



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 125 OF 2017

(FORMERLY NAKURU ELC 535 OF 2013)

MOFFAT MURIITHI MUCHAI (Suing on behalf of the Estate of the late

MILKA NJOKI MUCHAI (Deceased).....PLAINTIFF/APPLICANT

VERSUS

WANJIRU WANJOHI GATUNDU.....1ST DEFENDANT/RESPONDENT

LAND REGISTRAR, LAIKIPIA COUNTY.....2ND DEFENDANT/RESPONDENT

ATTORNEY GENERAL.....3RD DEFENDANT/RESPONDENT

RULING

1. Coming up before me for determination is a Preliminary Objection which was raised by the 1st defendant at paragraph 20 of his defence dated the 8th November 2013 to the effect that the Plaintiff's suit was statutorily time barred by virtue of Section 7 of the Limitations of Actions Act.
2. The present suit was filed on the 16th September 2013 with an amendment filed on the 17th July 2017 and a further amendment filed on the 14th May 2018, wherein the Plaintiff herein sought for orders that the Defendant be compelled to surrender the title deed for Marmanet/North block 11/4256 (Ndurumo) to the second Defendant for cancellation.
3. That the Land Registrar Nanyuki be compelled to cancel all entries made in the Register pursuant to the illegal transfer and subsequently enter Mika Njoki Muchai as the owner in the register and issue a title deed accordingly.
4. That a permanent injunction do issue restricting the 1st Defendant, acting herself or through her agents, employees and/or any other person claiming under her from entering, remaining or otherwise interfering with the Plaintiff's quiet possession and enjoyment of the suit property.
5. General damages for trespass and cost of the suit plus any other relief that the Court would deem just and fit to grant.
6. The 1st Defendant filed his defence to the suit on the above captioned date denying contents contained in the Plaintiff's Complaint and stating amongst others that he had been in peaceful and uninterrupted possession of the subject suit since the year 1997 wherein the Plaintiff had never staked any claim over the same.
7. It is worth noting that neither the 2nd nor the 3rd Defendants have filed their papers in this matter.
8. Since the filing of the suit in the year 2013, the same was not prosecuted up to the year 2017 when the court issued a Notice to Show Cause, dated the 23rd February 2017, for parties to show cause why the matter should not be dismissed for want of prosecution. Pursuant to the said Notice, parties appeared in court on the 5th April 2017 wherein after explanation by the Plaintiff's counsel on why the matter had not been prosecuted for more than one year, and the court being satisfied with the said explanation, reinstated the suit for hearing.
9. On the 15th June 2017 when the matter came up for mention and for directions, the Plaintiff sought leave to amend their Complaint which leave was granted and parties directed to comply with the provisions of Order 11 of the Civil Procedure Rules and thereafter fix the matter for hearing.

10. The matter was subsequently fixed for the 25th September 2017 for compliance wherein on this day, the Plaintiff again sought for leave to amend their plaint further, which leave was granted yet again and the matter re-scheduled for compliance and taking of a hearing date for the 14th November 2017.

11. On the said date, the Plaintiff was neither in attendance nor had he filed his further amended Paint. The Defence therefore sought for another mention date which was fixed for the 1st February 2018 on which day there was no appearance by both parties. The same scenario was repeated on the next mention date which had been scheduled for the 12th April 2018.

12. On the 14th May 2018, the Plaintiff herein filed an application under Certificate of Urgency seeking to restrain the 1st Defendant herein from dealing with the subject suit, wherein he was directed to effect service for inter parties hearing scheduled for the 13th June 2018 on which date parties recorded a consent to have the application herein marked as withdrawn and parties to maintain the status quo. They thus took a date for hearing of the main suit which hearing was scheduled for the 17th October 2018. On that day, the Plaintiff was not in attendance wherein Counsel for the Defendant sought for the Preliminary Objection to be set down for hearing instead of dismissing the suit.

13. Directions were taken that the said Preliminary Objection be disposed of by way of written submissions wherein leave was granted to the Defendant to file and serve their written submission. Corresponding leave was also granted to the Plaintiff to file and serve their response to the same.

14. Both the 1st Defendant and the Plaintiff herein filed their written submissions on the 21st January 2019. I have since considered the same and wish to observe as follows:

15. As herein above stated, on the 13th June 2018, parties had recorded a consent for the withdrawal of the Application dated the 14th May 2018 and for parties to maintain the status quo to which the court marked the said Application as withdrawn and scheduled the main suit for hearing. I note that the Plaintiff's written submission filed on the 21st January 2019 is in regard to the said application which has since been compromised and is therefore nonexistence. To that effect therefore as it stands, the 1st Defendant's Preliminary Objection is unopposed.

1st Defendant's written submissions.

16. It was the 1st Defendant's submission that although the present suit was brought on behalf of the Estate Milka Njoki Muchai (deceased) by the Plaintiff herein pursuant to limited grant of Administration issued by the High Court at Nakuru on the 7th February 2013, yet the said Plaintiff has neither pleaded which Succession Cause issued the said letters ad litem nor attached the alleged Limited grant in his pleadings hence he had no locus standi to commence or prosecute this case.

17. Secondly, the 1st Defendant's submission is to the effect that the Plaintiff at paragraph 13 of his Plaint had pleaded that the 1st Defendant was issued with a title to the suit land on the 5th November 1997, whereas the instant suit was filed in court on the 16th September 2013, more than 16 years after the issuance of the title deed that he sought to be cancelled. This, according to the 1st Defendant, was in contravention of the provisions of Section 7 of the Limitations of Actions Act as the suit was brought after the expiry of 12 years hence it was time barred.

18. Relying on the decided case of **Troustik Union International & Another vs Mbeyu & Another [1993] KLR**, the 1st Defendant submitted that the Plaintiff having clearly stated that in the year 1997, he had learnt that the 1st Defendant through corrupt means had managed to acquire title to the said parcel, was aware of the alleged fraud since the year 1997 yet he did not file any suit. The period of limitation hence started running in the year 1997 yet no leave to file suit out of time had been sought from court.

Determination.

19. Issues on Preliminary Objection were canvassed in the case of **Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696** where their Lordships observed thus:

“---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 the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“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 preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

20. The summation of the 1st Defendant's Preliminary Objection is that this matter involves a cause of action founded on fraud which is a tort herein and which ought to have been brought within 3 years from the date the cause of action arose. Secondly that the Plaintiff's claim was for the recovery of land which was time barred since it was brought after 12 years from the date on which the right of action accrued to him.

21. To contextualize 1st Defendant's application on a point of Preliminary Objection, it is necessary to set out the relevant provisions of the Limitation of Actions Act which they rely on and I set the same out hereunder:-

Section 4 (2) reads:

“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:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date”

22. I have considered the submissions herein, I note from the Plaintiff's pleadings that at all times his late mother Milka Njoki Muchai was the registered proprietor of land parcel No. Marmamet/North Rumuruti Block 2/4526 (Ndurumo) having purchased the same in the 1990's and having been registered as proprietor on the 29th July 1991. That subsequently, his mother had had a land dispute regarding the suit land with the 1st Defendant over ownership of the same which had not been resolved until her death on the 11th February 1995. He was left as an only child and heir to his mother's estate.

23. That sometime in the year 2006 or 2007 the 1st Defendant and her son herein had trespassed on the suit land thereby denying him peaceful occupation of the same. It was when he had conducted a search on the suit land that he had discovered that the 1st Defendant had fraudulently transferred the suit land to herself wherein she had been registered as the proprietor on the 5th November 1997.

24. At paragraph 2 of the Plaintiff's witness statement dated the 19th August 2013, the same is to the effect that in 1997, he had learnt that the Defendant through corrupt means, had managed to acquire title to the said suit land.

25. The Plaintiff further stated that his mother having died and leaving him as the only heir, he had sought for letters of Administration ad litem (which were not annexed to the pleadings) to which had been granted at the Nakuru High Court on the 7th February 2013.

26. I have asked myself when the operation of limitation comes into play in such a situation. I have considered paragraphs 13 of the Plaintiff's Plea as well as the copy of the register in regard to the suit land as well as paragraph 2 of the Plaintiff's statement and the same are clear that the alleged fraud was committed on the 5th November 1997 when 1st Defendant was registered as the proprietor of the suit land. The cause of action against the 1st Defendant therefore arose on 5th November 1997.

27. Section 26 of the Limitation of Actions 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 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:

28. From the Plaintiff's pleadings it is clear that he had discovered the fraud in the year 1997 as stated in paragraph 2 of his statement.

29. Section 4(2) of the Limitation of Actions Act provides that an action founded on tort may not be brought after three years. Time therefore started running in 1997 and the period of three years ended in 2000.

30. If the court decides to give the Plaintiff a benefit of the doubt in relation to Section 26 of the Limitation of Actions Act herein above stated and find that the cause of action arose in the year between 2006 and 2007 when the 1st defendant and her son are said to have trespassed on the suit land, then the period of three years would have ended in the year 2009 or 2010 and the Plaintiff would still be time barred in relation to the present case which was filed in the year 2013.

31. A cause of action, is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a plaintiff brings suit. According to Section 26 of the Limitation of Actions Act the cause of action accrues when the fraud is discovered.

32. From the above definition, I find that the cause of action accrued on the on the 5th November 1997 and a period of three years ended on 5th November 2000. These proceedings were filed in the year 2013 which period was beyond the 3 years from the date the cause of action arose.

33. Section 7 of the Limitation of Actions Act provides:

“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

34. Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the Plaintiff's mother having bought the suit land in the 1990's and thereby claiming ownership in the same, he could seek to recover it from the 1st Defendant, but only if he did so within twelve years from the date on which the right of action accrued to him .

35. There is no doubt that the period of about sixteen years have lapsed from the date on which the right of action accrued to the date when this suit was filed. No leave for extension of time to file the suit outside the twelve year period has been exhibited before this court. The Plaintiff needed to commence his claim within the time prescribed under Section 7 of the Limitation of Actions Act. It follows therefore that by the time he filed this suit, the claim was statute barred.

36. In the case of ***Bosire Ongero vs Royal Media Services [2015] eKLR*** the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.

37. I have considered the foregoing and I find that limitation being a substantive law, the provisions of section 1A and 1B of the Civil Procedure Act cannot be invoked with a view to disregard the provisions of another Act of Parliament. Even if the Limitation of Act was a procedural legislation, section 3 of the Civil Procedure Act provides:

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

38. The *locus classicus* on jurisdiction is the celebrated case of ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1*** where Justice Nyarangi of the Court of Appeal held as follows

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

39. Clearly, this Court lacks jurisdiction and the matter is at its end. I will have to down my tools and take no further step. The preliminary objection herein succeeds in its entirety with the result that the Plaintiff's suit is herein struck out with costs to the 1st Defendant.

Dated and delivered at Nyahururu this 5th day of March 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE