



**Nyaberi v Nyaberi & 4 others (Environment & Land Case
26 of 2018) [2022] KEELC 2328 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2328 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 26 OF 2018**

MC OUNDO, J

JULY 14, 2022

BETWEEN

FRANCIS PIUS MWERI NYABERI ALIAS FRANCIS ONGERA PLAINTIFF

AND

STEPHANO NYAKUNDI NYABERI 1ST DEFENDANT

WISLON NYAKUNDI 2ND DEFENDANT

MUTARAGON FARMERS CO-OPERATIVE SOCIETY 3RD DEFENDANT

LAND REGISTRAR KERICHO 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. Pursuant to the filing and service of the Amended Plaintiff of 8th February 2019, the 1st 2nd and 3rd Defendants filed their Amended Defence and a Notice of Preliminary Objection dated the 29th November 2021 to the effect that the Plaintiff's suit was statutory time barred and therefore unsustainable under the provisions of Sections 7, 8 and 26 of the *Limitation of Actions Act*, the gist of the Plaintiff's suit having been founded on fraud, the cause of action having been committed on the 3rd September 1991.
2. Via their Grounds of Opposition and Replying Affidavit to the Preliminary Objection dated the 17th February 2022, the Plaintiff's assertion was that both the Amended Plaintiff and Defence disclosed facts which ought to be investigated and ascertained before the court could make a determination of the matters in controversy and therefore the Preliminary Objection did not satisfy the principles set in the *Mukisa Biscuits Manufacturing Ltd v West End Distributors* [1969] EA 696 case.
3. There was no response from the 4th and 5th Defendants.



4. Parties thereafter consented to dispose of the application by way of written submissions.

1st 2nd and 3rd Defendants' submissions.

5. The 1st 2nd and 3rd Defendants' submissions was to the effect that parties were bound by their pleadings. That it was clear from the Plaintiff's pleadings at para 10A of the Amended Plaintiff that the cause of action, namely fraud in the registration of the 1st Defendant to the suit land, occurred on the 3rd September 1991.
6. That an action based on fraud, which was a tort and the recovery of land therefore ought to have been brought three years and twelve years respectively after the cause of action arose.
7. The Defendants framed their issues for determination as follows;
 - i. Whether the Preliminary Objection dated 29th November 2021 is merited and should be allowed.
 - ii. Who bears the cost of the suit.
8. On the first issue for determination, it was the Defendants' submission and based on the famous Mukisa Biscuits Manufacturing Ltd case (*supra*) that the Preliminary Objection was anchored on Section 7, 8, and 26 of the Limitation of Actions Act which clearly provided a time frame for an action for recovery of land.
9. That the alleged cause of action had occurred on 3rd September 1991, wherein a window period of 12 years had lapsed on 3rd September 2003 which was the time that the Plaintiff ought to have brought suit. That the Plaintiff having brought suit, after the lapse of 12 years, was guilty of laches and his cause of action was stale. That the Plaintiff cannot now hide under the provisions of Section 26 of the Limitation of Actions Act on the proposition that he visited the lands registry in 2015 wherein he had discovered the fraud and therefore that was when time had started running. That it was unbelievable that the Plaintiff would have discovered the alleged fraud after a period of 24 years, the 1st and 2nd Defendants, who were his relatives, a brother and nephew respectively, having been in exclusive occupation, possession and use of the suit land.
10. That the suit having been time barred, the court had no jurisdiction to entertain and determine the same as was held in the case of Harrison Ndung'u Mwai & 500 Others vs the Attorney General [2018] eKLR.
11. That further, the suit land having been within an adjudication area, the Plaintiff ought to have provided and/or attached a certificate of consent by the Land Adjudication officer consenting to his filing of the suit, as was provided for under Sections 8(1) (2), 26 and 30 of the Land Adjudication Act (repealed). That without such consent, the court lacked jurisdiction to entertain the suit, the Plaintiff having not exhausted all the mechanism provided for by law before approaching the court.
12. On the second issue for determination, it was the Defendants' submission and pursuant to the provisions of Section 27 of the Civil Procedure Act, that costs should normally be awarded to the successful litigant unless there were exceptional circumstances to be noted by the Judge to warrant departure from the general principle.

