



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 141 OF 2014

MONICA KANINI MUNYI (*Suing as the personal representative of*

ALBERT MUNYI J. KABARATHI)..... **PLAINTIFF**

VERSUS

ANNETE WANJIRA NTHIGA.....**1ST DEFENDANT**

NEMBURE FARMERS CO-OP SOCIETY LTD.....**2ND DEFENDANT**

MIKIKI FARMERS CO-OPERATIVE SOCIETY LTD....**3RD DEFENDANT**

JUDGEMENT

1. By plaint dated 10th June 2004 the Plaintiff sought the following reliefs against the original Defendants;

a. A declaration that the transfer of land parcel number Gaturi/Nembure/3138 to Joseph Nthiga Kagau was fraudulent, unlawful and illegal and the subsequent transfer of the said land to Gaturi Farmers Co-operative Society Limited and then to Nembure Farmers Co-operative Society are null and void as the said Joseph Nthiga Kagau did not have a good title to the said land.

b. That the honourable court do order that the registration of land parcel number Gaturi/Nembure/3138 in the name of Nembure Farmers Co-operative Society Limited be nullified and the Embu District Land Registrar be ordered to rectify the register of the said land by deleting and/or canceling the name of Nembure Farmers Co-operative Society Limited and restoring the name of Kabarathi Gachoreria. In the alternative the first Defendant be ordered to compensate the estate of Kabarathi Gachoreria with the equivalent of land parcel number Gaturi/Nembure/3138 which was measuring 2.36 hectares or six acres.

c. That this court do order for and/or award the Plaintiff any other relief that it deems just and fit.

d. Costs of this suit.

2. It was pleaded in the said plaint that the late Plaintiff's father, Kabarathi Gachoreria, was the proprietor of *Title No. Gaturi/Nembure/3138* (hereinafter known as the "suit property") and that the 1st Defendant's late husband, Joseph Nthiga, had through fraud and misrepresentation caused the suit property to be transferred into his name.

3. It was pleaded that that the Plaintiff's father, who was said to be illiterate, was made to sign some forms on the understanding that they enable the 1st Defendant's husband to acquire a loan. Several particulars of fraud and misrepresentation were pleaded in paragraph 5 of the plaint.

4. By an amended plaint dated 29th April 2008 but filed in court on 3rd July 2009, the Plaintiff joined the 3rd Defendant in this suit and included one more particular of fraud and misrepresentation against the 1st Defendant's late husband, Joseph Nthiga (hereinafter called 'Nthiga'). The 3rd Defendant did not file an appearance and defence at all.

5. According to the record, the 1st Defendant who was sued as the legal representative of the estate of Nthiga neither entered an appearance nor filed a defence to the action. The record shows that interlocutory judgement was entered against her on 16th August 2015. The judgement appears to have been irregularly entered in view of the reliefs which the Plaintiff was seeking in the plaint which did not include a claim for pecuniary damages.

6. In both its original statement of defence and the amended defence, the 2nd Defendant denied knowledge of all the allegations in the

Plaintiff's pleadings and averred that it lawfully obtained the suit property pursuant to a liquidation process of Gaturi Farmers Co-operative Society under the Co-operative Societies Act, 1997, without notice of the Plaintiff's claim.

7. The 2nd Defendant further pleaded that the Plaintiff's suit was barred under the statute on Limitation of Actions and that the suit had been filed without leave of court. It was the 2nd Defendant's further defence that the issues raised in this suit were adequately addressed in Embu Civil Suit No. 269 of 1994. It was pleaded that the instant suit was an abuse of court process and the same should be dismissed.

8. The suit was partly heard on 09.06.2010 before Hon Justice Wanjiru Karanja when the Plaintiff testified but did not close his case. It was his evidence that the suit property once belonged to his father but that it was fraudulently taken away by Nthiga. He testified that the said Nthiga wanted to be guaranteed a loan but his request was declined. It was his case that later on he discovered that the suit property had changed hands when a notice to vacate was served upon his brothers in 1977.

9. When the Plaintiff's family obtained a copy of the relevant land register, it was then discovered that the suit property had been transferred to the said Nthiga in 1975 as a gift. The Plaintiff's father died in 1976 and was said to be around 98 years at the time of the transfer.

10. It was the Plaintiff's further evidence that they used to reside on the suit property and his father had desired that they should inherit the suit property. The Plaintiff's father was buried on the suit property when he died in 1976.

11. The Plaintiff's evidence also showed that the suit property was sold by Nthiga to Gaturi Farmers Co-operative Society in 1978. Upon liquidation of the said society, the suit property was transferred to Nembure Farmers Co-operative Society, the 2nd Defendant herein.

12. During his evidence in chief, the Plaintiff conceded that he had filed a previous suit on the same cause of action which was dismissed. When he appealed against the said decision, the appeal was also dismissed on what he termed as technicalities. He produced copies of the two decisions as exhibits. He also indicated that he had obtained leave to file suit out of time in 2009.

13. The record shows that the Plaintiff was cross-examined by the 2nd Defendant's advocate on 5th February 2014 before Hon Justice H.I. Ong'udi. He stated that he had sued Nthiga in Embu PMCC No 269 of 1994 during his lifetime but the suit was dismissed as being time-barred. He conceded that his appeal against the dismissal was dismissed for want of prosecution. The Plaintiff also stated that he had applied for leave to file the instant suit although he did not produce the relevant order.

14. The 2nd Defendant called one witness (DW 1) before me on 25th July 2017. The witness was Peter K. Mwangi who was the secretary of the 2nd Defendant. He stated that he was the custodian of the society's records and that he was aware that the 2nd Defendant was formed upon liquidation of Gaturi Farmers Co-operative Society. He produced a copy of the liquidation report as an exhibit. It was as a result of the liquidation that the 2nd Defendant acquired the suit property during division of assets. They were issued with a title deed in 2001 and he produced it as an exhibit. He stated that the 2nd Defendant had been in possession of the suit property since 2001. He stated that he was unaware of the Plaintiff's claim at the time of liquidation.

15. The parties herein do not appear to have filed any statement of agreed issues and neither did they file separate issues. The court shall, therefore, frame the issues which arise from the pleadings, affidavits and documents filed by the parties.

16. In my assessment, the following are the issues which arise in this suit;

- a. Whether the instant suit is statute-barred under the Limitation of Actions Act (Cap 22).
- b. Whether the instant suit is *res-judicata*.
- c. Whether the suit property was transferred to Nthiga through fraud and misrepresentation.
- d. Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.
- e. Who shall bear the costs of the suit.

17. It is common ground that the suit property was transferred to the late Joseph Nthiga in 1975. It is also common ground that the Plaintiff's family received a notice to vacate the suit property in 1977. It is also not in dispute that the Plaintiff's first attempt to seek legal redress was in 1994. The Plaintiff filed that instant suit on 15th October 2004 i.e about 29 years after they lost the suit property.

18. The provisions on Limitation of Actions in respect of actions for recovery of land is found in section 7 of the Limitation of Actions Act (Cap 22). It states 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.”

19. That provision is, of course, subject to part III of the said Act which provides for extension of the period of limitation in case of disability, acknowledgement, payment, fraud, mistake, and ignorance of material facts. Sections 27 and 28 of the Act provide for the particular circumstances under which such leave may be sought and obtained.

20. The Plaintiff's advocate submitted that leave was obtained to proceed with the case out of time on 9th April 2008 even though the suit was filed on 19th July 2004. It was further submitted that the 2nd Defendant should not be heard to complain on limitation since no application was made to set aside such leave.

21. The court has carefully considered the issue of limitation and the leave obtained on 9th April 2008. It is now well settled that an application for leave under sections 27 and 28 of the Act should be made *ex-parte* and that once such leave has been granted it can only be challenged at the trial and not by way of application to set aside before trial. See *Mary Wambui Kabugu Vs Kenya Bus Services Ltd Civil Appeal No. 195 of 1995 [1997] eKLR.*

22. In the said case, Akiwumi J. A held as follows;

“Now, when the judge of the superior court grants leave ex-parte under the Limitation of Actions Act to institute proceedings which can be challenged at the trial, he in a way, does no more than a judge does when he for instance, grants an ex-parte injunction, which can also be successfully challenged before another judge at the inter-partes hearing. Furthermore, the question of a judge of the superior court sitting on appeal on the granting of an ex-parte order under the Limitation Act by another judge of the superior court, does not, in the particular circumstances, arise.”

23. In the said case, Akiwumi J.A also quoted the following passage by *Lord Denning MR in Cozens Vs North Devon Hospital Management Committee & Another [1966] 2ALL ER 799;*

“It must be remembered that even when the judge grants leave, there is nothing final about it. It is merely provisional. The Defendant will have every opportunity of challenging the facts and the law afterwards at the trial. The judge who tries the case is the one who must rule finally whether the Plaintiff has satisfied the conditions for overcoming the time bar. He is not in the least bound by the provisional view expressed by the judge in chambers who gave leave...”

The trial court may, therefore, only revisit and reconsider the granting of *ex-parte* leave upon hearing the suit itself.

24. The court has considered the provisions of section 27 and 28 of the Act and is unable to see any provision which would grant the superior court jurisdiction to grant an extension of the limitation period in suits or claims for recovery of land. The statute limits such leave only to claims for damages for negligence, nuisance or breach of duty in respect of personal injuries. As was held in the case of *Mary Osundwa Vs Nzoia Sugar Co. Ltd [2002] eKLR,*

“This section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to the tort of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the Plaintiff as a result of the tort. The section does not give jurisdiction to extend time for filing suit in cases involving contract or any other cause of action than those in tort. Accordingly, Osiemo J had no jurisdiction to extend time as he purported to do on 28th May 1991. That the order was by consent can neither be here nor there; the parties could not confer jurisdiction on the judge by their consent.”

25. The court is, therefore, of the view and I so hold that the Plaintiff's suit is time barred and the *ex-parte* leave was not warranted hence the same is of no avail. The Plaintiff's suit is therefore caught by section 7 of the Limitation of Actions Act, hence statute-barred.

26. The 2nd issue is whether the suit is *res-judicata* in view of previous proceedings between the parties. It was conceded by the Plaintiff that he had filed Embu PMCC No. 269 of 1994 over the same cause of action. The said suit was dismissed on two preliminary objections. First, that the Plaintiff had no *locus standi* to file suit for want of letters of administration. Second, that the suit was statute barred under the Limitation of Actions Act. The Plaintiff thereafter appealed against the dismissal of his suit vide High Court Civil Appeal No. 63 of 1995 which was dismissed ultimately for want of prosecution.

27. The question which begs for an answer is whether the Plaintiff was at liberty to file a fresh suit in view of the provisions of section 7 of the Civil Procedure Act (Cap 21) and the doctrine of *res judicata*. There is no doubt that where a suit is struck out for lack of letters of administration, such party can, subject to the statute of limitation, file a fresh suit upon being clothed with legal capacity. However, the Plaintiff's earlier suit was dismissed not only for lack of legal capacity but also on account of limitation of time.

28. In my view, the Plaintiff, did not have the option of filing a fresh suit. He may well have appealed to the Court of Appeal, but he did not choose that path. As was stated in the case of *NJue Ngai Vs Ephantus NJiru Ngai & Another, [2016] eKLR,*

“In the case of *Ukay Estate Ltd & Another Vs Shah Hirji Monak & 2 others [2006] eKLR (supra)*, which was cited by the Appellant, Waki JA stated as follows:

“The doctrine is not merely a technical one applicable only on records. It has a solid base from considerations of high public policy in order to achieve the twin goals of finality of litigation and to prevent harassment of individuals twice over with the same account of litigation. Put another way, there must be an end to litigation and no man shall be vexed twice over the same cause.

