REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC CASE NO.79 OF 2018

formerly machakos elc. 76 of 2015

BENJAMIN MUTUKU MUTWA.....PLAINTIFF/APPLICANT

VERSUS

BENARD MAITHYA NTHENGE.....1ST DEFENDANT/RESPONDENT

FRANCIS MUISYO MAITHYA.....2ND DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect to the Plaintiff's/Applicant's and the 2nd Defendant's/Applicant's applications dated 22nd November, 2017 and 04th July, 2018 respectively.

2. The Plaintiff's/Applicant's application is expressed to be brought under Order 40 Rules 1, 2, 3, 4 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act and all the enabling provisions of the law for orders: -

1) Spent

2) THAT an order of temporary injunction be issued, against the 2nd Defendant/Respondent by himself or his servants or agents whatsoever from trespassing on land parcel No.Makueni/Unoa/1901 and from continuing to build a toilet on the suit premises or in any other manner from interfering with the suit premises thereof pending the hearing and determination of this suit.

3) THAT an order of temporary injunction be issued, against the 2nd Defendant/Respondents by himself, his servants or agents whatsoever from trespassing on land parcel No.Makueni/Unoa/1901 and from continuing to build a toilet on the suit premises or in any other manner interfering with the suit premises thereof pending the hearing and determination of this suit.

4) THAT the costs of this application be borne by the Respondents.

3. The 2nd Defendant/Applicant's application is brought under Order 2 Rule 15 of the Civil Procedure Rules for orders that: -

1) THAT the amended plaint dated 1/3/2018 be struck out with costs to the Defendants.

2) THAT the costs of this application be provided for.

4. Both applications are predicated on the grounds on their respective faces with the Plaintiff's Applicants application being supported by the affidavit of Benjamin Mutuku Mutwa, the Plaintiff/Applicant herein, sworn at Machakos on the 22nd November, 2017.

5. The 2nd Defendant/Respondent filed notice of preliminary objection on 26th February, 2018 the same being dated on even date. The notice of preliminary objection is premised on the grounds that: -

(a) The Suit is time barred and the same being based on contract, time cannot be extended either by consent of the parties or Court (contract executed in 1977).

(b) The land subject matter herein being an Agricultural land, with the consent of the Land Board having been obtained, the

said land transaction is null and void.

(c) In view of (b) above, the consideration paid being recoverable as a Civil debt, the same is unsustainable for being time barred in view of (a) above.

6. On the same day the 2nd Defendant/Respondent filed a replying affidavit sworn at Nairobi on 26th February, 2018.

7. The 2nd Defendant's/Applicant's application is supported by the supporting affidavit of Francis Muisyo Maithya, the 2nd Respondent herein, sworn at Nairobi on the 04th July, 2018.

8. It is opposed by the Plaintiff/Respondent vide his replying affidavit sworn at Machakos on 16th August, 2018 by the Plaintiff/Respondent.

9. On the 03rd October, 2018 direction to dispose off the two applications by way of written submissions was issued.

10. As for the Plaintiff's/Applicant's application, his Counsel submitted that it meets the principles for the grant of order of interlocutory injunction. The Plaintiff's/Applicant's Counsel submitted that the Applicant has deponed that in the year 1977, he purchased the suit property from the 2nd Respondent (annextures 1 – sale agreement). That he remained in possession of the suit property from May, 1977 until sometimes in 2013 when he visited it with plans to commence development. The Counsel pointed out that he found the 2nd Respondent, who is the son of the 1st Respondent, had entered into the suit property and started to construct a toilet. The Counsel added that for a period of over 36 years the Applicant has never had any issue with regard to the suit property.

11. The Counsel went on to submit that the Plaintiff's/Applicant's position is supported by the 1st Defendant/Respondent in paragraph 2 of his replying affidavit where he has deposed that he sold the suit property to the Applicant and that the 2nd Respondent acquired title deed fraudulently. The Counsel pointed out that the allegation by the 2nd Respondent that he purchased the suit property from the 1st Respondent is not supported by a sale agreement and as such, the Applicant has a prima facie case with probability of success (*emphasis are mine*).

12. Regarding the principle that an interlocutory injunction will not normally issue unless the Applicant may otherwise suffer irreparable harm, which may not be adequately compensated in damages, the Applicant's Counsel submitted that the Applicant has been in possession of the suit property for over 35 years, a fact not denied in the Respondent's pleadings. The Counsel pointed out that once fraud is alleged, the court cannot take chances and as such, the Applicant will suffer irreparable harm that cannot be compensated by way of damages.

13. On the issue of balance of convenience, the Counsel submitted that taking into consideration the allegations of fraud leveled against the 2nd Respondent, it would be a higher risk of injustice if the orders sought are not granted. The Counsel cited the case of ***Suleiman vs. Amboseli Resort Ltd [2004] 2 KLR 589*** quoted in ***Purity Wanjiku Nderitu & Another vs. Humphrey Wang'ombe Kaharizi & Another [2013] eKLR*** where Ojwang J (as he then was) while adopting the three principles set out in Giella case stated thus: -

> *"Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunction relief should always opt for the lower rather than the higher risk of injustice."*

14. With regard to the 2nd Respondent's notice of motion application dated 04th July, 2018, seeking to strike out the Plaintiff's suit, the Plaintiff's/Applicant's Counsel submitted that the application raises two issues namely: -

(a) Whether the suit herein is statute barred due to limitation of time and,

(b) ***Consent of the Land Control Board, the Plaintiff/Applicant's Counsel submitted that the Applicant took possession of the suit property in 1977 after paying the entire purchase price.***

The Counsel went on to submit even though the 2nd Defendant/Applicant has alleged in paragraph 8 of his supporting affidavit that the 1st Defendant/Respondent sold the suit property to him, with the 2nd Defendant's mother acting as a witness, the 2nd Defendant/Applicant has however not annexed the sale agreement to the affidavit nor is there an affidavit from his witness to confirm the position. The Counsel pointed out that it is trite law that without a written agreement there cannot exist an agreement for sale of land.

15. It was further submitted for the Plaintiff/Applicant that the 1st Defendant has deponed that the 2nd Defendant fraudulently transferred the property to himself. The Counsel went on to add that the 1st Defendant has stated that the suit property belongs to the Plaintiff and is willing to complete the contract. That it is trite law that once an allegation of fraud has been made, the suit must proceed to full hearing. The Counsel relies on the case of ***Mintina Ene Keton Koponi (suing as a legal representative of the estate of Keton Ole Koponi Parsena (deceased) vs. Francis Njakwe Gathiari & 2 others [2018] eKLR*** where Okong'o J observed that: -

> *"I would wish to point out further that the Plaintiff's case although for recovery of land is based on fraud. The proviso to section 26(a) of the Limitation of Actions Act, Cap 22, Laws of Kenya provides that where an action is based on the fraud of the Defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the Defendant is a matter to be ascertained at the trial. In relying on section 26 of the Limitation of Actions Act and the authority above, I will not term the Plaintiff's claim of fraud as baseless and further it is trite law that where there are allegations of fraud, the suit should be set down for hearing. In the circumstances, I find that the Plaintiff's claim is not stature barred in accordance with the provisions of Section*

7 as read together with section 26 of the Limitations of Actions Act."

16. Arising from the above the Plaintiff's Counsel submitted that the Plaintiff discovered fraud sometime in 2015 when he visited the suit property and found construction done by the 2nd Defendant and as such time began to run from that time.

17. Regarding consent from the Land Control Board, the Plaintiff's Counsel submitted that the 1st Defendant admits that he entered into an agreement with the Plaintiff for sale of the suit property and that to this day, the 1st Defendant is ready and willing to transfer it to the Plaintiff.

18. Regarding the issue of the Plaintiff having failed to plead for refund of the purchase price and therefore the suit should be dismissed, the Plaintiff's Counsel submitted that the same can be cured by way of amendment of the plaint. The Counsel was of the view that to dismiss the Plaintiff's suit would amount to pushing him from the seat of justice. The Counsel cited the case of ***Bogani Properties Ltd vs. Fredrick Wairegi Karuri [2015] eKLR*** where Angote J held as follows: -

"In view of the fact that the Plaintiff's main prayer is for an order of specific performance, which cannot, prima facie, be granted where an agreement of sale is void by operation of the law, I find and hold that the Plaintiff has not established a prima facie case with chances of success. The Plaintiff's claim can only be for a refund of the money paid.

In view of the fact that the Plaintiff may amend his pleadings to pray for a refund of money paid, I decline to strike out the Plaint as prayed in the Defendant's application. I however allow the Defendant's Application dated 12th July, 2014 in terms of prayer number 3 and dismiss the Plaintiff's application dated 3rd July, 2014 with costs."

19. The Counsel for the 2nd Defendant/Respondent confined his submissions to the 2nd Defendants notice of motion application dated 04th March, 2018. The Counsel started off by referring to several authorities on what constitutes a cause of action. I need not repeat what the Counsel stated save to say that the cause of action is as highlighted by the Counsel from the authorities that he cited. The Counsel went on to submit that the 2nd Defendant's application is based on two (2) points of law namely: -

(a) Whether the cause of action herein is statute barred due to limitation of time.

(b) Whether some mandatory provision of the law namely Land Control Act was complied with within the required time.

The third point is the net effect of failing to observe (a) and (b) above in relation to the cause of action.

20. On whether the cause of action herein is statute barred due to limitation of time, the Counsel submitted that the cause of action is based on a contract dated 12th May, 1977 for the recovery of land parcel number Makueni/Unoa/1901.

