1988 under entry No. 2. That each of the two proprietors held a half share interest over the suit land. That the green card further confirms that the suit land's register was first opened on the 14th May 1987 in the names of Joseph Ochieng Oduol and Lucas Omolo Oduol, each holding half share under entry No. 1. That further, even though the pleadings filed by both sides and the affidavit evidence do not disclose the connection or relationship between the proprietors at entry No. 1 and 2, it is apparent that Benedeta Aboge Pambo (deceased), whose estate administrator is the Plaintiff, has never been registered with the said land.

c) That though the 1st and 2nd Defendants have annexed to their supporting affidavit the summons, motion and other related processes that they had filed in Kisumu H.C. Misc. App. No. 47 of 2011, the ruling or judgment thereof has not been availed to the court. That it is therefore impossible for the court to make a conclusive decision as to whether the issues in that application, and the parties or the capacities under which they sued or were sued are similar to those in this suit. That further, the court is unable, in the absence of the ruling or the judgment made thereof to know what issues were determined and whether the determinations thereof makes the issues herein res judicata, and therefore a contravention of **Section 7 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

d) That the finding in (c) above notwithstanding, judicial review proceedings are about legality or illegality of the processes in arriving at the impugned decisions. That judicial review proceedings do not make determinations for example, on ownership of or entitlement to land as between two sides. That accordingly the decisions made in Kisumu H.C. MISC App. No. 47 of 2011 could not have made the issue of ownership to the suit land as between the Plaintiff and the 1st and 2nd Defendant res judicata. The court therefore agrees with the Plaintiff's counsel's submissions on that aspect.

e) That **Section 7 of the Limitation of Actions Act Chapter 22 of Laws of Kenya** limits the window of the suits for recovery of land to twelve (12) years. That from the pleadings filed by the Plaintiff, specifically paragraph 7 of the plaint, ***"The cause of action in this cause arose on the 14th March 1998 (sic)....."*** The attached copies of the title deed and green card as found in (b) above carries the date of registration of 14th March 1998 and not 1988. That counting from 14th March 1998 to the date this suit was filed being the 14th September 2016, a period of eighteen (18) years six (6) months had lapsed. That if the calculation of the period was to start in 1988, then a period of about twenty eight (28) years six (6) months had lapsed.

f) That while the agrees with the Plaintiff's learned Counsel's submissions that extension of time to file a claim may be applied for pursuant to **Section 27 of the Limitations of Actions Act under Order 37 Rule 6 (2) of Civil Procedure Rules**, there is no evidence that any such extension had been applied for, and or granted before this suit was filed. There is also no evidence that such an application was filed after the filing of the suit. That this seems to have been confirmed by the Plaintiff's learned Counsel in their submission where they state ***"An appropriate application can still be made to have the suit deemed to have been filed within time."*** That the foregoing confirms the 1st and 2nd Defendants position that the Plaintiff filed this suit outside the statutory time prescribed by **Section 7 of the Limitation of Actions Act**, and without first obtaining leave to extend time or applying for that extension after filing the suit.

g) That the Plaintiff was not vigilant enough as this application was filed on 2nd August 2017 which was about eleven (11) months after the filing of the suit. That there is therefore nothing presented to the court to show that the Plaintiff intended to move the court for leave to file the suit out of time.

6. That flowing from the foregoing, the court finds merit in the motion by the 1st and 2nd Defendants that the Plaintiff's suit is time barred. That for that reason, the suit is dismissed with costs to the 1st and 2nd Defendants.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 19TH DAY OF JUNE 2019

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel M/s Adwar for Yogo for 1st & 2nd

Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE