



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KWALE

ELC NO 109 OF 2021

GEORGE STEPHEN NJOROGE MACHARIA.....PLAINTIFF

VERSUS

ISSA MJAWIRI JABIRI.....1ST DEFENDANT

STANLEY NDINGURI WANJIKU.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

RULING

1. As a way of background this suit was instituted vide a plaint dated 6th June 2017 in respect of parcel No. Kwale/Diani Settlement Scheme 397 (the suit land). The Plaintiff pleaded that in 1978 through the Settlement Fund Trustee he was offered Plot No. 397 situated in Diani Settlement Scheme Kwale. He accepted the offer and upon payment of the requisite charges was issued with certificate of outright purchase pending the issuance of title. However, in March 2015 the Plaintiff discovered that the title deed of the suit land was on 17th December 2002 issued to the 1st Defendant and subsequently transferred to the 2nd Defendant. It is the Plaintiffs case that the title deed issued to the 1st Defendant over the suit land was null and void as it had allegedly been processed fraudulently and that no good title had been passed to the 2nd defendant. The Plaintiff therefore asked for a declaration in these terms and for the 3rd Defendant to cancel or expunge from its records the title in the name of the 2nd defendant and for the suit land to be transferred to him. Service of summons was by leave of the court served upon the 1st and 2nd defendants by way of advertisement. No appearance was entered, interlocutory judgement was entered and the matter proceeded for hearing *ex parte* on 25th April 2019. The court entered judgement for the Plaintiff where the land was reverted to the Plaintiff. The 2nd defendant filed an application setting aside the said judgement on grounds that proper service had not been effected upon them hence the matter proceeding *ex parte* and the orders made against them were prejudicial and would result to loss and harm. The court rendered its ruling on the said application and on 28/9/2021 the Land Registrar Kwale was ordered to cancel entry of the Plaintiff as the owner of the suit land and for the register to revert to the way it was before filing of the suit.

2. The 2nd Defendant has now filed a preliminary objection dated 26/10/2021. The preliminary objection seeks to strike out the Plaintiff's suit on the grounds that;

1) The suit is fatally defective and a nullity as the Plaintiff failed to serve summons to enter appearance against the defendants as required under Order 5 Rule 1 of the Civil Procedure Rules.

2) The summons to enter appearance having been served upon the defendants and the validity of the said summons having lapsed, the suit herein has abated pursuant to order 5 rule 2[7] of the civil procedure rules.

3) *The suit filed herein is time barred having been filed after the lapse of the statutory period as set out in Section 7 of the Limitation of Actions Act [cap 22] Laws of Kenya.*

4) *The Plaintiffs pleadings are based on an incurable illegality and ought to be struck out.*

5) *The entire suit and all proceedings taken against the 2nd Defendant are nullity ab initio.*

6) *The plaintiffs suit and application herein are therefore incompetent, incurable defective, bad in law and ought to be struck out.*

3. The preliminary objection was canvassed by way of written submissions. From my perusal of the file. it is noteworthy that initially the 1st Defendant did not respond to the claim and interlocutory judgement was entered on 30th November 2018. However, on 4th March 2021 Ms. Kihika Counsel for the 2nd Defendant informed the court that the 1st Defendant was deceased

2nd Defendants Submissions

4. The 2nd defendants' submissions were filed on 27/10/2021 and identified two issues for determination. Whether the Plaintiff's suit herein was time barred and whether the Plaintiff's suit had abated pursuant to Order 5 Rule 2[7]. Counsel submitted that the preliminary objection raised was on pure points of law based on the provisions of Order 5 Rule 2[7] of the Civil Procedure Rules and Section 7 of the Limitation of Actions Act Cap 22 of the Laws of Kenya. The case of **Mukisa Biscuit Manufacturing Ltd Vs. West End Distributors Ltd Civil Appeal No. 9 of 1969 EA** was relied upon to buttress this point.

Whether the Plaintiff's suit herein was time barred

5. On whether the suit was time barred it was submitted that the 2nd Defendant is the absolute and indefeasible owner of LR No Kwale/Diani/Settlement Scheme 397 having purchased the same from the 1st Defendant herein. That he had first purchased 2.5 acres out of the 5 acres that constitute the whole parcel and that he later bought the remaining portion at a consideration of Kshs 100,000,000. He stated that before he purchased the suit land it was in occupation of the 1st defendant from the year 1970 and who was the absolute, indefeasible and registered owner of the suit property.

