



REPUBLIC OF KENYA



Nkoimo (Suing as legal administration of the Estate of Stanley Lemoiyo Nkoimo) v Asanyo & 4 others (Environment & Land Case E005 of 2022) [2022] KEELC 15561 (KLR) (19 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15561 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE E005 OF 2022**

**EM WASHE, J
DECEMBER 19, 2022**

BETWEEN

ANGELINE N NKOIMO (SUING AS LEGAL ADMINISTRATION OF THE ESTATE OF STANLEY LEMOIYO NKOIMO) PLAINTIFF

AND

GEOFFREY MAKANA ASANYO 1ST DEFENDANT

VINCENT KANTEET KAPEEN (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF JOHN LEMUTA NAIRURAN (DECEASED) 2ND DEFENDANT

CHAIRMAN - TRANSMARA LAND CONTROL BOARD 3RD DEFENDANT

INTONA INVESTMENTS COMPANY LIMITED 4TH DEFENDANT

DISTRICT LAND REGISTRAR TRANSMARA 5TH DEFENDANT

RULING

1. The 1st and 3rd Defendants (hereinafter referred to as “the applicants”) have filed a Preliminary Objection dated 27th of September 2022 (hereinafter referred to as “the present Preliminary Objection”) against the Plaintiff filed on the 10th of May 2022 by the Plaintiff (hereinafter referred to as “the Respondent”).
2. The present preliminary objection has been raised on the following grounds; -
 - a. That the suit offends the express provisions of Section 7, 9 (2) and 26 of the *Limitation of Actions Act*, cap 22 Laws of Kenya having been filed out of the prescribed period provided by law.
 - b. That by dint of the Limitation, this Court is divested of jurisdiction to entertain this suit.



3. The present Preliminary Objection was duly served on all the parties herein and thereafter the Court directed the same to be canvassed through written submissions.
4. The Applicants filed their submissions on the 25th October 2022 while the 1st Respondent filed their submissions on the 4th of November 2022.
5. The 4th and 5th Defendants similarly participated by filing their submissions on 2nd of November 2022.
6. The questions of law raised by the Applicants in the present preliminary objection a fundamental two;-
 - i. Whether or not the Plaint filed on the 10th of May 2022 is time barred in virtue of the provisions of Section 7 of the Limitation of Actions Act, cap 22 Laws of Kenya.
 - ii. If the Plaint has any claims of fraud, when did the Respondent discover these elements of fraud so that time can be computed in line with the provisions of Section 26 of the Limitation of Actions Act, cap 22 Laws of Kenya.
7. The Court having identified the two issues of determination in the present preliminary objection, the same are now discussed hereinbelow as follows; -

Issue No.1- Whether or not the Plaint filed on the 10th of May 2022 is time barred in virtue of the provisions of Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya.

8. Referring to the Plaint filed on the 10th of May 2022, the Respondent herein is seeking to challenge the Sale of the portion of the property known as Narok/Transmara/Intona/3 to the 1st and 2nd Defendant and the subsequent creation and registration of the property known as Transmara/Intona/5 in the name of the 1st and 3rd Defendants herein.
9. According to the Applicants Bundle of Documents filed on the 16th of September 2022, the Certified Green Card of the property known as Narok/Transmara/Intona/3 indicates that the same was closed on the 5.4.1993 upon sub-division and creation of two new properties known as Transmara/Intona/5 and Transmara/Intona/6.
10. One of the two new properties known as Transmara/Intona/5 which is the subject matter in the suit was initially registered in the name of the 1st Applicant and thereafter transferred and registered in the name of the 3rd Applicant.
11. According to the Applicants Bundle of Documents filed on the 16th of September 2022, the first title Deed of the property known as Transmara/Intona/5 which is the suit property was issued to the 1st Applicant on the 5th of May 1993.
12. Indeed, none of the documents listed in the Applicants Bundle of Documents has been disputed to exist by the Respondents.
13. A perusal of the Respondent's List of Documents dated 10th May 2022 confirms that the Applicants documents are what the Respondent is also relying upon.
14. Clearly therefore, there is no dispute that the first title deed of the suit property known as Transmara/Intona/5 was issued to the 1st Applicant on the 5th of May 1993 as the duly registered owner thereof.
15. Consequently therefore, based on the issuance of the title Deed to the suit property on the 5th of May 1993, the Respondent's actions of instituting this suit on the 10th of May 2022 as an effort to recover the suit property known as Transmara/Intona/5 was done approximately Twenty-Nine (29) years after the same transferred to the 1st Applicant.



