



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 144 OF 2018

SUSAN WANJIKU KIMANI.....PLAINTIFF

VERSUS

THE CREEK VENTURES LIMITED.....1ST DEFENDANT

THE REGISTRAR OF LANDS NGONG.....1ST INTERESTED PARTY

DISTRICT SURVEYOR KAJIADO.....2ND INTERESTED PARTY

THE ATTORNEY GENERAL.....3RD INTERESTED PARTY

RULING

What is before Court for determination is the Defendant's Notice of Preliminary objection dated the 27th October, 2018 which is based on the following grounds:

- a) The Honourable Court has no jurisdiction to entertain this matter as it is time barred by virtue of the provisions of section 7 of the Limitation of Actions Act (Cap 22 Laws of Kenya).
- b) This Honourable Court has no jurisdiction to entertain this matter by virtue of the provisions of Section 18 of the Land Registration (Act No. 3 of 2012).

The Plaintiff opposed the Preliminary Objection and both the Plaintiff and the Defendant filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the materials presented in respect of the Preliminary Objection, the following are the issues for determination:

- Whether the suit herein is time barred by virtue of the provisions of section 7 of the Limitation of Actions Act.
- Whether the Court has jurisdiction to entertain this matter.

As to whether the suit herein is time barred by virtue of the provisions of section 7 of the Limitation of Actions Act. It is the Plaintiff's contention in paragraph 19 of the Plaint that the Defendant got fraudulently registered on a portion of land parcel number Kajiado/ Olchoro – Onyore/ 2182 and proceeded to erect a fence on part of it. Further, that the Defendant has trespassed on the said land and proceeded to subdivide it. Further it is now known as Kajiado/ olchoro Onyore/ 29494. These averments are opposed by the Defendant, which claims the suit is statute barred and the Court has no jurisdiction to deal with the matter, as it is a boundary dispute.

Section 7 of the Limitation of Actions Act provides 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.**'

Further Section 26 gives an extension of time and states 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 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'

In the case of *R. G. Patel v. Lalji Makanji [1957] EA 314* the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

I opine that the said allegations of fraud must be proved and this can only be done once the suit is set down for hearing on its merit. It is against the foregoing and in relying on the legal provisions cited above as well as the facts as presented, that I find that the suit herein is not statute barred.

As to whether the Court has jurisdiction to entertain this matter.

I note from the averments in the Plaint, the Plaintiff has laid a claim over the suit land as well as pleaded that the Defendant had trespassed on the said land. The Defendant contends that this is a

boundary dispute. However from a keen perusal of the Plaint I do not see any averments alleging there is a boundary dispute. I hence hold that the court has jurisdiction to hear and determine this matter.

It is against the foregoing that I hold that the Preliminary Objection is unwarranted and will proceed to dismiss it.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 26th day of March, 2019.

CHRISTINE OCHIENG

JUDGE