



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**ENVIRONMENT & LAND CASE NO.87 OF 2011**

**JOSLYN WERUNGA OTOTI.....PLAINTIFF**

**VERSUS**

**JOSEPH WAFULA MBAVI.....DEFENDANT**

**JUDGEMENT**

Section 7 of the Limitation of Actions Act (CAP 22 LAWS OF KENYA) is couched in the following clear terms:

**7. “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 same Act has a provisos however that where such an action is based on fraud of the defendant or mistake, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it.

By his Plaint dated 27<sup>th</sup> September 2011, the Plaintiff sought judgement against the defendants jointly and severally in the following terms:

- a. Cancellation of title No. KIMILILI/KIMILILI/2997 and KIMILILI/KIMILILI/2998 and restoration of the original number KIMILILI/KIMILILI/266.**
- b. Costs**
- c. Any other relief the Honourable Court may deem fit to grant.**

The genesis of the claim is that the Plaintiff is the administrator of the Estate of **JONATHAN OTOTI** (deceased) having obtained letters of Administration on or about 26<sup>th</sup> October 1998. That on or about 15<sup>th</sup> April 1997 the 2<sup>nd</sup> defendant, without any colour of right or authority closed the title in respect to parcel No. KIMILILI/KIMILILI/266 belonging to the deceased and created two new parcels No. KIMILILI/KIMILILI/2997 which remained in the names of the deceased and KIMILILI/KIMILILI/2998 which was registered in the names of the 2<sup>nd</sup> defendant. That this was done purportedly in implementation of an Order arising from **KIMILILI RESIDENT MAGISTRATE’S COURT MISCELLANEOUS CIVIL APPLICATION NO.10 OF 1996** which proceedings were between the 1<sup>st</sup> defendant and one **RISPA NEKESA OTOTI** and were done without the knowledge of the deceased, who had infact died on 12<sup>th</sup> December 1976, or the Plaintiff. That it was not until recently when the Plaintiff went to check the status of the land at the Bungoma Lands Registry that he discovered that the land Parcel No. KIMILILI/KIMILILI/266 was no longer in existence. It is the Plaintiff’s case therefore that the sub-division of the land Parcel No. KIMILILI/KIMILILI/266 to create two parcels No. KIMILILI/KIMILILI/2997 and KIMILILI/KIMILILI/2998 (the suit land) was fraudulent particulars, of which have been pleaded in paragraph 11(a) to e) of the Plaintiff.

The 1<sup>st</sup> defendant filed a defence dated 5<sup>th</sup> October 2011 stating that he bought two(2) acres from the deceased who was the then registered proprietor of land Parcel No. KIMILILI/KIMILILI/266 which was registered in his names as Parcel No. KIMILILI/KIMILILI/2998 way back in 1974 and he has been utilizing the same since then with the knowledge of the Plaintiff. That land parcel No. KIMILILI/KIMILILI/266 was closed on sub-division following orders issued in **KIMILILI RESIDENT MAGISTRATE’S COURT MISCELLANEOUS CIVIL APPLICATION NO.10 OF 1996** in which a decree was issued followed by a vesting order directing the 2<sup>nd</sup> defendant to implement it. That the 1<sup>st</sup> defendant never applied to be enjoined in those proceedings nor challenge the decision yet he is the son of the deceased and was aware that the 1<sup>st</sup> defendant purchased the parcel No. KIMILILI/KIMILILI/2998 from the deceased at a consideration of Ksh.1,700. That in March 2011, the 1<sup>st</sup> Defendant approached the Plaintiff seeking to change the terms of the agreement on the ground that the purchase price was “little” a suggestion that the Plaintiff refuted. The 1<sup>st</sup> defendant denied all the averments of fraud and urged the Court to strike out the suit.

It is not clear how the 1<sup>st</sup> defendant filed two defences to the Plaintiff's claim but the record show that on 12<sup>th</sup> November 2012, the 1<sup>st</sup> defendant filed yet another defence not substantially different from the earlier defence except that he now sought in his counter-claim an Order that the Plaintiff, be restrained from dealing with land No. KIMILILI/KIMILILI/2998.

The 2<sup>nd</sup> defendant similarly denied the allegations of fraud levelled against it pleading instead that on or about 20<sup>th</sup> December 1997, it received a Court Order to sub-divide the land parcel No. KIMILILI/KIMILILI/266. That Order was never challenged and neither was the said land encumbered. Pursuant to that Court Order, titles No. KIMILILI/KIMILILI/2997 and 2998 were created and the 2<sup>nd</sup> defendant is therefore a stranger to any averments of fraud on its part. The 2<sup>nd</sup> defendant also pleaded that this suit is hopeless, mischievous, fatally defective time-barred and incompetent and a Preliminary Objection would be raised at the hearing. It prayed for the dismissal of the suit with costs.