Issue No.2- If the Plaintiff has any claims of fraud, when did the Respondent discover these elements of fraud so that time can be computed in line with the provisions of Section 26 of the Limitation of Actions Act, Cap 22 Laws of Kenya.

16. The Respondent herein in their submission to the present preliminary objection have referred to the provisions of Section 26 of the Limitation of Actions Act, cap 22 Laws of Kenya.
17. Section 26 of the Limitation of Actions Act, cap 22 Laws of Kenya 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 agents; or
 - b. The right of action is concealed by the fraud of such person as aforesaid; or
 - c. The action is for relief from the consequences of a mistake. The period of limitation does not begin running until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.
- Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set-aside any transaction affecting, any property which; -
- i. In the case of fraud, has been purchased for valuable consideration by a person who was not a party to the said fraud and did not at the time of the purchase know or have reason to believe that any fraud has been committed; or
 - ii. In the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.
18. The Respondent’s submission is that the original Agreement For Sale dated 25th March 1992 and the subsequent processes of sub-division of the property known as Narok/Transmara/Intona/3 and registration of the sub-division known as Transmara/Intona/5 in the 1st Applicant and thereafter in the name of the 3rd Applicant was marred with fraud through forgery and impersonation of both the original owner Stanley Lemoiyo Nkoimo and the Plaintiff who is the wife thereof.
19. According to the Respondent, the fraudulent activities by the Applicants and the other Defendants were concealed and unknown to the Respondents until May 2021 when a Search was undertaken and the same brought forth the said fraudulent actions.
20. Consequently, the Respondent submits that time for computing the Twelve (12) years period provided under Section 7 of the Limitation of Actions Act, cap 22 Laws of Kenya can only commence from May 2021 when the Certificate of Official Search was obtained and therefore the Plaintiff filed on the 10th of May 2022 is well within the Twelve (12) Years period provided under Section 7 of the Limitation of Actions Act, cap 22 Laws of Kenya.
21. On the other hand, the Applicants have refuted the allegations that the Respondents became aware of the Agreement For Sale dated 25th March 1992 and the subsequent sub-division of the original property



- known as Narok/Transmara/Intona/3 into the new properties known as Transmara/Intona/5 & Transmara/Intona/6 in the May 2021.
22. The Applicants submitted that the entire transaction from the Agreement For Sale dated 25th March 1992 and the subsequent sub-division of the original property known as Narok/Transmara/Intona/3 into the two properties known as Transmara/Intona/5 and Transmara/Intona/6 was done with the consent and participation of the original owner known as Stanley Lemoiyo Nkoimo .
 23. The Applicants have stated that due to the Respondent’s knowledge of the above-mentioned transactions, one of the asset listed in the Succession proceedings known as Succession Cause No. 565 of 2001 which the Respondent was an Administrator was the sub-division on known as Transmara/Intona/6 and not the original property known as Narok/Transmara/Intona/3.
 24. Consequently, the Applicants submit that the Respondent was well aware of the Applicants ownership of the property known as Transmara/Intona/5 at least by the time of instituting the succession proceedings in the year 2001 and can not now allege that the discovery only came to their knowledge when they conducted a search in May 2021.
 25. Looking at the two opposing submissions and the provisions of the Section 26 of the Limitation of Actions Act, cap 22 Laws of Kenya, the issue for determination is when the Respondents could possibly and reasonable discovered the Applicants and/or Defendants fraudulent activities in dealing with the original property known as Narok/Transmara/Intona/3 originally owned by the late Stanley Lemoiyo Nkoimo .
 26. The Court’s interpretation of Section 26 of the Limitation of Actions Act, Cap 22 Laws of Kenya is that even where a party pleads fraud, mistake and/or ignorance of material facts in a claim to recover land, the time period provided under Section 7 of the Limitation of Actions Act, cap 22 Laws of Kenya still applies.
 27. The only difference is that the party pleading fraud, mistake and/or ignorance of material facts will now shift the starting point of the computation to the point where the purported fraud and/or, mistake could reasonable be discovered.
 28. In this particular case, the Respondent alleges that the discovery of the Applicants and/or Defendants fraudulent activities was done in May 2021 when an official search was done.
 29. On the other hand, the Applicants submit that the Respondent was well aware of the creation and transfer of the property known as Transmara/Intona/5 at least by the year 2001 when the assets of the late Stanley Lemoiyo Nkoimo were being listed in Succession Cause No.565 of 2001 where the Respondent was an administrator.
 30. This Court in the determination of the present preliminary objection is guided by the authority of *Mukbisa Biscuits Manufacturing Co. Ltd-versus-westend Distributors* (1969) EA 696.
 31. The Court in the cited case pronounced itself in the following manner;-

