



REPUBLIC OF KENYA



Karanja ((Suing as the legal representative of the Estate of Karanja Gaturu)) v Kambi & 7 others (Environment & Land Case E002 of 2020) [2023] KEELC 18253 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18253 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE E002 OF 2020**

**YM ANGIMA, J
JUNE 15, 2023**

BETWEEN

**AMOS MWANGI KARANJA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KARANJA GATURU) PLAINTIFF
(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KARANJA GATURU)**

AND

**MARATA WANGARI KAMBI 1ST DEFENDANT
KAMAU KARIUKI 2ND DEFENDANT
JOSEPH MAINA KAMBI 3RD DEFENDANT
PETER NDERITU KAMBI 4TH DEFENDANT
CHARLES MUCHINA KAMBI 5TH DEFENDANT
DAVID NJOGU KAMBI 6TH DEFENDANT
SAMWEL NJOGU KAMBI 7TH DEFENDANT
VIRGINIA WANGUI NG'ANG'A 8TH DEFENDANT**

RULING

A. Introduction

1. By a plaint dated 09.10.2020 and amended on 05.07.2022 the plaintiff sought the following reliefs against the defendant s:
 - a. A declaration that the estate of Karanja Gaturu is the legal and absolute proprietor of L.R Nyandarua/South Kinangop/ 66.



- b. Nullification of the entry of 07.05.1998 of the register of L.R Nyandarua/ South Kinangop/ 66 and all the other subsequent entries including the entry on sub division of the said parcel of land.
 - c. Nullification and closure of all the registers of L.R Nyandarua/South Kinangop/4991 to 4996 and all the entries therein including the registration of the 1st defendant as the first proprietor of each parcel of land, and subsequent registration of the 2nd to 7th defendant s and Joseph Ng'ang'a Niuguna as proprietors, and the entry of 14.07.2010 that closed all the said registers on the basis of combination.
 - d. Nullification of the register of L.R Nyandarua/South Kinangop/9237 and all the entries therein including the registration of Joseph Ng'ang'a Njuguna as its proprietor and issuance of title deed in his name.
 - e. Costs of this suit.
 - f. Any other or further relief that the court may deem fit and just to grant.
2. The plaintiff pleaded that at all material times his late father Karanja Gaturu (the deceased) was the legitimate owner of Plot No. 66 South Kinangop which was later on registered as Title No. Nyandarua/South Kinangop/66. It was pleaded that although the deceased's ownership of Parcel 66 was declared in Naivasha SRM CC No. 52 of 1985 (the Naivasha Case) the 1st defendant had in 1998 fraudulently caused herself to be registered as proprietor thereof.
 3. It was further pleaded that come 2008 the 1st defendant sub-divided Parcel 66 into Parcel Nos. 4991 – 4996 and subsequently transferred the resultant parcels to her children the 2nd – 7th defendant s who later transferred them to the late Joseph Ng'ang'a Njuguna (late Njuguna) whose estate is represented by the 8th defendant . It was further pleaded that the parcels were later consolidated and registered in the name of the late Njuguna as Parcel No. 9237 in 2012.
 4. The plaintiff also pleaded that sometime in 2010 he became aware of the existence of Nairobi HCCC No. 33 of 2002 Amos Weru Murigu –vs- Marata Wangari Kambi & Another (the Nairobi Case) which involved litigation over the original parcel 66. He thereupon successfully applied to be joined as an interested party. The said case was subsequently transferred to Nyahururu and assigned Nyahururu ELC No. 306 of 2018.

B. 8th Defendant's Instant Application

5. Vide a notice of motion dated 28.11.2022 expressed to be based upon articles 50 and 159 of *the Constitution* of Kenya, sections 1A, 1B, 3A and section 6 of *Civil Procedure Act*, order 2 rule 15 of the *Civil Procedure Rules* (the Rules), section 4(4) of the *Limitations of Actions Act* and all other enabling provisions of the law, the 8th defendant sought to have the suit struck out for being statute-barred under Section 4(1) of the *Limitation of Actions Act* (LAA Cap. 22). In the alternative, the 8th defendant sought a stay of the instant suit for offending the provisions of section 6 of the *Civil Procedure Act* (CPA cap. 21) on account of the pendency of the Nairobi Case which was subsequently transferred to Nyahururu.
6. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Virginia Wangu Ng'ang'a on 28.11.2022. It was contended that the instant suit was time barred under section 4(4) of the LAA because it was based upon a judgment delivered 35 years ago in the Naivasha Case. It was further contended that the plaintiff had previously



filed multiple suits over the same subject matter and that one of them (the Nairobi Case) was still pending in court.

