



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

ENVIRONMENT & LAND CASE NO.118 OF 2015

BENJAMIN BARASA WAFULA.....PLAINTIFF

VERSUS

GLADYS NEKOYE MURUNGA.....1ST DEFENDANT / RESPONDENT

ELGON RELIGIOUS

SOCIETY OF FRIENDS.....2ND DEFENDANT/RESPONDENT

JOSEPH SIMIYU PRICHANI.....3RD DEFENDANT / RESPONDENT

STEPHEN BARASA WASWA.....4TH DEFENDANT / RESPONDENT

GEOFFREY WAFULA WASILWA....5TH DEFENDANT / RESPONDENT

PAULO SEME.....6TH DEFENDANT / RESPONDENT

CATHERINE BARASA.....7TH DEFENDANT / RESPONDENT

RULING

On 9th November 2015 the Plaintiff herein (**DISMAS WANJALA WOCHUNA**) acting in person filed what is commonly referred to in Judicial parlance as a “**home-made Plaintiff**” in which he sought judgement against the defendants in the following terms:

I. “This Honourable Court be pleased and grant Orders directing the District Land Registrar and the Government Surveyor to confirm the registered acreage of L.R. No. KIMILILI/KAMUKUYWA/339 and 337 for determining the existence of 2268 as well as 1408 on the ground then open the roads of access thereon”.

II. “This Honourable Court be pleased and grant eviction Orders for the 1st upto 7th Defendants herein, allow the Plaintiff’s freely occupation of his late father’s L.R. NO. KIMILILI/KAMUKUYWA/339 part portions grabbed and enjoined to L.R. NO. KIMILILI/KAMUKUYWA/1408 and 2268 formerly L.R. NO. KIMILILI/KAMUKUYWA/337 or if not be forcefully evicted there from by the OCS KIMILILI POLICE STATION.”

III. “This Honourable Court be pleased and grant Orders for the 1st upto 7th Defendants herein to pay for annual agricultural damages and murrum selling since their trespass and encroachments thereof”.

IV. “Any other remedy this Honourable Court finds just and expedient to grant”.

V. “Costs of this suit”.

The suit was premised on pleadings that the Plaintiff is the administrator of the Estate of his late father **OCHUNA MAELO** (herein the deceased) who at the time of his death was the proprietor of land parcels No. KIMILILI/KAMUKUYWA/339 measuring 8.9 Ha and KIMILILI/KAMUKUYWA/2325 measuring 1.28Ha. That the 1st defendant grabbed portions of land parcel No. KIMILILI/KAMUKUYWA/339 which she then sub-divided into parcels No. KIMILILI/KAMUKUYWA/1407, 1408 and 2268 and sold

them to the 2nd to 7th Defendants. The Plaintiff pleaded in paragraph 11 of the Plaintiff as follows which is relevant for purposes of this ruling:

“The 1st defendant who succeeded her late father one SEFANIA MURUNGA grabbed part portions of our late father’s L.R. No. KIMILILI/KAMUKUYWA/339 and added to his (sic) father’s 337 which was later sub-divided into 1407, 1408 and 2268 between 1994 and 1995 when the registered proprietor was severely sick (incapacitated).”

The plaintiff also pleaded fraud on the part of the defendants in paragraph 18 of the Plaintiff.

The defendants filed their defences to the suit.

The 1st defendant denied the allegations levelled against her stating that they are mere statements which she does not understand and put the plaintiff to strict proof thereof. She pleaded further that this suit is incurably defective and that even if the events complained of took place, they occurred in the 1990’s and this suit is barred by the statute of limitation.

The 2nd defendant also denied the claim against it adding further that it purchased land parcel No. KIMILILI/KAMUKUYWA/2268 from the late ZEPHANIA MURUNGA as far back as 1994 and got its title in 2002 and this suit is therefore barred by the Law of limitation.

The 3rd defendant similarly denied the claims against him adding that he bought his share of the suit land in 1983 and has occupied it since then and neither the Plaintiff nor his late father have lived there from 1969.

The 4th defendant admitted having purchased a portion of the land in dispute from the 1st defendant but denied any knowledge of any defect in ownership and is therefore a stranger to any allegations of fraud.

