



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC. CASE NO. 52 OF 2020

JOSHUA LESERE MAKAT

NTIYEYIO OLE MAITUMU

TIMOTHY TONKEI TISIKE (Suing as personal representatives of the

Estate of PULELE MARKAT (Deceased).....PLAINTIFFS

VERSUS

KATEI OLE MAKE DANIEL (Being sued as the legal representative of

MELONYIE OLE NAKEEL SOLOI (Deceased).....1ST DEFENDANT

DANIEL LENGETE OLDUKUNYI (Sued as the secretary of

KISAJU GROUP RANCH.....2ND DEFENDANT

LAND REGISTRAR KAJIADO.....3RD DEFENDANT

JACOB OLE KIPURY (Sued as the legal representative of

GEOFFREY KIMOISA OLE KIPURY).....4TH DEFENDANT

MOKIRA OLOYIONTE OLONG'URO.....5TH DEFENDANT

CLEAR RESOURCES LIMITED.....6TH DEFENDANT

RULING

What is before Court for determination is the 1st Defendant's Notice of Preliminary Objection dated 28th day of September, 2020 where he seeks to have this suit struck out with costs as against the 1st Defendant on the following grounds:-

1. That the Plaintiffs lacks *locus standi* to institute this suit as against the 1st Defendant as there exists a valid Agreement for Sale dated 31st October, 1979 between Pulele Markat and Malonyie Ole Nakeel Solai.
2. That Title Number Kajiado/Kisaju/69 was registered in the name of the 1st Defendant before the demise of the 3rd Plaintiff i.e. 1982 which is 38 years ago.
3. That the Plaintiffs are statute barred from instituting any claim as against the 1st Defendant as per Section 7 and 10 of the statute of Limitation of Actions Act.
4. That the Plaintiffs in total disregard of the Law have failed to seek leave for extension of time to file this suit against the 1st Defendant from this Honourable Court.

5. That the Plaintiffs have no legal interest in the Title Number Kajiado/Kisaju/69.

The Notice of Preliminary Objection was canvassed by way of written submissions, although it is only the 1st Defendant that filed his.

Analysis and Determination

Upon consideration of the 1st Defendant's Notice of Preliminary Objection dated 28th September, 2020 including the submissions, the only issue for determination is whether the Plaintiffs' suit against the 1st Defendant should be struck out with costs.

The 1st Defendant in his submissions contends that the Plaintiffs' lack the locus standi to institute this suit against him as the Agreement for Sale dated 1st October, 1979 was a personal one creating a legal as well as binding relationship solely between Pulele Markat (deceased) and Melonyie Ole Nakeel Soloi (deceased). Further land parcel number Kajiado/Kisaju/69 (suit land) was transferred when owner was alive. He insists the Plaintiffs' were not privy to the said agreement. He further submits that this suit is statute barred in accordance with the provisions of Section 7 and 10(2) of the Limitation of Actions Act. He insists the Plaintiffs failed to seek leave for extension of time before filing this suit as provided for under Section 27 and 28 of the Limitation of Actions Act. To buttress his averments, he has relied on the following decisions: **Securicor Guards (K) Ltd V Mohammed Saleem Malik & Another (2019) eKLR** and **Beatrice Wambui Kiarie v Beatrice Wambui Kiarie & 9 Others (2018) eKLR**.

From a perusal of the Complaint, I note the Plaintiffs confirm the deceased Pulele Makat died on 12th December, 1982. Further, the deceased was owner of land parcel number Kajiado/Kisaju/ 69. The Plaintiffs claim the 5th Defendant's father and 2nd Defendant colluded without authority or knowledge of the deceased culminating in the 1st Defendant's father being registered as owner of land parcel number Kajiado/Kisaju/69. As per the 1st Defendant's Defence, he confirms his father bought the suit land from the deceased and insists, the Plaintiffs cannot purport to open a valid agreement, which was undertaken 38 years ago. Further, he contends that he has been active possession and occupation of Kajiado/Kisaju/69 from 1982 to date. He avers that the said land has since been subdivided to the heirs and beneficiaries of the 1st Defendant. The 1st Defendant reiterates that since the Plaintiffs lodged a complaint with the Provincial Administration and Internal Security in 2009, it demonstrates the cause of action arose in 2009 as such the tort of fraud relied on in the Complaint is time barred.

Section 7 of the Limitation of Actions Act 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.'**

I note the Plaintiffs did not seek leave for extension of time before filing this suit as provided for under Section 27 and 28 of the Limitation of Actions Act. Further, from averments in the Complaint, the Plaintiffs seek to challenge a contract the deceased entered into with another deceased person during their lifetime, which contract was not disputed by the deceased in his lifetime. In the case of **Securicor Guards (K) Ltd V Mohammed Saleem Malik & Another (2019) eKLR**, the court held that: **"This basically means that a contract cannot confer rights or impose obligations on any person other than the contracting parties; that a contract cannot be enforced by or against a 3rd party. The effect of this legal principle is that only parties who are privy to a contract can sue to enforce its terms. This position was reinforced by the court in Agricultural Finance Corporation v Lengitia Limited, (1985) KLR 765 where the court held inter alia that: "As general rule a contract affects only the parties to it and it cannot be enforced by or against a person not a party even if the contract is made for his benefit and purports to give the right to sue or to make him liable upon it."**

In associating myself with this decision, I find that the Plaintiffs lacks *locus standi* to institute this suit as against the 1st Defendant challenging the Agreement for Sale dated 31st October, 1979 between Pulele Markat and Malonyie Ole Nakeel Solai which contract, the deceased entered into during his lifetime but never disputed. Further, it is only parties who are privy to the Sale Agreement entered into in 1979 who could sue to enforce its terms. I will hence proceed to uphold this point on the preliminary objection.

On the issue of limitation, I wish to make reference to the case of **Gathoni v Kenya Co-operative Creameries Ltd [1982] eKLR** where K.D. Porter JA held that:

"The Act does not help persons who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done."

See also the case of **Bosire Ogero v Royal Media Services [2015] eKLR**.

From the evidence as presented, I note the Plaintiffs were already aware of the dispute against the 1st Defendant as evident that in 2009, they even lodged a complaint with the Provincial Administration and Internal Security but chose to file this suit in 2020. I note the Plaintiffs did not controvert the 1st Defendant's averments made in his statement of Defence. It is trite that the issue of limitation also touches on the core of the jurisdiction of a court to deal with a matter.

Based on the facts as presented and in relying on sections 7, 26 and 27 of the Limitation of Actions Act, while associating myself with the above cited decisions, I find that Plaintiffs are statute barred to institute this suit as against the 1st Defendant.

It is against the foregoing that I find the instant Notice of Preliminary Objection merited and will uphold it. I will proceed to strike out this suit as against the 1st Defendant. The 1st Defendant is awarded costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 9TH DAY OF NOVEMBER, 2021

CHRISTINE OCHIENG

JUDGE