



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. E 1 OF 2020**

**VICTORY FAITH MINISTRY**

**REGISTERED TRUSTEES.....PLAINTIFFS**

**VERSUS**

**JOHN ROTE MUSWANYI.**

**GEORGE MAGENZI MUSINDI**

**THE COMMISSIONER OF LANDS**

**THE NATIONAL LANDS COMMISSION**

**THE LAND REGISTRAR**

**THE HON. ATTORNEY GENERAL..... DEFENDANTS**

**RULING**

The 2<sup>nd</sup> defendant/respondent raised a preliminary objection dated 1<sup>st</sup> December 2020 on a point of law for the following reasons:-

1. That the entire suit and application herein is bad in law and ought to be struck out and or dismissed with costs for being statute barred by virtue of the express provisions of Section 4 (2) of the Limitations of Actions Act, Cap. 22 Laws of Kenya.
2. That in view of (1) hereinabove, the honourable court lacks the requisite jurisdiction to hear and or determine the said suit and or application and ought to be struck out and or dismissed with costs.
3. That the suit and application hereinabove are bad at law for being instituted without the requisite resolution of the purportedly registered trustees, the plaintiffs herein as is required under law ought to be struck out and or dismissed with costs.
4. That the suit and application herein are bad at law for otherwise being an abuse of the due and court process of law and ought to be struck out and or dismissed with costs altogether.
5. That the said suit and application are a non-starter, raising no reasonable cause of action, defective in both substance and or form, and improperly presented.

The 2<sup>nd</sup> defendant/respondent submitted that tort have a limitation of action of three years from the time of discovery and that the alleged fraud was discovered in 2011. That section 7 of the Limitation of Actions Act states that action to recover land has a limitation of 12 years. That title was first issued to the 1<sup>st</sup> defendant in 2004 and transferred in favour of the 2<sup>nd</sup> defendant in 2010. This suit was instituted in 2020 clearly over 12 years.

The plaintiff submitted that, the plaintiff became the registered owner of Kakamega Municipality/Block 4/512 on 12<sup>th</sup> October, 2011. According to the law, specifically section 24 and section 25 of the Land Registration Act, Cap 300 of the Laws of Kenya, the plaintiff's rights and interests over the suit land accrued when he became the registered owner of the suit land. It was impossible for him to sue and claim over the land before acquiring registration. In the case of any registration regarding the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the law at section 26 a, b of Cap 300 allows this honourable court to look into this matter and eventually cancel those registrations to revert the title to the plaintiff applicant if the plaintiff's case is proved on a balance of probabilities. This particular claim falls outside the umbrella of section 4 (2) and we urge you to find thus. That plaintiff's claim to recover the land is still within time. Twelve years have not lapsed and as long as there was

fraud particulars, the title being recovered remains the subject of section 7 Cap 300 and 26 of the same Act.

That in Cap 22, Section 26 limitation of time does not apply where there is fraud and mistake on the part of the defendant. It goes on to elaborate that the exception is when the defendant is an innocent purchaser for value or where the defendant was not aware that a mistake had been made as at the time of the transaction on the land. They submit that the plaintiff is protected by Section 26 and that the protection would be uncovered had the 2<sup>nd</sup> defendant filed pleadings and the matter proceeded to trial to demonstrate his position in the case. Based on their submissions, they urge the court to find that this case was filed within time hence this honourable court has the requisite jurisdiction to hear and determine the crux of the matter. That points 3, 4 and 5 of the Preliminary objection goes to facts which must be proven at the trial stage.

This court has considered the preliminary objection and the submissions herein. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

*“..... consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”*

In the same case, Sir Charles Newbold said:

*“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 cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”.*

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja (2005) eKLR had the following to state regarding a ‘Preliminary Objection’.

*“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement ..... that, “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”.*

The issue as to whether or not this suit is barred by the Limitations of Actions Act is therefore properly raised as a Preliminary Objection. Section 7 of the Limitations of Actions Act provides:-

**“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.”**

On the issue of Limitation of Actions Act, I have perused the plaint and note that the Plaintiff alleges fraud on the part of the defendants. That the plaintiff became the registered owner of Kakamega Municipality/Block 4/512 on 12<sup>th</sup> October, 2011. That the issuance of the lease certificate to the 1<sup>st</sup> and 2<sup>nd</sup> defendants was irregular and fraudulent. Section 26 of the Limitation of Actions Act 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 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:”*

The facts of this matter can only be determined when the matter goes to full trial and must be distinguished from the authorities cited by the 2<sup>nd</sup> defendant/respondent in their submissions. I find that this matter cannot therefore fall under section 7 of the said Act. On point three of the objection that is lack of a resolution from the Trustees, Article 159 (2) (d) of the Constitution which provides:-

**“Justice shall be administered without undue regard to procedural technicalities.”**

Madan, JA (as he then was) in the case of *D.T Dobie & Co (Kenya) Ltd vs Muchina* (1982) **KLR1** stated as follows in regard to summary dismissal of suits:-

*“no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously -discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment . If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it”*

This Court has a duty to act cautiously but judiciously in promoting, fair trial and access to justice. The plaintiff is given 30 days to rectify the pleadings if need be. For these reasons the Preliminary Objection dated the 1<sup>st</sup> December 2020 lacks merit the same is herein dismissed. Costs to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 23<sup>RD</sup> MARCH 2021.**

**N.A. MATHEKA**

**JUDGE**