



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 24 OF 2015

EZEKIEL KAMAU.....PLAINTIFF/RESPONDENT

VERSUS

STANDARD CHARTERED BANK LIMITED.....1ST DEFENDANT /APPLICANT

GITCO AUCTIONEERS.....2ND DEFENDANT/APPLICANT

CYRUS MUCEBIU IRUNGU.....3RD DEFENDANT

RULING

By a plaint filed herein on 6th March 2015, the plaintiff sought judgment against the defendants in the following terms:

(a) A declaration that the statutory notice dated 26th May 1993 was and is not a valid statutory notice and the same be struck off.

(b) A declaration that the plaintiff is the legal owner of the suit property.

(c) Any title documents for the suit property purportedly issued to the 3rd defendant or any other person be nullified.

(d) Judgment against the 1st, 2nd and 3rd defendants for the sum of Ksh. 6,000,000.00 plus interest calculated at current commercial bank interest rate from the time of the public auction to 22nd September 2014.

(e) General damages for loss of user of the land.

(f) Any other relief which this Honourable Court deems fit to grant.

The genesis of this claim is that at all material times, the plaintiff was and is the legal registered owner of L.R No. NGARIAMA/LOWER NGARIAMA/514 situated in Kirinyaga District (the suit land) and on 18th April 1991, the 1st defendant advanced him a loan of Ksh. 100,000.00 secured by a charge over the suit land to be repaid over a three (3) years period through loan account No. 0120108256012 at Karatina Branch. The plaintiff only withdrew Ksh. 50,000.00 on 18th April 1991 leaving a credit balance of Ksh. 50,000.00 in the account and continued to diligently repay his loan with the 1st defendant. In 1993, the plaintiff was served with a statutory notice dated 26th May 1993 from the 1st defendant to the effect that the 2nd defendant had been contracted to exercise the statutory power of sale of the suit land since the plaintiff had defaulted in servicing his loan account and allegedly owed the 1st defendant Ksh.

138,396.75 yet the plaintiff had fully cleared his indebtedness with the 1st defendant. It is the plaintiff's case that the 1st defendant connived with the 2nd defendant to illegally sell the suit land to the 3rd defendant at a public auction on 18th November 1993 despite the plaintiff's protestation and as a result, the plaintiff lost his property valued at Ksh. 6,000,000.00 which was transferred to the 3rd defendant. Particulars of fraud are pleaded in paragraph eleven (11) of the plaint.

The 1st and 2nd defendants filed a joint defence denying that the plaintiff had diligently re-paid the loan sum adding that there was an outstanding balance of Ksh. 138,396.75 which resulted in a statutory notice being issued to the plaintiff on 26th May 1993. The 1st and 2nd defendants denied acting in connivance to sell the suit land through a public auction on 18th November 1993 and added that notwithstanding the issuance of the statutory notice, the plaintiff failed to settle the outstanding loan balance within the prescribed period and so the 1st defendant instructed the 2nd defendant to issue a redemption notice and advertised the suit land for sale and it was transferred to the 3rd defendant. The 1st and 2nd defendants denied the allegations of fraud adding that the sale was conducted lawfully and above board. The 1st and 2nd defendants finally pleaded that this suit is incompetent, bad in law and offends the provisions of the ***Limitation of Actions Act*** and they would be seeking its striking out in limine.

Two years later, and precisely on 29th January 2016, the 1st and 2nd defendants citing ***Order 2 Rule 15 (b) (c) and (d) of the Civil Procedure Rules*** filed a Notice of Motion seeking to have the suit against them struck out and dismissed with costs. The application was premised on the grounds set out therein and supported by the affidavit of **JANE CHEGE** the 1st defendant's Legal Counsel. The gravamen of that application is that the plaintiff's suit is frivolous, vexatious and an abuse of the Court process as it is time barred by virtue of the ***Limitation of Actions Act*** and therefore this Court lacks jurisdiction. Further, that the reliefs sought are not available to the plaintiff by dint of ***Section 77 (3) of the repealed Registered Land Act***. **JANE CHEGE** then proceeds to narrate the history of this dispute which is that on or about 18th April 1991, the plaintiff was advanced a loan of Ksh. 100,000.00 by the 1st defendant which was secured by a charge over the suit land but failed to honour the terms thereof thus entitling the 1st defendant to exercise its statutory power of sale to recover the outstanding amount. The 1st defendant therefore instructed the 2nd defendant to advertise and sell the suit land by way of public auction to recover the outstanding amount. That was done on 19th November 1993 and the suit land was sold to the 3rd defendant who holds a valid title thereto. That since the plaintiff's suit seeks recovery of land, it ought to have been filed latest by May 2005 and in any event, it is caught by the provisions of ***Section 77 (3) of the repealed Registered Land Act Chapter 300 Laws of Kenya***. This Court therefore lacks jurisdiction to handle this matter.

In opposing the application, the plaintiff filed a replying affidavit admitting that on 18th April 1991, the 1st defendant advanced him a loan of Ksh. 100,000.00 secured by a charge over the suit land but he only withdrew Ksh. 50,000.00 from the loan account leaving a credit balance of Ksh. 50,516.15. He diligently re-paid the loan but in 1993, he was served with a statutory notice dated 26th May 1993 claiming that he had defaulted in repaying the loan and that the outstanding balance was Ksh. 138,396.75. That despite his protests, the 1st and 2nd defendants connived and sold the suit land to the 3rd defendant in a public auction on 18th November 1993. That he demanded bank statements from the 1st defendant but the same were not supplied. On 28th October 2011, the 1st defendant wrote to him admitting to have understated the balance on his account due to a "***system error***" (annexture **EKK 3** and **EKK 4**) and later wrote to him on 22nd September 2011 saying it was un-able to account for the sum of Ksh. 50,000.00 (annexture **EKK 5**). That he therefore seeks to challenge the 1st defendant's exercise of its statutory power of sale on grounds of fraud or mistake and also recover damages for the loss of his property which remedy is available to him by virtue of ***Section 77 (3) of the repealed Registered Land Act***. That ***Section 26 of the Limitation of Actions Act*** allows for the extension of time in cases of fraud or mistake and this suit is therefore not barred by the ***Limitation of Actions Act*** since the 1st defendant has been engaging him with correspondences the last letter being one dated 12th June 2014. The 1st defendant should therefore not benefit from the "***system error***" and striking out the plaint would be draconian.

The application was canvassed by way of written submissions which have been filed by the firm of **ISEME KAMAU & MAEMA** Advocates for the 1st and 2nd defendants and **MUTITU THIONGO & CO.** Advocates for the plaintiff.

I have considered the application, the rival affidavits and annextures thereto and the submissions by counsel.

The 1st and 2nd defendants seek the striking out of the plaint herein on the grounds that it is frivolous, vexatious and an abuse of the Court process. Further, that the suit is barred by the **Limitation of Actions Act Chapter 22 Laws of Kenya** and in any event, the remedies sought are not available to the plaintiff by virtue of **Section 77 (3) of the repealed Registered Land Act**. I shall examine all those grounds.

THE SUIT IS FRIVOLOUS, VEXATIOUS AND AN ABUSE OF THE COURT PROCESS:

A matter is frivolous if it has no substance, is fanciful or where a party is trifling with the Court – **DAWKINS VS PRINCE EDWARD OF SAVE WEIMBER (1976) 1 QBD 449**. A pleading is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety trouble and expense – **BULLEN & LEAKE and JACOBS PRECEDENTS OF PLEADING 12TH EDITION**. A vexatious matter has no foundation, has no chance of succeeding and is brought merely for purposes of annoyance. **BLACK'S LAW DICTIONARY 9TH EDITION** defines frivolous as:

“Lacking a legal basis or legal merit; not serious; not reasonably purposeful”

The same dictionary defines a vexatious suit as one which is:

“..... instituted maliciously and without good grounds, meant to create trouble and expense for the party being sued”.

Looking at the pleadings herein and the various documents availed, I am not in the least persuaded that the plaintiff's suit has no substance or that he is trifling with the Court or merely aims at causing the defendants unnecessary anxiety, trouble and expense. It is common ground that the plaintiff's property was secured for a loan of Ksh. 100,000.00 but was later sold because he allegedly defaulted, a claim which he denies. The 1st defendant has itself admitted a “**system error**” and even offered the plaintiff a refund – see plaintiff's (annexture **EKK 3**). The defendants claim that this suit is vexatious, frivolous and an abuse of the Court process is clearly not well founded and must be rejected. This is not the type of suit in which this Court can employ the draconian measure of striking it out. I must reject any invitation to do so. Serious issues that require to be interrogated by this Court in a full trial have been disclosed by the pleadings.

SUIT IS BARRED BY THE LIMITATION OF ACTIONS ACT:

The 1st and 2nd defendants submit that the plaintiff's claim seeks to recover land and is therefore barred by **Sections 7 and 14 of the Limitation of Actions Act** since he had twelve (12) years from 18th November 1993 to lodge any claim to challenge the exercise of the statutory power of sale. **Section 7 of the Limitation of Actions Act** provides 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”.

Section 14 of the same Act provides as follows:

“Where a mortgagee of land has been in possession, as mortgagee, of any of the mortgaged land for a period of twelve years, no action to redeem the land of which the mortgagee has been so in possession may thereafter be brought by the mortgagor or any person claiming through him”.

It is however clear that **Section 26 of the same Limitation of Actions Act** provides for extension of the limitation period in cases of fraud by the defendant or where the action is concealed by fraud or where the action is for relief from the consequence of a mistake. In such cases, the period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake or could with reasonable diligence have

discovered it. The same section provides that it does not enable an action to be brought to recover or enforce any mortgage upon or set aside any transaction affecting any property which:

(i) “In the case of fraud, has been purchased from a valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made” Emphasis added

It is therefore clear from the above that only an innocent purchaser who was not a party to the fraud or who did not know of the mistake or have reasons to believe that the mistake had been made, can be protected by the provisions of **Section 26 of the Limitation of Actions Act**. The plaintiff has pleaded fraud against all the three defendants in this case which include collusion as per paragraph 11 of his plaint. Whether or not there was fraudulent conduct by the defendants is not a matter to be determined in an application such as this but is a matter to be determined by evidence during the trial. The plaintiff has pleaded in paragraph 14 of his replying affidavit that this suit is not barred by the **Limitation of Actions Act** since the 1st defendant has been engaging him with correspondences the last one being dated 12th June 2014 and therefore it should not benefit from its “**system error**”. He has annexed to his replying affidavit a letter addressed to him by the 1st defendant (annexture **EKK 3**) part of which reads as follows:

“Based on the available documents and statements of your account, the balance carried forward on 19th April 1991 was understated by Kes 50,516.15 due to what was clearly a system error. This is the only sustainable claim we could establish”

That letter is dated 28th October 2011. In the same letter, the 1st defendant refunded to the plaintiff the sum of Ksh. 159,390 on account of that “**system error**”. So if the mistake was discovered in 2011 and this suit was filed in 2015, the **Limitation of Actions Act** would not be a bar to the plaintiff’s claim.

The 1st and 2nd defendants have also submitted that the reliefs sought by the plaintiff are not available by dint of the provisions of **Section 77 (3) of the repealed Registered Land Act**. The provision provides as follows:

“A transfer by a chargee in exercise of his power of sale shall be made in the prescribed forum, and the Registrar may accept it as sufficient evidence that the power has been duly exercised, and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power”.

A similar provision is found in **Section 99 (4) of the Land Act 2012** which reads:

“A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power”

It is clear however from the plaintiff’s plaint that apart from pleading for declaratory orders including the cancellation of any title documents issued to the 3rd defendant, he has also sought damages of Ksh. 6,000,000.00 being the value of the suit land and also general damages for loss of user. Therefore, even if the other claims are not available to the plaintiff by virtue of **Section 77 (3) of the repealed Registered Land Act** or **Section 99 (4) of the Land Act 2012**, it is clear from those provisions that the remedy of damages is available and has been properly pleaded in paragraph 14 (d) and (e) of the plaint. There would be no justification therefore for striking out the plaintiff’s suit as sought.

The up-shot of the above therefore is that the 1st and 2nd defendants Notice of Motion dated 26th January 2016 and filed herein on 29th January 2016 lacks merit. It is accordingly dismissed with costs.

B.N. OLAO

JUDGE

21ST APRIL, 2017

Ruling delivered, dated and signed in open Court this 21st day of April 2017

Mr. Wakaba for Plaintiff present

Ms Kiragu for Nyambura for 1st & 2nd Defendants present

3rd Defendant – absent.

B.N. OLAO

JUDGE

21ST APRIL, 2017