



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC MISC NO. 68 OF 2019**

**SYLVIA WANJIRU GATHENDU.....APPLICANT**

**VERSUS**

**LILIAN WAITHERA MWAL.....1<sup>ST</sup> RESPONDENT**

**PETER KAMAU KABI.....2<sup>ND</sup> RESPONDENT**

**RUTH WANJIKU KAMAU.....3<sup>RD</sup> RESPONDENT**

**FRANCIS MWAURA MUNGARA.....4<sup>TH</sup> RESPONDENT**

**LAND REGISTRAR THIKA.....5<sup>TH</sup> RESPONDENT**

**RULING**

The Matter for determination is the Notice of Motion Application dated 18<sup>th</sup> April 2019, bought under Sections 7, 26, & 27 of the Limitation of Actions Act, Sections 3 of the Environment and Land Court Act, Order 50 Rule 6 of the Civil Procedure Rules, Section 4 of the Limitation of Actions Act and Section 3A of the Civil Procedure Act by the Applicant seeking for Orders that;

- 1. This Honorable Court be pleased to grant leave to the Applicant to file suit out of time.*
- 2. The draft and annexed Complaint be deemed as duly filed upon payment of requisite Court filing fees.*
- 3. Costs be in the cause.*

The Application is supported by the Affidavit of Sylvia Wanjiru Gathendu, who averred that she is the legal and bonafide proprietor of Ruiru East Block 5/229, having being registered as such on 12<sup>th</sup> January 1988. That in the year 2000, she learned that the 1<sup>st</sup> Respondent impersonated her and fraudulently sold and transferred the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and later transferred the same to the 4<sup>th</sup> Respondent. She further averred that the 1<sup>st</sup> Respondent was arrested and charged in Criminal Case No. 5294 of 2000, on four counts and the Court found her guilty of counts 3 and 4 i.e. obtaining money by false pretence contrary to Sec 313 of the Penal Code and making document without authority contrary to Sec. 357 of the Penal Code.

It was her further contention that the 4<sup>th</sup> Respondent instituted Suit No. Hccc No.2111 of 2000, against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents which suit was dismissed. That she was unable to file this suit earlier due to the subsistence of other suits.

The Application is opposed and the 4<sup>th</sup> Respondent filed a Replying Affidavit dated 14<sup>th</sup> December 2020, by Francis Mwaura Mungara, who deponed that he has been in possession of the suit property since the year 1998, and in the year 2000, he sued the Applicant in Nairobi Hccc No.2111 of 2000, seeking for permanent injunction against the Applicant and she in turn filed a counterclaim seeking the exact Orders she is seeking in this court and the suit was eventually dismissed. It was his contention that the Applicant has not demonstrated any hardship that has kept her from pursuing her rights over the suit property for more than 20 years.

The 4<sup>th</sup> Respondent also filed his Preliminary Objection dated 8<sup>th</sup> September 2020, on the following grounds that:-

- 1. The entire Application is statute barred by provisions of Sections 4 and 26 of the Limitations of Actions Act, Cap 22 Laws of Kenya.*
- 2. The entire Application is barred by provisions of section 30 of the Limitations of Actions Act.*

**3. The entire Application is unmaintainable in light of provisions of Order 37 of the Civil Procedure Rules.**

**4. The 4<sup>th</sup> Respondent prays that the entire Application be dismissed with Costs to the 4<sup>th</sup> Defendant.**

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents despite having been duly served by way of Substituted service, did not enter appearance nor filed any response to the Applicant's Application. The 5<sup>th</sup> Respondent did not file any response either.

Parties were directed to file written submissions on the Applicant's Application and the 4<sup>th</sup> Respondent's Preliminary Objection. The Applicant filed her Submissions on **26<sup>th</sup> April 2021** through the **Law Firm of Esther W. Gitau & Co. Advocates**, while the 4<sup>th</sup> Respondent filed his submissions dated **26<sup>th</sup> April 2021**, through the **Law Firm of Musa Boaz & Thomas Advocates**.

The Court having laid down the background of this case and considered the Application, the Replying Affidavit, Notice of Preliminary Objection, the written Submissions and Authorities relied upon, the main issues for determination are;

***i. Whether the Applicant deserves the Orders sought in her Application dated 18<sup>th</sup> April 2019.***

***ii. Whether the 4<sup>th</sup> Respondent's Preliminary Objection dated 8<sup>th</sup> September 2020 is merited.***

***(i) Whether the Applicant deserves the Orders sought in her Application dated 18<sup>th</sup> April 2019.***

The 4<sup>th</sup> Respondent in his submissions reiterated its claim and relied on section 7 of the Limitation of Actions Act. He insisted that this suit is statute barred as time begun to run way before **2002**, when the Applicant discovered the alleged Fraud. 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.'**

The provisions are clear in terms of the period within which a party can bring forth a claim to recover land which is **12 years**.

While **Section 26** of the **Limitation of Actions Act** provides an extension of time to bring an action to recover land on certain circumstances, and stipulates thus: **'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:***

***Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—***

***(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or***

***(ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made."***

In the case of **UCB Vs Mukoome Agencies (1982) HCB22**, it was held as follows: **'that where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit'**.

The Applicant alleges that the issues surrounding fraudulent transaction came to her knowledge in the year 2000, suffice to say, there were also other cases i.e. criminal case and civil case, which were determined in the year 2002 and 2012 respectively.

The Court notes that all through the suit property had been subjected to court process and based on the facts at hand while the court associates itself with the decisions cited above, the court finds that the Applicant has provided plausible reasons for the delay, noting that she could not have known the verdict of the cases filed, having explained that she was out of the country, a fact not disputed by the Respondents herein.

Further, the allegations of Fraud as stated in the draft Plaintiff cannot be proved unless viva voce evidence is adduced. Consequently, **section 7** as read together with **section 26** of the **Limitations of Actions Act** provides a reprieve to the Applicant. In the circumstance, the Court finds that the averments that the suit is statute barred and frivolous are misplaced and direct that this matter should proceed to full hearing instead of being dismissed at this interlocutory stage.

***(ii) Whether the 4<sup>th</sup> Respondent's Preliminary Objection dated 8<sup>th</sup> September 2020 is merited***

The 4<sup>th</sup> Respondents has filed a Notice of Preliminary Objection claiming that the suit is barred by **Section 4 and 26 of the Limitations of Actions Act**, and also barred by provisions of Section 30 of the same act. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696* to mean:-

***“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.”***

The above being the description of Preliminary Objection, it is evident that a **Preliminary Objection**, raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts has to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.

It is not in doubt that the Court is required to determine what the law says and whether indeed the suit is barred by Limitation of Action and that will not require the probing of evidence. All that the Court will then need to do is determine what the law says and this would only mean that the same raises a pure point of law. Therefore, the Court finds and holds that the first limb of the **Notice of Preliminary Objection** as filed by the 4<sup>th</sup> Respondent fits what a Preliminary Objection is as per the *Mukisa Biscuits case (supra)*.

The Court is now left to determine whether the objection is merited in terms of failing under the Limitations of Actions Act. It is the 4<sup>th</sup> Respondent's contention that the Applicant is seeking a right under **Section 4** of the **Limitation of Actions Act**, whose claim has a lifetime of six years. The reasoning has been coached under fraudulent actions which discovery was made more than **19 years ago**. The Court having carefully perused the draft Plaint herein is satisfied that the suit is hinged on the actions of fraud.

However, **Section 26 (c)** of the **Limitation of Actions Act** provides:

***“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.***

Given that the cause of action is hinged on the alleged fraud by the 4<sup>th</sup> Respondents and given that the alleged fraud was allegedly discovered by the Applicant in the **year 2000** as admitted, and this suit having been filed on **20<sup>th</sup> December 2019**, it is the Court's considered view that the suit is caught up by limitations of actions as the Limitations for cases involving fraud is 3 years.

However, In order to demonstrate the basis for leave to file claim out of time, the Applicant produced several annexures including copy of judgment and proceedings in **Cmcc No.5294 of 2000**. Further, if the Applicant had filed a subsequent Civil suit in light of the one already prevailing, and had the same been filed and determined, it would then have been termed as *Res judicata*.

Therefore, the court finds and hold that the Applicant had no knowledge of material facts which would have enabled her file suit within three years of the accrual of the cause of action. See the case of ***Tana and Athi Rivers Development Authority v Joseph Mbindyo and 3 Others*** NYR CA Civil Appeal No. 253 of 2011 [2013]eKLR, where the Court held as follows:-

***[13] ..... From the foregoing provisions it is clear that before the court granted the ex parte leave to the respondents to file the suit out of time, it had to be satisfied that the material facts relating to the cause of action were not within their knowledge until after time limited for filing the suit had expired.***

Over time, Courts have held that the effect of the statute of limitation is that certain causes of action may not be brought after the expiry of a particular period of time. In other words, the Act bars the bringing of particular actions after the specified periods of limitation but does not necessarily extinguish such causes of action. In *Rawal vs. Rawal [1990] KLR 275* it was observed that:

***“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after along lapse of time. It is not to extinguish claims”. See also Dhanesvar V Mehta vs. Manilal M Shah [1965] EA 321.***

Accordingly, having found that time started running from the time of discovery of fraud which was **year 2000**, and even if the Court was wrong on the above, it is still persuaded that the Applicant has satisfied the conditions for the extension of time to file suit out of time, noting that this is a matter involving **Fraud**, which should be determined on merit.

The Court further notes that the Applicant's names on the title deed and the one used to file pleadings, appear differently, an issue which needs determination too after calling of evidence.

Having now carefully considered the available evidence, the Court finds and holds that the **Notice of Preliminary Objection** dated **8<sup>th</sup> September 2020**, is **not** merited and the same is dismissed entirely with costs. While the Applicant's **Notice of Motion Application** dated **18<sup>th</sup> April 2019**, is found to be **merited**. Consequently, the Court allows the said Application entirely in terms of prayers **no. 1**, with costs being in the Cause.

Let the Applicant file the alleged suit within a period of **14 days** form the date hereof. Failure of which the leave granted herein will lapse automatically.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 15<sup>TH</sup> DAY OF JULY 2021.**

**L. GACHERU**

**JUDGE**

**15/7/2021**

**Court Assistant – Lucy**

**ORDER**

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Gitau for the Applicant**

**No appearance for the 1<sup>st</sup> Respondent**

**No appearance for the 2<sup>nd</sup> Respondent**

**No appearance for the 3<sup>rd</sup> Respondent**

**Mr. Tumu for the 4<sup>th</sup> Respondent**

**No appearancefor the 5<sup>th</sup> Respondent**

**L. GACHERU**

**JUDGE**

**15/7/2021**