



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 379 OF 2016

JOHN ONGUDI OYOO PLAINTIFF

VERSUS

JAPHETH OGOLO OYOO DEFENDANT

RULING

1. The plaintiff vide a plaint dated 8th November 2016 filed in court on 15th November 2016 claims that the defendant who is his brother obtained the registration of land parcel **Kabondo/Kasewe “A”/937** into his name fraudulently. The plaintiff avers that the defendant obtained grant of letters of administration to their late father’s estate fraudulently by concealing material information and used the fraudulent grant to cause the transfer of the suit property to his name which property the plaintiff avers had already been bequeathed to him by their late father before his death and therefore did not form part of the deceased estate.

2. Interalia the plaintiff prays for judgment against the defendant for:-

a. A declaration that the registration of the plaintiff as the proprietor of LR No. Kabondo/Kasewe “A”/937 was fraudulent and same be and is hereby cancelled and directed to be registered in the name of the defendant.

b. Permanent injunction.

c. Costs of the suit.

3. The defendant filed a statement of defence dated 8th December 2016 and denied all the allegations of fraud stating that he lawfully obtained the registration of the suit property in his name through the due process of transmission. The defendant vide paragraph 13 of the statement of defence intimated he would raise a preliminary objection on the grounds pleaded thereunder and on the same day he filed the defence, he simultaneously filed a Notice of Preliminary Objection setting out the following grounds:-

1. The transfer and registration of the suit property in favour of the defendant having been carried out vide Transmission, this Honourable Court is devoid of jurisdiction to entertain and/or adjudicate upon the instant suit.

2. The instant suit is barred and/or prohibited by dint of the provisions of Section 4 of the Limitation of Actions Act, Chapter 22, Laws of Kenya, taking into account the contents of paragraph 6 of the plaint.

3. The instant suit is barred by the provisions of Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya. Consequently, the suit is res judicata.

The suit herein is pre-mature, misconceived and bad in law.

5. The plaint herein and the Notice of Motion application do not disclose any reasonable cause of action against the defendant, whatsoever and/or howsoever.

6. The plaintiff is non-suited.

7. In any event, the property alluded to and which forms the basis of the instant proceedings is non-existent, having been subdivided and hence the orders sought are unmaintainable.

8. In any event, the instant suit and application amounts to and/or constitutes abuse of the due process of court.

4. On 13th December 2016 the court directed the parties to argue the preliminary objection by way of written submissions. The defendant filed his written submissions on 13th January 2017 and the plaintiff filed his response submissions on 10th May 2017.

5. The defendant submits that this court lacks the jurisdiction to deal with the present matter on account of the suit property having been transmitted to the defendant's name pursuant to a confirmed grant of letters of administration which were issued in a succession cause. A confirmed grant of letters of administration in Homa Bay SRM's Succ. Cause No. 50 of 1991 to the estate of Oyoo Ondiek dated 8th November 1993 is attached to the defendant's list and bundle of documents and indicates the whole of land parcel **Kabondo/Kasewe/937** was to be inherited by Japheth Ogolo Oyoo, the defendant herein. The defendant argues that to the extent that there was no challenge to the grant of letters of administration either by way of an application to revoke the same or by way of appeal the plaintiff has no basis to challenge the grant of letters of administration in these proceedings and contends the plaintiff's suit raises no reasonable cause of action and constitutes an abuse of the process of the court. He further submits that the Law of Succession Act, Cap 160 Laws of Kenya sets out a clear procedure and/or process to obtain revocation of any grant of letters of administration that is said to have been fraudulently obtained as alleged by the plaintiff. Relying on the case of the **Speaker of the National Assembly –vs- James Njenga Karume [1992] eKLR** the defendant avers that the plaintiff ought to have strictly followed the process/procedure under the Law of Succession Act to challenge the grant issued to the defendant.

6. The defendant has further submitted that the instant suit is *res judicata* as the land the subject matter in the suit was the subject matter in the succession proceedings that were concluded and further in the Kabondo Land Disputes Tribunal whose decision the defendant appealed to the Provincial Appeals Committee, Nyanza and the decision of the appeal was rendered in favour of the defendant. The defendant in pleading the instant suit is *res judicata* places reliance on the case of **Daniel Kirui & Another –vs- Monica W. Macharia & Another CACA No. 261 2002 (unreported)** where the Court of Appeal held that any matters which should have but were not made part of the claim in an earlier suit are deemed to have been substantially and directly in issue in such suit.