6. Counsel submitted that in the year 2009, the 1st Defendant sold the entire suit property to the 2nd defendant whereupon it was accordingly registered in the 2nd Defendants name. Before the sale the 1st Defendant had been in uninterrupted possession of the suit property from the year 1970. Counsel pointed that while the Plaintiff claims he was allocated the suit parcel in 1977 the Plaintiff had not given any explanation to court as to why he never took possession of the suit premises for 23 years. That the 1st defendant had been issued with a title deed in the year 2002 and the Plaintiff filed his suit in 2017, 15 years after title deed had been issued to the 1st Defendant and 47 years since the 1st Defendant had taken possession of the suit land. That from the said set of facts the suit was time barred as it had been brought after the statutory limitation of 12 years. It was submitted that time begun to run in the year 1970 when the 1st Defendant took possession of the land and further in the year 2002 when the suit land was registered in favour of the 1st defendant. That the dispute was basically between the 1st Defendant and the Plaintiff and the entry of the 2nd Defendant into the picture should not count as he was an innocent purchaser for value without notice. Moreover, the Plaintiff never placed any restriction for the entire time the suit property was in the 1st Defendants name or even the 2nd Defendants. Reliance was placed on several cases on when a suit is considered as being statute barred and effect of the same on the courts jurisdiction to handle such matters **Margaret Wairimu Magugu V Karura Investment Limited & 4 Others [2019] eKLR, Kenya Civil Aviation Authority V WK 7 2 others [2019] eKLR** and **Nelson Machoka Keraro V Land Registrar Kisii & 3 Others [2019] eKLR**

Whether the Plaintiff's suit had abated pursuant to Order 5 Rule 2[7].

7. On whether the suit has abated pursuant to Order 5 Rule 2[7] of the Civil Procedure Rules it was submitted that the plaintiff's suit was filed on 6/6/2017 and summons to enter appearance issued on 19/6/2017 and expired on 18/6/2018. That the Plaintiff failed to serve the summons upon the Defendants and did not seek for extension of the same. It was submitted that even though an application for summons to be reissued was made on 4/7/2018 and for the Plaintiff to be granted leave to serve the defendants by substituted service was granted, the courts record indicate that the plaintiff was allowed to effect such service but the issue of re issuance of summons was not canvassed on that particular day. Counsel stated that the summons had expired on 18/6/2018 and were not capable of being extended by the time an application for the same was made. That it was immaterial that the Defendants responded to the advertisement and filed their pleadings as this action could not revive the summons. On re issuance of summons it

was submitted that to date the Plaintiff has never moved the court to have the summons re issued to him, that the original summons have since expired and the suit stood abated as the expiry of 24 months period from the issuance of the original summons. This court was asked to make a finding that the Plaintiff's suit had abated and for the same to be struck out for being incompetent and incurably defective.

Plaintiffs Submissions

8. The Plaintiff filed submissions on 3/12/2021 and opposed the preliminary objection. Counsel submitted that upon summons to enter appearance being served the suit was heard and determined in favour of the Plaintiff on 31/7/2019 after the court being satisfied that service had been properly effected. However, the said judgement was however set aside at the Defendant's instance and the case re opened. That striking out the suit at this particular point would greatly prejudice the Plaintiff as he had demonstrated his ownership of the suit property. It was stated that ownership of the suit land would not be determined at the preliminary stage and the parties ought to be given an opportunity to present their cases for the court to reach a just finding. Reliance was placed on; **Joseph Kinuthia Njenga V Hannah Wangari Kinuthia & Another [2021] eKLR** and **Karisa Ngari Kombe V Esther Nzingo Kalume & Another [2020] eKLR**.

9. Lastly Counsel for the Plaintiff submitted that the plaintiffs claim was for fraudulent transfer of the suit land and the same was fit for a substantive hearing hence the prayer to have the preliminary objection dismissed with costs.

ANALYSIS AND DETERMINATION:

10. In my view three issues arise for determination in this application, first is whether the preliminary objection has been properly taken, second and most importantly is whether the suit is time barred and thirdly whether service of summons to enter appearance was properly effected.

11. I need to start by setting out what a proper preliminary objection is, and I will heavily rely on **Nitin Properties Ltd V Singh Kalsi & Another [1995] eKLR** which elaborated the legal principle when it stated as follows:

"...A Preliminary Objection 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 has to be ascertained or if what is sought is the exercise of judicial discretion..."

12. It is clear from the above excerpts that a preliminary objection may only be raised on a 'pure question of law'. In order to discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The court should be able by looking at the pleadings against the objection raised and on these alone decide on the same. The moment the court has to ascertain any fact and this would be by evidence then it ceases being a pure point of law. The Plaintiff herein alleges that he was allocated the suit land in the year 1978 by the Ministry of Lands through the Settlement Fund Trustee Kwale. That he made a discovery in respect of issuance of the title deed to the 1st defendant in March 2015 when pursuing the issue of transfer of the suit land and further discovered that the suit land had been transferred to the 2nd defendant. He stated that the said transfer was fraudulent. The 2nd defendant on his part stated that he was the indefeasible owner of the suit land herein having purchased the same from the 1st defendant. That before the said purchase the land had been in occupation of the 1st defendant from the year 1970 who had bought the same from one Ali Mwachivirima. It was submitted by the 2nd defendant that time begun to run in the year 1970 when the 1st Defendant took possession of the land and further in the year 2002 when the suit land was registered in favour of the 1st defendant. That the dispute was basically between the 1st Defendant and the Plaintiff and the entry of the 2nd Defendant into the picture should not count as he was an innocent purchaser for value without notice. I find all these as issues that should be canvassed at the full trial and cannot be confirmed at this preliminary stage by way of affidavits. The facts as stated by the parties herein have not been agreed upon. Each party gives their narration of events surrounding ownership of the suit property and they vary. It is not as straight forward as Counsel would want this court to believe. I am inclined to find that the preliminary objection does not raise pure points of law as the facts surrounding the suit are clearly disputed.

