



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC NO. 61 OF 2015

BONIFACE KIPKEMOI KENDUIYWO.....1ST PLAINTIFF

CHARLES CHERUIYOT KENDUIYWO.....2ND PLAINTIFF

VERSUS

RICHARD KENDUIWA KIPKEMOI.....1ST DEFENDANT

KIPKIRUI SAMWEL KENDUIWA.....2ND DEFENDANT

JOEL KIMUTAI KENDUIWA.....3RD DEFENDANT

JOEL KIPNGETICH KIRUI (KENDUIWA).....4TH DEFENDANT

JUDGEMENT

1. Vide a Complaint dated the 20th November 2015, filed on the 30th November 2015 the Plaintiffs herein sought for the following orders;

- i. That this honorable court does make a declaration that the title Deeds LR No Kericho/Ndarawetta/1945, 1946, 1947, 1948 and 1949 were fraudulently obtained.
- ii. An order compelling the Defendants to surrender half share in the estate of the deceased to then Plaintiffs.
- iii. Any other relief this Honorable court deems fit and just to grant.

2. In response, the Defendants herein filed their statement of defence dated the 11th January 2016 on the 13th January 2016, wherein they denied the allegations contained in the Plaintiff's Complaint stating that the original suit land being LR No. Kericho/Ndarawetta/638 had been registered to their late father Komboni A Too wherein it had been subdivided in his lifetime and therefore the Plaintiffs were not entitled to the orders sought in the complaint and therefore the present suit should be dismissed with costs to them.

3. Subsequently after both parties had complied with the provisions of Order 11 of the Civil Procedure Rules, the matter was set down for hearing.

The Plaintiff's case

4. The 2nd Plaintiff herein Charles Cheruiyot Kenduiywa, testified as PW 1 to the effect that his mother was married to one Stephen Komboni Arap Too under Kipsigis Customary Law thus the Defendants herein were their step-brothers. That before they moved to Nakuru County, they used to live in Bomet wherein they moved from place to place as their mother was a tea picker.

5. That he had sued the Defendants because they had not been given an equal share of their father's property in land parcel No. LR Kericho/Ndarawetta/638 because he and his brothers had been locked out of their father's estate.

6. He produced the Green Card to LR No. Kericho/Ndarawetta/638 land which was first registered in the name of Komboni Arap Too as Pf exh 1 wherein he continued to testify that the land had since been sub-divided into 5 parcels numbering 1945, 1946, 1948 and 1949 of which none of the resultant parcels were registered in either his or his brothers' name but rather that they had all been registered in the names of his stepbrothers.

7. He produced the certificates of official search to the 5 parcels of land as Pf exh 2(a-e) showing that they had been registered as follows:

- i. Parcel No. Kericho/Ndarawetta/1945, in the name of Joel Kimutai Kenduiyo (3rd Defendant).
- ii. Parcel No. Kericho/Ndarawetta/1946, in the name of John Kipngetich Kenduiwa (4th Defendant)
- iii. Parcel No. Kericho/Ndarawetta/ 1947, in the name of Richard Kenduiwa Kipkemoi (1st Defendant)
- iv. Parcel No. Kericho/Ndarawetta/1948, in the name of Joel Kimutai Kenduiwo (3rd Defendant)
- v. Parcel No. Kericho/Ndarawetta/1949, in the name of John Kipngetich Kenduiwa (4th Defendant)

8. The 2nd Plaintiff further testified that after he had learnt that his step brothers had been registered as the owners of the above parcels of land, he had written to the them through an advocate, via a letter dated 6th August 2015, herein produced as Pf exh 3, demanding that they show cause why the titles should not be cancelled for having been obtained illegally.

9. That prior to writing the said letter the family had had a sitting with the village elders wherein it had been agreed that they (Plaintiffs) be given their rightful share. He marked the minutes of the elders meeting, which was held in the presence of the Assistant Chief and the Chief, Singorwet location, as marked as PMFI 4.

10. He refuted that his father had sub-divided the land during his life time and testified that before his father died in 1996, he was old and had poor eye-sight wherein his step-brothers had procured his finger prints and had fraudulently sub-divided his land without his consent. That his mother had then placed a restriction/caution on the suit land. He did not however know how the caution had been removed before the land was sub-divided. He testified that his mother died in the year 2012 when he was in college by which time she had been chased away from home (suit land).

11. He thus sought for orders that the court gives them their share of their father's estate, for the resultant titles to be cancelled so that they could revert to the original title in their deceased father's name so that the suit land could be divided between the two families.

12. On being cross- examined, the witness stated that, his mother had been married under Kipsigis Customary Law but that she had left her matrimonial home in the 1980's although he was not sure of the exact year as he was young. That before his father died, there had been attempts for reconciliation although he was not sure what had transpired. That his father who was partially blind from too much drinking of alcohol died at the age of 62 years on the 28th October 1996.

13. The Plaintiff further confirmed the fact that the according to the green card (Pf exh 1), the transfer was effected on 19th April 1995 wherein the title deed was closed on 4th July 1996 before the death of their father.

14. That the mutation form was thumb printed and the person who was interested in sub-dividing the land was Komboni Arap Too. He also confirmed that as the registered owner of the land, his father had a right to deal with it as he wished.

15. The witness also confirmed that their mother had been buried where they currently live although according to Kipsigis Customary Law, she was to be buried on their late father's land. That the reason she was not buried on their father's land was because earlier on, his step brother's had objected to one of his brother's child being buried on their father's land and therefore they had feared that the same objection would prevail in respect of their mother's burial since she had been chased away.

16. The Plaintiff's assertion in re-examination was that his father used to drink a lot of chang'aa. His land was sub-divided in the same year that he died wherein the death certificate stated that he had died of alcoholism, which went to prove that he was not in a good state of mind to transfer his land.

17. PW2, Boniface Kipkemoi Kenduiwo, a brother to PW1 and a step brother to the 1st, 2nd and 3rd Defendants and an uncle to the 4th Defendant confirmed the evidence of PW1 to the effect that via this suit, the Plaintiffs were seeking for an equal share of their deceased father's property. That the Defendants were children of the first house while he, the 2nd Plaintiff together with other brothers were children from the 2nd house.

18. He confirmed the fact that their plea to the Defendants to have their fathers land known as L.R No Kericho (Ndarawetta/638) measuring 9 acres shared amongst them fell on deaf ears even despite there having been a meeting at the chief's office where it had been resolved that they be given a share of the same.

19. He further confirmed the fact that the suit land had been sub-divided into 5 portions where none of the parcels had been given to his mother's house. That his step-brothers were 4 (four) siblings while they were 7 (seven) siblings. He refuted the allegations that his late father willingly transferred the land to their step brothers, and instead stated that they had deceived him into transferring the land to them at a time when he was drunk. He also confirmed that their mother had been buried on her land because their stepbrothers were hostile to them, but testified that his mother had a right to get a share of their father's land since she was married to him.

20. The third witness PW3, Jackson Kipkemoi Langat testified to the effect that both the Defendants and the Plaintiffs' father was his cousin therefore making the parties herein his nephews who shared a father but had different mothers.

21. His further testimony was that the suit land was given to the 1st wife instead of being divided between the two wives. That the parties'

father used to live with the 2nd wife at Naivasha G.K home. When he retired, he took his family home to the suit land where his first wife and his sons who were staying. That the 1st house were unhappy to a point where when the deceased put up a house for his 2nd wife, the Defendants had demolished it.

22. That the relationship between the deceased, Kompuni Arap Too, and his second wife was okay and that he was not the one who had chased away the Plaintiffs' rather it had been the Defendants who had chased her away. That although when the deceased retired, he was sick yet he had earmarked the portion on the suit land that was meant for the 2nd wife.

23. The witness testified that he had sat in the meeting that was held at the Chief's office to resolve the dispute. (Witness referred to PMFI 4) wherein it had been resolved that the 2nd house be given land in Tinnet. However when they had gone there they had found that the said land was in a forest so they had come back home.

24. The witness also confirmed that the Plaintiffs lived in Mauche in Nakuru on a land that belonged to their mother and that the land Tinnet belonged to Samuel (2nd Defendant) who had agreed to give it to the Plaintiffs so that the suit land could not be sub-divided. That this did not work as the said land in Tinnet was not habitable and it had a caveat.

25. He also confirmed the fact that according to Kipsigis Customary Law, a wife should be buried on her husband's parcel of land but Plaintiff's mother was not buried on her husband's land because the Defendants were hostile. Their father was buried on the suit land though.

26. He also testified that the deceased (Kombuni) did not give any land to the Plaintiffs although if he had wanted to, he could have given them land. That further the Plaintiffs couldn't have claimed the land earlier because they were young at the time.

27. PW4 Joseph Cheboibek decided to adopt his statement as his evidence in chief wherein in cross examination, he confirmed that the late Kombuni Arap Too had two wives namely Joyce but he couldn't remember the name of the 1st one. That the said Joyce did not have a house on the suit property as she had relocated to Mauche where she had been buried, although he did not know who the proprietor of the land was.

Defence case

28. The 1st Defendant, DW1 Richard Kenduiywa while adopting his statement as his evidence, testified to the effect that he lived on land parcel No. Kericho /Ndarawetta/638 which belonged to his late father who died in the year 1996. That before his father died, he had sub-divided the land among his 4 sons namely Samwel Kenduiywa, 2nd Defendant; Joel Kenduiywa – 3rd Defendant John Kirui – 4th Defendant and himself wherein each of them were to get 2 acres (though on the ground the acreage was different). That subsequently they had been issued with their respective title deeds before their father died.

29. He testified that the Plaintiffs were not related to them as their late father had only one wife who was still alive. He further testified that his father, having followed the lawful process, registered him as proprietor of land parcel No. Kericho/Ndarawetta/1947 in the year 1996. He produced the title as Df exhibit 2(c) and stated that the Plaintiffs had no right to the suit property as they were not related. He sought for the Plaintiff's case to be dismissed with costs.

30. DW2, Zakary Kipkemoi Koech Kenduiywa a neighbor to the Defendants testified that he knew the Defendants' father the late Komboni Too who was married to one wife called Taplule Chepchirchir Too. That the late Too had four sons namely Richard Kenduiywa, Samwel Kenduiywa, Joel Kenduiywa and Joel Kirui.

31. That in 1996, the late Mzee Too sub-divided his land among his 4 sons who got 2 acres of land each as well as their title deeds. That he did not know the Plaintiffs before this suit was filed. That he had attended Mzee Too's funeral but had not seen the Plaintiffs whom acknowledged having seen them in 2015 for the first time. That although the Plaintiffs claimed that their mother was married to the deceased, yet he had never seen them. That the Plaintiff's mother died but she was buried on the Defendants' land and as far as he knew, the Defendants obtained their titles lawfully. He also confirmed that according to Kipsigis Customary Law, a wife must be buried next to her husband.

32. The 2nd Defendant Samuel Kipkurui Kenduiyo testified as DW3 wherein his testimony, after adopting his statement as his evidence, was that the title to parcel No. Kericho/Ndarawetta/638 was not obtained fraudulently. That the title to his land No. Kericho/Ndarawetta/1946 which he got in 1996 was as a result of subdivision of parcel No. Kericho/Ndarawetta/ 638. He produced the search for the land as Df exh 2(b) and went on to testify that the land was transferred to him by his deceased father Komboni Arap Too and that the Plaintiffs were not entitled to the same. He also refuted the allegation that the Plaintiff's mother was married to his father stating that she never lived on the suit land and neither had the Plaintiffs whom he first in the year 2015 when they filed this suit. He sought for the suit to be dismissed.

33. During the cross examination, DW3 confirmed that he was not aware that the surname of the Plaintiff's was the same as his surname which was the name of his late father. He confirmed that his father used to work in Nakuru and that Chemogoch was their clansman. That he also knew Kipsigei arap Cheboiben as his clansman but that he was not from their village as he came from a village called Kaptorgor. He acknowledged that he knew Jackson Langat as the son of Chemogoch.

34. That his father also worked in Naivasha as a prison officer but that it was not true that during that time he had lived with the Plaintiffs' mother and even brought her home. He stated that he had been present when the Plaintiffs testified and that they had lied to the court.

35. His evidence was that on the 15th May 2015 the Plaintiffs had approached him seeking to discuss with him over the issue of land. When he was referred to the document MFI -4, he refuted the allegations therein stating that it was not true that he had promised to give the Plaintiffs his land parcel No. Nakuru/Kabongoi/199. He confirmed that indeed the meeting had taken place but his elder brother was not

present.

36. He also denied having taken the Plaintiffs to see the land in Nakuru or having known about the Plaintiffs' mother – Joyce and the fact that he had claimed not to give Joyce land because she had “eaten” all the pension with their late father or that she was a Kisii by tribe. He stated that the Plaintiffs should not get a share of their late father's land and that even though his late father may have lived with Joyce, she never became his wife.

37. Upon the closure of the parties' cases, they filed their respective written submissions to which the Plaintiffs' case was that they had sued the Defendants because they were not given an equal share to their fathers land.

38. The Plaintiffs framed their issues for determination as follows;

- i. Whether the transfer of the suit land to the Plaintiff (sic) was fraudulent and illegal
- ii. Whether the transfer was proper in the presence of a caution.

39. On the first issue for determination, it was the Plaintiffs' submission that there was no doubt that their father, the late Komboni Arap Too who was the proprietor of land parcel No. Kericho/Ndarawetta/638 was husband to their mother with whom they lived with at his place of work in Naivasha. That their cohabitation resulted in the birth of the Plaintiffs. That their father had even marked a portion of land for their mother before he died but due to the hostility of the Defendants towards them, they had not settled on the said marked suit land.

40. That a meeting had subsequently been chaired by the area chief where it had been resolved by the Elders that the members of the second house be given land to which the 2nd Defendant had offered to give them (Plaintiffs) land in Tinet in lieu of the eventual share of the suit land. This did not work out as the land in Tinet was not habitable and had a caveat.

41. That prior to the passing away of their father, the Defendants had jointly and severally fraudulently procured the transfer and registration of land parcel No. Kericho/Ndarawetta/638 measuring 9 acres in their names thereby denying the Plaintiffs who were their step brothers, their rightful inheritance.

42. In submitting that the transaction by the Defendants was fraudulent, the Plaintiffs relied on the decided case of **Alice Chemutai Too vs Nickson Korir & 2 Others [2015] eKLR** to submit that the scheme by the Defendants to transfer the family land to themselves, based on a transfer document that was a thumb printed despite the proprietor of being literate, relatively old had poor eye sight and was an alcoholic, at the exclusion of the Plaintiffs was indeed fraudulent.

43. On the issue of whether the transfer was proper in the presence of a caution, it was the Plaintiffs submission that before their mother died she had placed a caution on the suit land which was registered as entry No. 9 on 3rd February 2012(see Pf exh 1) and they did not therefore understand how the same was removed before the land was subdivided and transferred amongst the Defendants. However no evidence was adduced on this issue. The Plaintiffs relied on the provisions of Section 71(1)(a), Section 71(2) and Section 73 of the Land Registration Act to buttress their submissions.

44. It was further the Plaintiffs' contention that the Defendants did not contest that the caution was lawfully removed by the Land Registrar and there was no more activity on record to that effect. There was also no notice of removal issued to the concerned parties, on the contrary the copy of the green card herein produced as Pf exh 1 indicated that the caution was still subsisting as at the time the suit property was transferred to the Defendants. Reliance was further placed on the decided case in **Elijah Makeri Nyang'wara vs Stephen Mungai Njuguna & Another [2013] eKLR**.

45. In conclusion, the Plaintiffs submitted that the subdivision of land parcel No. Kericho/Ndarawetta/638 into the resultant parcels No. Kericho/Ndarawetta/1945, 1946, 1948 and 1949 and issued with title deeds thereafter was indisputably faced with glaring impropriety and the said titles were ripe for cancellation and reversion to the origin title No. Kericho/Ndarawetta/638 for the equitable distribution among all the children of the original proprietor.

46. The Defendants' submissions on the other hand and upon analyses of the facts in question were to the effect that it was not in dispute that the mother title of the suit land had been subdivided and the resultant titles transferred to the Defendants by the registered proprietor prior to his death. That the allegations of fraud had not been supported by evidence on record.

47. That it was trite law that for one to succeed on a claim of fraud, the same ought to be pleaded and evidence tendered on a standard of proof that was above a balance of probabilities but not beyond reasonable doubt, given the serious nature of the acquisitions of fraud. That generally, allegations of fraud however strong as may be were are insufficient to amount to an averment of fraud as was held in the case of **Kibiro Wagoro Makumi vs Francis Nduati Macharia & Another [2018] eKLR**.

48. The Defendants further submitted that the allegation of fraud was committed in the year 1996 which was more than 19 years before the suit was filed in court and no explanation had been given as to why the same couldn't be filed earlier before the death of the original registered proprietor against whose estate that claim is premised.

49. That pursuant to the provisions of Section 7 of the Law of Limitation of Actions Act, the cause of action having arose 19 years prior to the filing of the suit, this suit was statutory barred and should be struck out.

50. That the suit property was transferred and registered to the Defendants in the life time of the registered proprietor to which at the time of his death there was therefore no land available to be distributed hence the claim against the Defendants was ill advised and farfetched.

51. That the court was being asked to determine the existence of a marriage between the registered proprietor of the mother title and the Plaintiffs' mother and to make orders for surrender of half share of the original title to the Plaintiffs which orders were not appropriate to be granted in this suit.

52. The Defendants therefore submitted that the Plaintiffs had failed to substantiate the allegations of fraud against them, that further the suit was statutory time barred and lastly a claim for inheritance could not be founded on the suit hence in totality the suit was ill-conceived, a nonstarter and the same should be dismissed with costs.

Determination.

53. I have considered the matter before me the, evidence as well as the submission, the authorities and the applicable law. Briefly the Plaintiffs' case is that their deceased mother was married to one Stephen Komboni Arap Too the defendants' father and proprietor of No. LR Kericho/Ndarawetta/638 as a second wife under Kipsigis Customary Law thus making the Defendants herein their step-brothers. That just before the death of the Komboni Arap Too the Defendants herein fraudulently caused the suit land to be sub-divided and registered the resultant parcels being Kericho/Ndarawetta/1945, 1946, 1948 and 1949 to themselves to the exclusion of the Plaintiffs. The Plaintiffs therefore sued the Defendants because they had not been given an equal share of their father's property in land parcel No. LR Kericho/Ndarawetta/638.

54. The Defendants' case on the other hand was that the Plaintiff were not their relatives and that the sub-division and transfer of the suit land was done lawfully by their father who was the original proprietor and during his life time. That the Plaintiffs claim of fraud had not been proved to the required standard which was above a balance of probabilities but not beyond reasonable doubt. It was further their case that the Plaintiffs suit was time barred, by virtue of the fact that the cause of action occurred more than 19 (nineteen) years before filing of the suit.

55. I find that the undisputed facts of this case being that the suit Land parcel No. Kericho/Ndarawetta/638 was registered to the deceased one Komboni Arap Too.

56. It is also not in contestation that the said parcel of land was sub- divided during the life time of the deceased Komboni Arap Too where the resultant suit lands being Kericho/Ndarawetta/1945, 1946, 1948 and 1949 were subsequently registered to the Defendants.

57. The bone of contestation herein is that the resultant parcels of land had been fraudulently sub divided and transferred to the Defendants despite there being a caution registered therein and further to the exclusion of the Plaintiffs who were sons and therefore heirs of the deceased original proprietor.

58. The Plaintiff relied on the documents herein produced as Plaintiff exhibits and took issue with the sub division and registration of the Defendants as proprietors to the suit land to the effect that they had obtained title illegally and fraudulently.

59. The Defendants on the other side have denied the Plaintiffs assertion stating that the suit land was lawfully transferred to them by its proprietor before he died.

60. Having laid down the background of the matter in question and having considered the evidence adduced in the matter, the issues that come out clearly for determination are as follows;

- i. Whether there was fraud involved in the transfer of ownership of the suit property to the Defendants.
- ii. Whether the suit is time barred by virtue of the provisions of the Limitation of Actions Act.
- iii. Do the Plaintiffs have any cause of action against the Defendants herein?
- iv. Who should pay the cost of the suit?

61. On the first issue for determination, having pleaded fraud and illegality on the part of the Defendants in the manner in which they obtained title to the suit land, I shall rely on the findings **in the case of Republic vs Senior Registrar of Titles Ex-parte Brookside Court Limited (2012) eKLR, where it was held that the** statutory sanctity of title to land is assured and protected under **Section 24, 25 and 26 of the Land Registration Act 2012** produced as herein under';

62. Section 24 stipulates as follows:

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

63. Section 25 of the act provides:

(1) The rights of a proprietor, whether acquired on 1st registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

64. Section 26 is to the effect that:

Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

65. One of the ingredients of impeaching the title of an owner of property on the grounds of fraud or misrepresentation is that the owner has to be proved to have been party to the acts of fraud and misrepresentation.

66. In this case therefore the onus was on the Plaintiff to prove those allegations. Fraud is a serious matter which must be proved to the required standard as was held in the case in **R.G Patel vs Lalji Makanji 1957 E.A 314** where the Court of Appeal stated as follows:

“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”.

67. I have no doubt in my mind that the Plaintiffs herein have distinctly pleaded the facts on which fraud is alleged against the Defendants. The next step however was for them to prove those allegations to the required standard. I will therefore interrogate all those allegations of fraud, illegality and misrepresentation as submitted by the Plaintiff.

68. It was the Plaintiffs' submission that prior to the passing away of their father, the Defendants had jointly and severally fraudulently procured the transfer and registration of land parcel No. Kericho/Ndarawetta/638 measuring 9 acres in their names thereby denying them as step brothers, their rightful inheritance. The Plaintiff's evidence was to the effect that the scheme by the Defendants to transfer the family land to themselves, based on a transfer document that was thumb printed despite the proprietor of being literate, relatively old, poor sighted and an alcoholic, at the exclusion of the Plaintiffs was indeed fraudulent.

69. That further, the sub division and transfer was improper in the presence of a caution registered on the suit land by their deceased mother as entry No. 9, on 3rd February 2012 as the said action was contrary to the provisions of Section 73 of the Land Registration Act.

70. I have considered the green card herein produced as Pf exh 1 and I find that unlike the evidence adduced in court, the suit land had been registered to its first proprietor on the 19th September 1977 thereafter a restriction had been registered on as entry No 2 on the 6th January 1988 by the Plaintiffs' mother, pending a determination of the a case. A title had been issued on the 19th April 1995 as entry No 3 wherein after there had been a sub-division on the 4th July 1996 and the title closed as shown in entry No 4.

71. I find that since the transfer document as well as the green card Pf exh 1 were the backbone instruments of the dispute herein, it was incumbent of the Plaintiff to produce the transfer document as an exhibit, adduce more tangible evidence of for example evidence of an expert witness in the nature of a forensic document examiner on the same, or even an independent witness from the Land Registry to shade more light on the subsequent entries after entry No. 1 as proof of these allegation that the subsequent entries after entry No. 1 could have been forgeries.

72. Such evidence was not called. As the provisions of *Section 107 to 109 of the Evidence Act* place the onus of proof on the Plaintiffs, it was their duty to displace such onus. The Plaintiffs did not even produce any document to demonstrate that they had reported the alleged crime of fraud to the police or that the matter was pending investigation. This allegation therefore remains un-proved.

73. In the case of **Arthi Highway Developers Ltd vs West End Buthery Ltd & Others C.A Civil Appeal No. 246 of 2013 (2015 e K.L.R)**, the Court of Appeal cited the following passage from **Bullen & Leake precedents pleadings 13th edition** at Page 427:

“The statement of the claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of It is not allowable to leave fraud to be inferred from the facts pleaded and

accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

74. On the second issue as to whether the suit is time barred by virtue of the provisions of the Limitation of Actions Act, it is clear that the provisions of Section 7 of the Limitation of Actions Act provides as follows:

“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...”

75. This means that original land having been sub divided and closed on the 4th July 1996, the Plaintiffs could only seek to recover it from the Defendants, but only if they did so within twelve years from the date on which the right of action accrued to them .

76. There is no doubt that the period of about nineteen (19) years has lapsed from the date on which the right of action accrued to the date when this suit was filed. No leave for extension of time to file the suit outside the twelve year period has been exhibited before this court. The Plaintiffs needed to commence their claim within the time prescribed under Section 7 of the Limitation of Actions Act. It follows therefore that by the time they filed this suit, the claim was statute barred.

77. In the case of **Bosire Ongero vs Royal Media Services [2015] eKLR** the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court had no jurisdiction to entertain the same.

78. I have considered the foregoing and I find that limitation being a substantive law, the provisions of section 1A and 1B of the Civil Procedure Act cannot be invoked with a view to disregard the provisions of another Act of Parliament. Even if the Limitation of Act was a procedural legislation, Section 3 of the Civil Procedure Act provides:

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

79. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

‘I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’

80. Clearly, this Court lacks jurisdiction and the matter is at its end. I will have to down my tools and take no further step. Plaintiff’s suit is herein dismissed with costs.

81. It is so ordered.

Dated and delivered at Kericho this 4th day of March 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE