



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. CASE NO. 1612 OF 2016**

**JANE WAMBUI WAINAINA.....PLAINTIFF**

**= VERSUS =**

**GRACE WAIRIMU NJOROGE.....1ST DEFENDANT**

**MILLICENT WANJIKU.....2ND DEFENDANT**

**ATTORNEY GENERAL.....3RD DEFENDANT**

**RULING**

1. The plaintiff brought this suit against the defendants on 21/12/2016 seeking the following orders.

**1) A declaration against the three defendants that the plaintiff herein is the legal owner of all that piece and parcel of land known as Muguga/Nderi/T.8.**

**2) A declaration that the sale and transfer of Muguga/Nderi/T.8 to the 1st defendant is unlawful and fraudulent and order the cancellation of the 1st defendant's title deed**

**3) An order of eviction be issued against the 1st defendant, her servants, employees, agents or representatives.**

**4) A permanent injunction to restrain the 1st defendant her servant, agents or employees from entering into, fencing, building, selling, transferring and or in any way interfering with the plaintiff's lawful use of Muguga/Nderi/T.8.**

**5) Costs of the suit.**

**6) Any other and further relief that this court may deem fit and just to grant.**

2. On 19/9/2017, the 1st defendant filed a memorandum of appearance and on the same day brought a notice of preliminary objection dated 15/9/2017 seeking the striking out of this suit on the ground that it is statute-barred under the **Limitation of Actions Act**. The preliminary objection was canvassed through written submissions.

3. In her written submissions dated 14/6/2018, the 1st defendant gave a historical background to this suit and contended that the suit property was sold in a public auction in 1986 to the 1st defendant's husband who in turn transferred it to the 1st defendant in 2011. She argued that this suit having been filed in 2016, it was brought outside the limitation period of 12 years prescribed under the **Limitation of Actions Act**.

4. Secondly, the 1st defendant argued that under **Sections 4(2) and 26 of the Limitation of Actions Act**, a claim predicated on fraud must be brought within three years from the time the alleged fraud comes into the knowledge of the claimant. She contended that the plaintiff had pleaded in paragraph 9 of the plaint that in 2010 she learnt that her land had been sold by way of auction to satisfy a decree issued in Civil Case Number 226 of 1982 against Wainaina Nganga. She submitted that the plaintiff having learnt about the alleged fraud in 2010, the suit herein became statute barred in 2013 upon expiry of the three year limitation period.

5. In response, the plaintiff submitted firstly that the plaintiff was not aware of the auction and transfer hence the limitation period of 12 years did not apply. Secondly, she submitted that her allusion to the year 2010 was an inadvertent error because she learnt about the fraud in 2015 when she obtained an official search. She contended that she will be applying for leave to amend the plea.

6. I have considered the ground set out in the notice of preliminary objection and the rival arguments by the parties. The case of the plaintiff is that she became registered proprietor of the suit property in 1984 and that the suit property was fraudulently transferred to the 1st defendant's husband in 1986 and subsequently to the defendant in 2011. She states that her allusion to the year 2010 as the year when she

learnt about the fraud was an error and that she intends to apply for leave to amend her papers to capture the correct year which is 2015. She refers to the official search annexed to the court papers and states that it bears the date when she learnt about the fraud

7. Save for the averment in paragraph 9 of the plaint and paragraph 2 of the witness statement which the plaintiff contends was an inadvertent error, the rest of the matters which the 1st defendant has relied on constitute factual matters which fall outside the definition of a preliminary objection as defined in **Mukisa Biscuit Manufacturing Company Limited v Westend Distributors Limited (1969) EA 696**. Similarly the evidential matters set out in the parties' written submissions are inadmissible on preliminary objection plea.

8. The dispute in this suit relates to fraud in relation to land. Fraud is alleged by the plaintiff who contends that paragraphs 9 of her plaint and paragraph 2 of her written witness statement contain an inadvertent error in terms of the year when she learnt about the fraud. In my view, it would not be in the interest of justice to strike out the suit and lock the plaintiff out of the seat of justice in the present circumstances where she says that there is a typographical error.

9. The net result is that I decline to strike out the suit. I instead direct the plaintiff to amend her plaint within 21 days. She will pay the 1st defendant throw-away costs for the preliminary objection assessed at Kshs 20,000 within 30 days. In default of amendment within 21 days or payment of the costs within 30 days, the suit herein will stand struck out with costs to the 1st defendant.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF NOVEMBER 2018.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Ms Bore Advocate for the 1st defendant

Ms Njuguna holding brief for Mr Macharia Advocate for the plaintiff

June Nafula - Court Clerk