



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
ELC CASE NO. 194 OF 2012

SOLOMON CURUKIA M'IBAYA.....PLAINTIFF

VERSUS

GRACE NTAKIRA.....1ST DEFENDANT

DAVD MWITHIRWA.....2ND DEFENDANT

LAND ADJ. OFFICER -TIGANIA

WEST DISTRICT.....3RD DEFENDANT

HON. THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

This ruling concerns a notice of Preliminary Objection dated 2.5.2013 filed by the 1st and 2nd defendants. The objection has the following grounds:

1. ***The defendant lacks the requisite locus standi to institute and maintain this suit.***
2. ***The entire suit offends the express provisions of Sections 4(2) and 7 of the Limitation of Actions Act Cap 22 Laws of Kenya and is hence time barred.***

The objectors have submitted that the two parcels of land in dispute belonged to one M'ibaya M'Maitai who transferred them to the two objectors before he passed away in 2006. The objectors argue that since the original owner passed away in 2006, any person purporting to pursue the interest of the deceased person must do so as a legal representative of the estate of the deceased person. They submitted that the plaintiff lacked capacity to institute this suit as he had not done so as the legal representative of the estate of the deceased person. They proffered the case of **Willie Vs Muchuki & 2 Others, Nakuru HCC No. 163 of 2004 (OS)** as their authority in this regard.

The objectors also submitted that the suit was statutorily time barred in terms of Section 4(2) of Limitation of Actions Act, as according to them, being tortuous in nature, time lapsed at the end of 3 years after 8.7.1992 when the disputed parcels of land were transferred to them. They argued that any action based on fraud should have been instituted before 7.7.1995 or thereabouts when the period of 3 years lapsed.

The objectors also argue that Section 7 of the Limitation of Actions Act decrees that any action may not be brought to recover land after the end of 12 years from the date on which the right accrued. They argue that the cause of action, if any, accrued on 8.7.1992 when the parcels of land were transferred

to the 1st and 2nd defendants. Hence, according to the objectors, the limitation period lapsed on 7.7.2004 or thereabouts and the plaintiff's suit therefore was time barred. The objector proffered the case of **Githongo – Vs – Munya (NBI HCC 810 OF 1992)** as an authority.

The plaintiff has opposed the objection and submitted that the preliminary objection raises issues which are not agreed by the parties as he claims land on his own right which he says he is entitled to. He argues that this can only be determined after hearing and cross-examination in Court. The plaintiff has argued that the land he is claiming is under adjudication and by virtue of Section 13 Cap 284 or Section 13 of Cap 284, he has a right to claim his interest in the land.

The plaintiff debunked the claim that he was statutorily barred from pursuing his claim by dint of the provisions of the Limitation of Actions Act. He said that he only learnt about the fraud in 2011 but did not rush to court as he wanted the matter sorted out by the clan elders who met on 18.11.2011. I do find that there are photocopied handwritten pages of a document which is hardly legible. The plaintiff has quoted Section 26 of the Limitation of Actions Act as saying:

“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 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 consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered fraud or mistake or could with reasonable diligence have

discovered it.”

The plaintiff submits that his claim is not time barred as he only discovered the alleged fraud in 2011.

The plaintiff has proffered the following authorities:

(a) Nairobi – Civil Appeal No 9 of 1969 – Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd,

(b) Mukangu Versus Mbui, KLR (E &L) 1, Nyeri Civil Appeal No. 613 of 2001,

(c) El – Busaidy Versus Commissioner of Lands & 2 Others (2002) 1 KLR 588, Mombasa Civil Case No. 613 of 2001,

(d) The Limitation of Actions Act, Cap 22 Section 26.

The plaintiff prayed that the objection, which in his view had no merits should be dismissed with costs.

I have considered the averments, the submissions and authorities proffered by the parties.

I agree that it is well settled law that one can only seek redress in pursuance of the deceased's interest or that of his estate as a legal representative of the deceased. Although the plaintiff claims that the defendants, who are his brother and sister, perpetrated fraud, I find it hard to believe that since the suit lands parcel Nos.627 and 938 had been transferred to the defendants by their common father in 1992, it had taken the plaintiff 19 years to discover this fact.

I am persuaded to find that the plaintiff had no capacity to institute this suit. I also find that the

plaintiff was statutorily barred by virtue of Section 4(2) and 7 of the Limitation of Actions Act from instituting this suit. I also find that the plaintiff was statutorily bared by virtue of Sections 4(2) and 7 of the Limitation of Actions Act from instituting this suit.

This suit, therefore, stands dismissed in its entirety. Costs are awarded to the defendants.

It is so ordered.

Delivered in Open Court at Meru this 27th day of October, 2014 in the presence of:

Cc Daniel/Lilian

Rimita for plaintiff's

Defendants not represented

P. M. NJOROGE

JUDGE