21. The Counsel referred to ***Section 4(1) (a) of the Limitation of Actions Act*** which provides for actions which may not be brought after the end of six years from the date on which the cause of action accrued. These were: -

(a) Action founded on contract,

(b) Action to recover land.

22. On the issue of action founded on contract, the 2nd Defendant's Counsel referred to ***Sections 7 of the Limitation of Actions Act*** which provides as follows: -

"An order may not be brought by any person to recover land after the end of twelve (12) years from the date in which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

23. The Counsel went on to submit that Sections 4(1)(a) and 7 are subject to Section 22 of the aforementioned Act. It was further submitted that the question would be whether it is tenable in law either through extension of time or otherwise for the Plaintiff to come to court 38 years after the contract between him and the 1st Defendant was executed on 12th May, 1997.

24. On the issue of action to recover land, the Counsel for the 2nd Defendant submitted that an action to recover land cannot be brought after 12 years. The Counsel added that Part III of Section 22 on extension of time on account of disability is very clear in that it provides for cessation of disability and no action can be brought after 30 years. With regard to the cause of action herein, the Counsel submitted that the same was brought 38 years after it accrued. It was further submitted that in order for a party to access the provisions of Section 22(iii), a party needs to prove the following conditions namely: -

(a) That the Plaintiff had been under some disability that caused him/her not to institute the proceedings within time.

(b) That the period of the disability has been ascertained.

(c) That after ascertainments not more than (30) years have lapsed.

(d) That applicant (the person suffering disability) has sought and obtained an extension of time to file such a case.

The Counsel was of the view that based on the foregoing conditions, this suit should fail.

25. On the issue of the consent from the Land Control Board, the Counsel for the 2nd Defendant submitted that it is not in dispute from either the pleadings or the replying affidavit that the suit property is an agricultural land within a land controlled area. That having failed to obtain consent within 6 months as required by the Land Control Act Chapter 302 of the Laws of Kenya, the contract is unenforceable and it would be a waste of judicial time to allow the suit to proceed to substantive hearing.

26. I propose to deal with the 2nd Defendant's application first before I turn to the application by the Plaintiff.

27. Indeed there is no doubt that the Plaintiff is out to enforce a contract that was entered in 1977. The Plaintiff and the 2nd Defendant are not in agreement as to the actual month and date when the contract was entered into but those are issues that can be ascertained during the hearing of the substantive suit. Whereas, I agree with the 2nd Defendant that a contract that was entered into 38 years may be statute barred, the Plaintiff herein has demonstrated by affidavit evidence that he took possession of the suit land after paying the purchase price. He has gone further to show that possession may have ceased in the year 2015 when the 2nd Defendant occupied the suitland. Of importance to note is that the 1st Defendant acknowledges the position as stated by the Plaintiff and as such, the 2nd Defendant cannot be heard to invoke the provisions of Section 4(1)(a) and 7 of the Statute of Limitations Act. Both the Plaintiff and the 1st Defendant have questioned how the 2nd Defendant came to be registered as the proprietor of the suit land and this would require substantive hearing as it touches upon the issue of fraud. Whether or not the Plaintiff's plaint does not have a prayer for refund of the purchase price cannot be a ground for dismissing his suit at this stage since the omission to so include the prayer is curable by way of an amendment as was correctly submitted by the Plaintiff's Counsel.

28. Arising from the above, my finding is that the application by the 2nd Defendant has no merit and same is dismissed with costs to the Plaintiff.

29. With regard to the Plaintiff's notice of motion application dated 27/11/17, I do note that there is affidavit evidence to show that the Plaintiff took possession of the suitland in May, 1977 after he paid the full purchase price. He remained in possession until 2015 when the 2nd Defendant purported to evict him. The Plaintiff's position is supported by the 1st Defendant in paragraphs 2 & 3 of his replying affidavit at Machakos on 27th June, 2018. As such, I agree with the Plaintiff that he has demonstrated a prima facie case with probability of success.

30. On the issue of irreparable harm, it is clear that the Plaintiff will suffer irreparable harm should the 2nd Defendant who has transferred the suit property to his name dispose it off to third parties taking into consideration that there are allegations of fraud levelled against the 2nd Defendant. The third parties may acquire valid titles if they are purchasers for value and without notice of fraud.

31. As for the balance, for the reasons that I have given in principles one and two, I hold that the balance of convenience tilts in favour of the Plaintiff/Applicant.

32. The upshot of the foregoing is that the application has merits and I proceed to allow it in terms of prayers 2, 3 and 4.

Signed, Dated and Delivered at Makueni this 28th day of November, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Kamiru holding brief for Mr. Masika for the Plaintiff/Applicant

No appearance for the Defendants/Respondents

Mr. Kwemboi - Court Assistant

MBOGO C. G., JUDGE,

28/11/2019.