



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C CASE NO. 104 OF 2017

MWENJERI KIBUBA

APPLICANT

VS

WILFRED WARUI KIBUBA

RESPONDENT

DISTRICT SURVEYOR MURANGA

1ST INTERESTED PARTY

DISTRICT LAND REGISTRAR MURANGA **1ST INTERESTED PARTY**

RULING

1. This ruling arises from the suit filed by Plaintiff against the Defendants on 16th August, 2016 seeking the orders stated below;-

a. A declaration that the purported subdivision of Loc.14/Kairo/885 (885) to Loc.14/Kairo/1193 (1193) and Loc.14/Kairo/1194 (1194) was illegally and fraudulently done.

b. The title deeds issued for Loc.14/Kairo/1193 and Loc.14/Kairo/1194 be cancelled and the register be rectified and the name of the Plaintiff be reinstated and the Plaintiff be allowed to repossess his 2.5 acres which is in excess of what the defendant is entitled to.

c. Costs of the suit.

2. In response the 1st Defendant filed a detailed defence on 7th December 2016 and followed by a Preliminary Objection of even date. The Preliminary objection is worded as follows:-

“The Defendant shall at the hearing raise a preliminary objection on the following grounds:-

a. That the claim is Res-judicata.

b. That the claim is statute barred under section 7 and 26 of the Limitation of Act.”

3. The court record shows that the Preliminary Objection had been withdrawn on the record by a verbal application on 4th April 2017 made by 1st Defendant registered by T M Njoroge Advocate who held brief for Mr. Kimunya Advocate. The said Mr Njoroge applied to abandon the application. On that day Mr. Ngige held brief for Mr. Gori for the Plaintiff. However on the 19th April 2017, Messrs Kimunya and Ms. Maina represented the 1st Defendant and the Plaintiff respectively. Mr. Kimunya informed the Court that the 1st Defendant was ready to proceed with the Preliminary Objection as the issues raised are purely on

point of law which could dispose of the suit. The Plaintiffs Advocate agreed with the 1st Defendant Advocate. This appears to create a new situation where an application which had been abandoned is being returned for litigation by consent of the parties all, without a formal application. I can only assume that the reason why the latter lawyers did not raise the fact of the Preliminary Objection having been withdrawn is because both were not on record on the date the Preliminary Objection was withdrawn and are not aware of the proceedings of the day.

4. The court does not accept this sort of behavior from litigants or their Advocates. Nevertheless, I will set aside the order on withdrawal of the Preliminary Objection, deemed it to be now properly on record, hear it and now give my ruling thereon.

5. The Parties agreed to file written submissions by 9th May 2017. Only the 1st Defendant did file his submissions. The Preliminary Objection is therefore undefended by the Plaintiff.

6. The Defendant's Counsel elected not to pursue the Preliminary Objection in respect to *res judicata*. The submissions are on the second limb that the Plaintiff's claim is statute barred under sections 7 and 26 of the Limitation of Actions Act. He relied on the cases of ***Republic vs The Principal Magistrate P Ngare Gesora; Exparte, Nation Media Group Ltd & Others, High Court at Nairobi Judicial Review Miscellaneous Civil Application Number 321 of 2011 (persuasive) and Anaclet Kalia Musau (suing on behalf of the estate of Vincent Mangalo Kalia)-vs-The Honourable Attorney General & 2 others, High Court of Kenya at Nairobi, Civil case number 30 of 2013(persuasive)***.

7. By way of background, the facts as captured from the pleadings are that the Plaintiff and the Defendant are step-brothers. Both were registered as owners of LR Nos. 885 and 1023 respectively. LR No. 885 measured 6 acres and LR Nos. 1023 measured 1 acre. It is the Plaintiff's case that he agreed with the Defendant to exchange ½ an acre from their respective parcels but the Defendant duped him into signing off half of his share of the land i.e 3 acres instead of 0.5 of an acre. The Plaintiff further alleges that he subdivided the land L.R No. 885 into two halves and registered one half in his name, an act which he terms illegal and fraudulent. He has itemized 5 instances of fraud on the part of the Defendant . (Clarify).

8. The Defendant in his defence filed on 7th December 2016 gave a detailed chronology of events surrounding the two sets of titles. He confirms that initially the titles were registered in their names but in trust for the family, their father had two wives thus two houses. That in accordance with Kikuyu Customs, Women were not registered as proprietors of land and so upon the death of his father the parcels were registered in the names of the Plaintiff and the Defendant; each representing each house. That neither he nor the Plaintiff bought the parcels.

9. On or about 22nd December 1982, parcel No.885 was subdivided into two equal portions giving rise to Plot Nos. 1193 and 1194. Plot No. 1193 was registered in the name of the Defendant and 1194 in the name of the Plaintiff. It is stated that the Plaintiff participated fully in the exercise. Needless to say, it was a family decision. Each took possession and planted tea bushes on their portions of the land.

10. In respect to Plot No. 884 measuring 1 acre, the same was sold as it was believed to be under a spell of curses and remained vacant from 1962 – 1973. Later it was sold with the knowledge of the two mothers and the Plaintiff and the proceeds were used to buy Plot No. 1023 from one Wambugu Njururu. This particular land measured 1 acre.

11. Plot 1023 was also subdivided into two portions: 1976 and 1975 and registered in the name of the Plaintiff and the Defendant respectively. Both plots measured 0.5 acres each. He stated that that has been the position on the ground for the last 29 years.

12. The Defendant denied that the parties were to exchange 0.5 acre from each of their parcels. That the trigger to this case is the case filed in ***Murang'a Misc. Application No. 11 of 2014*** seeking the boundaries to be rectified. He attached copies of titles cited above to support his position.

13. The Defendants counsel in his submissions cited section 7 of the Limitation of Actions Act which states as follows;-

“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”.

Following the above provision of the law it may mean that 12 years expired on or about December, 1994. This may be when the cause of action is taken to have arisen. This can only be ascertained on trial.

Section 26 makes provision that does not permit the period of limitation to run until the Plaintiff discovers fraud or a mistake or could with diligence have discovered the fraud or mistake. The suit by the Plaintiff is premised on fraud as itemized by him in his plaint. The point will then be at what point did he discover the fraud. Is it on or around 22nd December 1982, on subdivision or much later? Knowledge of the fraud is important for one to afford the defence of section 26. He has to show that 12 years have not elapsed since he discovered the fraud or that all reasonable diligence would not have helped him to discover the fraud.

14. This being a Preliminary Objection I wish to give the definition of a Preliminary Objection as stated in the case of **Mukisa Biscuit Company Vs Westend Distributors Limited (1969) EA 696** and **Oraro vs. Mbaja [2005] 1 KLR 141** . The gist in the two cases is that for a Preliminary Objection to succeed it must be a pure point of law that has been pleaded and agreed by both sides. Secondly, it should not require the Court to call for evidence of facts to prove the same. Thirdly, it should not be one which requires the Court to exercise discretion.

15. In applying the above to the facts of this case, it is clear that this Preliminary Objection as raised by the Defendant does not qualify to be a Preliminary Objection on pure point of law as it invites this Court to call for evidence to ascertain when time started running for purposes of the matter being statute barred and in view of the fraud pleaded by the plaintiff when the said fraud came to the knowledge of the plaintiff for purposes of The Limitation of Actions Act, Cap 22.

16. In the end I hold that the Preliminary Objection is not merited and proceed to dismiss it with costs to the Plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 13TH JULY 2017.

J. G. KEMEI

JUDGE