



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 391 OF 2013**

**THOMAS OMBUYA AROGO.....PLAINTIFF**

**VERSUS**

**EVANS NYAKAMBI NYANGERI.....1<sup>ST</sup> DEFENDANT**

**SOLOMON ABISI AROGO .....2<sup>ND</sup> DEFENDANT**

**KISII COUNTY LANDS REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The plaintiff with the leave of court filed an amended plaint dated 24<sup>th</sup> March 2016 on 31<sup>st</sup> March 2016. By the amended plaint the plaintiff enjoined the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to the suit. The plaintiff's claim against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants is that the said defendants conspired and caused the removal of a caution dated 19<sup>th</sup> may 1997 that was registered by the mother of the plaintiff and unlawfully caused the subdivision of title of **West Kitutu/Mwakibagendi/1000** into two parcels Nos. **West Kitutu/Mwakibagendi/2045** and **2046** respectively whereby parcel number **2046** was transferred to the 1<sup>st</sup> defendant in disregard of the interest of the beneficiaries hence depriving them of their right of ownership of the said parcel of land. The plaintiff claims to be entitled to a portion of land parcel 2046 transferred to the 1<sup>st</sup> defendant.

2. The plaintiff prays interalia for:-

**(i) A declaration that the transfer of parcel No. 2046 was unlawful, null and void and it's the property of the Estate of Haron Arogo Hachira.**

**(ii) An order that the defendant's title No. West Kitutu/ Mwakibagendi/2046 together with 2045 be cancelled and be reverted to the original title No. West Kitutu/Mwakibagendi/ 100 to be succeeded by the plaintiff.**

The 2<sup>nd</sup> defendant entered appearance on 28<sup>th</sup> April 2016 and on the same date filed a notice of preliminary objection on the following terms:-

**1. The suit is time barred by dint of the provisions of Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya.**

**2. The suit is defective and untenable by dint of the provisions of Section 82 of the Law of Succession Act, Cap 160 Laws of Kenya.**

### 3. The suit is *res judicata* and therefore an abuse of the process of the court.

3. The plaintiff filed grounds of objection to the preliminary objection on 20<sup>th</sup> June 2016 and denied that the suit is time barred as alleged by the 2<sup>nd</sup> defendant. The plaintiff states that the trespass on the suit land was discovered in 2006 when the 2<sup>nd</sup> defendant occupied the suit land and at the same time the plaintiff carried out a search at the lands office which revealed the suit land had fraudulently been subdivided in 1997 and the 2<sup>nd</sup> defendant obtained title. The plaintiff further denied the suit was defective by dint of Section 82 of the Law of Succession Act, Cap 160 Laws of Kenya stating that he was the legal representative of the Estate of the late Haron Arogo Hachira who was the original owner of the land the subject matter of the suit.

4. The court on 25<sup>th</sup> March 2017 directed that the 2<sup>nd</sup> defendant's preliminary objection dated 25<sup>th</sup> April 2016 be argued by way of written submissions. Both parties filed their respective written submissions on 5<sup>th</sup> June 2017. The 2<sup>nd</sup> defendant argues that the plaintiff's suit against him is time barred as the alleged acts on which the suit is founded occurred in the year 1997 which is a period in excess of 12 years and therefore offends Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya. The 2<sup>nd</sup> defendant placed reliance on the cases of **IGA -vs- Makerere University [1972] EA 65**, **Gathoni -vs- Kenya Co-operative Creameries Ltd [1982] KLR 104**, **Melita -vs- Shah [1965] E.A 321** and the case of **Haron Onyancha -vs- National Police Service Commission & Another [2017] eKLR** a decision by this court where all the other cited cases were considered.

5. The 2<sup>nd</sup> defendant further submits that the plaintiff's suit is defective as he has instituted the same in his personal capacity and not on behalf of the estate of the deceased. The 2<sup>nd</sup> defendant argues that the plaint offends Section 82 of the Law of Succession Act, Cap 160 Laws of Kenya and therefore ought to be dismissed.

6. Lastly, the 2<sup>nd</sup> defendant submits the suit by the plaintiff is *res judicata* in terms of Section 7 of the Civil Procedure Act and in support of this plea makes reference to paragraph 8 of the plaintiff's witness statement where the plaintiff alludes to a suit No. 417 of 1997 Kisii High Court allegedly brought by his mother but who died before the suit was finalized. The suit apparently was dismissed for want of prosecution at the instance of the court.

7. For his part the plaintiff in his submissions argues that his suit is not time barred as the period of limitation has not elapsed from the time he became aware of the fraudulent acts of the defendants that led to the subdivision and transfer of the suit land. As regards to whether the suit violates Section 82 of the Law of Succession Act, the plaintiff asserts that he is the legal representative of the estate of the late Haron Arogo Hachira having obtained letters of administration ad litem on 11<sup>th</sup> November, 2009 and therefore denies his suit is defective. The plaintiff further argues the instant suit is not *res judicata* as alleged by the 2<sup>nd</sup> defendant and states that he has never been a party to a suit involving him and the defendants where there were similar issues as in the present case. He avers that the doctrine of *res judicata* is inapplicable in the circumstances of the present suit.

