



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC CASE NO 261 OF 2017**

**PETER KIMANI NJENGA .....PLAINTIFF/APPLICANT**

**VERSUS**

**MUGO KAMABUNI MUGO.....1<sup>st</sup> DEFENDANT**

**MARY NJERI KABUKI.....2<sup>nd</sup> DEFENDANT**

**PAUL MUGANE KABUKI**

**(Being Administrators**

**of the Estate of JOSPHAT KABUKI MWANGI) .....3<sup>rd</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR LAIKIPIA.....4<sup>th</sup> DEFENDANT**

**RULING**

1. This matter was certified ready for hearing on the 11<sup>th</sup> December 2017, however on the hearing date, counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that he had a Preliminary Objection to raise and went ahead to inform the court that parties had agreed by consent to have the same prosecuted by way of written submissions before the matter could proceed for full hearing.
2. The court having granted the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants leave to file the application raising their Preliminary Objection, the same was filed on the 31<sup>st</sup> January 2018 wherein parties filed their written submissions to the application thereafter.
3. It was the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's application that the honorable court should strike out the entire suit with costs because the same offended the provisions of Section 7 of the Limitation of Actions Act as the Plaintiff's action being one for recovery of land and which was time barred having been brought after 12 years from the date on which the right of action accrued to him.
4. Secondly, that the suit also violated the provisions Section 4(2) of Limitation of Actions Act because the Plaintiff's cause of action having been founded on fraud, which was a tort, should have been brought within 3 years from the date when the cause of action arose. That the suit was vexatious, uncalled for, an abuse of the court process, fatally defective and unsustainable.
5. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's further submission was to the effect that since the Plaintiff's cause of action was founded on the allegation of fraud, when the 1<sup>st</sup> Defendant fraudulently sold the suit land and caused it to be transferred to Josphat Kabuki Mwangi (deceased) in the year 1993, it was incumbent of the Plaintiff herein to have filed his claim for cause action 3 years from the date when the cause of action arose.
6. That as per the Plaintiff's claim, the registration of the 1<sup>st</sup> Defendant was in the year 1992 while the registration in favour of the deceased was in the year 1993. That the Plaintiff then sought to recover the property in the year 2004 after the death of the Josphat Kabuki Mwangi by filing a dispute with the West Rimuruti Division Land Disputes Tribunal being Case No. 29 of 2007.
7. From the Plaintiff's pleadings, the deceased Josphat Kabuki Mwangi acquired ownership of the suit premises in the year 1993 through a transfer effected by the predecessor to the deceased, a fact that was within the knowledge of the Plaintiff. That the Plaintiff thus ought to have brought his action for claim within 3 years but he took more than 12 years to commence action.
8. That Fraud was a tort which is governed by the provisions of Section 4 (2) of the Limitations of Actions Act to the effect that:

*“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.*

9. That the present claim brought by the Plaintiff sought to prejudice the persons who were duly entitled to benefit from the estate of Josphat Kabuki Mwangi. That Justice and equity abhor a claimant's indolence or sloth. That this was a stale claim which was prejudicial and negatively impacted on the efficiency and efficacy of the administration of justice.

10. To buttress their submission, counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants relied on the decided case of **Republic vs. Principal Magistrate P. Ngare Gesora & 2 others Exparte Nation Media Group Ltd [2013] eKLR** where Odunga judge held as follows:

*The said provisions are meant to ensure that the path of justice is not clogged or littered with technicalities. Where, however, a certain cause of action is disallowed by the law, the issues of the path of justice being clogged does not arise since in that case justice demands that that claim should not be brought. Justice, it has been said time without a number, must be done in accordance with the law.*

11. The Defendants further submitted that according to the decided case of **Owners of Motor Vessel “Lilian S vs. Caltex Oil (K) Ltd [1980] KLR1**, this court had no jurisdiction to entertain this suit which was time barred.

12. The Application was opposed by the Plaintiff who submitted that the said Preliminary Objection lacked merit and ought to be dismissed. That the Plaintiff filed this suit vide his plaint dated the 4<sup>th</sup> July 2016 seeking for a declaration that he was the lawful owner of L.R Marmanet/ North Rumuruti Block 2/287(Ndurumo), for the cancellation of the Defendant's title to the said parcel of land as well as for a permanent injunction restraining the Defendants from interfering with the suit land. The claim therefore was to recover land fraudulently acquired by the Defendants.

13. It was the Plaintiff's contention that upon purchasing the suit land for valuable consideration and transfer effected, he took time before he could have his title processed. That it had been when he applied for the abstract, that he was shocked to discover that in 1992, Mugo Kumambuni Mugo had been issued with the title wherein he had transferred the suit land to Josphat Kabuki Mwangi in the year 1993. That when he sought for redress at the District officer's office, he had been advised to file a land dispute case before the Land Dispute Tribunal which he did vide the West Rimuruti Division Land Disputes Tribunal Case No. 18 of 1990. He submitted that he had made the discovery in the year 1990. That subsequently, the award was issued in his favour on the 21<sup>st</sup> August 2008.

14. That this award was subsequently quashed by the Environment & Land Court in Nakuru Judicial Review No 32 of 2009.

15. That during the pendency of the proceedings in both the tribunal and the Judicial Review, the Plaintiff was precluded from filing another suit over the ownership of the suit land. With this background, it was the Plaintiff's submission, that the cause of action first accrued in 1990 wherein he immediately sought redress which he was granted only to be quashed on the 17<sup>th</sup> May 2016. That in this regard, the cause of action thus accrued on the 17<sup>th</sup> May 2016 therefore he was within time as provided for under section 4 (2) and Section 7 of the Limitations of Actions Act to file the instant suit.

16. The Plaintiff relied on the case of Justus **Tureti Obara vs Peter Koipeitai [2014] eKLR** wherein J. Okong'o 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.*

17. I have considered the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants application on a point of Preliminary Objection to the effect that the suit should be struck out for contravening the provisions of Section 4(2) and Section 7 of the Limitation of Actions.

18. In the case of **Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696** where their Lordships observed thus:

*“---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 a contract giving rise to the suit to refer the dispute to arbitration”.*

In the same case Sir Charles Newbold, P. stated:

*“a preliminary objection is in the nature of what used to be a demurrer. It 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.*

19. The summation of the Defendant's Preliminary Objection is that this matter involves a cause of action founded on fraud which is a tort herein and which ought to have been brought within 3 years from the date the cause of action arose. Secondly that the Plaintiff's claim was for the recovery of land which was time barred since it was brought after 12 years from the date on which the right of action accrued to him.

20. To contextualize the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants application on a point of Preliminary Objection, it is necessary to set out the relevant provisions of the Limitation of Actions Act which they rely on and I set the same out hereunder:-

Section 4 (2) reads:

*“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:*

*Provided that an action for libel or slander may not be brought after the end of twelve months from such date”*

21. I have considered the submissions and the annexures herein, I note from the Plaintiff’s plaint that at all times he was the registered proprietor of land parcel No Plot 1889 (Now Marmanet/North Rumuruti Block 2/287 (Ndurumo) having bought the same from one Francis Weru Gichibu who had executed the transfer documents way back in the year 1983. That later while he awaited for the issuance of the title deed, he had discovered in 1992 that the 1<sup>st</sup> Defendant in collusion with the 4<sup>th</sup> Defendant had fraudulently registered the same in the name of the 1<sup>st</sup> Defendant.

22. That the 1<sup>st</sup> Defendant in the year 1993 had further fraudulently transferred the suit land to the name of Josphat Kabuki Mwangi (deceased) whose estate is now being administered by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

23. The plaintiff had then filed a dispute with the West Rimuruti Division Land Disputes Tribunal vide Case No. 29 of 2007, unlike what counsel wants the court to believe that the matter was filed in the West Rimuruti Division Land Disputes Tribunal vide Case No. 18 of 1990 (Before the cause of action accrued). The Award of the tribunal was subsequently quashed on the 17<sup>th</sup> May 2016 for want of jurisdiction vide Nakuru Judicial Review No 32 of 2009.

