



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC CASE NO.92 OF 2013

MESHACK NYAMBERI & 60 OTHERSPLAINTIFF

VERSUS

SERAH KATUMBI MULWA.....1ST DEFENDANT

BONIFACE MUSYOKI2ND DEFENDANT

NDETI KYAMBINU3RD DEFENDANT

MBUKONI HOLDINGS LIMITED.....4TH DEFENDANT

GEOFFREY MUSYOKA MUSEMBI5TH DEFENDANT

RULING

1. On 22nd October, 2013, the Plaintiffs lodged this suit by way of a Plaint dated 18th October, 2013 seeking declaratory injunctive reliefs, *inter alia*. The suit is predicated on the facts that the Plaintiffs bought various portions of land from the 4th Defendant, who in turn had bought the suit land.
2. Defendants Nos. 1, 2 and 3 filed a joint Defence on 6th December, 2013 dated 5th December, 2013. They denied the Plaintiffs' claim and mounted a Counter-claim, seeking declaratory and eviction reliefs against the Plaintiffs.
3. The 4th Defendant filed a Defence on 1st July, 2014 and substantially supported the Plaintiffs' claim.
4. Subsequently, the Plaintiffs amended their Plaint and added the 5th Defendant in the suit. Defendants Nos. 1, 2 and 3 also amended their Defence and Counter-claim to factor in the amendments by the Plaintiffs.
5. The 1st, 2nd and 3rd Defendants filed a Preliminary Objection on 26th September, 2014 dated 5th September, 2014 attacking the claim in the Plaint and sought for the entire suit to be struck out.
6. The parties agreed to canvass the said Preliminary Objection by way of written submissions.
7. The Preliminary Objection raises five (5) substantive grounds namely;
 - *The claim is statue barred under the Limitation of Actions Act.*
 - *The agreement sought to be enforced is null and void for want of the Land Control Board*

Consent.

- *The suit land was vested in the 5th Defendant as a purchaser without any fraud or mistake thus indefeasible under provisions of the Land Registration Act 2012.*
- *There is no privity of contract between the Plaintiffs and the rightful owners or personal representatives of the deceased.*

8. According to Defendants Nos. 1, 2 and 3, the 2nd and 3rd Defendants are the personal representatives of the Estate of a co-proprietor Ruth Munyiva Musyoki, deceased, who had been registered as a co-owner with the 1st Defendant. Defendants Nos. 1, 2, and 3 demanded vacant possession of the suit land from the Plaintiffs thus precipitating the instant suit.

9. The Defendants submitted that under Section 7 of the Limitation of Actions Act, an action for recovery of land cannot be brought after twelve (12) years from the date the right of action accrued to the claimant. They submitted that twelve (12) years lapsed on 17th November, 2009 and that the claim is time barred.

10. On Ground 2, the Defendants submitted that the consent of the Board was not obtained within six (6) months from the date the agreement was entered into contrary to Section 6 of the Land Control Act. Therefore, it was submitted, the agreement is null and void.

11. On Ground 3, the Defendants submitted that the agreement of 18th November, 1997 did not comply with Section 3(3) of the Law of Contract Act in that it was not signed by Serah Kalumbi Mulwa, one of the owners (*1st Defendant*). They relied on the case of ***District Co-operative Union Ltd vs. Philip Nzuki Kiilu C.A. 112/97*** which held that existence of a valid contract is a prerequisite to filing of a suit.

12. On Ground 4, they submitted that the 5th Defendant validly bought the suit land because the 4th Defendant's agreement with the buyer had been vitiated by operation of the law. It was submitted that there was no fraud.

13. The Defendants submitted there is no contract between the Plaintiffs and Defendants Nos. 1, 2 and 3. They relied on the case of ***Kenindia Assurance Co. Ltd. Vs James Otiende C.A. 103/89*** where the court held that a non-party to a contract cannot sue upon such contract as there is no privity of contract.

14. On the above grounds, Defendants Nos. 1, 2 and 3 prayed for the suit to be struck out.

15. The 5th Defendant associated and supported those submissions.

16. The 4th Defendant submitted that at the time it bought the land, it was in the name of the Government and that the Government is not obliged to seek Land Board Consent in transactions stated in Section 6(3) of the Land Control Act.

17. On Ground 2, the 4th Defendant submitted that the provisions of Section 7 of the Limitation of Actions Act are not applicable in the instant case. It was submitted that the Plaintiffs are in occupation of the land and are not seeking to recover it.

18. On the provisions of Sections 4(a) and 4(e) of the Limitation of Actions Act, the 4th Defendant submitted that the same do not apply as the action is specifically covered by Section 9(3) of the Act.

19. On Ground No.3, the 4th Defendant submitted that the existence of the agreement dated 10th July, 1997 between Serah Katumbi Mulwa and the 4th Defendant has not been denied; that it was properly drawn and witnessed by an advocate; that the agreement of 18th November, 1997 between Ruth Munyiva Musyoki and the 4th Defendant has not been denied and that the provisions of Section 3(3) of the Law of Contract Act were satisfied in the instant claim.

20. On Ground 4, the 4th Defendant submitted that the confirmation of grant of the Estate of Ruth Musyoki who died in 2005 was done on 22nd November, 2013 and issued on 14th January, 2014 with the 5th Defendant being included as a purchaser.

21. On Ground 5, the 4th Defendant submitted that Defendants Nos. 2 and 3 are sued as administrators of Ruth Munyiva Musyoka and that there need not to be a contract between them and the claimant. Relying on the case of *Michira vs. Gesima Power Mills Ltd (208) eKLR*, the 4th Defendant submitted that the agreements are clear as to the intentions of the parties.

