



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KERICHO

ELC CASE NO 123 OF 2017

JOHN KIPKORIR RUTO (Suing as the legal representative of the estate of

KPRUTO ARAP MAINA).....PLAINTIFF/RESPONDENT

VERSUS

AGNES CHEROP TOWETT (Sued as the legal representative of the estate of

JOHN TOWETT MOSONIK).....DEFENDANT/APPLICANT

RULING

1. On the 11th April 2018 this matter had been confirmed ready for hearing. Thereinafter, on the 11th February 2021, the Defendant/Applicant sought for and was granted leave to file their Notice of Preliminary Objection (in relation to their defence and counterclaim) to the Plaintiff's suit dated the 16th November 2017. The said Notice of Preliminary Objection dated the 24th February 2021 was filed on the 26th February 2021 wherein the Applicant sought that the Plaintiff's suit be dismissed and/or struck out with costs for being time barred in contravention of the provisions of Sections 7, 8 and 26 of the Limitation of Actions Act.

2. Although there was no response to the Notice of Preliminary Objection, by consent, both parties filed their respective written submissions to the same for which I shall endeavor to summarize as herein under.

Applicant's Submission

3. The Applicant's submissions was that it was trite law that parties are bound by their own pleadings until and unless the same is amended pursuant to the Civil Procedure Rules. That it was in relation to the Plaintiff/Respondent's disposition at paragraphs 4 and 5 of his Plaint that the said Preliminary Objection was raised. That from the Plaintiff/Respondent's pleadings, it was demonstrative enough that the deceased, whose estate was now represented by the Plaintiff/Respondent, was aware of the alleged fraud in the year 1988. That time continued to run irrespective of the demise of the deceased and the knowledge of the fraud in the year 1988 could not be changed by the Respondent/Plaintiff's allegation that he had discovered the same when he conducted a search in the year 2017 yet he had been living on that particular parcel of land all the while.

4. That the Preliminary Objection was first intimated in the Defendant/Applicant's statement of defence dated 8th February 2018 the gist of the Plaintiffs a suit having been founded on allegations of fraud.

5. The Defendant/Applicant framed their issues for determination as follows;

i. Whether the Preliminary Objection dated 24th February 2021 is merited and should be allowed.

ii. Who bears the cost of the suit?

6. On the first issue for determination, the Defendant/Applicant relied on the decided case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Limited (1969) EA. 696** as well as the provisions of Sections 7, 8 and 26 of the Limitation of Actions Act to submit that an action for recovery of land was statutory time barred after the expiry of 12 years from the date the cause of action arose. That in the present case, the cause of action accrued on 21st January 1988 wherein the window of 12 years lapsed on 21st January 2000 upon which time the Respondent/Plaintiff was required to bring the suit.

7. That the action herein having been disguised as being based on fraud under Section 26(sic) was untenable and since the

Respondent/Plaintiff filed suit in his capacity as the administrator of the estate of Kipruto Arap Maina (deceased) and started running against the estate of the said deceased from the 21st January 1988 when the alleged fraud was allegedly committed.

8. That it was not genuine on the part of the Respondent/Plaintiff to claim that he had discovered the alleged fraud when he conducted a search on October 2017 for the purpose of sub division. That the Succession Proceedings were filed in the year 2015 and the search was one of the requirements for purpose of filing the Succession Proceedings.

9. That the Respondent/Plaintiff was guilty of laches and could not hide and seek refuge under Section 26 of the Limitation of Actions Act for the proposition that the time started running in the year 2017 when he discovered the alleged fraud. That even if the Respondent/Plaintiff supposedly discovered the alleged fraud in the year 2017, time would still have run from when the Respondent/Plaintiff could have reasonably discovered it with exercise of due diligence. That it was inconceivable that for close to 30 years the Respondent/Plaintiff had failed to discover the fraud. Reliance was placed on the decided cases in **Margaret Wairimu Magugu vs Kenya Investments Limited & 4 Others [2019] eKLR** and this court's ruling in **Edward Moonge Lengusuranga vs James Lanaiyara & Another [2019] eKLR**.

10. That since the Respondent/Plaintiff was seeking to recover land, he could not circumvent the provisions of Section 7 of the Limitation of Actions Act and since the suit is time barred, it follows that the court has no jurisdiction to entertain and determine the same and should therefore down its tools. Reliance was placed on the decision in **Harrison Ndungu Mwai & 500 Others vs the Attorney General [2018] eKLR** as cited in the **Margaret Wairimu Magugu** case supra.

11. On the issue of costs, the Defendant/Applicant submitted while relying on Section 27 of the Civil Procedure Act that cost was normally awarded to the successful litigant(s) unless where there were exceptional circumstances to depart from the general principle. The Applicant sought for costs.

Respondent's submissions.

12. While placing reliance on the provisions of Section 26 of the Limitation of Actions Act, the Respondent/Plaintiff submitted that their claim was based on fraud which was discovered on or about October 2017 as per paragraph 7 of their Complaint, wherein after the suit had been filed on the 17th November 2017 which was one month after the discovery of the fraud.

13. The Respondent/Plaintiff further confirmed that indeed the fraud was committed in the year 1988 as per paragraph 4 (four) of the Complaint but that he could not have discovered the fraud earlier for reason that after the land was subdivided and two titles issued, there had been no interference with his occupation of the land. That he only discovered the fraud during a search conducted to facilitate transfer by transmission following completion of Succession Proceedings.

14. That it was wrong to imply that the deceased was aware of the fraud before his death and even if the fraud was discovered in the year 2015, which was denied, the time of computing the limitation period would have been 12 years thereafter. The suit was thus filed within time.

15. That the Respondent/Plaintiff was in occupation of the suit property and was now seeking for the revocation of the title deed for land he was in occupation of and therefore it would be a misrepresentation to state that he was seeking to recover the land.

16. The Respondent/Plaintiff thus sought for the Applicant/Defendant's Preliminary Objection to be dismissed with costs as it was devoid of merit.

Determination

17. Having considered the submissions herein and authorities cited thereof, I find the matters for determination as being;

- i. Whether the Preliminary Objection raised is sustainable.
- ii. Whether the present suit is time barred

18. A Preliminary Objection as was held in all-important case decided by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** was stated to be thus:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

19. In this Application, the Applicant/Defendant has raised a Preliminary Objection seeking that the Respondent/Plaintiff's suit be dismissed with costs as the same was time barred by virtue of the provisions of Sections 7, 8 and 26 of the Limitation of Actions Act. That the suit herein, which was founded on fraud that had been discovered on the 21st January 1988, was therefore brought after the expiry and /or lapse of the period of limitation from the date when the cause of action arose.

20. In rebuttal to the Preliminary Objection, the Respondent/Plaintiff submitted that the same had no merit as the fraud had been discovered in October 2017 wherein the suit was filed soon after being the 17th November 2017 which was one month after the fraud had been discovered. The suit was therefore within the set down time limits.

21. The Preliminary Objection being a point of law, the court is satisfied that it has been properly and validly raised. Section 26 of the Limitation of Actions Act gives an extension of time and states 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; 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. Section 4 of the Limitation of Actions Act, prescribes the limitation period for the institution of suits in regard to various causes of action. In regard to actions founded on tort, the limitation period is three (3) years.

23. Section 4(2) of the Limitation of Actions Act states thus:

“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”

24. The Law is thus very clear that where a matter is founded on fraud, which is a tort, the period of limitation does not begin to run until such a time when the Plaintiff discovers the fraud or could, with reasonable diligence, have discovered it wherein the matter may not be brought after the end of three years from the date on which the cause of action accrued.

25. 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.

26. Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve (12) years from the date on which the right accrued.

27. I have considered the Plaintiff/Respondent’s impugned disposition at paragraph 4 and 5 of the Plea to which he pleaded as follows;

4. ‘On or about 21st January 1988 one John Towett Mosonik (deceased) fraudulently caused the suit land parcel Kericho/Kyogong/13 to be subdivided into land parcel No. Kericho/Kyogong/809 measuring approximately 1.4 hectares and land parcel No. Kericho/Kyogong/810 measuring approximately 0.8 hectares.’

