



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 370 OF 2017 (O.S)

JANE MBIKU MUCHIRA.....PLAINTIFF

VERSUS

KENYA AFRICAN NATIONAL TRADERS

AND FARMERS UNION.....1ST DEFENDANT

REITS CAPITAL LIMITED.....2ND DEFENDANT

LAND REGISTRAR MACHAKOS.....3RD DEFENDANT

RULING

1. This Ruling is in respect to the Notice of Preliminary Objection by the 2nd Defendant dated 31st October, 2017. In the said Notice of Preliminary Objection, the 2nd Defendant has averred that all the proceedings emanating from the purported purchase of land known as Donyo Sabuk/Komarock Block 1/12258 by the Applicant are statute barred; that the purported sale of the suit property to the Plaintiff is null and void for want of the consent of the Board and that the suit should be dismissed in limine.

2. In his submissions, the 2nd Defendant's advocate submitted that the facts of this case are complex in nature; that the green card shows the suit land was transferred to many people who are not parties to this suit and that the issues involved far overwhelm the ambit of operation of an Originating Summons.

3. Counsel submitted that in any event, the Originating Summons is premised on the fact that on 27th February, 1995, the Applicant purchased from the 1st Defendant plot number 4440; that if that is the case, then the suit is statute barred and that the suit should be dismissed on that ground.

4. The 2nd Defendant's advocate finally submitted that the transaction in respect of the suit land offends the provisions of Section 6 of the Land Control Act; that the suit property falls within such property that requires the consent of the Land Control Board to transact and that the Sale Agreement that was entered into between the Applicant and the 1st Defendant became voidable after the laps of six (6) months from the day of signing. Counsel relied on several authorities which I have considered.

5. On his part, the Plaintiff's advocate submitted that the Plaintiff purchased plot number 4440 from the 1st Defendant in 1995; that in the year 2000, the Plaintiff developed the suit land by putting up four (4) classes and that the cause of action arose in this matter in the year 2017 when the Plaintiff found out that the suit land had been transferred to the 2nd Defendant.

6. Counsel submitted that courts of justice should strive to sustain suits rather than dismiss them. The Plaintiff's advocate did not submit on the issue of the validity of the Sale Agreement viz-a-viz the provisions of Section 6 of the Land Control Act.

7. This suit was commenced by way of an Originating Summons dated 7th September, 2017. In the said Summons, the Plaintiff is seeking for the following orders:

a. That this Honourable Court do order that the property known as Donyo Sabuk/Komarock Block 1/12258, is the property of the Plaintiff; owing and due to the fact that the Plaintiff bought the said property from the 1st Defendant and has all proper documentation on that regard.

b. That this Honourable Court do order that the 1st Defendant had no authority to deal with the property known as Donyo Sabuk/Komarock Block 1/12258, owing and due to the fact that he had rightfully sold the said property to the Applicant on or about 27th February, 1995.

c. That the 1st Defendant by himself, his tenants/servants and/or agents or any other occupants do forthwith deliver and give vacant possession of Donyo Sabuk/Komarock Block 1/12258 together with the Title Deed therefore to the Plaintiff.

d. That this Honourable Court do order that the 2nd Defendant is a trespasser on the said property and be restricted by way of injunction from further dealing on the said property.

e. That this Honourable Court do order the 3rd Defendant to issue Title Deed of the property known as Donyo Sabuk/Komarock Block 1/12258, to the Plaintiff.

f. That the costs of this suit be awarded to the Plaintiff.

8. The Summons are based on the grounds that the 1st Defendant sold to the Plaintiff the suit land in 1995; that when he visited the registry, he found that the 1st Defendant had transferred the suit land to the 2nd Defendant and that no consent or authority to sale the suit land has ever been executed and delivered by the Plaintiff.

9. The Plaintiff averred in the Summons that despite being aware of his fraudulent actions regarding the suit land, the Plaintiff proceeded to claim for more money from the Plaintiff.

10. The Plaintiff annexed on his Affidavit a copy of the register showing how the suit land was transferred from the 1st Defendant to one Nancy Wambui Mungai in the year 2000, then to Samuel Kibe Kamau in the year 2007 and lastly to the 2nd Defendant in the year 2017.

11. The 1st Defendant has raised three (3) preliminary points of law that he wants this court to determine. The said issues are, firstly, whether the commencement of the suit by way of an Originating Summons is permissible, secondly, whether the Sale Agreement between the Plaintiff and the 1st Defendant is null and void for want of the consent of the Board and lastly, whether the suit is time barred.

