



Kuyan (Suing as personal representative in the Estate of Kuyan Ole Morianka Nangeram alias Kuyan Murianka (Deceased) v Mutonyi & 4 others (Environment & Land Case E068 of 2022) [2023] KEELC 22484 (KLR) (19 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22484 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E068 OF 2022
MN GICHERU, J
DECEMBER 19, 2023**

BETWEEN

JOSEPH KUYAN (SUING AS PERSONAL REPRESENTATIVE IN THE ESTATE OF KUYAN OLE MORIANKA NANGERAM ALIAS KUYAN MURIANKA (DECEASED) PLAINTIFF

AND

**ISAAC GATHUGU MUTONYI 1ST DEFENDANT
ISAIAH KIRINDI WAMBUGU 2ND DEFENDANT
JAMES WAITHAKA CHEGE 3RD DEFENDANT
DISTRICT LANDS REGISTRAR, KAJIADO 4TH DEFENDANT
THE ATTORNEY GENERAL 5TH DEFENDANT**

RULING

1. This ruling is on the notice of preliminary objection dated 1/10/2022. The notice which is by the 1st and 2nd defendants seeks to have the plaintiff's suit struck out with costs on the following four grounds:
 - a. This court lacks jurisdiction to entertain the suit herein.
 - b. This suit is bad in law as it is barred by Section 7 of the *Limitation of Actions Act* as the cause of action arose 1991 – 31 years ago.
 - c. This suit is based on fraud, which is a tort, which allegedly occurred in 1991 and an action based on tort must be brought within 3 years from the date the action accrued according to Section 4 of the *Limitation of Actions Act*.



- d. As held in owners of *Motor Vessel Lillian S v Caltex Oil Kenya Ltd* (1989) KLR I, where a court lacks jurisdiction, it must down its tools; this is a suitable case for this court to down its tools.
2. On 1/2/2023, the court gave directions that the preliminary objection be canvassed by way of written submissions. The 1st and 2nd defendants filed their written submissions on 21/3/2023 while the plaintiffs' were filed on 2/5/2023.
 3. I have carefully considered the preliminary objection in its entirety including the submissions and the law cited therein and even through neither the plaint nor the plaintiff's witness statement disclose the date of discovery of the alleged fraud, the objection has no merit for the following reasons.
 4. Firstly, both the plaint and the witness statement can still be amended to disclose the date of the discovery of the alleged fraud on the part of the 1st, 2nd and 4th defendants. Under Order 8 Rule 5 of the *Civil Procedure Rules*, there is still room for amending the plaintiffs' pleadings.
 5. Secondly, though fraud may be a tort and actions founded on tort must be brought within three (3) years of the date of accrual, by dint of Section 4(2) of the *Limitation of Actions Act*, the same Act at Section 26(2) provides that time will not begin to run until the discovery of the alleged fraud on the part of the defendant.
 6. Finally, it is a draconian move to strike out pleadings that can be redeemed by an amendment. A court should always sustain a suit rather than strike it out so that the real issue in dispute is litigated upon in the manner envisaged by Article 50(1) of the *Constitution*.

For the above stated reasons, I disallow the notice of preliminary objection.

It is so ordered.

DELIVERED, SIGNED AND DATED VIRTUALLY THIS 19TH DAY DECEMBER, 2023.

M. N. GICHERU

JUDGE

