



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 7 OF 2014

TIMOTHY KADAGI UMBASU..... PLAINTIFF

VERSUS

JOHN ANDAYI OMENDA..... DEFENDANT

RULING

1. The application dated 7/3/2016 seeks orders that the plaintiff's amended plaint be struck out for failing to disclose any reasonable cause of action, for being otherwise an abuse of the process of the court and for being time barred under **Section 7** of the **Limitation of Actions Act**. The application is brought under **Section 3 and 3A of the Civil Procedure Act, Order 2 Rule 15 1(a) and (d) of the Civil Procedure Rules of Actions Act**.
2. The applicant has sworn a supporting affidavit in support of the application. The case of the applicant is that between 1994 and 1997 the respondent sold the applicant two plots which the applicant fully paid for and took possession of. The applicant developed the plots and has lived on the plots for more than 19 years. The applicant therefore avers that the respondent's claim is time barred by **Section 7** of the **Limitation of Actions Act Cap 22** Laws of Kenya. It has been urged that the respondent has not explained the delay in bringing the action.
3. A further ground is that the respondent, has subdivided the suit land giving rise to a new title number No. **Kiminini/Kinyoro Block 3/Matisi/1561** yet throughout his pleadings he has not pleaded that the sold land is part of the said **Plot No. 1561**.
4. In response to the application the respondent filed his sworn affidavit dated 29/9/2017. In it he avers that the application has no merits. He avers that the **Limitations of Actions Act** does not apply since he acquired his title in 2012. He also avers that the applicant's allegations refer to adverse possession which can only be raised by way of an originating summons, yet his prayers are based on a null and void transaction and is therefore properly before the court.
5. The applicant filed his submissions on 31/10/2017 while the respondent filed his on 30/10/2017. The submissions largely reiterate the contents of the application and its reply. The applicant submits further that the respondent did not deny the sale of the plots or the applicant's occupation of suit land, hence he is deemed to have admitted those facts.
6. The applicant relies on the case of **HCCC No.127 of 2004 - Damaris Kondoro -vs- Gachanja Gitere & Another** and **HCCC No. Nakuru 341 of 2004 - Moses Lesiamon ole Mpoie & Another -vs- Commissioner of Land and 4 Others**. In that judgment the court found that the respondents were challenging the transfer that had been done 21 years earlier obviously a period longer than the 12 years period provided for in Cap 22.

7. In this application the respondent raises the defence that the Limitations of Actions Act does not apply because he acquired the title deed in the year 2012 and that the matters raised in the defence can only be raised by way of an originating summons.

8. I do note that there is a counterclaim on the record. In my view the presence of the defence of the nature raised in this application as well as the existence of the counterclaim render it improper to dispose of this suit by way of this application.

9. Unless I am mistaken, in view of the counterclaim, the same evidence that would be needed if the plaintiff's suit is struck out would be the same evidence that would probably have been called if the plaint was not struck out.

10. For that reason I disallow the current application and order that this suit be allocated a date on priority in the third term of this year. Costs of the application shall be in the cause.

Dated, signed and delivered at Kitale on this **20th** day of **December, 2017**.

MWANGI NJOROGE

JUDGE

20/12/2017

Before - Mwangi Njoroge -Judge

Court Assistant - Isabellah

N/A for the parties

COURT

Ruling read in open court in the absence of the parties.

MWANGI NJOROGE

JUDGE

20/12/2017