



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 319 OF 2014 (OS)

(Formerly Nyeri HCCC NO. 71 OF 2012)

JAMESWARURU MUTAHI1ST PLAINTIFF/RESPONDENT

ANTONY KAMAU MUTAHI 2ND PLAINTIFF/RESPONDENT

MICHAEL WAMAI MUTAHI 3RD PLAINTIFF/RESPONDENT

PETER KARIUKI MUTAHI4TH PLAINTIFF/RESPONDENT

CELSUS MAINA MUTAHI..... 5TH PLAINTIFF/RESPONDENT

EZEKIEL NDIRANGU MUTAHI6TH PLAINTIFF/RESPONDENT

AND

**MARATA WANGARI NDURURI (Being sued in her capacity as the Legal Representative
of NDURURI KIGOTHO – Deceased)DEFENDANT/APPLICANT**

AND

PAUL THIBARA MURAYA..... INTERESTED PARTY/APPLICANT

RULING

1. By the Notice of Motion dated 18th September 2018, Paul Thibara Muraya (*the Interested Party/Applicant*) prays for an order that he be joined as one of the Plaintiffs herein.

2. The application which is supported by an affidavit sworn by the Applicant is premised on the grounds:

- (i) That the subject matter herein is L.R. No. Ruguru/Karuthi/798;
- (ii) That the Applicant purchased the subject land from the Defendant's husband who is now deceased.
- (iii) That the Applicant had instituted ELC No. 51 of 2013 against the Defendant but the same was struck out on a technicality; and
- (iv) That the Applicant is desirous to see the ends of justice and hence this application.

3. The Defendant – Marata Wangari Ndururi is however opposed to the application. In her Replying Affidavit sworn and filed herein on 18th February 2019, the Defendant admits that the suit property is registered in the name of her husband the late Ndururi Kigotho and that she is one of the administrators of the estate of the deceased who passed away on 18th September, 1995.

4. The Defendant however avers that she is not aware that her husband ever sold the suit property to the Interested party/Applicant. She asserts that if indeed there was any such sale, then the parties to the sale agreement dated 7th March, 1989 ought to have applied to the Land

Control Board for consent to transfer the same within 6 months.

5. The Defendant further avers that having failed to apply or obtain such consent, the sale agreement became void upon expiry of 6 months from 7th March, 1989 and the Interested party hence has no right to claim the suit land. It is further the Defendant's position that the sale having become void, the Interested party was under an obligation to claim any money he may have paid pursuant to the agreement from the Defendant's husband within 6 years and that having failed to do so, he cannot now make a claim under the agreement after some 18 years have lapsed.

6. The Defendant further asserts that the Interested Party had filed a similar suit against herself being Nyeri ELC Case No. 51 of 2013 wherein he raised the same issues relating to the same subject matter and the same was struck out for being time barred. The Defendant asserts that the said suit was not struck out on a technicality as stated by the Interested Party and urges the Court to dismiss the application with costs.

7. I have carefully perused and considered the application and the response thereto. I have similarly perused and considered the rival submissions by the Learned Advocates for the parties.

8. The Applicant herein seeks to be joined to these proceedings as one of the Plaintiffs on account of the fact that he did purchase the suit property from the Defendant's now deceased husband vide a Sale Agreement dated 7th March, 1989. The Applicant avers that he had earlier on instituted a suit being ELC No. 51 of 2013 against the Defendant herein but the same was dismissed on a technicality. It is his case that he is desirous to see the ends of justice met herein and hence his application to be enjoined to the suit which relates to the subject matter.

9. On her part, the Defendant contends that she is unaware of any sale of the suit property by her husband to the Applicant. It is further her case that even if there was a sale the parties were bound to obtain the Land Control Board consent within 6 months from the date of the sale and that where this was not done, the transaction stood void and the Applicant ought to have claimed any money paid to her deceased husband within 6 years from the date of sale.

10. In addition the Defendant raises the issue that the Applicant has had his day in Court having filed Nyeri ELC Case No. 51 of 2013 which case was dismissed. Interestingly, the Applicant readily concedes that he did file the said case. It is however his position that the said suit was struck out on a technicality and hence was not heard and determined on its merits.

11. At Paragraph 10 of the Supporting Affidavit to his application, the Interested party avers as follows:

“10. That I filed suit against the Defendant herein vide Nyeri ELC Case No. 51 of 2013 which was struck out on (a) technicality (annexed and marked “PTM 4” (a & b) is a copy of the Plaintiff and a copy of the Ruling).”

12. From a perusal of the Plaintiff annexed as “PTM 4 a” it was clear that the suit relates to the same suit property in dispute herein and that the Applicant had sought an order that the Defendant does transfer the same to himself on account that he bought the same from her deceased husband vide a Sale Agreement dated 7th March, 1989.

13. It is also clear from the annexed copy of the Ruling delivered by the Honourable Justice L. N. Waithaka on 12th June, 2018 that the Defendant herein raised a Preliminary Objection dated 29th January, 2014 in the said proceedings wherein she objected to the same on the grounds *inter alia* that the suit was time barred and the leave to file the same out of time as granted by the lower court was improper and contrary to the law.

14. Having considered the said Preliminary Objection, the Learned Judge went on to deliver herself at paragraphs 16 and 17 of the Ruling as follows:

“16. It is clear from the foregoing, that the leave granted to the Plaintiff was granted without jurisdiction hence null and void. It is also clear, that this court has no jurisdiction to entertain the suit as the same is time barred.

17. The upshot of the foregoing is that the defendant's notice of preliminary objection has merit and is upheld. Consequently, the Plaintiff's suit is struck out with costs to the defendant.”

15. The Applicant has neither appealed nor sought a review of the said orders. It is clear that he considered the issues raised in the determination of the court a mere technicality and hence the application filed herein some three months after the striking out of his suit on account that the same was time-barred.

16. With respect, I did not think the Learned Judge struck out the suit on the basis of a technicality. As Mwongo J. stated in **Kenya Ports Authority -vs Kenya Power and Lighting Company Limited (2012) eKLR:**

“Combining the meanings of these words, procedural technicalities” may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice. An example would be citing a provision from a non-existent or wrong statute when the context is clear as to the statute intended.”

17. In the matter before me, there was no dispute that the cause of action herein arose in the year 1989 when the Applicant purports to have

entered into a Sale Agreement with the Defendant's husband. As was stated by the Learned Judge in her Ruling of 12th June 2018, **Section 4(1) of the Limitation of Actions Act** expressly forbids the institution of suits founded on a contract after the end of six years from the date on which the cause of action accrued.

18. That is a matter of substance that cannot be equated with a mere procedural technicality. The court had clearly found that it has no jurisdiction to entertain a suit filed so hopelessly out of time. Nothing had changed by the time the Applicant filed the present application and it was clear to me that the issues being raised in the application were *res judicata* and only meant to abuse the process of this court and to harass the Defendant with ceaseless litigation.

19. In the premises, I find and hold that the application dated 18th September, 2018 has no basis. It is dismissed with costs to the Defendant.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 10TH DAY OF MARCH, 2022

In the presence of:

Mr. Muchiri wa Gathoni for the Defendant

Ms Magwa for Kariuki for Interested party

The 1st and 6th Plaintiffs present in person

Court assistant – Kendi

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J. O. OLOLA

JUDGE