



**REPUBLIC OF KENYA**

**IN THE E.L.C COURT OF KENYA AT EMBU**

**E.L.C NO. 9 OF 2015**

**SALESIO NJERU S. MBOGO.....PLAINTIFF**

**VERSUS**

**MICHAEL MURIITHI NJAGI.....1<sup>st</sup> DEFENDANT**

**ELIJAH MUTERO MURIITHI.....2<sup>nd</sup> DEFENDANT/APPLICANT**

**RULING**

1. By a Complaint dated 31<sup>st</sup> July 2014 and filed in court on 5<sup>th</sup> August 2014, the Plaintiff pleaded that sometime in the year 2005 the 1<sup>st</sup> Defendant sold to him Title No. Gatari/Nembure/7267 at a consideration of Kshs 180,000/- which he paid in full. He further pleaded that upon obtaining the consent of the relevant Land Control Board the 1<sup>st</sup> Defendant signed a transfer form in his favour and handed over completion documents to enable him to be registered as proprietor.
2. The Plaintiff further pleaded that he misplaced the said documents for nearly 10 years and when he recovered most of them he realized that the 1<sup>st</sup> Defendant had fraudulently transferred the suit property to his son who has been sued herein as the 2<sup>nd</sup> Defendant. The Plaintiff consequently sought nullification or revocation of the 2<sup>nd</sup> Defendant's registration and an order for his registration as proprietor of the said property Gatari/Nembure/7267. He also sought an order for costs.
3. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered appearance to the suit through the firm of Mosi & Co Advocates on or about 26<sup>th</sup> August 2014 and filed a notice of preliminary objection to the entire suit on the basis that the suit was statute barred under section 4(1)(a) of the Limitation of Actions Act (Cap 22). It would appear that the Defendants have never filed any statement of defence to the suit since there is none on record.
4. It would appear from the handwritten court record that the matter was fixed for hearing of the preliminary objection on 2<sup>nd</sup> March 2015 before the Hon. Momanyi Bwonwonga J. When the advocates for the parties appeared before him on 2<sup>nd</sup> March 2015 the parties consented to have the said preliminary objection disposed of through written submissions. The parties therefore filed their respective written submissions in March 2015. For some reason, the issue of the preliminary objection was never concluded through a ruling for another two years.
5. This matter was ultimately listed before me on 8<sup>th</sup> March 2017 when the parties were given a date for ruling on the preliminary objection.
6. The one and only question for determination is whether or not the instant suit is time barred under the

Limitation of Actions Act (Cap 22) herein after referred to as “the Act”. The Defendants contend that the action is barred under section 4 (1) (a) of the Act which prescribes a six year limitation period for claims founded on contract. The Defendants contend that the Plaintiff ought to have applied for leave to file the suit out of time. The Defendants have submitted that amongst the Plaintiff’s list of documents there is a sale agreement dated 8<sup>th</sup> January 2004 which the Plaintiff shall be relying upon.

7. On the other hand, the Plaintiff has submitted that the instant suit is a claim for recovery of land i.e. Title No. Gaturi/Nembure/7267 and that the reliefs being sought are the cancellation of the alleged fraudulent transfer and the registration of the Plaintiff as proprietor thereof. The Plaintiff therefore contends that the applicable limitation period for such claim is 12 years as prescribed under section 7 of the Act and that 12 years had not lapsed at the time of filing suit.

8. I have considered the rival submissions of the parties and taken the following view of the matter. Although it is true as contended by the Defendants that the Plaintiff’s list of documents includes a sale agreement dated 8<sup>th</sup> January 2004, that document cannot be considered in isolation from the rest of the documents listed therein. All the documents listed in the Plaintiff’s list of documents ought to be considered as a whole in order for one to have a proper appreciation of the nature of the Plaintiff’s claim. The Defendants ought also to look at the rest of the documents e.g the payment acknowledgement slips, copy of title deed, application for Land Control Board consent, the Land Control Board consent and the green card. It is also my view that the prayers or reliefs being sought in the suit should be considered in establishing the nature of the claim before court.

9. Having considered the foregoing, I am of the opinion that the Plaintiff’s suit is an action for recovery of land which he says he was entitled to as far back as 2004. That would constitute an action for recovery of land within the meaning of section 7 of the Act. In that case, the Plaintiff’s action was not statute barred by the time of filling suit on 5<sup>th</sup> August 2014.

10. I do not understand the Plaintiff’s claim to be a suit for “specific performance” as submitted by the Defendants’ counsel. The Plaintiff is not alleging that the 1<sup>st</sup> Defendant failed to do what he was required to do under the sale agreement. In fact, the Plaintiff concedes that the 1<sup>st</sup> Defendant did all he was required to do by signing the transfer forms, obtaining the Land Control Board consent and handing over all completion documents necessary for change of ownership. The Plaintiff’s case is that he was later on defrauded of the land by the 1<sup>st</sup> Defendant. It is on that basis that he seeks revocation of the transfer to the 1<sup>st</sup> Defendant’s son and his registration as proprietor. He is not seeking any specific performance against the 1<sup>st</sup> Defendant since he is no longer registered as owner of the suit property.

11. The upshot of the foregoing is that I find no merit in the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ preliminary objection and the same is hereby dismissed with costs.

Orders accordingly.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 16<sup>th</sup> day of MARCH 2017**

In the presence of Mr Okwaro holding brief for Mr Kathungu for the Plaintiff and Mr Momanyi holding brief for Ms Mosi & Co for the Defendant.

Court clerk Njue

**Y. M. ANGIMA**

**JUDGE**

**16.03.17**