



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 216 OF 2015

RAPHAEL KIPSOI ARAP KORIR.....PLAINTIFF

VERSUS

MUSKIE LIMITED.....1ST DEFENDANT

BENJAMIN KISOI SILA T/A LEGACY AUCTIONEERING SERVICES.....2ND DEFENDANT

LEGACY CONNECTION LIMITED.....3RD DEFENDANT

R. N. NYARIKI T/A BASELINE AUCTIONEERING.....4TH DEFENDANT

POST BANK CREDIT LIMITED.....5TH DEFENDANT

RULING

The 1st defendant, Muskie Ltd has filed a preliminary objection on points of law stating that the plaintiff suit is incompetent, bad in law and rather an abuse of the court process in that particulars of fraud have not been pleaded. Moreover, that the subject matter has been overtaken by events and that there exist Nakuru CMCC No. 1053 of 2009 revolving on the same subject matter and that the suit offends the provision of section 77 of the Registered Land Act Cap. 300 (repealed) and that in view of the ruling of the court of 17.10.2014, the 1st – 4th defendants are non-suited.

The 1st defendant submits that the suit property was sold pursuant to the chargee statutory power of sale vested under section 74 of the Registered Land Act (repealed). The gravamen of the 1st defendant's submission is that plaintiff's remedy is in damages and not what is sought in the plaint. Moreover, the 1st defendant argues that the prayer to nullify the sale is not available. The suit property has been subdivided into 130 parcels of land and different titles issued. Last but not least, the 1st defendant argues that the suit is founded on fraud but particulars of fraud are not specifically pleaded.

The 2nd and 3rd defendants submit in support of the preliminary objection that particulars of fraud are not pleaded and that the subject matter has been overtaken by events and that there exists Nakuru CMCC No. 1053 of 2009 revolving on the same subject matter and the 5th defendant. The plaintiff in his part, submits that there is no limitation of action in law where a cause of action revolves a fraud. He reiterates that the particulars of fraud have been pleaded.

The plaintiff cites Article 159 of the Constitution of Kenya 2010 which provides that the court should not take undue regard on procedural technicalities. The plaintiff further raises Article 40(6) of the Constitution of Kenya, 2010 that reviews protection of title to property that has been found to have been

unlawfully acquired.

On the issue of the pending suit, thus Nakuru CMCC No. 1053 of 2009 touching on the subject matter, the plaintiff argues that the remedy is to transfer the matter to the court and take directions. According to the plaintiff, res judicata does not apply.

In regard to section 77 of the Registered Land Act, Cap. 300, Laws of Kenya, the plaintiff argues that the issue of fraud vitiates the input of section 77 of the Registered Land Act. The plaintiff further argues that for the court to ascertain that, the chargor was informed the case has to go to full trial. It is further argued that no suit shall be defeated by mis-joinder or non-joinder of parties.

I have considered the submission by all parties herein and do find that the issues for determination are:

1. *Whether failure to plead fraud is fatal to the suit.*
2. *Whether the subject matter has been overtaken by events.*
3. *The effect of existence of Nakuru CMCC No. 10530 of 2009.*
4. *The import of the provisions of section 77 of Registered Land Act.*
5. *The import of the ruling of the court on 17.10.2014.*

To begin with, a preliminary objection was well defined in the case of Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) E.A. 696, where Newbold, V.P., observed that:

“Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

On the first issue, as to whether fraud has been pleaded as required by law, I do find that fraud has been generalised as opposed to the requirement that particulars by fraud should be specifically pleaded.

Order 2, Rule 4 of the Civil Procedure Rules, 2010 provides for Matters which must be specifically pleaded thus: -

(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or,

(c) which raises issues of fact not arising out of the preceding pleading.

The import of the above is that fraud ought to be specifically pleaded so as the other party is not taken by surprise. The plaintiff has not made an application to amend the plaint and has not indicated in his submissions that he is willing to amend the plaint. However, I do find that failure to plead the specifics of fraud by the plaintiff is not fatal as the plaint can be amended any time of the proceedings with leave of court after close of pleadings on such terms as to costs or otherwise as may be just and in such manner as it may direct. I do find that on this part, the preliminary objection is misconceived as I have the discretion to grant leave for the amendment of plaint.

On whether the subject matter has been overtaken by events, I do find that this is not a point to be raised as a preliminary objection as it requires evidence to be adduced to show that the suit has been overtaken by events. In any event, Article 40(6) of the Constitution is very clear that property unlawfully acquired cannot be protected by law and therefore, the only way to ascertain that the property has been lawfully acquired is to go for full trial.

On the effect of the existence of Nakuru CMCC No. 1053 of 2009, I do find that the facts of this case are scanty and therefore there was need to file an affidavit to assist the court to determine whether the proceedings herein are subjudice. In any event, the suit can be transferred from Nakuru Environment and Land Court to this court for purposes of consolidation.

On the import of section 77(4) of the Registered Land Act, Cap. 300 (repealed), I do find that the court needs to ascertain that the transfer was done in accordance with the law. Section 77(4) of the Registered Land Act, Cap. 300 (repealed) ought to be read with Article 40(6) of the Constitution and that the court can nullify any transaction that offends the provision of section 40(6) of the Constitution. This issue can only be determined after full hearing of the suit and not on a preliminary objection.

Last but not least, is the effect of the ruling in the Nakuru Hccc Suit No. 64 of 2012 consolidated with No. 331 of 2011, where the court struck out the suit against the 5th defendant due to the fact that the plaintiff failed to obtain leave of court before commencing the suit. The plaint herein does not indicate that leave was obtained. Section 228 of the Companies Act requires that leave of the court be obtained before instituting proceedings against a company under liquidation. I do take judicial notice that the 5th defendant is under liquidation and that the court has found so in Nakuru Hccc No. 64 of 2012. There is no appeal and/or review. The remedies sought in the plaint cannot be obtained without suing the 5th defendant who is the chargee. I do observe that the suit against the 5th respondent is a nullity as no leave has been obtained and therefore, the same is struck out. The suit against the 1st – 4th defendants cannot succeed without the joinder of the 5th respondent. Ultimately, the whole suit is struck out as the 1st – 4th defendants are non-suited. Costs to the 1st – 4th defendants.

DATED AND DELIVERED AT ELDORET THIS 16TH DAY OF OCTOBER, 2017.

A. OMBWAYO

JUDGE