



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA
Civil Case 159 of 2006

SALIM MWABWAGIZO

**MOHAMED MWABWAGIZO (Suing on their own behalf and on behalf of
the Estate of) HAMISI OMARI MWABWAGIZO Also known as HAMISI
OMARI MTANA (DECEASED) PLAINTIFFS**

- Versus -

NYAANI INVESTMENT CO. LTD. DEFENDANT

Coram: Before Hon. Justice L. Njagi

Mr. Kibe for Defendant

Ms. Langat h/b for Oddiaga

Court clerk - Ibrahim

R U L I N G

The plaintiff in this suit claims against the defendant a declaration that the process in which the defendant acquired the suit property was illegal, null and void; an order cancelling and revoking the title to the suit property held by the defendant; general damages for fraud; and any other relief that the court may deem fit to grant.

Before the matter came for hearing, the defendant gave a notice that it would raise a preliminary point of law as to the validity of the entire suit in that –

1. The suit as commenced by the plaintiff dated and filed on 17th July, 2006, is time barred under section 7 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya, in that the cause of action, if any, accrued on 28th June 1979 when the defendant was duly registered as absolute proprietor of Land Parcel Kwale/Galu Kinondo/731, a sub division out of Kwale/Galu Kinondo/54, during the lifetime of Hamisi Mwabwagizo, the deceased, from whom the plaintiffs claim.
2. The suit on behalf of the estate is brought after a period of 26 years and 3 months and that on behalf of the plaintiffs after 17 years and 3 months.
3. The averments contained in paragraphs 5 and 14 of the defendant's defence dated 26th August, 2006, upon which the plea of limitation is made remains uncontested and unrelieved to and or joined by the plaintiffs.

At the hearing of the application, Mr. Kibe appeared for the defendant and Mr. Oddiaga appeared for the plaintiffs. After considering the pleadings and the submissions of counsel, I find that the undisputed facts of this case are that the

plaintiffs are the sons of the late Hamisi Omari Mwabwagizo also known as Hamisi Omari Mtana, who passed away on 11th May, 1988. The grant of the letters of administration ad litem was made to them on 4th April, 2005. They commenced this action by the plaint filed in court on 17th July, 2006. The plaintiffs' father was the initial registered proprietor of the parcel of land known as L.R. No. Kwale/Galu Kinondo/54.

Against that background, the plaintiff's case is that the defendant fraudulently caused this parcel of land to be subdivided into Kwale/Galu/Kinondo/731 and Kwale/Galu/Kinondo/732. thereafter, parcel No. 731 was registered in the name of the deceased without the plaintiffs knowledge, and subsequently transferred to the defendant without the consent, permission and or authority of the deceased. The transfer was allegedly effected in June, 1979.

In contrast, the defendant's case is that the transfer of the property was done with the knowledge, permission and agreement of the deceased for valuable consideration. The said consideration was the sum of Kshs. 138,000/= which was paid to the deceased on 8th June, 1979, after which the defendant was duly registered as an absolute proprietor on 28th June, 1979, and was issued with a certificate of title.

With regard to the above facts, I agree with Mr. Kibe that under Section 7 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya, an action may not be brought to recover land after the end of twelve years from the date on which the cause of action accrued. I also agree with him that for the purposes of the provisions of the said Act relating to actions for the recovery of land, Section 16 thereof ordains that the administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration. This would, in effect, mean that the letters of administration would be taken to take effect from the time of the death of the deceased. In the instant case, the deceased died on 11th May, 1988. However, since the defendant obtained a certificate of title to the suit land on 28th June, 1979, that would be the date when the cause of action accrued to the deceased and the estate, and that was more than 12 years before this action was filed. Prima facie, this is a gross affront to Section 7 of the Limitation of Actions Act. Even if the cause of action were to accrue when the plaintiffs became the administrators of the estate of the deceased, pursuant to Section 16 of Cap 22 (supra), the effective date would be, not 4th April, 2005, but 11th May, 1988. That, too, would be more than 12 years before the action was commenced, and would be offensive to Section 7 of Cap 22.

I also agree with Mr. Oddiaga that Section 26 of Cap 22 is relevant to this case. In so far as is relevant to this matter, that section provides as follows –

“Where, in the case of an action for which a period of limitation is prescribed ...

(a) the action is based upon fraud of the defendant or his agent, or of any person through whom he claims or his agent ... the period of limitation does not begin to run until the plaintiff has discovered the fraud ...

The plaintiffs state in paragraph 3 of the plaint that the defendants fraudulently caused the original plot to be subdivided. They also maintain in paragraph 6 of the plaint that the subsequent transfer to the defendant of Kwale/Galu/Kinondo/731 was done without the knowledge, permission and or agreement of the deceased. And in paragraph 7, they say that it was not until sometime in 2004 that they discovered the changes. Prima facie, therefore, the period of limitation did not begin to run until 2004. Mr. Kibe was at pains to argue that since the deceased will never be able to testify, we shall never know whether he knew of the subdivision and subsequent transfer.

I note from paragraph 5 of the defence that the defendants themselves maintain that the alleged fraudulent transfer was effected with the knowledge, permission and agreement of the deceased. This renders Mr. Kibe's argument a double edged sword. How do the defendants propose to prove that allegation?

At this stage, I would say that it will be more prudent to let the matter go to trial so that the evidence adduced will form a solid basis for the court's decision. To allow the preliminary objection at this stage would be to base the decision on speculation that the plaintiffs will not be able to prove that which they allege. In the circumstances, I think that each side should be given an opportunity to adduce oral evidence in this matter. No one will lose anything except, perhaps, time. But such loss can be adequately compensated by costs. In any event, everyone will have everything to gain.

I accordingly disallow the preliminary objection. For the reasons outlined above, however, the costs of this preliminary

objection will be costs in the cause.

Dated and delivered at Mombasa this 19th day of October, 2007.

L. NJAGI

JUDGE