REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 471'A' OF 2013

MUCHIRI MUTERO……..……..PLAINTIFF

VERSUS

PATRICK MURIUKI NJERU……..…….1ST DEFENDANT

PETER MWANGI MUNENE……..…….2ND DEFENDANT

CECILY WANJA MBOGO……..……..3RD DEFENDANT

ESTHER WAMBUGI NYAGA……..……4TH DEFENDANT

EMMAH WAGATU ALBERT……..……5TH DEFENDANT

ALBERT GITHAMBO KIBONGE……..……6TH DEFENDANT

FREDRICK MURIUKI NJERU……..……7TH DEFENDANT

SAMUEL NGUGI MARUBU……..……8TH DEFENDANT

CECILIAH WANJIKU WACHIRA……..……9TH DEFENDANT

RULING

On 30th July 2007, the plaintiff herein filed this suit against the defendants seeking the following remedies:-

a. ***That this Honourable Court be pleased to issue a***

declaration that the sub-division carried out in the original title KABARE/KIRITINE/1763 and the subsequent transfers to the defendants jointly and severally is illegal, wrongful and fraudulent.

b. ***That this Honourable Court be pleased to order the cancellation of title numbers:-***

KABARE/KIRITINE/1764

KABARE/KIRITINE/1765

KABARE/KIRITINE/1766

KABARE/KIRITINE/1767

KABARE/KIRITINE/1768

KABARE/KIRITINE/1769

and the original KABARE/KIRITINE/1763 be reinstated in the names of the plaintiff.

c. ***The defendants be ordered to pay the costs of this suit.***
d. ***Any other or better relief the Honourable Court may deem fit to grant.***

The plaintiff's claim is that at all material times, prior to 26th February 2003, he was the registered owner of the land parcel No. KABARE/KIRITINE/1763 measuring 2.15 Hectares and in that year, the 1st and 2nd defendants approached him and represented to him that they were in a position to offer him survey services to sub-divide the said land in order to facilitate execution of the judgment issued in KERUGOYA L.D.T Case No. 42 of 2002. Unknown to plaintiff, the 1st and 2nd defendants did carry out sub-division on the original title No. KABARE/KIRITINE/1763 resulting in the above mentioned sub-divisions being KABARE/KIRITINE/1764 to 1769 and further, the parcel No. KABARE/KIRITINE/1768 was also sub-divided into KABARE/KIRITINE/1776 and 1777 which were then sold to the other defendants. That these sub-divisions and transfers were done illegally, fraudulently and without the consent or authority of the plaintiff. Particulars of the said fraud on the part of the defendants were pleaded in paragraph 11(a) to (f) of the plaint.

On 10th December 2007, the defendants filed a joint statement of defence through the firm of Magee wa Magee Advocates in which they denied all the plaintiff's averments but most importantly, they gave notice that they would raise a Preliminary Objection to the hearing of this suit on the grounds that:-

1. ***The same is incompetent and bad in law.***
2. ***The same is time barred***.

On 17th May 2011, the firm of Maina Kagio Advocates came on record for the 3rd and 4th defendants and also gave notice that a Preliminary Objection on a point of law would be raised on the grounds that the suit is res-judicata since another suit has already been concluded over the same subject matter and the same parties being KERUGOYA L.D.T NO. 101 of 2006 wherein a judgment was delivered on 6th November 2006.

That Preliminary Objection is the subject of this ruling and when the parties appeared before me on 16th July 2015 following the transfer of this case from the High Court Embu, it was agreed that the same be canvassed by way of written submissions. The submissions were filed by both Mr. Kirubi Mwangi advocates for the plaintiff and Mr. Maina Kagio advocate for the 3rd and 4th defendants. I did not receive any submissions by counsel for the other defendants.

I have considered the submissions by counsels on the Preliminary Objection raised herein together with the pleadings.

It is clear to me that the Preliminary Objection is founded on the following:-

1. ***That this suit is res-judicata because the same parties herein litigated over the same matter in KERUGOYA L.D.T No. 101 of 2006 and a judgment was delivered on 6th November 2006.***
2. ***That this suit is time barred.***

The other issue raised in the defence that this suit is incompetent and bad in law is too open ended and it is not clear what exactly is bad in law or incompetent about the suit. This Court only therefore confine itself to the issues identified above.

In ***MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD 1969 E.A 696 Law J.A*** said as follows:-

"So far as I am 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. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration"

It is clear from the above that where the Court needs to investigate facts, then that cannot be a proper case on which a Preliminary Objection can be founded. In the case of ***ORARO VS MBAJA (2005) 1 K.L.R 141*,** **Ojwang J.** (as he then was) captured the principle in the following words:-

"***I think the principle is abundantly clear. A Preliminary Objection correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed".***

As was stated by **Newbold P**, In the case of ***MUKISA BISCUIT*** (supra), a Preliminary Objection is a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.

Having set out the law on what amounts to a Preliminary Objection, I shall now consider the objections raised herein.

The first objection is that this suit is res-judicata since there is a decree issued in KERUGOYA LDT No. 101 OF 2006 involving the same parties and the same claim as in this suit. I have looked at the proceedings in that case and it is correct that it involved the plaintiff herein and seven (7) of the defendants except the 1st and 2nd defendants. The matter was heard by the Gichugu Land Disputes Tribunal under the now repealed Land Disputes Act and the plaintiff's complaint was that land parcel No. KABARE/KIRITINE/1763 had been sub-divided by the Tribunal and allocated to seven (7) defendants. The Tribunal made a finding that the said sub-division of KABARE/KIRITINE/1763 that gave rise to KABARE/KIRITINE/1764 to 1769 which parcels were then allocated to the seven (7) defendants was proper and refused to have the original title No. KABARE/KIRITINE/1763 revert to the plaintiff as requested. That award was adopted by the Principal Magistrate's Court in Kerugoya L.D.T No. 101 of 2006 and a decree issued on 6th November 2006. Is this suit therefore res-judicata in view of that decree"

Res-judicata is provided for in ***Section 7 of the Civil Procedure Act*** in the following words:-

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court"

I have no doubt in my mind that the claim in Kerugoya Principal Magistrate's L.D.T No. 101 of 2006 which arose from Gichugu Land Disputes Tribunal Case No. 27 of 2006 involved the parcel No. KABARE/KIRITINE/1763 and also the same parties herein save that the 1st and 2nd defendants were not parties. The dispute

therefore involved registered land. What is not clear is which other tribunals had made orders regarding the same land. What is clear from the proceedings in the Gichugu Land Disputes Tribunal Case No. 27 of 2006 is that the plaintiff herein was complaining that although the land parcel No. KABARE/KIRITINE/1763 belonged to him, the District Commissioner had appointed a Tribunal which arbitrated over the dispute and gave a portion thereof to one Muchira Macharia. Perhaps these matters will become clearer at the trial. What is obvious, however, is that a Land Disputes Tribunal had no jurisdiction to grant proprietary rights over registered land and any decree arising from such an award would therefore be a nullity. Res-judicata presupposes that the Court that determined the former suit had the requisite jurisdiction to do so. If it does not have jurisdiction, then a plea of res-judicata cannot be sustained. In ***MULLA, THE CODE OF CIVIL PROCEDURE 18TH EDITION***, this position is affirmed at page 285 as follows:-

"***A judgment delivered by a Court not competent to deliver it cannot operate as res-judicata since such a judgment is not of any effect. It is a well settled position in law that if a decision has been rendered between the same parties by a Court which had no jurisdiction to entertain and decide the suit, it does not operate as res-judicata between the same parties in subsequent proceedings"***

Therefore, as the Gichugu Land Disputes Tribunal had no jurisdiction to make any orders over ownership of registered land, whatever decision it rendered would not operate as res-judicata in subsequent suits.

Further, it is also clear from the award of the Gichugu Land Disputes Tribunal in Case No. 27 of 2006 that the said Tribunal did not infact render any decision. Instead, it downed its tools citing the law of limitation and ordered that the status quo be maintained. This is what the Tribunal said:-

AWARD

"After careful considerations from the evidence adduced by the complainant, his witnesses, the defendant, their witnesses and the documentary evidence produced, the Tribunal Court has ruled that the status quo should be maintained. This is in conjunction with Limitation of Action Act Cap 22 of the Registered Land Act.

No costs as to this suit. Each party to bear its own costs.

Any aggrieved party to appear to the Provincial Appeals Committee within 30 days from to-day"

This is the award that was adopted by the Principal Magistrate's Court Kerugoya in L.D.T Case No. 101 of 2006. The plaintiff had moved the Tribunal seeking some orders regarding land parcel No.

KABARE/KIRITINE/1763 which had been sub-divided and allocated to the defendants but the Tribunal infact made no orders and ordered "***that the status quo should be maintained".*** It cannot therefore be said that the Tribunal "***heard and finally decided***" the dispute between the parties over the said land. Therefore, not only did the Tribunal lack the jurisdiction to determine the dispute before it but it is clear from the proceedings and award that it did not render any decision which is a requirement under ***Section 7 of the Civil Procedure Act*** before res-judicata can apply. The Preliminary Objection on res-judicata is therefore not well founded and must be dismissed with I hereby do.

The other limb of the Preliminary Objection is that this suit is statute barred since it is founded on fraud which is a tort and under ***Section 4(2) of the Limitation of Actions Act,*** such an action cannot be brought after the end of three years. Therefore, since the fraud was committed in 2003 when the original title No. KABARE/KIRITINE/1763 was sub-divided and registered in the names of the defendants, it is the defendants' arguments that this suit became time barred in 2006.

That argument cannot be correct. Firstly, this suit is a claim for recovery of land from the defendants and under ***Section 7 of the Limitation of Actions Act,*** the limitation period for such a claim is 12 years. This suit was filed in 2007 which is well within the time allowed by law.

Secondly, this claim is based on fraud on the part of the defendants and under the provisal to ***Section 26(a) of the Limitation of Actions Act***, where an action is based on the fraud of the defendants or their agent, the period of limitation does not begin to run until the plaintiff has discovered the fraud. As to when exactly the plaintiff discovered the fraud alleged against the defendants will be a matter to be determined at the trial. However, a casual glance at the pleadings show that the earliest time the plaintiff could have discovered this fraud would only be after 2003 which again would mean that this suit filed in 2007 is well within the time set out in the law for recovery of land.

In the circumstances therefore, the Preliminary Objection is dismissed with costs.

B.N. OLAO

JUDGE

27TH NOVEMBER, 2015

27/11/2015

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Kirubi for Plaintiff – absent

Ms Kiragu for Kagio for 3rd & 4th Defendants – present

Ms Wairimu for 5th, 6th & 8th Defendants - absent

Mr. Chomba for 1st & 2nd Defendants – absent

COURT: Ruling delivered, dated and signed this 27th day of November, 2015 in open Court.

B.N. OLAO

JUDGE

27TH NOVEMBER, 2015