



**Angira (Suing as the legal representative of the Estate of Zablou
Angira Maseno) v Mulumbi & 7 others (Environment & Land Case
E013 of 2022) [2023] KEELC 21998 (KLR) (7 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21998 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE E013 OF 2022
MN KULLOW, J
NOVEMBER 7, 2023**

BETWEEN

**DAVID OMONDI ANGIRA (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF ZABLON ANGIRA MASENO) PLAINTIFF**

AND

**JAMES AGGREY EMP MULUMBI 1ST DEFENDANT
ROSE ADONDO OKOTH 2ND DEFENDANT
DOLLY ACHIENG RAJUI 3RD DEFENDANT
ANNE WEDA AMISSABUOR 4TH DEFENDANT
THE LAND REGISTRAR MIGORI 5TH DEFENDANT
THE DCIO URIRI 6TH DEFENDANT
THE INSPECTOR GENERAL OF POLICE 7TH DEFENDANT
THE HION ATTORNEY GENERAL 8TH DEFENDANT**

RULING

1. Vide a Notice of Motion dated 9th June, 2023 the 1st and 2nd Defendants/ Applicants sought the following orders: -
 - a. The Honourable Court be pleased to strike out the Plaintiff's suit, initiated vide the Plaint dated 21st November, 2022 for being statutorily time barred.
 - b. That upon striking out the suit in terms of Prayer (1) above, the suit herein be ordered dismissed.



- c. Costs of the Application herein together with that of the main suit be borne by the Plaintiff/ Respondent.
2. The Application is premised on 15 grounds thereof and on the 1st Applicant's Supporting Affidavit sworn on even date, on his own behalf and on behalf of the 2nd Applicant. It is his contention that the suit is statutorily time barred pursuant to the provisions of sections 4(1) (a), 15 and 26 of the Limitations of Actions Act as filed against the 1st – 4th Defendants and further, that the suit contravenes the provisions of section 3 of the Public Authority Limitation Act as filed against the 5th – 8th Defendants.
3. It was his claim that from the Plaint dated 21/11/2022, it is not in dispute that the cause of action is founded on a sale agreement that was entered on 22/4/2005 and is thus founded on a contract. Pursuant to the provisions of section 4(1) of the Limitations of Actions Act, the suit ought to have been instituted within a period of 6 years from the date the cause of action accrued.
4. Further, he averred that section 7 of the Limitation of Actions Act provides that no action for the recovery of land can be brought by any person after the end of 12 years from the date on which the right of action accrued to him. Thus, the sale agreement having been entered into on 22/04/2005, the limitation period lapsed in the year 2016.
5. He averred that section 15 of the Limitation of Actions Act expressly provides that no person is taken to have been in possession of any land by reason only of his having made a formal entry thereon. Section 3 of the Public Authority Limitation Act on the hand, expressly states that no proceedings founded on contract can be filed against the government or a local authority after the end of three years from the date on which the cause of action accrued.
6. Further, with regards to the allegation on fraud; he deposed that from the Plaint, the Plaintiff/ Respondent was fully aware of the purported fraud as early as 6/07/2005, a fact which is clearly pleaded at paragraph 17 and 22 of the Plaint. Consequently, he maintained that the Plaintiff cannot invoke section 26 (c) of the Limitation of Actions Act and contend that the period of limitation does not begin to run until the Plaintiff has discovered the fraud of the mistake. It was his contention that the said section cannot apply in the instant case since the plaintiff in this case was fully aware of the alleged fraud but was only indolent in bringing the suit within the expected time.
7. He thus dismissed the suit as being scandalous, frivolous, vexatious and an abuse of the court process. That in so far as the suit is time barred; the same is incompetent and incurably defective and owing to the same, this court is devoid of jurisdiction to entertain the suit as filed. He urged the court to strike out the suit with costs.
8. The Application was opposed, the Plaintiff/ Respondent filed a Replying Affidavit dated and sworn on 20th July, 2023. It was his contention that he only obtained Letters of Administration Ad Litem in respect to his father's estate on 03/11/2022 and the capacity to sue only arose to him then.
9. It was further his claim that even though the sale agreement was entered into in the year 2005; the suit is anchored on fraud which was discovered way later after the agreement was executed and the said fraud is still ongoing to date. He relied on the provisions of section 26 of the Limitation of Actions Act, which states that the period of limitation does not begin to run until the plaintiff has discovered the fraud or could within reasonable diligence have discovered it.
10. He also stated that the actions by the 1st and 2nd Defendants/ Applicants amounted to trespass, which constitutes a fresh cause of action and their continuous tortious acts of trespass create a separate cause of action that cannot be barred by the statute of limitation.



11. He maintained that the title held by the Applicants in respect to the suit land was subject to a fraudulent transaction without authority and the Applicants are merely holding the said title in trust for the rightful beneficiaries of Zablon Angira Maseno.
12. He argued that the cause of action is not anchored on contractual terms but fraud during and after the said contract, which discovery was way after it began and is continuous to date.
13. The Application was canvassed by way of written submissions; both parties filed their rival submissions which I have read and considered;

Analysis and Determination

14. The sole issue for determination before me is whether the Notice of Motion dated 9/06/2023 is merited and the suit as filed is time barred.
15. The 1st & 2nd Defendants/ Applicants has sought the striking out and/or dismissal of the Plaintiff's suit for being statutorily time barred. It is his contention that the Plaintiff's suit is primarily hinged on an alleged fraud which purportedly occurred sometimes in July, 2005 and that no Leave was sought before the filing of the instant suit.
16. It was their claim that the suit as filed contravenes the provisions of sections 3, 4(1)(a), 7, 15 and 26 of *Limitation of Actions Act* and section 3 of the *Public Authority Limitation Act*. Thus, since is suit being time barred, this court is not vested with the requisite jurisdiction to entertain the suit since matters of limitation of time touches on the jurisdiction of the court.
17. He argued that from the plaint dated 21/11/2022, it is clear that the cause of action arose sometimes around April, 2005 and the purported fraud occurred in July, 2005. He thus maintained that the Respondent/Plaintiff was fully aware of the alleged fraud and cannot therefore hide behind the provisions of section 26 of the *Limitation of Actions Act*.
18. The Respondent on the other hand deposed that he only discovered the fraudulent actions by the Applicants way after the execution of the said sale agreement and relied on the provisions of section 26 of the *Limitation of Actions Act*. He further contended that he only obtained the requisite Letters of Administration Ad Litem sometimes in the year 2022 and it is only then that he had the requisite capacity to institute the suit against the Applicants.
19. Section 3, 4, 7 and 26 of the *Limitation of Actions Act* provides as follows: - Section 3 of the Act provides for the extension of the periods of limitation in the case of disability, acknowledgement, part payment, fraud, mistake and ignorance of material facts. Section 4 on the other hand provides that: -

“(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

- (a) actions founded on contracts
- (b)
- (c)
- (d)
- (e)



(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

(3)

20. Section 7 of the Act further provides that “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.”

21. The Plaintiff/ Respondent on the other hand relied on the provisions of section 26 of the Act which 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. I have looked at the Plaintiff dated 21st November, 2022 and the statutory provisions outlined by the Applicants herein in totality. While the Applicants maintained that the suit is time barred on account of sections 4, 7 and 26 of the Limitation of Actions Act, the Respondent’s contention was that he did not discover the alleged fraud until year 2022 and thus relied on section 26 of the Act.

23. It is now well settled that a question of limitation is a question that goes to the jurisdiction of the Court to entertain the suit. The court in Bosire Ongero v Royal Media services [2015] eKLR, held that: -

“the question of limitation touches on the jurisdiction of the Court, which means that if a matter is statute barred, the Court would lack jurisdiction to entertain it”.

24. A plain reading of paragraphs 17, 22 and 29 of the Plaintiff, it is clear that the Plaintiff/ Respondent discovered the alleged fraud way back in the year 2005. The Respondent in his response avers that the fraud was discovered way after the contract was entered but willfully omitted and/or failed to specify the exact timelines when the said fraud was discovered for purposes of computing timelines. Be as it may, it is clear from his own pleadings that the alleged fraud was within his knowledge and therefore the provisions of section 26 of the Act cannot apply to him.

25. I wish to reproduce the contents of paragraphs 17,22 and 29 of the Plaintiff dated 21/11/2022 as hereunder: -

“17. On or about 6/7/2005, the plaintiff discovered the documents sent by the 4th defendant and forwarded these through the chief to LCB Chair Uriri and to the 5th Defendant Migori – upon which on or about 30/8/2005 the plaintiff



lodged a caution with the 5th Defendant, who served notice on intention to remove the same upon the plaintiff on or about 29/6/2005.

22. The deceased and the plaintiff jointly lodged a complaint with the 5th Defendant on 27/11/2006 concerning the application for caution on 30/8/2005 prohibiting registration and the application that effected registration on 14/11/2005 as to their order of priority.
 29. The deceased intended to have the fraud investigated and formally booked a complaint in OB 21/3/10/2016 at Migori Police Station. The matter was referred to the 6th defendant for investigation, which investigation failed as at 15/10/2019, just shortly before death of Zablun Angira Maseno. The deceased served by mail notice to rescind contract upon the 1st and 2nd defendants.”
26. It is trite law that parties are bound by their pleadings and from paragraphs 17,22 and 29 of the plaint cited above, it is evident that the plaintiff clearly indicated that he discovered the said fraud in the year 2005. I therefore find that the suit is time barred. The law on limitations is intended to bar the plaintiffs from instituting claims that are stale and the same is aimed at protecting defendants against unreasonable delay in the bringing of suit against them. The suit was filed out of the statutory time limits without leave of the court. This is a fact which goes to the jurisdiction of the court to entertain claims
27. Further, it is the Applicants’ contention that the suit offends the provisions of section 3 of the *Public Authority Limitation Act* which provides that no proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued. It is the Applicants claim that the instant suit against the 5th – 8th Defendants is time barred since the same is primarily based on the contract entered in the year 2005 and three years has since lapsed. While this provision is true to the extent that the 5th – 8th Defendants are government agencies/ institutions and 3 years has lapsed since the cause of action accrued, I do also note that the 5th – 8th Defendants were not parties in the said contract that the Plaintiff/Respondent seeks to rely on.
28. I have also noted that the Respondent stated he should be given an opportunity to prosecute his claim on merit. I wish to reiterate the sentiments in the Joel Tirop case that the timelines prescribed under the statutes are not ornamental. Where a party is unable to comply with the strict timelines, he is at liberty to apply to the court for leave and extension of the fixed timelines by offering sufficient explanation before the said time can be extended. This was not done in the instant case.
29. The upshot of the foregoing analysis, I find that the 1st and 2nd Applicants/ Defendants Notice of Motion dated 9th June, 2023 is merited and is hereby allowed with costs. Consequently, the Plaint dated 21st November, 2022 is hereby struck out for being statutorily time barred. It is so ordered!

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 7TH DAY OF NOVEMBER, 2023.

MOHAMMED N. KULLOW

JUDGE

