



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.3 OF 2013

ROSE MUREWE OMWARE.....PLAINTIFF

VERSUS

MARICUS OTIENO SEWE1ST DEFENDANT

DAVID OTIENO NYASIO.....2ND DEFENDANT

RULING

1. David Otieno Nyasio, the 2nd Defendant, through paragraph 3 and 6 of his amended defence dated 6th May 2015, raises the following issues of law;

- a) That this suit is time barred as he obtained the title deed more than 12 years before the suit was instituted and should therefore be struck out and or be dismissed with costs.
- b) The Plaintiff lacks locus standi to institute this suit and the court lacks jurisdiction to entertain the suit that discloses no reasonable cause of action.

2. The matter came up for hearing of the main suit on the 21st November 2016 and after hearing Mr. Kowino and Mr. Abande, learned counsel for the Plaintiff and the 2nd Defendant respectively and the 1st Defendant in person, the court directed that the 2nd Defendant's preliminary objection be heard first. The following is a summary of the two counsel and 1st Defendant submissions;

a) 2ND DEFENDANT'S COUNSEL SUBMISSIONS

- That the copy of the title deed for land parcel **South Ugenya/Ruwe/83** in the 2nd Defendants list of documents dated 12th February 2013 indicates that the 2nd Defendant got registered as proprietor of the land on 3rd April 1998 which was more than 12 years before this suit was filed.
- That as the Limitation of Actions Act requires action for recovery of land to be commenced before 12 years lapses, the Plaintiffs suit is therefore time barred and should be struck out with costs.
- That the Plaintiff has not pleaded fraud, mistake or misrepresentation in the process leading to the 2nd Defendant registration with the land. That the Plaintiff has also not pleaded that she had not known that the 2nd Defendant had got registered as proprietor of the land.
- That the sale agreement attached to the 2nd Defendant's list of documents shows that the 2nd Defendant bought the land from Joseph Onyunde Owino, who was a son to the late Ayub

Owino Langila who was the initial registered proprietor of the suit land. That the said Joseph Onyunde had taken out letters of administration in Siaya R.M. Succession Cause NO.32 of 1996 as confirmed in G.N.2982 of 17th May 1996.

- That the plaintiff has no locus to institute this suit and it should be struck out.

1ST DEFENDANT'S SUBMISSIONS;

- That he represent the late Joseph Onyunde who was his uncle.
- That the land belongs to the clan and the Plaintiff has capacity to file the suit.
- That 2nd Defendant had leased the land from Joseph Onyunde for ten years and that the 2nd Defendant was to construct a house for Joseph Onyunde and meet the costs of registering the land in his name. That later Joseph Oyunde filed a caution on the land and the 2nd Defendant stopped using the land and only started using it again after his death.

b) PLAINTIFF'S COUNSEL SUBMISSIONS;

- That though the 2nd Defendant claims that he got registered with the land on 3rd April 1998, the certificate of official search in respect of the same land indicates the date of registration as 2nd April 2003.
- That the pleadings filed by the Plaintiff alludes to the existence of trust and fraud. That time for limitation started to run after the Plaintiff discovered that the 2nd Defendant had had the land registered in his name. That the Plaintiff has not disclosed when that was, and the court cannot therefore make a finding that over 12 years has lapsed.
- That though the 2nd Defendant refered to the gazette notice under which Succession No.32 of 1996 Siaya was gazetted, there is no confirmation that a grant was issued and or confirmed before the land was transferred to the 2nd Defendant.
- That in the absence of a confirmed grant issued to Joseph Onyunde over the estate of the late Ayub, it is only the Plaintiff who has capacity to sue over the land based on trust.

3. The following are the issues for the determination by the court:

- a) Whether the suit should be struck out for being time barred and the Plaintiff's lack of capacity to sue.
- b) What orders to issue
- c) Who pays the costs.

4. The court has considered the two grounds of preliminary objection, submissions by the two counsel and 1st Defendant, the pleadings filed and come to the following conclusions;

- a) That the Plaintiff commenced this suit through the plaint dated 3rd January 2013 and amended on the 3st March 2015.
- b) That the initial Defendants were Joseph Onyunde Owino and David Otieno Nyasio, the 2nd Defendant.
- c) That Joseph Onyunde Owino, who was the 1st Defendant,

passed on and vide application dated 13th May 2014 that was heard on 25th June 2014, Maricus Otieno Sewe, the current 1st Defendant, was substituted for the deceased.
- d) That this court takes note that the Plaintiff's pleadings were filed in person and that her claim

was against the persons who had been registered with the suit land on the 2nd April 2003. That the copy of the certificate of official search dated 15th October 2012 shows that the initial 1st Defendant, namely Joseph Onyunde Owino, got registered with the suit land on the 2nd April 2003 under entry number 2 while under entry number 3 of the same date, the 2nd Defendant got registered as the proprietor.

e) That taking it that the 2nd Defendant got registered with the suit land on 3rd April 2003, and as the suit was filed on 3rd January 2013, then only about ten years had lapsed and the suit may not be time barred. That the court is aware that the 2nd Defendant position is that he became the registered proprietor the 3rd April 1998 and therefore over 12 years had lapsed by the time the suit was filed. That in case the date given by the 2nd Defendant is the correct one, then a period of about 15 years had lapsed by the time the suit was filed.

f) That as the Plaintiff and the 2nd Defendant have availed copies of documents allegedly obtained from the Land Registrar over the same land but carrying different year of the 2nd Defendant registration as proprietor, the court is not in a position to pronounce itself on the point of law of limitation. That the issue will have to wait for evidence to be called before it can be determined.

g) That on the issue of locus standi (capacity), this suit was commenced when Joseph Onyunde Owino was alive. The 2nd Defendant's case is that the land was transferred to him by the said Joseph Onyunde Owino who was a beneficiary of the estate of the registered proprietor, the late Ayub Owino Rangila. The court has noted that none of the parties has availed a confirmed grant in respect of the estate of the late Ayub Owino Rangila. The counsel for the Plaintiff submitted that the Plaintiff claim is based on trust and that she therefore has capacity to file this suit. The learned counsel has also alluded to the existence of fraud in the process leading to the 2nd Defendant registration with the suit land.

h) That flowing from the finding in (g) above, the court is of the view that the pleadings filed by the Plaintiff need to be amended to specifically set out the particulars of trust and or fraud attributed to any of the Defendants. The amendments would also allow the Plaintiff to disclose the date when she discovered that the land had been transferred from the name of the late Ayub Owino Rangila among others.

5. That in view of the foregoing and remembering that pleadings should only be struck out in clearest of cases that for example, cannot be sustained through amendments, the court orders as follows:

a) That the 2nd Defendant's preliminary objection on the grounds of locus and limitation is without merit and is rejected with costs in the cause.

b) That the court on its own motion directs that the Plaintiff do file and serve a further amended plaint within 21 days detailing among others, the particulars of fraud and or trust, date of discovery of the fraud, if any, and the prayers sought in view of the fact that the 2nd Defendant hold a title to the suit land.

c) That upon the Defendants being served with the further amended plaint, they will have corresponding leave to file and serve amended statements of defence as appropriate.

d) That the parties do comply with **Order 11 of Civil Procedure Rules** within the same timelines that they will be filing the amended pleadings as ordered in (b) and (c) above.

e) That the matter be mentioned before the Deputy Registrar to confirm compliance as directed above before a hearing date for the main suit is fixed.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 22ND DAY OF MARCH 2017

In presence of;

Plaintiff Present

Defendants 1st present

Counsel None

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/3/2017

22/3/2017

S.M. Kibunja Judge

Oyugi Court Assistant

1st Defendant present

Court: Ruling dated and delivered in open court in presence of the Plaintiff and the Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/3/2017