



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC N0 425B OF 2017

JULIUS NJUGUNA MWANGI.....RESPONDENT

VS

KARIUKI KAMAU MBIUKI.....1ST DEFENDANT/APPLICANT

HANNAH WARIGIA MWANGI.....2ND DEFENDANT/APPLICANT

WAMBUI MWANGI.....3RD DEFENDANT/APPLICANT

SARAH WAMAITHA.....4TH DEFENDANT/APPLICANT

THE DISTRICT LAND

REGISTRAR, MURANGA.....5TH DEFENDANT

RULING

1. The Plaintiff is the son of the 2nd Defendant and sister to 3rd and 4th Defendants accordingly. The subject matter of the case is LR No. Loc 20/Mirira/4481 originally registered in the name of Mwangi Mura in 1997. Mwangi Mura, the father of the Plaintiff and the 3-4th Defendants and husband to 2nd Defendant died on 19.4.2008 aged 108 years. That before his death, his father had given him the original title for safe keeping.

2. The Plaintiff allegedly the only son of Mwangi Mura avers that upon the death of the family patriarch, the 2nd -4th Defendants allegedly obtained letters of grant of administration fraudulently and later transmitted the same fraudulently to the 1st Defendant the sum of Kshs 150,000/-.

3. That on 18.5.2010, 1.11.2010, 24.11.2010, he was summoned before the assistant chief Mirira sub-location, chief Gikindu location and DO Kiharu Division respectively to appear before them for the purposes of sanctioning the disposal of the subject land but he declined to do so on the ground that the land was family land and if sold their aging mother would be landless. That the officials demanded that he hands over the title deed and death certificate which he also declined. However despite his protestations it occurred to him when the chief accompanied by the 1st Defendant entered onto the land with a tractor and on confronting them he was told that the land had been sold by his mother to the 1st Defendant.

4. That upon investigation it turned out that the sale transaction, it is averred, was fraudulently carried out using a confirmation of letters of grant belonging to one Reuben Ngugi Kiragu alias Reuben Ngugi. The Plaintiff then filed for grant of letters *adlitem* in Succ cause No 609 of 2016 to enable him file this case seeking *interalia* cancellation of title in the name of the 1st Defendant and reverting the land to Mwangi Mura as well as eviction orders against the 1st Defendant to issue.

5. In their defense filed on 14.9.2017 the 1st -4th Defendants denied the Plaintiffs' claims and in particular to fraud in para 9 intimated that they will raise a preliminary objection which they duly filed on even date. The Preliminary objection is framed with 3 grounds; the suit is statute barred by dint of section 4 and 26 of the Limitations of Actions Act- the claim having been founded on fraud should have been filed within 3 years from the discovery or knowledge of the said fraud; the Court lacks jurisdiction on account that the suit offends section 76 of the Law of succession Act and finally that the suit is incompetent for failure to disclose a reasonable cause of action.

6. Parties elected to file written submissions which I have carefully considered. The 5th Defendant neither filed any response to the Plaintiffs claim nor written submissions.

7. The 1st – 4th Defendants submitted that the Plaintiff's claim is statute barred on the basis that it being founded on fraud should have commenced 3 years from the time the alleged fraud was discovered in compliance with sections 4(2) and 26 of the Limitation of Actions Act which stipulate that time does not run until the Plaintiff discovered the fraud or mistake or could with reasonable diligence have discovered it. It is further submitted that the Plaintiff alleges to have discovered that the 2nd Defendant registered herself fraudulently as proprietor of the suit property in or around the year 2014 which prompted the Plaintiff to register a caution on the suit property on the 4.6.2014. It is contended that the Plaintiff knew that the property had been transferred way back in 2011 and should have commenced action not later than 4.6.2017. That the suit was filed on 19.7.2017.

8. Relying on the case of **Jared Iqbal Abdul Rahman & Anor Vs Bernard Alfred Wekesa Sambu & Anor CACA No 11 of 2001 (unreported)** the Defendants submitted that the Plaintiffs suit is statutorily time barred. In the above case the Court of Appeal held that the period for purposes of limitation in suits is founded on fraud begins to run from when the fraud is discovered. Further that section 26 of the Act is clear as time does not begin to run until the Plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it.

9. On the issue of Jurisdiction, citing the case of **The owners of Motor Vessel "Lilian S" Vs Caltex Oil Kenya Limited (1989) 1 KLR 1**, the Defendants submitted that this Court lacks jurisdiction to deal with the present case on account that the suit property having been transmitted to the Defendants name pursuant to a confirmed grant of letters of administration which were issued in a succession cause. That a certificate of confirmation of grant of letters of administration in Muranga Succession cause No 44 of 2007 in the estate of Mwangi Mura dated the 16.6.2008 is attached to the Plaintiffs list and bundle of documents and indicates that the suit property was to be inherited by the 2nd Defendant. It is the Defendants' contention that to the extent that the Plaintiff did not challenge the said grant of letters of administration by way of appeal, the Plaintiff's suit raises no reasonable cause of action and therefore constitutes an abuse of the process of the Court.