24. I have asked myself when the operation of limitation comes into play in such a situation. I have considered paragraphs 9 and 10 of the Plaintiff’s Plaint as well as the copy of the register in regard to the suit land and the same are clear that the alleged fraud was committed on the 2<sup>nd</sup> September 1993 when Josphat Kabuki Mwangi (deceased) was registered as the proprietor of the suit land. The cause of action against the deceased who is now represented by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants therefore arose on 2<sup>nd</sup> September 1993.

25. 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:*

26. From the Plaintiff’s pleadings it is clear that he had discovered the fraud in the year 1993 as stated in paragraph 10 of his plaint. That although a tribunal has no jurisdiction to hear matters on land proprietorship, yet the plaintiff filed a land dispute with the West Rimuruti Division Land Disputes Tribunal vide Case No. 29 of 2007

27. Section 4(2) of the Limitation of Actions Act provides that an action founded on tort may not be brought after three years. Time therefore started running on 2<sup>nd</sup> September 1993 and the period of three years ended on 2<sup>nd</sup> September 1996. The filing of the matter before the tribunal was therefore time barred in the circumstance.

28. If the court decides to give the Plaintiff a benefit of the doubt in relation to Section 26 of the Limitation of Actions Act herein above stated and find that the cause of action arose at the time the matter was referred to the tribunal in the year 2007, the period of three years would have ended in the year 2010 and the Plaintiff would still be time barred in relation to the present case which was filed in the year 2016.

29. Although the Plaintiff would want this court to believe that the cause of action accrued on the 17<sup>th</sup> May 2016 after the ruling in the Judicial review, I do not agree with this position.

30. A cause of action, is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a plaintiff brings suit. According to Section 26 of the Limitation of Actions Act the cause of action accrues when the fraud is discovered. In the present scenario therefore it cannot be right to state that the alleged fraud was discovered on the 17<sup>th</sup> May 2016 after the ruling of the Judicial Review.

31. From the above definition, I find that the cause of action accrued on the on 2<sup>nd</sup> September 1993 and a period of three years ended on 2<sup>nd</sup> September 1996. Submissions by the Plaintiff’s Counsel to the effect that during the pendency of the proceedings in both the tribunal and the Judicial Review, the Plaintiff was precluded from filing another suit cannot come to his aid in the sense that the tribunal lacked the jurisdiction to hear matters concerning title and secondly these proceedings were filed in the year 2007 which period was beyond the 3 years

from the date the cause of action arose.

32. Section 7 of the Limitation of Actions Act provides:

*“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*

33. Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the Plaintiff having bought the suit land in the year 1983 (as per paragraph 6 of his plaint) and thereby claiming ownership in the same, he could seek to recover it from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, but only if he did so within twelve years after he accrued the suit land.

34. There is no doubt that the period of about thirty three years have lapsed from the date of the sale agreement to the date this suit was filed. No leave for extension of time to file the suit outside the twelve year period has been exhibited before this court. There Plaintiff needed to commence his claim within the time prescribed under Section 7 of the Limitation of Actions Act. It follows therefore that by the time the Plaintiff filed this suit, the claim was statute barred.

35. In the case of **Bosire Ongero vs Royal Media Services [2015] eKLR** the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.

36. I have considered the foregoing and I find that limitation being a substantive law, the provisions of section 1A and 1B of the Civil Procedure Act cannot be invoked with a view to disregard the provisions of another Act of Parliament. Even if the Limitation of Act was a procedural legislation, section 3 of the Civil Procedure Act provides:

*In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.*

37. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

*‘I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’*

38. Clearly, this Court lacks jurisdiction and the matter is at its end. I will have to down my tools and take no further step. The preliminary objection herein succeeds in its entirety with the result that the plaintiff’s suit is herein struck out with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

**Dated and delivered at Nyahururu this 26<sup>th</sup> day of June 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**