



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT KAJIADO

ELC NO. 108 OF 2017

BISHOP MOSES MEELI.....1ST PLAINTIFF
TIMOTHY KIIPA MEELI.....2ND PLAINTIFF

VERSUS

PETER MUNGAI KIMANI.....1ST DEFENDANT
JOHN DUNCAN MBICHI.....2ND DEFENDANT
HENRY MOORE KIPKURUI ARAP LASOI.....3RD DEFENDANT
BARCLAYS BANK OF KENYA LIMITED.....4TH DEFENDANT
REGISTRAR KAJIADO LAND REGISTRY.....5TH DEFENDANT

RULING

What is before Court is a Preliminary Objection dated 26th May, 2015 by the 4th Defendant against the Plaintiffs (in the Counterclaim) on the following grounds:

1. That the Counterclaim against the 4th Defendant is time -barred under the provisions of the Limitations of Actions Act Cap 22 Laws of Kenya, the pleaded cause of action against the 4th Defendant having arisen on 14th October, 1998.
2. That the Counterclaim is instituted by persons who are not Administrators of the Estate of Noah Meeli Nguusa, hence the Plaintiffs have no *locus standi* to institute the Counterclaim.

The 4th Defendant prays that the Plaintiffs' in the said Counterclaim be struck out with costs to the 4th Defendant. The 4th Defendant filed its written submissions where the bank stated that it is not in dispute that the Plaintiffs' purported cause of action against it arose on 14th October, 1998 when the Plaintiffs', allege a fictitious entity known as Freemark Kenya Limited, charged the suit property to the 4th Defendant and hence it did not acquire a valid title. The 4th Defendant submits that the Counterclaim was instituted against it on 6th March, 2015 which is 16 years after the pleaded date of the cause of action. Further that the cause of action arose against it after the creation of a Charge dated 14th October, 1998.

On the 19th April, 2017 when the matter came up for hearing of the Preliminary Objection, Ms Obel for the 3rd Defendant and Mr. Kamunya holding brief for Ms Manegene for the Plaintiffs' in the original suit stated that they were not opposing the preliminary objection. Ms Karanja who was Counsel for the 4th Defendant stated that she would canvass the Preliminary Objection by way of her written submission.

Upon perusal of the Preliminary Objection, the written submissions and the pleadings filed herein, the Court will proceed to analyze whether the Preliminary Objection is merited or not.

The Court notes that the Defendants who were Plaintiffs' in the Counterclaim were served, entered appearance and filed their Defence in 2015. The Defence and Counterclaim filed raise triable issues especially allegations of fraud that ought to be heard and determined at a full trial. The Court finds that the cause of action did not arise at the time of registration of Charge as submitted by the 4th Defendant but arose when the Defendants/Plaintiffs in the Counterclaim learnt about the alleged fraud. As regards the allegations of fraud within the Counterclaim, I am persuaded by the case of **UCB Vs Mukoome Agencies (1982) HCB22, where it was stated 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 Court finds that the 4th Defendant seeks to rely on technicalities and this offends the provisions of section 19(1) of the Environment and Land Court Act which stipulates that 'in any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence. Further article 159 (2) (d) of the Constitution states that ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles (d) justice shall be administered without undue regard to procedural technicalities.'

In the instant case I find that it would be pertinent if the Defendants/Plaintiffs in the Counterclaim are granted a right to fair hearing as enshrined in article 50 of the Constitution.

On the question of *locus standi* the Court finds that the 2nd Plaintiff is indeed one of the administrators of the estate of Noah Meeli Nguusa (deceased). Further, that the issue of the spelling of the name and the absence of his middle name in the Grant does not make him a non administrator. However the court finds that the 1st Plaintiff in the Counterclaim is not an administrator of the estate and hence did not have locus to institute it.

In the circumstances I allow the second point of the Preliminary Objection as against the 2nd Defendant/2nd Plaintiff in the Counterclaim that he did not have *locus standi* to institute the Counter Claim but dismiss the rest of the Preliminary Objection. Costs will be in the cause.

Parties are urged to comply with order 11 and set the suit down for hearing to enable the court determine the issues once and for all.

Dated signed and delivered in open court at Kajiado this 18th day of July, 2017

CHRISTINE OCHIENG

JUDGE

REPRESENTATION

Cheboi holding brief for Manegene for plaintiff

Lesaigon holding brief for Karanja for 4th Defendant.

Court Clerk -Mpoye