10. The Defendants state that section 76 of the Law of succession Act Cap 160 stipulates the procedure to seek a revocation of grant of letters of administration that were allegedly obtained fraudulently. Relying on the case of **John Ongundi Oyoo Vs Japheth Ogolo Oyoo (2017) eKLR** the Defendants further submit that it was for the Plaintiff to follow the laid down procedure stipulated in section 76 of the Act by challenging the grant instead of approaching the Court for orders of cancellation of title.

11. The Plaintiff opposed the grounds of preliminary objection in his written submissions. He submitted that the Defendants have not understood his case and have misapprehended it as stated in the Preliminary objection. That contrary to the dicta stated in the case of **Mukisa Biscuit Manufacturing Co Ltd Vs Westend Distributors Ltd (1967) EA**, the Defendants have made false assertions about the Plaintiffs' pleadings and then purported to base their Preliminary objection on the same.

12. Further the Plaintiff sought to rely on sections 7, 9 and 10 and 26 of the Limitation of Actions Act to states that the Defendants fraudulently took possession of the property in 2011 and therefore pursuant to section 7, only 7 years have lapsed and therefore he is within his rights to bring an action for recovery of land. That given that his father died in 2008 and pursuant to section 9(2), he filed for grant of letters *ad litem* in 2016, 6 years after his death thus is within the time provided by law. That pursuant to section 13(1) the 1st Defendant took possession of the land on 18.8.11 and he filed suit on 19.7.2017, 6 years later.

13. The Plaintiff contends that he discovered the fraud on 3.6.2014 when he obtained a copy of the green card and realized that the land was transmitted to the 1st Defendant vide a succession cause No 44 of 2007. That he proceeded to the Chief Magistrate's Registry in Murang'a whereupon he noted that the said Succession cause belonged to another person other than his father.

14. Maintaining that section 26 of the Limitations of Act is in his favour, he argues that the period of limitation was extended by 12 years from the 3.6.2014 the alleged period that he discovered the fraud and therefore the period does not lapse until 2026. He maintained that the Defendants' objection on the jurisdiction of the Court to determine this matter is unfounded as no letters of administration have been obtained in the estate of his late father as the purported Succ. Cause No 44 of 2007 belongs to Reuben Ngugi, a stranger to him. That this act counts for intermeddling with the deceased's estate contrary to section 45 of the Law of Succession Act.

15. Citing section 13 of the Environment and Land Act, the Plaintiff contended that this Court has jurisdiction to determine this matter. Finally, relying on the case of **Kenya Commercial Bank Limited Vs John Benjamin Wanyama HCCA No 97 of 1999; Nancy Mwangi T/A Worthlin Marketers Vs Airtel Networks (k) Ltd & 2 others HCCC NO 275 OF 2013 (Commercial & admiralty Division); Janet Syokau Kaswii Vs Kathonzweni Financial Service Association ELRC 774 of 2012; Kennedy Mureithi & Anor Vs Peterson Karimi Gacewa HCCA No 39 of 2014a**, he urged the Court to dismiss the Preliminary Objection.

Determination

16. Having analyzed the Pleadings, Notice of preliminary objection, the rival submissions, there are three key issues for determination; firstly whether the Court has jurisdiction to determine this suit; secondly whether the suit is statute barred by dint of section 4 and section 26 of the Limitations of Actions Act; thirdly whether the suit is incompetent in law for failure to disclose a reasonable cause of action and/or constitutes abuse of the due process of Court.

17. What is a preliminary objection? As to whether the Preliminary objection as raised is a pure point of law, the Court in the case of **Mukhisa Biscuit Manufacturing Co. Ltd. – v- West End Distributors Limited, 91969) EA 696**, defined a preliminary objection as follows;

“.....a “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary

objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

18. In the case of **Oraro vs. Mbaja(2005) I KLR 141 Ojwang, J** the Court held as follows:-

“I think the principle is abundantly clear, a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principles a true preliminary objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary pointAnything that purports to be a preliminary objection must not deal with disputed facts, and must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence

19. Further in the case of **Nitia Properties Limited – v- Jagjit Singh Kalsi & Another, C.A. No. 132 of 1937**, it must be borne in mind that for a preliminary point to succeed, the facts as alleged in the plaint are deemed to be correct. In the instant case, the facts as alleged in the plaint and defence are disputed and prima facie the claim in this suit cannot be deemed to be incontestably hopeless and be summarily dismissed by way of preliminary objection.

20. The effect of the case law cited above means for one to succeed in putting up a preliminary objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing of the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.

