



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Civil Case 1132 of 1992**

**WARUGURU PETERO.....PLAINTIFF**

**VERSUS**

**HEZEKIAH MATHARA.....DEFENDANT**

**JUDGMENT**

The plaintiffs claim arises out of the subdivision and sharing of the land of one **PETERO GATENDE GATAMAIYU/KAGAA/272** among his wives and children. The deceased Petero Gathende had 5 wives. He died in 1940 upon his death his land was shared among his 5 widows namely Wangu Petero, Wanja Petero, Wanjiku Petero, Waruguru Petero and Nyambura Petero.

At the time of the death of Petero Gathende the 4 wives namely Wangu Petero, Wanja Petero, Wanjiku Petero and Waruguru Petero had deserted him and gone back to their parents and only Nyambura Petero was with him. The deceased land was subdivided

as follows:

Hezekiah Mathara            18 acres

Paul Nyori                    18 acres

Douglas Njuguna            12 acres

These were the sons of Nyambura Petero.

Joseph Mburu                12 acres

This is the son of wangu Petero.

Jeremiah Nyori              12 acres.

This is the son of Wanja Petero.

Waruguru Petero had no child. She got 6 acres.

The subdivisions were registered as follows:

**Hezekiah Mathara LR NO.GATAMAIYU/KAGAA/272**

**Paul Nyori LR NO.GATAMAIYU/KAGAA/271**

**Douglas Njuguna LR NO.GATAMAIY/KAGAA/331**

**Joseph Mburu LR NO.GATAMAIYU/KAGAA/274**

**Jeremiah Nyori LR NO. GATAMAIYU/KAGAA/273**

**Waruguru Petero LR NO. GATAMAIYU/KAGAA/333**

The plaintiff claims that each wife was entitled to 12 acres but

the defendant who was the administrator gave her only 6 acres while his mothers' house was allocated 48 acres. The plaintiff gave evidence and she told the court that each of the 5 wives of the deceased Petero Gathende was entitled to 12 acres but the defendant took her 6 acres and she got only 6 acres. On cross examination she admitted that she did not have any child with the deceased Petero Gathende and that at the time of his death she had deserted him and gone to her parents. She further admitted on cross examination that when the land was being subdivided she was away.

The evidence of the plaintiff was taken on 14<sup>th</sup> April 2005 and the case was adjourned to 28<sup>th</sup> June 2005. When the matter came up on 28<sup>th</sup> June 2005, Mr. Kinuthia counsel for the defendant raised a preliminary objection on a point of law on the ground that the plaintiffs suit is barred by statute. He cited Section 7 and 22(2) of the Limitation of Actions Act Cap 27. The cause of action is alleged to have occurred on 25<sup>th</sup> September 1958 when the defendant was registered as the proprietor of **LR NO.GATAMAIYU/KAGAA/272** comprised of 18 acres out of which the plaintiff is claiming 6 acres which the defendant took from her piece of land **LR NO.GATAIMAYU/KAGAA/333**. Section 7 of the Act provides:-

- 1. An action may not be brought by any person to recover land after the end of twelve years from the date of which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person***”.

Counsel for the defendant referred the court to various authorities which I have considered. The principle in those cited authorities is that a plaint by barred statute is barred by law and must be rejected. Mr. Kingara counsel for the plaintiff in opposing the Preliminary Objection submitted that the same is based on the misconception of the law. The plaintiff's suit is based under Section 20(1)(a) and (1) (b) of the Limitation of Actions Act Cap 27 which provide:

**“20 (1) (a) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust which is an action:-**

- (a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy;**  
**or**

**(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.”**

Mr. Kingara submitted that the defence of limitation is not available to the defendant and therefore it cannot form the basis of preliminary objection. When a person has property which he holds on behalf of another or others for the accomplishment of a particular purpose he is said to hold the property in trust for that other or those others and he is called a trustee.

Trusts are either.

- (1) express trusts which are created by the actual terms of some instrument or declaration or which by some enactment or expressly imposed on persons in relation to some property vested in them whether or not they are already trustees of that property, or
- (2) trusts arising by operation of law.

A trust arises where any person, called the trustee, who is the legal owner of property, is bound to hold and administer that property on behalf of another person called a beneficiary or cestui quo trust.

In this suit, the land of the deceased Petero Gathende was subdivided and shared among his sons who belonged to the 4 houses. The fifth house of the plaintiff did not have a son nor did she have any child but she was given 6 acres registered in her name. The plaintiff had deserted to her parents when the subdivisions were done and she was not present. When she was informed of the subdivisions she came back and was shown her 6 acres comprised in **LR NO. GATAMAIYU/KAGAA/333** where she settled to date. This was in 1958. There is no evidence that the defendant had registered 6 acres in **LR NO. GATAMAIYU/KAGAA/272** in trust for the plaintiff.

This therefore meant that the plaintiff’s claim does not fall under Section 20(1) of the Limitation of Actions Act Cap 27. That being the case the claim fell under Section 7 of the Act which makes the claim time barred and renders the suit incompetent.

The plaintiff’s plaint is rejected for being time barred under Section 7 of the Limitation of Actions Act Cap 27. The defendant is entitled to the costs of this suit and it is so ordered.

Delivered and dated this 20<sup>th</sup> day of September 2005.

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**J.L.A. OSIEMO**

**JUDGE**