



**REPUBLIC OF KENYA**  
**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 385 OF 2014**

**JOEL OICHOE OISEBE.....PLAINTIFF**

**VERSUS**

**THE AGRICULTURE, FISHERIES AND**

**FOOD AUTHORITY.....1<sup>ST</sup> DEFENDANT**

**THE DISTRICT LAND**

**REGISTRAR, NYAMIRA .....2<sup>ND</sup> DEFENDANT**

**LAND CONTROL BOARD, NYANSIONGO.....3<sup>RD</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL .....4<sup>TH</sup> DEFENDANT**

**BILIA BOSIBORI OISEBE .....5<sup>TH</sup> DEFENDANT**

**JAMES BOSIRE OISEBE.....6<sup>TH</sup> DEFENDANT**

**JANE KERUBO OISEBE.....7<sup>TH</sup> DEFENDANT**

**CHARLES NYASURA OISEBE.....8<sup>TH</sup> DEFENDANT**

**KENNEDY MARAKI OISEBE.....9<sup>TH</sup> DEFENDANT**

**ROBERT GEKONDE OISEBE.....10<sup>TH</sup> DEFENDANT**

**R U L I N G**

1. The plaintiff commenced the instant suit vide a plaint dated 10<sup>th</sup> October 2014 filed in court on 13<sup>th</sup> October 2014. The plaintiff claimed he was entitled as a beneficiary to a portion of **LR No. Gesima Settlement Scheme/234** which had been allotted by the 1<sup>st</sup> defendant to the late Shadrack Oichoe Oisebe in December 1964 or thereabouts. The plaintiff claimed that through the defendants fraudulent acts the said property was transferred into the name of the late Sweney Manasseh Oisebe, a step brother of the plaintiff. The plaintiff by the plaint sought inter alia a declaration that the transfer of land parcel on 26<sup>th</sup> April 2006 to the name of Sweney Manasseh Oisebe was unlawful and a nullity and a cancellation of the registration and for the title to be registered in the plaintiff's name as the holder of the grant of letters of

administration intestate to the estate of the late Shadrack Oichoe Oisebe pending the hearing and determination of Kisii Succession Cause No. 30 of 2014.

2. The 5<sup>th</sup> – 10<sup>th</sup> defendants vide a joint statement of defence dated 24<sup>th</sup> October 2014 filed in court on the same date in general terms denied the plaintiff's allegations as set out in the plaint. Under paragraph 18 of the statement of defence the said defendants pleaded that the plaintiff's suit was misconceived and bad in law and was untenable. The defendants pleaded that the suit was statute barred by virtue of Section 4 of the Limitation of Actions Act, Cap 22 Laws of Kenya; was *res judicata*; did not disclose any reasonable cause of action, and was otherwise an abuse of the due process of the court.

3. The 2<sup>nd</sup> – 4<sup>th</sup> defendants/respondents through the Attorney General filed a Notice of Preliminary Objection dated 25<sup>th</sup> November 2014 on 4<sup>th</sup> December on the following grounds:-

**1. That the entire suit is misconceived, incompetent and does not lie by virtue of the provisions of Order 5 Rule 1 (1) – (6) of the Civil Procedure Rules.**

**2. The instant suit amounts to abuse of the due process of court.**

**3. The plaint is scandalous, frivolous and/or vexatious for having been filed without being accompanied with valid summons to enter appearance as well as failing to serve summons.**

4. The plaintiff filed an amended plaint dated 2<sup>nd</sup> December 2014 on 5<sup>th</sup> December 2014 and a further amended plaint dated 6<sup>th</sup> May 2015 which was filed on 18<sup>th</sup> May 2015. I have endeavoured to set out in outline the pleadings by the parties to contextualize the Notice of Motion by the 5<sup>th</sup> – 10<sup>th</sup> defendants dated 17<sup>th</sup> March 2016 which is the subject of this ruling. By the application expressed to be brought under Order 2 Rule 15 (1) (b) (c) and (d) of the Civil Procedure Rules and Sections 1A, B and 3A of the Civil Procedure Act and Section 4 of the Limitation of Actions Act, Cap 22 Laws of Kenya, the applicants pray for orders:-

**(i) That the court be pleased to strike out the plaintiff's suit vide amended plaint dated 2<sup>nd</sup> December 2014 and 6<sup>th</sup> May 2015 respectively.**

**(ii) That the court do strike out the entire claim by the plaintiff whether founded and/or anchored on the plaint dated 10<sup>th</sup> October 2014, amended plaint dated 2<sup>nd</sup> December 2014 and/or further amended plaint dated 6<sup>th</sup> May 2015.**

**(iii) That consequent to prayer (2) being granted, the court be pleased to dismiss the suit herein.**

**(iv) Costs of this application and the main suit be borne by the plaintiff/respondent.**

5. The application is grounded on the grounds set out on the body of the application and on the supporting affidavit sworn by James Bosire Oisebe, the 6<sup>th</sup> defendant herein. The applicants contend that the plaintiff based his cause of action on fraud that he claims was perpetrated between 2003 and 2006. The plaintiff indeed lodged a caution against the suit property on 28<sup>th</sup> September 2006 after becoming aware of the alleged fraud. The applicants state that to the extent the plaintiff did not initiate his action within 3 years after he became aware of the alleged fraud, his suit is statute barred under the provisions of Section 4 of the Limitation of Actions Act, Cap 22 Law of Kenya.

6. The applicants further aver the amended plaint and further amended plaint were filed without leave of the court as required and are therefore *void ab initio*. They further aver the suit discloses no reasonable cause of action, is misconceived and constitutes an abuse of the due process of the court.

7. The plaintiff filed a replying affidavit sworn on 8<sup>th</sup> June 2016 in opposition to the 5<sup>th</sup> – 10<sup>th</sup>

defendants/applicants application dated 17<sup>th</sup> March 2016. The plaintiff in response to the averment that his suit was barred by the Limitation of Actions Act, Cap 22 Laws of Kenya as he did not bring the action within a period of 3 years after he discovered that the suit property was allegedly fraudulently transferred and registered in the name of Sweney Manasseh Oisebe now deceased in 2006, averred that he actually did not discover the fraud until 2013 when he got access to relevant documents and/or could not get all the necessary documents that supported the entries made against the register of the suit property from the lands office. The plaintiff averred that he had made efforts and numerous attempts to get access of the documents that supported the entries made against the title register as per the letter annexed as “JB02” in the applicants application but he was unsuccessful. He states that he only managed to get access to the documents on 13<sup>th</sup> November 2013 through the intervention of the CID. The plaintiff contends it was only after he got access to the documents that he was able to discern the nature of the illegalities committed and thus he actually became aware of the fraud on the 13<sup>th</sup> November 2013. In the premises, he contends having discovered the fraud in November 2013, he commenced the instant suit within the statutory period of 3 years and the suit is therefore not barred by limitation.

8. The plaintiff further argues the land registrar at Nyamira has failed to avail the relevant documents to support the entries shown in the abstract of title (green card) annexed in the applicants application as “JB01” and in the absence of such documents the entries would be unsustainable and are null and void. The plaintiff stated that the land registrar, Nyamira testifying in Criminal Case No. 862 of 2013 Keroka Principal Magistrate’s Court stated he was not able to retrieve or trace such documents in their records and this according to the plaintiff was an indication that the entries may have been fraudulently entered on the register.

9. The plaintiff in response to the averments by the applicants that he had amended the plaint twice without leave of the court maintained that the defendants filed their pleadings at various times and hence the pleadings did not close at the same time.

10. The parties argued the application by way of written submissions. The applicants submissions dated 6<sup>th</sup> May 2016 were filed on 9<sup>th</sup> May 2016 and the plaintiff/respondent’s submissions dated 11<sup>th</sup> July 2016 were filed on the same date.

11. The subject matter of the present suit is **LR No. Gesima Settlement Scheme/234** which as per the plaint was allotted to one Shadrack Oichoe Oisebe (deceased) in 1964 or thereabouts by the 1<sup>st</sup> defendant. Following the death of the said Shadrack Oichoe Oisebe the 1<sup>st</sup> defendant discharged a charge it had over the suit property and caused the suit property to be registered in the name of the late Sweney Manasseh Oisebe who is a son of the deceased in the year 2004. The plaintiff’s contention is that the process that culminated in the transfer and registration of Sweney Manasseh Oisebe as owner of the suit property was fraudulent. This is captured in the plaintiff’s plaint paragraph 12 which is in the following terms:-

**12. In or about the years 2003, 2004, 2005 and 2006 the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants on one hand and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants on the other hand hatched a fraudulent scheme which they agreed to execute by causing the preparation, execution and registration of the discharge of charge and transfer of the suit property into the names of the late Shadrack Oichoe Oisebe and on the very day the suit property was registered in the names of the late Shadrack Oichoe Oisebe, it be transferred into the names of the late Sweney Manasseh Oisebe without even issuance of a title deed in the names of the late Shadrack Oichoe Oisebe and without the signature of the late Shadrack Oichoe Oisebe on the transferee part of the transfer or appending a forged signature thereon and falsely certifying the same.**

12. At the latest the cause of action arising from the alleged fraudulent claims arose in the year 2006. The issue for the court to determine is when the plaintiff made discovery of the alleged fraud. As the plaintiff’s claim is predicated on fraud, the plaintiff would be required to have instituted the suit before the expiry of three (3) years from the time when he made discovery of the fraud. Section 4(2) of the

Limitation of Actions Act provides:-

**4(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.**

13. The applicants have submitted that the plaintiff became aware of the alleged fraudulent acts on or about 28<sup>th</sup> September 2006 when he registered a caution against the suit property claiming a **“beneficiary interest”**. Further the applicants state the plaintiff vide the letter dated 29<sup>th</sup> September 2006 (**“JB02”**) written by the plaintiff’s advocates to the land registrar, Nyamira the plaintiff was aware that the property had been transferred to Sweney Manasseh Oichoe as at the time the letter was written. The applicants submit the plaintiff ought to have instituted this suit not later than 28<sup>th</sup> September 2009 unless he sought and was granted leave to bring the suit out of time. The applicants in support of their submissions rely on the case of **Jared Lqbal Abdul Rahman & Another –vs- Bernard Alfred Wekesa Sambu & Another CACA No. 11 of 2001** (unreported), where the Court of Appeal stated that where an action is based on fraud the suit had to be brought within 3 years and that the period runs from when fraud was discovered. The judges in the case stated:-

**“It is clear from that part of the evidence that the plaintiff conducted a search on the title in 1988 and found that the suit had been sold and transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and these defendants had been registered as the proprietors. That was all he needed to know in order to assert his claim. He did not need a file. So the time started to run for the purposes of limitation from the date in 1988 when he found that the suit land had been sold and transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. And since his claim against these two defendants was based on the tort of fraud, the suit should have been brought within 3 years. It was not. So the claim was clearly time barred and the plaintiff should have been non-suited forever.”**

14. It is not in dispute that the plaintiff registered a caution against the title of the suit land on 28<sup>th</sup> September 2006. Before doing so he definitely knew the status of the register as clearly expounded in the letter by his advocates to the land registrar Nyamira on 29<sup>th</sup> September 2006. It is the same entries that were on the register as at 28<sup>th</sup> September 2006 that he seeks to be annulled on the basis that they were entered fraudulently. If there was fraud he knew about it as at 28<sup>th</sup> September 2006 and he did not, as the appellate judges stated in the above referenced case, need documents held by the land registrar to assert his interest and by failing to do so within the period provided by the statute his suit became time barred and he is now non suited. From the evidence placed before the court, the plaintiff petitioned for grant of letters of administration to the estate of Shadrack Oichoe Oisebe vide Nairobi HCC Succession Cause No. 2150 of 2008 (now Kisii HCC Succession Cause No. 30 of 2014) after he had discovered that the suit property had been transferred to Sweney Manasseh Oisebe yet he did not initiate the present action then. The plaintiff has only himself to blame for the delay.

15. The principle behind prescribing a limitation period within which a suit ought to be brought is recognition of the fact that there ought to be a period within which a suit must be brought to avoid situations where stale actions are orchestrated. There is also cognizance that with the passage of time memories fade or evidence is lost or destroyed and further that witnesses die or become incapacitated. It is thus the duty of a party to institute their actions at the earliest possible times to avoid being caught up by limitation. Where there is cause for a party to be allowed to bring a suit outside the limitation period an appropriate application for extension of the period may be made under Sections 27 and 28 of the Limitation of Actions Act. In the instant matter it is my finding and holding that the plaintiff’s suit is statute barred and that the plaintiff is non suited.

16. My finding on the issue of limitation is sufficient to dispose of this matter and I need not make any finding in regard to the other limb of the application that the plaintiff amended the plaint twice without leave and that the plaint ought to be struck out. However, were it not for the fact that I have held the suit to be time barred which goes to the jurisdiction of the court to entertain the suit, I would have been inclined to apply the Oxygen Principle (the overriding objective) as I am enjoined to do under Sections 1A and 1B of the Civil Procedure Act and Section 3 of the Environment and Land Court Act, 2011 to

enable the ends of justice to be met. I would have sustained the amended plaint and to obviate any prejudice to the defendants, I would have permitted them to amend their respective defences if necessary within a specified period. As I have stated, these would have been my considerations if I had not held the suit to be time barred.

17. Having come to the conclusion that the plaintiff's suit is statute barred by reason of having been filed outside the limitation period, I accordingly order that the suit be and it is hereby struck out in its entirety. I have considered the circumstances surrounding the matter and having regard to the fact that the matter virtually relates to a family dispute, I have elected not to award any costs against any party. Each party shall bear their own costs of the application and the struck out suit.

18. Orders accordingly.

**Ruling dated, signed and delivered at Kisii this 12<sup>th</sup> day of May, 2017.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Arumba for Siagi for the plaintiff

Ms. Mireri for Ochwal for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants

Ms. Mireri for the 5<sup>th</sup> to 10<sup>th</sup> defendants

Milcent court assistant

**J. M. MUTUNGI**

**JUDGE**