



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 341 OF 2013**

**MILTON MAINA MUSA KIURU.....PLAINTIFF**

**VERSUS**

**ELIJAH KIGUNDU KIURU.....1<sup>ST</sup> DEFENDANT**

**SAMUEL KARUUMI KIURU.....2<sup>ND</sup> DEFENDANT**

**NAHASHON MIANO.....3<sup>RD</sup> DEFENDANT**

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

**THE DISTRICT LAND REGISTRAR, KIRINYAGA...5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

This suit was originally filed in **NAIROBI HIGH COURT CIVIL CASE NO. 124 of 2007** before it was transferred to **NYERI HIGH COURT** where it was registered as **CIVIL CASE NO. 97 of 2009** before it was finally transferred to this Court in 2013.

The plaintiff **MILTON MAINA MUSA KIURU** sought the following orders against the defendants:-

- a. ***A declaration that the plaintiff is the bona fide registered proprietor of all that parcel of land known as MWERUA/KAGIOINI/1436 (the land is actually MWERUA/KAGIOINI/436 as per the Land Certificate produced in the course of the trial) and the registration of the 1st, 2nd and 3rd defendants as proprietors is fraudulent, illegal, null and void.***
- b. ***A mandatory injunctive order restraining the 5th defendant to cancel the title issued to the 1st, 2nd and 3rd defendants over and rectify the Kirinyaga District Land Register to reflect the plaintiff as the registered proprietor of L.R No. MWERUA/KAGIOINI/436.***

The claim was based on pleadings that whereas the plaintiff is the bona fide registered proprietor of all that parcel of land known as **WERUA/KAGIOINI/436** measuring 2.18 Hectares or thereabout (herein the suit land) having been gifted the same by his father on or about 24th February 1976, the 1st defendant had filed Succession Cause No. 199 of 1994 at Kerugoya Court alleging that the plaintiff was deceased and that grant was confirmed on 15th November 1995 whereupon the 1st, 2nd and 3rd defendants registered themselves as proprietors of the plaintiff's land. However, the plaintiff filed **NAIROBI HIGH COURT SUCCESSION CAUSE NO. 3466 of 2004** which revoked the earlier grant issued in 1995. It is the plaintiff's case that the registration of the 1st, 2nd and 3rd defendants as proprietors of the suit land was obtained through fraud and misrepresentation. The particulars of fraud and misrepresentation alleged

against the 1st, 2nd and 3rd defendants include:-

1. ***Alleging that the plaintiff is dead when he is still alive.***
2. ***Filing Succession Cause No. 199 Kerugoya for the Estate of MILTON MUSA KIURU.***
3. ***Alleging that MILTON MUSA KIURU was also known as MUSA KIURU KARUGUMI.***
4. ***Presenting false documents to the Kerugoya Land Registrar etc.***

As against the 5th defendant, the particulars of fraud included:-

1. ***Colluding with the 1st, 2nd and 3rd defendants and changing entries/particulars in the Register without due attention.***
2. ***Failing to verify the authenticity of documents (if any) presented by the 1st, 2nd and 3rd defendants etc.***

The 1st, 2nd and 3rd defendants, having been served by way of substituted service by advertisement in the Daily Nation as ordered by **Sergon J.** on 22nd June 2011, failed to enter appearance or file any defence and interlocutory judgment was entered against them on 27th April 2015.

The 4th and 5th defendants filed a defence in which they pleaded, inter alia, that they are strangers to the averments alleging fraud or collusion on their part adding that if the 5th defendant effected any changes on the proprietorship of the suit land, they did so in good faith on the basis of documents presented which included what appeared at the time to be a valid grant of letters of administration without any intention to defraud. The 4th and 5th defendants further pleaded that they have no objection to the cancellation and/or rectification of the register to reflect the true and bona fide proprietor thereto upon proof.

Hearing commenced before me on 4th November 2015 when only the plaintiff and 4th and 5th defendants were represented, the 1st, 2nd and 3rd defendants having failed to enter appearance or file defence to the claim.

**MILTON MAINA MUSA KIURU** (PW1) told the Court that he is the proprietor of the suit land which was gifted to him by his late father who died in 1986. He produced a copy of the certificate of lease (Exhibit 1) adding that on 16th March 1994, the 1st defendant filed Kerugoya Court Succession Cause No. 199 of 1994 alleging that the plaintiff had died and obtained a grant which was confirmed in 1995. The plaintiff however filed Succession Cause No. 3466 of 2004 at Nairobi. He produced the grant together with his late father's will –see Exhibit 1 to 5. He stated that the grant issued in Kerugoya Case No. 199 of 1994 was obtained through fraud and collusion on the part of the defendants hence this suit.

The 4th and 5th defendants called no witness.

Submissions were filed both by the firm of Oonge & Company Advocates for the plaintiff and Mr. F.O. Makori, Litigation Counsel on behalf of the 4th and 5th defendants.

I have considered the pleadings herein, the oral and documentary evidence of the plaintiff who was the only witness and the submissions by counsel.

It is clear from the Land Certificate in respect of the suit land (Exhibit 1) that it is registered in the names of **MILTON MUSA KIURU**. During cross-examination by Mr. Makori, the plaintiff confirmed that his names are **MILTON MUSA KIURU** or **MILTON MAINA KIURA** and his late father was called **MUSA KIURU KARUGUMI**. He also stated that the 1st, 2nd and 3rd defendants are strangers to him whom he only came to know about after this fraud. It is not clear if the 1st, 2nd and 3rd defendants obtained any document of title with respect to the suit land. None was availed to the Court at trial. What is clear however is that on 21st March 1995, the 1st defendant **ELIJAH KIGUNDU KIURU** obtained a grant of letters of administration interstate in respect of the Estate of **MILTON MUSA KIURU** also known as **MUSA KIURU KARUGUMI** having filed **KERUGOYA SENIOR RESIDENT MAGISTRATE'S SUCCESSION CAUSE No. 199 of 1994** (Exhibit 2) which was confirmed on 15th November 1995 sharing out the suit land as follows:-

**SHARE**

**ELIJAH KIGUNDU KIURU - 2 Acres to hold**

**K K (Minors) in trust for himself, LUCY WANJIRU KIURU K K and Lucy Wanjiru Kiuru**

**SAMUEL KARUUMI KIURU - 2 Acres to hold in**

**F M K (Minor) in trust for himself, C W K (Minor) F M K and C W K**

The plaintiff also produced a copy of the grant issued to him by **NAIROBI HIGH COURT SUCCESSION CAUSE NO. 3466 of 2004** on 29th March 2006 (Exhibit 4) and the will of his late father **MUSA KIURU KARUGUMI** dated 22nd February 1977 (Exhibit 5). The plaintiff stated that the grant issued in **KERUGOYA SENIOR RESIDENT MAGISTRATE'S SUCCESSION CAUSE NO. 199 of 1994** was cancelled by the one issued in **NAIROBI HIGH COURT SUCCESSION CAUSE NO. 3466 of 2004**. That of course cannot be possible because a grant is not revoked by obtaining another grant. The jurisdiction to revoke or annul a grant is clearly set out in **Section 76 of the Law of Succession Act (Chapter 160 of the Laws of Kenya)**. It is not within this Court's jurisdiction to impugn any of those grants. That can only be done by filing applications in the respective Succession Causes. That, however, does not prevent this Court from commenting on the grant issued in **KERUGOYA SENIOR RESIDENT MAGISTRATE'S COURT SUCCESSION CAUSE NO. 199 of 1994**. In so far as that grant was issued in respect of the Estate of the plaintiff who is still alive, it cannot be a genuine grant as known in law. Secondly, the plaintiff has produced a copy of a will dated 22nd February 1997 by **MUSA KIURU KARUMI** in which he devised and bequeathed all his real and personal Estate to his son **MILTON MUSA KIURU**. It is therefore doubtful if the deceased's property could, in light of that will be shared out in the manner that was done when the grant in **KERUGOYA SENIOR RESIDENT MAGISTRATE'S COURT SUCCESSION CAUSE NO. 199 OF 1994** was confirmed on 15th November 1995. It is therefore clear to me that any transfer of the suit land on the basis of that grant could only have been obtained by fraud because the plaintiff is not only alive and therefore his Estate is not available for distribution but further, the plaintiff in fact holds the land certificate in respect of the suit land. That certificate, by virtue of **Section 26(1) of the Land Registration Act** can only be taken by this Court "***as prima facie evidence***" that the plaintiff is the absolute and indefeasible owner of the suit land unless it is shown to have been obtained illegally. I am satisfied therefore that the plaintiff has not only established that he is the bona fide proprietor of the suit land herein but also, that any other registration of the same land in favour of the 1st, 2nd and 3rd defendants could only have been obtained through fraudulent means.

