



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 60 OF 2015 (OS)

SYMON MUBIKA MACIURA (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARIUNGU THIBA (DECEASED)).....PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERA.....1ST DEFENDANT

THE LAND REGISTRAR, KIRINYAGA COUNTY2ND DEFENDANT

THE ESTATE OF KARURI NDURA (DECEASED).....3RD DEFENDANT

THE ESTATE OF EUNICE WANJIRU KARURI (DCD)..4TH DEFENDANT

THE ESTATE OF ANNA WAMBUI KARURI (DCD)5TH DEFENDANT

MARGARET WANJIRU KARURI.....6TH DEFENDANT

JOHANA RUKUNGU KARURI.....7TH DEFENDANT

PETER NJUGUNA MACHARIA.....8TH DEFENDANT

CHARLES MWANGI KAMAU.....9TH DEFENDANT

RULING

On 18th May 2015, the plaintiff/applicant filed an Originating Summons seeking the determination of various questions in relation to the parcel of land No. MWERUA/KITHUMBU/89 and the resultant subdivisions thereof. Briefly, from the supporting affidavit he deponed that he filed this Originating Summons as the legal representative of the Estate of his father MARIUNGU THIBA (deceased) who died in 1962 but before that, he had been the lawfully registered proprietor of land parcel No. MWERUA/KITHUMBU/89. However, he later discovered that between 1983 and 1989, the Land Registrar Kirinyaga caused the said land parcel No. MWERUA/KITHUMBU89 to be sub-divided into several portions which were registered in the names of some of the defendants. Upon discovery of that fraudulent transfer of the sub-divisions of the original land parcel MWERUA/KITHUMBU/89 into the names of some of the defendants who are strangers to his family, he obtained letters of administration ad litem in Kerugoya High Court Succession Cause No. 497 of 2014 and therefore filed this Originating Summons.

It would appear from the record that on 23rd June 2015, an interlocutory judgment was entered against

the defendants and this matter was fixed for formal proof on 10th November 2015. However, when the 1st and 2nd defendants were served with a notice of the entry of that interlocutory judgment, they filed an application on 14th July 2015 to have it set aside but on 27th July 2015, that interlocutory judgment was set aside by a consent entered into between the plaintiff and the 1st and 2nd defendants who were then given 7 days within which to serve their responses to the Originating Summons. From my perusal of the record, that had not been done at least by the time I was drafting this ruling.

By a Notice of Motion dated 7th August 2015, the plaintiff/applicant filed an application citing **Article 159 (2) of the Constitution, Section 27 and 28 of the Limitation of Actions Act and Order 37 Rule 6 and 7 of the Civil Procedure Rules** seeking the following substantive orders:-

1. ***That the plaintiff be granted extension of time with respect to the Originating Summons dated 15th May 2015 and filed herein on 18th May 2015.***
2. ***That the Originating Summons dated 15th May 2015 and filed hereon on 18th May 2015 be deemed as duly filed.***
3. ***That costs be in the cause.***

The application was clearly a reaction to the application filed by the 1st and 2nd defendants seeking the striking out of the plaintiff/applicant's Notice of Motion for being statute barred and therefore incurably defective, incompetent and an abuse of the Court process. When the parties appeared before me on 16th September 2015, it was agreed that the plaintiff/applicant's application dated 7th August 2015 be canvassed by way of written submissions. That application is the subject of this ruling.

I have considered the application, the grounds of opposition filed by the 1st and 2nd defendants, the applicant's supporting affidavit and the submissions by counsels.

It is clear from the plaintiff/applicant's supporting affidavit that he is the legal representative of his deceased father MARIUNGU THIBA who was the registered proprietor of the parcel of land No. MWERUA/KITHUMBU/89 since 1961 and that he has always been residing on the said land since 2013 when total strangers evicted him therefrom. When he did investigations, the plaintiff/applicant discovered that on diverse dates between 1983 and 1989 the Land Registry in Kirinyaga unlawfully had the land parcel No. MWERUA/KITHUMBU/89 to be sub-divided into MWERUA/KITHUMBU/944 and 945 and subsequent the portion MWERUA/KITHUMBU/944 was also further sub-divided into MWERUA/KITHUMBU/1438, 1439, 1440 and 1441 and registered in the names of the 6th to 9th defendants herein. That all this was done by MAARGARET WANJIRU KARURI, JOHANA RUKUNGU KARURI, PETER NJUGUNA MACHARIA and CHARLES MWANGI KAMAU. It was after discovery of the fraud that the plaintiff/applicant sought legal advice and was advised to seek a grant of letters of administration in respect to the Estate of his late father which he obtained on 26th September 2014 before filing this Originating Summons.

In opposing the application, the 1st and 2nd defendants have taken issue with the plaintiff/applicant's supporting affidavit as being in breach of **Order 2 Rule 6 of the Civil Procedure Rules** and therefore inadmissible and that the application itself is therefore fatally incompetent and an abuse of the Court process.

