



REPUBLIC OF KENYA



KENYA LAW
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**Gikanda v Waiharo & 17 others (Environment & Land Case
261 of 2018) [2024] KEELC 1344 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1344 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 261 OF 2018**

BM EBOSO, J

FEBRUARY 29, 2024

BETWEEN

SOPHIA WANGARI GIKANDA PLAINTIFF

AND

JAMES KINUTHIA WAIHARO 1ST DEFENDANT
PETER MWANGI MUIGAI 2ND DEFENDANT
LAWRENCE THUKU GAKURU 3RD DEFENDANT
DAVID NDEGWA MURIUKI 4TH DEFENDANT
JAMES MACHARIA NDUNGU 5TH DEFENDANT
CHARLES MBOGO NJUE 6TH DEFENDANT
LUCY GAITI KAARIA 7TH DEFENDANT
REGINA KARWIRWA ANAMPIU 8TH DEFENDANT
HEZRON WAINAINA MUTHEE 9TH DEFENDANT
MARY WANJIKU GATHERU 10TH DEFENDANT
STEPHEN NDIRITU MWANGI 11TH DEFENDANT
DANIEL GATURU MANGURIU 12TH DEFENDANT
JOHN MUCHIRI NYAGA 13TH DEFENDANT
PURITY WAMBURA GAKURU 14TH DEFENDANT
SULEIMAN KAMAU 15TH DEFENDANT
THE DISTRICT LAND REGISTRAR AT THIKA 16TH DEFENDANT
THE HON. ATTORNEY GENERAL OF KENYA 17TH DEFENDANT



RULING

1. Through a notice of motion dated 27/9/2023, the 18th defendant in this suit, Rebeka Wanjiru Kamau [the applicant], seeks the following orders: (i) a declaration that this suit was filed out of time and offends the provisions of sections 7, 9 and 26 of the Limitation of Actions Act; and (ii) an order that this suit is incurably defective because the plaintiff did not take out a grant under the Law of Succession Act. She urges the court to strike out the suit with costs. The said application is the subject of this ruling.
2. The 18th defendant's case is that title to land parcel number Ruiru/ Kiu Block 2[Githunguri]/3744 was issued to the 1st defendant on 11/9/2003. The 18th defendant faults the plaintiff for filing the suit in 2018, more than 14 years after 2003, the year she contends the cause of action accrued. The 18th defendant argues that the above provisions of the Limitation of Actions Act barred the plaintiff from bringing action to recover the suit land after expiry of 12 years reckoned from 2003. She adds that time was neither extended nor was leave of the Court sought to extend time. It is the 18th defendant's further case that the plaintiff has not taken out a Grant to sue on behalf of the estate of Jonah Gikang'a Gitiba, her deceased husband.
3. The 6th defendant supports the application through his replying affidavit sworn on 13/10/2023. The 6th defendant contends that the suit is statute – barred because it was filed after 14 years had lapsed from the date the cause of action accrued. It is his case that the cause of action arose in 2003 when title to the suit land was issued in the name of the 1st defendant. He adds that the limitation period lapsed in 2015, which marked the lapse of 12 years from the time the cause of action accrued in 2003. He contends that the suit is time-barred.
4. The 6th defendant further contends that, given that the plaintiff's claim is that the suit land is part of the estate of the plaintiff's deceased husband, then the plaintiff ought to have taken out a grant relating the deceased's estate before suing as the personal representative of her deceased husband.
5. The plaintiff opposed the application through her replying affidavit sworn on 8/11/2023 and a notice of preliminary objection of an even date. The points raised in the notice of preliminary objection were argued as grounds of opposition. The plaintiff contends that she is the administrator of the estate of Jonah Gikang'a Gitiba (deceased), her late husband. The plaintiff further contends that she took out a Grant of Letters of Administration in Kiambu Chief Magistrate Court Succession Cause No. 156 of 2009; In the Matter of the Estate of Jonah Gikang'a Gitiba (deceased).
6. It is the plaintiff's case that she discovered the fraud relating to the suit land after her husband had died in 2007, when she was following up on the assets of her late husband. The plaintiff adds that her late husband did not know that a title to the suit land had been issued in the name of the 1st defendant.
7. The application was canvassed through written submissions dated 22/11/2023 filed by M/s S. Ogeto Ongari & Co. Advocates. The plaintiff filed written submissions dated 28/11/2023 through M/s Gatitu Wangoo & Company Advocates. The 2nd to 15th defendants filed written submissions dated 30/11/2023 through M/s Gatumuta & Company Advocates.
8. I have considered the application, the responses to the application, and the parties' respective submissions on the application. I have also considered the legal frameworks and jurisprudence relevant to the issues that fall for determination in the application. The following are the two key issues that fall for determination in the application: (i) Whether this suit is statute-barred under the Limitation



of Actions Act; and (ii) Whether this suit is fatally defective due to lack of a grant under the Law of Succession Act. I will make brief sequential analysis and disposal pronouncements on the two issues.

