



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 365 OF 2015

JOSEPH KIPKEMOI KIGEN:.....:PLAINTIFF

VERSUS

MOSES OBIERO OYOKO:.....:DEFENDANT

RULING

Joseph Kipkemoi Kigen has come to court by way of plaint claiming that he is the lawful owner of a half portion of that parcel of land known as ELDORET MUNICIPALITY BLOCK 15/930 FORMELY 190 herein after referred to as the suit property having purchased the same from one Charles Alwanyi Maganga. That upon purchase the plaintiff occupied the said half of the portion aforesaid where he commenced the construction of a house and stopped construction at the foundation stage. That it was until on or about 20th September 2015 that the plaintiff was called by a neighbour and informed that someone had embarked on constructing a building which extended and or encroached on his portion of the suit property. It was a term of agreement that the said Charles Alwanyi Maganga would own the property in common with the owner of the property having identified and occupied respective portion. That upon visiting the property and inquiring on the identity of the person behind the construction, it turned out that the said person is the defendant herein. That the plaintiff therefore prays for an order of injunction against the defendant from trespassing on his portion of the suit property and damages for wrongful entry.

The plaintiff ultimately prays for an order of a permanent injunction restraining the respondent whether by himself, his agents and/or servants from trespassing on, wasting, constructing on remaining on, alienating, offering for sale, charging, leasing, subdividing or otherwise interfering or dealing with the plaintiff's property being title Number ELDORET MUNICIPALITY BLOCK 15/930 FORMELY 190. He also prays for costs of this suit.

The plaintiff has filed an application for injunction restraining the respondent whether by himself, his agents and/or servants from trespassing on, wasting, constructing on, remaining on, alienating, offering for sale, charging, leasing, subdividing or otherwise interfering or dealing with the plaintiff's property being Title Number ELDORET MUNICIPALITY BLOCK 15/930 FORMELY 190 pending the hearing and determination of the suit. The plaintiff prays that the officer commanding Eldoret Police Station do enforce compliance of the orders above and that the costs of this application be provided for.

The application is supported by an affidavit wherein the plaintiff states that on 20th July 1992 he purchased half of a portion of that property known as ELDORET MUNICIPALITY BLOCK 15/930 FORMELY 190 and that upon purchase he occupied the said half of the portion where he commenced the construction of a house and stopped construction at the foundation stage. That it was until on or about 10th September 2015 that he was called by a neighbour and informed that someone had embarked on constructing a building which extended and or encroached his portion of the said property. It was a term of agreement between the plaintiff and the said Charles Alwanyi Maganga that they would own the

property in common having identified and occupied respective portion. Upon visiting the property and inquiring on the identity of the person behind the construction, he was informed that the said person was the defendant herein. He was given the contacts of the defendants and upon contacting him, he confirmed that he had been sold the said property by owners but he could not disclose the identity of the person who sold him the property.

The defendant filed defence and denied that the plaintiff is a lawful owner of half portion of Land Parcel No. ELDORET MUNICIPALITY BLOCK 15/930 FORMELY 190 and asserted that the property was purchased from Charles Alwanyi Maganga (deceased). That the plaintiff has no conceivable interest in the suit land as the said Charles Alwanyi Maganga (deceased) continued and remained the owner till his demise on 25.3.2008. The said parcel measures 324 square meters and has never been subdivided into any number of portions and that no approval for subdivision was ever given and that no transfer to joint names was ever done. The family of the deceased occupied the land since 1986 till 25.8.2012 when the defendant bought the said parcel from the deceased's widow and children in order for them to pay for rates arrears after the County Government of Uasin Gishu issued waiver of rates. Upon purchase of the suit land, the defendant embarked on removing temporary structures with the consent and help of the beneficiaries of the estate of the late Charles Alwanyi Maganga (deceased) and that the Defendant thereafter extensively developed the entire parcel and they are tenants *in situ*. That the suit is a gimmick to defraud the defendant and the estate of the late Charges Alwanyi Maganga (deceased). The defendant incurred expenses in salvaging the suit land from being auctioned by the Municipal Council of Eldoret (now County Government of Uasin Gishu) and obtained a valid interest thereon which is more superior than the Plaintiff's fictitious claim.

Moreover, the defendant pleads that there is no transfer of the suit land to the Plaintiff or any part thereof and that the Plaintiff's interest having allegedly arisen on 21.7.1992 or thereabouts stood extinguished on 20.7.2004 by dint of section 7 and 16 of the Limitations of Action Act, Cap 22 Laws of Kenya. The plaintiff's claim is time barred despite the fact that the Plaintiff has failed to disclose in the plaint the alleged date of purchase to defraud the court.

He denies that the plaintiff started a house up to the foundation stage as the time of starting such construction has not been disclosed. The plaintiff has never entered possession of the suit land for the last 23 years and is thus statute barred as he is guilty of *laches*. The defendant never encroached on any land but he is a *bonafide* purchaser for value without notice. There was no defect in title belonging to the deceased.

The defendant further states that there is no valid agreement affecting the suit property and that if there was any agreement between the deceased and the plaintiff then it could only be dealt with *interse*. The only person to whom the plaintiff can raise a claim to reclaim the land is Charles Alwanyi Maganga (deceased). In any case the alleged claim was subject to certain preconditions which do not appear to have been accepted and formal transfer done. There is no privity of estate and/or contract between the Plaintiff and the Defendant.

The defendant further contends that the plaintiff has no locus standi as the land belongs to the Late Charles Alwanyi Maganga and that the plaintiff has no interest in the land as the deceased died without transferring the property.

The defendant has further raised a preliminary objection that the Plaintiff's interest having allegedly arisen on 21.7.1992 or thereabouts stood extinguished on 20.7.2004 by dint of Section 7 and 16 of Limitations of Action Act Cap 22 Laws of Kenya.

The Plaintiff's claim is time barred and the Plaintiff has failed to disclose in the Plaint the alleged date of purchase to defraud the court. The Plaintiff lacks *locus standi* and that the title is in the name of the late Charles Alwanyi Maganga (deceased) and thus the suit is bad for non joinder of parties and for litigating over title belonging to a deceased person contrary to section 45 of the Succession Act Cap 160 Law of Kenya.

The Plaintiff had never been registered as a co-owner or joint owner of the suit land for the last 23 years and as such the suit is time barred by virtue of Sections 4, 7 and 16 of the Limitation of Actions Act and the Plaintiff cannot seek to have a right declared after 23 years (some 11 years out of time). The suit is scandalous, frivolous, vexatious and an abuse of the due process of court. The suit offends Order 31 Rule 1 of the Civil Procedure Act.

The defendant submits that the suit property is registered in the name of Charles Alwany Maganga who is deceased while the defendant claim as a licensee from the deceased Estate and argues that it is the succession court that can determine the dispute. He argues that dealing with the property of a deceased person is contrary to Section 45 of the Succession Act. Moreover, he argues that the plaintiff is not the registered owner of the suit land and not the administrator of Estate of deceased and therefore lacks standing.

The defendant further argues that the suit is time barred by dint of Section 7 and 16 of the Limitation of Actions Act as the time for enforcement of agreement lapsed. The defendant further argues that the suit offends order 31 rule 1 as it is brought against the estate of a deceased person.

The defendant also raises the issue of jurisdiction of the court as the property in dispute is registered in the names of a deceased person, hence it is only the High Court with jurisdiction to entertain such disputes.

The plaintiff in response submits that the preliminary objection does not meet the threshold to warrant the summary dismissal and or striking out of a suit. The plaintiff contends that the plea of limitation does not hold water as time stated running when the defendant trespassed on 20.9.2015. Moreover, the plaintiff argues that the property was jointly owned by himself and the deceased hence there was no need for succession.

I have considered the preliminary objection and do find that neither the plaintiff nor the deceased father of the defendant nor the defendant are registered proprietors of the land in dispute. The deceased died before he obtained the certificate of lease and it is not clear whether he complied with the conditions on the allotment letter which in law is a letter of offer that requires acceptance. This issue will require investigation and therefore cant be determined by a preliminary objection. It is not clear that the deceased had obtained proprietary rights in the property.

I agree with Mr. Korir that the Preliminary Objection does not meet the threshold to warrant the summary dismissal and or striking out of the suit. The substantive law on striking out pleadings is based upon **Order 2 Rule 15** of the *Civil Procedure Rules*. That provision, as read together with **Section 3A** of the *Civil Procedure Act*, empowers the Court to make substantive orders as to the striking out of pleadings if the grounds upon which the application to strike out the pleadings are predicated and satisfy the principles as per the requirements set out in the Act. At **sub-rule 15 (1) (d)** of the aforementioned Order, it is provided that:

“(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(d) it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

The law on striking out of pleadings has been well settled by the Court of Appeal in the case of **D.T Dobie & Company Ltd –vs- Muchina & Another (1982) KLR 1** in the finding of **Madan, Miller & Potter, JJA** wherein the court stated:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and

incurable by amendment.”

In **D.T Dobie & Co. Ltd v Muchina** (supra), the Court of Appeal analyzed the issue of striking out of proceedings and deduced therefrom the principles that govern the Court’s inherent and unfettered power to strike out a pleading which were: (a) that the remedy that should only be exercised in the clearest of cases, in plain and obvious cases where the pleadings in question were unsustainable; (b) it is a power to be exercised with extreme caution and that it is a strong power to be sparingly

On the issue of jurisdiction, this court finds that it has jurisdiction to entertain the matter as to dispute relates to the use and occupation of land as envisaged in Article 162 of the Constitution of Kenya.

The definition of a preliminary objection was well set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd (1969) EA 696.** "So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

This was followed up by the judgment of **Sir Charles Newbold** in the same case:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A 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”

This court is of the view that the preliminary objection is misconceived and the same is dismissed with costs. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 3RD DAY OF JUNE, 2016.

ANTONY OMBWAYO

JUDGE