



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 55 OF 2018

JOSEPH KASYO KAREIYA.....PLAINTIFF

VERSUS

PJ DAVE FLOWERS LIMITED.....1ST DEFENDANT

CRETUM PROPERTIES LIMITED.....2ND DEFENDANT

THE CHIEF LANDS REGISTRAR.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

What is before Court for determination is the 1st Defendant's Notice of Preliminary Objection dated the 1st November, 2018 and the 2nd Defendant's Notice of Preliminary Objection dated the 31st October, 2018. The 1st Defendant contends that the Plaintiff's suit is statute barred under the provisions of the Limitation of Actions Act and the Court lacks jurisdiction to adjudicate on it. Further, that the suit does not disclose any privity of contract between the Plaintiff and 1st Defendant in respect of the subject matter; the Plaintiff is indolent and guilty of laches and the suit is an abuse of Court Process. The 2nd Defendant also avers that the suit herein is statute barred by the express provisions of the Limitations of Action Act and a wanton abuse of court process and must be dismissed in limine.

The Plaintiff, 1st and 2nd Defendants filed their submissions that I have considered.

Analysis and Determination

Upon consideration of the 1st and 2nd Defendants' Notices of Preliminary Objection as well as the parties' submission, the only issue for consideration is whether the suit herein is statute barred by virtue of the Limitation of Actions Act.

The 1st and 2nd Defendants contend that this suit is statute barred and should be dismissed. In the 1st Defendant's submissions, it relied on sections 7 and 26 of the Limitation of Actions Act as well as the cases of **Beatrice Wambui Kiarie & 2 Others V Beatrice Wambui Nganaga & 9 others (2018) eKLR**; **Vijay Morjaria V Nansingh Madhusingh Darbar & Another (2000) eKLR** to support this argument. The 1st Defendant further averred that there is no privity of contract between it and the Plaintiff and relied on the cases of **Aineah Likuyani Njirah V Aga Khan Health Services (2013) eKLR** including **Agricultural Finance Corporation V Lengatia Ltd 1982 – 88 1KAR 772** to buttress this argument. Further, it submitted that the Court lacks jurisdiction to entertain this suit and relied on the case of the **Owners of the Motor Vessel 'Lillian S' Vs Caltex Oil (Kenya) Ltd 1989 KLR 1**. It also submitted that the instant suit is an abuse of the Court process and relied on the case of **Stephen Somek Takwenyi & Another Vs David Mbutia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009** to support this claim.

The 2nd Defendant in its submission to support its argument that the suit is statute barred, relied on the following cases: **Letore Ntirori & Anor Vs Zacharia Manyura Nrb ELC No. 1376 of 2013**; **Bosire Ogero v Royal Media Services (2015) eKLR**; **Hilton v Sultan S. Team Laundry (1946) 1 KLR 81** and **Grace Adhiambo Ogaga (suing as the legal rep of the estate of Trufena Kemunto Ogaga) - DCD- V William Ochieng Ogaga & 3 Others MIGORI ELC No. 290 OF 2017**.

The Plaintiff in opposing the two Notices of Preliminary Objection submitted that he had discovered fraud on 30th July, 2017 and filed the suit on 27th April, 2018. He relied on section 26 of the Limitation of Actions Act and contended that he was not indolent. He further argued that the Court had jurisdiction to entertain the suit as it revolves around a claim for rectification of register.

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.'

These provisions are clear in terms of the period within which a party can bring forth a claim to recover land.

While 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.'

From the Plaintiff, at paragraph 6 the Plaintiff has alleged fraud and pleaded the particulars thereof as against the Defendant. The Plaintiff claimed he discovered fraud on 30th July, 2017 when he had proceeded to the Kajiado Lands office to undertake a search and discovered his land Kajiado/ Kaputiei North/ 816 had been subdivided. He itemized the resultant subdivisions in the said Plaintiff. At paragraph 7, he has sought for rectification of title by deleting the names of the 1st and 2nd Defendants and inserting his name. The 1st and 2nd Defendants have disputed the Plaintiff's averments in the Plaintiff and insist the suit is statute barred. The 1st Defendant insists there is no privity of contract between it and the Plaintiff.

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."

Further, in the case of **Vijay Morjaria V Nansingh Madhusingh Darbar & Another (2000) eKLR Tunoi J A** was categorical that particulars of fraud must be stated on the face of the pleadings.

While in the case of **UCB Vs Mukoome Agencies (1982) HCB22** it was held as follows '**that where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit**'.

In relying on the three above cited decisions, I note the Plaintiff clearly stated the particulars of fraud in paragraph 6 of the Plaintiff. Further, the allegations of fraud in the suit herein cannot be proved unless viva voce evidence is adduced. Section 7 as read together with section 26 of the Limitations of Actions Act further provides a reprieve to the Plaintiff who discovered fraud in 2017 when he went to undertake a Search. In the circumstance, I find the objection that the suit is statute barred premature and direct that this matter should proceed to full hearing instead of being dismissed at this interlocutory stage.

On the question that there was no privity of contract between the Plaintiff and the 1st Defendant, I find that this cannot be proven at this interlocutory stage without proper evidence being adduced by the 1st Defendant to prove this averment.

It is against the foregoing that I find that the Plaintiff's claim herein is not an abuse of Court process nor statute barred. Further, I hold that since the dispute herein revolves around title to the suit land, this Court by virtue of section 13 of the Environment and Land Court Act has jurisdiction to hear and determine it.

In the circumstances, I will disallow the 1st Defendant's Notice of Preliminary Objection dated the 1st November, 2018 and the 2nd Defendant's Notice of Preliminary Objection dated the 31st October, 2018 respectively.

Costs will be in the cause.

I urge parties to comply with Order 11 and set the suit down for hearing on its merits.

Dated signed and delivered in open court at Kajiado this 28th day of October, 2019

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF

M/S. Chimau holding brief for Fatma for 2nd and 4th respondents

No appearance for the applicant, the 2nd Respondent and plaintiff

Court Assistant- Mpoye