9. Is this suit statute-barred under the Limitation of Actions Act? The applicant contends that the suit is statute-barred because the alleged cause of action accrued in 2003, the year the impugned title was registered in the name of the 1st defendant. She argues that the plaintiff had 12 years from 2003 within which to bring a claim challenging the title and for recovery of the land. On her part, the plaintiff contends that she discovered the alleged fraudulent registration of the 1st defendant after the death of her husband in July 2007 while following up on the assets of her deceased husband. It is her case that at the time of his demise, the late Gitiba did not know that the 1st defendant had obtained a fraudulent title relating to the suit land, adding that she discovered the fraud while following up on the assets of her late husband [the late Gitiba] post July 2007.
10. I have read the plaintiff's pleadings. Her claim is anchored on fraud relating to registration of the suit land in the name of the 1st defendant. Under sections 7 and 9 of the Limitation of Actions Act, the limitation period for challenging the impugned title and for recovery of the land was 12 years. Under Section 26 of the Act, limitation period in a cause of action founded on fraud runs from the date the claimant discovers the fraud. For avoidance of doubt, Section 26 of the Limitation of Actions Act provides as follows:

“26. Where, in the case of an action for which a period of limitation is prescribed, either—

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which— (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

11. In the present suit, there is nothing in the pleadings which suggests that the plaintiff or her deceased husband were aware of the alleged fraud in 2003. There is also no evidence placed before this court suggesting that the plaintiff and her deceased husband were aware of the alleged fraud in 2003. In my interpretation of the above legal framework, the fact that the impugned title is alleged to have been issued in 2003 cannot be construed to mean that the limitation period relating to the alleged



fraudulent registration started running in 2003. The cause of action started running the moment the alleged fraudulent registration was discovered by the claimant. The claimant/plaintiff contends that she discovered the alleged fraudulent registration post July 2007 while following up on assets of her late husband. She contends that her late husband was not aware of the alleged fraudulent registration by the time he died in July 2007. No evidence has been placed before this court to controvert that position.

12. The result is that the applicant has failed to demonstrate that limitation period relating to the cause of action in this suit started running in 2003. She has failed to demonstrate that the 12 year limitation period had lapsed by the time this suit was brought on 29/10/2018. It is therefore the court's finding that, at this point, there is nothing to suggest that this suit is statute-barred under the *Limitation of Actions Act*.
13. Is the suit fatally defective for lack of a grant under the *Law of Succession Act*? The applicant made reference to paragraph 7 of the amended plaint and contended that because the plaintiff had disclosed that the late Jonah Gikang'a Gitiba was the allottee of the suit land, the suit is fatally defective for want of a grant relating to the estate of the late Gitiba. In response, the plaintiff contended that she is the duly appointed personal representative of the late Gitiba. She exhibited a Grant of Letters of Administration issued on 28/7/2007 by the Kiambu Chief Magistrate Court, relating to the estate of the late Jonah Gikanga Gitiba. A perusal of the Grant reveals that it was issued to Sophia Wangari Gikanga to administer the estate of the late Gitiba.
14. In the absence of evidence demonstrating that the said Grant had ceased to be operative as at the time this suit was initiated by the plaintiff, the court would have no basis for doubting the plaintiff's locus standi. Put differently, by dint of the Grant dated 28/7/2007, the plaintiff has demonstrated that she had and still has the *locus standi* to initiate and prosecute this suit on behalf of the estate of the late Gitiba. It is therefore the finding of the court that there is no evidence before it demonstrating that the plaintiff's suit is fatally defective for want of a grant under the *Law of Succession Act*.
15. In the end, the notice of motion dated 27/9/2023 is dismissed for lack of merit. The applicant in the said application shall bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 29TH DAY OF FEBRUARY 2024

B M EBOSO

JUDGE

In the presence of: -

Mr. Gatitu for the Plaintiff

Mr. Ogeto for 18th Defendant

Mr. Gatumuta for 2nd to 16th Defendant

Court Assistant: Hinga