Plaintiff's submissions

13. The Plaintiff's submissions, in opposition to the 1st, 2nd and 3rd Defendants' Notice of Preliminary Objection was that his suit was not statutory barred, him having visited the Lands office in Kericho in



July 2015, wherein he had discovered the alleged fraud. That he had subsequently instructed Counsel to file the current suit which had been filed on 3rd April 2018, a period of three years from the date of the discovery of the fraud.

14. The Plaintiff relied on the provisions of Section 26 as read together with Section 4(2) of the [Limitation of Actions Act](#), to submit that he had filed the present suit within three years upon discovery of the fraud complained of and time started running from when he had discovered the fraud. That the time when he had discovered the fraud had not been controverted by the Defendants and therefore should be conceded to. He placed his reliance on the decided case by the Supreme Court in [Kenya Ports Authority v Timberland Kenya Limited](#) [2017] eKLR.
15. That the Defendants' Counsel's submissions could not be a substitute for evidence and that the same ought to have been adduced by the Defendants in their sworn Affidavit. Reliance was placed on the decided case by the Court of Appeal in *Joseph Murungi & Another v Beatrice Kainda Kaibiria* Civil Appeal No. 175 of 1996. (unreported)
16. That the Preliminary Objection as filed did not meet the threshold in the principles established in the celebrated case of Mukisa Biscuits Manufacturing Ltd case (*supra*) where Sir Charles Newbold had castigated the use of the Preliminary Objections. The Plaintiff submitted that since he had demonstrated that he had filed the suit within the prescribed period of time, the Preliminary Objection ought to be dismissed with costs so that the suit could be set down for full hearing.

Determination.

17. I have anxiously considered pleadings herein as well as the submissions for and against allowing the Preliminary Objection. I have also considered the fact that the suit pits a brother against his brother and nephew respectively.
18. Applying the principles set in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 to wit that an objection must consist purely of point(s) of law which if argued as a Preliminary Objection, is capable of disposing of the suit, the 1st, 2nd and 3rd Defendants herein have argued that the Plaintiff cannot bring a suit against them because the same is time barred by virtue of the provisions of Section 7, 8, and 26 of the [Limitation of Actions Act](#). I therefore find the matters that arise for determination as being:
 - i. Whether the Preliminary Objection raised is sustainable.
 - ii. Whether the said Preliminary Objection has merit and should be upheld.
19. The 1st, 2nd and 3rd Defendants submitted that based on the Plaintiff's pleadings, the gist of his suit was founded on fraud which was allegedly committed on the 3rd September 1991 when the 1st Defendant in collusion with the 2nd and 3rd Defendants fraudulently registered the suit land in the name of the 1st Defendant. That subsequently, this suit had been instituted vide a Plaint dated 3rd April 2018 which Plaint had been amended on 8th February 2019. That the suit had therefore been brought after the lapse of 12 years which was in contravention of the provisions of Section 7, 8, and 26 of the [Limitation of Actions Act](#).
20. The Plaintiff on the other hand, in total opposition to the Preliminary Objection has submitted that suit was not statutory barred, him having visited the lands office in Kericho in July 2015, wherein he had discovered the alleged fraud. That he had subsequently filed suit on the 3rd April 2018, a period of three years from the date of the discovery of the fraud and therefore he was within the ambit of the provisions of Section 26 as read with Section 4(2) of the [Limitation of Actions Act](#).



