



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ngugi v Gathariki & 2 others (Environment & Land Case 45 of 2021)
[2023] KEELC 22565 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22565 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND CASE 45 OF 2021**

AK BOR, J

DECEMBER 20, 2023

BETWEEN

JAMES NJENGA NGUGI PLAINTIFF

AND

JOSEPH KIHURIA GATHARIKI DEFENDANT

AND

SAMWEL WATORO WAWERU 1ST PROPOSED DEFENDANT

LAND REGISTRAR, RUMURUTI 2ND PROPOSED DEFENDANT

RULING

1. The Plaintiff filed the application dated 19/10/2023 seeking leave to amend his plaint in terms of the annexed draft amended plaint. The application was made on the grounds that the proposed amendment was unnecessary for purposes of determining the real questions in dispute and that the proposed amendments were necessitated by information which came to the Plaintiff's knowledge after he had filed suit. The other grounds were that the proposed amendment would not occasion any prejudice to the Defendant and that the presence of the proposed 2nd and 3rd Defendant in these proceedings was necessary to enable the court effectually and completely adjudicate upon and settle all the questions in the suit. The Plaintiff swore the supporting affidavit and exhibited the draft amended plaint.
2. The Defendant swore the replying affidavit in opposition to the Plaintiff application. He deponed that his title was issued on 23/1/2002 while the proposed 2nd Defendant's title was issued on 24/1/2002. Based on this, he averred that the suit against the proposed Defendants was statute barred by dint of Section 13 of the *Limitation of Actions Act*. He added that Section 26 of that Act could not rescue the Plaintiff. He maintained that the fraud pleaded in the draft amended plaint was discovered in January 2002 yet the suit was instituted on 28/9/2018 while the proposed amendments are sought to



be introduced in 2023. He averred that the 12-year period for bringing an action against the proposed Defendants had already lapsed and that time had not been extended for the Plaintiff. He contended that the Plaintiff all along had the mutation form and it was only after he raised in his defence the issue of not joining the buyer of the other portion of the land that the Plaintiff deemed it fit to seek to join the proposed Defendants. He maintained that the amendments were an afterthought and no reason had been given for the delay. He also averred that the plaint sought to be amended was filed without locus on 28/9/2018 yet the limited grant was issued on 26/8/2022.

3. The court directed parties to file written submissions which it has considered. The Plaintiff submitted that the Defendant would not suffer any prejudice because he will have the right to file an amended defence. Further, he submitted that in his draft amended plaint he wished to specifically plead fraud before the suit can be set down for hearing.
4. The Plaintiff submitted that his late mother, Jacinta Muthoni Ngugi Gathariki purchased, owned and enjoyed quiet possession of the land known as Laikipia Kinamba Mwenje Block 1/376 (Mwenje) and that she died intestate. That although no succession proceedings were taken out with respect to the estate of his late mother, the proposed 3rd Defendant caused the subdivision of the land on 23/1/2002 into parcel numbers 3493 and 3494 which were registered in favour of the Defendant and the proposed 2nd Defendant respectively. Further, he contended that the 3rd Defendant fraudulently registered parcel no. 3493 and issued titles illegally in favour of the Defendant and the proposed 2nd Defendant. He relied on Section 26 of the *Land Registration Act* and Section 26 of the *Limitation of Actions Act* which provides that the period of limitation only begins to run when an applicant has discovered the fraud or the mistake or could have discovered it with reasonable diligence. He submitted that he discovered the fraud on or about 2014 and therefore the statutory time limit had not yet lapsed as contemplated by Section 7 read with Section 26 (c) of the *Limitation of Actions Act*. He added that the period of limitation began running in 2014 upon discovery of the fraud and that he filed the suit in 2018 which was within the time frame contemplated by Section 7 of the *Limitations of Actions Act*.
5. Further, he contended that the question of the date or time of the discovery of fraud could only be deciphered at the trial. He relied on *Mugo Muruachimba v Moffat Nyaga Kagau and 2 Others* [2020] eKLR where it was held that some facts had to be established in relation to when the plaintiff's cause of action arose and that that was a question of fact to be established at the trial whether the alleged fraud was discovered in 2000. He also relied on *Justus Tureti Obara v Peter Koipeitai Nengiso* [2014] eKLR where the court pointed out that Section 26 (a) of the Limitations of Actions Act provided that for an action based on fraud on the Defendant or his agent, the period of limitation only began to run when the Plaintiff discovered the fraud or could have with reasonable diligence discovered it. The court stated that when the Plaintiff discovered the fraud in that case was a matter to be ascertained at the trial. The Plaintiff concluded that the copy of the search dated 19/9/2023 brought out the web of fraud between the Defendant and the proposed Defendants and that the proposed 3rd Defendant was a holder of public office which required him to promote and uphold the values of *the Constitution*. The Plaintiff filed a supplementary affidavit on 15/11/2023 and exhibited copies of the searches done on 18/10/2023 as well as copies of the green card and various correspondence.
6. The Defendant submitted that the Plaintiff's claim was based on fraud and that fraud being a civil tort, then under Section 4 (2) of the *Limitation of Actions Act* a suit based on tort must be filed within 3 years from the date when the cause of action accrued. He submitted that this suit was filed on 28/9/2018 and the titles sought to be cancelled were issued in 2002. The Defendant contended that if the fraud was discovered in 2014, then the 3 years lapsed in 2017 which means the Plaintiff cannot hide behind Section 26 (c) of the *Limitation of Actions Act*. He also submitted that Section 7 of that Act could not



assist the Plaintiff because a claim for land could not be brought after the lapse of 12 years unless it was a claim for adverse possession.

7. The Defendant relied on *Edward Moonge Lengusuranga v James Lanaiyara & Another* [2019] eKLR where the court found that the claim was statute barred and stated that limitation went to the jurisdiction of the court to entertain claims and that where a matter was statute barred, the court did not have jurisdiction to entertain it.
8. The Defendant submitted that the Plaintiff was issued a grant ad litem 4 years after he filed the suit and that he therefore lacked capacity to file the suit. The Defendant argued that the suit sought to be amended was incompetently before this court and that the Plaintiff should first have withdrawn it and filed another suit after obtaining the grant ad litem because it was evident that he was pursuing a claim on behalf of the estate of his deceased mother which is why he obtained the grant after filing suit. The Defendant urged the court to down it tools and dismiss the application. The Defendant concluded that the suit should be struck out with costs to save judicial time.
9. The issue for determination is whether the court should allow the Plaintiff to amend his suit in terms of the draft amended plaint. The Defendant opposed the application on the grounds that the claim against the parties sought to be added to the suit was statute barred. It will require evidence to ascertain when it is that the Plaintiff discovered the alleged fraud or when he could reasonably have discovered for purposes of computing the time for limitation of the claim under the *Limitation of Actions Act*. The other ground advanced by the Defendant is that the Plaintiff lacks capacity to bring this suit. The Defendant would need to move the court separately for a determination of this issue. It does not a proper response to an application for amendment.
10. Order 8 of the *Civil Procedure Rules* deals with amendment of pleadings. Under Rule 3 the court has a discretion at any stage of the proceedings to allow a party to amend its pleadings on such terms as to cost or otherwise as may be just.
11. The main purpose of amendment is to enable the court to effectually and completely adjudicate upon and settle all the questions involved in the suit and it is therefore imperative that the parties whose presence before the court is necessary are added to the suit. The Plaintiff seeks to add the proposed 2nd Defendant to the suit because after the suit land was subdivided, a portion of it was transferred to the proposed defendant.
12. The court grants the Plaintiff leave to amend his plaint in terms of the draft amended plaint and to join the proposed 2nd and 3rd Defendants as parties and serve the amended plaint within 14 days of today.

The costs of the application will be in the cause.

DELIVERED VIRTUALLY AT NANYUKI THIS 20TH DAY OF DECEMBER 2023.

K. BOR

JUDGE

In the presence of: -

Mr. Japheth Munyendo the Plaintiff

Mr. Gakenia Gicheru for the Defendant

Ms. Stella Gakii- Court Assistant

