



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**Civil Case 2 of 2007**

**FRANCIS MUNYIRI KAMAU .....PLAINTIFF**

**VERSUS**

**MARGARET NYAWIRA & 2 OTHERS.....DEFENDANTS**

**RULING**

On 7<sup>th</sup> July, 2008, when this suit came up for hearing, **Mr. Oluoch**, learned counsel for the defendants raised an objection based on limitation of actions Act as well as Re judicata. **Mr. Oluoch** contented that the basis of this suit was the alleged fraud committed on 2<sup>nd</sup> August, 1966 and 26<sup>th</sup> July, 1995 respectively. Fraud being a tort and by virtue of *section 4 (2)* of the limitation of Actions Act, this action ought to have been commenced within 3 years which was not the case here. Secondly, counsel submitted that the plaintiff had in 1996 filed a suit in this court being HCCC No.39 of 1996 relating to the suit premises, the subject matter of this case. The suit was against the instant 3 defendants and 2 others since deceased. A similar suit having been filed between the same parties over the same issue and namely ownership of land parcel **Iriaini/Cheche/327**, the court did not have jurisdiction to entertain the instant suit in the face of the previous suit.

In response, **Mr. Nderi**, learned counsel for the plaintiff submitted that the limitation period for fraud is 6 years. That the fraud was discovered on 15<sup>th</sup> April, 2004 and accordingly the suit was filed in time. As for the earlier suit, **Mr. Nderi's** take on it was that the two were based on different causes of Action. Counsel pleaded that striking out pleadings should only be done in the clearest of cases and that this was not one of those cases.

I have carefully considered the pleadings submissions of learned counsel as well as the law. It is common ground that the plaintiff filed in this court, HCCC No.39 of 1996. In that suit the plaintiff was seeking against the defendants herein and two others.

**“(a) An injunction restraining the defendants their families, servants and or agents from interfering with land parcel LR.Iriaini/Cheche/327,**

**(b) An order that the registration of LR.Iriaini/Cheche/327 in favour of the defendants is null and void.**

**(c) An order that anew title deed be issued in the name of the plaintiff.....”**

Among other prayers.

In the instant suit the plaintiff has sought

**“(a) Cancellation of the registration on the register of 2.8.1966 and 26.7.1995 and rectification in to the appropriate names of Francis Munyiri Kamau.”**

It is therefore quite clear from the foregoing that the issues raised in this suit as well in the previous suit are intertwined, if not, similar. The parties to the suits are same except for two other defendants in HCCC No.30 of 1996 who have since passed on. The suits relate to the same suit premises. *Section 7* of the Civil Procedure Act, forbids this court from trying any suit or issue in which the matter directly or

substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. This is the doctrine of Res judicata. Parties herein are in agreement that there was a previous suit involving them being HCCC No.39 of 1996. That suit according to the affidavit of the plaintiff sworn on 14<sup>th</sup> February, 2008 was dismissed on 23<sup>rd</sup> January, 2001 for want of prosecution. That being the case, the doctrine of Res judicata would not strictly apply in the circumstances of this case as no decision on the merit of the case was ever arrived at. If a suit is dismissed for want of prosecution under order 16 rule 6 of the Civil Procedure Rules a party May still file a fresh suit subject however to the law of limitation. Indeed the rule provides interlia; “.....**In such case the plaintiff may, subject to the law of limitation, bring a fresh suit.**” Therefore the only limitation to filing a fresh suit on the part of the plaintiff here is in regard to law of limitation. The plaintiff was therefore within his right to file the instant suit as long as he brought himself within the law of limitation. The plaintiff’s cause of action in this suit is based on alleged fraud committed by the defendants on 2<sup>nd</sup> August, 1966 and 26<sup>th</sup> July, 1995 respectively. If fraud is a tort as argued by **Mr. Oluoch**, then the plaintiff’s claim is time barred by virtue of *section 4(2)* of the Limitation of Actions Act. That section provides interlia that “**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....**” In the instant case the fraud complained of was committed in 1966, a period in excess of 40 years. The other fraud was apparently committed on 26<sup>th</sup> July, 1995, yet again a period in excess of 12 years. From the foregoing it should be apparent that the plaintiff’s instant suit is time barred. There is no evidence that he sought and obtained leave of court to file it out of time. Even if we were to assume that the plaintiff’s action is for recovery of land, he would still be caught up with limitation. Ordinarily such an action may not be brought by any person after 12 years from the date on which the right of action accrued to him. See *section 7* of the Limitation of Actions Act. So which ever way one looks at the plaintiff’s case, his goose has been cooked. It is time barred both ways. I agree with **Mr. Nderi** that striking out of a pleading is a drastic and draconian step and should be only exercised in the clearest of cases. I have no doubt that this is indeed one of those very clear cases. The frauds complained of were committed decades ago. It will serve no useful purpose to keep this suit alive any much longer. Accordingly I accede to the request by learned counsel for the defendant to strike out the suit. The suit is thus struck out with costs to the defendants.

*Dated and delivered at Nyeri this 9<sup>th</sup> day of October, 2008.*

**M.S.A. MAKHANDIA**

**JUDGE**