



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC NO. 501 OF 2017

(Formerly Nairobi HCCC No. 1138 of 2015)

FRANCIS MBUGUA KAMAU

JOHN KIOI KAMAU (Suing as the legal representative

of the estate of KAMAU NJOROGE - deceased).....PLAINTIFFS

VERSUS

SAIKIMBA OLE LEKISHAPUI.....1ST DEFENDANT

THE LAND REGISTRAR KAJIADO.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

What is before Court for determination is the 1st Defendant’s Notice of Preliminary Objection dated the 12th February, 2020 based on the following grounds:

1. That the claim herein is time barred and offends the provisions of the Limitation of Actions Act.
2. That the Honourable Court lacks jurisdiction to entertain, hear and determine the suit herein.
3. That the suit herein is frivolous, vexatious, incompetent, fatally defective and is an abuse of court process.

He sought for the suit to be dismissed with costs.

The Plaintiffs in response to the Notice of Preliminary Objection contended that they are suing as the administrators and as such the claim is taken as if there had been no interval of time between the death of the deceased person and the Grant of the Letters Administration Intestate. Further that they also alleged fraud on the part of the Defendants and as such the time did not being to run until they had discovered the fraud or mistake. They reiterated that since this is a matter that touches on land, this Court has jurisdiction to hear and determine it.

The Notice of Preliminary Objection was canvassed through written submissions. However, it is only the Plaintiffs that filed theirs’ but the Defendants failed to do so, despite the Court’s directions.

Analysis and determination

Upon consideration of the 1st Defendant’s Notice of Preliminary Objection, Plaintiff’s Reply to the said Notice and Submissions, the only issue for determination is whether the Plaintiff’s suit should be dismissed with costs for being statute barred.

The Plaintiffs in opposing the Notice of Preliminary Objection in their submissions reiterated the grounds raised in their response and contended that the suit is not statute barred.

Section 7 of the Limitation of Actions Act provides that: ‘**An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.**’

The provisions are clear in terms of the period within which a party can bring forth a claim to recover land and indicates it is 12 years.

While section 26 of the Limitation of Actions Act provides an extension of time to bring an action to recover land on certain circumstances, and stipulates thus: **‘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 agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run 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 fraud and did not at the time of the purchase know or have reason to believe that any fraud had 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.’

The Plaintiffs at paragraph 9 of the Complaint have particularized their allegations of fraud as against the Defendant. The Plaintiffs indicate they are administrators of the deceased estate and seek for the 1st Defendant to transfer the suit land to them. Further, they contend that the 1st Defendant seeks to conceal the subdivision of the land he had made during the deceased lifetime and want the land to revert to its original position. The Plaintiffs have not however indicated the year they discovered the fraud but plead that they reside on the suit land.

In the case of *R. G. Patel v. Lalji Makanji [1957] EA 314* the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

Further, in the case of *Vijay Morjaria V Nansingh Madhusingh Darbar & Another (2000) eKLR Tunoi J A* was categorical that particulars of fraud must be stated on the face of the pleadings.

While in the case of *UCB Vs Mukoome Agencies (1982) HCB22* it was held as follows: **'that where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit'.**

Based on the facts at hand while associating myself with the three decisions cited above, I note the Plaintiffs clearly stated the particulars of fraud in paragraph 9 of the Complaint. Further, the said allegations of fraud cannot be proved unless viva voce evidence is adduced. I note section 7 as read together with section 26 of the Limitations of Actions Act provides a reprieve to the Plaintiffs. In the circumstance, I find the objection that the suit is statute barred premature and direct that this matter should proceed to full hearing instead of being dismissed at this interlocutory stage.

It is against the foregoing that I proceed to disallow the Defendant’s Notice of Preliminary Objection dated 12th February, 2020.

The costs will be in the cause.

Dated signed and delivered virtually at Kajiado this 16th day of February, 2021.

CHRISTINE OCHIENG

JUDGE