

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 552 OF 2018

GITERE KAHURA INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

SAMUEL MUNDATI GATABAKI.....1ST DEFENDANT

NANCY WANJA GATABAKI.....2ND DEFENDANT

RULING

This suit was settled through a consent that was recorded before O' Connor J. on 3rd October, 1985. A consent decree was thereafter extracted and issued on 20th January, 1987. Pursuant to the said decree, an order was made on 13th June, 1986 vesting all that parcel of land known as L.R No. 5980/4 situated in Kiambu Municipality measuring 24.28 hectares upon the plaintiff. The application for the vesting order was not objected to by the defendants' advocates when it came up for hearing on 13th June, 1986.

No further action was taken in the matter after the said vesting order until 22nd January, 2018; 32 years later when the defendants brought the present application dated 19th January, 2018 seeking an order that the firm of Gatheru Gathemia & Company Advocates be granted leave to come on record in this matter on behalf of the defendants in place of the firm of M/s Daine & Wariithi Advocates. The application was brought on the grounds that the firm of Daine & Wariithi Advocates who acted for the defendants when the said judgment and vesting orders were made ceased to exist after the death of the senior partner in the firm, Mr. Wariithi Advocate.

The defendants averred that they were desirous of moving the court to rectify some acts of fraud which were perpetrated against them by the plaintiff during the execution of the consent decree issued herein. The defendants averred that they had instructed the firm of Gatheru Gathemia & Company Advocates to act for them in the intended application. The defendants averred further that it would serve the interest of justice if the application was allowed.

The defendants' application was opposed by the plaintiff through Notice of Preliminary Objection dated 27th February, 2018. In its objection, the plaintiff contended that the defendants' application was time barred by virtue of section 4(4) of the Limitation of Actions Act, Chapter 22 Laws of Kenya.

The application was heard by way of written submissions. The plaintiff filed its submissions on 29th June, 2018 while the defendants filed their submissions on 9th July, 2018. I have considered the defendants' application and the Notice of Preliminary Objection filed in opposition thereto by the plaintiff. I have also considered the written submissions by the parties' respective advocates. The defendants' application was brought under Order 9 Rule 9 of the Civil Procedure Rules. It is seeking only one principal prayer namely, leave for the firm of Gatheru Gathemia & Company Advocates to come on record in the matter for the defendants in place of the firm of Daine & Wariithi Advocates who were previously acting for the defendants.

I find no merit in the plaintiff's objection to the application. Section 4 (4) of the Limitation of Actions Act, Chapter 22 Laws of Kenya on which the objection is based relates to the limitation period for execution of judgments. In their application, the defendants have contended that fraud was committed by the plaintiff during the execution of the judgment that was made herein on 3rd October, 1985 and that they

intend to move the court to rectify the alleged fraud. As of now, it is not clear as to the nature of the application which the defendants intend to bring to court; whether it will be directed at the judgment or to the vesting order is unknown.

I am in agreement with the defendants that the objections raised by the plaintiff to the application are speculative and premature. The application before the court is not seeking to enforce, set aside or vary the judgment of 3rd October, 1985. The plaintiff's contention that the application is time barred has no basis in the circumstances. I did not follow the plaintiff's argument that following the judgment entered on 3rd October, 1985 this suit became "extinguished". Well; as far as the court is concerned, the suit is finalised judgment having been entered in the matter on 3rd August, 1985. The entry of judgment as aforesaid cannot however be said to have "extinguished" the suit so as to prevent an application like the one currently before the court from being made.

The upshot of the foregoing is that the plaintiff's Preliminary Objection dated 27th February, 2018 has no merit. The same is dismissed with costs. With the dismissal of the said objection, the defendants' application dated 19th January, 2018 is now unopposed. The application is allowed in terms of prayer 2 thereof.

Delivered and Dated at Nairobi this 7th day of November 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Gatheru Gathemia for the Plaintiff

Mr. Sumba for the Defendants

C.Nyokabi-Court Assistant