



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 1102 OF 2016

JAPHES ARISA MAKORI (Chairman suing on behalf of Ndonyo

Grazing Ground Community Based Organization).....1ST PLAINTIFF

ELLIAM OKACHI MAKORI (Member).....2ND PLAINTIFF

VERUS

COUNTY GOVERNMENT OF KISII.....1ST DEFENDANT

SAFARICOM LIMITED.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiffs are members of Ndonyo Grazing Ground Community Based Organization. The Plaintiffs claim that they had reserved Land Parcel No. SOUTH MUGIRANGO/NYATAARA/1202 as a grazing ground for the members but during the process of adjudication, the 1st Defendant with an intent to defraud the Plaintiffs colluded with the Land Adjudication Officers and caused the suit property to be registered in the name of the 1st Defendant. The 1st Defendant further avers subsequently entered into an agreement with the 2nd Defendant for the lease of the suit property with a view to depriving the Plaintiffs of the same. The Plaintiffs seek the following reliefs:

a) An order of rectification of the register by deleting the name of Gusii County Council as the entry for Land Parcel Number SOUTH MUGIRANGO/NYATAARA/1202 and in its place inserting the name reserved for Ndonyo Grazing Ground community(sic) for easy sub-division each member takes back the portion donated

b) A Declaration that the registration of land parcel number SOUTH MUGIRANGO/NYATAARA/1202 in the name of Gusii County Council was obtained by fraud and the same be deleted.

c) Costs of this suit together with interest thereon at the rate of 14% .p.a from the date of filing suit until payment in full.

2. In their defence dated 30th January 2020 the 1st Defendant denies the Plaintiff's claim and states that even if the Plaintiff acquired the suit property, she has never been in actual possession or occupation thereof.

3. The 2nd Defendant filed its defence dated 28th February 2017 in which it denies the Plaintiff's claim and states that it leased a portion of the suit property measuring 14.4 metres by 7.4 metres (76.76 square metres). It denies that it intends to disinherit the Plaintiff and states that it is willing to pay rent to the rightful owner of the property.

4. In addition to its defence the 1st Defendant filed a Notice of Preliminary Objection dated 29th March 2019 in which it states that the suit is barred by the Limitation of Actions Act. It is the said Preliminary Objection that is the subject of this ruling. The court directed that the Preliminary Objection be canvassed by way of written submissions but only the Plaintiffs filed their submissions.

ANALYSIS AND DETERMINATION

5. The singular issue for determination is whether the suit is statute barred.

Before determining whether the suit is statute barred it is necessary to define what a Preliminary Objection is. In the case of **Mukisa Biscuits Manufacturing Company Limited V West End Distributors Ltd (1969) E.A 696** the court held as follows:

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit.

Justice Newbold in the said suit argues that

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 had to be ascertained or if what is sought is the exercise of judicial discretion”

6. Furthermore, in **Oraro v Mbajja (2005) eKLR** J.B Ojwang J (as he then was) stated as follows:

“I think the principle is abundantly clear. A Preliminary Objection, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual detail liable to be contested an in any event, to be proved through the process of evidence.

Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication, is not, as a matter of legal principle a true preliminary objection which the court should allow to proceed. I am in agreement... that where a court needs to investigate facts, the matter cannot be raised as a preliminary point.”

7. It is not in dispute that the issue of limitation is a pure point of law. 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 accrued to him or, if it first accrued to some person through whom he claims, to that person.”

8. The Plaintiffs’ suit is founded on fraud. At paragraph 6 of the Plaint, the Plaintiffs allege that on unknown dates, the Defendants with intent to defraud the Plaintiff’s land (sic) which they had set aside as a grazing field for their animals, the said land being SOUTH MUGIRANGO/NYATAARA/1202, the said defunct Gusii County Council colluded with the Adjudication Officer and inserted its name on the land register as the owners when it knew that the land belonged to Ndonyo Grazing Community. The Particulars of fraud are provided.

9. In his submissions Learned counsel for the Plaintiff has contended that the Plaintiffs discovered the fraud when they conducted an official search at the Land Registry on 7th August 2015, which revealed that the suit property was registered in the name of the 1st Defendant. They subsequently filed suit in 2016. He submitted that in the circumstances, the limitation period under section 7 of the Limitation of Actions Act does not apply as time started running when the fraud was discovered.

Section 26 of the Act 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 through any person through whom he claims or his agent or the*
- 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 mistake or could with reasonable diligence have discovered it;

10. In view of the foregoing, I am constrained to agree with counsel for the Plaintiff that this suit falls within the provisions of section 26 of the Limitation of Actions Act and it is therefore not statute –barred. The upshot is that the Preliminary Objection lacks merit and it is hereby dismissed with costs to the Plaintiffs.

Dated, signed and delivered at Kisii this 1st day of December, 2020.

J.M ONYANGO

JUDGE