12. It is apparent from the Originating Summons that the Plaintiff is seeking for the cancellation of the Title Deed that was issued to the 2nd Defendant, and the titles that had been issued to Nancy Wambui and Samuel Kibe Kamau in respect of the suit land. It is also apparent that the Plaintiff's suit is premised on the validity or otherwise of the Sale Agreement dated 10th December, 1994 between himself and the 1st Defendant.

13. The filing of suits is governed by the provisions of the Civil Procedure Rules, 2010. Order 3 Rule 1 of the Civil Procedure Rules provides that every suit shall be instituted by presenting a Plaint to the court, or in such other manner as may be prescribed. Other than commencing a suit by way of a Plaint, the Civil Procedure Rules also prescribes the commencement of a suit by way of Originating Summons in very limited instances. The law relating to the commencement of suits by way of Originating Summons is governed by the provisions of Order 37 of the Civil Procedure Rules and Case law.

14. The circumstances under which a suit can be commenced by way of an Originating Summons was stated by the Court of Appeal in the case of *Wepukhulu vs. Secretary Board of Governors Buruburu Secondary School (2000) 1KLR 473*. In the said matter, the court held as follows:

“The procedure of Originating Summons is designed for summary or ad hoc determination of point of law, construction of certain specific facts or obtaining specific directions of the court such as trustees... the procedure should not be used for the determination of matters that involve serious questions or determination of disputed questions of fact...”

15. In the case of *Cyril J. Haroo & Another vs. Uchumi Services Ltd & 3 others (2014) eKLR*, this court held as follows:

“26. However, Order 37 Rule 8 of the Civil Procedure Rules expressly prohibits this court to entertain a claim for cancellation of a title registered under the Registered Land Act by way of an Originating Summons. The simple explanations for this provision of the law is that a title can only be cancelled by the court after evidence has been tendered to show that the same was procured fraudulently or by mistake. To prove fraud, one has to examine in detail the documents that led to the acquisition of the said title, examination and cross-examination of the people who were involved in the processing of the title and sometimes the calling of expert witnesses or the officials from the Ministry of Lands and other relevant institutions. It therefore follows that cancellation of a Title Deed or a Certificate of Lease is not a simple issue which can be decided by way of an Originating Summons thus the provisions of Order 37 Rule 8.”

16. In *Kibutiri vs. Kibutiri (1983) KLR1*, Law J.A held as follows:

“The scope of an inquiry which could be made on an Originating Summons and the ability to deal with a contested case was very limited. When it comes obvious that the issues raise complex and contentious questions of facts and law, a Judge should dismiss the Summons and leave the parties to pursue their claim by ordinary suit.”

17. In the present suit, the court can only revert the suit land to the Plaintiff after ascertaining that indeed the suit land was registered in the

name of the 2nd Defendant either fraudulently or by misrepresentation. The examination of the transactions in respect of the suit land raises complex issues that cannot be dealt with by way of an Originating Summons.

18. Indeed, Order 38 Rule 3 of the Civil Procedure Rules does not allow the commencement of a suit where a question affecting the existence or validity of the contract is in issue. Order 38 Rule 8 of the Civil Procedure Rules also does not allow the commencement of a suit in respect of matters pertaining to the cancellation of a title pursuant to the provisions of Section 143 of the Registered Land Act (*repealed*). Consequently, the claim by the Plaintiff in this matter cannot proceed by way of an Originating Summons. The claim therefore falls on that ground.

19. Section 6 of the Land Control Act invalidates any transaction in land described as agricultural land unless parties can prove that they obtained the consent of the Land Control Board before the lapse of six (6) months. However, that issue can only be dealt with conclusively after trial. I shall therefore not make any finding on whether the transaction between the Plaintiff and the 1st Defendant is null and void for want of the consent of the Board at this stage.

20. Although Section 7 of the Limitation of Actions Act prohibits a party from recovering land after the end of twelve (12) years from the date when the right of action accrued, the issue of when the Plaintiff discovered about the transfer of the suit land to the 2nd Defendant, which is the date on which the right of action accrued, can only be determined by the court after trial, and not by way of a Preliminary Objection.

21. For those reasons, the 2nd Defendant's Notice of Preliminary Objection succeeds on the ground that the suit was wrongly instituted by way of an Originating Summons. The Plaintiff's Originating Summons dated 7th September, 2017 is therefore struck out with costs to the Defendants.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF OCTOBER, 2018.

O.A. ANGOTE

JUDGE