



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

E.L.C CASE NO. 78 OF 2016

TECLA CHERONO SIRMA.....PLAINTIFF

VERSUS

PETER KIPLANGAT KIMETTO.....1ST DEFENDANT

VINCENT KIPKURUI ARAP SERON.....2ND DEFENDANT

RULING

Introduction

1. This Ruling is in respect of the defendants' Preliminary Objection dated 28th March 2016 which is based on the following grounds:

1. That time limit under the Limitation of Actions Act has not been complied with
2. That there is no cause of action disclosed since the suit properties have demarcated boundaries which are not disputed
3. That the complaint raises elements of boundary which can be canvassed by the boundary disputes tribunal under the Land Registrar and thus the court lacks jurisdiction to entertain this suit.

2. The Preliminary Objection was opposed by the Plaintiff through his Replying affidavit sworn on the 8th May 2018 in which he states that the P.O is improper, incompetent, fundamentally defective, limping and incurable and made in bad taste as the prayers sought are not in good faith.

3. The Plaintiff avers that land matters are contentious and cannot be determined in a summary manner without taking evidence and thus the suit ought to be determined on its merits. The Plaintiff further states that it is in the interest of justice that she be allowed to ventilate her case in line with Article 48 of the Constitution of Kenya 2010

4. The Plaintiff states that even though the suit is for recovery of land, it is anchored on fraud and the provisions of section 26 (a) of the Limitation of Actions Act Cap 22 of the Laws of Kenya provides that where an action is based on fraud on the part of the Defendant or his agent, the period of limitation does not begin to run until the plaintiff has discovered the said fraud or could with reasonable diligence could have discovered it.

5. The Plaintiff states that the court has jurisdiction to hear and determine the case as it relates to a claim for ownership of land which the Defendant unlawfully and or/fraudulently caused to be sub-divided and transferred to himself.

6. The Plaintiff refutes the Defendant's contention that the suit is about a boundary dispute and states that the P.O is incompetent and incurably defective.

7. The court directed that the P.O be canvassed by way of written submissions and counsel for the Plaintiff filed his submissions but the defendant's counsel did not file any.

Issues for Determination

8. The main issues for determination are as follows:

- i. Whether the Plaintiff's suit is time barred

ii. If the answer to (i) is in the affirmative, can the court extend time?

iii. Whether the case is based on fraud and if so, whether the provisions of section 26 (a) of the Limitation of Actions Act apply?

iv. Whether this court has the jurisdiction to entertain this suit.

Analysis and Determination

9. With regard to the first, second and third issues, Section 7 of the Limitation of Actions Act provides as follows:

‘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.’

10. 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.’

11. Learned counsel for the Applicant has submitted that the matter is anchored on fraud.

12. In the case of *Ishmael Ithongo v Geoffrey Ithongo Thindiu [1981] eKLR* the appellate court stated as follows

“Section 26 of the Act states that where, in case of an action for which a period of limitation is prescribed, the action is based on the fraud of the defendant or his agent, or the right of action is concealed by the fraud of any such person, the period of limitation does not begin to run until the plaintiff has discovered the fraud. In deciding whether first issue *is time barred* the court reiterated section 26 of the Act, and it provides:

“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 mistake or could with reasonable diligence have discovered it.”

13. In the case of *Justus Tureti Obara v Peter Koipeitai Nengisoi [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. ‘the court went ahead and stated thus:

“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”.

14. **Guided by the above cited authorities, it is my finding that the suit herein is anchored on fraud and in terms of Section 26 of the Limitation of Actions Act the suit herein is not time barred.**

15. The fourth and final issue for determination is whether this honourable court has jurisdiction to entertain this matter in first instance. The jurisdiction of this court is found in Article 162 (2) (b) of the Constitution of Kenya and section 13 of the Environment and Land Court Act 2011.

16. In the case of Peter Mburu v Andrew Kimani Adam & 2 others [2016] eKLR the court relied on **Section 13 (1) of the Environment and Land Court Act** which provides for the jurisdiction of the **Environment and Land Court** states as follows:-

“The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any other law relating to environment and land

(Miscellaneous Amendments) Act No. 25 of 2015, amended Section 150, of the Land Act 2012 which previously read as follows:-

“The Environment and Land Court established in the Environment and Land Court Act is vested with exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act”

17. I agree with the submission of the Plaintiff’s counsel that this matter falls within the jurisdiction of this Court as provided by section 13 of the Environment and Land Court Act, and Article 162 of the Constitution. Article 162(2)(b) of the Constitution which states that this Court shall have jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition, section 13 of the Environment and Land Court Act expounds on the jurisdiction of this Court as follows:

“(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.”

18. It is therefore my finding that this honourable court has jurisdiction to hear and determine this matter.

19. Accordingly, I find no merit in the Preliminary Objection raised by the defendant and I dismiss it.

Dated, signed and delivered at Kericho this 13th day of July 2018

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Kitur for the Plaintiff

2. Mr. Ngeno for the Defendant

3. Court assistant - Rotich