14. This court is of the opinion that justice can only be substantively delivered if the parties are allowed to ventilate their case as was held much more recently in the Supreme Court in Independent **Electoral & Boundaries Commission -v- Jane Cheperenger & 2 Others [2015] eKLR where the court had this to say; -**

"[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants

to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

15. On whether the suit is time barred, the 2nd Defendant submits that the Plaintiff’s action to recover land is statute barred by reason of Section 7 of the **Limitation of Actions Act**, Cap 22 Laws of Kenya which provides that; -

‘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.’

16. The Plaintiff herein was filed before court on 6/6/2017. It is pleaded at paragraph 7 of the same, that the Plaintiff discovered the fraudulent transactions on the suit land by the defendants in March 2015. The Plaintiff is pegged on fraudulent transfer of the suit land to its current owners; therefore, fraud has clearly been pleaded. Section 26 of the Limitation of Actions Act provides as follows;

‘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

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

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

17 Going by the above provision it is trite that in circumstances where fraud is pleaded, time does not start to run until when such fraud was discovered. Emphasis over the said position was highlighted in the case of **Justus Tureti Obara vs Peter Koipeitai [2014] eKLR** wherein Okong’o J held that;

‘I am in agreement with the Plaintiff’s submission that the Plaintiff’s claim is for the recovery of the suit property from the Defendant and as such the limitation period for such a claim is 12 years as provided for in section 7 of the Limitation of Actions Act, Cap. 22, Laws of Kenya. I would wish to point out further that the Plaintiff’s case although for recovery of land is based on fraud. The proviso to section 26 (a) of the Limitation of Actions Act, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the Defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the Defendant is a matter to be ascertained at the trial.’

18. I am fully persuaded by the above position. I note that from the facts as gathered in the pleadings herein fraud was discovered in 2015 and the suit filed in the year 2017. The Plaintiff had therefore not run out of time for filing the present suit as at the time he discovered the fraud and the filing of this suit it was approximately three years only. The twelve years stipulated by statute had not lapsed.

On whether the summons to enter appearance were properly effected and if the same had expired and new ones never re issued.

19. Order 5 Rule 2 of the Civil Procedure Rules ,2010 guides and guards the process of issuance of summons which reads: -

2. (1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons. (Emphasis mine)

(2) Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if

satisfied it is just to do so.

(3) Where the validity of a summons has been extended under sub-rule (2) before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended.

(4) Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same suit which has not been served so as to extend its validity until the period specified in the order.

(5) An application for an order under sub-rule (2) shall be made by filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff in person being heard.

(6) As many attempts to serve the summons as are necessary may be made during the period of validity of the summons.

(7) Where no application has been made under sub rule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.

20. The original summons were taken out by the Plaintiff on 19th June 2017 and therefore were to expire after 12 months, that is on 19th June 2018. By a Notice of Motion Application dated 4th July 2018 the Plaintiff applied for the summons to re-issue. The application was allowed by the court on 18th October 2020, which was 4 months after expiry of the original summons. The law is clear that where no application has been made under sub rule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons. While indeed the summons had expired after the first 12 months' period upon issuance of the original summons, the 12 months thereafter available at the discretion of the court to allow the extension of time within which summons should be held expired had not lapsed. From my computation I find that these 12 months had not lapsed as at the time the court allowed the application to re-issue the summons herein.

21. I am further guided by the observations of Apaloo JA (as he then was) in his dissenting judgment in the case of Wachira vs. Ndanjeru [1982 -88] IKAR 1062 said at page 1065:

"At all events it seems to me that the appellant is merely standing on bare technicalities. Nobody has a vested right in procedure and a court, must, at least at the present day, strive to do substantial justice to the parties, undeterred by technical procedure rules."

22. Moreover, under Articles 159 (2) (d) this court would also be inclined to disregard such technicality and focus on substantive justice through hearing the case on merit. I would not forgive myself were I found to have dismissed a suit for a 4 months lapse, this is excluding the time in between the actual filing and the hearing of the application for re-issuance of the summons.

23. In the premises, I dismiss the 2nd defendant's preliminary objection. Let the Plaintiff set down this suit for hearing subject to compliance with pretrial directions within 60 days of this order. I make no order for costs

Orders accordingly.

Delivered and Dated at Kwale this 25th Day of February 2022

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Othimfor the Plaintiff

Mrs. Kamotho holding brief for Mrs Kihika for the..... 2nd Defendant

N/A for the rest of the Parties.

Mr. Denis Mwakina..... Court Assistant.



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