



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC CASE NO. 54 OF 2015

CHEMITEI KANDAGORPLAINTIFF

VERSUS

JOB KIPNANDI CHEBON1ST DEFENDANT

CABINET SECRETARY MINISTRY OF LANDS.....2ND DEFENDANT

REGISTRAR OF LANDS BARINGO COUNTY3RD DEFENDANT

CHIEF SURVEYOR KABARNET.....4TH DEFENDANT

ATTORNEY GENERAL5TH DEFENDANT

RULING

This ruling is in respect of the 1st defendant’s Notice of Preliminary Objection dated 11th November, 2020 on the following points of law:

- a. That the suit against the 1st Defendant herein is time barred and the same ought to be struck out;
- b. That the suit against the 1st Defendant herein is filed in express violation of section 7 of the Limitation of Actions Act Chapter 22 of the Laws of Kenya and ought to be struck out.

The plaintiff/respondent opposed the objection and stated that a suit for recovery of land may be brought outside the 12-year period since the Plaintiff alleges fraud against the Defendants. That the fraud was discovered on 9th June, 2015 after the Plaintiff conducted a search at the registry and further that section 26 of the Limitation of Actions Act provides that time does not start running until the point when the Plaintiff discovers the fraud.

Counsel agreed to canvas the preliminary objection vide written submissions which were duly filed.

1ST DEFENDANT/APPLICANT’S SUBMISSIONS

Counsel for the 1st defendant submitted that the plaintiff’s cause of action is time barred since the title to the suit land was issued in 1989 and the plaintiff file this suit in 2015. The 1st Defendant relied on the contents of paragraph 10 of the Amended Plaintiff which states as follows:

10. The Plaintiff upon realizing the Defendant’s encroachment visited land registry to carry out search of the remaining portion known as BARINGO/KAPROPITA 606 and to the Plaintiff’s surprise discovered that the Defendant has unlawfully subdivided the land known as BARINGO/KAPROPITA 606 into two portions 706 to 705as per the mutation forms dated 23rd March, 1998 registered on 24th April, 1998.

Counsel therefore submitted that from the pleadings, it is clear that the Plaintiff’s claim against the 1st Defendant was brought after approximately Twenty-Six (26) years yet section 7 of the Limitation of Actions Act states that an action may not be brought by any person to recover land after the end of Twelve (12) years.

Mr. Mugambi relied on the case of **IGA V. MAKERERE UNIVERSITY CIVIL APPEAL NO. 51 OF 1971 (1972) EA 65** where the court held that:

“plaint which is barred by limitation is a plaintiff "barred by law". Reading these provisions together it seems clear to me that unless the Appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the court "shall reject" his claim. The Appellant was clearly out of time and despite an opportunity afforded him by the judge, he did not show what grounds of exemption he relied on, presumably because none existed. The Limitation Act does not extinguish a suit or action itself, but operates to bare the claim or remedy sought for, and when a suit is time- barred, the court cannot grant the remedy or relief."

LAW. Ag. V.P: at pg 67 of the said authority expressed himself thus: -

"An action founded in tort to recover damages in respect of personal injuries, such as the action the subject of this appeal, shall not be brought after the expiration of three years from the date on which the cause of action arose, see s.4(1) of the Limitation Act (Cap. 70). The Plaintiff in the action the subject of this appeal was filed on 26May 1971. The accident, the cause of action, occurred on 2nd September 1966. The action was accordingly brought more than 4 years and 8 months after the cause of action, and was barred by limitation. This was not appreciated when interlocutory judgement was entered in default of appearance, under 0.9, r.6 of the Civil Procedure Rules; but when the action came before MEAD, J. for assessment of damages, the Judge decided that the High Court had no jurisdiction to entertain the suit, that the interlocutory judgement was a nullity, and he dismissed the appellant's claim"

Further at page 68, the Learned Judge expressed himself as follows: -

This is the position here, clearly the Plaintiff should have been rejected. I have no doubt that s.4 of the Limitation Act and 0.7 of the Civil Procedure Rules must be read together. The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the Plaintiff, and no grounds of exemption are shown in the Plaintiff, the Plaintiff must be rejected. That is what I think the Judge meant when he held that the High Court had no jurisdiction to entertain the suit. His terminology may not have been exact, but he arrived at the right result. For these reasons I agree with MUSTAFA, J.A. that this appeal fails, and should be dismissed with costs, and it is ordered accordingly'

Counsel also relied on the case of **HARON ONYANCHA V NATIONAL POLICE SERVICE COMMISSION & ANOTHER [2017] eKLR** and **NAIROBI CIVIL APPEAL NO. 64 OF 1984 KENYA CARGO HANDLING SERVICES LTD V. DAVID UGWANG** on the issue of limitation of actions.

The Court of Appeal in the case of **GATHONI V KENYA CO-OPERATIVE CREAMERIES LTD [1982] eKLR** correctly pronounced itself as follows:

“The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done”.

Counsel therefore urged the court to strike out the suit with costs.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff opposed the preliminary objection on the ground that the plaintiff discovered the fraud on 9th June 2015 after conducting an official search and submitted that section 26 of the Limitation of Actions Act provides that time does not start running until the point when the Plaintiff discovers the fraud.

Counsel relied on the case of **JUSTUS TURETI OBARA V PETER KOIPEITAI NENGISOI [2014] eKLR** where Okon'go J. held 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.

Counsel therefore urged the court to find that the preliminary objection lacks merit and be dismissed with costs to the plaintiff.

ANALYSIS AND DETERMINATION

The issue for determination is whether the preliminary objection on the plaintiff's suit being time barred has merit. From the pleadings it is clear that the plaintiff has raised an issue of fraud which he allegedly discovered on 9th June 2015 upon conducting an official search at the Land registry. It is also on record that the plaintiff thereafter filed the current suit in 2015.

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.

It is indeed trite that a claim founded on recovery of land should be filed within a period of 12 years' failure to which it is time barred. However, section 26 of the same Act provides that:

26. Extension of limitation period in case of fraud or mistake 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.

The Supreme Court in the case of **KENYA PORTS AUTHORITY VS TIMBERLAND(K) LTD [2017] eKLR** upheld the view that where an action is based on fraud the period of limitation prescribed does not begin to run until the plaintiff discovers the fraud.

In the case of **EDWARD GITHAKA KIANDINGU V MARY NAOMI MWANGI & ANOTHER [2020] eKLR** the Court held as follows:

The plaintiff at paragraph 9 of the plaint averred that he became aware of the fraudulent subdivision of L.R. No. GICHUGU/SETTLEMENT/SCHEME/598 on 20th November 2012 when he conducted a search at the relevant Land Registry and thereafter filed a succession cause No. 444/2013 and obtained a limited grant ad litem. Though the plaintiff's claim is for the recovery of land whose limitation period is 12 years as provided for in Section 7 of the Limitation of Actions Act, the provisions of Section 26 of the same Act provides that the period of limitation does not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it. On that qualification under Section 26 of the Act, I find that this suit is not time barred.

In the case of **JOSEPH MWANIKI MUCHIRA V GODFREY MUCHANGI [2018] eKLR** the court held that

This is to say that time starts to run when the plaintiff discovers the fraud. So where fraud committed and does not come to the notice or is not known by the party who is affected by it and who would be entitled to sue as a plaintiff time does not run. Time starts to run when the would be plaintiff becomes aware of the fraud.

I have considered the submissions by counsel and the relevant authorities and find that the preliminary objection lacks merit and is therefore dismissed with costs to the plaintiff.

DATED AND DELIVERED AT ELDORET THIS 14TH DAY OF APRIL, 2021

M. A. ODENY

JUDGE