



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.250 OF 2013

DAVID OUMA OKORE.....PLAINTIFF

VERSUS

MARTIN OTIENO OPIACHA1STDEFENDANT

THE DISTRICT LAND REGISTRAR NYANDO DISTRICT.....2ND DEFENDANT

RULING

1. The court was moved by **Martin Otieno Opiacha**, the 1st Defendant, vide notice of motion dated 9th November 2013 to strike out the suit commenced by **David Ouma Okore**, the Plaintiff, through the plaint dated 24th September 2013, for failure to disclose a cause of action and being time barred. The application is based on four grounds on its face summarized as follows:

- a. That the pleadings are in breach and offends the mandatory provision of **Order 2 Rule 16** of Civil Procedure Rules.
- b. The purported cause of action is statutory time barred by dint of **Section 4 and 7 of the Limitation of Actions Act** Chapter 22 of Laws of Kenya.
- c. The suit is nullity on account of **Section 7 of Land Act 2012**.

2. The application is opposed by the Plaintiff through the seven grounds in the grounds of opposition dated 13th November 2013, summarized as follows;

- a. That the pleadings were duly signed by an advocate.
- b. That **Section 7 of the Land Act No.6 of 2012** supports this suit.
- c. That the title to the suit land passed through the operations of law to the Plaintiff as administrator of the estate of Ludia Sigu Nyahanga.
- d. That **section 26 of the Limitation of Actions Act** provides for time to start running from the moment a litigant discovers the fraud or mistake.
- e. That the application will prejudice the rights of the Plaintiff as enshrined in **Article 48 and 50 (1) of the Constitution** and the suit should be heard and determined on merit.
- f. That the application is an abuse of the due process of the court.

3. The matter came up for hearing on 8th September 2016 when direction on filing of written submissions were given. The counsel for the Plaintiff filed theirs dated 9th October 2016 on the 10th October 2016, while counsel for the 1st Defendant filed theirs dated 11th October 2016 on the same date.

4. The following are the issues for determination:

- a. Whether the suit discloses a reasonable cause of action.
- b. Whether the suit is statutory time barred.
- c. What orders to issue
- d. Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, written rival submissions, pleadings filed, and come to the following determination:

- a. That the pleadings in the plaint dated 24th September 2013, at paragraph 10, indicates that it was in the year 2004 that the Plaintiff discovered that the 1st Defendant had **“fraudulently misrepresented to the Lands Officer that the suit parcel had been transferred to him by my grandmother Ludia Sigu Nyahanga (deceased)”**.
- b. That though actions to recover land become time barred after 12 years under **Section 7 and 17 of the Limitation of Actions Act** Chapter 22 of Laws of Kenya, the provision of **Section 26** of the same Act states that in actions based on fraud, mistake and ignorance of fact, the time starts to be counted from the time the fraud or mistake was discovered or could have been discovered with reasonable diligence.
- c. That the pleadings in the plaint especially paragraphs 8, 10 and 11 leaves no doubt that this suit is based on fraud and misrepresentation in the acquisition of land attributed to the 1st Defendant and which came to the knowledge of the Plaintiff in 2004.
- d. That the time within which to recover the suit land started to run, as against the Plaintiff, in 2004 and by the time this suit was filed on 24th September 2013, a period of about (9) nine years had lapsed.
- e. That in view of the finding in (d) above, this suit is not statutory time barred.
- f. That the Plaintiff has availed a copy of a grant of letters of administration issued to one Norah Adhiambo Odhiambo and himself in Kisumu H.C. Succession Cause No.523 of 2012 on the 19th February 2013, in respect to the estate of Ludia Sigu Nyahanga, deceased. That the said deceased is described at paragraph 7 of the plaint as grandmother to the Plaintiff.
- g. That the said deceased was the first registered proprietor of the land parcel **Kisumu/Sidho East/7** which is the suit land herein. The Plaintiff undoubtedly has beneficial interests over the said land as a grandson to the said deceased.

6. That from the foregoing, the court finds that the 1st Defendant’s notice of motion dated 9th November 2013 has no merit and is dismissed with costs to the Plaintiff.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 22nd DAY OF FEBRUARY 2017

In presence of;

Plaintiff Absent

Defendants Absent

Counsel Mr. Lore for Onyango for 1st Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/2/2017

22/2/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mr. Lore for Onyango for 1st Defendant

Court: The ruling delivered in open court in presence of Mr. lore for Onyango for 1st Defendant only.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/2/2017