



REPUBLIC OF KENYA



**Angaza Real Estate Limited v Wainaina & another (Environment & Land
Case 113 of 2022) [2025] KEELC 3269 (KLR) (7 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3269 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 113 OF 2022**

JM ONYANGO, J

APRIL 7, 2025

BETWEEN

ANGAZA REAL ESTATE LIMITED PLAINTIFF

AND

STEPHEN NJENGA WAINAINA 1ST DEFENDANT

LEAH WAIRIMU KINUTHIA 2ND DEFENDANT

RULING

1. By a Notice of Motion dated 7th December, 2023 the 1st Defendant filed an application seeking an order that the suit be struck out for non-disclosure of material facts. He also sought an order dismissing the suit for being statute barred under the *Limitation of Actions Act* Cap 22 of the Laws of Kenya.
2. The application is based on the grounds set out on the face of the Notice of Motion and the Supporting Affidavit of the 1st Defendant. He contends that he and the 2nd Defendant are co-administrators of the Estate of Wainaina Kinuthia (hereinafter referred to as “the deceased”). He further contends that Land Parcel number Kiambu/Munyu/560 and Kiambu/Munyu/559 were subdivisions of Kiambu/Munyu/160 registered in the name of the deceased. He adds that one Jacob Kimani Mwangi (a former administrator of the Estate of the deceased) caused Land Parcel numbers Kiambu/Munyu/560 and Kiambu/Munyu/559 to be fraudulently registered in his name, however the court in Thika Succession Cause No. 198 of 1991, In the matter of the Estate of Wainaina Kinuthia (deceased) ordered the cancellation of the titles that had been fraudulently obtained.
3. He contends that the confirmed Letters of Administration issued to Jacob Kimani Mwangi and Leah Wairimu Kinuthia on 26th August 1993 in Thika Succession Cause No. 198 of 1991 which facilitated the transfer of title of Land Parcel number Kiambu/Munyu/560 (hereinafter referred to as “the suit property”) to the Plaintiff was revoked and all title deeds registered pursuant to the said Grant were cancelled. A fresh Grant was subsequently issued in the name of the Defendants.



4. The 1st Defendant deposes that the order for cancellation of the fraudulent titles issued in Succession Cause No. 198 of 1991 has neither been appealed against nor set aside. He further deposes that the Plaintiff is aware of the existence of the order and of investigations by the police given that he was summoned by the Land Registrar to present the title deed for the suit property, for cancellation.
5. He maintains that the Plaintiff is guilty of material non-disclosure hence it is not entitled to the equitable injunctive reliefs sought. It is his assertion that the Plaintiff has admitted that it has not been in possession of the suit property for more than 12 years therefore the Plaintiff's suit for recovery of land is time-barred. He adds that he has been in constructive possession of the suit property for more than 12 years where he currently resides, a fact admitted by the Plaintiff. He urged the court to dismiss the suit.
6. The application is opposed by the Plaintiff through a Replying Affidavit sworn by the Plaintiff's project manager Peter Ngugi Kimani, on 11th November 2024 in which he deposes that the Plaintiff is the bonafide registered owner of the suit property which originally belonged to the deceased. He states that upon the deceased's death on 9th June 1991, his heirs filed Thika Succession Cause No. 198 of 1991 and a Grant of Letters of administration was issued and confirmed on 26th August 1993. Jacob Kamau Mwangi and the 2nd Defendant were appointed as the administrators of the estate. The suit property was transmitted to them on 4th October 1993 and it was registered in the name of Jacob Kimani Mwangi in conformity with the confirmed grant.
7. He contends that in 2010, Jacob Kimani Mwangi sold the suit property to one Vincent Wainaina Kimani who in turn sold it to Samuel Ngundo Maina in 2013. He further contends that the Plaintiff's director bought the suit property from Samuel Ngundo Maina in 2015 for valuable consideration of Kshs 4,200,000 and the same was transferred and registered in the Plaintiff's name in 2016. He adds that the Plaintiff thereafter subdivided the suit property and sold the subdivisions to third parties.
8. It is his assertion that the Plaintiff was not aware that the Grant confirmed on 26th August 1993 was revoked and that the said cancellation had the effect of cancelling all transactions on the suit property that had happened since 1993. He denies that the suit is time barred given that the cause of action arose in 2022 when the grant was revoked. He maintains that the Plaintiff is a bona fide purchaser for value, without knowledge of defect of title. He adds that the transactions on the suit property cannot be cancelled without hearing the current title holders of the suit property. He urged the court to dismiss the application dated 7th December 2023.
9. The court directed that the application be canvassed through written submissions. The Defendants filed written submissions dated 25th February 2025 while the Plaintiff filed written submissions dated 11th November 2024 which I have carefully considered.