5. ‘Land parcel No. Kericho/Kyogong/809 remained in the name of Kipruto Arap Maina (deceased) while Kericho/Kyogong/810 was fraudulently registered in the name of John Towett Mosonik (Deceased)’

28. From the above statements, it is clear that this Preliminary Objection is one that is determinable with reference to the pleadings. Apart from being an admission that the discovery of the fraud was on the 21st January 1988, the Respondent/Plaintiff has also annexed a green card of the sub-division of the mother land No. Kericho/Kyogong/13 which resulted into land parcel No. Kericho/Kyogong/810. And it is clear that the registration of the same to the deceased John Towett Mosonik was on the 21st January 1988.

29. Based on the reliefs sought in the Plea dated the 17th November 2017, the Respondent/Plaintiff in his capacity as the administrator of the estate of the deceased Kipruto Arap Maina sought that LR No. Kericho/Kyogong/810 be declared as part of the deceased’s estate, which in effect was to recover the land.

30. The present suit was thus instituted over 29 years after the transfer of the property had been effected. One then is left to wonder why during the lifetime of the deceased Kipruto Arap Maina, when he discovered the alleged fraud, he himself never raised this serious allegations against the Applicant’s deceased husband John Towett Mosonik. The Plaintiff has not even offered any explanation as to why it took him all that time to initiate the recovery action. His argument that he only discovered the fraud in October 2017 whilst executing a Succession Cause is therefore not believable in the circumstance.

31. The Respondent/Plaintiff instituted the action in his capacity as the administrator of the estate of his late father who died on 15th May 1978. The registration of the property in favour of the Applicant’s husband to which the Respondent/Plaintiff sought to impeach was done on 21st January 1988. The Respondent/Plaintiff had all the time from 21st January 1988 up to January 2000 to challenge the registration of the Defendant/Applicant’s husband as the owner of the property. He did not do so. Could the Plaintiff/Respondent, as the administrator claiming through the deceased (Kipruto Arap Maina) do so approximately 29 years later?

32. It cannot be reasonable that it would have taken the Respondent/Plaintiff over 29 years to discover that the Applicant/Defendant’s husband had fraudulently transferred to himself the said suit land more so keeping in mind that parties have been in occupation of their

respective parcels of land all this time. I find that the *discovery of fraud was not only confined to the Respondent/Plaintiff himself, but to the deceased (Kipruto Arap Maina) during his lifetime.*

33. The Court of Appeal in **Margaret Wairimu Magugu** (Supra) and whilst dealing with an issue similar to the one at hand held that:

*There is no doubt that under that provision, where the action is based on fraud the period of limitation prescribed does not begin to run until the Plaintiff discovers the fraud. (see for instance **Kenya Ports Authority vs Timberland(K) Ltd [2017] eKLR**). However, having regard to the proviso to Section 26 of the Act as highlighted above, it is inconceivable that for 19 years, in the case of the deceased, and 24 years in the case of the appellant, they would have failed to discover, with the exercise of due diligence, the alleged fraud and to act if indeed the acquisition of the property by the 1st Respondent was fraudulent.*

*Due diligence entails the exercise of care required from a given person in a given situation. It entails proactivity and absence of carelessness or idleness. In the English case of **Paragon Finance vs D B Thackerar & Co [1999] 1 All ER 400** at 418B-D, Millett LJ of the Supreme Court of England opined that:*

“The question is not whether the Plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take.”

34. I am in agreement with the above finding and it is in this regard that I find that the Plaintiff/Respondent’s claim is time-barred under Sections 4, 7 and 26 of the Limitation of Actions Act. The same is an abuse of the process of the court having been filed 29 years after the cause of action allegedly arose. Since limitation goes to the jurisdiction of the court, I am obliged to terminate this issue at a preliminary stage see **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1**. The matter is at its end and I will have to down my tools and take no further step. The Preliminary Objection herein succeeds in its entirety with the result that the Respondent/Plaintiff’s suit is herein struck out with costs to the Applicant/Defendant.

DATED AND DELIVERED AT KERICHO THIS 29TH DAY OF JULY 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE