



REPUBLIC OF KENYA



Mbugua & 151 others v Nganga & 6 others (Environment & Land Case E16 of 2023) [2024] KEELC 4012 (KLR) (2 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4012 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E16 OF 2023**

LA OMOLLO, J

MAY 2, 2024

BETWEEN

FRANCIS GITIRIA MBUGUA & 151 OTHERS PLAINTIFF

AND

GRACE WANJIRU NGANGA 1ST DEFENDANT

JENNIFER WARINGA MIARAHO 2ND DEFENDANT

JECINTER WANGARI NYOIKE 3RD DEFENDANT

**AGRICULTURAL AND INDUSTRIAL HOLDINGS LIMITED 4TH
DEFENDANT**

THE DISTRICT LAND REGISTRAR, NAIVASHA 5TH DEFENDANT

RIFT VALLEY REGIONAL SURVEYOR 6TH DEFENDANT

THE HONORABLE ATTORNEY GENERAL 7TH DEFENDANT

RULING

1. This ruling is in respect of the Applicants Notice of Motion application dated 25th September, 2023. The said application is expressed to be brought under Order 2 rule 15 (1) (a), (b) and (d) of the Civil Procedure Rules and Sections 7, 1A, 1B and 3A of the *Civil Procedure Act*.
2. The application seeks the following orders:
 1. That the plaintiff's prayer numbers g, h and j, for restoration of the 5th defendant's decision to nullify and cancel the titles of land parcel nos. Gilgil/Gilgil block 1/9563 to 9570 (Kekopey) and the 6th defendant's decision to cancel the parcels from the R.I.M are res judicata and the court lacks jurisdiction to entertain the prayers.



2. That the plaintiff's pleadings and prayers regarding the propriety of the proceedings and judgement in Nakuru ELC case no 407 of 2017 are res judicata and the court lacks jurisdiction.
 3. That the plaintiff's case and prayers based on fraud to wit that in 2008 Elias Ngugi Nganga And Grace Nduta Theuri obtained registration of land parcel no Gilgil/Gilgil block 1/7413 (Kekopey) through fraud and in 2009 fraudulently sub divided the parcel has been made over 14 years later and is barred by sections 7 and 8 of the limitation of actions Act, the court lacks jurisdiction over the aforesaid claims.
 4. That the applicants are not the registered proprietors of land parcel no's Gilgil/Gilgil block 1/7413, 9563, 9564, 9566, 9567, 9568, 9569 and 9570 (Kekopey) and therefore not necessary parties in litigation over the parcels and the aforesaid claims as against them be struck off.
 5. That the plaintiff's claim to be entitled to parts of land parcel Gilgil/Gilgil block 1/7413 (Kekopey) which is owned by Naivasha Uiguano Group on the ground of adverse possession is not compatible with their main claim of ownership by purchase through the same group and the claim be struck off.
 6. That the Plaintiffs have not shown they have dispossessed the registered proprietors for the period prescribed by law and have not disclosed a cause of action for adverse possession.
 7. That the suit is about alleged misdeeds of Elias Ngugi Nganga And Grace Nduta Theuri and the 1st, 2nd and 3rd defendants are not necessary parties in the matter.
 8. That the plaintiff's entire suit is otherwise an abuse of the process of the court and be struck off in its entirety.
 9. That the plaintiff's bear the costs of the suit.
3. The application is based on the grounds on its face and supported by the affidavit sworn on 25th September, 2023 by the 1st Defendant, one Grace Wanjiru Nganga. The Supporting affidavit is sworn on 25th September, 2023.

Factual Background.

4. The suit was instituted vide a plaint dated 28th February 2023 and subsequently amended on 26th June, 2023. The Plaintiffs sought the following orders:
 - a. A declaration that the Plaintiffs have become entitled to the property known as Gilgil/Gilgil Block 1/7413 (Kekopey) by virtue of adverse possession.
 - b. A declaration that the Plaintiffs are the rightful owners of land parcel, Gilgil/Gilgil Block 1/7413 (Kekopey) by virtue of agreements for sale and subsequent transfer from GEMA Holdings Limited, now known as Agricultural & Industrial Holdings Limited, the 4th Defendant herein.
 - c. That the Honourable Court do declare that the Plaintiffs are entitled to own their portions in their own names absolutely.
 - d. A declaration that the Gazettement of Title No. Gilgil/gilgil Block 1/7413 via Gazette No 341, subsequent cancellation of the fraudulent title and issuance of new title to the Plaintiffs on 7th April, 2009 was procedural.



- e. A declaration that the entries contained on the proprietorship section in favor of the Plaintiffs are legal and absolute.
- f. A declaration that the Plaintiffs' subsequent titles that is to say, Gilgil/gilgil Block 1/54381 (kekopey), Gilgil/gilgil Block 1/54366 (kekopey), Gilgil/gilgil Block 1/54416 (kekopey), Gilgil/gilgil Block 1/54368 (kekopey), Gilgil/gilgil Block 1/54398 (kekopey), Gilgil/gilgil Block 1/54367 (kekopey), Gilgil/gilgil Block 1/54392 (kekopey) Gilgil/gilgil Block1/54402 (kekopey) Gilgil/gilgil Block 1/54435 (kekopey) Gilgil/gilgil Block 1/54414 (kekopey) Gilgil/gilgil Block 1/54383 (kekopey) Gilgil/gilgil Block 1/54442 (kekopey) Gilgil/gilgil Block 1/54407 (kekopey) Gilgil/gilgil Block 1/ 54374 (kekopey) Gilgil/gilgil Block 1/54420 (kekopey) Gilgil/gilgil Block 1/54369 (kekopey),
 Gilgil/gilgil Block 1/54391 (kekopey) And Gilgil/gilgil Block 1/ 54382 (kekopey) are valid and such, the registers for the said titles be reinstated.
- g. A declaration that titles for parcels numbers Gilgil/Gilgil Block 1/9863 to 9570 were obtained fraudulently and/or through corrupt means therefore null and void.
- h. An order for cancellation of the records reflecting title numbers Gilgil/gilgil Block 1/9563-9570.
 - i. A declaration do issue that the court orders obtained by the 1st, 2nd and 3rd defendants in:
 - i. Grace Wanjiru Ng'anga & 2 others v Elias Ngugi Ng'ang'a & another [2020] eKLR &
 - ii. Republic v Naivasha District Land Registrar & 2 others Ex parte Grace Wanjiru Nganga & 2 others [2022] eKLR were fraudulently obtained and the same be nullified.
 - j. That the 6th Defendant be ordered to reinstate mutation entry reference number MUT/NV/9877/5/19 in the registry index map number 14 and 15 Gilgil/Gilgil Block 1 (Kekopey)
 - k. Costs of the suit; and
 - l. Interest at court rates on (c) and (d) above.
5. The matter came up before this court on 23rd October, 2023. Counsel for the Plaintiffs confirmed that he had filed a replying affidavit and that they had also receiving the 1st, 2nd and 3rd Defendants supplementary affidavit.
6. The court directed that the application shall be heard by way of written submissions. On 29th November, 2023 all parties, apart from the 4th Defendant, confirmed that they had filed submissions. Counsel for the 4th Defendant informed court that the 4th Defendant would not be taking part in the application.
7. The application was then reserved for ruling.

