



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C CASE NO 28 OF 2018

GEORGE NYAKUNDI OMBABA.....PLAINTIFF

VERSUS

TURUSIRA OSIEMO1ST DEFENDANT

THE KISII COUNTY REGISTRAR.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

BACKGROUND

1. This ruling is in respect of the Preliminary Objection dated 30th May 2019 in which the 1st Defendant states that the suit herein is time barred in terms of section 7 of the Limitation of Actions Act Cap 22 of the Laws of Kenya. Consequently, he prays that the suit be struck out with costs to the defendant.

2. The Plaintiff instituted this suit against the defendants by way of a plaint filed in court on 3rd December 2018. In the said plaint he avers that his late father Osiemo Onyinkwa was polygamous, having married four wives namely Kemunto Osiemo, Mora Osiemo, Kerubo Osiemo and Turusira Osiemo. All the wives have since died except Turusira Osiemo who is the 1st defendant herein. The plaintiff avers that the late Osiemo Onyinkwa was the registered owner of land parcel no. NYARIBARI CHACHE /BIRONGO/291 while the plaintiff's mother Kerubo Osiemo was the registered owner of land parcel no. NYARIBARI CHACHE /BIRONGO/572. It is his contention that during his life time, the plaintiff's father never interfered with the land parcel no. NYARIBARI CHACHE /BIRONGO /572 as it was independently acquired and owned by the Kerubo Osiemo. The said Kerubo Osiemo lived and utilized the said parcel of land upto the time of her death.

3. The Plaintiff avers that sometime in 2013 the 1st defendant who is his step mother trespassed onto land parcel no. NYARIBARI/CHACHE / BIROINGO 572 and started harvesting his mother's trees and when he inquired why she was doing so, she informed him that she had been given a portion of the said parcel of land by the plaintiff's late father. Upon further investigation, the plaintiff discovered that a portion of land parcel no. NYARIBARI CHACHE /BIROINGO /572 had been hived off and the 1st defendant had been registered as the owner of the resultant title no. NYARIBARI CHACHE /BIROINGO /717. It is the plaintiff's contention that the said sub-division of his mother's land and subsequent registration of the land parcel no. NYARIBARI CHACHE/BIRONGO /717 in the 1st defendant's name was as a result of the fraudulent acts of the 1st, 2nd and 3rd defendants. The plaintiff therefore seeks inter alia a declaration that the sub-division of land parcel no. NYARIBARI CHACHE /BIROINGO /572 and registration of title no. NYARIBARI CHACHE /BIROINGO /717 in the name of the 1st defendant be cancelled and the title for land parcel no. NYARIBARI CHACHE /BIROINGO /572 be restored to the name of the original owner. He also seeks a permanent injunction to restrain the 1st defendant from interfering with the plaintiff's occupation of the suit property as well as special damages.

4. In his defence filed in person dated 24th December 2018 the defendant denies the plaintiff's claim in totality and prays that the suit be dismissed with costs. The 1st defendant's counsel subsequently filed the Preliminary Objection which is the subject of this ruling. The court directed that the Preliminary objection be canvassed by way of written submissions.

ISSUES FOR DETERMINATION

5. There are only two issues for determination:

i. Whether the plaintiff's suit is statute barred for being in contravention of the provisions of section 7 of the Limitation of Actions Act Cap 22 of the Laws of Kenya.

ii. Whether the suit should be struck out.

ANALYSIS AND DETERMINATION

6. Section 7 of the Limitation of Actions Act provides as follows:

'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.'

7. Section 26 of the Limitation of Actions Act gives an extension of time where the case is based on fraud or mistake 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:

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.'

8. In the case of **Justus Tureti Obara v Peter Koipeitai Nengisoi [2014] eKLR** Justice Okongo observed as follows:

'I would wish to point out further that the Plaintiff's case although for recovery of land is based on fraud. The provision to section 26 (a) of the Limitation of Actions Act, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the defendant is a matter to be ascertained at the trial. 'the court went ahead and stated thus:

"In relying on section 26 of the Limitation of Actions Act and the authority above, I will not term the Plaintiff's claim of fraud as baseless and further it is trite law that where there are allegations of fraud, the suit should be set down for hearing. In the circumstances, I find that the Plaintiff's claim is not statute barred in accordance with the provisions of section 7 as read together with section 26 of the Limitations of Actions Act".

9. Similarly, the suit herein is anchored on fraud and in terms of Section 26 of the Limitation of Actions Act, the period of limitation starts to run from the time the fraud was discovered. In his submissions the plaintiff stated that the fraud was discovered much later. The time when the fraud was discovered is a matter of evidence which will only become clear when the plaintiff testifies and his evidence is subjected to cross-examination.

10. The upshot is that I find no merit in the Preliminary Objection and I dismiss it with no order as to costs.

Dated signed and delivered at Kisii this 28th day of February, 2020.

J.M ONYANGO

JUDGE