



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 322 OF 2015

MUGO MURUACHIMBA alias MUGO NYAGA.....PLAINTIFF

VERSUS

MOFFAT NYAGA KAGAU.....1ST DEFENDANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT

COUNTY LAND REGISTRAR – EMBU.....3RD DEFENDANT

RULING

A. INTRODUCTION

1. This is a ruling on a preliminary objection raised by the 1st Defendant to the Plaintiff's suit. In paragraph 13 of his written statement of defence, the 1st Defendant pleaded that the Plaintiff's suit was incompetent and fatally defective for being time barred under the **Limitation of Actions Act (Cap. 22)**.

B. THE PLAINTIFF'S SUIT

2. By a plaint dated 13th August 2015 the Plaintiff sought cancellation of the sub-divisions of *Title No. Gaturi/Githimu/549* (the *suit property*) and various orders for recovery thereof. Among the orders sought were an order for cancellation of the sub-divisions and titles; cancellation of all entries made in 1961 in the relevant land register; permanent injunctions, general damages for fraud; mesne profits; and any other relief the court may deem just and fair to grant.

3. The basis of the claim was that the Plaintiff was duly registered as proprietor of the suit property in 1961 and that sometime in 2000 he was surprised to learn that the suit property had been fraudulently transferred into the 1st Defendant's name with the collusion of the 2nd and 3rd Defendants and subsequently sub-divided into 12 parcels. He pleaded ten (10) particulars of fraud against the Defendants.

C. THE 1ST DEFENDANT'S RESPONSE

4. The 1st Defendant denied the Plaintiff's claim and pleaded that it was the Plaintiff who had sold and transferred the suit property to the 1st Defendant's father in 1974 and that his interest therein ceased upon such transfer. The 1st Defendant denied the alleged fraud and collusion with the 2nd and 3rd Defendants. He further stated that the sub-division of the suit property was lawfully done since he was the legitimate owner at the material time. The 1st Defendant further pleaded that he shall raise a preliminary objection to the suit on the basis that it was incompetent and defective on account of being time-barred under the **Limitation of Actions Act (Cap. 22)**.

D. DIRECTIONS ON THE HEARING OF THE PRELIMINARY OBJECTION

5. When the suit was listed for directions on 7th July 2020 the 1st Defendant sought to canvass his preliminary objection first before the suit could be heard. It was directed that the preliminary objection shall be canvassed through written submissions. The 1st Defendant was granted 21 days to file and serve his submissions whereas the Plaintiff and the Attorney General for the 2nd and 3rd Defendants were granted 21 days upon the lapse of the 1st Defendant's period to file theirs. The material on record shows that the Plaintiff filed his submissions on or about 14th September 2020. However, none of the Defendants had filed submissions by the time of preparation of the ruling.

E. THE ISSUES FOR DETERMINATION

6. The court has considered the plaint, the 1st Defendant's statement of defence and the material on record. The main question for determination is whether the Plaintiff's suit is statute barred under the **Limitation of Actions Act** and whether the issue can be determined as a preliminary objection.

F. ANALYSIS AND DETERMINATION

7. The court has considered the material and the Plaintiff's submissions on record. The 1st Defendant's preliminary objection was based on the fact that his father acquired the suit property way back in 1974 and that the instant suit was filed in violation of **Section 7** of the **Limitation of Actions Act** which prescribes a limitation period of 12 years from the date of the accrual of the cause of action. The said section stipulates that:

“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. The Plaintiff submitted that his suit for recovery of the suit property was based on fraud and that he did not discover the alleged fraud until the year 2000 when he conducted a search on the suit property. The Plaintiff also submitted that under **Section 26** of the **Limitation of Actions Act**, the period of limitation does not run until the Plaintiff has discovered the fraud or could have with reasonable diligence have done so.

9. The Plaintiff relied upon the case of **Mintina Keton Kopuni (suing as legal representative of the estate of Keton Ole Kopuni Parsena v Francis Gathiari & 2 Others Kajado ELC Case No. 557 of 2017** and **Tecla Cheroni Sirma v Kimetto and Another Kericho ELC Case No. 78 of 2016** for the proposition that where a suit is based on alleged fraud it should be allowed to proceed for full hearing.

10. In the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** a preliminary objection was described as follows:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point, may dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration

(per Law, JA)

11. In the said case *Sir Charles Newbold, P*, made the following remarks on the matter:

“The first relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs, and on occasion, confuse the issues. This improper practice should stop.”

12. Although a plea of limitation is capable of being canvassed as a preliminary objection, the same cannot be effectively canvassed if some facts have to be ascertained. The court is of the opinion that in the instant case the **date of accrual** of the Plaintiff's cause of action has to be ascertained in terms of **Section 7** and **Part III** of the **Limitation of Actions Act**. **Section 26** of the **Act** provides for extension of the period of limitation on account of disability, acknowledgement, fraud, mistake and ignorance of material facts.

13. **Section 26** of the said **Act** stipulates that:

“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.”

14. The court is thus of the opinion that some facts have to be established in relation to when the Plaintiff's cause of action accrued. For instance, the Plaintiff has pleaded that he discovered the alleged fraud in 2000. This is a question of fact to be established at the trial. The question of whether or not the Plaintiff could, with due diligence, have discovered the fraud earlier is also a question of fact to be established at the trial. The question of whether or not the 1st Defendant's father was a *bona fide* purchaser for value is also a question of fact which is best established at the trial.

15. In the circumstances, the court is not satisfied that the issue of limitation can be determined as a preliminary objection in the instant suit. It is an issue which should be determined at the trial upon evidence being taken.

G. CONCLUSION AND DISPOSAL ORDER

16. The upshot of the foregoing is that the court finds no merit in the 1st Defendant's preliminary objection and the same is accordingly overruled. However, the 1st Defendant shall be at liberty to pursue the plea of limitation at the trial. Costs shall be in the cause. It is so ordered.

RULING DATED and **SIGNED** in Chambers at **EMBU** this **22ND DAY** of **OCTOBER 2020** and delivered via Microsoft Teams platform in the presence of Ms. Muthama for the Plaintiff, Ms. Nzekele holding brief for Mr. Okwaro for the 1st Defendant and Mrs. Njoroge for the Attorney General for the 2nd & 3rd Defendants

Y.M. ANGIMA

JUDGE

22.10.2020