



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT EMBU

Civil Case 123 of 2009

JOHN GICIRU NDEGWA.....PLAINTIFF

VERSUS

ALFRED WARUI NDEGWA & 14 OTHERS.....DEFENDANTS

RULING

The plaintiff's suit which he filed on 27/7/09 against 15 defendants has attracted 3 preliminary objections. The first one was filed by Nyachiro Nyagaka & Co Advocates for the 14th defendant; next was filed on 18/9/09 by Gitonga & Co. for 2nd, 5th, 7th, 8th and 15th defendants and the last one dated 26/2/2010 by Mohamed and Lethome for the 9th, 10th and 12th defendants. Other counsel had also indicated in their response to the application that they would be raising preliminary objections but it was not necessary to do so since the ones already on record covered whatever issues they wanted to raise. Having looked at the preliminary objections, I was satisfied that they are not frivolous as they touch on the locus standi of the plaintiff to file the suit and also on the statute of limitation. These are issues that can determine the entire suit if the court were to uphold the preliminary objections and so in my view, the P.O.s do meet the threshold set out in the locus classica case of **Mukhisa Biscuit –Vs- West End and Distributors Ltd (1969) EA 700**. We agreed that counsel would file written submissions in support or opposition of the preliminary objections. The submissions were filed on behalf of most of the defendants which submissions all raised points of law as to why this suit should be dismissed at this stage. Unfortunately, counsel for the plaintiff had not filed his submissions in reply to those other submissions as at 16/6/2010 which is when I am writing this Ruling. When I gave the date for judgment, I directed that whoever wanted to file submissions was free to do so but I would proceed to prepare the Ruling with whatever submissions that will have been filed. The issues raised in the P.O.s have not therefore been rebutted. I will try to pick out the most important ones. They are as hereunder:-

- 1. That the suit is time barred.***

2. *That the suit is defective as presented.*
3. *That the plaintiff/Applicant has no locus standi to bring the suit herein.*
4. *That the suit was filed contrary to the provisions of the limitation of Actions Act Cap 22 and the Public Authorities Limitation of Actions Act Cap 39 of the Laws of Kenya.*
5. *That the Grant of letters of Administration relied upon by the Plaintiff are fake as the said suit does not exist.*
6. *That the suit is a non-starter and the application is based on a non-starter suit.*

All these issues were supported by the submissions filed by the various counsel. It is not possible for me to repeat all the contents of the said submissions. I have nonetheless read all of them and digested the contents there in. I must however applaud those advocates who filled their submissions. They were very helpful to me for purposes of this ruling. I will start with the point that the suit is time barred. This submission was 2 pronged. Firstly, the suit is said to be time barred under the Limitations of Actions Act Cap 22 of the Laws of Kenya and secondly in respect of the 4th defendant, that the suit contravenes the provisions of Cap 39 of the Laws of Kenya. On the second prong, Section 3 (1) of Cap 39 provides as hereunder:-

1. *No proceedings founded on tort shall be brought against the Government or a local authority after the end of 12 months from the date on which the cause of action accrued.*
2. *No proceedings founded on contract shall be brought against the Government or a local authority after the end of 3 years from the date on which the cause of action accrued.*

The cause of action in this matter is based on fraud. Fraud is a 'Tort' and so since the council i.e. 4th defendant was acting in its official capacity when dealing with the said land, then no action can lie against it after expiry of 12 months. If the suit was based on contract, the limitation would have been in 3 years. This suit was filed long after the above periods had expired. That alone suffices to dismiss this suit against the 4th defendant namely Kirinyaga County Council.

On the 1st prong of the limitation issue in respect of the other Defendants/Respondents, I note that according to paragraph 12 of the plaint, the cause of action arose in the year 1993. Claims for recovery of land must be made within 12 years since accrual of the right claimed.

Section 7 of the Limitation of Actions Act (Cap 22 Laws of Kenya) provides:-

“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”.

In this case, the cause of action arose in 1993. Any claim of ownership over that land should have made within the 12 years thereof. This suit is brought to court after 10 years. It is clearly time barred by statute and it should be dismissed. Where the cause of action is based on fraud, the limitation is even shorter. It is 3 years and so the suit was brought 5 times later than it was supposed to. It is noted that the plaintiff claims that he was a minor by the time his late father died and that is why he did not take action within the prescribed time. Even if this court were to accept that explanation, he says he was born in 1975. By 1993 when the land was transferred, he was actually 18 years old which is the age of majority. It still took him 16 years to file this suit. No reason has been advanced for that delay. I find that this suit is time barred by statute and it is therefore bad in law.

I do not need to go further than that but I believe it is important to also deal with the issue of locus standi. Did the plaintiff have the requisite locus standi to file this suit? Locus standi in respect of the Estate of a deceased person is obtained when a person is granted letters of Administration in respect of that Estate. Then and only then is he clothed with the locus standi to file suits in respect of the deceased's estate or to represent it in any way. The said Grant of letters of Administration must of course be legal.

In this case Alfred Warui Ndegwa who is the 1st defendant moved to the Senior Resident Magistrate Court Wanguru and filed Succession Cause No. 2 of 1999. He was issued with a Grant of Letters of Administration to the Estate of his late father. It is evident that by then, the parcel of land in question was no longer in existence it having been transferred to some of the defendants in 1993. It was not therefore included in the Certificate of Confirmation which was issued later.

The plaintiff in this matter was well aware of those proceedings because he was then an adult. What surprises me therefore is that much later in 2007, he decided to file another succession cause for the same estate. I have called for and perused Succession Cause No.413 of 2007 when the said Grant was confirmed, the 1st defendant was present in court. They were all well aware that there was another Grant which had been issued to 1st Defendant. They did not disclose that fact to the court when the plaintiff filed that cause or when the said Grant was confirmed. If for whatever reason, the Grant issued earlier on was found to be defective in one way or another then the right recourse was to move the court, either for rectification (to include any property that had been omitted) or for revocation. They did not do so. Instead, they chose to apply for another grant while the earlier one was still in existence. That was in my view dishonest on the part of the plaintiff herein, 1st defendant and all his other siblings.

The law does not allow for 2 Grants of letters of Administration to be issued in respect of the same Estate. If for whatever reason another grant is issued subsequently then the same lacks the force of the law. In this case therefore, the Grant of letters of Administration issued to the plaintiff herein was issued contrary to the law. Indeed the reason why all succession causes have to be sent to the Principal Registrar in Nairobi is for confirmation that no other Grant has been issued in respect of the Estate in question. A grant cannot be issued until the Principal Registry sends back Form 30 confirming that no other Grant in respect of the same Estate has been issued. Sometimes however especially where there is collusion by the parties like is the case here, or due to the overwhelming number of applications, it is not possible to detect if there are other Grants which have been issued in respect of the same estate earlier and a second one is issued. In that case however, the second grant is void and has no force of law since there was already another Grant issued earlier unless of course the earlier one has been revoked or annulled. In this case therefore, the Grant of Letters of Administration issued to the plaintiff by this court of 18/6/2009 is declared null and void and this court moves itself suo motu and nullifies the same. That leaves the plaintiff herein bare and with no locus standi whatsoever to file any claims in respect of his late father's estate. The only person with that locus is the 1st defendant. On this one ground the entire suit crumbles like a house of Dominos. Whichever way one looks at it therefore, this is a bad suit. It is a non-starter and so is the application which seeks to draw life from it.

In sum, for the foregoing reasons, I find the points raised in all 3 preliminary objections meritorious. I uphold the same and dismiss this entire suit with costs to the defendants.

W. KARANJA
JUDGE

Delivered, signed and dated this 22nd day of June 2010.

In presence of:- (as per coram).

22/06/2010

Before W. Karanja J

Mr. Ali for 9th, 10th & 12th defendants also holding brief or I.NN. Muchiri

Mrs. Kimani for Mr. Gitonga

N/A by Muchiri wa Gathoni for plaintiffs

Mr. Muchira for Wakini Kiarie for the 4th defendant present.

**W. KARANJA
JUDGE**

Court:

Ruling delivered today in presence of the above.

**W. KARANJA
JUDGE
22/06/2010**