8. Having considered the pleadings and the submissions by the parties I have now to ask myself whether the preliminary objection taken satisfies the test of what constitutes a preliminary objection as laid out in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] EA 696** at pg 700 where Law JA stated as follows:-

**“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit or to refer the dispute to arbitration.”**

In the same case **Sir Charles Newbold**, P at pg 701 stated:-

**“A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or, what is the exercise of judicial discretion.**

9. In the instant matter the 2<sup>nd</sup> defendant has not filed his defence and the court only has the plaint and the defence filed by the 1<sup>st</sup> defendant to go by. The 1<sup>st</sup> defendant for his part has not pleaded limitation and/or *res judicata*. The 1<sup>st</sup> defendant's defence while he denies the allegation of collusion and fraud states that the subdivision of land parcel **1000** and transfer of land parcel **2046** to him was pursuant to valid sale entered into with the deceased Arogo Haron Hachira on 16<sup>th</sup> May 1997. Hence the transaction was on the basis of willing buyer and willing seller.

10. In the amended plaint where the 2<sup>nd</sup> defendant was enjoined as a party it is not evident when the plaintiff became aware of the fraud allegedly committed by the 2<sup>nd</sup> defendant. In the grounds of opposition to the preliminary objection filed by the 2<sup>nd</sup> defendant, the plaintiff avers that he discovered the trespass and fraudulent subdivision and transfer in 2006 when he carried out a search at the lands office. His contention is that 12 years had not elapsed by 2013 when he instituted the instant suit. It is therefore in dispute as to when the plaintiff discovered the alleged fraudulent dealings. The plaintiff's claim is for recovery of land which he claims was fraudulently transferred to the defendant. If it is true he discovered the fraud in 2006 then his suit to recover the land is not barred by limitation under Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya. The period of limitation would start to run from when the discovery was made. Section 7 of the Limitations of Actions Act provides:-

**“An action may not be brought by any person to recover land after the end of twelve (12) years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims to that person.”**

11. In the present case the issue as to when the right of action accrued to the plaintiff is disputed and can only be determined at the hearing. For the court to make that determination it would require to take evidence and in that regard relying on the **Mukisa Biscuit** case as per Charles Newbold, P. the preliminary objection on the ground of limitation cannot be sustained.

12. As regards to whether the plaint is fatally defective by reason of Section 82 of the Law of Succession Act, Cap 160, my view is that it is not. From a perusal of the amended plaint, paragraph 3, it is clear that the plaintiff is the legal representative of Harun Arogo Hachira (deceased). Among the documents he has listed in his bundle of documents as No. 6 in the list of documents is **“A letter of Administration Ad Litem issued on 11<sup>th</sup> November 2009”**. This document has been exhibited and shows the plaintiff was granted the letters of administration Ad Litem limited for the purposes of filing suit. While the plaintiff should have in the preamble of the plaint shown that he was filing the suit on behalf of the estate of Harun Arogo Hachira, the omission to do so in my view was not fatal as the defect can be cured by a simple amendment of the plaint. The court ought not to resort to the draconian act to strike out a case if a defect can be cured by an amendment. See the case of **DT Dobie & Co. Ltd –vs- Muchina & Another [1982] KLR 1**. I would therefore refuse to sustain the objection on the ground that the plaint is defective.

13. Turning to the final ground of the preliminary objection that the instant suit is *res judicata*, I have to say that it has not been demonstrated that the instant suit is *res judicata* Kisii HCC No. 417 of 1997. Section 7 of the Civil Procedure Act provides thus:-

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally determined.”**

The issue to consider in a matter where a plea of *res judicata* is raised is whether there was a previous suit

between the same parties where similar issues were raised as in the subsequent suit and that such issues were heard and determined by a competent court finally.

14. In the instant case the 2<sup>nd</sup> defendant states that HCCC No. 417 of 1997 (Kisii) which apparently was between the plaintiff's mother and his father was a case between the same parties. The case apparently was not heard on merit because as per the witness statement of the plaintiff paragraph 8, his father died before the case was heard and was ultimately dismissed by the court on its own motion. No decree or extracted order was availed and it is therefore not easy to say how the case was finalized. Be it as it may be, the case was not heard and determined on any merits and therefore the issues raised in the case were not finally determined.

15. From the copy of the plaint in Kisii HCCC No. 417 of 1997 annexed in the plaintiff's bundle of documents, it is evident that the plaintiff who was the defendant's wife was claiming a trust over land parcel **West Kitutu/ Mwakibagendi/1000** and sought a declaration that the defendant was holding the land in trust for her and her son. In the present suit the plaintiff seeks to recover the land as a beneficiary on the basis that the same was fraudulently transferred to the defendant. The issues in the present suit are clearly not the same issues that were raised in the previous suit. It cannot also be said the parties in the instant suit were the same parties in the previous suit.

16. The 2<sup>nd</sup> defendant's preliminary objection on the ground of *res judicata* must also fail. The ingredients necessary for a plea of *res judicata* to succeed are totally lacking. The preliminary objection is hereby dismissed with costs to the plaintiff.

17. As I note the 2<sup>nd</sup> defendant is yet to file his defence to the suit, leave is hereby granted to the 2<sup>nd</sup> defendant to file his defence within the next 21 days from the date of this ruling.

18. Orders accordingly.

**Ruling dated, signed and delivered at Kisii this 29<sup>th</sup> day of September, 2017.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Obure for Onyancha for the plaintiff

N/A for the 1<sup>st</sup> defendant

N/A for the 2<sup>nd</sup> defendant

N/A for the 3<sup>rd</sup> defendant

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**