IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MUSINGA, KIAGE & GATEMBU, JJ.A)

CIVIL APPEAL NO. 56 OF 2017

BETWEEN

PETER REUBEN OREMO ODANGA.....APPELLANT

AND

MICHAEL C. KORIRI.....1ST RESPONDENT

REV. FRANCIS MWANGI MWAURA (Suing as a Pastor

and **Trustee of Deliverance Church Lanet).....2ND RESPONDENT**

(An appeal from the Ruling and Order of the Environment and Land Court of Kenya at Nakuru (L. N. Waithaka, J.) dated 17th September 2013

in

E.L.C. Case No. 295 of 2012.)

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JUDGMENT OF THE COURT

1. This appeal is from the ruling of ***L. N. Waithaka, J.*** dated 17th September 2013 in which the Court struck out the appellant's suit against the respondent, ***HCCC No. 295 of 2012***.

2. The facts that gave rise to the ruling are simple and straight forward. In August 2012 the appellant filed the suit against the respondents stating, *inter alia*, that by an agreement dated 11th July 1995 the 1st respondent sold to him four parcels of land, ***LR No.19915/1, 19915/2, 19915/3*** and ***19915/4*** situate at Lanet within Nakuru Municipality (the suit properties) at a consideration of ***Kshs.720,000*** and he took possession thereof. The appellant stated that as at the date of filing suit he had not been given titles to the suit properties. He blamed the 1st respondent for the delay in processing the titles.

3. The appellant further stated that on 28th June 2012 the 1st respondent unlawfully entered into a sale agreement with the 2nd respondent in respect of the suit properties at a consideration of ***Kshs.7,000,000***.

4. The appellant sought a declaration that he was the lawful owner of the suit properties and the sale of the same to the 2nd respondent was illegal; an order of injunction to restrain the respondents from taking possession, transferring, developing or in any way dealing with the suit properties.

5. In May 2012 the 2nd respondent had filed a suit against the appellant, stating that the appellant had threatened to evict him from a parcel of land which he was using as a church parking yard and sought a permanent injunction to restrain the appellant from entering the parking yard or interfering with it in any manner.

6. The 1st respondent, in his statement of defence, conceded having sold the suit properties to the appellant in 1995 at a consideration of Kshs.720,000 but stated that the appellant paid a deposit of Kshs.250,000 and failed to pay the balance of Kshs.470,000. He faulted the appellant for breach of the sale agreement; denied that the appellant had been in possession of the suit properties; and stated that he had sold the suit properties to the 2nd respondent.

7. On 18th February 2013 the 1st respondent filed an application under ***order 2 rule 15*** seeking an order to strike out the appellant's suit on grounds that the appellant had no *locus standi* to institute the suit, that the suit is time barred; and that the suit disclosed no cause of action in law and was therefore an abuse of the court process.

8. The appellant opposed the application stating, *inter alia*, that the orders sought are draconian; the application had been brought in bad faith and was vexatious; contravened his right to defend his interest, and amounted to abuse of the court process. Subsequently the two suits were consolidated with HCCC No. 295 of 2012 as the lead file.

9. In the impugned ruling, the learned judge held that the appellant had *locus standi* to institute the suit but found that the suit was time barred as per ***section 7*** of the ***Limitation of Actions Act*** having been filed more than 12 years from 11th July 1995 when the cause of action accrued. The court rejected the appellant's contention that time began to run in 2011 when titles to the suit properties were issued. The court struck out the appellant's suit with costs to the respondents.

10. Being aggrieved by the said ruling, the appellant preferred this appeal. In his memorandum of appeal, the appellant faulted the learned judge for holding that the suit was time barred; for failing to consider that the cause of action arose in 2012 when he sold the suit properties to the 2nd respondent; and for disregarding his submissions. He urged the court to set aside the trial court's ruling and reinstate the suit to hearing on its merits.

11. When the appeal came up for hearing, ***Mr. Nanda*** appeared for the appellant. He relied on his written submissions which he briefly highlighted. ***Mr. Simiyu*** appeared for the 2nd respondent and similarly relied on his written submissions with brief oral highlights. The 1st respondent neither filed submissions nor instructed any counsel to represent him.

12. The single issue for determination in this appeal is whether the appellant's suit against the respondent was time barred.

Section 7 of the ***Limitation of Actions Act*** states as follows:-

> ***"7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."***

13. It is not in dispute that the appellant's suit was based on the sale agreement between himself and the 1st respondent dated 11th July 1995. The appellant had stated in his court papers in response to the application for striking out the suit that clause 4(b) of the sale agreement between him and the 1st respondent was to the effect that the final sum of Kshs.370,000 was to be paid upon obtaining title deeds for the suit properties; that the title deeds were obtained in 2012 and therefore there was no breach on his part. The appellant submitted that the trial judge did not consider that issue at all. In our view, this is an issue that required proper interrogation before a determination of the application was arrived at.

14. There are also other issues that the appellant submitted were pertinent for consideration and required evidence before the application could be determined one way or the other. The appellant stated that as at 6th June 2012 the 1st respondent was still committed to the sale agreement and swore an affidavit stating that he had sold the suit properties to the appellant and the processing of the titles had delayed; that on 18th July 2012 the 1st respondent through his advocates had written to the appellant stating that he was still processing the title deeds; that the cause of action arose on 28th June 2012 when the 1st respondent entered into a sale agreement with the 2nd respondent over the suit properties; that the issue of limitation had not been pleaded at all; and that prior to the sale of suit properties to the 2nd respondent the appellant had been in possession of the same.

15. We agree with the appellant that some of the issues stated above required adduction of oral evidence to enable the trial court make an informed determination either way. Besides, ***Order 2 rule 4*** of the ***Civil Procedure Rules*** states as follows:-

> ***"4. (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;***
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> ***(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.***
>
> ***(2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient."***

16. The issue of time limitation was not raised by the respondents in their defences, it was only raised as an application but as already stated, it was not exhaustively dealt with.

17. We have said enough, we believe, to show that this appeal is for allowing, which we hereby do. Consequently, we set aside the trial court's ruling dated 17th September 2013 and substitute therefor an order directing that the suit that gave rise to the impugned ruling be set down for hearing and determination on its merit. The matter shall be heard before any judge of the Environment and Land Court in Nakuru other than L. N. Waithaka, J. The respondents shall bear the costs.

Dated and delivered at Nairobi this 29th day of January, 2021.

D.K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR