



REPUBLIC OF KENYA



**Nanai v Wanene & 3 others (Environment & Land Case E17 of 2020)
[2023] KEELC 21408 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21408 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E17 OF 2020
MN GICHERU, J
NOVEMBER 2, 2023**

BETWEEN

NATIMAMA KUKAN NANAI PLAINTIFF

AND

JOSEPH MUIGAI WANENE 1ST DEFENDANT

GEORGE IRERI MUKINDIA 2ND DEFENDANT

SAMUEL GITHINJI KARIKO 3RD DEFENDANT

HEZEKIAH KARIUKI MWANGI 4TH DEFENDANT

RULING

1. This ruling is on the notice of motion dated 30/7/2021. The motion which is brought under Section 4(1) (a) of the *Limitation of Actions Act*, Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 2 Rule 15 (1) (a), (b), (c) and (d) and Order 51 of Rule 1 of the *Civil Procedure Rules* and all enabling provisions of the law seeks three orders.
 - a. Striking out of the suit for being time barred, bad in law, frivolous, vexatious and otherwise an abuse of the court process.
 - b. Such order/directions as the court may deem just and appropriate in the circumstances of this case.
 - c. The costs of this application and suit be awarded to the defendants.
2. The motion is supported by five (5) grounds, a supporting affidavit by the third Respondent Samuel Githinji Kariko and nine (9) annexures. In summary the three applicants raise the following issues.



Firstly, the suit is time barred because the contract giving rise to the suit was entered into in the year 1996 yet under Section 4(1) (a) of the *Limitation of Actions Act*, a suit based on contract cannot be brought after six years.

Secondly, the Plaintiff did not file an application to file the suit out of time.

Thirdly, the suit raises no triable issues between the plaintiff and the three Applicants because there is no privity of contract between them as the Applicants bought their land parcels through a private treaty after the cooperative bank advertised them for sale.

Fourthly, the Applicants conducted due diligence on the suit parcels and confirmed that they had been charged in favour of the bank and the outstanding loan arrears amounted to Kshs. 8.5 million.

Finally, even though the Plaintiff became aware of that the bank advertised to sell the suit land in 2012, he did not take any action then and he has also failed to include the bank as one of the Defendants in the suit.

3. I have not seen any replying affidavit by the Plaintiff on record. What I have seen are written submissions dated 21/10/2022 filed by the Plaintiff's counsel. They raise the following issues in answer to the current motion.
 - a. Which is the proper provision of the Limitation of Actions Act applicable to land matters.
 - b. Whether the Plaintiff has pleaded fraud and the time when the fraud was discovered.
 - c. Whether the suit is time barred.
 - d. Whether there is a contract between the Plaintiff and the Applicants.
4. On the other hand, the Applicants have filed eight (8) authorities dated 6/6/2022.
5. I have carefully considered the motion dated 30/7/2021 in its entirety including the entire record, the five issues raised above, the submissions by both sides including the law cited therein. I make the following findings.
6. Firstly, I find that the Plaintiff's suit is not based on contract. It is founded on the alleged fraud of the Defendants. Such fraud is pleaded in paragraph 32 and 37 of the plaint dated 5/2/2021. Under Section 26(1) of the *Limitation of Actions Act*, it is provided 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, 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...”

At this stage of the case, evidence has not been adduced as to when the alleged fraud was discovered.

7. On the second issue of filing an application to extend time to file the suit, I find that such an application would not be necessary if the suit is not time barred.
8. Regarding the absence of privity of contract between the Plaintiff and the Applicant, that may be the case but suit raises other critical issues regarding the validity of the sale between the Plaintiff and the first Defendant which cannot be determined at this interlocutory stage. They include whether there was a valid sale agreement, consent of Land Control Board, transfer instrument duly executed by the Plaintiff among others. This finding covers the other two issues raised by the Applicants namely the



due diligence that they conducted before purchasing their parcels and failure by the Plaintiff to take action in the year 2012 after the bank advertised his land for sale.

Finally, it is a draconian move to strike out a suit as it denies a party the right to a fair hearing which is enshrined in Article 50(1) of the *Constitution*. It provides as follows.

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or, if appropriate, another independent and impartial tribunal or body”.

A court should always sustain a suit rather than dismiss it. It should hear all the contested issues. In this case there are many contested issues which should go for trial.

For the above stated reasons, I dismiss the motion dated 30/7/2021. Costs in the cause.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 2ND DAY OF NOVEMBER, 2023.

M.N. GICHERU

JUDGE

