



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 114 OF 2013

IN THE MATTER OF REGISTERED LAND ACT – CAP 200 LAWS OF KENYA

AND

(IN THE MATTER OF THE PARCEL OF LAND TITLE NOS. NTHAWA/RIANDU 130, 1291, 1376, 1377, 1396, 1397, 1398, 1999, 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1409, 1410, 1428, 1429, 1443, 1450, 3332, 3333, 1468, 3799, 3800, 3707, 3708, 3709, 3710 & 3711)

FREDRICK KIURA NYAGA WAWERU)

**WAWERU MUGO RIMUNYA)
PLAINTIFFS/APPLICANTS**

ERNEST MUGO KIVUTI)

VERSUS

JUSTINO NJUE M'MBUCHI)

ISAAC MUCHAI NJERU)

CHRISTOPHER MATU WANGANGA)

JOHN NJERU KANYARIRI)

NJUE KUBUTA)

JONAH KUBUTA)

NYAGA KATHIERI)

FREDRICK NJERU JAPHAT)

NYAGA IRERI)

NJERU MIKE EDWARDS)

MAINA WAIRIMU)

FRANCIS NJERU KARANI	)
KAMAU CHARLES RUMITO	) INTERESTED PARTIES/
ROBERT MOFFAT MWANGI	)
RESPONDENTS/DEFENDANTS	
FRANCIS THATHI JOMAH	)
JOE KATHUNGU	)
CYRUS MUTHIKE KIRONJI	)
NJERI KIHORIA	)
PAUL MITHIKA JOMAH	)
SAMMY NAMU GATUMU	)
ELIAS MURIITHI GATUMU	)
STEPHEN MWANIKI NJUE	)
JOYCE WAWIRA NJERU	)
NAZARENO VINCENT NYAGA KARUIRU	)
JONAH KUBUTA	)

RULING

This is in relation to the Preliminary Objection raised by the 9th respondent against the plaintiffs Originating Summons seeking the Court to order cancellation of all the registered proprietors of some titles described in the said Summons and also to order that the said parcels of and be distributed among members of MARIGU clan as ordered and decreed by Hon. L. Gitari Senior Principal Magistrate in Embu S.P.M.C.C No. 70 of 1984 on 9th July 1993. According to the Originating Summons which was filed on 7th July 2011, the said decree was never challenged and therefore ought to be enforced.

The Preliminary Objection is raised on the following grounds:-

1. ***That this suit is statute barred and it offends the provisions of Section 4 (4) of the Limitation of Actions Act Cap 22 laws of Kenya.***
2. ***That the suit offends the provisions of Section 7 of the Civil Procedure Act.***

The Preliminary Objection was filed before the suit was transferred to this Court from Embu and the parties had agreed to canvass it by way of written submissions which have been filed.

I have considered the submissions on record.

It is clear from the pleadings that this suit seeks to enforce the Decree in Embu Civil Case No. 70 of 1984. That decree was issued on 9th July 1993 by Mrs L. Gitari Senior Principal Magistrate. A copy of the Decree is indeed attached to the Originating Summons and this is confirmed by the supporting affidavit of FREDRICK KIURA NYAGA the 1st applicant herein. It is the case of 9th respondent that this Originating Summons being a suit to execute a decree is time barred by **Section 4 (4) of the Limitation of Actions Act.** The applicant's case is that infact the Decree was signed on 14th September

2005 and so it is not time barred and further, there are issues of fraud which this Court should allow to be litigated.

Section 4 (4) of the Limitation of Actions Act states as follows as far as is material for this application:-

“ An action may not be brought upon a judgment after the end of twelve years from the date of which the judgment was delivered -----“

emphasis added.

It is therefore clear from the above that the effective date under **Section 4 (4) of the Limitation of Actions Act** is the date when the judgment was delivered and not, as suggested by counsel for the plaintiff in their submissions, the date when the Decree was drawn. The judgment herein having been delivered on 9th July 1993 and this Originating Summons filed on 7th June 2011 (almost 18 years later), the same has clearly been filed in contravention of the law which set a time limit of 12 years. The Originating Summons is Statute barred under **Section**

4(4) of the Limitation of Actions Act and the other remedies sought therein cannot stand on their own as they are founded upon the judgment of the lower Court dated 9th July 1993.

The applicants counsel has also submitted that this Preliminary Objection does not raise pure points of law as defined in the case of **MUKISA BISCUIT CO. LTD VS WEST END DISTRIBUTORS LTD 1969 E.A 696**. In that case, the Court described a Preliminary Objection as follows:-

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion”.

The Preliminary Objection raised herein is that this Originating Summons is Statute barred and it is a fact that needs no ascertainment that the judgment sought to be enforced was delivered on 9th July 1993. I therefore do not see how it can be argued that this Preliminary Objection is misconceived and does not raise a pure point of law. My finding is that this objection is premised on a clear Statutory provision and is therefore a valid Preliminary Objection.

Counsel for the applicant has also raised issues of fraud and that this Court has power to cancel titles obtained fraudulently. That is correct. However, this Court's jurisdiction has to be properly invoked within the law and that cannot be done if what is being sought is to enforce a judgment which the law says cannot be enforced.

On the issue of res-judicata, it is clear from the copy of the Decree in Embu Civil Case No. 70 of 1984 that the parties were RUEL KARANJA as plaintiff Vs JONAH KUBUTA & ALFRED KAMURI. The case now before me involves three (3) applicants and twenty five (25) respondents and the only party who was in the previous case is JONAH KABUTA. Clearly therefore, the plea of res-judicata is not available and cannot be sustained.

Ultimately therefore, having found that this Originating Summons is caught up by the **Law of Limitations**, the same is dismissed with costs.

B.N. OLAO

JUDGE

27TH NOVEMBER 2013

27/11/2013

Coram

B.N. OLao – Judge

CC – Muriithi

3rd Plaintiff – present

1st to 18th Defendant – absent

Ms Muthoni for Muriithi for 19th Respondent present

COURT: Ruling delivered this 27th day of November 2013 in open Court.

3rd Applicant present

Ms Muthoni for Muriithi for 19th Respondent present.

B.N. OLAO

JUDGE

27TH NOVEMBER, 2013`