



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E&L MISC 2 OF 2015**

**JOSHUA KIPROP KIPTANUI.....PLAINTIFF**

**VS**

**AGRICULTURAL FINANCE CORPORATION.....DEFENDANT**

**RULING**

By application dated 29/1/2015, Joshua Kiprop Kiptanui (*hereinafter referred to as the applicant*) seeks for orders against the Agricultural Finance Corporation (*hereinafter referred to as Respondent*) in that this honourable court be pleased to grant leave to Exparte applicant to file suit out of time against the respondent. The application is based on the grounds that the applicant is the legal owner of all that land parcel L.R. *Uasin Gishu/Ainabkoi/134* measuring 45.5 hectares. It is alleged that on 20/12/2000 the proposed defendant M/s Agricultural Finance Corporation unlawfully illegally transferred the proposed Plaintiff's/Exparte applicant's parcel of land into its own name under sale by Chargee by way of an improper Auction on 13/01/2000. The time within which to file suit against the proposed defendant has since lapsed. The applicant states that this Honourable Court has powers to enlarge time within which to file suit against the proposed defendant herein and that the Ex-parte Applicant/proposed plaintiff has a prima facie case against the proposed defendant herein who intends to further alienate and/or sub-divide and dispose of the said land hence need to have this application heard and determined expeditiously. He further states that this application has been taken out expeditiously and without undue delay.

The application is supported by affidavit of the applicant who states that in the year 1989 he secured a loan of Kshs.700,000/- from M/s Agricultural Finance Corporation Kitale Branch and charged the Title Deed to his aforesaid land in favour of M/s Agricultural Finance Corporation. Subsequently he repaid the said loan through his Kenya Co-operative Cremaries Limited A/c *No. SP/No 04613K* in full settlement of the outstanding arrears therein. The said payments were fully settled through Standing Orders and/or deductions made against the said K.C.C Ltd A/c provided. That on 13/01/2000 the said proposed Defendant M/s Agricultural Finance Corporation Advertised the said land for public Auction on 13/01/2000 through a Notice by M/s Regent Auctioneers (K) ltd dated 14/12/1999. That however the said M/s Agricultural Finance Corporation did not sale the land by Auction but chose to acquire the same by itself. That later on through a letter dated 10/07/2001 the said Agricultural Finance Corporation offered to re-sell the said land to the applicant. However, through M/s Baraka Land Co. Limited a land buying and selling Company, the proposed Defendant M/s Agricultural Finance Corporation has a re-advertised the aforementioned land for sale and/or disposal at the rate of Kshs.450,000/= per acre and therefore he believes that it is necessary to file this application to enlarge time to file suit out of time since the cause of action which arose on 20/12/2000 when the proposed Defendant M/s Agricultural Finance Corporation was fraudulently and illegally registered as the proprietors of the said land and issued with a Title Deed, is

more than 15 years prior to filing of the intended suit.

The respondent opposed the application and relied on the replying affidavit of Rose A. Ochanda who states that she is the Corporation Secretary of the Respondent and therefore competent to swear this affidavit and well versed and seized of matters therein. That sometimes in 1989 the plaintiff obtained a loan facility of Kenya Shillings Eight Hundred and Seven Thousand, Two hundred and Fifty (Kshs.807,250/-) and a charge was registered against all that parcel of land known as UASIN GISHU/AINABKOI/134. Shortly after inception of the said loan the plaintiff reneged on the loan agreement prompting the Defendant to make several reminders and demand letters asking him to regularize his loan account. The plaintiff ignored and/or refused to honour his contractual obligation.

The respondent claims that it is imprecise for the plaintiff to contend that he cleared the outstanding loan together with interest whereas it is clear from the records that he made several proposals to clear the amount outstanding but never fulfilled any whatsoever and therefore the Respondent initiated recovery process in exercise of its statutory power of sale by issuing a statutory notice to the Applicant dated 4th February 1997 recalling the outstanding sums in full together with interest thereon. However the plaintiff remained adamant or simply ignored the seriousness of the statutory notice served on him and that is when the Defendant instructed the firm of Regent Auctioneers to institute recovery process and execute against the plaintiff by issuing a notification of sale then proceed to dispose of the suit property in case the plaintiff continues to default. That upon receiving the notifications for the public auction of the suit property scheduled for 5th August, 1999 the plaintiff pleaded with the defendant to suspend the intended auction so that he could clear the outstanding loan soonest possible.