“ A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as preliminary point, may dispose of the suit. Example is an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are



correct.it can not be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

32. The evaluation of the Pleadings filed by the parties in this suit and the submissions on the present preliminary objection, the following facts have not been disputed.
- i. The late Stanley Lemoiyo Nkoimo was the original owner of the property known as Narok/Transmara/Intona/3.
 - ii. The original property known as Narok/Transmara/Intona/3 was sub-divided into two portions namely Transmara/Intona/5 & Transmara/Intona/6.
 - iii. The property known as Transmara/Intona/6 was subsequently registered in the late Stanley Lemoiyo Nkoimo on the 5th of April 1993.
 - iv. The property known as Transmara/Intona/5 was also registered in the name of the 1st Applicant on the 5th of April 1993.
 - v. The property known as Transmara/Intona/6 was listed as an asset of the late Stanley Lemoiyo Nkoimo in the Succession Cause no. 565 of 2001 by the Respondent who was one of the administrators.
 - vi. The property originally known as Narok/Transmara/Intona/3 was never listed as an asset of the Late Stanley Lemoiyo Nkoimo in the Succession Cause No. 565 of 2001 who was one of the administrators.
33. Based on the above facts which have not been disputed by any of the parties herein, would it be possible that the Respondent only came to discover the Applicant's ownership of the property known as Transmara/Intona/5 either through fraud or otherwise in the year 2021 by virtue of the Search conducted therein?
34. This Court unfortunately does not agree with the Respondent at all.
35. First and foremost, the Respondent is the wife of the late Stanley Lemoiyo Nkoimo who was the original owner of the property known as Narok/Transmara/Intona/3.
36. Upon the demise of Stanley Lemoiyo Nkoimo, the Respondent herein was appointed as one of the administrators in Succession Cause No. 565 of 2001.
37. Some of the duties bestowed on the Administrators of an Estate under the *Law of Succession*, cap 160 Laws of Kenya is to investigate, establish and list the deceased assets and liabilities at the time of his demise.
38. Consequently therefore, the Respondent as the administrator of the estate of Stanley Lemoiyo Nkoimo was under a statutory duty to establish the legal ownership of the original property known as Narok/Transmara/Intona/3 and list the same as an asset of the deceased.
39. Clearly, the copies of the Succession Cause No. 565 of 2001 placed before this Court do not include the property originally known as Transmara/Narok/Intona/3 as an asset of the late Stanley Lemoiyo Nkoimo.
40. Instead the Respondent as one of the administrators has listed the sub-division known as Transmara/Intona/6 as the asset of the deceased Stanley Lemoiyo Nkoimo.



