



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 400 OF 2017**

**AGNES ANDENYI IMBUCHI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**NANCY WITAMBULA AMBULA**

**ROSE IKAMBILI AMBULA**

**(ADMINISTRATORS OF THE ESTATE OF**

**RICHARD MISE IMBUCHI).....DEFENDANTS/APPLICANT**

**RULING**

This application is dated 12<sup>th</sup> March 2018 and is brought under sections 1A, 1B and 3A of the Civil Procedure Act order 2 rule 15, 1 (a), (b) and (c), order 51 rule 1 of the Civil Procedure Rules, sections 4 (2) and 26 of the Limitations of Actions Act seeking the following orders:-

1. That the plaintiff's plaint dated 9<sup>th</sup> June, 2016 be struck out and the suit dismissed as prayed for by the defendant.
2. That an order for restitution following illegal and unlawful eviction and alienation of the 1<sup>st</sup> defendant/applicant from land parcel number Kakamega/Lumakanda/3274 (hereinafter the suit property) be issued in favour of the 1<sup>st</sup> defendant.
3. That the costs of this application be awarded to the defendants/applicants.

The applicant submitted that, the subject of the plaint, is statute barred under the Limitations of Actions Act Chapter 22 of the Laws of Kenya, it discloses no reasonable cause of action in law and is scandalous, frivolous and vexatious. That the plaintiff/respondent's suit alleging fraud on the part of her late husband the late Richard Mise Imbuchi in the transfer of title to Kakamega/Lumakanda/3274 (hereinafter, the suit property") was filed on 9<sup>th</sup> June, 2016. That the suit property was transferred to her late husband the late Richard Mise Imbuchi on 7<sup>th</sup> February, 2005. That a certificate of official search applied for, and obtained, by the plaintiff/respondent and filed by the plaintiff/respondent in an objection to grant of representation application filed in Succession Cause No. 316 of 2012 Eldoret, concerning the estate of her late husband the late Richard Mise Imbuchi indicates that the plaintiff/respondent placed a caution on the suit property on 13<sup>th</sup> February, 2007. (Annexed and marked "NWA 1" is a copy of the certificate of official search referred to). That if indeed fraud was committed against the plaintiff/respondent as alleged, which is denied, the plaintiff/respondent gained knowledge of the transfer in 2007. That section 4 (2) of the Limitation of Actions Act stipulates quite clearly that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. That that from the caution submitted by the plaintiff/respondent in Succession Cause Number 316 of 2012, it is evident that the plaintiff/respondent was aware of the transfer, and consequently, is deemed to have had knowledge of any alleged fraud, which is denied, as far back as 2007, and for purposes of this application, time should be deemed to have begun to run from 13<sup>th</sup> February, 2007. That the plaintiff/respondent is in no position to prove the transfer of the suit property to the late Richard Mise Imbuchi was not within her knowledge during the limitation. That the plaintiff/respondent willingly transferred the suit property to her late husband, the late Richard Mise Imbuchi and in fact obtained the land control board consent to transfer the suit property to her late husband and was present when the Land Control Board granted the consent to transfer the property. (Annexed hereto and marked "NWA 2" is a copy of the Land Control Board minutes at which it is indicated, the consent was granted to her and/or in her presence) That the institution of this suit by the plaintiff/respondent, who is her mother in law, was only intended to deny her children and her a rightful claim to property belonging to her husband.

The respondent submitted that, the late Richard Mise Imbuchi fraudulently and unlawfully acquired title of the disputed parcel without her knowledge and/or consent. That the late Richard Mise Imbuchi had promised to cancel the title deed registered in his name and have it changed to her name but unfortunately he passed on. That the claim that the suit is statute barred is not true in that the subject matter of the suit is a land which is at the verge of being sold and wasted by the defendant/applicant. That the said disputed parcel ought to be preserved and the sole aim of the plaintiff/respondent is to preserve it hence Statutory Limitations do not apply. That the defendant/applicant deserted her matrimonial home with the children after intermeddling with the Estate of the deceased instead of preserving for the children of the deceased. That the defendant/applicant has secured potential purchasers of the said parcel of land and is at the verge of disposing it. That she has no intention of denying her grandchildren their rightful claim in that her intention is to ensure the said parcel of land is preserved. That land matters have statutory limitations of upto twelve (12) years and therefore the suit herein has been instituted within time. That there is a pending suit in the High Court to revoke the grant issued and confirmed to the defendants herein and being Eldoret Succession Cause No. 316 of 2012 and she prays that suit herein be stayed pending hearing and determination. That the application herein does not have merit and is an abuse of the part process and same should be dismissed with costs.

This court has considered the application and the annexures therein. The application is based on the grounds that, the cause of action the subject of the plaintiff/respondent's plaint is statute barred under the Limitations of Actions Act chapter 22 of the Laws of Kenya, it discloses no reasonable cause of action in law and is scandalous, frivolous and vexatious. That the plaintiff filed suit against the defendants/applicants alleging fraud on the part of the late Richard Mise Imbuchi in the transfer of title to the suit property on 9<sup>th</sup> June, 2016. That the suit property was transferred to the late Richard Mise Imbuchi on 7<sup>th</sup> February, 2005. That a certificate of official search applied for, and obtained, by the plaintiff/respondent and filed by the plaintiff/respondent in an objection to grant of representation application in Succession Cause number 316 of 2012 Eldoret, concerning the estate of the late Richard Mise Imbuchi indicates that the plaintiff/respondent placed a caution on the suit property on 13<sup>th</sup> February, 2007. That if indeed fraud was committed against the plaintiff/respondent as alleged, which is denied, the plaintiff/respondent gained knowledge of the transfer in 2007. That section 4 (2) of the Limitation of Actions Act stipulates quite clearly that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. That from the caution submitted by the plaintiff/respondent in Succession Cause number 316 of 2012, it is evident that the plaintiff/respondent was aware of the transfer, and consequently, is deemed to have had knowledge of any alleged fraud, which is denied, as far back as 2007 and for purposes of this application, time should be deemed to have begun to run from 13<sup>th</sup> February, 2007. It is not in dispute that there is a pending suit touching on the same subject matter and the same parties in the High Court to revoke the grant issued and confirmed to the defendants herein and being Eldoret Succession Cause No. 316 of 2012. I concur with the applicant's submissions and find that this suit is time barred. The issue of restitution cannot be granted by way of an application as these are substantive orders. I find that the application has merit and I order that, the plaintiff/respondent's plaint be struck out with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26<sup>TH</sup> DAY OF FEBRUARY 2019.**

**N.A. MATHEKA**

**JUDGE**