21. In the instant case, the Plaintiff under para 11 adverted that the land was transmitted to the 2nd Defendant fraudulently using a grant in succession cause No 44 of 2007 which succession belonged to the estate of Reuben Ngugi Kiragu and not Mwangi Mura. See copy of the green card and entry No 3 dated the 23.5.2011 where the name of the 2nd Defendant was recorded as RL 7 – succession cause No 44 of 2007, Muranga. That subsequently the suit land was transferred to 1st Defendants stated in entry No 4 dated 18.8.2011 with a life interest to the 2nd Defendant. In entry No 5 dated 18.6.2014 the title was issued to the 1st Defendant thus becoming the registered owner of the suit land. That this discovery came to his knowledge on the 3.6.2014 which prompted him to lodge a caution on 4.6.2014 on the suit land. That he also sought and obtained letters of grant ad litem on 7.6.2016 and filed this suit on 19.7.2017. That no succession of the estate of Mwangi Mura has been filed. That the actions of the Defendants of disposing the asset of the estate before a succession cause is filed is tantamount to intermeddling with the deceased estate contrary to section 45 of the Law of Succession Act.

22. In Para 8 of their defense the 2nd -4th Defendants aver that the suit land was legally transmitted to the 2nd Defendant pursuant to letters of grant of administration and confirmation of grant obtained in succession cause No 44 of 2007. It must be noted that though the letters of grant and confirmation of grant appears on the list of the 1st -4th Defendants list of documents, the same was not attached. Neither were RL 7 and RL9. On page 2 of the submissions by the Defendants, it is alluded that the certificate of confirmation of grant of letters of administration in Succ Cause No 44 of 2007 in the estate of Mwangi Mura dated 16.6.2008 is attached to the Plaintiffs list of documents and which indicate that the suit property was inherited by the 2nd Defendant. The Court has perused the confirmation of grant in succession cause no 44 of 2007 dated 24/6/2010 which relate to the estate of Reuben Ngugi Kiagu alias Rueben Ngugi. In this cause the representatives are Margaret Murugi Ngugi and Jane Njeri Gatune and the land referred to is Loc 11 /Muchungucha/223 & 1522.

23. In the instant case for the preliminary objection to succeed, it has to be pleaded in plaint and admitted in the defense or it is a plea in other documents of the pleadings and admitted by the other party. In both the plaint and the submissions by the Plaintiff he has stated that no succession cause was filed in the estate of his late father and secondly the Succession Cause used to transmit the title to the 2nd Defendant was fraudulent as it referred to a different deceased person’s estate. The Defendants have insisted that indeed there was a succession cause referring to the impugned Succession Cause No 44 of 2007 which I have analyzed above. The Defendants have not admitted any of the two allegations. To that extent that the Court would have to call for evidence on whether or not there were indeed letters of grant of administration taken out in the estate of the late Mwangi Mura and whether or not the Succession Cause No 44 Of 2007 refer to the estate of Mwangi Mura and whether or not the transmission was fraudulent

24. Turning to the jurisdiction of the Court, the cause of action relates to title to land. The Plaintiff is seeking to challenge the disposition of land previously owned by his father on account of a fraudulent grant. It is calling for the Court to investigate title to land. There are arguments and counter arguments that have been made by the parties respecting the grant on record. The Defendants have not helped the Court by attaching the grant being referred to in their responses. In the absence of this it is difficult for the Court to ascertain whether the suit offends section 76 of the Law on Succession which provides procedure to challenge the grant in the Court that granted the same. In the absence of any evidence whether indeed the grants under reference are different and in the circumstances and by dint of section 13 of the Environment and Land Act, I hold that the jurisdiction of the Court has not been ousted.

25. On the issue whether the suit is statute barred, it is the Defendant’s averments that the Plaintiff was aware that the suit land had been transferred to the Defendant way back in 2011 and having based his claim on fraud, he ought to have filed suit not later than 4.6.14. The fact that it was filed on 19.7.2017 is way out of time and is therefore statute barred. It is clear from the Plaintiffs’ pleadings that he got knowledge that the suit land had been transferred to the 1st Defendant on 25.8.2011 when the chief of the area accompanied the 1st Defendant to plough the land. He however avers that he discovered the fraud on 3.6.2014 which prompted him to lodge a caution and file for letters of grant *adlitem* for purposes of filing this case. Be that as it may, he then should have commenced suit by 3.6.17 pursuant to section 26 of the Limitations of Actions Act. The suit was filed on 9.7.17, a clear 36 days out of time as stipulated by the Act. No material has been adverted by the Plaintiff to show that he was under any disability and for which an extension of time has been sought and obtained under section 22 of the Limitations of Actions Act. The suit is therefore statute barred.

26. Having determined the second issue, I see no reason to determine the third one in view of the holding that the suit is statute barred.

27. The upshot is that the Preliminary Objection has merit and is accordingly upheld on account of statute bar. The suit is hereby struck out.

28. The Plaintiff to meet the costs of the suit and of the application.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 12TH DAY OF APRIL 2018.

J G KEMEI

JUDGE