



REPUBLIC OF KENYA
IN THE ENVIROMENT AND LAND COURT
AT MACHAKOS

E.L.C. CASE NO. 79 OF 2013

PHILLIP MUTISO KIMOMO.....PLAINTIFF

VERSUS

FRANCIS MWIKYA KALINZOYA.....DEFENDANT

RULING

The Plaintiff filed this suit together with an Application dated 1st October, 2013 seeking for injunctive orders.

However, on 6th November, 2013, the Defendant filed a Preliminary Objection dated 5th November, 2013 in which he averred that he is the registered proprietor of the suit property and that the Plaintiff has no specific interest in the subject matter and therefore lacks the *locus standi*.

According to the Defendant's Preliminary Objection, the suit is time barred pursuant to the provisions of Section 7 of the Limitation of Actions Act. This Ruling is in respect to the said Preliminary Objection.

In his submissions, the Defendant's advocate submitted that the parties herein entered into an agreement dated 30th April, 1970; that the Plaintiff relinquished his right in the property after selling it and that the suit is defective, misconceived, time barred and devoid of merit.

The Plaintiff's advocate submitted that the Defendant was only allowed to occupy the Plaintiff's house as a brother-in-law and that the suit is not an abuse of the court process because it raises discernible questions which can only be answered after a full hearing and not by way of a Preliminary Objection.

Counsel submitted that the Plaintiff only established in the year 2013 that in January 1983, the Defendant had effected registration of the suit property in his name and that Section 7 of the Limitation of Actions is not an absolute bar on commencing legal action for the recovery of land.

The Plaintiff's counsel further submitted that the Preliminary Objection does not meet the requirements of a Preliminary Objection as set out in the case of **Mukisa Biscuit vs West End Distributors**.

I have considered the submissions, the Affidavits on record and the authorities.

In his Pleint, the Plaintiff has averred that he inherited the suit property from his parents. However, **it is** the Plaintiff's case that in the year 1973, he bought another piece of land in Kilala area, Makueni County where he stayed with his family members.

The Plaintiff has averred that while he was living in Kilala, the Defendant, who is his brother-in-law moved into his house situated on the suit property with his permission; that during the adjudication process in the year 1983, the Defendant fraudulently registered the suit property in his name and that the said title should be cancelled.

In his Affidavit in support of the Application for injunction the Plaintiff deponed that he only learnt that the suit property had been registered in favour of the Defendant in June 2013 when he applied for a copy of the green card.

In his Defence, the Defendant has averred that he purchased the suit property from the plaintiff in 1973.

Considering that the Plaintiff's case is that the Defendant fraudulently had the suit property registered in his name, while the Defendant's case is that he purchased the land from the Plaintiff, there is a joinder of issue.

Having admitted that the Plaintiff owned the suit property at some particular point in time, the Defendant cannot claim at this stage that the plaintiff's suit is an abuse of the court process.

It is only after trial that the court will be able to ascertain what actually transpired.

If the Defendant's case is that this suit is time barred, then he should raise this issue as a Defence and canvass it at the hearing.

Indeed, it is only after hearing the witnesses that the court will be able to ascertain whether time started to run when the suit property was registered in favour of the Defendant or when the Plaintiff actually came to know that the land had been registered in favour of the Defendant, and if so, when.

It is for those reasons that I find the Notice of Preliminary Objection dated 5th November, 2013 to be unmeritorious. The Preliminary Objection is therefore dismissed with costs.

Dated, signed and delivered in Machakos this 27th day of **January, 2017.**

O. A. ANGOTE

JUDGE