



**Magere v Magere (Environment & Land Case E014 of 2023)
[2024] KEELC 5312 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5312 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE E014 OF 2023**

**FO NYAGAKA, J
JULY 11, 2024**

BETWEEN

SAMSON OKEYO MAGERE PLAINTIFF

AND

DAVID OGERO MAGERE DEFENDANT

RULING

(On a Preliminary Objection on limitation of time)

1. By a Complaint dated 30/07/2023 and verified by an Affidavit sworn by the Plaintiff on the same date the Plaintiff sued the Defendant who is his step brother, over ownership of two parcels of land situate in Trans Nzoia. Briefly, his claim was that he, the Plaintiff, was the Administrator of the Estate of their late father, one Astariko Magere who died in the year 2010. His further claim was that the deceased father owned a number of properties including three, one of which was ancestral and situate in the ancestral home in Gusii. The other two were, Kwanza/Namanjalala/Buk 1/Goseta/12 measuring approximately 2.992 Ha and the other being Kwanza/Namanjalala/ Buk 1/Goseta/162 measuring approximately 0.6475 Ha.
2. He averred further that before his death, the late father discovered in the year 2005 that the Defendant had fraudulently registered himself as owner of the two parcels of land in Trans Nzoia after the title documents went missing from his father's home. The father, before dying, followed up with the Land Registry in Kitale and discovered the issue of fraud. He put a restriction on the land. He called a family meeting and in it he was treated roughly. After a while the father died of hypertension in 2010. He stated that the transfer of the land to the Defendant's name was fraudulent. He particularized the fraud at paragraph 13 of the Complaint before giving particulars of loss in paragraph 14. He prayed for a number of reliefs including a declaration that he, being the duly appointed administrator of the estate of the deceased father is the legal owner of the two parcels in issue; an order of rectification of title in respect of the suit land known as Kwanza/Namanjalala/ Buk 1/Goseta/12 measuring approximately 2.992



Ha; a permanent injunction restraining the Defendant from entering, fencing, selling, transferring and or in any way dealing in the suit parcel number Kwanza/Namanjalala/ Buk 1/Goseta/12 measuring approximately 2.992 Ha; an order of eviction of the Defendant from the suit lands; an order for rectification of the register and lifting of the restriction over the land parcels; an order directing that the two parcels of land be subject of the succession proceedings in respect of the estate of the deceased father; damages for trespass; mesne profits; exemplary damages and costs of the suit.

3. The Defendant filed a Defence in which he denied that he was not female as described in the Plaint. Briefly, he denied the Plaintiff's claim and averred that the two parcels of land being the subject herein were acquired solely by the efforts of his late mother, one Sarah Kwamboka who was the first wife of the deceased father. She acquired the parcels solely before she died in 1979. The deceased father later distributed his properties in 1988 and specifically stated that the two parcels belonged to the first house while the second house had no stake in them. Further, that vide a meeting held on 02/05/2005 the meeting resolved that the two parcels belonged to the children of the first house being of the late Sarah Kwamboka. He stated that the restriction put on the parcels by the late father was done with intimidation and undue influence by both the Plaintiff and his mother Prisca Moraa Ayienda. He then pleaded that the suit was incompetent and time barred and improperly before the Court by virtue of Section 4(2) of the *Limitation of Actions Act*.
4. After that the Defendant raised a Preliminary Objection to the entire suit. It was dated 11/04/2024. The grounds were that the Plaintiff's claim was incompetent and time barred by virtue of Section 4(2) of the *Limitation of Actions Act*. That the original owner of the land, one Astariko Magere Gechino became aware of the fraud by 08/08/2005 when he complained to the Land Registrar but did not act within three years as provided by law, and he died on 06/08/2010. The suit having been brought on 20/07/2024 was thus out of time for over a period of 13 years.
5. The Preliminary Objection was disposed of by way of written submissions. The Defendant filed his dated 09/05/2024 while the Plaintiff filed his dated 25/04/2024. Both parties' submissions were quite extensive, and I have carefully considered them. I will infuse them into my analysis of the preliminary objection.
6. I begin by bringing out the meaning of a Preliminary Objection so that I lay the basis as to whether the instant objection fits it, that is to say, whether it is a Preliminary Objection properly so called. A Preliminary Objection was defined by the seminal case of *Mukbisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, wherein Sir Charles Newbold defined it as follows:

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

7. In *Bashir Haji Abdullahi v Adan Mohammed Noor & 3 Others* [2004] eKLR, the same Court held that:

“We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other



side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”

8. Also, in *Susan Wairimu Ndiangui v Pauline W. Thuo & Another* [2005] eKLR, Musinga J as he then was held as follows:-

“a preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”

9. It is clear that a Preliminary Objection arises on a point of law only, and a deduction of this ought to flow directly from the parties’ pleadings which then is compared with the law. Anything that involves an inquiry into facts or the need to clarify the point through an assessment or audit of facts will mean that the Court is being called upon to examine the factual merits of point. Facts would have to require proof and their veracity or otherwise will have to be tested through proof as laid down in the law of evidence. It will necessitate a hearing on merits. That means the argument will cease to be a point of law.
10. In my view, the point raised by the Defendant can be discernible from the pleadings and therefore it is one which qualifies as a preliminary point of law which this Court ought to consider.
11. In the instant case, the Defendant argues, through his submissions, that this suit having been founded on fraud, and the alleged fraud having been pleaded as having been known in 2005 yet the suit was brought on 17/10/2023 it means that the claim is time barred in terms of Section 4(2) of the *Limitation of Actions Act*. The Defendant argued further that from 08/08/2005 when the alleged owner of the suit lands discovered the fraud at the Land Registrar’s office when he went there, he ought to have acted before time ran out. He argued that Section 26 of the *Limitation of Actions Act* provides that where a period of limitation is prescribed and is based on either fraud of the defendant or his agent or the right of action is concealed by the fraud of any such person as aforesaid, or the due to a mistake, the time of limitation does not run until the Plaintiff has discovered the fraud or mistake or could have with reasonable diligence have discovered it.
12. He then relied on Section 7 of the Act which bars an action for recovery of land if brought after 12 years. He relied on the case of *IGA v. Makerere University* [1972] EA 65 wherein Law Ag. VP stated that a suit brought after the expiry of the period of limitation must be rejected. Also, he relied on the case of *Gathoni v Kenya cooperative Creameries* [1982] KLR, 104; *Bosire Ogero v Royal Media Services* [2015] eKLR and *Beatrice Wambui Kiarie v. Beatrice Wambui Kiarie & 9 Others* [2018] eKLR.
13. The Plaintiff thinks not. He argues that he too relied on the case of *Mukisa Biscuits* (supra) and Sections 7 and 26 of the *Act*. He argued that no succession was ever done to have the land registered in the Defendant’s name.
14. However, this Court notes that the land was allegedly registered in the name of the Defendant during the lifetime of the deceased father. That is why as per the Plaintiff, the father complained of the loss of the documents by 2005 and in that year, he even summons the elders and community who held a meeting to resolve the issue. By that time, he was alive hence there was no need for succession proceedings to be taken out. Succession proceedings ordinarily lie when the owner of a property dies either testate or intestate. In the instant case there was no need of such.



15. The Plaintiff argued that even though the fraud was discovered by the late father before he died, he (Plaintiff) had only recently been appointed as administrator of the estate of the father. He argued that for that reason it behoves him to bring suit. He relied in the case of *Ratilal Godhambhai Patel v Lalji Makanji* [1957] EA 314 where the Court stated that fraud has to do with everything with one's state of mind.
16. He also relied on the case of *Justus Tureti Obara v Peter Koipetitai Nengisoi* [2014] eKLR where the judge held that when considering Section 26 of the Act regarding when the fraud was discovered it was a fact that could only be ascertained at the trial and that where fraud is alleged the suit should be set down for hearing.
17. In my humble view, the two authorities are distinguishable from the instant case in the following way. In the first decision (the Ratilal case), the Court had no issue regarding fraud constituting the state of one's mind. Indeed, it does constitute it. It is not in dispute that the allegations are that the Defendant committed fraud and that had to do with his state of mind. Further, the discovery of the same has too to do with the state of mind. The father of the parties herein was aware of the alleged fraud in 2005. That too constitutes a state of mind.
18. Regarding the latter decision, the issue was that the parties did not plead expressly when the fraud was discovered though the Plaintiff pleaded it. Therefore, the judge was right to conclude that where such an allegation was made, it had to be proved at the hearing when it was discovered. Contrary to the instant case, the Plaintiff is clear in his pleadings when and how the father discovered the fraud and the step he took to resolve the issue: that was done in 2005 but he did not file suit then until the Plaintiff has filed it on 17/10/2023.
19. He also relied on Section 80 of the *Land Registration Act* about the rectification of the register and the knowledge of fraud or mistake. He relied on *Athi Highway Developers Limited v West End Butchery Limited & 6 others* [2-15] eKLR and *Kenya Anti-Corruption Commission v Online Enterprise Limited*, Kisumu ELC No 708 of 2015 (sic).
20. I have carefully considered the argument by the Plaintiff on the remaining issues he raised. They are not relevant to the Preliminary Objection hence no need to analyse them now. Thus, the issue is whether the suit is time-barred or not. Section 4(2) of the *Limitation of Actions Act* provides for limitation of actions based on contract, tort and other aspects. But the instant suit does not allege that there was a contract between the Defendant and his deceased father. This suit is based on the averment that the Defendant is alleged to have committed fraud.
21. Section 26(1) of the *Act* provides that:
 - “Where, in the case of an action for which a period of limitation is prescribed, either-
 - (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
 - (b) the right of action is concealed by the fraud of any such person as aforesaid; or
 - (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”
22. . The Plaintiff's father 'discovered' or became aware of the alleged fraud in 2005. As a result, he even placed a restriction on the parcels. As to whether the registration of the restriction was due to



coercion or undue influence, it is a matter of conjecture and neither here nor there for purposes of the determination of the Preliminary Objection. He never sued for the reversal of the alleged fraud, Thus, time started running from the date of discovery of the fraud. Which date was that? Although the Plaintiff does not specifically state the date, it was in the year 2005. It was upon that that he placed a restriction on the suit lands. It was on 08/08/2005.

23. In terms of the law, time for suing on the fraud began to run on that date and ended after the period stipulated by law. By that date no suit had been filed, more so the instant one, and it was not until 30/11/2023 when the Plaintiffs moved the court. It was way beyond the period. Thus, in my view, and I agree with the Defendant, the period of limitation ended almost 13 years ago. This suit is statute barred and it is incompetent. It must and is hereby struck out in entirety. Since the parties are brothers, for the same of promoting family harmony and unity in the social fabric, each party is to bear own costs of the suit.
23. Let the parties bury the hatchet and move on with life. They are sons of the same father, and more so of the One in heaven. I hope they have “heard” this voice.
24. Orders accordingly

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA TEAMS PLATFORM THIS 11TH DAY OF JULY, 2024.

HON. DR. IUR F. NYAGAKA

JUDGE, ELC KITALE

In the presence of:

Ms V. Mong'are for rh Plaintiff.

Ms. Nafula.for the Defendant

