



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 678 OF 2017**

**(formerly Nairobi ELC Case No. 980 of 2016)**

**MUSIAINE TININA.....PLAINTIFF**

**VERSUS**

**JAMES ONDENG .....1ST DEFENDANT**

**THE LAND REGISTRAR.....2ND DEFENDANT**

**RULING**

What is before Court is the 1st Defendant's Preliminary Objection dated 26th September, 2016 against the Plaintiff on the following grounds which in summary is that:

1. That this Honourable Court has no jurisdiction under the Statute of Limitation of Actions (Cap 22) to re - open a matter based on contract after six years.

Both the 1st Defendant and the Plaintiff filed their respective submissions.

The 1st Defendant submitted that the Sale Agreements in this case were executed on 20th March, 1999 and 9th November, 1999 while this case was filed in 2016. He states that this is 15 years and the Law of Limitation at Section 4(1)(a) provides that actions founded on contract may not be brought after the end of six years. He avers that the Plaintiff willingly executed the two Sale Agreement as witnessed by ADO Rachier Advocate and David Ole Kindi.

The Plaintiff on the other hand contends that both the Plaintiff and 1st Defendant had filed separate suits against each other which were consolidated by an order of the Court on 25th May, 2017 and a new number issued. He submitted that the Plaintiff only discovered in 2014 that there were people claiming proprietary interest over her land and she filed the suit in 2016 which is two years after the cause of action arose. He submitted that if the Court was to go by the 1st Defendant's averments, it would mean that Suit No. 201 of 2015 would also stand dismissed for being time barred. He insists that the agreements which form the hallmark of the 1st Defendant's claim are impugned and are disowned by the Plaintiff. He relied on sections 7 and 9(1) of the Limitation of Actions Act that stipulates that: ***'S.7. An action may not be brought by any person to recover land after the end of twelve 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'***.

***'S. 9(1) Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right to action accrues on the date of the dispossession or discontinuance. '***

I note that the Plaintiff in the suit, alleges fraud on the part of the Defendants culminating in the transfer of a portion of her land to the 1st Defendant. She prays for judgment against the Defendants for a permanent injunction, cancellation of title, compensation for trespass and mesne profit and declaratory orders that she is the owner of the suit land.

Section 26 of the Limitation of Actions Act provides as follows: *'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:'*

In so far as I note that there was a purported contract for Sale of Land, I find that this is a suit for the recovery of land. There are also serious allegations of fraud, by the plaintiff against the defendants.

In relying on Section 7 and 26 of the Limitation of Actions Act, pleadings filed herein and the facts presented, I find that the Court has jurisdiction to entertain this suit as the Plaintiff claims to have realized the suit land was transferred to the 1st Defendant in 2014 and instituted the suit in 2016. I further find that the 1st Defendant seeks to rely on technicalities and this offends the provisions of section 19(1) of the Environment and Land Court Act which stipulates that 'in any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence. Further article 159 (2) (d) of the Constitution states that ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities.'

In the circumstances I find that the Plaintiff filed herein raises triable issues that ought to be heard and determined at a full trial.

I dismiss the Preliminary Objection and decline to strike out the Plaintiff. Costs will be in the cause.

Parties are urged to comply with order 11 and set the suit down for hearing to enable the court determine the issues once and for all.

**Dated signed and delivered in open court at Kajiado this 14<sup>th</sup> day of November, 2017**

**CHRISTINE OCHIENG**

**JUDGE**

**REPRESENTATION**

M/s Wekesa holding brief for Prof. Wekesa for 1<sup>st</sup> Defendant

Chengeche holding brief for Gachugi Gichuki for plaintiff

Court Assistant Mpoye