22. The 4th Defendant submitted that the Preliminary Objection raised is not purely on point of law as prescribed by the case of *Mukisa Biscuit Manufacturing Ltd vs. Westend Distributers (1969) E.A 569* and should be dismissed.

23. The 4th Defendant also relied on Section 3A of the Civil Procedure Act and Article 159 (2) d of the Constitution in urging the court to hear the suit on merit.

24. On the Plaintiffs' part, they submitted that the Preliminary Objection is a breach of the principles set out in *Mukisa Biscuit Manufacturing Ltd* case as it does not raise a pure point of law but of both law and fact.

25. The Plaintiffs submitted that under Section 7 of the Limitation of Actions Act, a person in occupation of land cannot be barred from bringing a suit and relied on the case of *John Kiprotich Langat vs. Samuel K. Maiywa (2004) eKLR*. They submitted that their cause of action arose in 2013 when they were told to vacate the suit land by Defendants Nos. 1, 2 and 3 and thus their claim was within time. They urged the court to be slow in striking out the suit and take advice from the following cited authorities:

- *Trivedi & another vs. Njeri Ngiru Civil Appeal No. 129/84*
- *D.T. Dobie & Co. Ltd vs. Joseph Muchina & Another Civil Appeal 37/98*
- *Insurance Company of East Africa vs. Attorney General & 3 others Civil Suit No. 135/98.*

26. The Plaintiffs submitted that they paid the full price for the portions of land that they bought and that they are in occupation and should be heard on merit because dismissing the suit on a Preliminary Objection will expose them to eviction and render them homeless.

27. They submitted that a party cannot be allowed to benefit from his own mistake and that they are bona fide purchasers for value. They referred to the cases of:

- *Edgar Eric Omoto & Samuel Kisoro ELC 70/2014.*
- *Westlands Residential Resort Ltd vs. Kawakanja & 2 others (2008) 3 KLR.*

28. On the issue of failure to procure a Land Board Consent, they threw the ball to the 4th Defendant who ought to have secured the same. They submitted that the issue should be ventilated during trial. They cited the case of *Emily Hawatu Kalivoo vs. Jushua Katana & another ELC 76/2013.*

29. After going through the pleadings, Affidavits and the parties' submissions, I make the following findings.

30. Section 7 of the Limitation of Actions Act bars a claim for recovery of land after the lapse of twelve (12) years from the date the cause of action arises. Section 4(1) (a) and (e) bars claims based on contract after the lapse of six (6) years after the cause of action arises.

31. The Plaintiffs have pleaded that between the year 1997 and 2003, they purchased the suit plots from the 4th Defendant and took possession of the same and have extensively developed the land.

32. The 4th Defendant averred in its documents that the purchase of the suit land was in form of shares; that on 10th July, 1997, the 1st Defendant sold her share of 20 acres in plot 478; that on 18th November, 1997, Ruth Munyiva Musyoki sold her share of 20 acres in unsurveyed Plot No. 478; that by then, the land was held by Lukenya F.C.S Ltd and the sellers had only allotment letters and that they handed over some letters to the 4th Defendant who became the beneficial owner. However, due to mix up, the titles came out in the sellers' names instead of the 4th Defendant.

33. From the pleadings of the parties, one cannot discern when the cause of action arose as at no time is it demonstrated that the sellers repudiated the agreements they entered into with the 4th Defendant. 4th Defendant took possession of the land and also sold its beneficial interest to the Plaintiffs. In fact the 4th Defendant acknowledges the fact that the Plaintiffs bought the plots and developed them. Defendants Nos. 1, 2 and 3 and the vendors never stopped the Plaintiffs' occupation and development of the suit land.

34. The provisions of Section 7 of the Limitation of Actions Act talks of recovery of land. The Plaintiffs are not seeking to recover the land but declaration of ownership of what they bought.

35. In the circumstances, this court finds that the issue of limitation period cannot be properly determined without interrogating the circumstances under which the agreements were entered into by all parties.

36. It is not denied that what the sellers sold was their beneficial interest in the suit land as they had not been registered as the owners of the same. The 4th Defendant acquired the beneficial ownership of the land awaiting the title to be issued in its names. By that time, the land was in the name of the Government. The agreement of sale could not therefore be subjected to the provisions of the Land Control Act. As to whether they could have been subjected to the Act after the land was transferred from the Government, the court finds that that is a matter for trial.

37. I say so because the 4th Defendant averred that the title ought to have come out in its name from the society. The necessity of the consent of the Land Control Board will have to be interrogated viz-a-viz all the parties' agreements.

38. Defendants Nos. 1, 2 and 3 have impugned the agreements for not meeting the threshold of validity set out by the provisions of Section 3(3) of the Law of Contract Act.

39. The two agreements between the 4th Defendant and the sellers, Ruth and Serah, dated 10th July, 1997 and 18th November, 1997, seem, on the face of them, executed by parties and witnessed as required by the law.

40. The interests of the Plaintiffs who are in occupation of the land and who have extensively developed it were not taken into account or noted when the suit land was transferred to the 5th Defendant. The court will have to hear the parties as to the validity of that transfer. The interests of the 4th Defendant were also seems to have been ignored despite the fact that Defendants Nos. 1, 2 and 3 had knowledge of its interest.

41. The Plaintiffs' contract is as between them and the 4th Defendant. The Plaintiffs' claim is tied and tethered on the 4th Defendant's beneficial interest in the land. If upheld, the Plaintiffs' interests will be taken care of.

42. The issues raised on the validity of the contracts by all the parties requires evidential interrogation. The court therefore finds that it is not safe at this stage to strike out the suit without hearing the parties.

43. In the premises, the court rejects the Preliminary Objection with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22ND DAY OF SEPTEMBER, 2017.

O.A. ANGOTE

JUDGE