Applicants Contention.

8. The first Applicant deposes that she is the first defendant in this suit and has the authority of the second and third defendants to swear the affidavit on their behalf.
9. It is her deposition that the Plaintiffs want the court to restore the 5th Defendant's administrative decision cancelling the titles of land parcel numbers Gilgil/Gilgil block 1/9563 to 9570 (Kekopey)



made by letter dated March 2019 and the 6th defendant's administrative decisions to delete the aforesaid parcels from the Registered Index Map (herein referred to as RIM map).

10. It is her further deposition that the aforesaid administrative decisions and actions were the subject of Nakuru Judicial Review Cause No 2 of 2021.
11. She deposes that the Plaintiffs filed an application dated 19th April, 2022 for review of the proceeding in the aforesaid judicial review cause on several grounds, the major ground being that they had an interest in the suit land and were not notified but the Honorable court dismissed the application principally on the ground that the Plaintiffs were aware of the cause and participated by proxy through the 5th Defendant.
12. It is her deposition that the issue raised in this suit that the Registrar's gazette notice no 341 of 2009 cancelled the title of land parcel number Gilgil/Gilgil block 1/7413 (Kekopey) was raised by the Plaintiffs and the 5th defendant in the aforesaid Judicial review cause and in this regard, she refers to the plaintiff's affidavit in support of the application.
13. She deposes that all issues regarding restoration of the 5th and 6th defendant's administrative decisions were issues in the aforesaid judicial review cause and were finally determined by a court of competent jurisdiction. She states that they are res judicata and an abuse of the process of this court.
14. She deposes that the Plaintiff's complaint in this suit that the proceedings of this court in Nakuru ELC suit no 407 of 2017 in which the court replaced the trustees of Naivasha Uiguano Group in respect of land parcel no. Gilgil/Gilgil block 1/9565 (Kekopey) were fraudulent should be raised in that suit and impugning the aforesaid proceeding in this suit is re-litigating the same matter before the same court, is improper and an abuse of the courts process.
15. It is her deposition that in Nakuru ELC suit no 407 of 2017, the 1st to 3rd defendants represented the members of the group and beneficial owners of the land by virtue of a court order, hence the Plaintiffs were parties in the matter and the issues they raise in this suit concerning the former suit are res judicata.
16. She deposes that the Plaintiffs are required to apply for the review of the suits in the subject courts or appeal but not lodge separate suits over the same matters and this suit is therefore an abuse of the process of the court.
17. It is her deposition that the Plaintiffs aver that in the year 2008 they learnt that Elias Ngugi Nganga And Grace Nduta Theuri had fraudulently registered themselves as proprietors of land parcel no Gilgil/Gilgil block 1/7413 (Kekopey) and the following year subdivided it into eight parcels. She states that this claim based on fraud should have been lodged within the limitation period provided by the law and the court lacks jurisdiction to entertain the claim.
18. She states that the order of certiorari quashing the 5th and 6th defendant's aforesaid administrative decisions issued in Judicial Review Cause no 2 of 2021 nullified and voided the aforesaid decisions and actions and the same do not affect the limitation period nor confer any legal rights.
19. She deposes that the Plaintiffs have brought them to court for misdeeds that were allegedly committed by Elias Ngugi Nganga and Grace Nduta Theuri without showing how they were privy or involved in the management of the land parcels. She deposes that they are not necessary parties in the aforesaid claims and this suit is only meant to harass and intimidate them.
20. She deposes that they are not the registered proprietors of land parcels numbers Gilgil/Gilgil block 1/7413, 9563, 9564,9566,9567,9568,9669 and 9570 (Kekopey) and not necessary parties in the Plaintiffs' litigation over these parcels and that the claim against them is an abuse of the court process.



21. She deposes that the Plaintiffs are by virtue of the document granting five of them authority to conduct this matter dated 25th February, 2023 lodged in this suit and their pleadings in Nakuru Judicial Review Cause No 2 of 2021 are members of Naivasha Uiguano Group, yet claim adverse possession against the same group; the claim is illogical, incompatible and no cause of action is disclosed.
22. She further deposes that the Plaintiffs aver at paragraph 22 of the plaint that in 2009, one year after Elias Ngugi Nganga And Grace Nduta Theuri were registered as proprietors of land parcel no Gilgil/Gilgil block 1/7413 (Kekopey), they lodged a restriction prohibiting any dealings without their consent.
23. She deposes that the aforesaid restriction was removed by the decree of the court in Nakuru Judicial Review Cause no 2 of 2021 in the year 2022. She deposes that together with Elias Ngugi Nganga And Grace Nduta Theuri, they could not take possession of the suit land during the time of the aforesaid restriction and they were therefore never dispossessed; rendering a cause of action based on adverse possession impossible.
24. She contends that from the Plaintiffs pleadings, some of them claim they were allowed to put up temporary homes on the land by the trustees by virtue of being members and beneficiaries of the group awaiting the subdivision to all member, the claim of adverse possession is untenable in the circumstances.
25. She deposes that they have given notice of these objections and this application to strike out the plaint in their pleadings but the Plaintiffs insist on proceeding with this matter hence forcing them to proceed with this application. She prays that the entire suit be struck out with costs to the 1st, 2nd and 3rd Defendants.

Plaintiffs/Respondents Response

26. The Plaintiffs/ Respondents filed a Replying Affidavit sworn by Francis Gitiria Mbugua and Francis Mwaura Thiongo on 5th October, 2023 and filed on 9th October, 2023.
27. They contend that the Plaintiffs are the legal and beneficial owners of land Title number Gilgil/Gilgil Block 1/7413 (Kekopey) and at the time of purchase, there was no title to the suit land and the subject land had not been surveyed and no parcel number had been allocated. They state that they moved this Honourable court to follow on their rightful claim.
28. They contend that on or about the year 2020, the Plaintiffs' leaders and/or trustees were summoned to the 5th Defendant's office where they met with the 1st to 3rd Defendants who were alleging ownership of one of the illegal portions of land, Gilgil/Gilgil Block 1/9565 in which they claimed to have been awarded by the court after filing a case, Nakuru ELC No 407 of 2017 (Grace Wanjiru Ng'ang'a & 2 others v Elias Ngugi Ng'ang'a & another [2020] eKLR.
29. They contend that it was then that they discovered the malicious acts of the 1st to 3rd Defendants. They contend that the 1st, 2nd and 3rd Defendants filed Nakuru ELC Case Number 407 of 2017 seeking change of trustees of the group. They contend that in those proceedings they passed themselves as the appointed trustees of Naivasha Uiguano Group despite the fact that they were not and have never been part of Naivasha Uiguano Group.
30. The Plaintiffs contend that in the proceedings of Nakuru ELC case number 407 of 2017, the 1st, 2nd and 3rd Defendants entered into a consent with the Defendants therein that the appointment of Elias Ngugi Ng'ang'a and Grace Nduta Theuri be revoked and that the 1st, 2nd and 3rd Defendants be registered as proprietors of parcel, Gilgil/gilgil Block 1/9565.



