



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 147 OF 2019

KENNETH KIPKURUI (Suing as Administrator on behalf of

the Estate of the late JOSEPH KIMIBEI ROTICH.....PLAINTIFF

=VERSUS=

ELIZABETH KILELE.....1 ST DEFENDANT

FEDRICK KIPTONUI KILELE.....2 ND DEFENDANT

JOSEPH KIPSIGEI BII, FAITH NAITORE KIRIMI

& PHINEAS MWONGERA KIRIMI (Sued as the Administrators

of the Estate of the late Daniel Kirimi M'Muna.....3RD DEFENDANT

THE CHIEF LAND REGISTRAR.....4TH DEFENDANT

RULING

1. The plaintiff brought this suit on 6/5/2019 on behalf of the estate of the late Joseph Kimibei Rotich. He sought the following orders against the defendants:

- a) An order that the actions by the 1st defendant of selling and/or transferring the parcel of land known as Land Reference Number 330/507 to the late Daniel Kirimi M'Muna amounted to breach of trust.*
- b) An order that the purchase, sell and/or transfer of the parcel of land known as Land Reference Number 330/507 by the 1st defendant to the late Daniel Kirimi M'Muna was fraudulently done.*
- c) A declaration that the parcel of land known as Land Reference Number 330/570 legally belongs to the plaintiff as the administrator of the estate of the late Joseph Kimibei Rotich.*
- d) An order directing the 4th defendant to register the parcel of land known as Land Reference Number 330/507 in the name of the plaintiff.*
- e) A permanent injunction restraining the 1st, 2nd and 3rd defendants through themselves, their agents, employees or servants and/or any other person from interfering whatsoever with the parcel of land known as Land Reference Number 330/507.*
- f) Costs of this suit and interest thereon.*

2. In summary, the plaintiffs' case is that the late Joseph Kimibei Rotich (**the deceased**) was son to the 1st defendant, Elizabeth Kilele. In 1983, the deceased acquired Land Reference Number 330/507 and caused it to be registered in the name of the 1st defendant. The deceased subsequently died in July 2002 when the Land was still registered in the name of the 1st defendant. In December 2002, the plaintiff was appointed administrator of the estate of the deceased. On 29/1/2005, the 1st defendant illegally sold the suit property to the late Daniel Kirimi M'Muna. Through a letter dated 1/1/11/2006 written by the plaintiff's Advocates, the plaintiff objected to the sale. Upon the death of Daniel Kirimi M'Muna, the property was transferred to the beneficiaries of his estate.

3. The plaintiff contends that the 1st defendant was a trustee of her deceased son, the late Joseph Kimibei Rotich, and had no mandate to

dispose the suit property. He adds that the 1st defendant did not have a good title to pass to the late Daniel Kirimi M'Muna.

4. Together with the plaint, the plaintiff brought a notice of motion dated 2/5/2019 in which he sought a temporary injunction restraining the defendants against entering, selling, advertising, transferring and/or interfering with the suit property. That application is one of the two subjects of this ruling.

5. The second subject of the ruling is the 1st and 2nd defendant's preliminary objection dated 19/11/2019 in which the 1st and 2nd defendants seek an order striking out this suit on the following two verbatim grounds: (i) **the suit is a non-starter, the plaintiff has brought the suit after the lapse of 12 years contrary to Section 7 and 17 of the Limitation of Actions Act Cap 22 Laws of Kenya**; and (ii) **the plaintiff lacks locus standi to maintain the suit**.

6. Both the motion dated 2/5/2019 and the preliminary objection dated 19/11/2019 were opposed. They were canvassed through written submissions. Because the preliminary objection raises the question as to whether this court should entertain this suit or not, it poses a question of jurisdiction. I will therefore dispose it first, in line with the principle articulated in **Owners of the Motor Vessel "Lilian S" v Caltex oil (Kenya) Ltd [1989] eKLR**.

7. Two questions fall for determination in the preliminary objection. The first question is whether the plaintiff's suit is statute-barred under the provisions of the Limitation of Actions Act. The second question is whether the plaintiff lacks *locus standi* to bring this suit.

8. The 1st and 2nd defendants contend in their written submissions dated 20/12/2019 that this suit is a non- starter because it was brought after the expiry of the limitation period prescribed by the Limitation of Actions Act. In response, the plaintiff contends that the issue in dispute relates to a trust and that under Section 20 of the Limitation of Actions Act, a claim under a trust has no limitation period. It is the contention of the plaintiff that the preliminary objection is misplaced.

9. On the second question, the 1st and 2nd defendants submitted that the plaintiffs' time to file an action to assert that he had an interest in the suit property started running on 4/12/2002 when he was appointed administrator of the estate of Joseph Kimibei Rotich and that, upon expiry of 12 years, the plaintiff's claim was extinguished, hence he has no *locus standi* to bring this suit. In response, the plaintiff argued that the second ground of preliminary objection was not a pure point of law. He added that he had exhibited a grant of letters of administration to demonstrate that he was a duly appointed administrator.

10. I have considered the tenor and import of the preliminary objection. I have also considered the pleadings before court and the authorities cited in the parties' rival submissions. I will make brief pronouncements on the two questions falling for determination in the preliminary objection in the order in which they are itemized above.

11. The first question is whether the plaintiff's suit is statute-barred under the provisions of the Limitation of Actions Act. It is clear from the plaint before court that the plaintiff brought this suit on behalf of the estate of the late Joseph Kimibei Rotich. It is contended that although the 1st defendant was the registered proprietor of the suit property, the late Joseph Kimibei Rotich was the beneficiary of the property and or the 1st defendant was merely a trustee of the deceased.

12. From the plaint and the materials accompanying the plaint, it is clear that the 1st defendant as registered proprietor of the suit property, sold the suit property to the late Daniel Kirimi M'Muna in 2005. At that time, the plaintiff was the administrator of the estate of the late Joseph Kimibei Rotich's estate. It is clear from paragraph 29 of the plaint that on 1/11/2006, the estate of the late Joseph Kimibei Rotich objected to the transaction. Further, the estate, through the plaintiff, invited the Directorate of Criminal Investigations (**the DCI**) to investigate the transaction and the DCI returned a finding that the suit property properly belonged to the 1st defendant and there was no fraud in the disposal of the suit property by the 1st defendant.

13. Indeed, through a letter dated 1/11/2006, the estate's advocates, M/s Biwott Korir & Company Advocates wrote to M/S Njeru Nyaga & Company Advocates as follows:

“

Our Ref JKBMSC 06 Your Ref TBA 1ST November 2006

NJERU NYAGA & COMPANY ADVOCATES

UGANDA HOUSE, 3RD FLOOR

P O BOX 576

NAIROBI

RE: FRAUDULENT SALE OF LAND REFERENCE NUMBER 330/507

We have been instructed by the administrators of the estate of Joseph Rotich M K. Mibei Rotich that an agreement of sale of the above piece of land was executed in your offices and of M/S KANDIE MUTAI MUDEIZI & COMPANY ADVOCATES.

We have been further instructed that the persons holding themselves out as the Vendor(s) namely Elizabeth Kilele and her brother Fredrick Kiptanui Kilele who purports to have a power of Attorney on her behalf have purported to sell the above piece of land without a colour of right whatsoever and the land transaction or conveyance is fraudulent null and void.

We do not wish to go to great lengths as to the extent of the fraudulent acts of the two but suffice it is to say that the said Elizabeth Kilele is a trustee in terms of the Declaration of Trust executed on 21/12/1983 (whose trust document we believe was placed in your hands) and the beneficiary was/is the late Joseph Rotich and whose legal representative is Kenneth Mibei.

As the legal representative then, the said Kenneth Mibei Rotich has never given consent to the sale nor in any manner allowed any person to deal in whatever manner with whatever asset(s) belonging to the estate including but not limited to Land Reference Number 330/507 containing by measurement 1.374 acres or thereabouts situated in the City of Nairobi (Thompson Estate).

We have instructions to make various applications and proceedings against all parties concerned and we advise that your client mitigates his loses by claiming for a refund from Elizabeth Kilele and others involved. By a copy hereof we advise the Commissioner for Lands that no transfers of the above parcel of land is to be effected for lack of capacity by the trustee to sell the land.

All the said Kenneth Mibei Rotich was aware that the said trustee Elizabeth Kilele had leased a main house to a tenant to enable the estate pay for accumulated land rent and City Council rates owing. The said Kenneth Mibei Rotich only learnt that the said piece of land had been fraudulently sold not only to one but two different people, and when his sister who live in one of the houses was thrown out and her movable goods taken by the trustee to Nakuru.

Kindly be advised.

Yours faithfully,

Biwott J Korir Advocates

Signed

Biwott J Korir

Advocate

CC.

Elizabeth Kilele,

Fredrick Kiptanui Kilele

Commissioner for Lands

Registrar for Titles Chief Land Registrar

Director C I D”

14. What emerges from paragraph 29 of the plaint and from the letter dated 1/11/2006 is that, as at 1/11/2006, the cause of action in this suit had accrued. The plaintiff did not, however, bother to initiate appropriate proceedings to ventilate the estate’s claim. He waited until 6/5/2019 when he brought the present suit. That is a period of more than 12 years.

15. The plaintiff invokes the framework in Section 20 of the Limitation of Actions Act and contends that the suit herein is not statute-barred. The said Section provides as follows:

20. Actions concerning trust property

(1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action—

a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or

b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.

(2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action accrued: Provided that the right of action does not accrue to a beneficiary entitled to a future interest in the trust property, until the interest falls into possession.

(3) A beneficiary against whom there would be a good defence under this Act may not derive a greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.

16. My interpretation of Section 20(2) of the Limitation of Actions Act is that, once the beneficiary of a trust property discovers that there is breach of the trust, he has six years within which to bring action to seek redress relating to the breach. After six years, the claim is statute-barred.

17. What is challenged in this suit is the sale of the suit property by the 1st defendant to the late Daniel Karimi M’Muna. The plaintiff contends that the suit property was trust property and the late Joseph Kimibei was the beneficiary of the suit property. The plaintiff further contends that the sale to the late Daniel Kirimi M’Muna was fraudulent and was a breach of trust. It is clear from the plaint that the sale happened in 2005. As at 1/11/2006, the plaintiff was aware of the sale and formally objected to the sale. It is therefore clear that the cause of action in this suit accrued on or before 1/11/2006. This is a period of more than twelve years prior to the initiation of this suit. Section 20(2) of the Limitation of Actions Act required the plaintiff to bring the present action within six years from the date of accrual of the cause of action. Consequently, it is apparent that the plaintiff’s suit is statute-barred.

18. In light of the foregoing, the court upholds the 1st ground of preliminary objection and finds that this suit is statute-barred under the Limitation of Actions Act.

19. No convincing or relevant submission was presented to support the second ground of preliminary objection. The plaintiff as administrator of the estate of the late Joseph Kimibei Rotich was the proper person to initiate proceedings on behalf of the estate. Nothing serious was presented to the court to challenge his *locus standi*. Consequently, I reject the second limb of the preliminary objection.

20. Having come to the above findings in relation to the preliminary objection, I will not venture to make any findings on the merits of the notice of motion dated 2/5/2019.

21. The net result is that the first limb of the preliminary objection is upheld and the suit herein is struck out on the ground that it is statute-barred under the Limitation of Actions Act. The plaintiff shall bear costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF JUNE 2020.

B M EBOSO

JUDGE

In the presence of: -

June Nafula - Court Clerk