With regard to the provisions of **Order 2 Rule 6 of the Civil Procedure Rules**, I do not discern any defect in the plaintiff/applicant's affidavit in support of this application. He has deponed on facts as to why he did not file the Originating Summons earlier. It must also be remembered that a party has the right to amend pleadings at any stage of the trial and if that should be necessary a proper application may be made. For now, all the plaintiff/applicant needs to do is satisfy the Court that he had good reasons as not filing his Originating Summons in time.

Ordinarily, an application of this nature is made ex-parte as per the provisions of **Section 28 (1) of the**

Limitation of Actions Act which reads:-

“An application for the leave of the Court for the purpose of Section 27 shall be made ex-parte except in so far as rules of Court may otherwise provide in relation to application made after the commencement of a relevant action”

The Originating Summons here is founded on fraud. It is the plaintiff/applicant's case that his late father's land was fraudulently transferred to the defendants and as indicated above, although such an application is usually made ex-parte, the 1st and 2nd defendants had already come into the proceedings by the time this application was filed hence their involvement in the same. Obviously, this application ought to have been made prior to the filing of the Originating Summons. However, there is no prejudice caused to the

defendants herein in this circumstances and this Court is enjoined to do justice to the parties without undue regard to technicalities. The plaintiff/applicant has deponed that he did not know about the fraud until 2013 when strangers evicted him from his land. That is when he commenced investigations and discovered that infact the land had been fraudulently sub-divided between 1983 and 1989. This discovery was made in March 2015 when he obtained the official searches of the resultant sub-divisions of the original MWERUA/KITHUMBU/89. Under **Section 26 of the Limitation of Actions Act**, where the cause of action is based on the fraud of the defendant or his agents or any of the persons through whom he claims, the period of Limitation does not begin to run until the plaintiff has discovered the fraud. In the circumstances, this suit which was filed on 18th May 2015 is clearly within the time provided in law because under **Section 7 of the Limitation of Actions Act**, a claim to recover land must be brought within 12 years which period would therefore begin to run from the time the fraud was discovered which was in March 2015.

Counsel for the 1st and 2nd defendants has submitted that this suit is also statute barred by virtue of the provisions of **Section 6 of the Public Authorities Limitations Act**. That section provides as follows:-

“Notwithstanding the provisions of Section 31 of the Limitation of Actions Act, Section 22 of the Act shall not apply in respect of the provisions of that Act, and in Section 27 of the Limitation of Actions Act the reference to Section 4 (2) of the Act shall be read and construed as reference to Section 3 (1) of this Act, but subject thereto and notwithstanding Section 42 of the Limitation of Actions Act. Part III of the Act shall apply to this Act”

As to whether **Section 6 of the Public Authorities Limitation Act** would be a bar to this claim, this issue was considered by the Court of Appeal in the case of **RICHARD ODUOL OPOLE VS THE COMMISSIONER OF LANDS AND TWO OTHERS C.A CIVIL APPEAL**

NO. 285 OF 2007 (KISUMU) which held that the **Public Authorities Limitation Act** itself incorporates **part III** of the **Limitation of Actions Act** more and particularly **Section 26** of the latter which provides that where the cause of action is based on fraud, the limitation period does not begin to run until the plaintiff has discovered the fraud provided that the section does not enable an action to be brought to recover property which has been purchased by valuable consideration by a person who was not a party to the fraud. It is clear therefore that the **Public Authorities Limitation Act** also incorporates **Section 26 of the Limitation of Action Act** by allowing the filing of suits to recover land beyond the statutory period in cases of fraud. As indicated above, the plaintiff/applicant in his Notice of Motion pleads that he only discovered the fraudulent transaction in 2015 when he visited the Lands office after strangers had been to his land in 2013. It is also clear from his supporting affidavit that he also attributes fraud to the 1st and 2nd defendant/respondents. In paragraph 9 of the said affidavit, he depones as follows:-

***“That I subsequently visited the County Land Registry, Kirinyaga County where I discovered that on diverse dates between 1983 and 1989, the Land Registrar Kirinyaga in the then Kirinyaga District had unlawfully caused the suit parcel of land MWERUA/KITHUMBU/89 to be sub-divided into 2 resultant land parcel Numbers MWERUA/KITHUMBU/944 and 945.....
...”***

As indicated earlier, there may be need for the plaintiff/applicant to amend his pleadings to set out the particulars of fraud against each of the defendants/respondents herein. In view of the wide powers donated by **Order 8 of the Civil Procedure Rules** with respect to amendment of pleadings, this Court is not minded to make any adverse orders against the plaintiff/applicant at this early stage of the proceedings. The Court can only place the plaintiff/applicant on notice.

Having said all the above, I find that the plaintiff/applicant's Notice of Motion dated 7th August 2015 is well merited and I allow it with the result that the Originating Summons dated 15th May 2015 and filed herein on 18th May 2015 be deemed as duly filed.

costs shall be in the cause.

B.N. OLAO

JUDGE

4TH DECEMBER, 2015

COURT: Ruling delivered, dated and signed this 4th December, 2015 in open Court.

Mr. Miano for Plaintiff/Applicant – present

Ms Nyawira for 1st and 2nd Defendant/Respondents – present.

B.N. OLAO

JUDGE

4TH DECEMBER, 2015