



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 142 OF 2007

WINFRED PENINA MUTHUBI & FRANCIS KANGERE MUCHIRI

(Suing as Representatives and Administrators of the Estate of

JOSEPH KANGERE MUTHUBI (Deceased).....PLAINTIFFS

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT

NANAK INVESTMENTS LIMITED.....2ND DEFENDANT

JAMES AMALEMBA ATEMA.....3RD DEFENDANT

THERESA SALASYA ATEMA.....4TH DEFENDANT

SAM KOKACH.....5TH DEFENDANT

BERTHA KOKACH.....6TH DEFENDANT

JOSIAH KIPKEMBOI KIPLAGAT.....7TH DEFENDANT

JOSEPH WANJALA.....8TH DEFENDANT

CHRISTINE WANJALA.....9TH DEFENDANT

LILIAN WANJIRA.....10TH DEFENDANT

HON. DR. PAUL OTUOMA.....11TH DEFENDANT

CELINA OTUOMA.....12TH DEFENDANT

FLORENCE MWAL.....13TH DEFENDANT

NEELTJE ROSENSTOK.....14TH DEFENDANT

WINNIE WANGARI SCHULTE KELLINGHAUS.....15TH DEFENDANT

FRANCIS OFAFA.....16TH DEFENDANT

RULING

The 2nd Defendant filed the preliminary objection dated 27/6/2019 while the 3rd to 16th Defendants filed the preliminary objection dated

4/10/2019 claiming that the suit had abated by operation of the law and that the Plaintiffs' claim against the 2nd to 16th Defendants was time-barred. The gist of both preliminary objections was that the Plaintiffs did not have capacity to institute the suit against the 2nd to 16th Defendants and further that the suit was time- barred as against these Defendants.

Parties filed submissions which the court has considered. The 2nd Defendant submitted that the original Plaintiff Mr. Joseph Kangere Muthubi died on 26/11/2013 and a limited grant of letters of administration *ad litem* was issued by the High Court to his personal representatives on 14/10/2014. The 2nd Defendant contended that the personal representatives of the late Joseph Kangere Muthubi were required to file a formal application to continue the proceedings within a year of his death failing which the suit would abate under Order 24 Rule 3 of the Civil Procedure Rules. The 2nd Defendant further submitted that the suit alleging fraud on the part of the 2nd Defendant's director, Mr. Manmohan Chawla, should have been instituted not later than October 2000.

The 3rd to 16th Defendants also relied on Order 24 Rule 3 of the Civil Procedure Rules in urging that any personal representative intending to be made a party to an existing suit that survives a deceased party must make an application for substitution within a year of the Plaintiff's death. The 3rd to 16th Defendants submitted that the grant of letters of administration *ad litem* were issued to the Plaintiff on 14/10/2020 and urged that the personal representatives should have made an application for substitution by 26/11/2014 which they never did. These Defendants contended that 6 years had lapsed from the time the Plaintiff died without steps being taken to substitute him in the suit. They contended that the court lacked jurisdiction to determine this suit for it had already abated. The 3rd to 16th Defendants contended that the 2nd Defendant undertook the development of the maisonettes on the Suit property in 1993 with the deceased Plaintiff's knowledge since the two parcels of land are adjacent to each other and are only separated by a perimeter wall. The 3rd to 16th Defendants maintained that the maisonettes were developed more than 20 years ago and maintained that the Plaintiff's personal representatives had always occupied and resided on the Suit property and were therefore aware of the development of the maisonettes.

The Plaintiffs submitted that their application for substitution was filed on 13/11/2014 before a year had elapsed after the death of Joseph Muthubi Kangere. They maintained that the personal representatives of the deceased Plaintiff had capacity to institute a suit against any other person on behalf of the estate of the deceased. The Plaintiffs contended that in a preliminary objection there was no room to ascertain facts as the Defendants seek to have done in this instance. The Plaintiffs contended that in order to determine whether their claim against the 2nd to 16th Defendants was time barred factual issues would need to be ascertained.

This file has had the misfortune of getting lost and being reconstructed on more than one occasion. The court notes from the typed proceedings of 27/4/2017 that on that day the Plaintiff's advocate Mr. Mwangi Muturi informed the court that there was an application dated 13/11/2014 pending which sought to substitute the Plaintiff. The court record shows that the court allowed the application as prayed. Unfortunately, the Plaintiffs did not deem it fit to file an affidavit and produce a copy of the application for substitution as well as the order extracted to prove to the 2nd to 16th Defendants that they did apply for substitution and that the court granted an order for the substitution of the deceased Plaintiff. The court is inclined to give the Plaintiffs the benefit of doubt that they made an application within time and were properly substituted in the suit in the place of the original Plaintiff who died in 2013.

The issue that falls for determination is whether the suit against the 2nd to 16th Defendants is time- barred. The original suit was filed in February 2007 against Savings and Loans Kenya Limited seeking to compel the bank to release the original title deed over L.R. No. 330/60 to the Plaintiff on the basis that the loan sum secured by the title had been repaid. The plaint was amended in May 2011 and Kenya Commercial Bank Limited was substituted as a Defendant. It is not clear what happened thereafter and whether the plaint was ever amended again after the demise of Joseph Kangere Muthubi in 2013. This difficulty is borne out by the fact that the court file went missing and had to be reconstructed. The next amendments came in March 2018 when the Plaintiffs joined the 2nd to 16th Defendants to the suit in which they sought a declaration that the subdivision by the 2nd Defendant of L.R. No. 330/60 to create L.R. No. 330/927 and L.R. No. 330/928 was illegal and void and that the conveyances in respect of L.R. No. 330/928 hived out of L.R. No. 330/60 were fraudulently obtained and should be cancelled and the original title over L.R. No. 330/60 restored.

The court notes from the list of documents the 3rd to 16th Defendants filed that the list contains leases dated 3/5/1994 in respect of the maisonettes developed on L.R. No. 330/928. Based on the documents the 3rd to 16th Defendants filed by the 3rd to 16th Respondents including the leases, the court agrees with the 3rd to 16th Defendant that the Plaintiffs' claim is statute barred as it was filed almost 24 years after the 3rd to 16th Defendants acquired interests in the Suit property. The late Joseph Kangere Muthubi should have filed a suit against the 2nd to 16th Defendants to recover the land known as L.R. No. 330/928 which was hived out of L.R. No. 330/60 within twelve years of the date of subdivision and transfer of the resultant portions of the land to third parties.

The suit against the 2nd to 16th Defendants is dismissed for being time- barred. The Plaintiffs will pay costs of the suit to the 2nd to 16th Defendants.

Delivered virtually at Nairobi this 7th day of October 2020.

K.BOR

JUDGE

In the presence of:-

Ms. M. Nthiga holding brief for Mr. Muturi Mwangi for the Plaintiffs

Ms. Winfred Nzuki for the 1st Defendant

Ms. Diana Mulei for the 2nd Defendant

Mr. Mitchell Kitonyi for the 3rd to 16th Defendants

Mr. V. Owuor- Court Assistant