Defendants Submissions

10. The Plaintiff filed its submissions dated 11.11.24 through the firm of Kany Kiruchi & Company Advocates. Learned counsel for the Plaintiff submitted that the Plaintiff's title was issued in 2016 and therefore the suit is not time-barred. He relied on the case of Salim Mohammed Salim Tweshe v Khalid Salim Naaman & 5 Others (2020) eKLR for the proposition that where the court is invited to conduct a mini trial on facts to establish whether a preliminary objection is valid, then the Preliminary Objection itself ceased to be a preliminary objection as the court should only look at the pleadings.
11. Additionally, counsel relied on the case of Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu (2009) eKLR and D.T Dobie & Company (Kenya) Ltd v Muchina (1982) KLR1 for the



proposition that the discretion to strike out a suit should be exercised with great care and caution. He submitted that the Plaintiffs have an arguable case which should not be dismissed summarily.

Defendants' Submissions

12. On his part, learned counsel for the Defendant submitted that when the Plaintiff filed the application dated 26.9.2022, it did not disclose that Thika CM Succession Cause No. 198 of 1991 cancelled title No. Kiambu/Munyu/560 and the cancellation order was annexed in the Replying Affidavit of Stephen Njenga Wainaina dated 7.11.22. He added that the said order had not been appealed against.
13. He submitted that the plaintiff being a land buying company ought to have conducted due diligence to establish the history of the land.
14. He added that the Plaintiff did not disclose that there were on-going investigations and that it had been summoned by the Land Registrar to present its title for cancellation.
15. Counsel insisted that the suit was time-barred by virtue of section 7 of the *Limitation of Actions Act* Cap 22 of the Laws of Kenya. He relied on the cases of Halima Haji Sarah v Multiple Hauliers (E.A) Ltd (2022) eKLR and Grace Wanjiru Gichari & Another v Stephen Maina Muchiri [2024] KEELC1519 (KLR)

Analysis and Determination

16. The two issues for determination are:
 - i. Whether this suit is time-barred.
 - ii. Whether the suit should be struck out for material non-disclosure.
17. The court in the case of Mukisa Biscuit Company Ltd vs West End Distributors Limited (1969) E.A 696. held as follows:

“...A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.”

“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 improper raising of Preliminary objections does nothing but unnecessarily increase the costs and occasions confusion of the issues. This improper practice should stop.”

18. In the instant case the 1st Defendant has raised the question of the suit being time-barred and the same offending the mandatory provisions of the *Limitation of Actions Act*, which is a pure point of law. Even though the 1st Defendant did not specify the specific Section of the *Limitation of Actions*



Act contravened by the Plaintiff, a perusal of the pleadings show that the 1st Defendant is referring to Section 7 on actions to recover land which provides that:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

19. The 1st Defendant contended that the confirmed Letters of Administration issued to Jacob Kimani Mwangi and the 2nd Defendant on 26th August 1993 in Thika Succession Cause No. 198 of 1991 which facilitated the transfer of title of the suit property to the Plaintiff was revoked and all title deeds registered pursuant to the said Grant were cancelled. A fresh Grant was subsequently issued in the name of the Defendants.
20. The Plaintiff on the other hand contended that the suit property was registered in their name in 2016 and that the initial Grant was revoked in 2022. This suit was filed in 2022. This court is of the opinion that the cause of action only arose in 2016 and Twelve years had not elapsed from the time the cause of action arose to the time the Plaintiff filed the suit.
21. On the second issue, the court in *Brinks-MAT Ltd Vs Elcombe* (1988) 3 All ER 188, set out what the court has to consider to be material non-disclosure as follows: -

“In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (i) The duty of the applicant is to make a full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) The nature of the case which the applicant is making when he makes the application. (b) The order for which application is made and the probable effect of the order on the defendant, and (c) The degree of legitimate urgency and the time available for the making of inquiries. (v) If material non-disclosure is established the court will be astute to ensure that a Plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty.... see *Bank Mellat v Nikpour* at (91) per Donaldson LJ, citing Warrington LJ in the *Kensington Income Tax Comrs* case (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, it is not for every omission that the injunction will be automatically discharged.”

“A locus poenitentiae (chance of repentance) may sometimes be afforded. The court has a discretion, notwithstanding proof of material non-disclosure which



justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.

.....when the whole of the facts, including that of the original non-disclosure, are before it, (the court) may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.”

22. The Plaintiff contended that one of its directors bought the suit property from Samuel Ngundo Maina in 2015 for valuable consideration of Kshs 4,200,000 and the same was transferred and registered in their name in 2016. The Plaintiff further contended that it subdivided the suit property and sold the subdivisions to third parties. The Plaintiff stated that it was not aware that the Grant confirmed on 26th August 1993 was revoked with the effect of cancelling all transactions on the suit property that had happened since 1993. The Plaintiff contended that the transactions on the suit property ought not to have been cancelled without the current title holders of the suit property being heard on the matter.
23. I am of the view that the issues raised by the defendant require the case to go to full hearing so that evidence can be tested in cross-examination. For this reason, it is my finding that the application lacks merit and it is hereby dismissed.
24. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 7TH DAY OF APRIL 2025.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Wachira for Mr. Kanyi for the Plaintiff
2. Mr. Njogu for the Defendant.

Court Assistant: Hinga

