



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 557 OF 2017**

**(formerly NAIROBI ELC No. 742 of 2015)**

**MINTINA ENE KETON KOPONI**

**(Suing as a legal representative of the estate**

**of KETON OLE KOPONI PARSENA(DECEASED).....PLAINTIFF**

**VERSUS**

**FRANCIS NJAKWE GATHIARI.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR NGONG.....2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

The application for determination is the 1<sup>st</sup> Defendant's Notice of Motion dated the 5<sup>th</sup> October, 2015 brought pursuant to Section 3A of the Civil Procedure Act, Order 2 Rule 15(d) of the Civil Procedure Rules, Section 7 of the Limitation of Actions Act and all the other enabling provisions of the law. The 1<sup>st</sup> Defendant seeks the Plaintiff's suit be struck out and Court to order the removal of the restriction registered against the suit land parcel number NGONG/ NGONG/ 13500. It is premised on various grounds that the suit is an abuse of the process of court, time barred and that the Respondent acquired Letters of Administration Intestate fifteen (15) years late for the sole purpose of harassing the Applicant over the suit land. Further that all documents regarding the sale transaction of the suit land cannot be retrieved since, they were destroyed by the advocates who acted for both the seller and the purchaser in the said transaction. The Respondent and 2<sup>nd</sup> Defendant have fraudulently registered a restriction against the suit land which is injurious to the Applicant as it is in contravention of section 76 of the Land Registration Act. A substantial part of the suit land has been disposed off to third parties in order to discharge the land from the encumbrances with the National Bank of Kenya Limited.

The Application is supported by the affidavit of FRANCIS NJAKWE GATHIARI who avers that he is the registered owner of the suit land with the transaction having been undertaken by a reputable law firm of Muthoga Gaturu & Company Advocates who acted for both the seller and himself. He states that he has been in occupation of the suit land openly for eighteen (18) years since the completion of the transfer process in 1997 with the original title of the suit land being charged to National Bank of Kenya Limited on 3<sup>rd</sup> March, 1997 after the purchase. He claims until 2012 he has been farming roses on the suit land but as a result of default in loan repayment, with the National Bank of Kenya, he subdivided the said land, obtained consent of the Land Control Board on 8<sup>th</sup> July, 2014 to subdivide twenty nine (29) portions which are to be sold to enable him repay the bank. He contends that after the Respondent registered a restriction over the suit land on 4<sup>th</sup> August, 2015 restraining any dealings thereon, it has prejudiced the undertaking given by his lawyers to National Bank of Kenya Limited to submit title documents of the subdivisions to it as well as putting the entire property at risk of sale by the Bank. He insists the restriction is oppressive as he is the legal owner of the suit land, and is unable to honour the undertaking, repay the loan to the Bank, with the same being at risk of being auctioned by the Bank. He reiterates that the suit has been filed fifteen (15) years after the suit land was transferred to him and offends the provisions of the Limitation of Actions Act that requires a suit for recovery of land to be instituted within 12 years from the time the cause of action accrued. He deposes that the Respondent is driven by greed and unjust motives to deny him of his proprietary interest, with the suit being a mode of harassment to extort money from him as his lawyer told him that the Plaintiff's Advocate Mr. Itaya has said that the suit can only be withdrawn if he pays Kshs. 100 million to the Plaintiff including other interested parties.

The application is opposed by the Plaintiff MINTINA ENE KETON KOPONI who deposes that she discovered the fraud herein on 1<sup>st</sup> July, 2015 when she went to the Lands Office to conduct a search on the suit land. She claims she is in possession of the original title deed of the suit land and there is no way the deceased or herself knew the land was transferred to a third party. Further that the deceased was seriously sick from 1995 to 2001 and could not have been in a position to enter into any transactions. She contends that the 1<sup>st</sup> Defendant fraudulently transferred the suit land to himself by misleading the Land Registrar that the title to the suit land was lost. Further that the title was gazetted

as lost on 11<sup>th</sup> April, 1997 but the same was transferred to the 1<sup>st</sup> Defendant on 5<sup>th</sup> May, 1997 even before the period of 60 days lapsed. She insists, the deceased and herself never reported the title deed as lost and do not understand who did so, and that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have a duty to produce the original documents which include Transfer Forms as well as Consent Forms used to transfer the land to the 1<sup>st</sup> Defendant. She contends that the restriction placed on the land is meant to protect it since the 1<sup>st</sup> Defendant already subdivided the land and if the restriction is removed, the 29 titles will be issued hence defeating this case. She prays the application be dismissed with costs.

Both the Applicant and Respondent filed their respective submissions that I have considered.

### **Analysis and Determination**

The issues for determination are:

- Whether the suit is time barred
- Whether the restriction entered against land parcel number NGONG/NGONG/13500 should be removed

The Plaintiff's claim is that the suit land was fraudulently transferred to the 1<sup>st</sup> Defendant as her husband never sold the same to him and she still has in her possession the original title deed. She insists the husband never executed documents of transfer, never received any consideration, no consent to transfer was obtained and that the registration of the 1<sup>st</sup> Defendant was done by mistake and procured under false pretences. She seeks for the rectification of the land register, so that the suit land can revert back to the husband's estate and eviction of the 1<sup>st</sup> Defendant from it.

The 1<sup>st</sup> Defendant insists he legally purchased the suit land, has quietly been in possession and is the absolute proprietor. Further, that the suit herein is time barred and filed to harass him.

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 of the Limitation of Actions Act 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**

**(ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.’**

In the current scenario, I note that the Plaintiff alleges she discovered the fraud against the 1<sup>st</sup> Defendant in 2015 when she went to undertake a search at the Land Registry. Further that she learnt the 1<sup>st</sup> Defendant had claimed the title deed was lost and the same was gazetted on 11<sup>th</sup> April, 1997 (annexure ‘MK – 2’) after which he was issued with a new title before the expiry of 60 days. The Plaintiff still has in her custody the original title deed and does not know who reported it as lost. The question we need to ask is whether the Plaintiff was aware of the alleged transfer of the suit land to the 1<sup>st</sup> Defendant within the 12 years of the purported purchase. It is the 1<sup>st</sup> Defendant's contention that the Plaintiff only filed for succession 15 years later to institute this suit. I note the 1<sup>st</sup> Defendant's title deed was indeed issued on 5<sup>th</sup> May, 1997 (annexure ‘FNG1’) less than 60 days after the gazette notice and he does not explain why this was so. No Sale Agreement nor documents of transfer were furnished by the 1<sup>st</sup> Defendant. These are questions which beg an answer and can only be determined once oral evidence is adduced at not through the facts as presented in the respective affidavits.

In the case of **Justus Tureti Obara v Peter Koipeitai Nengiso [2014] eKLR** Justice Okongo observed that:

**‘I would wish to point out further that the Plaintiff's case although for recovery of land is based on fraud. The proviso to section 26 (a) of the Limitation of Actions Act, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the defendant is a matter to be ascertained at the trial. ‘In relying on section 26 of the Limitation of Actions Act and the authority above, I will not term the Plaintiff's claim of fraud as**

baseless and further it is trite law that where there are allegations of fraud, the suit should be set down for hearing. In the circumstances, I find that the Plaintiff's claim is not statute barred in accordance with the provisions of section 7 as read together with section 26 of the Limitations of Actions Act.

On the issue of registration of the restriction. Section 76 of the Land Registration Act provides that: '**(1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.**

**(2) A restriction may be expressed to endure—**

**(a) for a particular period;**

**(b) until the occurrence of a particular event; or**

**(c) until a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.**

**(2A) A restriction shall be registered in the register and may prohibit or restrict either all dealings in the land or only those dealings which do not comply with specified conditions.'**

I note that the Plaintiff lodged the restriction when she discovered the suit land had been transferred to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant has admitted he has subdivided the suit land and awaiting registration of the same to enable him sell them and settle his loan with National Bank of Kenya. If the restriction was to be removed, the substratum of the suit will be lost. Since both the Plaintiff and 1<sup>st</sup> Defendant are staking claim over the suit land, which the Plaintiff claims was fraudulently transferred to the 1<sup>st</sup> Defendant, I find that these are issues best determined at a full trial, I will decline to grant the order for removal of the restriction as sought by the 1<sup>st</sup> Defendant.

It is against the foregoing that I find the application dated the 5<sup>th</sup> October, 2015 is not merited and dismiss it.

Costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

**Dated signed and delivered in open court at Kajiado this 28th day of February, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**