

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 342 OF 2012

KIOKO MUTHOKAPLAINTIFF

VERSUS

KALEMBWANI & NGAAMBA FARMERS COMPANY LIMITED ...DEFENDANT

RULING

1. What is before me is the Notice of Preliminary Objection dated 17th March, 2015 filed by the Defendant.
2. The Preliminary point of law raised by the Defendant is that by virtue of Section 7 of the Limitation of Actions Act, this suit cannot lie against the Defendant.
3. In his Replying Affidavit, the Plaintiff deponed that the course of action herein arose in the year 2005 when he became aware of the fraudulent transfer of his land to Shadrack Mailu Makundi; that twelve (12) years had not lapsed by the time he filed this suit and that the Notice of Preliminary Objection should be dismissed.
4. The Objection was argued by way of written submissions.
5. The Defendant's advocate submitted that the Plaintiff's claim against the Defendant is time barred; that the cause for action allegedly arose in 1978 when the Plaintiff realised that the land which he was allocated was fraudulently allocated to third party and that is over thirty four (34) years ago.
6. The issue of limitation, it was submitted, goes to the jurisdiction of the court and that this court cannot entertain the current suit because it is time barred.
7. In his submissions, the Plaintiff's advocate submitted that the suit is not time barred and that the Plaintiff filed this suit when the Defendant refused to allocate him the land.
8. Counsel submitted that pursuant to the provision of Section 26 of the Limitation of Actions Act, the period of limitation does not begin to run until when the Plaintiff discovers the fraud or mistake.
9. In his Amended Complaint dated 20th January, 2015, the Plaintiff averred that he became a member of the Defendant in 1972; that he later on found that the land that the Defendant had allocated him had been fraudulently allocated to one Shadrack Makundi Mailu and that he lodged a claim in respect to the suit land with the Makueni Land Dispute Tribunal in the year 2006.
10. The Complaint does not specifically indicate when the Plaintiff realised that the land allegedly allocated to him by the Defendant had been re-allocated to one Shadrack. The actual date of when the Plaintiff knew about the alleged fraudulent dealings in the suit property can only be ascertained at trial.
11. In the circumstances, and in view of the provisions of Section 26 of the Limitation of Actions Act which provides that where fraud is pleaded, the period of limitation does not begin to run until the Plaintiff has discovered the fraud, I find the Preliminary Objection to be unmeritorious.

12. For those reasons, the Notice of Preliminary Objection dated 17th March, 2015 is dismissed with costs.

DATED AND DELIVERED AT MACHAKOS THIS 17TH DAY OF MARCH, 2017

OSCAR A. ANGOTE

JUDGE