41. The decision to actually list the sub-division known as Transmara/Intona/6 which is a portion of the original property known as Narok/Transmara/Intona/3 clearly informs the Court that the Respondent was well aware that the original property known as Narok/Transmara/Intona/3 was no longer existing as at the year 2001.
42. Moving backwards therefore, for the Respondent to have ascertained that the property known as Transmara/Intona/6 belonged to the deceased husband Stanley Lemoiyo Nkoimo, either a Certificate of Title must have been issued to her or an official search conducted by the Respondent as an administrator to establish ownership of the property known as Transmara/Intona/6 was done.
43. Looking at the Green Cards placed before the Court through the Applicant's Bundle of Documents, both properties known as Transmara/Intona/5 and Transmara/Intona/6 were issued individual Title Deeds on the 5th of May 1993 after the closure of the Green card relating to the original property known as Transmara/Narok/Intona/3.
44. In other words, the point at which either the deceased Stanley Lemoiyo Nkoimo or the Respondent had a reasonable opportunity to discover the Applicants fraudulent actions of impersonation and/or forgery was at the time of issuance of the two titles of Transmara/Intona/5 and Transmara/Intona/6 were issued on the 5th May 1993.
45. This Court is at a loss as to how the deceased Stanley Lemoiyo Nkoimo and/or the Respondent collected the title of one sub-division known as Transmara/Intona/6 and failed to ascertain or establish the legal ownership of the other sub-division known as Transmara/Intona/5.
46. The Court is of the opinion that the Respondent in this suit would like to eat her cake and keep it as well.
47. Unfortunately, this is not possible in a court of law and equity.
48. It is therefore the Court's considered view that the reasonable time when the late Stanley Lemoiyo Nkoimo and/or the Respondent herein should have discovered the alleged fraud perpetuated by the Applicants and/or Defendants herein was on the 5th of May 1993 and not May 2021 as submitted through the submissions filed on the 4th of November 2022.
49. In support of this finding hereinabove, the Court shall also rely on the Applicant's authority *Edward Moonge Lengusuranga-versus-james Lanaiyara & Another* (2019) eKLR where the Court held as follows:-

“I have asked myself when the operation of limitation comes into play in such a situation. I have considered paragraphs 14-16 of the Plaintiff's Complaint as well as the copy of the green card in regard to the suit land and the same are clear that the alleged fraud was committed on the 13th January 2004 when the 1st Defendant was registered as the proprietor of the suit property. The cause of action against the 1st Defendant therefore arose on the 13th of January 2004.”
50. Applying the date of 5th May 1993, the Complaint filed on the 10th of May 2022 is clearly outside the provided period of Twelve (12) years envisaged under section 7 of the *Limitation of Actions Act*, cap 22 Laws of Kenya having been filed 29 years after the possible discovery of the alleged fraud by the Applicants and/or Defendants.



51. The consequence of filing a claim which is time barred was discussed in the case of *Bosire Ongero-versus-Royal Media Services* (2015) eKLR, the Court held as follows;-

“The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over it.”

52. This Court indeed fully associates itself with the finding made hereinabove and therefore makes a finding that it does not have the jurisdiction to entertain the Plaint filed on the 10th of May 2022.

53. In conclusion therefore, the court makes the following Orders as appertains the Preliminary Objection dated 27th September 2022;-

1. The Preliminary Objection dated 27th September 2022 be and is hereby upheld.
2. The Plaint filed on the 10th May 2022 by the Plaintiff/Respondent be and is hereby struck out by virtue of being time barred under Section 7 of the *Limitation of Actions Act*, cap 22 Laws of Kenya.
3. The temporary Orders against the 1st, 2nd, 3rd, 4th and 5th Defendants herein on the 13th of June 2022 be and are hereby vacated and/or discharged forthwith.
4. The Plaintiff/Respondent herein shall pay and/or meet the 1st, 2nd, 3rd, 4th and 5th Defendants costs for both the suit and this preliminary objection as well.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 19TH DECEMBER, 2022.

EMMANUEL.M.WASHE

JUDGE

In the presence of:

Court Assistant: Mr. Ngeno

Advocate for the Plaintiff/respondent: Mr. Macharia H/b Mr. Tuya

Advocates for the 1st & 3rd Defendant/applicant: Mr. Muiruri

Advocate for the 2nd Defendant: Mr. Mkira

