

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO

Civil Case 100 of 2005

PHILIP KIMUTAI LANGAT

p/a KIPLANGAT MAINA.....PLAINTIFF

VERSUS

JOB KIBET MAINA.....DEFENDANT

RULING

On the 29th September 2005, Phillip Kimutai Langat claiming to be suing on a power of attorney given to him by his father Kiplangat Maina, filed suit against the defendant Job Kibet Maina seeking for orders of this court to make an order that the transfer of parcel No. Kericho/Sosiot/604 to the defendant and the subsequent subdivision of the same into two parcel of land i.e. parcels No. Kericho/Sosiot/655 and 656 be declared to be null and void on account of the same having been procured by fraud. The defendant filed a defence denying that the said parcel of land had been fraudulently transferred to him. He averred that he had lawfully purchased the same from the father of the plaintiff in 1976.

At the hearing of the case, the defendant raised a preliminary objection to the effect that the plaintiff's suit was fatally defective in that it was filed after the period in which the same ought to have been filed as provided for by the **Limitation of Actions Act** had expired. Mr. Kirui for the defendant submitted that the cause of action arose on the 30th of December 1976 and since then the plaintiff did nothing to assert his rights. According to the defendant, the plaintiff could not now file suit purportedly to enforce a right to land after the expiry of more than thirty years. He submitted that according to **Section 7 of Limitation of Actions Act**, any claim to land ought to be filed within twelve years. He therefore submitted that the suit filed by the plaintiff was time barred. He urged this court to uphold the preliminary objection.

Mr. Korir for the plaintiff opposed the preliminary objection. He submitted that the plaintiff had filed the case within the period allowed by the **Limitation of Actions Act**. He submitted that under **Section 26 of the Limitation of Actions Act**, time started to run the moment a litigant discovered the fraud. In the present case, he submitted that the plaintiff learnt of the fraud when the defendant purported to sub-divide the suit land. He submitted that this court should lean towards deciding land disputes on merits. He was of the view that any deficiency in the plaint could be cured by the plaintiff making the necessary amendments. He urged this court to disallow the preliminary objection.

I have carefully considered the preliminary objection raised. The issue for determination by this court is whether the plaintiff's suit is time barred. The plaintiff pleaded that the defendant fraudulently transferred the suit land to himself in 1976. He further averred that the defendant fraudulently subdivided the suit land in 2001 without following the requisite procedure of seeking the consent of the Land Control Board. The plaintiff's suit is based on fraud. Whereas I agree with the defendant that any suit for the recovery of land ought to be filed within twelve years as provided for by **Section 7 of the Limitation of Actions Act**, **Section 26 of the said Act** provides that where fraud, mistake or ignorance of material facts is pleaded, time will run from the moment such a litigant discovered the fraud or mistake. In the present case, the plaintiff did not plead when he discovered the fraud. It is further evident from the plaint that the plaintiff has brought the suit on behalf of his father Kiplangat Maina who has donated to him a power of attorney. He did not annex the said power of attorney to the plaint.

However, I have taken into consideration that the subject matter of the suit is land. The Court of Appeal

has directed courts to hear and determine matters dealing with disputes involving land, in so far as possible, on its merits and not on technicalities. In the present case, the fact that the plaintiff did not plead the time which he discovered the fraud is not fatal to his case. He can plead such a time after amending his pleadings. As earlier stated in this ruling, the plaintiff's suit is predicated on allegations of fraud. It is imperative that the plaintiff be allowed to ventilate his case by establishing or otherwise the allegations of fraud against the defendant.

In the circumstances of this case therefore, I hold that the preliminary objection lacks merit and is hereby dismissed with costs. Although the plaintiff's suit is for the recovery of land, the substance of the suit is the allegations of fraud raised by the plaintiff. Those allegations should be heard and determined on merits. The plaintiff is advised to make appropriate amendments to his plaint so that the confusion as to the time when the cause of action arose may be clarified.

DATED at KERICHO this 19th day of January 2007.

L. KIMARU

JUDGE