The record shows that on 5<sup>th</sup> June 2018, the Plaintiff took a hearing dated in the registry for 27<sup>th</sup> June 2018 and duly served both the 1<sup>st</sup> and 2<sup>nd</sup> defendants as per the affidavit of service dated 20<sup>th</sup> June 2018 and filed on 25<sup>th</sup> June 2018. However, when the suit was called for hearing on 27<sup>th</sup> June, 2018, only the Plaintiff attended Court and asked the Court to rely on his witness statement dated 27<sup>th</sup> September 2011 as his evidence. He also asked the Court to dismiss the 1<sup>st</sup> defendant's Counter – Claim. As there was no explanation as to why both the 1<sup>st</sup> and 2<sup>nd</sup> defendants were not in Court having been duly served with notices for hearing, the Court obliged and dismissed the 1<sup>st</sup> defendant's Counter Claim with no Order as to costs.

In his statement dated 27<sup>th</sup> September 2011, the Plaintiff has narrated that after the deceased passed away on 12<sup>th</sup> December 1976, he obtained a grant of Letters of Administration in respect of his Estate on 26<sup>th</sup> October 1998. That about the year 1996, the 1<sup>st</sup> defendant had commenced proceedings against one **RISPA NEKESA OTOTI** claiming two(2) acres out of land parcel No. KIMILILI/KIMILILI/266 which was then registered in the names of the deceased. A decree was issued and on 15<sup>th</sup> April 1997 the 1<sup>st</sup> defendant obtained a vesting Order which he presented to the 2<sup>nd</sup> defendant which then sub-divided the land parcel No. KIMILILI/KIMILILI/266 into two parcels being the suit land. That all this was done notwithstanding the fact that **RISPA NEKESA OTOTI** was not the registered proprietor of the land parcel No. KIMILILI/KIMILILI/266 nor was she the Administrator of the deceased's Estate.

What is immediately clear both from the Plaintiff and the Plaintiff's statement is that the land parcel No. KIMILILI/KIMILILI/266 was subdivided into two parcels being the suit land on the basis of a Court Order. This is what is pleaded in paragraph nine(9) of the Plaintiff:

**9. "The Plaintiff avers that when he went to check on the status hereof at the 2<sup>nd</sup> defendant Offices in Bungoma he was only informed that the said parcel number was not existing as same had been closed on sub-division following an Order from KIMILILI COURT but was unable to explain how and why the Orders herein had changed the status of the innocent and deceased person who did not participate in the same."**

And this is what the 1<sup>st</sup> defendant pleaded in paragraph six(6) of his defence dated 5<sup>th</sup> October 2011:

**6. "The 1<sup>st</sup> defendant states that the KIMILILI/KIMILILI/266 was closed on sub-division following a lawful Court Order arising from Court proceedings and ruling vide KIMILILI RESIDENT MAGISTRATE'S COURT MISCELLANEOUS CIVIL APPLICATION NUMBER 10 OF 1996 where a decree was issued followed by a vesting Order directing the 2<sup>nd</sup> defendant for implementation which was done promptly".**

On its part, the 2<sup>nd</sup> defendant in response to the Plaintiff's allegations of fraud pleaded as follows in paragraph fourteen(14) of its defence dated 20<sup>th</sup> June 2016:

**14. "In response to paragraph 11 of the Plaintiff, the 2<sup>nd</sup> defendant denies any knowledge of fraud and/or participation in the alleged fraud on the contrary if the 2<sup>nd</sup> defendant effected the sub-division on the land known as KIMILILI/KIMILILI/266 then the (sic) did so pursuant to the documents presented including a Court Order and without knowledge of fraud and puts the Plaintiff to strict proof thereof".**

The 2<sup>nd</sup> defendant is more explicit in paragraph sixteen(16) of the defence where it is pleaded that:

**16. "In response to paragraph 12 of the Plaintiff, the 2<sup>nd</sup> defendant avers that the resultant titles i.e. KIMILILI/KIMILILI/2997 and KIMILILI/KIMILILI/2998 were lawfully created pursuant to a valid Court Order thus an Order of cancellation is not available where the Court Order was never challenged."**

It is therefore common ground from the above pleadings that the suit land was created as a result of a Court Order. Indeed among the documents filed by the Plaintiff is a vesting Order issued by the **RESIDENT MAGISTRATE KIMILILI IN MISCELLANEOUS CIVIL APPLICATION NO.10 OF 1996** authorizing the Executive Officer of the Court to sign transfer documents to facilitate the transfer of two(2) acres out of land parcel No. KIMILILI/KIMILILI/266 to the Plaintiff. That vesting Order not having been challenged, the Plaintiff cannot mount a successful claim of fraud on the part of the defendants. What is done on the basis of a valid order from a competent Court cannot be fraudulent unless it can be demonstrated that the Court was itself party to the fraud. Courts can make mistakes. It is called to err. That is rectified through an appeal or review. Courts are not however in the habit of engaging in fraud. That would be a serious indictment. Faced with that Court Order, the 2<sup>nd</sup> defendant was obliged to comply otherwise the Land Registrar would have exposed himself to proceedings for contempt of Court. The long and short of all the above is that there is really no evidence placed before this Court by the Plaintiff to prove the allegations of fraud levelled against the defendants which, as was held in the Case of **PATEL V LALJI MAKANJI 1957 E.A. 314:**

**“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”.** Emphasis added.

The Plaintiff’s suit was clearly founded on quick sand.

However, the Plaintiff had an even bigger hurdle to surmount. That of his claim being statute barred by virtue of the provisions of Section 7 of the Limitation of Actions Act cited at the beginning of this judgement.

Again from the Plaintiff’s own pleadings, it is clear that the cause of action in this suit accrued on 15<sup>th</sup> April 1997. This is what the Plaintiff pleaded in paragraph five(5) of his Plaintiff:

5. **“On or about 15.4.1997 the 2<sup>nd</sup> defendant without any colour of right or authority closed parcel number KIMILILI/KIMILILI/266 the Estate of JONATHAN OTOTI on sub-division resulting to two new parcel numbers vide KIMILILI/KIMILILI/2997 in the name of JONATHAN OTOTI and KIMILILI/KIMILILI/2998 in the name of the 1<sup>st</sup> defendant purporting to implement an Order of the Court arising from KIMILILI RESIDENT MAGISTRATE’S COURT MISC. CIVIL APPLICATION NUMBER 10 OF 1996 whose proceedings were between the 1<sup>st</sup> defendant and the 1<sup>st</sup> defendant (sic) and one RISPA NEKESA OTOTI.”**

This averment is repeated in the Plaintiff’s own statement dated 27<sup>th</sup> September 2011 in which it is recorded in paragraph five(5) as follows:

5. **“On the 15.4.1997, the 1<sup>st</sup> defendant presented a vesting Order herein to the 2<sup>nd</sup> defendant with instructions that 2 acres be vested in the name of the 1<sup>st</sup> defendant from parcel number KIMILILI/KIMILILI/266 the property of JONATHAN OTOTI deceased yet the Order condemned one RISPA NEKESA OTOTI and further directed the said RISPA NEKESA OTOTI gives (sic) the 1<sup>st</sup> defendant two acres.”**

There is nothing in the Plaintiff’s own statement to suggest that this suit could be saved by the provisions of Section 26 of the Limitation of Actions Act. Indeed in paragraph nine(9) of his Plaintiff he only states **“...that when he went to check on the status hereof at the 2<sup>nd</sup> defendant Offices in Bungoma he was only informed that the said parcel number was not existing.”**

He does not state when it was that he went to the 2<sup>nd</sup> defendant’s Bungoma Office. In his own statement dated 27<sup>th</sup> September 2011, he alludes to the fact that the 1<sup>st</sup> defendant commenced proceedings against one **RISPA NEKESA OTOTI** in the year 1996 and on 15<sup>th</sup> April 1997 presented a vesting order to the 2<sup>nd</sup> defendant. So those are clearly matters that were within his knowledge as far back as 1996 or could, **“with due diligence,”** have been discovered. This suit was filed on 28<sup>th</sup> September 2011 some fourteen(14) years after the title to parcel No. KIMILILI/KIMILILI/266 had been closed and parcel No. KIMILILI/KIMILILI/2998 had been transferred to the 1<sup>st</sup> defendant. This suit is therefore time barred and must be struck out.

The up – shot of the above is that this Court makes the following orders with regard to the Plaintiff’s suit and the 1<sup>st</sup> defendant’s Counter – Claim.

- 1. The Plaintiff’s suit is struck out as it is barred by Section 7 of the Limitation of Actions Act.**
- 2. The 1<sup>st</sup> defendant’s Counter – Claim is dismissed for want of prosecution.**
- 3. No Orders as to costs.**

**BOAZ N. OLAO**

**JUDGE**

**26<sup>TH</sup> JULY 2018**

**Judgment delivered, dated and signed in open Court this 26<sup>th</sup> day of July 2018 at Bungoma**

Plaintiff present

Defendant Absent

Right of Appeal

**BOAZ N. OLAO**

**JUDGE**

**26<sup>TH</sup> JULY 2018**