31. They further contend that on 3rd March, 2020, owing to the misleading information availed by the 1st, 2nd and 3rd defendants, the court revoked the appointment of Elias Ngugi Nganga And Grace Nduta Theuri and appointed the 1st, 2nd and 3rd defendants in their place in regards to land parcel number Gilgil/Gilgil Block 1/9565 which was one out of eight fraudulent subdivisions from the mother title Gilgil/Gilgil block 1/7413.
32. The Plaintiffs contend that at the time when the 1st, 2nd and 3rd defendants were pursuing Nakuru ELC Case No 407 of 2017, the Plaintiffs were in the process of procuring title deeds to their pieces of land from the mother title Gilgil/Gilgil block 1/7413.
33. The Plaintiffs further contend that during the meeting of the year 2020, the land registrar advised the parties to go to the suit land to prove ownership. They contend that it was also noted that the 1st to 3rd defendants failed to provide proof of purchase of the suit land and they did not show up to visit the suit parcel.
34. It is also the Plaintiff's contention that following the 1st to 3rd Defendants failure to prove their allegations, the Plaintiffs went ahead and started procuring title deeds to their 94 subsequent subdivisions to the suit land from the mother title Gilgil/Gilgil Block 1/7413 in the year 2021 or thereabout.
35. The Plaintiffs further contend that from their documentation, when they started acquiring individual titles, they discovered that the green card approving their subsequent titles had been cancelled. They contend that upon following up with the 4th Defendant, they discovered that a case Nakuru Elc Judicial Review No 2 Of 2021 had been filed in court by the 1st to 3rd Defendants seeking from the court various orders including restoring parcel registers for Gilgil/Gilgil Block 1/9563 to 9570 and also the removal of mutation entry number MUT/NVS/9877/5/19 and the same was allowed.
36. They contend that they filed a review application but the same was not allowed due to the nature of the suit being a Judicial Review Application from which the opinion of the court, it cannot be subjected to review but rather to appeal and they were advised to pursue other avenues.
37. The Plaintiffs contend that in their application dated 19th April, 2022, they sought certain orders and the court in its ruling at paragraph 44 noted as follows: "In the present case too, I hold that under Order 53 of the Civil Procedure Rules and Section 8 (3) and Section 8 (5) of the [Law Reform Act](#), no orders of review may issue on a judgment made in a judicial review application."
38. They further contend that in its final verdict, the court at paragraph 60 stated that "Lastly, the substantive disputes regarding trusteeship and land ownership and distribution among members can be ventilated in other fora as this court lacks jurisdiction to address the same in a judicial review application. The exercise of the court's inherent jurisdiction in the circumstances of the present application would be undesirable."
39. It is the Plaintiffs contention that the claim of land ownership between the parties in the present suit has not been determined on merit. They further contend that the issue of trusteeship was obtained fraudulently by the 1st to 3rd Defendants as they have never been members of Naivasha Uiguano Group. They contend that they were never part of the scheme of the 1st to 3rd Defendants when they filed fraudulent suits and they only came in later after discovering the 1st to 3rd defendant's fraudulent actions and as such, their real issues in dispute were never determined.
40. The Plaintiffs also contend that their suit raises the issue of fraud on the part of the 1st to 3rd Defendants and as such, any purported representation by the 1st to 3rd Defendants are challenged and the concerns



of the Plaintiffs were not fully addressed in JR 2 of 2021 as the court noted that a judicial review application is not the right forum to address such issues of trusteeship and land ownership.

41. The Plaintiffs contend that an application for review in suits where they were never proper parties will not address the real issue of ownership of the suit land. They further contend that the issue of fraud by the former trustees was already resolved by the Land Registrar when he cancelled the fraudulent title and issued a new title in favour of the Plaintiffs in the year 2009. They contend that as such, the explanation was only to give this Honourable court a background of the case and the suit is within the statute of limitations as it is against the Defendants herein.
42. The Plaintiffs contend that this suit is against the cited defendants and it is not barred by statute of limitations. They contend that a search conducted in 2020 proves that the land was still registered in favour of Naivasha Uiguano Group before the 1st-3rd defendants started laying their claim thereon.
43. The Plaintiffs contend that the 1st to 3rd Defendants have blatantly misled courts to believe they have a claim in the land belonging to the Plaintiffs and they are thus necessary parties to this litigation. It is their further contention that in any event, the 1st to 3rd Defendants had misled the court in the proceedings of NAKURU ELC JUDICIAL REVIEW NO 2 OF 2021 that their previous purported trustees had led them into believing that their groups land was only Gilgil/Gilgil 1/9565 (Kekopey) only for them to learn later on that it is one out of eight subdivisions of Gilgil/Gilgil Block 1/7413 (Kekopey).
44. The Plaintiffs state that the 1st and 3rd Defendants are relevant parties as they themselves claimed ownership of land parcel Gilgil/Gilgil Block 1/7413 which they claim to do so on behalf of their purported members.
45. It is the Plaintiffs contention that issues of ownership, occupation and adverse possession are factual to be proved during trial and cannot be determined in a summary manner as the defendants are suggesting.
46. The Plaintiffs contend that the 1st to 3rd Defendants application raises issues of facts that can only be determined during a full trial. They contend that the application is not a preliminary objection and is ill- advised, misconceived and aimed at defeating fair trial.
47. They contend that the 1st- 3rd Defendants' application should be dismissed as the same is frivolous, vexatious and an abuse of court process. They contend that the suit raises issues of fact that cannot be summarily disposed through an application.
48. The Plaintiffs contend that the conduct of the 1st and 3rd Defendant is questionable as they have fraudulently tried to purport through their advocates on representing the 4th Defendant, a critical party in these proceedings.
49. The Plaintiffs contend that the falsification of representation was only done with the intent of ensuring that this court is not furnished with the relevant facts that would lead to a just decision.

Applicant's Further Contention.

50. The 1st to 3rd Defendants/Applicants filed a Supplementary Affidavit on 18th October 2023. It is sworn by the 1st Defendant. She states that she has the authority of the second and third defendants to swear the affidavit.
51. She deposes that the meeting with the 5th Defendant in the month of November 2020 was a follow up of their letter to the 5th Defendant protesting her refusal to supply them with information regarding



- the cancellation of title deeds and government survey records for land parcel numbers Gilgil/Gilgil block 1/9563 to 9570 (Kekokey).
52. It is her deposition that in the letter annexure GW-6, they also pleaded with the 5th Defendant to restore the titles and comply with the vesting order issued in Nakuru ELC suit No 407 of 2017 and further gave notice that they would move to court to enforce their rights.
 53. She deposes that during the meeting, they presented their evidence of ownership of the land but further proof by pointing out beacon markers on the suit land and production of government land records was not possible since government land officials in cahoots with the Plaintiffs had erased the records and the Plaintiffs had already removed the beacons from the suit parcel.
 54. The 1st Defendant/Applicant deposes that on the issue of the Plaintiffs' claim against Elias Ngugi Nganga And Grace Nduta Theuri, the Plaintiffs aver at paragraph 17 of the amended plaint that in 2008, the two individuals fraudulently registered themselves as proprietors of land parcel no Gilgil/Gilgil block 1/7413 (Kekokey).
 55. She deposes that the 4th Defendant has been joined in this matter because it is alleged to have transferred the land to two individuals instead of the Plaintiffs. She deposes that the Plaintiffs at paragraph 22 of the amended plaint aver that the two individuals fraudulently subdivided the land into 8 portions in 2009.
 56. She deposes that arising from the foregoing, the Plaintiffs pray for a declaration that the titles of the 8 subdivisions were obtained irregularly and therefore be cancelled. She deposes that the main ground of fraud is that the land registrar had cancelled the title of the two individuals by gazette notice 341 of 2009 at the time they subdivided the land.
 57. It is her deposition that upon discovery of the aforesaid irregularities, the Plaintiffs had the records of the 8 subdivisions erased from land records by land officials, unfortunately the records were restored by a certiorari order of the court in Nakuru Judicial Review Cause No 2 of 2021, meaning the illegal erasure of the records was in vain, a wastage of time and void ab initio.
 58. She deposes that these averments clearly show who are answerable to the aforesaid claim and it is futile for the Plaintiffs to look sideways on the ground of giving a historical background whereas it is apparent they are not interested parties, besides the claims being barred by limitation.
 59. The 1st Defendant deposes that in the event they have to defend the actions of the aforesaid individuals, she states that the Plaintiff's averments and documents do not show that the instrument of change of trustees referred to in gazette notice 341 of 2009 was registered. She deposes it does not show that a process of rectification or revocation of title was carried out and lastly that a new title deed was issued to their trustees. She states that their case in this regard is speculative and extremely frivolous.
 60. She deposes that following the failure of the illegal scheme, the Plaintiffs have now decided to seek redress in court. It is her deposition that the Plaintiffs case based on the aforesaid fraud and irregularities is the basis of their claim of ownership of the subject land and they are not the right parties and in any event the claim is barred by the statute of limitations.
 61. The 1st Defendant deposes that the Plaintiffs give the current registered proprietors of land parcel number Gilgil/Gilgil block 1/9563, 9564, 9566, 9567, 9568, 9669 and 9570 (Kekokey) and states that those registered proprietors shall be affected by the Plaintiffs proposed decree and are the necessary parties in this matter and not them.



62. It is the 1st Defendant's deposition that in the judicial review matter, they agitated for the rights of the group in their capacity as trustees/managers of the group but not as the registered proprietors of the land, a capacity the Honorable Court allowed. She deposes that this capacity cannot apply in a suit where the plaintiff's want the court to nullify the proprietor's titles and one has to sue the registered proprietor.
63. She deposes that it is apparent that the Plaintiffs are not satisfied with the decision of the judicial review court in allowing this capacity and state that they should address their grievance over the judicial review matter through an appeal as found in the ruling on their review application.
64. She deposes that the Plaintiffs case based on adverse possession fails to disclose a cause of action and this application is necessary to protect them from intimidation and harassment of a frivolous and misguided suit.
65. It is also her deposition that while the Plaintiffs claim they are representatives, the litigants are represented by advocates and not by the parties through their advocate. She deposes that the 4th Defendant has a counsel on record and has filed its pleadings. She deposes that they have not purported to represent anyone and the false claim shows their ill will, animosity and how far they will go to hurt them.
66. The 1st Defendant deposes that the Plaintiffs claim of ownership either on account of fraud or adverse possession is frivolous, vexatious and otherwise an abuse of the process of court besides being barred by limitation.
67. She deposes that the Plaintiffs suit is only meant to make them incur unnecessary expenses, harass, intimidate and vex them and they thus pray this application be allowed.

Issues for Determination.

68. The Applicants filed submissions on 10th November, 2023. They submit that their case is that they are members and officials of Naivasha Uiguano Group. They submit that during the same time, members of the group purchased land from the same area using their councilor and patron the late Nganga Kihonge and later his son Elias Ngugi Nganga as agents.
69. They submit that the aforesaid defendants and their members differed with the agent after he refused to transfer the land to the groups officials to hold in trust for members of the group.
70. The Applicants submit that they therefore instituted Nakuru ELC suit no 407 of 2017 seeking orders that they be appointed as trustee of the group and vested with land parcel no Gilgil/Gilgil block 1/9565 (Kikohey) as trustees in place of Elias Ngugi Nganga and his sister Grace Nduta Theuri.
71. The Applicants submit that one of their grounds of objection to the plaintiff's claim on purchase is that it is about the misdeeds of Elias Ngugi Nganga and his sister Grace Nduta Theuri and they are not necessary parties to these claims. The Applicants refer to prayer number 7 and 8 in the application dated 25th September, 2023 and the Plaintiff's prayers numbers (b) and (h) in the amended plaint. They reiterate prayers d, g and h seeking declarations that the registrar revoked the titles of Elias Ngugi Nganga and his sister Grace Nduta Theuri and issued a new title deed sometime in April 2009, therefore the subdivision of the same parcel thereafter was un-procedural and the resultant new parcels which are in the names of the two individuals be cancelled by the court.
72. The Applicants submit that they have emphasized that these claims and prayers are directed at the two individuals who are the proper and necessary parties to answer the claims. They submit that the



- Plaintiffs' response in the replying affidavit filed on 9th October, 2023 at paragraph 9 thereof is that the fraud of the two individuals was resolved by the registrar when a new title deed was issued in 2009.
73. The Applicants submit that the Plaintiffs amended the plaint on 23rd June, 2023 and retained the claims and reliefs prayed against two individuals as well as the claim against the seller of the land. They submit that it is preposterous for them to claim that the pleadings against them are a mere historical background of their claim when they have sought clear and special prayers against them. They rely on the judicial decision of Boniface Omondi v Mathare Youth Sports Association & another [2021]eKLR.
 74. They submit that the allegations of fraud in this regard are not made against the applicants and the cancellation of the titles will affect the two individuals and the applicants are not necessary parties in the above claims.
 75. The Applicants submit that the objection also applies to the Plaintiffs' entire claim regarding the other parcels apart from Gilgil/Gilgil block 1/9565 (Kekopey) which the Plaintiffs acknowledge are not registered in the Applicants names.
 76. It is the Applicants submission that parties decide how they want to prosecute their claims and the court cannot force a party to enjoin a person. They submit that the court has an obligation to protect a person who is wrongly joined and they pray that the foregoing claim against the applicants be dismissed since it is an abuse of the courts process.
 77. The Applicants submit that in the event the foregoing claim is to proceed against them, they have objected that the same is barred by sections 7 and 8 of the *limitation of actions act* and the court lacks jurisdiction. They submit that it is clear from the Plaintiffs pleadings that they discovered the alleged fraud in 2008 and 2009 and therefore should have filed an action based on fraud within the prescribed time or claim the land within 12 years.
 78. It is their submission that from 2009 to date, the Plaintiffs have been seeking a remedy at the land registry clandestinely behind closed doors. They submit that this suit was filed in February 2023, 14 years later and is hopelessly out of time.
 79. They submit that the Plaintiffs response to this objection is that the land registrar sorted out the individual's fraud. They question why they have come to court seeking the aforesaid declarations against them? They submit that the Plaintiffs have no response to this objection and the court lacks jurisdiction over a suit filed out of time.
 80. The Applicants submit that they acknowledge that the court can direct the Plaintiffs to join the proper parties. They submit that since courts do not act in vain, the barred claims cannot be saved by joinder of the proper parties. They urge that the aforesaid claim be dismissed forthwith in the interest of justice.
 81. On res-judicata, the Applicants submit that the objection touches on the plaintiff's second claim. They submit that it is clear that the court had jurisdiction and finally determined the issue of cancellation of the aforesaid records.
 82. The Applicants submit that the Plaintiffs' application seeking review of the aforesaid judgment was principally on the ground that they were not notified and that this was rejected on the ground inter alia that they were aware of the matter and participated through the 5th Defendant.
 83. They submit that in the matter, the 5th Defendant defended her action on the ground that she acted in good faith and complied with the procedure for rectification of title under section 79 (1) (2) of the *Land Registration Act*. They submit that the court considered the rival arguments and found that the aforesaid law and *the constitution* were not complied with.



84. They further submit that one of the new matters raised in this suit is that the applicants misled the court in the former suit that they were trustees or members of the group. They submit that a party's capacity comprises one of the major issues in litigation. They submit that in the former suit, the court made a specific finding that the applicants were official and trustees of the group stating as follows at paragraph 15 of the judgment; "From the uncontested material on record, I am satisfied that the ex parte applicants are office bearers and trustees of Naivasha Uiguano Group (the group), that the group owned land known as Gilgil/Gilgil block 1/7413 (Kekopey) which was subdivided in July 2009 into parcel numbers Gilgil/Gilgil block 1/9563 to 9570 (Kekopey) and new title deeds issued in the names of trustees of the group."
85. The Applicants submit that the issue of capacity was a central issue in this matter and should have been raised by the Plaintiffs' representative in this suit. They submit that the issue from this position is whether it is permissible to challenge a former suit by filing a new suit claiming that the court was misled.
86. The Applicants further submit that the avenue for such a relief is to apply for review or appeal. They submit that the honorable court advised the Plaintiffs to challenge the decision by an appeal. They rely on the judicial decision of Africa oil Turkana Limited (previously known as Turkana Drilling Consortium Ltd) & 3 others v Permanent Secretary, Ministry of Energy & 17 others Civil Appeal 376 of 2014.
87. The Applicants submit that the holdings of the superior court is that a judgement of a judicial review court raises the plea of res judicata. They make this submission in anticipation of the plaintiff's arguing that the aforesaid civil procedure principle applies only to normal litigation under the aforesaid rules; therefore, it cannot affect their suit. It is their submission that the court further held that parties are supposed to present their claim in a suit and not litigate by phases or instalment though successive suits.
88. The Applicants rely on the judicial decision of Bellevue Development Company Ltd v Francis Gikonyo & 7 others [2018] eKLR. They submit that the plaintiff's claim regarding the status of the applicant's group, specifically that the applicants are not trustees or officials/members of the group, therefore the court was misled belongs to the earlier suit and should be raised there.
89. The Applicants submit that their plea of res judicata equally applies to Nakuru ELC case No 407 of 2017. They submit that this was a representative suit whereby members of the group and beneficial owners of the land in issue were served with notice of the suit and it is annexure GW-5 in the supporting affidavit.
90. They submit that after serving the notice, some interested parties indeed joined the suit. They submit that the Plaintiffs have not disputed receiving the notice. They submit that the court appointed the applicants as the trustees and vested them with land parcel No Gilgil/Gilgil block 1/9565 (Kekopey).
91. The Applicants submit that the Plaintiffs responded that they were not parties in the suit. They submit that the representative order has never been challenged either on appeal or review and is a valid court order, it cannot be wished away. The Applicants submit that the issue then is whether persons who were notified but did not wish to join the matter can file a fresh suit over the same matters. They rely on the judicial decision of Joseph Kashau Olokuo & 6 others v Ngati Farmers' Co-operative Society Ltd [2011] eKLR.
92. It is the Applicants submission that in the earlier suit, they averred that they were members and officials of the group and sought to be allowed by the court to represent the members in that capacity and appointed its trustees. They submit that the previous trustees were defendants in that suit and that the applicant's capacity was the central issue. They further submit that the Plaintiff's averments that the



- aforesaid capacity is fraudulent clearly belong to the previous suit and they urge the court to find that the Plaintiffs are abusing the court process and strike out the claim.
93. On the claim of adverse possession, the applicants submit that one of their objections to this claim is that the Plaintiffs claim to be members of the group which is the registered owner of the land. They refer to copies of titles exhibited by the parties which show the group is the registered owner. They submit that in a claim for adverse possession, a claimant pleads that the owners title has been extinguished by his adverse possession praying to be substituted which is impossible where the Plaintiffs claim to be members of the group and the beneficial owners.
 94. The Applicants further submit that they lodged a restriction in 2009 when they realized the land had been subdivided. They submit that this was to officially block the newly registered owners from taking possession of the land. They rely on the judicial decision of *Immaculate Wambia Mungai v Fredrick Mwai Mwhia* [2022] eKLR.
 95. The Applicants submit that the Plaintiffs removed their restriction in the month of February 2020 meaning that their alleged limitation period has barely began to ran. They submit that the Plaintiff's also claim the land and have also alleged fraud. They submit that this means that they have a right of occupation as owners, a claim that is incompatible with adverse possession which is based on trespass. They submit that the claim based on adverse possession is misconceived and does not disclose a cause of action.
 96. The Applicants submit that they have addressed the Plaintiffs entire claim and hope that they have demonstrated that it cannot be sustained. They submit that their prayer is that the entire suit be struck off.
 97. They also submit that while their prayer is that the entire suit be struck off, they are aware that some of the objections may not be sustained and in such an event they plead with the honorable court to apply order 2 rule 15 and direct the Plaintiffs to amend their pleading and remove pleadings which are found to be unsustainable.
 98. The Applicants submit that in their supplementary affidavit, they have responded to the issue of the proceedings before the land registrar where the Plaintiffs claim that the Applicants failed to establish ownership or location of the land as well as the alleged fraudulent representation of the 4th Defendant.
 99. They submit that these issues are not relevant to this matter. They submit that the entire suit cannot be saved by amendments and they urge the court to strike out the Plaintiff's entire suit at this stage.
 100. The Plaintiffs filed submissions on 28th November, 2023. They identified the following issues for determination:
 - a. Whether the Plaintiffs suit is res judicata as alleged in prayer 1 and 2 of the Application?
 - b. Whether the Plaintiffs suit is time barred under section 7 and 8 of the Limitations of Actions act as alleged in prayer 3?
 - c. Whether there exists a cause of action?
 - d. Whether the prayers No 4, 5 and 6 of the application amount to be a preliminary objection that can be disposed off in a summary manner?
 - e. Whether the Applicants are necessary parties in this matter in light of prayer 7 of the Application?
 - f. Whether this suit is an abuse of the court process and if it should be struck off?



101. On the issue of whether a matter is res-judicata, they rely on Section 7 of the [Civil Procedure Act](#) and the judicial decisions in *Justus Atsieno Odhiambo v Peter Onyango Achieng* [2019] eKLR and *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited* [2017] eKLR. They submit that the court in *Judicial Review 2 of 2021* had no jurisdiction to determine matters of land ownership as between the parties herein, hence necessitating this suit. They submit that the judicial review did not determine the real issues in dispute to finality.
102. It is their submission that this position is well reiterated in the ruling of the Honourable judge at paragraph 60 in *Nakuru ELC Judicial Review 2 of 2021*, where the following was stated: “The substance disputes regarding trusteeship and land ownership and distribution among members can be ventilated in other fora as this court lacks jurisdiction to address the same in a judicial review application.”
103. They submit that in view of the elements of res judicata which were held in the judicial decision of *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited* [2017] eKLR. They submit that it is clear from the present case that all the elements enumerated therein have not been established herein for the following reasons: a) The Plaintiffs herein were not parties in *Nakuru ELC Case number 407 of 2017* and neither in *Nakuru Judicial Review Case No E002 of 2021*, b) The claims in *Nakuru ELC Case Number 407 of 2017* and *Nakuru Judicial Review Case No E002 of 2021* are different. They submit that it is evidently clear that the claim in *ELC case Number 407 of 2017* was purely on change of trustees which is not connected to the Plaintiffs herein as they are not part of the 1st to 3rd Defendants self-help group. c) The issues raised in the suit herein has not been heard and no final decision has been made on the cause of action sought herein. They submit that none of the elements have been satisfied and the allegation of this suit being res judicata should fail.
104. The Plaintiffs submit that on or about the year 2020 or there about, their leaders and/or trustees were summoned to the 5th Defendant’s office where they met with the 1st to 3rd Defendants who were alleging ownership of one of the illegal portions of land, *Gilgil/Gilgil Block 1/9565* in which they claimed to have been awarded by the court after filing a case, *Nakuru ELC No 407 of 2017 (Grace Wanjiru Ng’ang’a & 2 others v Elias Ngugi Ng’ang’a & another* [2020] eKLR. They submit that it was then that they discovered the fraudulent/ malicious acts of the 1st to 3rd Defendants. They submit that time started running in the year 2020.
105. The Plaintiffs submit that the issue of fraud by the former trustees namely *Elias Ngugi Nganga & Grace Nduta Theuri* in the year 2008 was already resolved by the Land Registrar when he cancelled the fraudulent title and issued a new title in favour of the Plaintiffs in the year 2009. They submit that the explanation was only to give this Honourable court a background of the case and the suit is within the statute of limitations as it is against the current defendants herein. They submit that this suit is against the cited defendants whose fraudulent actions were discovered in the year 2020 and it is not barred by statute of limitations.
106. They rely on Section 26 of the [Limitation of Actions Act](#) and the judicial decisions of *Justus Tureti Obara vs Peter Koipeitai* [2014] eKLR and *Joseph Mwaniki Muchira v Godfrey Muchangi* [2018] eKLR.
107. They submit that as it can be established from the judicial review suit filed by the 1st to 3rd Defendant vide *Nakuru ELC Judicial Review No E002 OF 2021*, they sought for an order of certiorari to quash the decision of the 5th Defendant/Respondent herein in a letter dated March, 2019 nullifying and/or cancelling the title deeds for land parcel numbers *Gilgil/Gilgil Block 1/9563 to 9570 (Kekopey)* and reinstating their parent title parcel number *Gilgil/Gilgil Block 1/7413 (Kekopey)*. They submit



- that this in itself together with another order sought for an order of mandamus compelling the 5th Defendant/Respondent herein to open registers for land parcels numbers Gilgil/Gilgil block 1/9563 to 9570 (Kekopey) clearly indicates that the 1st to 3rd Defendants herein had been dispossessed of their ownership of the subject land and were on a mission to recover ownership through the review application wherein they succeeded by failing to disclose of the existence of contest of ownership.
108. The Plaintiffs submit that it is upon the ruling being delivered in their favour on 28th February, 2022 in Nakuru JR E002 of 2021 that the 1st to 3rd Defendants attempted to dispossess the Plaintiffs herein by being issued with a title specifically for Gilgil/Gilgil Block 1/9565 in 2023. They submit that the 1st to 3rd Defendants cannot therefore seek refuge in section 7 of the *Limitation of Actions Act* as they have only attempted to dispossess the Plaintiffs herein in 2023 when they were issued with a title for parcel Gilgil/Gilgil Block 1/9565. They submit that as it can be evidenced from the documents on the court record, the Plaintiffs are already in possession of new titles as early as the year 2022 and therefore the period of limitation only started running from 2023 when the Defendants were partially able to disposes the Plaintiffs.
 109. The Plaintiff's rely on the judicial decision of Edward Moonge Lengasuranga v James Lanaiyara & another [2019] eKLR. They submit that the 1st to 3rd Defendants purport that their claim of ownership and adverse possession are incompatible and they further claim that as a result of restriction being removed in the month of February, 2020 then the limitation period has barely begun to ran.
 110. They Plaintiffs submit that they are individuals who purchased the suit land individually while others purchased through their respective groups. They submit that it can be ascertained from the titles produced by the Plaintiffs, not all the persons have been issued with titles and the said process of issuance of titles was affected by the decision issued in Nakuru JR No 2 of 2021.
 111. It is their submission that it is a result of the interference with the issuance of titles to all the Plaintiffs herein that some are seeking to assert their right of ownership by way of adverse possession while those in possession of titles are claiming beneficial ownership. They rely on the judicial decision of Public Trustee vs Wanduru. They submit that it is a fact which has been backed by the 4th Defendant that the Plaintiffs upon payment of the purchase price took possession in 1980 and therefore have been in peaceful possession of the suit land for over 12 years.
 112. They submit that there is a clear cause of action and/or actions in the suit before this court which is mainly on the contest of ownership of the parcel of land Gilgil/Gilgil Block 1/7413 (Kekopey) and it would be fair if all parties are allowed to ventilate the issues herein via viva voice evidence due to the complexity and sensitivity of the matters raised herein. They rely on the judicial decision of Zipporah Njoki Kangara v Rock and Pure Limited & 3 others [2021] eKLR in support of this point.
 113. The Plaintiffs submit that the applicants in prayer 4 raised the question of who is the registered proprietor of land title numbers Gilgil/gilgil Block 1/7413, 9563-9570 is. They submit that in prayer 5 they argue that a claim for adverse possession cannot go hand in hand with that of claim of ownership by purchase. The Plaintiffs submit that in prayer 6, they say a cause of action for adverse possession has not been disclosed. They submit that these are issues to be argued in a normal manner as they are based on facts and not law. To buttress this point, they rely on the judicial decision of Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696.
 114. The Plaintiffs submit that the Applicants are necessary parties in this suit as they have raised the issue of fraud on the part of the Applicants when they sought to be registered as proprietors of the suit land. They submit that it cannot be said that the Plaintiffs suit does not raise any cause of action. They submit that the issues raised in the pleadings can only be determined at a full trial.



115. They submit that they have a cause of action as against the Applicants in this matter and that this suit is not a non-starter in its wording or on the face of record. They submit that they are aggrieved by the actions of the Applicants herein and pray that in the interest of justice, this suit be heard and finalized. Reliance is placed on Order 2, Rule 15 of the Civil Procedure Rules.
116. The Plaintiffs submit that their suit is merited and should not be stuck off at the preliminary stage. They rely on the judicial decisions of DT Dobie & Co (K) Ltd vs Muchina, [1982] KLR and Crescent Construction Co Ltd v Delphis Bank Limited, [2007] eKLR.
117. The Plaintiffs submit that their suit is neither time barred nor res judicata. They pray that the Application dated 25th September, 2023 be dismissed with costs to the Plaintiffs/Respondents.

Analysis and Determination.

118. I have considered the application, the affidavits in support of the replying affidavit and submissions filed.
119. In my view, the questions that arise for determination are:
 - a. Whether the Plaintiffs suit is res judicata?
 - b. Whether the Plaintiffs suit is time barred under section 7 and 8 of the Limitations of Actions act?
 - c. Whether the Applicants are entitled to the other orders sought in the Notice of Motion Application?
 - d. Who should bear the cost of this Application?

A. Whether the Plaintiffs' suit is res- judicata?

120. The Applicants have moved this court under provisions of Order 2 rule 15 (1) (a), (b) and (d) of the Civil Procedure Rules and Section 7 of the *Civil Procedure Act*.
121. Section 7 of the *Civil Procedure Act* provides:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

122. Order 2 rule 15 (1) (a), (b), (c) and (d) of the Civil Procedure Rules provides as follows:

“At any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that-

- a. it discloses no reasonable cause of action or defence in law; or
- b. it is scandalous, frivolous or vexatious; or
- c. it may prejudice, embarrass or delay the fair trial of the action; or
- d. It is otherwise an abuse of the process of the court.”



123. It is the Applicants contention that in the Plaintiffs amended plaint filed on 26th June, 2023, prayers numbers g, h and j for restoration of the 5th Defendant's decision to nullify and cancel the titles of land parcel numbers Gilgil/Gilgil block 1/9563 to 9570 (Kekopey) and the 6th defendant's decision to cancel the parcels from the R.I.M are res judicata and the court lacks jurisdiction to entertain the prayers.
124. The Applicants also contend that the Plaintiffs pleadings and prayers regarding the propriety of the proceedings and judgement in Nakuru ELC case No 407 of 2017 are res judicata and the court lacks jurisdiction.
125. The Plaintiffs/Respondents on the other hand state that their suit is not res judicata as they were not parties in Nakuru ELC Case number 407 of 2017 and Nakuru Judicial Review Case No. E002 of 2021. They state that the claims in Nakuru ELC Case Number 407 of 2017 of 2017 and Nakuru Judicial Review Case No E002 of 2021 are different and the issues raised in the suit herein have not been heard and no final decision has been made on the cause of action sought herein.
126. In the judicial decision of Christopher Kenyariri v Salama Beach (2017) eKLR, the court clearly stated the elements to be satisfied to sustain a defence of res judicata are as follows:
- “...the following elements must be satisfied...in conjunctive terms;
- a. The suit or issue was directly and substantially in issue in the former suit.
 - b. Former suit is between same parties or parties under whom they or any of them claim.
 - c. Those parties are litigating under the same title.
 - d. The issue was heard and finally determined.
 - e. The court was competent to try the subsequent suit in which the suit is raised.”
127. The Applicants claim for resjudicata is premised on the suit Nakuru ELC No. 407 of 2017. This is read from ground no. 2 on the face of the application. The Applicants claim that the Plaintiffs claim of fraudulent transfer ought to have been raised in that suit as they represented the members of the Naivasha Uiguano Group. I have perused the ruling in Nakuru ELC No. 407 of 2017. The questions for determination as framed by the Learned Judge were:
- a. Whether the court should revoke the appointment of the defendants therein as trustees for the beneficial owners of land parcel number Gilgil/Gilgil Block 1/9565 (Kekopey) registered in the name of the defendants as trustees,
 - b. Whether the court should appoint the Plaintiffs therein, the current office bearers of the group as trustees in place of the Defendants and
 - c. Whether the court should order or direct the Naivasha Land Registrar to register the newly appointed trustees as holders in trust of the group's parcel of land knows as Gilgil/Gilgil Block 1/9565 (Kekopey) in place of the defendants.
128. A consent was entered in the said suit which had the effect of determining the questions framed in the affirmative.
129. In the present suit the Plaintiffs (151 of them) are asserting their proprietary rights and seek a declaratory order that they are owners of land parcel Gilgil/Gilgil Block 1/7413 (Kekopey).
130. It is evident, therefore, that issue in dispute in Nakuru ELC No. 407 of 2017 (the former suit) and the instant suit are different and defence of res judicata cannot be sustained.



131. For what it's worth, I must also mention that I have interrogated the judgement in Judicial Review No. 2 OF 2021 (The former suit) and it is evident that the ex-parte applicants were seeking orders of certiorari, mandamus and prohibition which is distinct from the declaratory orders sought in this suit.
132. Secondly for a defence of resjudicata to be upheld, the applicant must prove that the former suit is between same parties or parties under whom they or any of them claim.

I have perused the cause titles in annexures GW1 and GW4. They are a judgment and ruling in the former suits. Again, it is evident that the parties are different in comparison to the instant suit that has 151 plaintiffs.

I further note that annexure GW2 is an application dated 19th April, 2023 filed in JR No. 2 of 2021 wherein three individuals i.e. Grace Wanjiru Nganga, Jeniffer Warina Miaraho and Jecinter Wangare Nyoike are described as suing as trustees of the members of Naivasha Uiguano Group. (They are the Applicants/ 1st, 2nd and 3rd Defendants herein). In that application, they sought among other orders that they be joined in the suit as an interested party. Annexure GW3 in the Applicants application is an order of the court issued on 18th November, 2022. The order states:

“That the Notice of Motion dated 19/4/2022 lacks merit and it is hereby dismissed with costs to the exparte applicants.”

133. It is thus clear that the Plaintiffs were not admitted as parties in the ELC JR CASE NO 2 OF 2021 and they were therefore not parties. On this second point the claim of res judicata fails.
134. The third requirement is that the parties must be litigating under the same title. This requirement is related to the second. In the present suit the Plaintiffs are suing in their personal capacity while in the former suits, they are suing as trustees of Naivasha Uiguano Group.
135. The former suits were heard and finally determined by this court but the questions for determination, as can be read from the preceding paragraphs, are distinct from the questions in this suit.

B. Whether the Plaintiffs suit is time barred under section 7 and 8 of the Limitations of Actions act?

136. The Applicants claim that the Plaintiffs aver that in the year 2008, they learned that Elias Ngugi Nganga And Grace Nduto Theuri had fraudulently registered themselves as proprietors of land parcel no Gilgil/Gilgil block 1/7413 (Kekopey) and the following year sub-divided the parcel into eight parcels. The Applicants state that this claim on fraud should have been lodged within the period prescribed by the *Limitation of Actions Act*. It is their submission that this suit is time barred.

137. Section 7 of the *Limitation 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.

138. Section 8 of the *Limitation of Actions Act* provides:

An action may not be brought, and distress may not be made, to recover arrears of rent, or damages in respect thereof, after the end of six years from the date on which the arrears became due.



139. The Plaintiffs on the other hand claim that the suit imputes fraud on the part of the Defendants and that their fraudulent acts were discovered in the year 2020 and as such the claim is not barred by the statute of limitation.

140. I have interrogated paragraph 23 of the Amended Plaint dated 23rd June, 2023. The Plaintiffs aver as follows:

“That on or about the year 2020 or thereabout, Plaintiffs’ leaders and/or trustees were summoned to the 5th Defendant’s office where they met with 1st to 3rd Defendants who were alleging ownership of one of the illegal portions of land, Gilgil/Gilgil Block 1/9565 in which they claimed to have been awarded by the court after filing a case, Nakuru ELC No 407 of 2017 (Grace Wanjiru Ng’ang’a & 2 others v Elias Ngugi N’gang’a & another [2020] eKLR.”

141. In the judicial decision 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’.

142. In Justus Tureti Obara v Peter Koipeitai Nengisoi (2014) eKLR the court held that the inquiry as to when discovery of fraud is made is a matter to be ascertained at the trial.

143. Further in Sichuan Huashi Enterprises Corp. Limited v Micheal Misiko Muhindi [2019] eKLR at paragraph 13 and 14 it was stated as follows:

The law as I understand it is that the defence of limitation of time is a matter for determination at the trial; it cannot be dealt with in a summary manner or at preliminary stage or as a preliminary objection. The court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial. (Emphasis Mine) On this see the case of Oruta & Another vs. Nyamato [1998] KLR 590, where the court held that limitation of action:-

”... could only be queried at the trial but not by... a preliminary objection... The appellant could raise the objection at the trial and the trial judge would have to deal with the matter on the evidence to be adduced at the trial”

See also the case of Divecon Ltd vs Shirinkhanu S. Samani Civil Appeal No. 142 Of 1997, where the court quoted with approval the words of Gachuhi, J.A., the leading judge in the Oruta case (ibid) that:

‘It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the Limitation of Actions Act...’

144. I find that the question of limitation of actions should not be raised as a preliminary issue and/ or should not be dealt with summarily for the reason that it requires interrogation of evidence.

C. Whether the Applicants are entitled to the other orders sought in the Notice of Motion Application?

145. The Applicants also prays that the court grants the following orders:



4. That the applicants are not the registered proprietors of land parcel no's Gilgil/Gilgil block 1/7413, 9563, 9564, 9566, 9567, 9568, 9569 and 9570 (Kekopey) and therefore not necessary parties in litigation over the parcels and the aforesaid claims as against them be struck off.
 5. That the plaintiff's claim to be entitled to parts of land parcel Gilgil/Gilgil block 1/7413 (Kekopey) which is owned by Naivasha Uiguano Group on the ground of adverse possession is not compatible with their main claim of ownership by purchase through the same group and the claim be struck off.
 6. That the Plaintiffs have not shown they have dispossessed the registered proprietors for the period prescribed by law and have not disclosed a cause of action for adverse possession.
 7. That the suit is about alleged misdeeds of Elias Ngugi Nganga And Grace Nduta Theuri and the 1st, 2nd and 3rd defendants are not necessary parties in the matter.
 6. That the plaintiff's entire suit is otherwise an abuse of the process of the court and be struck off in its entirety.
 7. That the plaintiff's bear the costs of the suit.
146. My view is that these orders if granted would be tantamount to determining the suit at an interlocutory stage. They comprise of questions of fact which can only be resolved after hearing witnessed and interrogating documents. The plaintiffs allege fraud on the 1st, 2nd and 3rd Defendants in respect of the suit parcels. They then seek orders against them. They are therefore necessary parties to this suit.
147. In respect of prayer number 5 and 6 of the Application, in *Virginia Wanjiku Mwangi v David Mwangi Jotham Kamau* [2013] eKLR it was held thus;
- “The Applicants claim is based on principles of adverse possession whose import is that any person who claims to be entitled to land by adverse possession must prove possession of the land exclusively and openly as of right and without interruption for a period of 12 years, Adverse possession requires basic conditions being met to perfect the title of the adverse part.”
148. Proof of adverse possession can only happen during a trial and this further restates that prayers (5) and (6) cannot be granted at an interlocutory stage and doing so cannot be in the interest of justice.

D. Who should bear the cost of this Application?

149. On the question of costs of the application, the general rule is that cost shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court for good reason, directs otherwise.

Disposition.

150. Consequently, I find as follows:
- a. The 1st, 2nd and 3rd Defendants/Applicants application dated 25th September, 2023 lacks merit and is hereby dismissed.
 - b. The costs of the application shall abide the outcome of the suit.
151. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 2nd DAY OF MAY, 2024.



L. A. OMOLLO

JUDGE

In the presence of: -

No appearance for the 1st, 2nd and 3rd Defendants/Applicants.

Mr. Mbugua for Gachango for the Plaintiffs/ Respondents.

No appearance for the 4th Defendant/Respondent.

No appearance for the 5th Defendant.

No appearance for 6th Defendant.

No appearance for 7th Defendant.

Court Assistant; Mr. Joseph Makori.