7. The defendant further contends the plaintiff's claim is statute barred on the basis that the same has been brought long after the period of limitation had expired. The defendant argues that the plaintiff's claim is founded on fraud and should have been commenced within 3 years from the time the alleged fraud was discovered. The defendant submits that the plaintiff alleges to have discovered the defendant had fraudulently registered himself as proprietor of the suit property in 1998 which prompted the plaintiff to register a caution over the suit property on 9th December 1998. The defendant argues that the plaintiff was aware or had knowledge that the suit property had been transferred to the defendant way back in 1998 and that to the extent that he based the cause of action on fraud, he ought to have commence the suit not later than 9th December 2001. Consequently, the defendant submits the plaintiff's suit is statutorily time barred and in support of this submission he relies on the case of **Jared IQbal Abdul Rahman &**

Another –vs- Bernard Alfred Wekesa Sambu & Another CACA No. 11 of 2001 (unreported) where the Court of Appeal held that the period for purposes of limitation in suits founded on fraud begins to run from when fraud is discovered. In the case the court stated thus:-

“It is clear from that part of his evidence that the plaintiff conducted search on the title in 1988 and found that the suit land had been sold and transferred to the 2nd and 3rd defendants and these defendants had been registered as the proprietors. That was all he needed to know in order to assert his claim. He did not need a file. So the time started to run for the purpose of limitation from the date in 1988 when he found that the suit land had been sold and transferred to the 2nd and 3rd defendants. And since his claim against these two defendants was based on the tort of fraud, the suit should have been brought within 3 years. It was not. So the claim was clearly time barred and the plaintiff should have been non-suited forever.”

8. The defendant has further submitted that the plaintiff’s suit is an abuse of the court process considering that the defendant was awarded the suit land through the due process of succession and that the confirmed grant of letters of administration have not been revoked. Further having regard to the previous proceedings and the pending suit vide Oyugis SPMCC No. 35 of 2012 the defendant argues the plaintiff’s instant suit is an abuse of the process of the court and should be dismissed.

9. The plaintiff in response to the defendant’s submissions states that the defendant’s preliminary objection does not satisfy the threshold of what constitutes a preliminary objection as articulated by **Charles Newbold, P.** in the case of **Mukisa Biscuits Co. Ltd –vs- West End Distributors Ltd [1969] E.A 696** where he stated:

“...A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercised of judicial discretion.”

10. The plaintiff responding to the submission that this court lacks the jurisdiction to entertain the instant suit argues that article 162(2) (b) of the Constitution confers this court the jurisdiction to hear and determine disputes relating to the environment and the use and occupation of and title to land. The plaintiff asserts that the defendant is challenging title issued to the plaintiff which he claims was issued through a flawed process of transmission and was thus tainted with fraud. He argues that it is only this court which is vested with the jurisdiction to determine this matter with finality. The plaintiff states that the decision of the District Land Disputes Tribunal was not appealed against or that the defendant has not demonstrated that it was, which means the decision of the Tribunal remains valid which entitles the plaintiff to seek the declaratory reliefs sought before this court.

11. On the issue of limitation the plaintiff states that his action is one for the recovery of land and submits that to the extent that there was no appeal against the decision of the District Land Disputes tribunal, the defendant is estopped under the provisions of Section 39 of the Limitation of Actions Act, Cap 22 Laws of Kenya from setting up the defence of limitation.

12. The plaintiff finally submits the preliminary objection on the basis of the suit being *res judicata* is unsustainable because the defendant has not demonstrated that the previous suits had been heard and determined and/or that the issues raised in the instant suit were substantially and directly in issue in the previous suits and had been finally determined.

13. I have set out in brief the rival submissions in support of and in opposition to the preliminary objection. The issue for the court to determine is whether the preliminary objection taken by the defendant satisfies the test in the **Mukisa Biscuits Co. Ltd** case (Supra) that the preliminary objection must relate to a pure point of law to qualify as a preliminary objection. The defendant’s preliminary objection is predicated on the fact that this suit is *res judicata* and further that the court lacks jurisdiction to entertain the suit as the same is statutorily time barred under the Limitation of Actions Act, Cap 22 Laws of Kenya. The issues of *res judicata* and jurisdiction are indeed pure points of law and perfectly fit

in the category of what would be a basis of a preliminary objection. In the case of **Mukisa Biscuits Co. Ltd (supra) Law J.A** stated thus:-

“...so far as I am aware a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

14. In the instant suit the defendant under paragraph 13 of the statement of defence pleaded that the court lacked jurisdiction, that the suit was *res judicata* and that the action was time barred and gave intimation that he would raise a preliminary objection. In the premises, it is my view that the preliminary objection is well taken and the next issue for the court to determine is whether the preliminary objection is sustainable.

15. It is not disputed that the plaintiff and the defendant are brothers and that Oyoo Ondiek (deceased) was their father. Prior to his death, the said Oyoo Ondiek (deceased) was the registered owner of land parcel **Kabondo/ Kosewe “A”/937**. The defendant as per the documentary evidence availed by the parties petitioned for grant of letters of administration for the estate of Oyoo Ondiek (deceased) vide Homa Bay SRM Succession Cause No. 50 of 1991 and was issued a certificate of confirmed grant on 8th November 1993 which showed that land parcel **Kabondo/Kasewe “A”/937** was to be inherited by the defendant wholly. Pursuant to the succession cause the said property was transferred to the name of the defendant through transmission. The defendant subsequently subdivided the land into two portions being land parcels **Kabondo/Kasewe/1711** and **1712** which he registered in his name.

16. The plaintiff claims to be entitled as a heir to land parcel **Kabondo/Kasewe “A”/937** and asserts that his late father had intended that the land would be inherited by him as the last born in accordance with the Luo Customary Law. The plaintiff alleges that the plaintiff obtained the letters of administration over the estate of their late father Oyoo Ondieki fraudulently without the consent of the other beneficiaries. The plaintiff thus contends the registration of the defendant as owner of and parcel **Kabondo/Kasewe “A”/937** was fraudulent.

17. The defendant has countered the plaintiff’s averments maintaining that he was properly and validly issued with the grant through due process and that such grant has not been cancelled and/or revoked. The defendant asserts he was lawfully and validly registered as the owner of suit land through transmission, a fact whereof the defendant has been aware of since 1998. The Law of Succession Act, Cap 160 under Section 76 provides an avenue for an interested party to apply for the revocation of grant that may have been obtained through fraud and/or through concealment of material information. It is not clear or apparent why the plaintiff never sought to have the grant which he claims was fraudulently issued to his brother revoked.

18. Section 76 of the Law of Succession Act, inter alia provides:-

76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

(a) That the proceedings to obtain the grant were defective in substance;

(b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

19. Essentially in this suit what is in issue is the grant that the defendant used to have the suit property transmitted to him. **Was the grant fraudulently obtained by making a false statement or was the grant obtained through the concealment of some material information?** Those are questions which could only be answered or inquired into by the court that issued the grant. Section 76 of the Law of Succession Act envisages that an application for revocation or annulment of the grant would be made in the cause and before the court that issued the grant. This court in my view lacks the jurisdiction to interrogate the validity or authenticity of the grant issued to the defendant which he used to cause the suit property to be transmitted to himself. That duty lies within the province of the court that issued the grant. It is my view therefore to the extent that the grant issued to the defendant has never been successfully challenged, that this court lacks the jurisdiction to entertain the present suit. The comments/observation by the Court of Appeal in the case of the **Speaker of the National Assembly –vs- James Njenga Karume [1992] eKLR** are appropriate in the circumstances of the instant case. The judges stated thus:-

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution and an Act of Parliament, that procedure should be strictly followed.”

20. The Law of Succession Act provides what an aggrieved interested party, where it is alleged a grant has been issued fraudulently, should do. That procedure should be followed to its conclusion. This court has no jurisdiction to annul or revoke a grant yet what the plaintiff is seeking is exactly that because without annulling or revoking the grant issued to the defendant the court cannot lawfully cancel titles issued pursuant to such grant.

21. Having held that this court lacks the jurisdiction to entertain this matter, that is sufficient to dispose of this matter. In the words of Nyarangi, JA in the case of **Owners of the Motor Vessel “Lillian S” –vs- Caltex Oil (Kenya) Ltd [1989] KLR 1** the court lacks the capacity to continue with the case any further. The Judge in the case stated:-

“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

22. Without going into any detailed analysis, I am not satisfied the plea of *res judicata* is sustainable. Considering the issues being raised in the instant suit relate to fraud, I am not able to hold that those are issues that were directly and substantially in issue in the previous suits referred to by the defendant and on that account I would overrule the preliminary objection on this ground.

23. To the extent that the plaintiffs suit is grounded on the tort of fraud which evidence shows the plaintiff became aware of in October 1998 when he caused the land registrar to register an inhibition. On the basis that the plaintiff never challenged the succession proceedings which led the defendant to be registered as owner of the suit property, the present suit would be statutorily time barred. The plaintiff had 3 years to bring the suit from the time he discovered the fraud which he did not do.

24. The upshot is that I uphold the defendant’s preliminary objection on the ground that the court lacks the jurisdiction to entertain the suit and further on the ground that the plaintiff’s suit is statutorily time barred under Section 4 of the Limitation of Actions Act, Cap 22 Laws of Kenya. Even if the claim was for the recovery of land as claimed by the plaintiff, the claim would likewise be time barred under Section 7 of the Limitation of Actions Act, as the action was not commenced within 12 years from the time the cause of action arose, which is, 1998 when the plaintiff discovered the defendant was registered as owner. It is noteworthy that the plaint is not predicated on trust in regard to which limitation does not apply.

25. I accordingly find and hold that the plaintiff’s suit is unsustainable and I dismiss the same with costs to the defendant.

26. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 23rd day of June, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

Okemwa for Begi for the plaintiff

N/A for the defendant

Milcent court assistant

J. M. MUTUNGI

JUDGE