



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 214 OF 2013**

**JOHN SEMBE NAMATSI.....PLAINTIFF**

**VERSUS**

**JOHN LUKHISI MISIKO**

**MARY NANDAKA LUKHISI**

**NDANYA KAMUTI MISIKO.....DEFENDANT**

**MICHAEL CHUMA KOKOYO**

**JUDGEMENT**

By a plaint dated 12<sup>th</sup> July 2013, the plaintiff avers that the parcel of land originally known as BUNYALA/BUDONGA/527 was registered in the name of Tofiko Misiko, now deceased. That on 16<sup>th</sup> November, 1990 the plaintiff by an agreement in writing bought the said parcel of land L.R. NO. BUNYALA/BUDONGA/527 from the said Tofiko Misiko at a consideration of Ksh. 300,000/= Pursuant to the said agreement the plaintiff paid for the parcel of land in several instalments to Tofiko Misiko and his family members and as at 22<sup>nd</sup> February, 1992, Isaac Ndege Tofiko and Francis Ndombi Misiko acknowledged receipt of Ksh. 250,000/= as part payment of the said purchase price and the balance of Ksh. 50,000/= was paid to Francis Ndombi Misiko as a directive from the family this being full and final payment of the purchase price. The plaintiff further contends that pursuant to the said sale of land agreement consent from Lurambi Land Control Board to transfer the suit property to him was obtained and documents to transfer were duly executed by Tofiko Misiko in favour of the plaintiff. That in a bid to defeat the plaintiff's interest and or prohibit the registration of transfer documents aforesaid the 1<sup>st</sup> defendant secretly, unlawfully and without any justifiable cause or reason lodged a caution against the said title thus preventing the plaintiff from registering the transfer in his favour. The plaintiff contends that at the time of the demise of the said Tofiko Misiko his estate comprised the said title number BUNYALA/BUDONGA/527 and the plaintiff was a liability in the said estate having purchased the said parcel of land and that his interest as a purchaser/liability was protected and or recognized by the Law of succession Act, Cap 160 Laws of Kenya. The said title number BUNYALA/BUDONGA/527 remained so registered in the name of the said Tofiko Misiko – deceased until the year 1997 when it was fraudulently, illegally, unprocedurally and irregularly transferred to the 1<sup>st</sup> defendant purportedly as an administrator of the estate of the said Tofiko Misiko vide Kakamega HC. Succ. Cause No. 397 of 1997 when the 1<sup>st</sup> defendant knew that he had not filed the said or any succession cause and when he knew that Kakamega HC Succ. Cause No. 397 of 1997 related to the estate of a different deceased person and when the parcel of land or property involved was also different. The plaintiff prays for judgment against the defendants jointly and severally for:-

(a) A declaration that the transfer of title number BUNYALA/BUDONGA/527 in favour of the 1<sup>st</sup> defendant from the deceased Tofiko Misiko in the absence of succession proceedings was irregular, illegal, unprocedural, improper, fraudulent and unlawful and the same be revoked and or cancelled forthwith.

(b) A declaration that the sub-division of the said title number BUNYALA/BUDONGA/527 and creation of title numbers BUNYALA/BUDONGA/1714, 1715 and 1716 and the purported transfer thereof to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants respectively was irregular, illegal, unprocedural, improper and unlawful and the same be revoked and or cancelled forthwith and the original title NO. BUNYALA/BUDONGA/527 be reverted to and the same be transferred to the plaintiff.

(c) A permanent injunction against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, either by themselves or through their servants, agents, relative and whomsoever claiming under them from alienating, selling or offering for sale, transferring, laying claim to trespassing onto, carrying out any works on or in any manner interfering with the plaintiff's occupation, possession and or use of the suit land L.R. NO. BUNYALA/BUDONGA/527.

- (d) Costs of this suit and interest.
- (e) Any other or further relief deemed fit and just.

The plaintiff testified that he used the land from 1992 to 1995 when he was chased away. PW2 corroborated the plaintiff's evidence.

The defendants submit that they are not aware of the agreement of 16<sup>th</sup> November, 1990 and aver that even if such an agreement happened, then the same cannot found an action in 2013 as the same is statutory barred. The defendants deny that there was obtained consent from the Land Control Board at Lurambi Control Board. In the alternative, the defendants aver that even if the consent was obtained, the same was done out of time without extending the period to which such consent is granted. The consent was void and illegal for failure to abide by the Land Control Act. The defendants jointly and severally aver that land parcel number BUNYALA/BUDONGA/525 was and still is family land and that them being members of the family, were not consulted when the plaintiff purported to enter into an agreement with the late Tofiko Misiko. The defendants aver that the late Tofiko Misiko held land parcel number BUNYALA/BUDONGA/527 in trust for them and other family members and that by entering into a sale agreement, he breached the trust. The defendants aver that the law of succession Act recognizes them as heirs to the estate of the late Tofiko Misiko and that their rights rank higher to those of the plaintiff.

This court has considered the evidence and the submissions herein. The preliminary issue for determination is whether the plaintiff's suit is time barred, section 4 of the Limitation of Act provides the circumstances when a suit founded on contract or tort may be time barred as follows:

**(1) *The following actions may not be brought after the end of six years from the date on which the cause of action accrued -***

***(a) actions founded on contract;***

***(b) actions to enforce a recognizance;***

***(c) actions to enforce an award;***

***(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;***

***(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.***

**(2) *An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:***

***Provided that an action for libel or slander may not be brought after the end of twelve months from such date.***

The plaintiff adduced evidence that, on 16<sup>th</sup> November, 1990 by an agreement in writing bought the said parcel of land L.R. NO. BUNYALA/BUDONGA/527 from the said Tofiko Misiko at a consideration of Ksh. 300,000/=. The plaintiff testified that he used the land from 1992 to 1995 when he was chased away. The agreement was entered into on 16<sup>th</sup> November, 1990 and this case filed in 2013 the same is statutory barred as this date is six years after the cause of action arose. This was clearly pleaded in paragraph 14 of the defence on record.

In **Gathoni vs. Kenya Co-operative Creameries Ltd Civil Application No.122 of 1981**, Potter, J. observed in *obiter* that;

*“The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest”*

I find that this suit is time barred and I dismiss it with costs to the defendants.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23<sup>RD</sup> DAY OF OCTOBER 2018.**

**N.A. MATHEKA**

**JUDGE**