



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 75 OF 2016

FRANCIS RATEMO NYAMABERE 1ST PLAINTIFF
NYAMBISA NYAMARERE SUING AS A LEGAL ADMINISTRATOR OF THE ESTATE OF
NYAMARERE ABUGA – DECEASED 2ND PLAINTIFF

VERSUS

JOYCE KERUBO 1ST DEFENDANT
JUSTUS OMANGA MACHUKI 2ND DEFENDANT
HUDSON NYAUNDI MORWANI 3RD DEFENDANT
SUNKA SUB COUNTY 4TH DEFENDANT

RULING

1. By an amended plaint dated 25th April 2016 the plaintiffs herein Francis Ratemo Nyamarere and Nyambisa Nyamarere (suing as legal administrators of the estate of Nyamarere Abuga – deceased) sought the following orders:

- a. A permanent injunction restraining the defendants either by themselves their agents, servants and/or workmen from occupying, developing, alienating, wasting and/or dealing in any way whatsoever with Plot number 5 “A” Nyambunwa market (hereinafter also known as suit property).
- b. An order that the purported registration of the 3rd defendant as registered owner of suit property by the 1st, 2nd and 4th defendants is null and void and that the same be cancelled forthwith and be registered in the plaintiff’s names.
- c. An order for eviction against the defendants, their agents, servants and/or workmen from the suit property.
- d. Costs of the suit.
- e. Any other relief this honourable court may deem fit to grant.

2. It is the plaintiffs’ case that at all material times the (plaintiffs) deceased father who died in 1957 was

the registered owner of the suit property. That the 1st and 2nd defendants are the wife and son of **Ono Nyanguku** and **Martin Machuki** (respectively) who are now both deceased. That sometimes in the year 1974, the plaintiffs and their two other brothers who are now deceased leased the suit property to Ono Nyanguku (husband to the 1st defendant) and Martin Machukia (father to the 2nd defendant).

3. The plaintiffs further state that sometimes in the year 2003 upon obtaining grant of letters of administration in respect of their late father's estate and upon presentation of the same to the 4th defendant, they were informed by the 4th defendant that the plot card was lost hence were not registered as owners of the suit property by way of transmission.

4. The plaintiffs have further stated that sometimes in the year 2009, the 1st and 2nd defendants accompanied with their agents, servants and workmen demolished the plaintiffs father's house constructed on the suit property and as a consequence thereof, the plaintiffs reported the matter to the Kisii Central Police Station and the 1st and 2nd defendants upon being requested to prove their claim of ownership of the suit property were unable to do so.

5. That in the year 2011 and on insistence of the 4th defendant that they avail the plot card, the 4th defendant informed the plaintiffs that the plot had been transferred to the 3rd defendant by the 1st and 2nd defendants. The 4th defendant further availed documents purporting to be genuine minutes alleging that the suit property had earlier been transferred by the plaintiffs to the 1st and 2nd defendants' husband and father respectively.

6. It is thus the plaintiffs case that the purported transfer of the suit property to the 1st and 2nd defendants husband and father respectively by the (plaintiffs) is a forgery perpetrated by the 3rd defendant to defraud the plaintiffs father's estate of the suit property as the purported transfer was carried out after the proprietor had long died and no letters of administration had been obtained at that time to pave way for its transfer or at all.

7. The plaintiffs further state that since 2nd March 2016, the 3rd defendant commenced development of the suit property with a view of constructing a permanent storey building on the suit property despite the plaintiffs protest and that attempts to amicably resolve have been futile. The plaintiffs have further filed an amended Notice of Motion dated 19th April 2016 seeking injunctive orders that is pending hearing.

8. The defendants on their part, oppose the application by the plaintiff and the 1st, 2nd and 3rd defendants have given a Notice of Preliminary objection dated 16th May 2016 predicated on the following grounds:-

1. That the suit is statute barred, offends section 4 (2) of the Limitation of Actions Act Cap 22 Laws of Kenya.

2. The court lacks Jurisdiction to entertain the plaintiffs claim.

3. The plaintiff entire suit is incompetent in law and an abuse of the due process of the court.

4. The plaintiffs are pursuing the subject of the suit property contrary to the certificate of confirmation of grant dated 20th May 2011.

9. The court on 19th April 2016 following intimation by counsel for the 1st, 2nd and 3rd defendants that he wished to argue a preliminary objection directed that the preliminary objection once raised should be canvassed by way of written submissions by the parties. The parties exchanged written submissions on the preliminary objection as per the directions.

10. Having considered the plaint, the notice of motion with supporting annexures as filed by the plaintiff, the preliminary objection raised by the defendants and the written submissions filed by advocates

representing parties, the issue for the court to determine is whether the preliminary objection raised by the defendants is sustainable.

11. The law is now settled that a preliminary objection has to be on a pure point of law and ought not to relate to facts that need to be argued and/or investigated to establish their truth or otherwise. The court of appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West end Distributors Ltd 1969 E. A 696** considered what constitutes a preliminary objection. Sir Charles Newbold, P. in the case stated thus:-

“...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way preliminary objection does nothing but unnecessarily increase costs and on occasion, confuse issues.

The court in the instant matter has to ask itself whether the preliminary objection taken by the 1st, 2nd and 3rd defendants satisfies the threshold of what constitutes a preliminary objection as articulated in the Mukisa Case (Supra).

12. Firstly, the defendants contend that the suit is statute barred as it offends section 4 (2) of the Limitation of Actions Act, cap 22 Laws of Kenya which provides thus:-

“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.”

The plaintiff’s claim as I perceive it is indeed not a claim on tort but rather a claim to recover land and therefore section 4 (2) of the Limitation of Actions Act would in my view have no application. The provision of the Limitation of Actions Act that may have application is section 7 which provides thus:-

“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.”

13. In the instant case the plaintiffs claim they became aware of the alleged fraud by the defendants in 2009 when they apparently sought to have confirmed grant of letters of administration actualized by having the suit property transferred to them through transmission. In essence therefore it is the plaintiffs’ case that they discovered the fraud in 2009 and consequently their right to seek to recover their land from the defendants accrued when they made the discovery of the alleged fraud. In the case of **Ahmed Siad Mohammed –vs- Municipal Council of Garissa & Another [2014] eKLR** the Court of Appeal at Nyeri upheld the ruling by **S. Muketi, J.** where she stated thus:

“Section 26 of the Limitation of Actions Act makes it very clear that in claims where fraud or mistake is alleged, time starts to run from the moment such fraud or mistake is discovered. Fraud is alleged in this case and therefore under the provisions of section 26 time started to run when the fraud was discovered in this case. It is alleged that the fraud was discovered in the year 2010... The prudent thing for a court to do where fraud is alleged in a claim is to allow the parties to proceed to full trial so that the parties can present facts for and against the alleged fraud for the court to make a determination on the matter. It would be against the dictates of fair play and justice to decide such a case at the preliminary stage.”

The Court of Appeal judges went on to state in the same case thus:-

“In relation to limitation of actions, it is our considered view that section 26 of the Limitation of Actions Act establishes an exception to the 12 year limitation period when fraud is involved. In the instant case, the honourable judge held that fraud is a matter that cannot be determined at a preliminary stage in the suit and it requires full hearing. We concur with the

reasoning and finding by the judge. The learned judge did not error in invoking the provisions of section 26 of the Limitation of Actions Act and ordering that this suit should proceed to full hearing. Fraud must be proved and it can only be proved through hearing and cannot be summarily rejected.”

14. In the instant case my view is that the plaintiffs should be accorded the opportunity to ventilate their concerns. Section 26 of the Limitation of Actions Act affords them that window and opportunity to prove their allegations of fraud. Striking out the suit on the basis of the preliminary objection would no doubt drive them away from the seat of justice and as I am not persuaded the defendants have established the point of law that the preliminary objection is predicated upon, being that the plaintiffs’ suit is statute barred, I disallow the preliminary objection.

15. As the other limb of the preliminary objection the defendants relied on was that this court lacks the jurisdiction to entertain the plaintiffs claim, I must say that I find no merit in that objection. The plaintiffs claim to be entitled to the suit property, the same having been what they allege was part of their deceased father’s estate. The fact that they proceeded with succession matter and infact obtained a certificate of confirmation of grant that included the suit property as part of the deceased estate does not in my view render the matter to be one to be handled through the succession court. The plaintiffs having made the discovery that the property was transferred out in what they claim was a fraudulent transaction, they are entitled to come before this court which is the court mandated under Article 162 (2) (b) of the Constitution to deal with all matters relating to the environment and the use and occupation of and title to land for redress. The plaintiffs claim ownership of the suit property and that is within the jurisdiction of this court. The plaintiffs have brought the suit as the legal administrators of the estate of Nyamarere Abuga from whom they claim to derive title.

16. The upshot is that I find no merit in the preliminary objections taken by the defendants and the same are dismissed with costs to the plaintiff.

Ruling dated, signed and delivered at Kisii this 1st day of July, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the plaintiffs

.....for the defendants

..... for the Court Assistant

J. M. MUTUNGI

JUDGE