



REPUBLIC OF KENYA



**Wairera v Nderitu & 2 others (Environment & Land Case
272 of 2014) [2023] KEELC 17207 (KLR) (8 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17207 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 272 OF 2014**

JO OLOLA, J

MAY 8, 2023

BETWEEN

PETER MAHUGU WAIRERA PLAINTIFF

AND

NAOMI WANJIKU NDERITU 1ST DEFENDANT

SCHOLASTICA WAIRIMU MUGO 2ND DEFENDANT

JANE WANGECHI WARIARI 3RD DEFENDANT

RULING

1. By his Complaint dated May 11, 2009 as amended on April 27, 2019, Peter Mahugu Wairera (the Plaintiff) prays for Judgment against the Defendants jointly and severally for:
 - (a) An order that the register and certificate of lease in respect of L R No Nyeri Municipality/Block III/141 be rectified by cancelling the names of Hiram Ndung'u Ng'ayu, Naomi Wanjiku Nderitu and Mathew Nderitu Rubia and all entries in the register relating to proprietorship from August 18, 2005 to date and reinstating that of the Plaintiff, Peter Mahugu as the owner of the suit land;
 - (b) In the alternative but without prejudice, an order directed at the Defendants, jointly and severally, to pay to the Plaintiff the monetary equivalent of the suit land as at the date of Judgment, damages for conversion plus interest, plus costs;
 - (c) General damages plus interest;
 - (d) Costs of this suit plus interest; and
 - (e) Any other or further relief as this Honourable Court may deem fit and just to grant.



2. Those prayers arise from the Plaintiff's contention that he was until August 18, 2005 the registered proprietor as lessee of all that parcel of land known as Nyeri Municipality/Block III/141. It is the Plaintiff's case that on the said August 18, 2005, one Mathew Nderitu Rubia fraudulently caused himself to be registered as the proprietor of the said parcel of land thereby converting the same.
3. The Plaintiff avers that he reported, the crime to the Police and investigations were started but the said Mathew Nderitu Rubia passed away before he could be apprehended and arraigned in Court. On February 6, 2008, the 1st and 2nd Defendants who are his widows obtained a Grant of Letters of Administration intestate which Grant was confirmed on October 29, 2008 with the 1st Defendant being proclaimed as the beneficiary of the suit property.
4. The Plaintiff further avers that on November 28, 2008, the 1st Defendant transferred the suit property to herself and immediately on the same day, transferred the land to one Hiram Ndung'u Ng'ayu (now deceased). It is the Plaintiff's case that the 1st Defendant had no valid interest or property in the suit property and therefore had no title to pass to the said Hiram Ndung'u Ng'ayu whose estate is represented herein by the 3rd Defendant.
5. But in their joint Statement of Defence dated and filed herein on June 15, 2009, the 1st and 2nd Defendants deny that they have any capacity to be sued as done herein. The Defendants further deny the existence of any fraud as attributed to the late Mathew Nderitu Rubia and invite the Plaintiff to strict proof. It is the Defendant's case that the deceased was a purchaser for value of the suit property without any notice of any illegality and that his title to the property is indefeasible.
6. The 1st and 2nd Defendants further aver that they acquired the property pursuant to a valid Certificate of Confirmation of Grant and the Plaintiff having failed to contest the succession proceedings has no competent suit before the Court. They further aver that the transfer of the property to the 3rd Defendant was valid and that the 3rd Defendant's title is indefeasible.
7. The Defendants assert that this suit is an afterthought and aimed at an unjust enrichment of the Plaintiff. They aver that the suit is incompetent, an abuse of the Court process and that at an opportune time they shall raise a preliminary objection in respect thereof.
8. True to their word, by a Notice of Preliminary Objection dated October 31, 2022, the 1st and 2nd Defendants object to the suit and have urged the Court to strike it out on the grounds:
 - (a) That the Plaint as filed is time-barred in that it is based on the tort of fraud which ought to have been brought within three years after the date when the cause of action arose; and
 - (b) That the Plaintiff's suit is incurably defective and should be struck out.
9. Following directions issued herein, it was agreed that the said Preliminary Objection be disposed off by way of written submissions. I have accordingly carefully perused and considered the pleadings filed herein as well as the Preliminary Objection. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
10. By their submissions the Defendants assert that their objection is premised on Section 4 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya. It is the Defendant's case that the claim herein is based on a tort and that as per Section 4(2) of the said Act, no action can be brought more than 3 years from the date when the cause of action occurred. In that respect, the Defendants assert that the cause of action accrued on August 18, 2005 as stated at Paragraph 7 of the Amended Plaint and hence this action ought to have been instituted on or before August 18, 2008.



11. I have looked at the pleadings herein and more so the prayers made by the Plaintiff in the Amended Plaint dated April 27, 2019 and I was unable to see the basis upon which one could come to the conclusion that this is a claim in tort. Looking at the pleadings before the Court, it was clear to me that this is a claim for recovery of land. An action for recovery of land cannot be equated to a personal claim in tort whose remedy lies in recovery of damages.
12. As it were, this Court is duty bound to look at the facts and the remedy being sought in a claim. While it is indeed true that the Plaintiff pleads fraud, it was apparent that the fraud was pleaded as a facilitating element in how the land was allegedly taken from the Plaintiff. That on its own does not make a claim such as this to be considered as one based in tort. Indeed if that were the case, this suit would have been filed in an ordinary Civil Court and not in the Environment and Land Court.
13. From his pleadings herein, the Plaintiff prays for a rectification of the register in order to reflect his name as the proprietor of the suit property. The power to do so is given to this Court under Section 80(1) of the Land Registration Act, 2012, in the following terms:

“Subject to Sub-Section (2), the Court may order rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.” (Emphasis added).
14. That being the case, it was clear that the land law regime in this Country anticipates and recognize that land can be obtained by fraud. The mere fact that fraud is an element in the conversion of the land does not however make any resultant claim an action in tort.
15. While the Limitation of Actions Act makes provision for actions based on contract and tort under Section 4 thereof as submitted by the Plaintiff, an action for recovery of land is provided for under Section 7 of the Act which as opposed to Section 4 aforesaid is in the following terms:

“7. 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.”
16. The suit herein was initially instituted in May, 2009 at the High Court. Going by the Plaintiff’s contention that the cause of action arose on August 18, 2005, this suit was filed a mere four (4) years after the alleged cause of action occurred and not, after twelve (12) years as provided in law.
17. At any rate, I have looked at the Defendants pleadings and I was unable to see any defence of limitation raised therein. The Preliminary Objection was therefore clearly an afterthought being raised some 12 years after the suit was filed. It is misconceived and without any merit.
18. The Preliminary Objection is accordingly dismissed with costs to the Plaintiff.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 8TH DAY OF MAY, 2023:**

In the presence of

Ms Wothaya for the Plaintiff

No appearance for the Defendants

Court assistant - Kendi

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J O OLOLA
JUDGE