The defendant was persuaded to suspend the auction as requested by the Plaintiff but the promise was never honoured thus constraining the Defendant to slate a new date for public auction by serving fresh notifications. That as per the notification issued to the plaintiff, a successful auction was carried out on 13th January 2000 in Burnt Forest town at exactly 11:30 am as advertised in the newspaper and the defendant purchased the suit property since it was the highest bidder. It is the defendant's position that everything was done procedurally and in due regard to the existing laws right from inception of the loan to the recovery and the fraud allegations being touted by the plaintiff are tenuous, made in bad faith and purely an afterthought. That it is unfathomable why the plaintiff is seeking leave to file a suit out of time approximately 15 years after the auction and subsequent transfer of the suit property.

The respondent believes that a certificate of title issued by the Registrar upon registration, shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate thus the claim by the plaintiff amounts to trespass. The plaintiff does not warrant the orders sought since he has always been aware that the suit parcel was purchased for valuable consideration and transferred to the defendant way back in December 2000 thus seeking extension under limitation of actions Act is a desperate move to lay bets with the judicial system.

The application is premised on sections **7, 9 and 26 of the Limitation of Actions Act Cap 22 Laws of Kenya**. Section 7 provides that an action may not be brought to recover land after 12 years from the date on which the right of action accrued to him or, It first accrued to some person through whom he claims, to that person.

The applicant having acknowledged that the suit is time barred seeks extension of limitation period on basis of fraud or mistake under section 26 of Cap 22 Laws of Kenya. **Mr. Komen** for the applicant argues that the applicant has a good case because the respondent did not follow the process envisaged under Section 33 of the Agricultural Finance Corporation Act as the said process was flawed. They should have allowed the applicant to repurchase the property.

**Mr. Mabonga** for the Respondent argues that the applicant has not satisfied the requirement of section 26 of Cap 22 Laws of Kenya as they have not explained the 15 years delay. The property was registered in the year 2000 in the names of Agricultural Finance Corporation hence they lack locus standi. For the applicant to succeed under section 26, he must prove that the action is based upon fraud of the

defendant or his agent, or of any person through whom he claims. Moreover, this section can only be relevant where the right of action is concealed by the fraud of any such person as aforesaid or the action is for relief from the consequences of Mistake.

Section 26 of the Limitations of Actions Act Cap 22 laws of Kenya which provides that :-

**Where, in the case of an action for which a period of limitation is prescribed, either:-**

***(a)The action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or***

***(a)The action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or***

***(c)The action is for relief from the consequences of a mistake,***

***(i) The period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:***

***(ii) Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which:-***

***(i) In the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or***

***(ii)In the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.***

does not require proof of fraud but as long as the action is based on the fraud of the defendant or his agent time begins running when the plaintiff discovers the fraudulent activities of the defendant. I have looked at the the supporting affidavit and discerned that it appears that the applicant was aware of the activities of the respondent which he describes as fraudulent. The documents attached to the supporting affidavit as JKK 4 (a) and 4 (b) suggest that the applicant knew before the year 2006 that the respondent was the Registered proprietor of the suit property and yet never took action. The respondent in the replying affidavit has established that she had a right to buy the property in the public auction which was carried out on 13/1/2000 in Burnt Forest town and was advertised in the newspaper and it purchased the property as the highest bidder.

I have considered the application and the response by the respondent and do find that the applicant was aware of the whole process of sale of his property by the defendant and even tried to negotiate and therefore cannot allege that the whole process of sale of the property was fraudulent. The applicant had the burden to prove that he was not aware of the process and had a duty to tell the court when he became aware, however he has skirted around this issue leaving the court to find that he was aware of the sale of the property to Agricultural Finance Corporation in the year 2000 when the same was advertised in the newspapers for sale. The upshot of the above is that the application is dismissed with costs.

**DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF APRIL, 2015**

**ANTONY OMBWAYO**

**JUDGE**