



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 116 OF 2018**

**MOTEMPA SUAKEI SITEYA (Suing as the legal of the estate of**

**SUAKEI OLE SITEYA KORONGOLO).....PLAINTIFF**

**VERSUS**

**CHARLES OMONDI OLUTE.....1<sup>ST</sup> DEFENDANT**

**DISMAS OPANDE OGOT.....2<sup>ND</sup> DEFENDANT**

**TOM AYIEKO OKUNDI.....3<sup>RD</sup> DEFENDANT**

**AGNETA MOLLY AWINO.....4<sup>TH</sup> DEFENDANT**

**ALFRED OTIENO.....5<sup>TH</sup> DEFENDANT**

**RULING**

What is before Court for determination is the 1<sup>st</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants Notice of Preliminary Objection dated the 10<sup>th</sup> January, 2019, premised on the following grounds:

1. That the suit is barred by statute of Limitation of Actions Act Cap. 22 Laws of Kenya and is unmaintainable in law.
2. The Plaintiff lacks locus standi to institute the suit herein since no confirmation of Grant has been issued in respect of suit property hence the suit is a nullity ab initio.
3. That the suit is incurably incompetent and fatally defective and ought to be struck out in limine with costs.

The 1<sup>st</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants including the Plaintiff filed their respective submissions in respect of the Preliminary Objection.

**Analysis and Determination**

I have considered the Notice of Preliminary Objection dated the 10<sup>th</sup> January, 2019 including the Plaintiff's, 1<sup>st</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants submissions and the only issue for consideration is whether the suit should be dismissed on the grounds cited above.

The 1<sup>st</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants submitted that the suit herein is statute barred and the Plaintiff has no locus to institute it since there is no Certificate for Confirmation of Grant in respect to the suit property. They relied on the cases of **Haron Onyancha V National Police Service Commission & Another (2017) eKLR**; **Mehta V Shah ( 1965) EA 321**; **Moffat Muriithi Muchai ( suing on behalf of the estate of the Late Milka Njoki Muchai (deceased) V Wanjiru Wanjohi Gatundu & 2 Others (2019) eKLR**; **Damaris Kondoro V Gachanja & Another (20050 eKLR**; **Abraham Gina Adams ( Suing as the Administrator of the Estate of Geoffrey Adams Ogwa) V James Ouma Natolio (2015) eKLR** to support their argument that the suit was statute barred. On the issue that the Plaintiff lacked locus to institute the suit, they relied on the case of **Julian Adoyo Ongunga & Another V Francis Kiberenge Bondeva ( Suing as the Administrator of the estate of Fanuel Amudavi – Deceased) ( 2016) eKLR**; **Irine Mwango Anasi V Jared Tom Ngiti Opande & 4 Others ( 2016) eKLR**; **Charles Ratemo Nyambati V Jacton Ocharo & 4 others ( 2016) eKLR** and **Omari Kaburu V Industrial & Commercial Development Corporation ( 2007) eKLR** to buttress their arguments. The Plaintiff opposed the Preliminary Objection and submitted that the same should be on pure points of law and to discern such a point of law, the court should be satisfied that there are no

contested facts. She relied on the cases of **Mukhisa Biscuits & Co. Ltd V West End Distributors Ltd (1969) EA 696**; **Aviation and Allied Workers Union Kenya V Kenya Airways Ltd & 3 Others to support this argument**. She further submitted that the suit was not statute barred as the Plaintiff pleaded and particularized fraud in the Plaintiff. Further, that time only begins to run when the Plaintiff discovered the fraud. She relied on the cases of **Ishmael Ithongo V Geoffrey Ithongo Thindiu (1981) eKLR**; and **Justus Tureti Obara V Peter Koipeitai Nengiso (2014) eKLR** to oppose the preliminary objection. She contended that she had locus to institute this suit as she is the legally recognized administrator of the entire estate of the deceased having obtained a Grant of Letters of Administration intestate. To support this argument, she relied on the cases of **Wairimu Gathute V Theuri & Another Nyeri CACA No. 33 of 1991**; and **Re Estate of Job Ndunda Muthike (Deceased) (2018) eKLR** respectively.

In the case of **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696**; the Court held that **‘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 points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop. ‘**

Further in the case of **Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others Civil Application No. 36 of 2014**, the Supreme Court reiterated the principles set out in the aforementioned case and held as follows: **‘A preliminary objection consists of a point of law which has to be pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.....it cannot be raised if any fact has to be ascertained of if what is sought is the exercise of judicial discretion. ‘**

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 of the Limitation of Actions Act 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’**

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.”***

In the instant Preliminary Objection, I note the Applicants contend that the suit is statute barred. On perusal of the Plaintiff, I note the Plaintiff has pleaded fraud and at paragraph 9, she had particularized the same. In the Plaintiff, the Plaintiff claims to have carried out a search on land parcel number Kajiado/ Kitengela/ 3246 and realized that the 1<sup>st</sup> Defendant had fraudulently or mistakenly transferred the land to himself.

At this juncture, I opine that where there are allegations of fraud, the Court cannot make a proper determination of the suit at an interlocutory stage but unless viva voce evidence is adduced. Based on my analysis above as well as relying on the legal provisions and associating myself with the authority I have cited, I decline to find that the claim herein is statute barred and direct that the matter be set down and heard on its merits.

On the issue of locus, I note the Plaintiff was issued with a Certificate of Confirmation of Grant dated the 6<sup>th</sup> July, 2007 in respect of the deceased estate, which she is representing in the suit herein. The said Certificate for Confirmation of Grant is part of the Court Record. I note the Defendants have averred that the disputed land was not part of the Grant. However, I do not deem this omission to be fatal as the Law of Succession Act allow for amendment of a Grant and further these are facts to be ascertained on why the suit land did not form part of the said Certificate for confirmation of Grant. Further, I find that the Defendants seek to rely technicalities by claiming the Plaintiff does not have locus.

In the case of **Republic Vs. District Land Registrar, Uasin Gishu & Anor (2014) eKLR** where Justice Ochieng held that **.. to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d) .....in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by the**

**following principles .....(d) justice shall be administered without undue regard to procedural technicalities. '**

In associating myself with this decision and facts as presented, I find that since the Plaintiff is the Administrator of the deceased estate, she indeed has locus to proceed with this suit.

In the circumstance, I find the instant Notice of Preliminary objection dated the 10<sup>th</sup> January, 2019 unmerited and will disallow it.

Costs will be in the cause

I urge the parties to set down the suit for hearing on its merits.

**Dated signed and delivered in open court at Kajiado this 14<sup>th</sup> day of November, 2019.**

**CHRISTINE OCHIENG**

**JUDGE**