



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 796 OF 2017

PAUL KIROKET OLE MUTUNKEL.....PLAINTIFF

VERSUS

MAGANA HOLDINGS LIMITED.....1ST DEFENDANT

LAND REGISTRAR KAJIADO.....2ND DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 8th November, 2017 and the 1st Defendant's Notice of Motion application dated the 8th December, 2017.

In the Plaintiff's Notice of Motion Application, he seeks the following orders:

1. Spent
2. This Honourable Court be pleased to issue an order of temporary injunction restraining the Defendants, their servants and/or agents or any one acting for them or through them from subdividing, trespassing, conveying, charging, constructing or in any way alienating land parcel number Kajiado/ Kitengela/3456 or any subdivisions thereof till this suit is heard and determined.
3. This Honourable Court be pleased to authorize the Plaintiff to serve the summonses in this suit to 3rd Parties by way of advertisement in a local newspaper.

In the 1st Defendant's notice of motion application, it seeks the following orders:

- i. That the suit herein against the Defendant, be dismissed, is statute barred by virtue of section 7 of the Limitation of Actions Act (Cap 22) Laws of Kenya.
- ii. That in the alternative the suit be dismissed under the doctrine of laches.
- iii. That the Plaintiff do pay costs of this application.

The Plaintiff's application is premised on the grounds that he was previously registered as the proprietor of land parcel number Kajiado/ Kitengela/ 3456, hereinafter referred to as the 'suit land' and that in May 2017 he conducted a search which revealed that the suit land was registered in the 1st Defendant's name. He denies selling the suit land to the 1st Defendant but states that he only sold twenty (20) acres comprised in land parcel number Kajiado/ Kitengela/ 3209. The Plaintiff avers that he has been rendered landless and totally pauperized by the fraudulent actions of the 1st Defendant in collusion with the 2nd Defendant in alienating the suit land without his consent.

The Plaintiff's application is supported by his affidavit where deposes that land parcel number Kajiado/ Kitengela/ 2746 was his land which he subdivided into two portions namely Kajiado/ Kitengela/ 3209 measuring 8.09 hectares and Kajiado/ Kitengela/ 3201 measuring 40.47 hectares. He states that he sold 20 acres of land to Njoroge Mungai, which comprised in land parcel number Kajiado/ Kitengela/ 3209 and transferred the title to him through his company, which is the 1st Defendant herein. He claims he thereafter subdivided his remaining land parcel Kajiado/ Kitengela/ 3210 into four portions namely Kajiado/ Kitengela/ 3455; 3456; 3457; and 3458 respectively. He avers that thereafter his entire land disappeared and he could not find the remaining portion of the 40 acres that should have been his, to build a home. He contends that he became totally pauperized without a home or shelter as he lost his family and became landless. Further, that he is physically disabled and travelling is difficult and slow unless he has a good well-wisher to assist him, hence the delay in coming to court. He states that he sought the assistance of the Defendant to get his land but to no avail. Further, after retaining the services of his advocate, he discovered that several persons have been registered in portions of his land and one, which is the suit land herein, has been transferred to the

1st Defendant. He denies selling the suit land to the 1st Defendant and states that he is an illiterate as well as physically disabled and believes the 1st Defendant's agents simply took advantage of his disability to alienate his land fraudulently. He further denies entering into a Sale Agreement with the 1st Defendant or attending any land control board for selling land to it. He reiterates that he only sold the 1st Defendant 20 acres and not 40 acres. He believes the 1st Defendant's lawyers defrauded him of 20 acres of his land and that if he signed documents in respect of the suit land he was misled by the said lawyers to believe he was signing documents for land parcel number Kajiado/ Kitengela/ 3209. He reiterates that he would like the title to the 1st Defendant cancelled including subsequent subdivisions and it would hence be important if all purchasers were informed. Further, he would like all the developments on the land and all its subdivisions stopped forthwith until the matter is heard and determined. He further claims that his efforts to view documents of transfer over the suit land has been in vain and he disputes the authenticity of the title deed, transfer as well as application for Land Control Board Consent.

The application is opposed by the 1st Defendant that filed a replying affidavit sworn by JACK OKELLO who is its Real Estate Manager where he deposes that the Plaintiff is guilty of laches as he has lodged his alleged claim more than 25 years after signing the sale agreement and concluding the sale of the suit land to the 1st Defendant. He contends that the suit is statute barred pursuant to the provisions of the Limitation of Actions Act and the Plaintiff's claim is time barred as he is disallowed from lodging a claim over ownership of the suit land, 12 years after the purported cause of action arose. He avers that the instant Notice of Motion and the suit herein are incurably incompetent, vexatious and the same ought to be dismissed at the first instance for want of jurisdiction. He disputed the annexures 'JO 1' attached to the Plaintiff's affidavit. He confirms that it is not in dispute that the Plaintiff sold land parcel number Kajiado/ Kitengela/ 3209 to the 1st Defendant and he was fully compensated by the 1st Defendant. He contends that after the Sale of land parcel number Kajiado/ Kitengela/ 3209, the Plaintiff subdivide land parcel number Kajiado/ Kitengela/ 3210 and agreed to sell a portion of 20 acres to the 1st Defendant. Further, that a Sale Agreement was prepared for the sale of the subdivided portion of land known as Kajiado/ Kitengela/ 3456 which is the suit land herein, with the 1st Defendant represented by the law firm of messrs Mwaura & Mukuria Advocates. He insists the Agreement of Sale was properly executed by the 1st Defendant on 18th December, 1991 and the Plaintiff's signature was attested to by Advocate Robert Njenga Mwaura, while the 1st Defendant affixed its common seal. He reiterates that subsequent to the Sale, the Plaintiff willfully transferred the suit property by signing the Transfer Form on 15th January, 1992, in the presence of an Advocate – Robert Njenga Mwaura. He confirms that the 1st Defendant paid the full purchase price amounting to Kshs. 560, 000, to the Plaintiff by cheque payments into his account which he operated and he signed a Completion Statement to that effect where he acknowledged receipt of the said monies. He states that it is unconscionable for the Plaintiff to feign ignorance of the transactions and allege fraud but from the evidence presented, it demonstrates he is not an illiterate person who did not understand the procedure of selling land. He confirms that he was present when the suit land was being subdivided and was involved in the sale as well as transfer of the subdivided plots to individual purchasers, who subsequently constructed residential house in place. He reaffirms that the subdivision of the suit land was undertaken in 2008 and the sale as well as transfer processes took place four (4) years from 2008, and the same was not interrupted by anybody claiming its ownership. Further, that while on the ground and heavily involved in the subdivision as well as sale, nobody informed him or the 1st Defendant that they had beneficial interest over the suit land. He deposes that while the Plaintiff claims he is a resident of Kitengela, he did not at any time claim an interest in the suit land or raise an objection on the subdivision, yet he had knowledge of the activities that were taking place on it. He further reiterates that the Plaintiff cannot, therefore claim ownership, or that he did sell the suit land and is seeking an unjust enrichment.

1st Defendant's application is premised on the grounds that this Court lacks jurisdiction to hear this suit as it is statute barred pursuant to section 7 of the Limitation of Actions Act. Further, that the cause of action arose in November, 1991 yet the suit was filed on 30th June, 2017 and pursuant to the Plaintiff, the Plaintiff has admitted subdividing Kajiado/ Kitengela/ 3210 in November, 1991 and is therefore guilty of laches.

The 1st Defendant's application is supported by the affidavit of JACK OKELLO who is its Real Estate Manager where deposes that the Plaintiff agreed to sell 20 acres of land to the 1st Defendant and a Sale Agreement was executed over land parcel number Kajiado/ Kitengela/ 3456 which was a resultant subdivision of Kajiado/ Kitengela/ 3210. He deposes that the 1st Defendant was represented by the Advocate Robert Njenga Mwaura and the Plaintiff willingly signed a Transfer Form on 15th January, 1992. He confirms that the 1st Defendant paid Kshs. 560,000/= in full to the Plaintiff by cheque payments into his bank account, which he operated. He further reiterated the 1st Defendant's claim as per the averments stated in the replying affidavit above.

The Plaintiff PAUL KIROKET OLE MUNTUNKEI filed a replying affidavit where he deposed that the suit herein is based on fraud on the part of the Defendants who transferred the suit land without his participation and that limitation of time began to run on the date he discovered this. He confirms having sold to the 1st Defendant, land parcel number KAJIADO/ KITENGELA/ 3209 and not the suit land. He insists he is illiterate including being physically challenged and just trusted that the 1st Defendant transferred the land he sold to it. He contends that during the transaction, he was not represented by his advocates but only the 1st Defendant had a lawyer Mwaura & Mukuria Co. Advocates who drew the Sale Agreement as well as transfer. He believes the 1st Defendant and his advocates deceived him into parting with two parcels of land while he only sold one piece. He insists that where one Advocate acted for both of them, he owed him a fiduciary duty to advise him honestly as well as sincerely that he was transferring two pieces of land and not one. He claims the Sale Agreement dated the 18th December, 1990 contained blank spaces at the recital part and he suspects the Advocate for the Purchaser inserted the title of his land fraudulently, in the said spaces. Further, that his identity card appears inserted and differs from the one mentioned on the document at page 7 while the Sale Agreement is reproduced half way leaving paragraph 7 including 8, which he believes is an indication of fraud. He states that he would like the Advocate who acted in the two transactions to be available in Court with the original transfer as well as Sale Agreements for both the suit land and Kajiado/ Kitengela/ 3209 for cross examination. He reiterates that save for the cheque payments of Kshs. 300,000 and Kshs. 97,000, he did not receive any other payments from messrs Mwaura & Mukuria Advocates and neither did he authorize payments to be made to any person. He further contends that the two cheque payments were for the purchase of LR. Kajiado/ Kitengela/ 3209, since there is no explanation as to why he was paid Kshs. 80,000 by messrs Mwaura & Mukuria Advocates on 8th December, 1991 while the Sale Agreement is dated 18th December, 1991 some ten (10) days later. Further, that the Sale Agreement contradicts the position as stated in paragraph 1 which, states that he should have been paid Kshs. 112, 000 on signing the Agreement and Kshs. 448,000/= on obtaining the Land Control Board Consent. He denies being paid Kshs. 45, 000/= by messrs Mwaura & Mukuria Advocates and disputes it. He further denies ever attending a Land Control Board for consent in respect of the suit land and states that when his advocate sought to inspect the relevant file at the Kajiado Land Office, the register went missing. He reiterates that since the 1st Defendant failed to allow his advocate

inspect the documents pertaining to the sale of the suit land, the 1st Defendant has no basis to apply for his suit to be dismissed.

The 1st Defendant further filed a further affidavits sworn by JACK OKELLO and ROBERT NJENGA MWAURA who was the advocate who drew up the Sale Agreement in respect of the suit land. In JACK OKELLO's further affidavit he responds to the averments in the Plaintiff's replying affidavit where he disputes the allegations of fraud and deposes that the Plaintiff has not made any demand to the 1st Defendant nor reported the complaint to the Police. He contends that the transfer to the suit land was effected on 15th January, 1992 and thereafter the said land was occupied by third parties; and the Plaintiff ought to have seen occupation on his alleged land in the land twenty six (26) years. He insists that it is not reasonable that the Plaintiff discovered the transfer and occupation of the land that is purported to be his, twenty six (26) years later which means he is guilty of laches. He contends that the suit land is now developed with residential as well as commercial buildings constructed thereon, which has been done over a period of time from 1992. He reiterates that the Plaintiff has admitted that he has not been in actual possession of the land which only proves that his absence from the land is because he sold it to the 1st Defendant. He avers that the Plaintiff ought to have sought leave of court to institute the suit herein and that he is not an illiterate person who did not understand the procedure of transacting on the land. He notes that all the documents adduced in the 1st Defendant's supporting affidavit show the same signature of the Plaintiff, which is the same used on his replying affidavit and that an illiterate person would sign using a thumbprint and not signature.

In the affidavit of ROBERT NJENGA MWAURA, he confirms that the Plaintiff together with his two (2) brothers sold some land to the 1st Defendant, where his firm of messrs Mwaura & Mukuria Advocates, in which he was the Senior Partner acted for them while the Plaintiff including his brothers were represented by the firm of messrs D. K. Thuo & Company Advocates. Further, that in the subsequent sale transactions, the Plaintiff on his own volition opted for the firm of messrs Mwaura & Mukuria Advocates to act for him as well as the 1st Defendant. He denies that the firm of messrs Mwaura & Mukuria Advocates deceived the Plaintiff into parting with two (2) parcels of land while he only sold one piece. He avers that it is incredible and unimaginable that the Plaintiff just discovered twenty six (26) years later, after he sold the suit land for valuable consideration that he only sold one piece and not two, yet he has been living in Kitengela where the suit land is situated. He contends that it is strange and curious that the Plaintiff is raising his claim after the Agent he used to sell the property, Mr. Evanson Ngari Kamau and Dr. Njoroge Mungai, the CEO of the 1st Defendant have both died. He confirms that while it is not humanly possible to remember everything that transpired during this transaction and all other transactions involving the Plaintiff as well as the 1st Defendant, he believes that all the payments were made by messrs Mwaura & Mukuria Advocates to the Plaintiff or his designated agents, either by cash or cheque, details of which may all not be available as the firm of messrs Mwaura & Mukuria Advocates was dissolved in 1995. He reaffirms that he is not in possession of the Original Sale Agreement and the Transfer documents as the same are usually passed to Purchasers on Completion of Sale.

The Plaintiff and the 1st Defendant filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the Plaintiff's Notice of Motion application dated the 8th November, 2017 and the 1st Defendant's Notice of Motion application dated the 8th December, 2017 including the various affidavits as well as the submissions, there are two issues for determination:

- Whether the Plaintiff is entitled to orders of temporary injunction pending the outcome of the suit.
- Whether the suit herein is statute barred pursuant to the provisions of the Limitation of Actions Act.

It is not in dispute that the Plaintiff sold to the 1st Defendant some land. What is in dispute is the Plaintiff contention that he only sold land parcel number Kajiado/ Kitengela/ 3209 and not Kajiado/ Kitengela/ 3456, which is the suit, land herein. He insists the 1st Defendant fraudulently colluded with the 2nd Defendant to transfer the suit land to the 1st Defendant. The 1st Defendant on the other hand states that it bought land parcels numbers Kajiado/ Kitengela/ 3209 including Kajiado/Kitengela/ 3456 from the plaintiff and paid the full purchase price.

In his submission the Plaintiff relied on the cases of **Giella Vs Casmann Brown; Mrao Vs first American Bank; Lucy Wangui Gacara Vs Minumbi Okemba Lore Civil Appeal No. 4 of 2015** to support his claim for an injunction. The 1st Defendant opposed the application for injunction and relied on the cases of **Giella Vs Cassman Brown and Company Ltd (1973) EA 358; Halai & Another V Thorton & Turpin (1963) Ltd (1990) KLR 365; Bilha Mideva Buluku Vs Everlyne Kanyere (2016); Mrao Vs First American Bank of Kenya Limited & 2Others 2003, KLR, 125; Anne Njeri Mwangi V Musafee Essajee & Another (2014) eKLR and Hassan Zubeidi Vs Patrick Mwangangi Kibaiya & Another (2014) eKLR** to support its arguments.

In the case of **Giella Vs Casman Brown (1973) E.A 358**

The Court clearly established the principles for granting an injunction. As to whether the Plaintiff has established a prima facie case with a probability of success, I wish to refer to the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003) K.L.R 125** described a prima facie case as follows:

“..... is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

I note the 1st Defendant produced the Sale Agreement for Kajiado/Kitengela/ 3456 including evidence of payments. From the annexed Sale Agreement, it is evident that it was duly executed by both the Plaintiff and the 1st Defendant. From a perusal of the said Sale Agreement, it is clear the Plaintiff's signature thereon is the same as the one in his supporting affidavit. From the averments of ROBERT NJENGA MWAURA Advocate, who is the lawyer who undertook the transaction over the suit land, he confirms that the Plaintiff together with his two (2) brothers sold some land to the 1st Defendant and he oversaw the transaction while the Plaintiff including his brothers were represented by

the firm of messrs D. K. Thuo & Company Advocates. The said advocate explains that it is the Plaintiff who opted to have one lawyer with the 1st Defendant on transaction over the suit land. The Plaintiff admitted subdividing land and did not controvert these averment and neither did he controvert the fact that he has been residing in Kitengela where the suit land is situated and the fact that these are developments thereon which include both residential as well as commercial buildings. What is interesting is that for 26 years, the Plaintiff noted developments on his land but never bothered to act nor send away the intruders. The Plaintiff challenged the authenticity of the Sale Agreement but I find that his averments can only be determined once viva voce evidence is adduced. I note the Plaintiff has also not been in occupation of the suit land for twenty six (26) years and the same has even been transferred to third parties as per the averments of the 1st Defendant.

I note from the annexures to the replying affidavit, the Plaintiff signed the Transfer Form as well as various acknowledgments confirming receipt of purchase price, some of which was even paid to a third party whom he owed money. Further, that despite the Plaintiff acknowledging losing land after sub division that was done in 1991, he never took any action. A cursory look at the entries in the Green Card which were availed to Court, it indicates parcels Kajiado/Kitengela 3456 and 3209 were both transferred to the 1st Defendant in 1991. Further, that on 21st January, 2008, the title deed to Kajiado/Kitengela 3456 was closed upon subdivision and the register refers to numbers 22794 to 22870. I note all these years the Plaintiff did not take any action over the suit land and seeks the cancellation of the title 3456 in this suit, which title no longer exists as it was closed ten (10) years ago.

Section 26 of the Land Registration Act provides as follows:

‘(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.’

Section 24 (a) of the Land Registration Act stipulates that **‘Subject this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**

In relying on the above legal provisions, the facts as presented and the above cited judicial authorities, I find that the Plaintiff has not established a prima facie case to meet the threshold for the grant of orders of injunction.

As to whether the Plaintiff’s suit is statute barred, it is the 1st Defendant’s argument that the Plaintiff is guilty of laches as the transaction in dispute occurred 26 years ago, and yet the Plaintiff instituted the suit herein without leave of Court. The 1st Defendant relied on the cases of: **Josephat Ndirangu V Henkel Chemicals (EA) Ltd (2013) eKLR; Lillian Njeri Muranja & John Muranja Mahinda Vs Virginia Nyambura Ndiba & Kajiado County Government (2014) eKLR; Kennedy Mureithi & Another vs Peterson Karimi Gacewa (2016) and Paul Kipsigei Rono V Johan Kipkemoi Rono (2014) eKLR** to support its arguments that the Plaintiff’s suit is statute barred pursuant to the Limitation of Actions Act. The Plaintiff opposed the application and argued that his claim is not statute barred as he has raised allegations of fraud against the Defendants.

I note in paragraphs, 6, 10 and 11 of the Complaint, the Plaintiff has raised allegations of fraud which have been denied by the Defendants. These are triable issues which cannot be dispensed with at an application stage but only after viva voce evidence being adduced.

In the case of **Davy...Vs...Garrette (1878) 7 ch.473 at Pg 489**, the Court held that:-

“In the common law courts, no rule was more clearly settled than that fraud must be distinctly proved and that it was not allowable to leave fraud to be inferred from the facts...”

Further in the case of **R. G. Patel v. Lalji Makanji [1957] EA 314** the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

Section 7 of the Limitation of Actions Act 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.’**

While section 26 gives an extension of time and states 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:

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.'

In the current scenario, I note that the Plaintiff alleges fraud against the 1st Defendant and 2nd Defendant and claims he did not sell the suit land to the 1st Defendant. He disputes documents of Sale annexed by the 1st Defendant and insists he never appeared before the Land Control Board to obtain consent to effect transfer of the suit land to the 1st Defendant. These are questions which beg for an answer and can only be determined once oral evidence is adduced and not through the facts as presented in the affidavits. In relying on section 26 of the Limitation of Actions Act, I will not term the Plaintiff's claim of fraud as baseless.

In the circumstances, I find that the Plaintiff's claim is not statute barred in accordance with the provisions of section 7 as read together with section 26 of the Limitation of Actions Act.

It is against the foregoing, I find that the two Notice of Motion applications dated the 8th November, 2017 as well as 8th December 2017 are unmerited and proceed to dismiss them. Costs will be in the cause.

Parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated signed and delivered in open court at Kajiado this 30th day of June, 2018

CHRISTINE OCHIENG

JUDGE