



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 191 OF 2016**

**CHRISTOPHER NDOLO MBUTA.....1<sup>ST</sup> PLAINTIFF**

**ANNAH NDOLO MBUTA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JACKSON MUTUA KAVILA.....DEFENDANT**

**REUBEN MBUTA NDOLO.....2<sup>ND</sup> DEFENDANT**

**ESTHER WANZA MBUTA (*Administrator of the Estate of ALICE NDUNGE*)..3<sup>RD</sup> DEFENDANT**

**LAND ADJUDICATION AND SETTLEMENT OFFICE-MAKUENI COUNTY.....4<sup>TH</sup>  
DEFENDANT**

**THE COUNTY LAND REGISTRAR, MAKUENI.....5<sup>TH</sup>  
DEFENDANT**

**RULING**

1. This Ruling is in respect to the Defendants' Notice of Preliminary Objection dated 24<sup>th</sup> November, 2016.
2. In the said Notice of Preliminary Objection, the Defendants have averred that this suit is incompetent, statute-barred, *res-judicata* and an abuse of the court process.
3. In her submissions, the Defendants' advocate submitted that the Plaintiffs are son and widow of the late Mbuta Ndolo respectively; that the deceased's Estate is the subject matter in Machakos High Court Succession Cause No.167 of 1996; that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are son and daughter respectively of the late Ndolo and that in its Ruling dated 31<sup>st</sup> March, 2016, the Succession court ruled that the suit properties did not belong to either Mbuta Ndolo or the Plaintiffs' brother/son but belong to the 1<sup>st</sup> Defendant.
4. The Defendants' advocate submitted that the High Court has made a final decision that the suit land belongs to the 1<sup>st</sup> Defendant and that in any event, the suit is time bared.
5. The Plaintiffs' counsel submitted that the suit before the court is not a Succession Cause; that the suit relates to an interest in land which was fraudulently transferred to the 1<sup>st</sup> Defendant by Alice Ndunge Mbuta Ndolo (*deceased*) and Reuben Kinyumu and that the suit should be heard as such.

6. The Plaintiffs' advocate submitted that the Plaintiffs became privy of the fraudulent transactions in respect of the suit land when the 1<sup>st</sup> Defendant filed a protest of Confirmation of Grant in the Succession Matter No. 167 of 1996.
7. Counsel submitted that limitation of action does not begin to run until the Plaintiff has discovered the fraud or mistake and that they only discovered the fraud when the Defendants started destroying their property on the land in April, 2016.
8. The only issue I am supposed to determine at this stage is whether this suit is *res-judicata* in view of the Ruling in Machakos Succession Cause No. 167 of 2016 and whether the suit is time barred.
9. In the Plaint dated 11<sup>th</sup> April, 2016, the Plaintiffs averred that the Government allocated to the 1<sup>st</sup> Plaintiff parcel number 912 and 1160 and to the 2<sup>nd</sup> Plaintiff and the late Annah Ndolo Mbuta parcel number 1902 and 2916 in equal share in Mang'elete Settlement Scheme.
10. According to the Plaintiffs, the Estate of Mbuta Ndolo filed Machakos Succession Cause No. 167 of 1996 and included the four parcels of land in the mistaken belief that they were part of the Estate of the late Mbuta Ndolo.
11. It is the Plaintiffs' case that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants purported to transfer the suit properties to the 1<sup>st</sup> Defendant and that the said transfers were fraudulent and illegal.
12. The main prayer in the suit that the Plaintiffs are asking is for an order of rectification of the Register to substitute the names of the 1<sup>st</sup> Defendant with the Plaintiffs' names.
13. In the Defence, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that the current suit is seeking to unlawfully challenge the High Court's decision in the Succession matter; that the 1<sup>st</sup> Defendant is the registered proprietor of the suit land having lawfully purchased them and that the suit should be dismissed.
14. From the Ruling of the court in Machakos Succession Cause No. 167 of 1996, what was before the court was an Application seeking a determination of the deceased's Estate prior to the determination of the Application for Confirmation of Grant dated 30<sup>th</sup> June, 2009.
15. In the said suit, the 1<sup>st</sup> Defendant herein sought for an order that the suit properties herein, amongst others, should be excluded from the Succession proceedings. After hearing the Application, the court held as follows;  
  

***“16: On a balance of probabilities, there being no evidence of allocation or acquisition by the deceased, the Estate or indeed the 1<sup>st</sup> Administrator of interest in properties the subject of the Application and having considered the letter of the District Land Adjudication Settlement Officer dated the 17<sup>th</sup> August, 2011, which confirms ownership of the plots Mang'elete Settlement Scheme Nos. 602, 912, 1160, 1902, 2916 and 3609, the court must find and hold that the said properties belong to the Interested Party (the Defendant herein) and therefore do not form part of the Estate of the deceased.”***
16. In my view, the issue that was before the Succession Court was whether the suit properties as at that time, were part of the Estate of the late Mbuta Ndolo.
17. After considering the documents from the Ministry of Lands, the court arrived at the conclusion that indeed the said parcels of land were in the name of the 1<sup>st</sup> Defendant and not the late Mbuta Ndolo.
18. However, the court never considered the issue of whether the said suit properties were fraudulently or illegally registered in the name of the 1<sup>st</sup> Defendant. That issue was neither before the court nor was it considered.

19. Consequently, the issues raised in the current suit cannot be said to have been heard and finally determined by the High Court in the Succession Cause. The 1<sup>st</sup> Defendant will have to satisfy the court that he acquired the suit properties lawfully.

20. The Plaintiffs have pleaded in the Plaint that they always believed that the suit land formed part of the Estate of the late Mbuta Ndolo.

21. However, it was not until the 1<sup>st</sup> Defendant joined in the Succession matter that they realised that indeed the suit land had been transferred to the 1<sup>st</sup> Defendant.

22. The 1<sup>st</sup> Defendant filed his Application dated 28<sup>th</sup> February, 2012 in the Machakos High Court Succession Cause number 167 of 1996 alleging that the suit properties were indeed in his name.

23. Section 26(a) of the Limitation of Actions Act provides that where an action is based on the fraud of the Defendant, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it.

24. In the circumstances of this case, and from the Plaintiffs' pleadings, a period of twelve (12) years has not lapsed from the time when the Plaintiffs discovered the alleged fraudulent transfer of the suit property to the 1<sup>st</sup> Defendant and when they filed this suit. This suit is therefore not time barred.

25. For those reasons, I dismiss the Defendants' Notice of Preliminary Objection dated 24<sup>th</sup> November, 2016 with costs to the Plaintiffs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2017.**

**O. A. ANGOTE**

**JUDGE**