



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO 911 OF 2017

PATRICK KOINERY TUTUI.....PLAINTIFF

VERSUS

**RAINGOT SUIYANKA NOONCHIGENI (1ST ADMINISTRATION OF THE ESTATE
OF SUIYANKA OLOIBONI LENOOLIADAT).....1ST DEFENDANT**

**NAIRONI ENE SUIYANKA OLOIBONI (2ND ADMINISTRATOR OF THE ESTATE
OF SUIYANKA OLOIBONI LENOOLIADAT).....2ND DEFENDANT**

**KAJIADO COUNTY GOVERNMENT (SUCCESSOR TO THE COUNTY COUNCIL
OF OL KEJUADO).....3RD DEFENDANT**

SUSAN NAICHANU GITINKA.....4TH DEFENDANT

PHILIP SAMUEL ODERA.....5TH DEFENDANT

BIPIN JAYANTILAL KANJI PARMAR.....6TH DEFENDANT

MEETA HARILAL LALJI CHOHAM.....7TH DEFENDANT

THARA ORCHARDS LIMITED.....8TH DEFENDANT

CHRISTINE CHEBET TIRIONGO.....9TH DEFENDANT

PRESTON NGIGI MUKURIA.....10TH DEFENDANT

OTUMA SUIYANKA.....11TH DEFENDANT

OLOONTAKIUA INVESTMENT LTD.....12TH DEFENDANT

MOSES NAROK.....13TH DEFENDANT

SAIMON NTASIKOI NOONKANAS.....14TH DEFENDANT

DAVID MUKUI KARUNGU.....15TH DEFENDANT

FELISTAS WANGARI NJOROGE.....16TH DEFENDANT

RULING

What is before Court for determination is the 2nd Defendant as well as 11th and 14th Defendants' Notices of Preliminary Objection dated the 4th June, 2018 and 30th October, 2018 respectively. In the Notice of Preliminary Objection dated the 4th June, 2018, the 2nd Defendant relied on the following grounds:

- a. The Plaintiff's suit and Notice of Motion dated 6th November, 2017 be and is hereby struck out in limine.
- b. The 2nd Defendant be paid costs of the suit.

While the 11th and 14th Defendants' Notice of Preliminary Objection dated the 30th October, 2018 is based on the following grounds:

1. That the suit is time barred in view of section 7 of the Limitation of Actions Act.
2. That the suit is res judicata.
3. That the Honourable Court lacks jurisdiction in this matter.

The Plaintiff filed Grounds of Opposition to oppose the Notice of Preliminary Objection.

Both the Plaintiffs and the 2nd, 11th including 14th Defendants filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the Preliminary Objection and Grounds of Opposition including the submissions, the following are the issues for determination:

- Whether the suit is time barred in view of section 7 of the Limitation of Actions Act.
- Whether the suit is res judicata.
- Whether the Court has jurisdiction to deal with this matter.

As to whether the suit is time barred in view of section 7 of the Limitation of Actions Act.

The 11th and 13th Defendants contend that the suit herein is statute barred in view of the Limitation of Actions Act. It is the Plaintiff's contention in paragraph 52 of the Complaint that the Defendants got fraudulently registered on a portion of land which had been allocated to him in a succession cause. These averments are opposed by the Defendants, who claim the suit is statute barred and the Court has no jurisdiction to deal with the matter, as it had been dealt with in a succession cause. I note the 1st Defendant has admitted in an affidavit filed in Court on 25/6/2018 that the Plaintiff was indeed entitled to parcel number KAJIADO/MAILUA/862 which was a resultant subdivision of KAJIADO/MAILUA/376.

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.'**

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 note the Court made an order in Nairobi succession cause number 454 of 1996 in 2009 for the 1st and 2nd Defendants as administrators of

their husbands' estate to transfer the portion of the Plaintiff's land to him, which they failed to do. I note from 2009 to date is under 12 years. Further, I opine that the allegations of fraud pleaded in the Plaint 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 suit is res judicata.

The 2nd, 11th and 14th Defendant claim the suit herein is res judicata as the issues herein had been dealt with in the Succession Cause which fact the Plaintiff disputes. Section 7 of the Civil Procedure Act, stipulates as follows in relation to res judicata: **' No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.'**

In the case of **Stephen Wanganga Njoroge Vs Stanley Ngugi Njoroge & Another (2017) eKLR** referred to **Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996** where the Court of Appeal stated that :-

' in order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.'

The Plaintiff herein had been allocated a portion of the deceased land vide the Nairobi succession cause number 454 of 1996.

The Administrators of the deceased estate never transferred land to the Plaintiff but instead transferred it to other beneficiaries who sold most of them to the Defendants. In this suit, the Plaintiff is challenging titles issued to the Defendants. The 3rd to 16th Defendants were not party to the succession cause. Further, the title the Plaintiff is challenging had not been issued in the succession cause. In relying on the legal provisions above, as well as the principles of res judicata, I find that the suit herein is not res judicata as claimed.

As to whether the Court has jurisdiction to deal with this matter.

The 11th and 13th Defendants have contended that the court does not have jurisdiction to deal with this matter.

Section 13 of the Environment and Land Court Act, which confers jurisdiction to the Environment and Land Court, provides as follows:

' (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land. (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes— (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; (b) relating to compulsory acquisition of land; (c) relating to land administration and management; (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (e) any other dispute relating to environment and land.'

These provisions are couched in mandatory terms and give exclusive jurisdiction to the Environment and Land Court to handle all disputes relating to land and environment.

In the case of **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696**; the Court held 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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.'**

The Plaintiff's claim in the Plaint revolves around a different parcel of land from the subject land mentioned in the succession cause. Further, I note the Plaintiff has sought for cancellation of certain titles as well as being declared owner of suit land. Since the substratum of the suit touch on title to land, and this being an ELC Court, I hold that the court is seized with jurisdiction to hear and determine it.

It is against the foregoing that, I find the 2nd Defendant as well as 11th and 14th Defendants' Notices of Preliminary Objection dated the 4th June, 2018 and 30th October, 2018 unmerited and will disallow them

Costs will be in the cause.

Parties are urged to comply with order 11 and set the suit down for hearing to enable the court determine the issues once and for all.

Dated signed and delivered in open court at Kajiado this 22nd day of May, 2019

CHRISTINE OCHIENG

JUDGE