



REPUBLIC OF KENYA

IN THE LAND AND ENVIROMENT COURT OF KENYA AT NYAHURURU

ELC NO 339 OF 2017

(Formerly Nakuru 73 of 2015)

ILMISIGIYO GROUP RANCH.....PLAINTIFF

VERSUS

LEMIYON KEPARMARAI.....1ST DEFENDANT

JOB LASITI LETUNTA.....2ND DEFENDANT

ZAMBEZI RITEY.....3RD DEFENDANT

FARID ANKALE RITEY.....4TH DEFENDANT

LEKIRE LESHOMO.....5TH DEFENDANT

MOSES MAYO LENAIROSHI.....6TH DEFENDANT

THE KENYA BROADCASTING CORPORATION

THE MINISTRY OF LAND.....7TH DEFENDANT

HOUSING AND URBAN DEVELOPMENT.....8TH DEFENDANT

THE HON ATTORNEY GENERAL.....9TH DEFENDANT

RULING

1. The Plaintiff in this case instituted the same through a plaint dated the 17th March 2015 which was filed on the same date. Along with the Plaintiff, the Plaintiff filed their application seeking injunctive orders against the Defendants herein. When the matter was placed before Justice Munyao sitting in the Environment and Land Court in Nakuru on the 17th March 2015, the Judge made an observation that since some of the titles said to be fraudulent were issued 40 years ago, this was not a fit case to issue any interlocutory order given the time lapse. The application was not certified as urgent. Directions were then issued to the effect that pleadings and the application be served for inter parties hearing for the 23rd September 2015.

2. On the said date, the court noted that vide a letter filed on 3rd September 2015 the Plaintiff had withdrawn the application which was subsequently marked as withdrawn with costs to the 5th and 6th Respondents. The matter was then transferred to Environment and Land Court Nyahururu.

3. On the 25th July 2017 when the matter was before me, there was no appearance for the 1st, 2nd, 5th and 6th defendants and neither was there an appearance for counsel representing the 3rd and 4th Defendants and no appearance for the Hon the Attorney General for the 8th and 9th Defendants.

4. The court was informed that the 1st, 2nd, 5th and 6th defendants had not participated in the proceedings despite service and that all parties save for the ones who had not participated in the proceedings had been served with the day's mention date.

5. Counsel for the Plaintiff confirmed that they had complied with the provisions of Order 11 of the Civil Procedure Rules. The 7th, 3rd and 4th Defendants also confirmed that they had also complied wherein counsel prayed for the matter be certified ready for hearing.
6. The matter was certified ready for hearing wherein it was set for hearing for the 20th November 2017 on which day counsel for the Plaintiff informed the court that there had been no participation in the proceedings by the 1st and 2nd Defendant who had been served. He thus informed the court that he was ready to proceed with 3 witnesses.
7. Counsel holding brief for counsel for the 5th and 6th Defendants applied for an adjournment stating that the date had been taken ex parte and that counsel on record had not been invited. That the date was not convenient as counsel was appearing before the Muranga Court in civil case No 466 of 2014 which had been fixed earlier.
8. The application for adjournment was not objected to by counsel for the 7th Defendant although they were ready to proceed. The Adjournment was however objected to by the Plaintiff's counsel but the court overruled him and granted the same wherein it re-scheduled the matter for hearing on the 13th February 2018.
9. On the said date, although the Plaintiff was ready to proceed with the hearing, there was an application for an adjournment made by Counsel for the 5th and 6th Defendant and holding brief for counsel for the 7th Defendant, which application was overruled and the matter ordered to proceed at 11:00 am.
10. At 11:00 am when the matter was set for hearing, the court was informed by one Mr. Fuelime Letunta who was the son of the 2nd Defendant that the said Defendant had died on the 3rd March 1995. Court was shown the certificate of death as well as the Succession Cause. This new development was not known to counsel to all the Parties. The Plaintiff's Counsel then applied to amend their Plaint.
11. The court thus granted leave to the Plaintiff to amend file and serve his plaint within 14 days. Further leave was also granted to Mrs. Kamau advocate to file and serve her notice of appointment, to act for the estate of the 2nd Defendant. Further, pursuant to Order 7 Rule 17(2) of the Civil Procedure Rules, leave was granted to the 2nd Defendant and 5th Defendant to file and serve all their documents and to comply with the provisions of Order 11 of the Civil Procedure Rules. The matter was set for mention to confirm compliance.
12. What followed was a myriad of applications. There was an Application dated the 20th February 2018 by the 2nd, 5th and 6th defendants respectively wherein they sought to have the suit struck out for being a gross abuse of the court process. On the 20th April 2018 the 1st Defendant also filed an application seeking leave to file his defence out of time whereas on the 20th April 2018 the 7th Defendant filed an application to have the suit struck out for being a gross abuse of the court process.
13. On the 24th April 2018, the court noted that the matter was taking a turn that would delay the disposition of the same. Therefore after considering the numerous applications filed and the arguments advanced by counsel for all parties and in the best interests of justice and pursuant to section 1A, 1B and 3A of the Civil Procedure Act, the court allowed the unopposed application by the 1st Defendant dated the 20th April 2015 and granted him leave to file and serve his defence and counter claim out of time.
14. The applications dated the 20th February 2018 and 20th April 2018 filed by the 2nd, 5th, 6th and 7th Defendants respectively were consolidated whereas the 1st Defendant's application remained independent. Directions taken to have all the applications disposed of by way of written submissions.
15. The Defendants chose not to highlight on their submissions but to adopt them the way they were and sought for a date for ruling. The Plaintiff on the other hand chose to highlight on his submissions.

Defendants' Submission

16. The 2nd, 5th, 6th and 7th Defendants' consolidated submissions was to the effect that the present suit was incurably and fatally defective null and void ab initio the same being statute barred for reason that it was instituted 43 years after the cause of action arose. Secondly that the suit against the 2nd Defendant was also fatally defective null and void ab initio the same having been instituted 20 years after the 2nd Defendant had passed away.
17. The Defendants relied on the Section 7 of the Limitation of Actions Act as well as the provisions of Section 3 of the Public Authorities Limitation act to buttress their submissions.
18. The defendants further submitted on the history of the matter in question to the effect that the suit land in question was declared a land adjudication area on 6th December 1972, where residents of Samburu and Lodokejek were invited to apply for individual ranches wherein the 6th Defendant and the 2nd deceased Defendant were allocated Samburu/Lodokejek 36 and Samburu/Lodokejek 33 ranches respectively.
19. That on 20th March 1974, the Land Adjudication officer gave notice that the Adjudication register for Lodokejek had been completed wherein he opened the register for public inspection for 60 days from the 20th March 1974 to 19th May 1974. No objection was raised concerning the two parcels of land being No. Samburu/Lodokejek 36 and Samburu/Lodokejek 33 respectively.
20. The adjudication process was completed with no complaints registered and a notice of finality was issued on the 4th July 1977 wherein both parcels of land were titled.

21. That if anything, that the cause of action could have arisen in the year 1974 when the register was opened for inspection. This was not the case, instead the Plaintiff has waited for 43 years to institute the present suit which is statute barred. That the suit could also not be brought against the Hon the Attorney General on behalf of the Ministry of Lands and Planning because they were 40 years late.

22. They relied on the decided cases of **Mehta vs Shah (1965) E.A 321 and Owners of the Motor Vessel Lillian S vs Caltex Oil (Kenya) Ltd [1989] KLR 1** to buttress their submissions that the effect of limitation enactment was to remove remedies irrespective of the merits of a case and that if the court had no jurisdiction then it ought to down its tools as it had no power to make one more step.

23. The Defendants further submitted that the Plaintiff's suit against the 2nd Defendant was fatally defective, null and void ab initio the same having been instituted 20 years after his death. That the suit had abated as against the 2nd Defendant. That in fact when the Plaintiff made an application to amend his plaint and substitute the 2nd Defendant, the same was not within the time stipulated under Section 24 Rule 4 of the Civil Procedure Rules.

24. That the Plaintiff perjured himself when he deposed in his affidavit of service that he had served the 2nd Defendant when indeed the 2nd Defendant had long died.

25. The Defendants also submitted that the 8th Defendant named in the plaint was a nonexistent entity, and that when the Plaintiff made his application to amend his plaint which application was granted, he ought to have amended the issue touching on the 8th Defendant. The Defendants wondered whether the Plaintiff had served this non-existent entity as deposed or it was another perjury.

26. Lastly the Defendants submitted that the Plaintiff had not proved its case on a balance of probability and sought that their Application dated 5th July 2011(sic) be allowed.

27. The 1st Defendant's submission was premised on the fact that although the plaint was filed on the premise that the Plaintiff was the proprietor of parcels of land No. Samburu/Lodokejek 10, 33 and Samburu/Lodokejek 34-37 yet no leave had been sought to file the same out of time, the adjudication and demarcation process having been finalized in the year 1972, 43 years ago.

28. Like his co-defendants the 1st Defendant submitted that this suit was time barred by virtue of Section 4 of the Limitations of Actions Act.

29. The 1st Defendant also relied on the provisions of Section 5 of the Civil Procedure Act which clearly provide that the court had jurisdiction to try all civil suits save for suits which have been expressly or implied barred. That Section 3(1) of the Limitation of Actions Act outlined actions that may not be brought after the lapse of 6 years from the date on which the cause of action occurred. The Defendant also referred to Section 7 and Section 22 of the said Act to submit that the Plaintiff's suit was time barred.

30. That the fact that the Plaintiff tried to wiggle out of this scenario by stating that their claim was based on fraud cannot hold water. That no report was made to any authority to show that any investigations were under way.

31. That it was hard to believe that in all the 43 years when the Plaintiff knew that he had been defrauded of its land, none of its members had filed any complaint.

32. The Defendants sought that the Applications dated the 20th February 2018 and 20th April 2018 be allowed and the Plaintiff's plaint be struck out.

The Plaintiff's submission

33. The Plaintiff's Counsel highlighted on his submissions opposing the Application by the Defendants to have the suit dismissed on the basis that it was statute barred stating that their claim was based on the tort of Fraud.

34. That Section 26 of the Law of Limitations Act made it clear that in dealing with claims where fraud is alleged, time starts to run when the fraud or mistake is discovered.

35. That in this case they had indicated that the fraud was discovered in the year 2007 an issue which remains contested by the defendants' defences. That the allegations by the Plaintiff could not therefore be said to be hopeless and dismissed summarily.

36. That the Defendants had raised the issue of limitation under Section 2 of the Public Authorities Act. That that provision of the law should be viewed under the sense of Article 159 of the Constitution of Kenya.

37. The Plaintiff relied on the case of **Kenya Bus Service Ltd vs Minister of Transport Civil [2012] eKLR** and the fact that the Hon Attorney General did not seem to oppose to have parties heard on merit.

38. That the Court of Appeal in the case of **Ahmed Said Mohammed vs Municipal Council of Garissa & Another [2014] eKLR** found that:-

'The prudent thing for the a court to do where fraud is alleged in a claim is to allow the parties to proceed to full trial so that the parties can present facts for and against the alleged fraud for the court to make a determination on the matter. It would be against the dictates of fair play and justice to decide such a case at the preliminary stage''

39. The Plaintiff further submitted that on the 2nd issue where the Defendants alleged that the suit was defective for failing to sue the legal representative of the 2nd Defendant/deceased, that this aspect had been addressed by the court in its ruling dated the 13th February 2018 where the court had allowed them to file an amended plaint to reflect the legal representative of the 2nd Defendant.

40. That they had complied with the orders and filed an amended plaint on the 22nd March 2018. That the said application was therefore made through the back door seeking for the suit to be dismissed. That the court could therefore revisit its decision without being against public policy.

41. That the Defendants benefitted a lot when the court exercised its inherent jurisdiction in allowing them to file their defences out of time as at time when the matter was coming for hearing. The same Defendants now did not want the Plaintiff to benefit from the same inherent powers of this court.

42. They supported the court's inherent jurisdiction in ensuring a fair trial between all parties and sought that it does justice to all parties.

43. The allegations that the Plaintiff s had served documents on the 2nd Defendant who is deceased was deceiving before the court. That counsel had personally served the Defendant who then came on record. At paragraph 7 the same was clear that they had served the 2nd Defendant's wife who was his legal representative and who was now on record.

44. That the conduct of the Defendants in this suit was telling. That they had not been participating until they were served with a notice that they were woken from deep slumber only to file a myriad of applications seeking to have the suit dismissed.

45. That the aim of a court was to sustain rather than terminate a suit prematurely before hearing all parties to the suit. That striking out a pleading would drive the Plaintiff from the seat of justice. They sought for a chance to be heard.

Issues for determination.

46. I have considered the submissions by the all parties herein as well as the contents of the application and authorities thereto which have herein above been enumerated.

47. I find the matters that emerge for determination herein as being;

- i. Whether the suit against the 2nd Defendant is also fatally defective null and void ab initio.
- ii. Whether the whole suit is statute barred by virtue of the provisions of the Limitations of Actions Act.

48. On the first issue, it is not in dispute that the suit was instituted on the 17th March 2015, wherein the 2nd Defendant was enjoined as one of the parties. That subsequently on the 13th February 2018 when the matter was slated for hearing, the court was informed by the 2nd Defendant's son and through documentary evidence that the 2nd Defendant had passed away 3rd March 1995. This was way before the present suit had been instituted. That following his death, letters of Administration had been issued to one Joyce Letuna on the 6th February 2012.

49. Following this turn of events, the Plaintiff sought leave to amend their plaint an application which was not opposed by counsel for the Defendants. The court pursuant to Article 159 (2) (d) of the Constitution as well as Section 1A and 3A of the Civil Procedure Act granted leave to the Plaintiff to amend his Plaint.

50. At this point I must point out that the 2nd Defendant had died, not in the cause of the suit, and therefore leave was granted to the Plaintiff to amend their Plaint, not pursuant to the provisions of Order 24 Rule (4) of the Civil Procedure Rules which provision stipulates the procedure to be followed when a party dies in the course of the suit.

51. It cannot therefore be said that the suit against the 2nd Defendant abated pursuant to the provisions of Order 24 Rule 4(3) of the Civil Procedure Rule and that the Plaintiff ought to have made an application to reinstate the same.

52. Order 1 Rule 9 Civil Procedure Rule stipulates that

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

53. Leave was therefore granted pursuant to the provision under Order 1 Rule 10 of the Civil Procedure Rules which provision also gives the court discretion to direct that the Plaint be amended so that the name of any person who ought to have been joined, whether as Plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the in the suit, be added.

54. The court of Appeal in the case of **J M K v M W M & another [2015] eKLR** held as follows;

'This Court adopted the same approach in Central Kenya Ltd. v. Trust Bank & 4 Others, CA NO. 222 OF 1998, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:

all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.’’

55. I find that the misjoinder of 2nd deceased to the suit was not fatally defective null and void ab initio as the same was curable pursuant to the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules wherein leave could be given to the Plaintiff, as was done, to amend the plaint so as to reflect the proper entity as Defendant. This line of opposition therefore fails.

56. On the second issue as to whether the whole suit is statute barred by virtue of the provisions of the Limitations of Actions Act, I have considered the submission for and against the striking out of the suit based on the effect that it was time barred,

57. Looking at the suit herein, I note that the same was filed on the 17th March 2015 wherein the Plaintiff identified itself as Group Ranch registered under the Land (Group representatives) Act and that all material times relevant to this suit, its members were the owners and occupiers of all parcels of land situated in Samburu County, Lodokejek ward land which had its clear traditional boundaries marked out.

58. That during the demarcation of the land in the year 1972, clear boundaries and beacons were placed on the said land setting out the area covered by the traditional Ilmisigiyo Group Ranch where the original titles were Samburu/Lodokejek 10, Samburu/ Lodokejek/8 and Samburu/Lodokejek 31 which were fraudulently and/or in an unlawful process registered in the names of the 1st Defendant, 2nd Defendant (now deceased) and 6th Defendants respectively.

59. That the 8th Defendant's officials had, in collusion with the 1st, 2nd (Deceased) Defendant and 6th Defendants unlawfully and fraudulently caused part of the Plaintiff's parcel of land to be hived off and allocated to the said Defendants thus altering the Plaintiff's boundaries.

60. The Plaintiff had particularized the fraud committed by 1st -7th Defendants herein. At paragraph 21 of the Complaint the Plaintiff stated that the fraudulent activity was noted in the year 2007 when they noted suspicious activity on its parcel of land and after some investigations, came to find out that that part of its land had been carved away and that 3rd, 4th, 5th, and 7th Defendants were complacent to the illegalities and fraudulent transactions.

61. Fraud is 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.

62. This matter having been founded on fraud as stated by the Plaintiff in his submissions, I find that the suit herein 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, the same ought to have been brought within 3 years from the date when the cause of action arose.

63. 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.

64. From the Plaintiff's pleadings, more so at paragraph 20 of the complaint, the same is clear that they had discovered the fraudulent activity in the year 2007 when they noted suspicious activity on its parcel of land and after some investigations, came to find out that that part of its land had been carved away and that 3rd, 4th, 5th, and 7th Defendants were complacent to the illegalities and fraudulent transactions. Upon this discovery, the present suit was not filed immediately but the Plaintiff waited for 8 years to file the same. Their statutory period starting running in the year 2007 and stopped after 3 years in 2010. The cause of action accrued when the fraud was discovered. The filing of the matter in the year 2015 was therefore time barred in the circumstance.

65. 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

66. 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. From the green cards attached in the pleadings the 1st Defendant was registered as the proprietor of Samburu/Lodokejek 10 on the 19th December 2005, the 2nd Defendant's (deceased) parcel of land No Samburu/Lodokejek/8 was registered in his name on the 3rd July 1978 wherein the title was closed upon subdivision into numbers 33, 34, and 35 in the year 1984. That the last parcel of land being Samburu/Lodokejek 31 was registered in the name of the 6th Defendant on the 28th April 1976 wherein it was also closed upon sub-division into titles No's 36 and 37 on the 10th September 1990.

67. It is therefore clear that for the Plaintiff to have brought this suit claiming ownership and/or to recover the original parcels of land as well as the resultant subdivisions of the same from the 1st, 2nd (deceased), 5th, and 6th and 7th Defendants herein it was incumbent of them to have done so within twelve years after they accrued the suit land.

68. There is no doubt that the period of more than 12 years have lapsed from the date of the registration of the said parcels of land into the names of the Defendants to the date when 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. The 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.

69. As this court has held before in the case of **Peter Kimani Njenga v Mugo Kamabuni Mugo & 3 others [2018] eKLR** to the effect that 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.

70. 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.

71. 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.'

72. 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 Applications dated the 20th February 2018 and 20th April 2018 are hereby allowed with the result that the Plaintiff 's suit is herein struck out with costs to the 1st, 2nd (deceased's representative) 5th, 6th and 7th Defendants.

Dated and delivered at Nyahururu this 5th day of November 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE