



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**E.L.C CASE NO. 404 OF 2015**

**THOMAS MONGARE OKARE.....PLAINTIFF/APPLICANT**

**VERSUS**

**CHARLES BUNDI OKARI.....1<sup>ST</sup> DEFENDANT**

**PETERSON AGWATA MARIKO.....2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR NYAMIRA.....3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**THE KENYA COMMERCIAL BANK LTD NYAMIRA BRANCH.....5<sup>TH</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff filed this suit in his capacity as the administrator of the estate of Joseph Okari-deceased. The said deceased was the registered owner of the land parcel known as WEST MUGIRANGO BOGICHORA/877 measuring 0.8 hectares. The Plaintiff claims that that the 1<sup>st</sup> Defendant with the collusion of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants unlawfully transferred the suit property to his name. The 1<sup>st</sup> Defendant then charged the title to the 5<sup>th</sup> Defendant to secure a loan. The property was subsequently transferred to the 2<sup>nd</sup> Defendant under unclear circumstances. The Plaintiff therefore prays for nullification of the title so that it can revert to the name of the deceased.

2. The 2<sup>nd</sup> Defendant filed his defence dated 9<sup>th</sup> February 2016 which was later amended 26<sup>th</sup> March 2018. In the said Defence he denies that the 1<sup>st</sup> Defendant transferred the suit property to him and avers that he purchased the suit property in 1999 at a public auction conducted on behalf of the Kenya Commercial Bank limited. He avers that the suit offends the provision of the limitation of Actions Act and that he will at the first instance apply to have the suit struck out. Together with his defence, the 2<sup>nd</sup> Defendant filed a Notice of Preliminary Objection on the ground that the suit is time barred.

3. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed a defence dated 15<sup>th</sup> May 2018 denying the Plaintiff's claim. They stated that whatever transactions were done on the suit property were legal and done in good faith. They further averred that the suit is barred by the Limitation of Actions Act and does not disclose any cause of action against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. In its defence filed on 6<sup>th</sup> June 2018, the 5<sup>th</sup> Defendant denies any impropriety on its part and states that it charged the suit property after conducting due diligence and obtaining all the requisite consents.

4. When the matter came up for hearing on 4<sup>th</sup> November 2019, counsel for the 2<sup>nd</sup> Defendant drew the court's attention to the Preliminary objection filed by the 2<sup>nd</sup> Defendant. The court directed that the Preliminary Objection be canvassed by way of written submissions. The 2<sup>nd</sup> Defendant and Plaintiff filed their submissions which I have considered.

**ISSUES FOR DETERMINATION:**

5. The singular issue for determination is whether the suit herein is statute –barred.

**ANALYSIS AND DETERMINATION.**

6. The case of **Mukisa Biscuits Manufacturing Company Limited V West End Distributors Ltd (1969) E.A 696** held as follows:

*“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit.*

*Justice Newbold in the said suit argues that*

*A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”*

Furthermore, in **Oraro v Mbajja (2005) eKLR** J.B Ojwang J (as he then was) stated as follows:

*“I think the principle is abundantly clear. A preliminary objection, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested an in any event, to be proved through the process of evidence.*

*Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication, is not, as a matter of legal principle a true preliminary objection which the court should allow to proceed. I am in agreement... that where a court needs to investigate facts, the matter cannot be raised as a preliminary point.”*

7. It is not in dispute that the issue of limitation is a pure point of law. 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.”*

8. Learned counsel for the 2<sup>nd</sup> Defendant submitted that the instant suit is founded on fraud which was discovered by the Plaintiff when he checked at the Land Registry and discovered that the land had been transferred from the original owner to the 2<sup>nd</sup> Defendant. He submitted that in the circumstances the limitation period under section 7 of the Limitation of Actions Act does not apply as time started running when the fraud was discovered.

9. On the other hand, learned counsel for the 2<sup>nd</sup> Defendant submitted that this suit falls within the exception to section 26 of the Limitation of Actions Act and therefore the suit is time-barred. Section 26 of the Act provides 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 through any person through whom he claims or his agent or the*

*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 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.*

10. It is therefore clear from the above that only an innocent purchaser who was not a party to the fraud or who did not know of the mistake or have reasons to believe that the mistake had been made, can be protected by the provisions of Section 26 of the Limitation of Actions Act. See the case of **Ezekiel Kamau v Standard Chartered Bank & 2 others (2017) eKLR**. In the instant case the Plaintiff has pleaded impropriety against all the five Defendants as per paragraphs 5, 5A, 6, 6A, 7 and 7A of his Amended plaint. Whether or not there was fraudulent conduct by the Defendants is a matter that can only be determined by evidence during the trial. It would therefore be premature to strike out the Plaintiff's suit at this stage.

11. In the premises, I find no merit in the preliminary objection and I dismiss it with costs to the Plaintiff.

**Dated, signed and delivered at Kisii via zoom this 28<sup>th</sup> day of May 2020.**

**J.M ONYANGO**

**JUDGE**