



Nzola & another (Suing as the legal representatives of the Estate of David Nzola Komu) v Mutiso & another (Environment & Land Case E27 of 2023) [2023] KEELC 21575 (KLR) (16 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21575 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE E27 OF 2023
JM MUTUNGI, J
NOVEMBER 16, 2023**

BETWEEN

**REUBEN MUNYAO NZOLA 1ST PLAINTIFF
ROBERT MAINGI NZOLA 2ND PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF DAVID
NZOLA KOMU**

AND

**JEMIMAH KASIVU MUTISO 1ST DEFENDANT
PATRICK GICOBI KARANI 2ND DEFENDANT**

RULING

1. The Plaintiffs commenced this suit by way of a Plaint dated 18th May 2023. The Plaintiff inter alia sought for a declaration that the 1st Defendant held L.R Kirinyaga/Gathigiriri/67 in trust for the entire family of David Nzola Komu (deceased); cancellation of title deeds of L.R Kirinyaga/Gathigiriri/4781,4782,4783,4784,4785,4786 and 4787 which resulted from the division of L.R Kirinyaga/Gathigiriri/67; and the land to revert back to its original form before the fraudulent division alleged.
2. The Defendants on 31st May 2023 filed a notice of Preliminary Objection predicated on the following grounds: -
 1. The suit is time barred having been brought outside the statutory limitation of 12 years in view of Section 7 of the *Limitation of Actions Act* Cap 22, since the alleged fraud was discovered sometime in the year 2003 which is now 20 years since that time.



2. The Plaintiffs' suit is incompetent, bad in law and an abuse of the Court's process and should be dismissed with costs to the Defendants.
3. The Court on 6.6.2023 gave directions that the Preliminary Objection should be disposed of first and that it should be canvassed by way of written missions. The Defendants filed their written missions on 22.6.2023. The Plaintiffs did not file any missions.
4. The issues that emerge for determination in regard to the Defendants' application are whether this suit is statute barred and/or whether the suit filed is incompetent, bad in law and ought to be struck out.
5. The Court of Appeal in the Case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 laid down the principle as to what constitutes a Preliminary Objection. A Preliminary objection to be valid must be on a point of law and must be founded on facts that are not in dispute. If evidence would require to be adduced to establish the facts, then a Preliminary Objection would not be sustainable. In the *Mukisa Biscuit Case*(*supra*) Law, JA stated as follow: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of the 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 mission that the parties are bound by the contract giving rise to the suit to refer the dispute to the arbitration.”
6. In the present matter the Defendants have hinged their Preliminary Objection on the fact that the Plaintiffs' cause of action is time barred and that the suit is brought after the expiry or lapse of the period of limitation. The question whether or not the Plaintiffs' suit is barred by statute on account of limitation goes to the jurisdiction of the Court to entertain the suit. If the suit is statute barred on account of limitation, then the Court lacks the jurisdiction to entertain the same. If the Court proceeds to hear and adjudicate the suit when it lacks the jurisdiction, its decision will be rendered null and void.
7. The Defendants contend that the cause of action accrued in 2003 when the Plaintiffs discovered the fraud. They posit that apart from seeking an intervention from their father, the Plaintiffs have taken no action and 20 years have lapsed. The Defendants mit that the Plaintiffs having particularized fraud on the part of the 1st Defendant and cancellation of the resultant titles of Kirinyaga/Gathigiriri/67 being one of their prayers means that their claim is based on recovery of land. Consequently therefore, the Defendants mit that the Plaintiffs claim is statute barred as the same is being sought 20 years after the alleged discovery of fraud.
8. The Defendants' mit further that the 2nd Defendant purchased the suit property from the 1st Defendant as a bona fide purchaser for value and asserts that his ownership should be protected by Section 26 of the [Land Registration Act](#). As to whether the suit is incompetent, the Defendants contend that it is, as the Plaintiffs are claiming fraud and trust at the same time.
9. The Plaintiffs in their plaint claims against the 1st Defendant a declaration that she held L.R Kirinyaga/Gathigiriri/67 in trust for the entire family of David Nzolo Komu their father. They also claim for the cancellation of the resultant titles L.R Kirinyaga/Gathigiriri/4781, 4782, 4783, 4784, 4785, 4786 and 4787 as they were divided illegally. According to the Plaintiffs the 1st Defendant's deceased husband (their brother) fraudulently transferred L.R Kirinyaga/Gathigiriri/67 to himself. The Plaintiffs contend that the land belonged to their father and when they discovered the fraud, they informed their father who called a family meeting and instructed his son to transfer the land to their eldest sibling Joseph Mutunga Nzola who was the Chairman of the house. That the deceased handed over the title to his elder brother and it was decided at the meeting that the land would be divided



- and each family member would get a portion. They also allege that before -division was done, the 1st Defendant’s husband died and that they discovered that on 23.12.2021, the 1st Defendant fraudulently divided the land without their knowledge, consent and without any colour of right.
10. It is my view apparent that the Plaintiffs claim is founded principally on trust. A claim based on trust cannot be defeated on grounds of time limitation. Trust has no limitation of time and a claimant under trust can raise the claimant.
 11. Section 28 of the *Land Registration Act* which is similar to Section 30 of *Cap 300(repealed)* provides that:

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being exist and affect the same, without their being noted on the register—

 - (a)
 - (b) trusts including customary trusts;”
 12. Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya states as follows: –

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.
 13. In the Case of *Macharia Kibari v Ngigi Kibari* Civil Appeal No. 170 OF 1993, it was held that: -

“Under customary law the land even after the right of action has accrued, is held in trust even for decades before any step is contemplated for a formal transfer or division. Limitation does not apply in customary law. We reject this ground of Appeal.”
 14. Even if this Court is to look at the claim of fraud alleged by the Plaintiffs, still the Plaintiffs would be within the time limits stipulated by Section 26 of the *Limitation of Actions Act* for the reason that the fraud complained against the 1st Defendant of -dividing what the Plaintiffs presumed as trust land and selling it to the 2nd Defendant without their knowledge and consent occurred in November/December 2021 and a period of 3 years had not lapsed by the time the instant suit was filed.
 15. Section 26 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya states as follows: –

Where, in the cause 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.
16. In the Case of *Abmed Siad Mohammed -v- Municipal Council of Garissa & Another* [2014] eKLR the Court of Appeal at Nyeri upheld the ruling by S. Muketi, J. where she stated thus:

“Section 26 of the *Limitation of Action Act* makes it very clear that in claims where fraud or mistake is alleged, time starts to run from the moment such fraud or mistake is discovered. Fraud is alleged in this Case and therefore under the provisions of Section 26 time start to run when the fraud was discovered in the case. It is alleged that the fraud was discovered in 2010... The prudent thing for 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.”
17. The Court of Appeal Judges went on to state in the same case thus: -

“In relation to Limitation of Actions, it is our considered view that the Section 26 of the *Limitation of Actions Act* establishes an exception to the 12 years limitation period when fraud is involved. In the instant case, the Honourable Judge held that fraud is a matter that cannot be determined at a preliminary stage in the suit and it requires full hearing. We concur with the reasoning and finding by the Judge. The Learned Judge did not error in invoking the provisions of Section 26 of the *Limitation of Actions Act* and ordering that this suit should proceed to full hearing. Fraud must be proved and it can only be proved through hearing and cannot be summarily rejected.”
18. In the instant case my view is that the fraud alleged by the plaintiffs was supposedly discovered on 21.01.2022, when the Plaintiffs did a search at the land registry and found that the 1st Defendant had divided their father’s land and sold a portion to the 2nd Defendant without their consent. Consequently, Section 26 of the *Limitation of Actions Act* affords the Plaintiffs the window and the opportunity to prove their allegations of fraud as time started running after the discovery. Striking out the suit on the basis of the Preliminary Objection would no doubt be prejudicial to the Plaintiffs.
19. In the circumstances, I find no merit in the Preliminary Objection and the same is dismissed in its entirety. The Costs of the Preliminary Objection shall be in the cause.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 16TH DAY OF NOVEMBER 2023.

J. M. MUTUNGI

ELC-JUDGE

