



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO 162 OF 2018

JOASH WINYO ONGAYO.....PLAINTIFF

=VERSUS=

AGRICULTURAL FINANCE CORPORATION.....DEFENDANT

RULING

1. The Plaintiff filed this suit against the Defendant claiming compensation in the sum of Kshs.3,200,000/= being, the current market price of LR No. Kamagambo/Koluoch/303 (suit property). The Plaintiff had purchased the suit property from the Defendant who had allegedly acquired it in a public auction pursuant to a statutory power of sale. The suit property had been charged to the Defendant by one Samuel Nyandiga Ondiwa who had taken a loan from the Defendant but failed to re-pay it.

2. The Plaintiff purchased the suit property from the Defendant in the 70's but the transfer was only effected in his name in 2012. Soon after the suit property had been transferred to the Plaintiff, Samuel Nyandiga Ondiwa filed Kisii ELC No.115 of 2013 (Samuel Nyandiga Ondiwa Vs Joash Winyo Ongayo & Agricultural Finance Corporation) In a Judgement delivered on 27th June 2016, the court found that the transfer of the suit property by the 2nd Defendant to the 1st Defendant was illegal and void. The title in favour of the 1st Defendant was cancelled and the court ordered that the Plaintiff had acquired the suit property by way of adverse possession.

3. On 4th June 2018, the Defendant herein filed a preliminary objection on the ground that the Plaintiff's suit was statute barred, and that the same was scandalous, frivolous, vexatious and is otherwise an abuse of the process of the court. The parties were directed to canvass the preliminary objection by way of written submissions. The Defendant filed its submissions on 9th October 2019. The Plaintiff who had been given 7 days from 15th October 2019 to file his submissions did not file any and if any were filed then they are not in the court file.

4. The Defendant argues that the Plaintiff's claim is based on a contract which was entered in the 70's and that therefore this suit is statute barred. The Defendant argues that the Plaintiff's claim should have been brought within six years from the time when the contract was signed. The Defendant also argues in its submissions that this suit is res-judicata in view of the decision in Kisii ELC No.115 of 2013.

5. I have carefully considered the preliminary objection raised by the Defendant. The Plaintiff's claim is based on the findings of the court in ELC 115 of 2013 which found that the transfer of the suit property from the Defendant to him was illegal and void. The Plaintiff had no reason to file any suit before 2013 because the suit property was already registered in his name and he did not know that the transfer of the same into his name by the Defendant was illegal prior to the date the court pronounced its judgement.

6. I have read the judgement of the court in ELC 115 of 2013 . The Judge clearly found that the Defendant did not adduce any evidence that the purchase of the suit property which was subsequently sold to the Plaintiff was done above board. It is after the judgement was delivered that it dawned on the Plaintiff that he had lost his property for no fault of his own. The blame was placed on the Defendant who was the 2nd Defendant in ELC No.115 of 2019.

7. The law of Limitation is clear that in matters where fraud is involved, time does not start running until the fraud is discovered. There is no way the Plaintiff would have known that the transfer of the suit property to himself by the Defendant was illegal or fraudulent as he was not privy to what occurred between the Defendant and Samuel Nyandiga Ondiwa. The Plaintiff found that already the suit property had been registered in the name of the Defendant who by virtue of Section 33 of the Agricultural Finance Corporation Act was allowed to take part in any auction. There is therefore no way he would have discovered any fraud on the part of the Defendant. The fraud came to light in the Judgement delivered on 27th June 2016 and if there is any limitation of time, then computation of that time started to run from 27th June 2016. The Plaintiff's suit is therefore not statute barred.

8. The Plaintiff's suit is also not res-judicata as the Plaintiff who was the 1st Defendant in ELC No. 115 of 2013 would have not known that there was any fraudulent activity involving the Defendant as to make it an issue or subject of determination in that case. I therefore find that

the preliminary objection lacks merit. The same is hereby dismissed with costs to the Plaintiff. The suit property is located at Migori within the jurisdiction of Migori ELC Court or Chief Magistrate's Court. I therefore make an order transferring this suit to Migori ELC Court for the Court to determine whether to hear it or it be heard by the Chief Magistrate's Court.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 19th day of December 2019.

E.O.OBAGA

JUDGE

In the Presence of:-

Mr Mutuma for Mr Ngaira for Defendant

Court Assistant: Hilda

E.O.OBAGA

JUDGE