



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nganga v Koiyet (Civil Case 20 of 2020)  
[2024] KEHC 16656 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 16656 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CIVIL CASE 20 OF 2020  
JL TAMAR, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**PETER NJOROGI NGANGA ..... PLAINTIFF**

**AND**

**MARTIN KOIYET ..... DEFENDANT**

**RULING**

1. The plaintiff herein filed this suit against the defendant seeking the following orders;
  1. A declaration that the defendant acted fraudulently by entering into a contract that the defendant would not perform.
  2. A refund from the defendant together with interest of ksh. 21,500,000/ being the purchase price of the property.
  3. Damages in the form of lost opportunities, profits and emotional distress; ksh 300,000/=
  4. Damages incurred in filing and prosecuting High Court Machakos Civil Suit No 243 Of 2012; Peter Njoroge Nganga Vs Kenya Reinsurance Company Limited (statutory manager for United Insurance Company Limited) And United Insurance Company Limited which suit was later transferred to kajiado Environment And Land Court Elc Suit No 204 OF 2017 between the same parties; ksh 1000,000/=
  5. Damages for filing and prosecuting Nairobi Civil Appeal 175 Of 2018 Peter Njoroge Nganga Vs Kenya Reinsurance Company Ltd (statutory manager for United Insurance Company Ltd) And United Insurance Company Limited; ksh.1000,000
  6. Interest in (b) (c) (d) and (e) at court rates from 11<sup>th</sup> September,2011 to date of payment.



2. The facts of this case albeit briefly is that sometimes on or about 15<sup>th</sup> September 2011 the plaintiff a businessman had entered into a land sale agreement with the defendant for the purchase of land known as Title no Kajiado/Kaputei-north/4243 for a consideration of ksh.21,500,000.
3. After all the processes relating to the sale of the said land were concluded, the plaintiff took possession of the property from the defendant with the understanding that he was the sole proprietor with a good title, but on 12<sup>th</sup> June 2012, the plaintiff was shocked when he stumbled upon an advertisement on Daily Nation newspaper inviting persons to tender and purchase the property title no KAJIADO/KAPUTEI-NORTH/4243 from United Insurance Company Limited.
4. The plaintiff surprised with the new development, took immediate action and through his counsel wrote a demand letter requiring the withdrawal of the advertisement over his property giving evidence of its ownership. Unknown to the plaintiff, way back in 1999, the defendant had sold the same property to United Insurance Company Limited and a title deed in its favour issued on 27<sup>th</sup> August 1999. This fact which was well within the knowledge of the defendant was never disclosed to the plaintiff. The defendant on being confronted with the information above denied ever selling the property to the Insurance Company resulting in the plaintiff filing a case in High Court Machakos later transferred to Kajiado ELC as referred to above. It was during the hearing of the case in the High court ELC where the defendant testified as plaintiff witness, that it became clear to the plaintiff that the defendant had orchestrated a fraudulent transaction against the him and misrepresented facts at the time of signing of the sale agreement. The plaintiff suit in the High was dismissed as was the resultant appeal to the court of appeal.
5. It is on the basis of the above, and having had his title to Kajiado/Kaputei -North /4243 cancelled by the order of the Court, that the plaintiff file the present suit seeking the orders earlier set out in at the beginning of this ruling and specifically refund from the defendant of the purchase price plus interest.
6. The defendant on being served with the suit papers filed a defence to the plaintiff claim and took out a preliminary objection filed on 19<sup>th</sup> April, 2021 challenging the plaintiff suit mainly on two grounds;
  - a. That this court has no jurisdiction to entertain this matter pursuant to the provisions of section 7 of the *civil procedure Act* Cap 21 and thus the suit should be dismissed with cost.
  - b. That the suit offends the provisions of section 4 of the Limitation of Action Act, Cap 22 Laws of Kenya as the same ostensibly emanates from a breach of contract entered on 15<sup>th</sup> September, which is over ten (10) years ago.
7. What constitute a Preliminary Objection was stated in the much-celebrated case of Mukisa Biscuits Manufacturing Company Limited –vs- West End Distributors [1969] E A 696 as follows;
  - a. ....” A Preliminary Objection consists of point of law which has been pleaded or which arises by clear implication out of pleading, and which if argued as a Preliminary point, will dispose of the suit. Examples are an objection to the jurisdiction of the court, and a plea of limitation (emphasis supplied), or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration”.
8. The twin issues raised by the defendant are proper points of law contemplated in Mukisa Biscuit case and which if sustained have the potential of disposing the suit without the need for a full trial.
  2. In John Musakali –vs- Speaker County of Bungoma & 4 others [2015] EKLR, Justice Chacha Mwita stated “once raised the Preliminary Objection should have the potential of disposing of the suit at that point without the need to go for trial.”



I will deal with the first point/issue which is whether the suit herein is res judicata in terms of section 7 of the [Civil Procedure Act](#).

9. The defendant in his submissions dated 24<sup>th</sup> June 2024 contend that the plaintiff with reasonable diligence and proper advice from his advocate, should have filed a suit against the defendant for breach of contractual obligations the moment he received a demand letter from the United Insurance Company Limited informing him that they held the original title. Secondly, the plaintiff having seen the particulars of fraud and misrepresentation, illegalities and irregularities set out in the counterclaim against the defendants should have sued the defendant in the same suit.
10. The defendant also cites a passage in the court of appeal decision stating that the “cost of the appeal should have been borne by PW1” (defendant) as a basis for the argument that the plaintiff ought to have sued the defendant earlier. The defendant submitted that the issue raised by the plaintiff had already been raised and determined by the court on 5<sup>th</sup> march 2018 by a declaration that United Insurance Company Limited is the legal owner of land parcel no Kajiado/Kaputei-North 4243 and that the transfer of the title deed over all that piece of land is invalid, null and void ab initio. I do not understand this limp of the defendant submission
11. On the other hand, the plaintiff filed a replying affidavit on 27<sup>th</sup> November 2023 and submission on 22<sup>nd</sup> January 2024 in opposition to the preliminary objection raised by the defendant. The plaintiff contend that this court has jurisdiction to hear and determine this matter as the same emanated from the fraudulent actions of the defendant who entered into a written agreement for the sale of land parcel no Kajiado/Kaputei-North/4243 aware that he had no good title to transfer to the plaintiff. Secondly that the cause of action, the prayers sought and the issues adjudicated upon in High Court Machakos suit no 243 of 2021 are different and that the doctrine of res judicata does not apply.
12. In determining whether an issue raised in a particular suit is re judicata certain elements must be present as outlined in John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 others (2021) KESC 39 (KLR) where the Supreme Court held;

“Whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case, and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same or are litigating under the same title, and whether the previous case was determined by a court of competent jurisdiction.”
13. For a plea of res judicata to be invoked in a civil matter the following elements must be demonstrated:
  - a. There is a formal judgement or order which was final
  - b. The judgement or order was on merit
  - c. The judgement or order was rendered by a court having jurisdiction over the subject matter and the parties; and
  - d. There must be between the first and the second action identical parties, subject matter and the cause of action.



14. Further in Independent Electoral & Boundaries Commission vs Miana Kiai & 5 others (2017) eklr and referred to by counsel the court stated;

“Thus, for the bar of re judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit
- b. The former suit was between the same parties or parties under whom they or any of them claim
- c. Those parties were litigating under the same title
- d. The issue was heard and finally determined in the former suit
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

15. In Communication commission of Kenya & 5 others vs Royal Media Services Limited & 5 others (2014) eklr the court reaffirmed that the doctrine of Res judicata is based on the principle of finality which is a matter of public policy, one of the pillars upon which our judicial systems founded. The doctrine is intended to prevent a multiplicity of suits and ensures that litigation comes to an end. It operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits.

16. In the former suit High Court Machakos Civil Suit No243 of 2012 Peter Njoroge Nganga vs Kenya Re-insurance Corporation Limited & Another later Kajiado ELC no 204 of 2017 between the same parties, the plaintiff sought for a permanent injunction as against United Insurance Company Limited from interfering, disposing or entering the property, damages and cost of the suit. The defendant United Insurance Company Limited file a cross action against the plaintiff seeking the dismissal of the suit and a declaration that the Land Registrar rectify the records to show that the title belonged to United Insurance Company Limited among other reliefs.

17. The defendant was not a party to the above suit instituted by the plaintiff against the defendants. He was not litigating under any of the parties and neither was any reliefs sought against him. He was also not a party in the cross action by the defendant against the plaintiff which ultimately sought the cancellation of the plaintiff title. The defendant was indeed a witness of the plaintiff in the above suit as witness number (pw1).

18. The court in the former suit determined conclusively the issues in that suit and the cross action as follows;

1. The plaintiff suit be dismissed
2. That a declaration be and is hereby issued that United Insurance Company Limited is the legal owner of Land Parcel no KAJIADO/KAPUTEI NORTH/4243
3. A declaration be and is hereby issued that the transfer of the title deed over all that parcel of land known as LR Kajiado /Kaputei north/4243 to the plaintiff is invalid null and void abinitio
4. That the land registrar Kajiado be and is hereby directed to recall, revoke, cancel and/or nullify the Title deed issued to Peter Nganga Njoroge on 14<sup>th</sup> March 2012 for land parcel no Kajiado/ Kaputei North /4243



5. The Land Registrar Kajiado be and is hereby directed to rectify the records and /or the register at the land's registry, Kajiado so as to reflect or read United Insurance Company Limited as the registered proprietor of land parcel no Kajiado/Kaputei North/4243.
19. It is therefore clear that the decision of the court in the former suit settled the issues as between the parties conclusively. None of the issues in the present suit were directly or substantially in issue in the previous suit.
20. In answer to the defendant contention, that the plaintiff should have filed a suit against the defendant for breach of contractual obligations the moment he received a demand letter from the United Insurance Company Limited, that they held the original title, the plaintiff couldn't have done that because the defendant insisted that he had a good title and even testified in favour of the plaintiff in the former suit where it became apparent by the defendant own admission that he had indeed sold the suit property earlier.
21. With regard to the allegations of irregularities and fraud set out against the plaintiff in the cross action, the court determined in the previous suit that the plaintiff did not participate in it and therefore could not have filed an action against the defendant as he had not known the extent of his (defendant) involvement. In any case the plaintiff through his counsel had conducted due diligence that confirmed that the suit land was registered in the name of the defendant herein and without any encumbrances.
22. Consequently, the preliminary objection on whether the present suit is res judicata has not met the threshold for such a plea, lacks merit and the same is dismissed.

**Whether the suit is barred by the provisions of the *Limitation of Actions Act*.**

23. Central to defendants' second Preliminary Objection and the opposition thereto is the contention that the action by the plaintiff offends Sections 4 and 26 of the *Limitation of Actions Act* (Cap 22 of the Laws of Kenya ). It is contended that the contract for sale of land now sought to be enforced took place 10 years earlier
24. Section 4 of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya prescribes the limitation period for the institution of suits in regard to various causes of action. In regard to actions founded on contract the limitation period is six years whereas in regard to actions founded on tort the limitation period is three years .
25. Section 26 of the *Limitation of Actions Act* on the other hand provides for an extension of the limitation of time in case of fraud or mistake wherein time starts running at the point when the fraud is discovered by the plaintiff. The section provides 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."

26. Before determining whether this suit is statute barred by dint of section 4 of the *Limitation of Actions Act* and whether the plaintiff can invoke section 26 of the same Act, it will be important to first and fore



most to establish the main cause of action in the suit. In the case of Edward Moonge Lenguuranga vs James Lanaiyara & another (2019) eKLR, the court defined a cause of action as a set of facts sufficient to justify a right to sue to obtain property or enforcement of a right against a party. The court defined a cause of action to be the legal theory upon which a Plaintiff brings a suit. That being the case, it is important to look at the averments and the prayers contained in the plaint to determine the cause of action raised by the Plaintiff.

27. It is clear from the Amended Plaint that the Plaintiffs' main cause of action against the Defendants is based on fraud. In paragraph 12 of the plaint, the plaintiff avers that he had the defendant assurance that he had acquired a good title. However, and subsequent to the court proceedings and judgement the plaintiff realized that the defendant orchestrated a fraudulent transaction against the plaintiff and misrepresented facts at the time of signing of the agreement. The plaintiff case is therefore premised on the alleged fraud, which is a factual issue to be determined at the trial. In Oraro vs Barak Eston (2005) eKLR the court stated

Anything that purport to be a preliminary objection must not derive its foundations from factual information which stands to be tested by rules of evidence”

28. It is not for this court at least at this stage to make inquiry into the alleged fraud particularized in paragraph 13 of the plaint or determine when the alleged fraud was discovered. Whether the plaintiff would have discovered the alleged fraud had he been diligent, is a matter to be ascertained at the trial.
29. In the case of Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta Patrick Mbinga ...Vs... Eliud Timothy Mwamunga Sagalla Ranchers Limited [2017] eKLR, the Court held that: -

Upholding the said Preliminary Objection at this stage would be draconian as there appeared to be substantive issues that had emerged that needed to be heard and determined at the time of the hearing of the said Notice of Motion application.

30. Indeed, the question of whether they have a cause of action against the Defendant and if they can sustain the same against him ought to be considered during the hearing of their Notice of Motion application when this court will consider whether or not leave should be granted for them to continue with the derivative action against him. The said question cannot be considered at this stage as there is potential of the court inadvertently delving into the merits or otherwise of their said application”.
31. In the circumstances therefore, the second limb of the preliminary objection must fail as well. The basis for a plea of limitation as framed in this case cannot be determined in a summary manner without a full trail and taking into considerations the evidence that may be tendered and tested.

Consequently, the preliminary objection is hereby dismissed with cost.

**READ AND DELIVERED AT THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2024**

**JOHN T. LOLWATAN**

**JUDGE**

