



Konde (Suing for and on behalf of the Estate of Mbogo Konde Tuva (Deceased) v Charo & another (Environment & Land Case 83 of 2018) [2023] KEELC 517 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KEELC 517 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 83 OF 2018
MAO ODENY, J
FEBRUARY 3, 2023**

BETWEEN

KARISA MBOGO KONDE (SUING FOR AND ON BEHALF OF THE ESTATE OF MBOGO KONDE TUVA (DECEASED) PLAINTIFF

AND

KANG'OMBE JOHN CHARO 1ST DEFENDANT

ELIZA NYAKERARIO OSORO 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated 11th April 2018 the Plaintiff herein sued the Defendants jointly and severally seeking the following orders: -
 - a) A permanent injunction order restraining the defendants, their servants, agents and anyone deriving authority from the defendants restraining them from trespassing encroaching and entering into ½ the undivided share of plot number Kilifi/Ngerenyi/1492 and from cutting down trees thereon, from dealing with this part of the land in any way.
 - b) Revocation of title deed plot number Kilifi/Ngerenyi/1492 and a declaration that the half undivided share of this land belongs to the late Mbogo Konde Tuva
 - c) Costs
 - d) Interest
 - e) Any other or further relief this court may grant



Plaintiffs'case

2. The brief facts of the case are that sometime in the year 1963, the Plaintiff's late father one Mbogo Konde Tuva together with his two brothers settled in different parcels of land bordering each other. That the Plaintiff's father gave his brother his personal details for registration of the suit property who instead registered the suit property in his name (John Charo Konde).
3. PW1 Karisa Mbogo Konde adopted his witness statement dated 11th April 2018 and produced documents as per the list of documents and stated that his late father was a businessman who travelled a lot.
4. PW1 testified that his late father gave his brother his National Identity card so that he could be registered as an owner of the suit property but when the Adjudication officers came, it was registered in the name of John Charo. PW1 further stated that when his father discovered the registration he was prevailed upon by elders to subdivide the land into 2 in 1967 and each person utilized their portion of land.
5. It was PW1's evidence that his father died in 1992 and John Charo in 2010 respectively and further told the court that the 1st Defendant who is the 4th wife of John Charo obtained a grant of Letters of Administration and processed a title deed without their consent and sold the entire piece of land to the 2nd Defendant.
6. PW2 Onesmus Kahindi, PW3, Mycle Kalume Wanje, PW4 Kahindi Katana adopted their witness statements and corroborated the evidence of PW1 who stated that the late John Charo subdivided the plot into 2 portions whereby he took one and the brother took the other portion

Defendants'case

7. DW1 Kango'mbe John Charo Konde adopted her witness statement dated 3rd September 2021 as her evidence and produced the documents in the list of documents as exhibits. She stated that she is the wife of the late John Charo Konde and that they resided on the property Kilifi/Ngerenyi/632 whereby he was the registered proprietor.
8. DW1 further stated that upon the demise of John Charo Konde, she proceeded to lodge succession proceedings vide Kilifi Succession Cause No. 48 of 2011 in respect of the administration of the Estate of John Charo Konde (Deceased) where a certificate of grant of administration was issued on 12th September 2013.
9. DW1 stated that on 18th September 2013, she executed the Transfer by Personal Representative to Person Entitled under a Will or on an Intestacy and Application to be Registered as Proprietor by Transmission and the same was registered on 2nd October 2013 whereby a Title Deed was subsequently issued on 2nd October 2013 to DW1.
10. It was DW1's further testimony that she proceeded to subdivide and dispose of portions of the property to several purchasers including the 2nd Defendant who paid the purchase price.
11. That the suit property Kilifi/Ngerenyi/632 was subdivided in property Kilifi/Ngerenyi/1430 and Kilifi/Ngerenyi/1431. Property Kilifi/Ngerenyi/1430 was further subdivided into other portions including the suit property Kilifi/Ngerenyi/1492 which came into existence sometime on or about 14th December 2017 with the Title Deed issued in favour of the 2nd Defendant.



12. DW2 Eliza Nyakerario Osoro adopted her witness statement dated 3/9/2021 as her evidence as produced as exhibits a list of documents as per the list of documents dated 1/9/21. She stated that she bought 4 acres of the suit plot from Kang'ombe Charo but transferred 28 portions of 50X100 thus the Plaintiff has no right to claim the suit land.
13. DW3 Irene Dama John adopted her witness statement dated 3/9/21 as her evidence and told the court that the 1st Defendant is her mother and the late John Charo Konde was her father. She testified that they sold the land to 4 different people as the land belonged to them.

Plaintiff's Submissions

14. Counsel submitted that the 1st Defendant obtained the title fraudulently and ought to be cancelled. Counsel relied on the case of *Elijah Makori Nyang'wara v Stephen Mungai Njunguna & Another* [2013] eKLR.

Defendants' submissions

15. Counsel identified the following issues for determination: -
 - a) Whether the Plaintiff's cause of action is time barred;
 - b) Whether the 1st Defendant had legal proprietary rights over Property Kilifi/Ngerenyi/632 and the suit property Kilifi/Ngerenyi/1492;
 - c) Whether the 1st Defendant had capacity to pass good title to the 2nd Defendant in respect of property Kilifi/Ngerenyi/1492;
 - d) Whether the 2nd Defendant has proprietary rights over the suit property Kilifi/Ngerenyi/1492;
 - e) Whether the Plaintiff has any claim in respect of the suit property;
 - f) Whether the Plaintiff has proved the allegations of fraud against the Defendants.
16. On the issue whether the Plaintiff's cause of action is time barred, counsel submitted that the Plaintiff's cause of action is founded on allegations of fraud that allegedly took place sometime in 1963 which the Plaintiff confirms that his late father was aware of.
17. Counsel stated that from 1963 to the institution of the instant suit, 55 years have lapsed and the Plaintiff failed to address the matter within the stipulated period in law and there is no explanation for the delay nor was there leave sought.
18. Further that Mbogo Konde Tuva had a period from 1963 to his demise in 1998 to address his grievance which amounts to thirty-five (35) years. The period from the Plaintiff's father's [1998] and institution of the suit [2018] tabulates to twenty (20) years.
19. Counsel relied on the cases of *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR and *Gathoni v Kenya Co-operative Creameries Ltd* [1982] eKLR on jurisdiction and urged the court to strike out the case for being time barred.
20. Counsel similarly submitted that 1st Defendant was the wife of the late John Charo Konde who lodged Succession proceedings in Kilifi Succession Cause No. 48 of 2011 in respect of the administration of the estate of her late husband and procedurally acquired the estate of her late husband including the



suit land thus the Plaintiff has no claim over the suit land and cited the case of *Joseph K. Arap Ng'ok v Moijo Ole Keiwua & 4 Others* [1997] eKLR.

21. Counsel for the 1st and 2nd Defendant submitted that the 1st Defendant legally acquired ownership of the suit property and had capacity to pass good title to the 2nd Defendant. Further, that parties are bound by their pleadings and the Plaintiff has not adduced any documentary evidence to support his claim.
22. Counsel relied on the cases of *Galaxy Paints Company Ltd v Falcon Guards Ltd* [2000] eKLR and *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others* [2014] eKLR.
23. In addition, counsel submitted that the Plaintiff has laid allegations of fraud which have not been proved and relied on the case of *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR and Ahmed Mohammed Noor v Abdi Aziz Osman [2019] eKLR.

Analysis And Determination

24. The issue for determination are whether this suit is time barred, whether the Plaintiff has proved fraud and whether the Plaintiff is entitled to the reliefs sought.
25. 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 or, if it first accrued to some person through whom he claims, to that person.”
26. The purpose of the Law of Limitation was stated in the case of *Mehra v Shah* [1965] E.A 321, as follows;

“The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”
27. In this case the action accrued in 1963 as per the pleadings and the evidence of the parties. This means that this suit was instituted 55 years from the date when the action accrued. The Plaintiff's late father had time to address his grievance with the brother from 1963 to the time of his demise but never took any action by the time of his demise the action was already time barred.
28. Section 26 of the *Limitation of Actions Act* provides as follows;

Where, in the case of an action for which a period of limitation is prescribed, either—

 - a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
 - b) the right of action is concealed by the fraud of any such person as aforesaid; or
 - c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:



29. It is trite law that time does not run where an action is based on fraud, until the Plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered as was held in the case of *Justus Tureti Obara v Peter Koipeitai* [2014] eKLR where the court held that; -

“I am in agreement with the Plaintiff’s submission that the Plaintiff’s claim is for the recovery of the suit property from the Defendant and as such the limitation period for such a claim is 12 years as provided for in section 7 of the *Limitation of Actions Act*, Cap. 22, Laws of Kenya. I would wish to point out further that the Plaintiff’s case although for recovery of land is based on fraud. The proviso to section 26 (a) of the *Limitation of Actions Act*, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the Defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the Defendant is a matter to be ascertained at the trial.”

30. In the instant suit, the alleged fraud is stated to have taken place at around 1963 when the Plaintiff’s father was still alive. The Plaintiff’s father is said to have passed on in the year 1992. The Plaintiff did not demonstrate why the alleged fraud was never challenged even during the lifetime of his father. No leave was sought to file the suit out of time or even explanation as to why the same was filed out of time. In the circumstance the only conclusion is that this suit is time barred.

30. Having found that the suit is time barred there would be no need of looking into the issue whether the Plaintiff has proved fraud or whether he is entitled to the suit property. Had the court gone into the issues, it does not add up why the Plaintiff did not take action if what he wants the court to believe that they were allocated the land together, stayed in two different portions which he subdivided upon being prevailed upon by elders and never processed a title for his portion during his life time.

30. The upshot is that the Plaintiffs’ suit is dismissed with costs to the Defendants.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF FEBRUARY, 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