The 5th defendant also pleaded that he purchased land from the 1st defendant but denied any knowledge of defect in ownership adding that when he purchased his share in 2009, it was with the full knowledge of the Plaintiff who even assisted him in constructing his house thereon.

The 7th defendant averred that the Plaintiff has not disclosed any claim against her at all adding that she is a purchaser for value of land parcel No. KIMILILI/KAMUKUYWA/1408 measuring approximately 1 acre from the 1st defendant but the title is still in the 1st defendant’s names. She therefore denied any allegations of fraud against her.

The 6th defendant appears not to have filed any defence to the Plaintiff’s claim.

I now have before me an application dated 9th March 2016 by **BENJAMIN BARASA WAFULA** (the Applicant herein). That application which is the subject of this ruling is drawn by the Applicant in person and is headed

“APPLICATION TO BE ENJOINED AS AN INTERESTED PARTY/APPLICANT”.

It is premised under the provisions of Order 1 Rules 10(1-2) 14, 8(3) and Order 8 Rules 3(5) and 5(1) of the Civil Procedure Rules and seeks the following prayers:

- 1. “That since it was not within the knowledge of the Interested Party and the Plaintiff/Applicant to file an appropriate application about the donated powers of attorney to BENJAMIN BARASA WAFULA on L.R. NO. KIMILILI/KAMUKUYWA/339, this Honourable Court be pleased and grant Orders for BENJAMIN BARASA WAFULA who is the grandson to the late YOHANA OCHUNA MAELO and nephew to the Plaintiff / Applicant herein to be enjoined as an Interested Party in this suit for effectual determination of issues and matters of similarities to stop the 1st upto 7th Defendants/Respondents herein from intermeddling with the late YOHANA OCHUNA MAELO’S Intestate part portion grabbed from L.R. NO. KIMILILI/KAMUKUYWA/339.”***
- 2. “That upon granting of such Orders, this Honourable Court be pleased and make further priority Interlocutory Orders restraining the 1st upto 7th defendants/Respondents, their families, relatives, customers, agents, clients and/or Counsel from ploughing, planting and harvesting or doing of any dealings which may dispose off, alienate and or damage L.R. NO. KIMILILI/KAMUKUYWA/339 measuring approximately 8.9Ha (22¼ acres).”***
- 3. “This Honourable Court be pleased and grant priority Orders for determining the application dated 22nd December 2015 so that the late YOHANA OCHUNA MAELO’s Intestate dependants utilize their part portions grabbed from L.R. NO. KIMILILI/KAMUKUYWA/339 by the 1st upto 7th Defendants/Respondents during this annual planting season.”***
- 4. “This Honourable Court be pleased and grant priority Orders following the appointment and donation of power of Attorney dated 15th January 2016 by DISMAS WANJALA WOCHUNA and family members agreement dated 24th February 2016 that the said BENJAMIN BARASA WAFULA shall only sue, plead, defend, swear and file documents on matters of Law and facts in the names of the Plaintiff/Applicant herein.”***
- 5. “Costs of this application payable to the Plaintiff/Applicant herein.”***

The application is premised on 26 grounds (a to z) and supported by the Applicants 26 paragraph affidavit. I must at this stage state that I

found it difficult to comprehend the said grounds or the contents of the affidavit. However, I need not belabor that because as will become clear later in this ruling, this dispute will be determined on other grounds and not the Applicant's application dated 9th March 2016.

The application is opposed and the 1st defendant filed grounds of opposition dated 8th April 2016 describing it a defective and an abuse of the process of the Court, incompetent with no probability of success, misconceived and contrary to the established principles of Law. Lastly, the 1st defendant questioned the Applicant's locus standi in this matter.

The 2nd defendant also filed grounds of opposition dated 25th April 2016 stating that the applications is founded on an incompetent suit with no probability of success and further that it is misconceived and contrary to the established principles of Law.

The 3rd defendant filed both grounds of opposition dated 13th April 2016 and a replying affidavit. He stated that this suit is *res judicata* and that there have been various cases touching on the same subject matter in other Courts and listed those Cases as:

1. Criminal Case No.1084 of 2003 at KIMILILI COURT.

2. Civil Suit No.32 of 2009

3. Civil Suit No.141 of 1995.

In his replying affidavit also dated 13th April 2016, he also deponed inter alia that the Applicant is a stranger in the family of **YOHANA MAELO WOCHUNA**, that the Plaintiff filed this Case and does not need the assistance of any Interested Party, that the parcels No. KIMILILI/KAMUKUYWA/339 and KIMILILI/KAMUKUYWA/337 have distinct boundaries since 1939 e.t.c e.t.c.

When the Parties appeared before me on 25th June 2018, the Applicant informed the Court that he had infact already filed his submissions to the application on 24th October 2016.

Mr. KHAKULA ADVOCATE for the 1st defendant also informed the Court that he too had filed his submissions on 24th October 2016 while Mr. OLONYI ADVOCATE for the 1st defendant told the Court that he had filed his submissions on 29th September 2016. It was not clear why submissions having been filed two years earlier the matter was not placed before **MUKUNYA J** for a ruling.

I have considered the application dated 9th March 2016, the grounds of opposition and the replying affidavit by the 3rd defendant as well as the submission filed.

Notwithstanding that not too precise nature of the Applicant's application dated 9th March 2016, it is clear that he seeks the following two remedies:

1. To be enjoined in this suit and;

2. An Interlocutory Order of injunction to restrain the 1st to 7th defendants, their families, relatives, customers, agents, clients or Counsels from ploughing, planting and harvesting or doing any act that may lead to the disposition, alienation or damage to land parcel NO. KIMILILI/KAMUKUYWA/339.

I must confess I do not fully comprehend the other prayers sought by the Applicant in what, if I may again use the common Judicial parlance, is a **"home-made application"**.

Having said so, and as I have already indicated above, this application may not see the light of day if, as pleaded by the 2nd defendant and repeated in its submissions, this suit is time barred.

I have earlier on in this ruling cited paragraph II of the Plaintiff's Complaint from which it is clear that matters giving rise to this suit occurred **"between 1994 and 1995"**. It is in that regard therefore that Mr. J.S. KHAKULA Counsel for the 2nd defendant has submitted as follows:

"The events complained of are in paragraph II of the Complaint. It is alleged that the 1st defendant grabbed land from the Plaintiff's father between 1994 and 1995. It is more than 20 years ago. Section 7 of the Limitation of Action bars suits to recover land if brought after 12 years after the cause of action. This suit cannot be entertained. Entertaining this application would be an exercise in futility".

That is the correct position in Law. Section 7 of the Limitation of Actions Act (CAP 22 LAWS OF KENYA) states 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".

The cause of action having accrued **"between 1994 and 1995"**, by the Plaintiffs own pleadings, this suit which was filed on 9th November 2015 was clearly filed well out of time. Even assuming that this suit could be saved by the provisions of Section 26 of the Limitation of Actions Act which provides for extension of time in Cases of fraud, there is no evidence placed before this Court to demonstrate that this suit comes under that provision. If anything, it is clear from the 1st defendant's defence that the acts complained of took place in the 1990's. The

2nd defendant has pleaded on its part that it occupied land Parcel No. KIMILILI/KAMUKUYWA/2268 as far back as 1994 and is still in occupation thereof although the title was only obtained in 2002. Even assuming that the Plaintiff only became aware about any fraud in 2002, which has not been pleaded, this suit is still statute barred. In any case, the 2nd defendant having occupied the land parcel No. KIMILILI/KAMUKUYWA/2268 as far back as 1994, the Plaintiff could, with reasonable diligence, have discovered that fraud at that time and did not have to wait until 2015 to file this suit. It is therefore clear that this suit is statute barred and cannot provide a basis upon which the Applicants application to be enjoined can be considered. That application can only suffer the same fate of being struck out. Submissions have been raised as to whether the Applicant can properly file pleadings herein on the basis of a power of attorney. In view of my finding that this suit is Statute barred, no purpose will be served in addressing that issue which must await another occasion.

The up-shot of the above is that this suit is struck out for being statute barred and the application dated 9th March 2016 shall suffer the same fate. The Plaintiff shall meet the costs of the 1st, 2nd, 3rd, 4th, 5th and 7th defendants.

BOAZ N. OLAO

JUDGE

19TH JULY 2018

Ruling dated, delivered and signed at Bungoma this 19th day of July 2018 in open Court.

Mr. Anwar for Mr. Olonyi for 1st defendant present

Mr. Khakula for 2nd defendant present

Plaintiff absent

BOAZ N. OLAO

JUDGE

19TH JULY 2018