21. Section 26 of the *Limitation of Actions Act* provides as follows;

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

22. Section 4(2) of the *Limitation of Actions Act* provides as follows:

An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

23. A cause of action, is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a Plaintiff brings suit.

24. I have considered paragraph 10A of the Plaintiff's amended Plaintiff wherein he states as follows:

"The Plaintiff avers that in or about 1991, during the process of adjudication and registration of the lands within Mutaragon area, the 1st Defendant in collusion with officers of the said society fraudulently had registered the two parcels in his names on Kericho/ Kipchorian / Lelu Block 4 (Mutaragon)/453 measuring 2.650 hectares on (sic) Kericho/ Kipchorian / Lelu Block 4 (Mutaragon)/77 measuring 0.2800 hectares in lieu of the Plaintiff."

25. According to Section 26 of the *Limitation of Actions Act*, the cause of action accrues when the fraud is discovered. The above captioned extract from the Plaintiff's pleading is clear that the fraud had been committed on 3rd September 1991. It is on record that during this period in time, the 1st Defendant had been in possession and occupation of the suit land. The Plaintiff seems to allege that although the 1st Defendant in collusion with the 2nd and 3rd Defendants had fraudulently registered the 1st Defendant to the suit land on 3rd September 1991, yet he had only discovered the said fraud in July 2015. This was some 24 years after the alleged fraud had been committed. Could it then be said that even with reasonable diligence the Plaintiff was not able or could not have discovered the fraud despite the fact that his relatives were living on the land? Be it as it may, since it is trite that parties are bound by their pleadings and the fact that the Plaintiff has ingeniously drafted his pleadings so as to have the suit fit within the ambit of the limitation period as provided for under Section 26 and Section 4(2) of the *Limitation of Actions Act*, we shall leave the matter to rest at that, give him a benefit of doubt and accept that he discovered the fraud when he did which was in the year 2015.

26. The Plaintiff is however not off the hook more so when the law as provided for under Section 7 of the *Limitation of Actions Act* comes knocking. The said provision of the law provides as follows;

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.'



27. The Plaintiff, in his amended plaint has sought to be declared as the sole owner and allottee of LR Nos Kericho/ Kipchorian /Lelu Block 4 (Mutaragon)/453 and 77.
28. Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the Plaintiff herein could only seek to recover the suit land from the 1st Defendant, but only if he did so within twelve years after the cause of action had accrued.
29. There is no doubt that the cause of action occurred on the 3rd September 1991 when the 1st Defendant was registered as proprietor of the suit land. A period of about twenty four (24) years had lapsed from 3rd September 1991 up to the 3rd April 2018 when the suit was filed. The Plaintiff needed to commence his claim within the time prescribed under Section 7 of the *Limitation of Actions Act*. It follows therefore that by the time this suit was filed, the claim had become statute barred.
30. The Court of Appeal in *Mukuru Munge v Florence Shingi Mwawana & 2 Others* [2016] eKLR held that:
- "The purpose of the law on limitation of actions is to avoid stale claims, based on the sensible and rationale appreciation that over time memories fade and evidence is lost. The law of limitation therefore seeks to compel claimants not to sleep on their rights and to bring their claims to court promptly. Secondly, the law on limitation of actions ensures that claims are instituted within reasonable time after the cause of action has arisen, so as to secure fair trial when all the evidence is available and to ensure that justice is not delayed. In our minds, those are important constitutional values and principles, which are underpinned by legislation on limitation of actions."
31. In the case of *Bosire Ongero v Royal Media Services* [2015] eKLR, the court had held that the issue of limitation went to the jurisdiction of the court to entertain claims and therefore if a matter was statute barred, the court had no jurisdiction to entertain the same.
32. The locus classicus on jurisdiction is the celebrated case of *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Justice Nyarangi of the Court of Appeal held as follows
- 'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'
33. From the facts of the case as presented, it is clear that this Court lacks jurisdiction and the matter is at its end. I will have to down my tools and take no further step. The Preliminary Objection herein succeeds in its entirety with the result that the Plaintiff's suit is herein struck out with costs to the 1st, 2nd and 3rd Defendants.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 14TH DAY OF JULY 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