C. 1st – 7th Defendants’ Response

7. The 1st – 7th defendant s filed a replying affidavit sworn by the 6th defendant , David Njogu Kambi, in support of the said application. They stated that judgment in the Naivasha Case was delivered in favour of the deceased on 09.09.1986 and that the instant suit was an action for enforcement of the said judgment.
8. It was contended that the said judgment was never executed within the stipulated period hence the instant suit was statute barred by virtue of the provisions of section 4(4), 7, and 17 of the LAA. The defendant s further contended that the plaintiff has filed several suits previously over the same subject matter and that one such suit was the Nairobi Case which was still pending in court.

D. Plaintiff’s Response

9. The plaintiff filed a replying affidavit sworn on 15.02.2023 in opposition to the said application. It was denied that the instant suit was an action for enforcement of the decree in the Nairobi Case. It was contended that the decree in the Naivasha Case merely declared the deceased to be the legitimate owner of Parcel 66 and that it was duly executed at the time.
10. The plaintiff contended that he was prosecuting a new cause of action based on fraud which arose much later as a result of the 1st defendant ’s fraudulent actions of sub-dividing Parcel 66 and transferring the resultant sub-divisions to the 2 – 7 defendant s who in turn transferred them to the late Njuguna. The plaintiff contended that he only became aware of the alleged fraud in 2010 hence the LAA could not apply to him until discovery of the fraud.
11. The plaintiff admitted that he had successfully applied to be joined as an interested party in the Nairobi Case and that he had applied for joinder of the late Njuguna as well. He contended, however, that by the time of their joinder that suit had already been concluded hence there was no opportunity to canvass his claim based on fraud even though the file was subsequently transferred to Nyahururu.
12. The plaintiff admitted having filed an application for leave to apply for judicial review in Nakuru High Court J.R. No. 67 of 2011 but stated that the same was dismissed at the leave stage hence there was no hearing on the merits. He, therefore, prayed for dismissal of the 8th defendant ’s application for lack of merit.

E. Directions on Submissions

13. When the application came up for directions it was directed that the same shall be canvassed through written submissions. The parties were consequently given timelines within which to file and exchange their respective submissions. The record shows that the 1 – 7 defendant s’ submissions were filed on 28.04.2023, the plaintiffs’ submissions on 23.05.2023 whereas the 8th defendant ’s submissions were filed on 06.06.2023.

F. Issues for Determination

14. The court has considered the 8th defendant ’s notice of motion dated 28.11.2022, the two replying affidavits in response thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:
 - a. Whether the plaintiff’s suit is time barred under the *Limitation of Actions Act* (cap. 22).



- b. Whether the plaintiff's suit should be stayed under section 6 of the *Civil Procedure Act* (cap. 21).
- c. Who shall bear costs of the application.

G. Analysis and Determination

a. Whether the Plaintiff's suit is time barred under the *Limitation of Actions Act* (Cap. 22)

15. The court has considered the material and submissions on record in this matter. The defendant s submitted that the instant suit is in reality an action to enforce the judgment and decree of 1986 in the Naivasha Case. It was submitted that under section 4(4) of the LAA, no action can be brought on a judgment after expiry of 12 years from the date thereof. Further, and in the alternative, it was submitted that the instant suit is in action for recovery of land and the same may not be filed after the expiry of 12 years from the date on which the cause of action accrued.
16. It was contended that although the deceased had obtained a decree in his favour with respect to Plot 66 in the Naivasha Case there was no evidence to demonstrate that the same was ever executed. The defendant s cited among others, the case of *M'Kiara M'Rinkanya & Another –vs- Gilbert Kabeere M'Mbijewe* [2007] eKLR in support of their respective submissions.
17. The plaintiff, on the other hand, submitted that the instant suit was not an action for enforcement of the judgment in the Naivasha Case but was a suit for taming the fraudulent acts allegedly committed by the 1st defendant long after the conclusion of that suit. It was submitted that the 1st defendant 's wrongful actions took place between 1998 and 2010. According to the plaintiff the only significance of the Naivasha Case is that it declared that the deceased was the legitimate owner of Plot No. 66.
18. On the aspect of limitation on account of section 7 of LAA it was submitted that the limitation period does not run until the aggrieved party has discovered the fraud constituting the cause of action. It was submitted that although the fraudulent acts were committed by the 1st defendant between 1998 and 2010 the plaintiff did not discover the same until 05.02.2010 hence by the time the instant suit was filed on 21.10.2020 only 10 years had lapsed. The plaintiff cited the case of *Yasmin Anwar Khan Yusuf –vs- Samuel Gatugi Maina & 2 others* [2021] eKLR in support of his submissions on the issue of the alleged fraud.
19. The court is not satisfied that the instant suit is an action for enforcement of the judgment rendered in the Naivasha Case on 09.09.1986. This is evident from the plaintiff's amended plaint whereby it was alleged that the fraudulent acts could not have been adjudicated in the Naivasha Case and resolved vide the judgment of 1986. The court is thus of the opinion that on the basis of the material on record, the plaintiff's action is based upon post-judgment acts by the 1st defendant which were said to be fraudulent.
20. The court is further of the opinion that although the plaintiff's action seeks recovery of what was originally Plot 66, there is no conclusive evidence on record to demonstrate that the action is statute-barred under Section 7 of the LAA. The said section has to be read in conjunction with the provisions of Part III of the Act which provide for extension of the limitation period in cases of disability, acknowledgement, fraud, mistake and ignorance of material facts.
21. Section 26 of the Act stipulates that:

“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.”

22. In the *Yasmin Anwar Khan Yusuf* Case which was cited by the plaintiff, it was, inter alia, that:

“...It is important to note that this suit was filed against the Defendants based on fraud. In matters where fraud is alleged, time does not start running for purposes of limitation until the fraud is discovered. In the instant case, the plaintiff discovered that the suit property had been fraudulently registered in the name of the 1st and 2nd defendant s in 2014 when she wanted to dispose of the suit property. She had gone to Ngong land registry where she was informed that the suit property no longer existed as the same had been sub-divided. It is therefore clear that this suit which was filed on 21st March 2014 is not statute barred. In the case of Margaret Wairimu Magugu Vs Karura Investment Limited & 4 Others, (2019) eKLR, the Court of Appeal while dealing with Section 26 of the *Limitation of Actions Act* stated as follows: –

“There is no doubt that under that provision, where the action is based on fraud, the period of limitation prescribed does not begin to run until the plaintiff discovers the fraud. See for instance Kenya Ports Authority Vs Timberland (K) Ltd (2017) eKLR.”

23. Whereas the defendant s held the view that the plaintiff’s cause of action arose more than 12 years prior to the filing of the suit, the plaintiff took the view that time could only start running against him in 2010 when he claimed he discovered the alleged fraud. In the premises, the issue of when the plaintiff actually discovered the alleged fraud can only be conclusively determined at the trial.

b. Whether the Plaintiff’s suit should be stayed under Section 6 of the *Civil Procedure Act* (Cap. 21)

24. The court has considered the material and submissions on record on this issue. The defendant s submitted that the instant suit should be stayed because the matters directly and substantially in issue in the instant suit are also the same matters in issue in the Nairobi Case which was filed earlier and which was still pending in court. The 1st – 7th defendant s were of the view that the matters in issue herein were in fact pending before the Court of Appeal. However, the citation and particulars of the said civil appeal were not provided.

25. Section 6 of the *Civil Procedure Act* (Cap.21) provides that:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation - The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.”



26. The court has perused the copy of the judgment in the Nairobi Case. It is evident that the originating summons concerned a claim for adverse possession by one Amos Weru Murigu against the 1st defendant and the District Land Registrar – Nyahururu. The judgment shows that the suit was dismissed because the claimant had failed to prove his claim to the required standard. The material on record shows that the plaintiff herein applied to be joined in that suit after judgment as an Interested Party and his application was granted. He also successfully applied to have the late Njuguna joined as an Interested Party.
27. It is evident from the material on record that the plaintiff in the Nairobi Case was Amos Murigu and not the plaintiff in the instant case. The instant plaintiff was merely an Interested Party in that suit. Similarly, the late Njuguna was joined in that suit as an Interested Party long after judgment had been delivered. The court is thus not satisfied that the Nairobi Case is between the same parties litigating under the same title as contemplated in Section 6 of the CPA. Consequently, the court is not inclined to grant an order for stay of proceedings.
28. Although the plaintiff may have raised some of his grievances in the Nairobi Case after judgment the court is not satisfied that all his grievances were canvassed and determined on merit. It is not clear from the material on record what else remains to be heard in the Nairobi Case which was eventually transferred to Nyahururu. The plaintiff's advocate held the view that the suit was concluded and that there was nothing else to be heard or determined by this court. On the other hand, the defendant s took the view the suit was still pending either before this court or the Court of Appeal.

c. Who shall bear costs of the application

29. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the CPA. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful party should be deprived of the costs of the application. Consequently, the plaintiff shall be awarded costs of the application to be borne by the 8th defendant .

H. Conclusion and Disposal Order

30. The upshot of the foregoing is that the court finds no merit in the 8th defendant 's application. Accordingly, the court makes the following orders for disposal thereof:
- a. The 8th defendant 's notice of motion dated 28.11.2022 is hereby dismissed in its entirety with costs to the plaintiff.
- b. The suit is hereby fixed for hearing on 03.10.2023.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU THIS 15TH DAY OF JUNE, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Nderitu Komu for the plaintiff

Mrs. Muchoki for the 1st – 7th defendant s

Ms. Nyambura holding brief for Mr. Mbigi for the 8th defendant

C/A - Carol



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Y. M. ANGIMA
JUDGE

