REBULIC OF KENYA

IIN THE ENVIRONMENT AND LAND COURT AT KERICHO

E.L.C CASE NO. 19 OF 2008

ERICK KIPKEMBOI (Suing as the administrator of the estate of

JAMES CHERIRO DECEASED)…………………......PLAINTIFF

VERSUS

BROOKE BOND (KENYA LIMITED)………..... DEFENDANT

R U L I N G.

Introduction

1. This ruling is in respect of an application dated 30th October, 2017 filed by the Defendant /Applicant under Order 2 Rule 15(1) (b), (c) and (d) of the Civil Procedure Rules of the Civil Procedure Act seeking the following orders:

1. THAT the Plaintiff's suit be struck out as:

a. It discloses no reasonable cause of action

b. It is scandalous frivolous and vexatious

c. It may prejudice, embarrass or delay the fair trial of this case

2. THAT the cost of this application be provided for.

2. The application is supported by the grounds set out in the Notice of Motion and the affidavit of Winnie Ochieng, the Legal Counsel of Unilever Tea (K) Limited, formerly known as Brooke Bond (K) Ltd, the Defendant herein. In her affidavit, Counsel for the Defendant /Applicant depones that the Plaintiff lacks the capacity to sue on behalf of Paraiywot and Partners Company as the said entity is not an incorporated company. She depones that the partners of Paraiywot and Partners Company are all deceased save for one Simion Arap Chebusit, consequently, the Plaintiff ought to have sought the authority of the representatives of all the twenty (20) individual partners before instituting the suit herein. In the absence of such authority and in the absence of proof that all the estates of the deceased partners have duly appointed legal representatives, then the plaintiff lacks the capacity to file suit on their behalf.

3. She depones that the defendant who was earlier known as Kenya Tea Company and subsequently, Brooke Bond Kenya Ltd purchased all that land comprised in **I.R No. 28410** also known as **L.R No. 6022/2** measuring **227.8 hectares** from **Bureti Tea Company Limited** and the same was transferred to the Defendant upon registration of a deed of transfer registered as Number I.R 2138/8 on 7th July, 1975.

4. The defendant subsequently took possession of the said 227.8 hectares and has its exclusive user to date.

5. She further depones that **Paraiywot and Partners Company** purchased a total of 91.1 hectares form Bureti Tea Company Ltd for a consideration of Kshs. 97,608 vide a sale agreement dated 13th January, 1972 which portion was transferred to them vide entry number 7 in the Certificate of title. The respective portions purchased by the Defendant and Paraiywot & Partners Company were formerly comprised in L.R No 6022 (original No. 3945/4 & 5) also known as title no. I.R 2138 formerly registered in the name of GEORGE STUART SNEY before its transfer and registration in the name of Bureti Tea Company Limited vide entry number 5 on 5th January, 1943.

6. She depones that following registration, of entry number 7 in the certificate of title in respect of L.R No 6022 (original number 3945/4 and 5) also known as title no. I.R 2138, the partners of Paraiywot and Partners Company were issued with certificate e of title number I.R 2138/7 also known as L.R 6022/1 which is one of the resultant titles from mutation and sub-division of title number I.R 2138 also known as 6022 (original 3945/4 &5)

7. She depones that after the said transfer and registration the defendants took possession of the land and have remained in occupation to date. In the circumstances, the Plaintiff's claim against the defendant is based on a fundamental misapprehension of the import of the entries made in respect of L.R No 6022 especially relating to its sub-division into L.R No. 6022/1 belonging to Paraiywot and Partners Company and L.R6022/2 belonging to the defendant.

8. She further depones that the Plaintiff filed another suit, to wit Kericho HCCC No. 49 of 2015 against the defendant making similar claims in respect of L.R No. 6026 (Original no. 3945/9 title No. I.R 2140/1 belonging to the defendant which suit was struck out for failing to disclose a reasonable cause of action. She therefore claims that the Plaintiff is a vexatious litigant who lacks the authority of the 19 partners of Paraiywot and Partners Company to bring this suit.

9. In his replying affidavit dated 23rd November, 2017 the Plaintiff depones that nothing prevents him from instituting the present suit to recover the property that belonged to the partnership as liability in a partnership is unlimited and he does not need the authority of the other partners. He further depones that the partnership was dissolved upon the death of the partners. Consequently, any of the partners or their personal representatives can institute a suit to recover property that belonged to the partnership since liability in a partnership is unlimited.

10. The Plaintiff maintains that he Paraiywot and Partners Company purchased land parcel number I.R 2138 also known as L.R No 6022 from Bureti Tea Company in 1972 and they have never sold any part of it to the Defendant and that the original land measuring 788 acres has always been in the exclusive possession of Paraiywot and Partners Company since 1972 to date.

11. He depones that the said parcel of land has never been sub-divided into parcels of land known as title no L.R 6022/1 and 6022/2 nor has the same been transferred to any other person and if such transfer has been made, the same was fraudulent. In effect he states that entry number 8 and representation no. 157 on the certificate of title of land known as I.R 2138 also known as L.R No. 6022 where L.R No 6022/2 was created and transferred to the defendant on 7th July, 1975 is fraudulent.

12. In response to the contention that the suit is time barred, the plaintiff contents that the suit is based on trust and therefore time only started running when the plaintiff learnt about the existence of the trust. He states that he learnt about the trust in 2007 after which he filed this suit in 2008.

13. He depones that this application is incurably defective and *res judicata* as the issues raised herein were raised before the court and a ruling was delivered on the same by Justice Waithaka on 24th February, 2014.

Issues for Determination

14. The main issues for determination are as follows:

1. Whether the Plaintiff's suit offends the provisions of Order 2 Rule 15 of the Civil Procedure Rules by disclosing no reasonable cause of action, being scandalous, frivolous and vexatious and whether it may prejudice, embarrass or delay the fair trial of this suit.

2. Whether the Plaintiff has the *locus standi* to institute the suit.

3. Whether the suit herein is time barred.

4. Whether the application is *res judicata*.

Analysis and Determination

15. I will start by addressing the issue as to whether this application is *res judicata*.

16. On 15th February, 2011 the Defendant filed a Notice of Preliminary Objection based on two grounds namely:

i. That the suit contravenes the provisions of Order 1 rule 8 of the Civil Procedure Rules.

ii. That the Plaintiff's claim is statute barred.

17. In her Ruling dated 24th February, 2011 Waithaka J dismissed the Preliminary objection. With regard to the first ground of objection she stated that the court would be able to effectively and completely deal with the dispute between the parties if the other partners of Paraiywot and Partners are enjoined to this suit. On the second ground touching on whether the suit is statute barred, the learned judge stated as follows:

> "The plaintiff in his submission sought to rely on the claim being based on trust. He did not however, substantiate in his submission when and how the trust was created. On the other hand, the defendant submitted that 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. According to him, 1975 is the year when the cause of action arose. This is however not clear from the pleadings filed by the parties.
>
> Had this objection been raised by way of a formal application supported by an affidavit, that would have given the defendant an opportunity to annex supporting documents and in extension allow this co*urt to satisfy itself*"

18. She then proceeded to dismiss the Preliminary Objection as she found that the same lacked merit.

19. The question I have to address myself to is whether based on the above-mentioned ruling, the issue as to whether the suit is statue barred can be said to have been finally determined and is therefore *res judicata*.

20. In my considered view, the judge expressed her inability to deal with the issue exhaustively owing to the manner in which it had been raised (by way of Preliminary Objection rather than a substantive application) which means it cannot be said to be *res judicata*.

21. To lend credence to the above finding I rely on Black's Law Dictionary 9th Edition which defines *res judicata* as follows:

> "An issue that has been definitively settled by judicial decision".
>
> Res judicata has 3 key elements:
>
> i. An earlier decision on the issue
>
> ii. A final judgment on the merits
>
> iii. The involvement of the same parties or parties in parity with the original parties.

22. This principle is captured in section 7 of the Civil Procedure Act which provides as follows:

> "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent or the suit in which <u>such issue has subsequently been raised and has been heard and finally decided by such court.</u>"(*emphasis added)*

23. In **Enock Kirau Muhanji V Hamid Abdalla Mbaraka 2013 eKLR** the court held that a case that had been dismissed instead of being struck out without being heard was not *res judicata.*

24. Similarly, I find and hold that in this case, the issue as to whether the suit was statute barred is not *res judicata*. However, the issue regarding whether the plaintiff has the *locus standi* or capacity to institute this suit was exhaustively dealt with and finally determined by the court and is therefore res judicata.

25. I will therefore proceed to examine the issue as to whether this suit offends the provisions of Order 2 Rule 15 of the Civil Procedure Rules.

The said provision states as follows:

> "At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:
>
> a. It discloses no reasonable cause of action or defence in law;
>
> b. It is scandalous, frivolous or vexatious; or
>
> c. It may prejudice, embarrass or delay the fair trial of the court or action it is otherwise an abuse of the court process."

26. On the first issue as to whether the Plaintiff's case has a reasonable cause of action, it is the Defendant/Applicant's submission that the claim of fraud by the defendants is not well founded as it is based on a glaring misinterpretation of the import of the entries made in L.R No 6022 (original Nos 4 & 5) also known as title No. I.R 2138 and therefore does not constitute a reasonable cause of action.

27. Is the plaintiff's suit scandalous, frivolous and vexatious?

Black's Law Dictionary 7th Edition defines scandal as follows:

> **"Scandal consists of the allegation of anything which is unbecoming of the dignity of the court to hear, or is contrary to decency or good manners, or which charges some person with a crime not necessary to be shown in the cause to which may be added any unnecessary allegation, bearing cruelly upon the moral character of an individual, is also scandalous. The alleged matter however must be not only offensive, but also irrelevant to the cause, for however offensive it may be, if it be pertinent and material to the cause the party has a right to plead it. It may be necessary to charge false representations, fraud and immorality, and the pleading will not be open to the objection of scandal, if the facts justify the charge."**

28. A scandalous matter is one that is both grossly disgraceful and irrelevant to the action or defence.

> **"According to *Bullen, Leake and Jacobs Precedents of Pleadings (12th Edition)- a pleading or action is frivolous when it is***

without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless and offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense."

29. The word frivolous is described as something lacking a legal basis or legal merit; not serious, not reasonably purposeful.

30. A matter is said to be vexatious when:

i. It has no foundation

ii. It has no chance of succeeding.

iii. The pleading is brought merely for the purpose of annoyance.

iv. It is brought so that the party' s pleading should have some fanciful advantage or,

v. Where it can really lead to no possible good (per Willis Vs Earl Beauchamp (1866).

31. In **Strokes Vs Grant (1878) AC 345** and **Hardnorb Vs Monk (1876) 1 Ex D 367** cited in the case of **Elijah Sikona & George Pariken Narok on behalf of Trusted Society of Human Rights Vs Mara Conservancy and 5Others, (2014) KLR** it was held that a pleading tends to prejudice and embarrass or delay the fair trial of the suit when:

i. It is evasive or

ii. It obscures, conceals the real question in issue between the parties in the case ***and is embarrassing if***

i. It is ambiguous or unintelligible, or

ii. It raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense or

iii. It is a pleading that a party is not entitled to make use of or

iv. A defence does not say how much he admits and how much he denies

32. A pleading which is an abuse of the court process really means in brief, a pleading which is a misuse of the court machinery or process- **Trust Bank Ltd Vs Hemanshusirkat Amin & Co Ltd & Another** (Nrb HCCC No. 984 of 1999).

33. In **Nyati (2002) Kenya Limited Vs Kenya Revenue Authority 2009 KLR Justice Ringera** stated as follows:

"A matter would only be scandalous, frivolous and vexatious, if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned, for example imputation of character is not in issue. A pleading is frivolous if it lacks seriousness. It would be vexatious if it annoys or tends to annoy. It would annoy if it is not serious or contains scandalous matter, or is irrelevant to the action or defence. A scandalous and/ or frivolous pleading is ipso facto vexatious."

34. The question therefore is whether in light of the facts set out in the foregoing paragraphs, the plaintiff's claim discloses any reasonable cause of action or it is merely a scandalous, frivolous and vexatious suit which is brought to embarrass the defendants herein.

35. The first issue to be determined is whether the plaintiffs claim has any legal basis. The Plaintiff claims is premised on the belief that the entire property comprised in L.R No 6022 (original No. 3945/4 & 5) also known as Title No. I.R 2138 measuring 788 acres belongs to the partners of Paraiywot and Partners Company while the defendant claims that Paraiywot and Company Partners only purchased 91.1hecatres thereof while the remaining portion measuring 227.8 hectares was purchased by the defendant. Each of the parties has attached title documents in support of their claim.

36. There is controversy surrounding entries number 7 and 8 in the certificate of title which effected the transfers to the Paraiywot and Partners Company and which the plaintiff alleges are fraudulent. The particulars of fraud are pleaded in his plaint although this claim is strenuously refuted by the defendant. I would be hesitant to dismiss the plaintiff's claim as scandalous, frivolous and vexatious on this account as the court would only be able to determine the veracity of the documents at a full hearing.

37. On the second issue as to whether the suit is statute barred, it is clear that the transfer of land to Paraiywot & Company Partners took place way back in 1975 when the Plaintiff's father was still alive.

38. It has been submitted by the Plaintiff that this suit is based on trust and that time does not begin to run until such as time that knowledge of the existence of the trust comes to the attention of the beneficiary of the said trust. Whereas that is the correct position, I have carefully studied the pleadings herein and nowhere in the Plaint or Reply to Defence does the plaintiff plead the that the defendant holds the suit property in trust for the partners of Paraiywot & Partners Company. The Replying Affidavit also stops short of explaining how the inference of a trust arises. In the circumstances the court cannot speculate. It is trite law that a party is bound by his pleadings.

39. According to Section 7 of the Limitation of Actions Act Cap 22 a suit for a claim to land must be brought within 12 years. The Plaintiff's suit which was filed in 2008, 33 years after the cause of action arose is hopelessly out of time.

40. The above analysis points to the fact that the Plaintiff has no legal basis to sustain a claim against the defendants and I am inclined to grant the application. In arriving at this conclusion, I am guided by the principles in respect of applications for striking out of pleadings set out in **D. T Dobie & Company (Kenya Ltd Vs Muchina 1982 KLR 1 in which Madan J** (as he then was stated as follows:

> "**The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way," Sellers LJ. (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.**
>
> **If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind to summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing.**
>
> **No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of a case before it."**

41.That decision of Madan J.A (as he then was) in the case above has been consistently followed and is sound law. In the case of **Crescent Construction Co. Ltd vs Delphis Bank Ltd Civil Appeal No.146 of 2001** decided on 9th February, 2007, this Court after quoting it with approval further stated thus:

> **"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant, however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter."**

42. Having considered the Defendant's application together with the entire set of documents filed herein including the pleadings, notice of motion, affidavits and other supporting documents as well as the law, I am of the view that the plaintiff's claim against the defendant is statute barred and thus incompetent. I am persuaded that on the basis of the material placed before me, this is a case where the Defendant has unfairly been dragged to the seat of justice on a claim that is incompetent unsustainable. It is also not lost to me that this is not the only case that the plaintiff has filed against the defendant making similar claims. The Plaintiff's conduct in refusing to serve the legal representatives of Paraiywot and Partners company Limited(who would have been able to shed light on the plaintiff's case) even after the court made an order to this effect in 2014 is also telling. I therefore exercise my discretion and strike out the plaintiff's case with costs.

43. This does not preclude the legal representatives of Paraiywot and Partners company from filing a fresh suit if they are so minded, subject to their being able to surmount the hurdle of the Limitation of Actions Act.

Dated, signed and delivered at Kericho this 6th day of March, 2018.

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JANE M. ONYANGO

JUDGE

<u>In the presence of:</u>

1. Mr. Nyaingiri for the Interested Party.

2. Mr. Kiprono for Mr. Koech for the Defendant/Applicant.

3. Mr. Motanya for the Plaintiff/Respondent.

4. Court Assistant - Rotich