



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. E013 OF 2021

NORMASI ENE MUSA MESHOI.....PLAINTIFF

-VERSUS-

MUSA OLR SALAASH MESHOI.....1ST DEFENDANT

KIENYI OLE POLONG.....2ND DEFENDANT

ANGELA NASIEKU.....3RD DEFENDANT

KERIANGO OLE KAPOLO SAXINO.....4TH DEFENDANT

FRANKLIN WERE JUMA.....5TH DEFENDANT

TUKERO OLE MUSA MESHOE.....6TH DEFENDANT

YIAMPENOI TUKERO MUA.....7TH DEFENDANT

MARY WANJIRU MURANG'A.....8TH DEFENDANT

RUKIA ASMAN.....9TH DEFENDANT

NICHOLAS OCHIENG.....10TH DEFENDANT

RULING

This ruling is on the Preliminary Objection dated 19th August, 2021. The Preliminary Objection which is by the fifth Defendant is based on three grounds namely;

1. The suit offends the mandatory provisions of **Section 7** of the **Limitations of Actions Act**, having been filed over 12 years from the date subdivisions were done and titles issued to the 5th Defendant or the parties from whom he purchased the parcels.
2. The subdivisions and issuance of Title Deeds to the 5th Defendant or previous owners of the parcels was done in the years 2003 and 2004, which is over 17 years ago.
3. The above facts are apparent from the certified copies of Green Cards and mutations filed by the Plaintiff in her List and Bundle of Documents dated 9th March, 2021.

Counsel for the Plaintiff and the 5th Defendant filed written submissions on 2nd November, 2021 and 26th November, 2021 respectively. The said submissions are in support of and in opposition to the Preliminary Objection.

In opposing the objection the Plaintiff's Counsel urged that fraud can only be proved through oral evidence and cross examination and by virtue of **Section 26 of Limitation of Actions Act**, limitation does not apply where fraud is pleaded unless there is proof that it was discovered twelve (12) years before the action was brought.

On the other hand, Counsel for the 5th Defendant urges that the Preliminary Objection is on a pure point of law as per the case of **Mukisa**

Biscuit Manufacturing Company Limited –versus- West End Distributors Ltd (1969) E.A. 696.

Counsel urges that since the Plaintiff has pleaded that subdivision started in 1996, then she is estopped from denying that she became aware of the fraud recently.

I have carefully considered the Preliminary Objection in its entirety and I find that it has no merit for the following reasons;

Firstly, the right to a fair hearing is enshrined in **Article 50 (1)** of the **Constitution**. Fair hearing entails giving each party a chance to state its case through all the available avenues including affidavits, viva voce evidence and submissions. Striking out pleadings is a draconian move which should only be exercised in the clearest of cases.

Secondly, saying that the first Defendant started selling land in 1996 is not the same thing as saying I discovered the fraud in 1996. The sale could have been in 1996 and the discovery of the sale could have been recent.

The law allows the nullification of a title deed that has been obtained irregularly, fraudulently, unprocedurally or through a corrupt scheme. At this interlocutory stage it is too early to establish what exactly happened. We shall establish this after we hear the parties.

The applicability of **Section 26 of the Limitation of Actions Act** will become clear after the parties have been heard. The plaintiff vide paragraph 19 alleges and pleads fraud. Prima facie, **Section 26 of the Limitation Act** applies.

Even if fraud had not been pleaded, it could be pleaded later because pleadings can be amended at any stage before final judgment.

In all the circumstances of this case, it would be a denial of justice to the Plaintiff if the suit were to be struck out. It is premature to do so.

I dismiss the Preliminary Objection. Costs to be in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO 20TH DAY OF APRIL, 2022.

M.N. GICHERU

JUDGE