With respect to the 4th and 5th defendants, it was pleaded, inter alia, that any changes effected on the suit land was done in good faith on the basis of the documents presented which appeared at that time to be a valid grant of letters of administration without any intention to defraud the plaintiff. Having found that indeed such documents exist, it would be difficult for this Court not to make a finding that the 4th and 5th defendants acted in good faith. Notwithstanding the fact that the 4th and 5th defendants led no evidence in support of their defence, I am persuaded that on the basis of the documentary evidence produced herein, the allegations of fraud on the part of the 4th and 5th defendants have not been proved and I would dismiss the plaintiff's suit against them.

I have also considered whether this suit is statute barred. Mr. Makori counsel for the 4th and 5th defendants did submit that the cause of action against the 4th and 5th defendants occurred on 31st March 1996 yet this suit was filed on 22nd May 2007 and therefore in terms of **Section 3(1) of the Public Authorities Limitation Act**, this suit is legally un-tenable. That section provides as follows:-

***"No proceeding founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action arose"***

On the other hand, **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 occurred to him or, if it first occurred to some person through whom he claims, to that person”.***

This claim was however based on the pleading that the defendants fraudulently colluded to effect changes in the proprietorship of the suit land. Once fraud is pleaded, the period of limitation does not begin to run until the plaintiff discovers the fraud or could, with reasonable diligence, have discovered the same. In that regard, **Section 26 of the Limitation of Actions Act**, so far as is relevant, 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 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...”.***

This Court has of course already exonerated the 4th and 5th defendants on the allegation of fraud. However, had fraud been established against them, the provisions of **Section 3(1) of the Public Authorities Limitation Act** would not have shielded them because the provisions of that Act incorporate **Section 26 of the Limitation of Actions Act**.

This is found in **Section 6 of the Public Authorities Limitation Act** which states:-

***“Notwithstanding the provisions of Section 3(1) of the Limitation of Actions Act, Section 22 of the Act shall not apply in respect of the provisions of this Act, and in Section 27 of the Limitation of Actions Act, the reference to Section 4(2) of that Act shall be read and construed as reference to Section 3(1) of the Act;***

***but subject thereto and notwithstanding Section 42 of the Limitation of Actions Act, part III of that Act shall apply to this Act”***

The plaintiff could not of course have been aware that the 1st defendant had filed **KERUGOYA SENIOR RESIDENT MAGISTRATE’S SUCCESSION CAUSE NO. 199 of 1994** otherwise he would have objected to the same. When he became aware, he filed **NAIROBI HIGH COURT SUCCESSION CAUSE NO. 3466 of 2004**. So the plaintiff could only have become aware of the fraud in 2004 and that is when the period of limitation started to run. This suit was filed in 2007 well within the limitation period of twelve years where the claim relates to land. This suit is therefore not statute barred as suggested by Mr. Makori Counsel for the 4th and 5th defendants.

Having considered the evidence in this case, I am satisfied that the plaintiff has proved his case against the 1st, 2nd and 3rd defendants as required in law. The claim against the 4th and 5th defendants has however not been established as I am persuaded that they acted in good faith on the basis of the documents exhibited herein.

Ultimately therefore, the judgment of this Court is as follows:-

- 1. There shall be orders in favour of the plaintiff as against the 1st, 2nd and 3rd defendants as prayed in paragraph 15 (a) and (b) of his plaint.***
- 2. The claim against the 4th and 5th defendants is dismissed.***
- 3. The plaintiff shall meet the costs of the 4th and 5th defendants.***

It is so ordered.

**B.N. OLAO**

**JUDGE**

**12<sup>TH</sup> MAY, 2016**

**Judgment dated, delivered and signed in open Court this 12<sup>th</sup> day of May, 2016**

Mr. Oonge for the Plaintiff present

Attorney General for Defendant absent

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**12<sup>TH</sup> MAY, 2016**