29. The test for *res judicata* was articulated in the case of *Kamunye & Others Vs The Pioneer Assurance Society Ltd [1971] EA 263* as follows;

“The test whether or not a suit is barred by res judicata seems to me to be - is the Plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which have been adjudicated upon. If so, the plea of res judicata applies not only to points upon which the court was actually required to adjudicate but to every point which properly belonged to the subject of and which the parties, exercising due diligence, might have brought forward at the time.”

30. The court is of the view, and I so hold, that the instant suit is *res judicata* since the issues raised herein were directly and substantially in issue in the previous suit between the parties. It does not matter that the 2nd and 3rd Defendants were not parties to the earlier proceedings.

31. The 3rd issue relates to the legality of the transfer of the suit property to the late Nthiga. It was pleaded in paragraph 5 of the amended plaint that the said transfer was obtained through fraud and misrepresentation. Several particulars thereof were pleaded without distinguishing which ones related to fraud and which ones related to misrepresentation.

32. It is, however, clear that the main plank of the Plaintiff's case, which was pleaded in paragraph 5 of the amended plaint was that his late father was made to sign forms which he believed were to enable Nthiga obtain a loan whereas they were, in fact, for transfer of the suit property. The court has noted from the record that such transfer forms were not produced at the trial hereof.

33. The court has further noted from the record that it was not the Plaintiff's evidence that the late Nthiga misled his late father in such manner. In fact, his case was that the Plaintiff's late father **declined** Nthiga's request to be guaranteed a loan facility. Mr Nthiga was said to have gone away and the Plaintiff did not know what else Nthiga did. The Plaintiff was recorded in his evidence-in-chief as follows;

“Nthiga used to visit my home. At one time he told us to guarantee his loan. We refused and he left. We did not know what he went to do. He wanted to be guaranteed by my father but we refused.”

If it was intended to state that Nthiga thereafter went on to forge the transfer documents, that was not pleaded in the plaint or amended plaint.

34. In my opinion, the allegations of fraud and misrepresentation were not proved by the Plaintiff to the required standard. There was a material contradiction and variance between the Plaintiff's pleading on the forms which his late father may have signed and his evidence at the trial.

35. The 4th issue is whether the Plaintiff is entitled to the reliefs sought in the amended plaint. In view of my findings on the 1st, 2nd and 3rd issues, it would follow that the Plaintiff is not entitled to the reliefs sought or any one of them.

36. The 5th issue relates to costs of the suit. The general rule is that costs of an action follow the event so that a successful party is entitled to costs unless, for good reason, the court decides otherwise. In the circumstances of this case, the 2nd Defendant shall have the costs of the suit.

37. The court, therefore, summarizes its findings on the issues for determination as follows;

- a. The Plaintiff's suit is statute-barred under the Limitation of Actions Act (Cap 22).
- b. The instant suit is *res judicata* in view of previous proceedings over the same subject matter.
- c. There is no evidence on record to demonstrate that the suit property was transferred to the late Joseph Nthiga through fraud or misrepresentation.
- d. The Plaintiff is not entitled to the reliefs sought in the amended plaint or any one of them.
- e. The Plaintiff shall bear the 2nd Defendant's costs of the suit.

38. The upshot of the foregoing is that the Plaintiff's suit is hereby dismissed with costs to the 2nd Defendant.

39. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **1st** day of **March 2018**.

In the presence of Plaintiff in person, Ms. Muriuki holding brief for Mr. Ithiga for the 2nd Defendant and in the absence of the 1st and 3rd Defendants.

The Plaintiff's suit was dismissed with costs.

Court clerk Njue/Leadys.

Y.M. ANGIMA

JUDGE

01.03.2018.