



REPUBLIC OF KENYA

High Court at Kakamega

Civil Case 113 of 2012

MWANAISHA A. MASANGA

(suing as he legal representative of the estate of

ALI OKWANG' MASANGA) PLAINTIFFS

V E R S U S

JOSEPH M. SAKWA 1ST DEFENDANT

HENRY MALALA SAKWA 2ND DEFENDANT

KASSIM WESONGA SHIKUNDU 3RD DEFENDANT

BERNARD KWEYU 4TH DEFENDANT

R U L I N G

The plaintiff filed this sit on 8th May 2012. She contemporaneously filed a Notice of Motion dated 7th May 2012 seeking orders that the court prohibits any dealings relating to plot number **NORTH WANGA/INDANGALASIA/463** pending the hearing and determination of the suit.

The 1st, 2nd, 3rd, and 4th defendants filed a Notice of Preliminary Objection dated 21st May 2012. The grounds itemized therein are that the suit is time barred, res judicata, the court lacks jurisdiction and the suit is an abuse of the court process. Parties agreed to file written submissions. The defendants contend that plot number **NORTH WANGA/INDANGALASIA/463** was registered in the names of the plaintiff's husband. It was then sub-divided into plot numbers 880-884 in 1998. The suit is time barred as under section 7 of the Limitation of Actions Act, the suit ought to have been filed within 12 years from 1998.

Secondly, the defendants argue that the suit is res judicata. The plaintiff filed case number 482 of 2004 before the SMCC Mumias. The court heard the case and held that it had no jurisdiction to determine the suit. According to the defendants, the principle of Res judicata applies to situations where a litigant had an earlier opportunity to address the issues before the court but squandered it. The Mumias court advised the plaintiff to refer the case to the High Court. For the principle of Res judicata to apply as held in the case of **BULHAN & ANOTHER -VS- EASTERN AND SOUTHERN AFRICAN TRADE DEVELOPMENT BANK [2004] KLR 147**, the issues alleged to be similar must have been raised in the earlier suit, heard and finally determined by the court. The Mumias court did not determine the dispute and referred the parties to the High Court.

Finally, the defendants contend that this court lacks jurisdiction as the suit is statutorily time barred. The plaintiff ought to have filed an appeal against the decision of the Mumias court. Further, there is no verifying affidavit to the suit and that the suit is an abuse of the court process.

The plaintiff's position is that the basis of the suit is fraud committed by the defendants. The plaintiff's deceased husband sold three acres of land to one of the defendant. The defendants went ahead and transferred the entire land comprising 12 acres into themselves.

With regard to the issues of verifying affidavit, I have seen a verifying affidavit annexed to the plaint sworn by the plaintiff on 7th May 2012 before Mr. Ombito Advocate. The suit was therefore properly filed. On the issue of Res judicata, it is common knowledge that Res judicata cannot apply to situations where the trial court lacked jurisdiction. The plaintiff's suit was not fully heard and determined by the Mumias court as it lacked jurisdiction. The trial court heard the case and held that the plaintiff's suit failed as the court lacked jurisdiction. It advised the plaintiff to file another suit before the High court. This does not mean that the plaintiff squandered an opportunity to have the dispute resolved as the trial court lacked jurisdiction. This suit is not Res judicata. Paragraph 10 of the plaint reveals that the plaintiff had filed the suit before the Mumias court.

Under the law relating to limitation of actions, where the case involves fraud, what is important is the time when the complainant discovered the fraud. The defendants contend that the land was subdivided in 1998. The Mumias suit was filed in the year 2004. That means 12 years had not elapsed. The decision of the Mumias court was made in 2012.

I do find that this suit is not time barred. The claimant alleges that the defendants perpetrated fraud and transferred the entire land. Such a claim cannot be dismissed as an abuse of the court process.

In the end, I do find that the preliminary objection lacks merit and the same is dismissed with costs.

Delivered, dated and signed at Kakamega this 7th day of February, 2013

**SAID J. CHITEMBWE
J U D G E**