

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 193 OF 2013

PETER CHEPKOCHOI MITEI.....PLAINTIFF

VS

ESTHER JELAGAT NG'ENY.....1ST DEFENDANT

BARABARA KIPRUGUT ARAP TANUI.....2ND DEFENDANT

ISAIAH KIMURGOR TANUI.....3RD DEFENDANT

CHRISTOPHER KIPLAGAT YEGO.....4TH DEFENDANT

(On application dated 15 October 2013)

(Application seeking to strike out plaint as being an abuse of court process; argument that suit is time barred, is res judicata, and that no fair trial can take place owing to death of witnesses; title issued in 1989 and suit instituted in 2013; previous suit in magistrate's court; limitation of actions; time for recovery of land vis a vis time to recover possession; S. 7 and 9 Limitation of Actions Act; held suit time barred and res judicata; death of witnesses not reason enough to strike out suit; application allowed on time and res judicata).

RULING

Before me is an application dated 15 October 2013 filed by the 1st and 4th defendants and stated to have been filed vide the provisions of Order 2 Rule 15 of the Civil Procedure Rules and Section 2A and 2B of the Civil Procedure Act. It is seeking orders to have the plaintiff's suit struck out with costs for the reasons that :-

- (a) It discloses no reasonable cause of action against the 1st and 4th defendants.
- (b) It is scandalous, frivolous or vexatious.
- (c) It may prejudice, embarrass the fair trial of the action.
- (d) It is otherwise an abuse of the process of court.
- (e) It is time barred.

The application is opposed by the plaintiff and I think it is necessary that I give a little background to this suit before delving on the issues at hand.

This suit was instituted by way of plaint filed on 3 April 2013. It is a lengthy plaint going to 33 paragraphs. The plaintiff has described himself as the brother of the late Kimaiyo arap Ng'eny who is the late husband to the 1st plaintiff. The 1st plaintiff is administrator of the estate of Kimaiyo arap Ng'eny and has been sued in that capacity. Kimaiyo arap Ng'eny died in the year 2009. Kimaiyo arap Ng'eny was previously the registered proprietor of the land parcel Uasin Gishu/Tapsagoi/93 measuring approximately 11.7 hectares (the suit land). The land became registered in his name in the year 1989. That land is now registered in the name of the 4th defendant after a series of transactions.

It is contended by the plaintiff, that in the year 1965 or thereabouts, the plaintiff together with one of his brothers by name of Alfred Kiptogom Mitei, contributed money and bought a land parcel Nandi/Salient/226 measuring 44 acres. In the year 1974 the plaintiff, now together with his two brothers Alfred Kiptogom and the late Kimaiyo arap Ng'eny, again contributed some money and purchased a land parcel Uasin Gishu/Tapsagoi/61 measuring about 30 acres. In the year 1975, the plaintiff, again with his two said brothers, contributed money and purchased the suit land, which is Uasin Gishu/Tapsagoi/93. This money that was contributed, was allegedly handed to Kimaiyo arap Ng'eny, to pay for the three properties.

It is pleaded that in the year 1985, the families of the plaintiff and his brothers, held a meeting and it was agreed that the plaintiff would keep the suit land Uasin Gishu/Tapsagoi/93; that Kimaiyo arap Ng'eny would keep the land Nandi/Salient/226, and Alfred Kiptogom would keep the land parcel Uasin Gishu/Tapsagoi/61. Pursuant to this resolution, it is averred that each brother took possession of their respective parcels of land. The plaintiff later learnt that Kimaiyo had registered all the three properties in his own name. He was prevailed to relinquish the titles but he only surrendered the title to Uasin Gishu/Tapsagoi/61 to Alfred Kiptogom. As for the suit land, he obtained the title deed in his name in the year 1989, which the plaintiff alleges was obtained by fraud inter alia by failing to disclose the interest of the plaintiff in the property. It is further averred that the plaintiff convened several meetings to try and resolve the dispute, which meetings resolved that the suit land belongs to the plaintiff and that Kimaiyo should transfer the same to him, but it is said that Kimaiyo remained adamant and refused to transfer the land to the plaintiff.

In the year 1991, the plaintiff filed a suit, in the Chief Magistrate's Court at Eldoret, being Eldoret CMCC No. 31 of 1991. The case has never been concluded, but the plaintiff has pleaded, that he will seek to have it transferred to this court.

In the year 1999, Kimaiyo sold the suit land to the 2nd defendant. The 2nd defendant in the year 2003 transferred the land to his son, who is the 3rd defendant herein. In early 2003, the 3rd defendant transferred the suit land to the 4th defendant and the 4th defendant is now the registered proprietor.

It is pleaded that in March 2013, the 4th defendant accompanied by police officers, descended on the suit land and demolished houses which belong to the plaintiff and has asked the plaintiff to vacate. The prayers sought in the plaint are for orders to declare the sale by the late Kimaiyo, to the 2nd defendant, as illegal, null and void. The plaintiff also seeks a declaration that the sale by the 2nd defendant to the 3rd defendant, and the sale by the 3rd defendant to the 4th defendant, are also illegal, null and void. He has also sought orders that the title deed of the suit land, held by the 4th defendant, be cancelled as it was obtained by fraud or mistake. He has sought for the 4th defendant to be permanently restrained from the suit land and for a declaration that he (the plaintiff) be declared the rightful owner of the suit land.

The defendants entered appearance and filed Defence. The 1st and 4th defendants filed a joint defence in which they refuted the plaintiff's claims. It is averred that the suit land was solely purchased by the late Kimaiyo without any financial contribution from the plaintiff or Alfred Kiptogom. As to the three properties, it is pleaded that Nandi/Salient/226 was vested upon the late Kimaiyo; Uasin Gishu/Tapsagoi/61 was vested upon Alfred Kiptogom; and a family land in Aldai, measuring 75 acres was vested upon the plaintiff. It is pleaded that the late Kimaiyo had exclusive use and possession, from 1975 until he sold it in 1999, to the 2nd defendant.

The 2nd and 3rd defendants also filed a joint defence in which they pleaded that the late Kimaiyo sold to the 2nd defendant the suit land around 1999. They have pleaded that there was no caution or inhibition registered against the title, and the 2nd defendant has denied being aware of any dispute over the land, when he purchased it. In 2003, the land was transferred to the 3rd defendant. It is denied that the plaintiff has ever lived on the suit land except that in 2008 a son of the plaintiff, one Benjamin Kiplagat Mitei, attempted to enter the land and was charged in Eldoret Criminal Case No. 49 of 2009. A civil suit Eldoret HCCC No. 19 of 2008 was also filed against him to restrain him from entering the land. However, they had difficulties in utilizing the land and they handed it back to the deceased who promised to refund the purchase price. The suit Eldoret HCCC No. 19 of 2008 was therefore withdrawn. They have also pleaded

that they have been wrongly sued, and that the case cannot stand, as it is based on fraud that was allegedly committed over 30 years ago.

The supporting affidavit to this application has been sworn by the 1st plaintiff on her own behalf and on behalf of the 4th defendant. She has deponed that the issues in this suit were the subject of the suit Eldoret CMCC No. 31 of 1991. It is averred that this suit is res judicata. She has further deponed that the late Kimaiyo became registered as proprietor of the suit land on 30 June 1989 having purchased the land in the year 1975 from one Okumu Ogisa. It has been averred that it is now 38 years since the purchase of the suit land and 24 years since the land was registered in favour of the late Kimaiyo. It is her contention that the suit is now time barred. It is stated that the late Kimaiyo died on 14 February 2009, and at the time he died, the suit property had already been sold and transferred to the 2nd defendant. It is further averred that the 2nd defendant sold the same to the 3rd defendant who has since sold the same to the 4th defendant. It is deponed that Kimaiyo is now deceased, the mother to Kimaiyo is deceased, and that the whereabouts of Okumu Ogisa are unknown, and that therefore it is not possible to have a fair trial.

The application by the 1st and 4th defendants has been supported by the 2nd and 3rd defendants who filed a Replying Affidavit sworn by the 2nd defendant. It is stated that the issues in this case are the same as those in Eldoret CMCC No. 31 of 1991; that the suit is time barred; and that there cannot be a possibility of a fair trial as all key witnesses are now not available.

The plaintiff has opposed this application by filing a Replying Affidavit. First he has challenged the authority of the 1st defendant in swearing the supporting affidavit on behalf of the 4th defendant. It is also stated that the fact that the 1st defendant has sworn an affidavit also on behalf of the 4th defendant is evidence that the two colluded to have transferred the suit land to the 4th defendant. He has accepted that Kimaiyo became registered as proprietor of the suit land in the year 1989 but has contended that this was done fraudulently thus resulting in the suit Eldoret CMCC No. 31 of 1991. He has stated that he has been in possession of the suit land since 1975 until the year 2013 when they were removed by the 4th defendant. He has averred that this suit is not time barred because the suit Eldoret CMCC No. 31 of 1999 was filed but not concluded since Kimaiyo died before its conclusion. It is contended that the suit land was never sold to the 2nd defendant but was fraudulently transferred to him. It is also disputed that the 2nd defendant sold the suit land to the 3rd defendant as the 3rd defendant is son to the 2nd defendant, and that there has been no sale of the suit land to the 4th defendant. It is also stated that the 4th defendant has not taken possession of the suit land save for planting some trees. It is averred that the hearing can proceed even in the absence of the deceased witnesses and the unknown whereabouts of Okumu Ogisa. It is denied that this suit is res judicata because the previous suit has not been heard and finally determined. He has contended that this suit raises triable issues and the same should proceed for trial.

It is with the above opposing positions that I need to determine this application.

From the outset, it will be discerned that this application is brought pursuant to the provisions of Order 2 Rule 15. The same provides as follows :-

Striking out pleadings [Order 2, rule 15.]

(1 At any stage of the proceedings the court may order to be struck out or amended any pleading on the) ground that—

*(a it discloses no reasonable cause of action or defence in law;
) or*

(b) it is scandalous, frivolous or vexatious; or

*(c) it may prejudice, embarrass or delay the fair trial of the action;
or*

(d)
) *it is otherwise an abuse of the process of the court,*

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2 *No evidence shall be admissible on an application under subrule (1)(a) but the application shall state
) concisely the grounds on which it is made.*

(3
) *So far as applicable this r. shall apply to an originating summons and a petition.*

It is discernable that a pleading is liable to be struck out if :-

(a *it discloses no reasonable cause of action or defence in law;*
) *or*

(b
) *it is scandalous, frivolous or vexatious; or*

(c) *it may prejudice, embarrass or delay the fair trial of the action;*
or

(d
) *it is otherwise an abuse of the process of the court,*

It follows that if the pleading being struck out is the plaint, then the whole suit must go with it. The grounds upon which the applicant wishes to have this suit include the reasons that the suit is statute barred, that the issues in this suit are the subject of Eldoret CMCC No. 31 of 1991, and that there cannot be a fair trial because most of the witnesses are dead.

I will deal with the above stated issues, upon which I think this application hinges.

(a) Is this suit statute barred ?

The law provides for various time frames within which a party must present his claim. These are contained in the Limitation of Actions Act, CAP 22, Laws of Kenya. Mr. Tororey for the applicant, argued that this suit is statute barred by dint of the provisions of Section 7 of the Limitation of Actions Act. He submitted that a suit such as this must be filed within 12 years. He submitted that the land became registered in the name of Kimaiyo on 30 June 1999 and that the plaintiff placed a caution on 16 October 1999 claiming a beneficiary interest. He submitted that the plaintiff knew of the issues as far back as the year 1999.

On the other hand Mr. Miyienda for the plaintiff, argued that the relevant section of the Limitation of Actions Act, is Section 9 and not Section 7 and that time started running from 19 March 2013.

I will set out the two Sections of the Limitation of Actions Act, stated by the parties. They provide as follows :-

S. 7 Actions to recover land

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 Accrual of right of action in case of present interest in land

(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 of action accrues on the date of the dispossession or discontinuance.

(2) Where a person brings an action to recover land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of his death in possession of the land, and was the last person entitled to the land to be in possession of the land, the right of action accrues on the date of death.

(3) Where a person brings an action to recover land, being an estate or interest in possession assured otherwise than by will, to him, or to some person through whom he claims, by a person who, at the date when the assurance took effect, was in possession of the land, and no person has been in possession of the land by virtue of the assurance, the right of action accrues on the date when the assurance took effect.

It will be seen that Section 7 provides for a limitation period of 12 years for any action aimed at recovering land. Section 9 (a) on the other hand provides that the right of accrual where the person is in possession of land, accrues on the date of dispossession. It is Mr. Miyienda's argument that since the plaintiff has been in possession, till the year 2013, then his right to claim the land has not been extinguished by limitation of time. I am unable to agree with this submission. In my view, Section 9 applies where the cause of action is one to recover possession of land and no more. The right to re-possess will obviously accrue at the time the plaintiff is dispossessed of the land and not before. For example, if person A owns a piece of land, and person B, illegally dispossesses him of the land, person A has a right to reclaim back that land and his right to reclaim, accrues at the time he is dispossessed. A has no other claim over B, other than a right to recover possession and possibly occupation of the land. His right to recover possession will become extinguished 12 years after the dispossession, and indeed, as a corollary, B may probably assert a right to adverse possession.

But in this case, the plaintiff's claim is not one for recovery of possession. He is actually seeking declarations that he is entitled to ownership of the suit land on the basis that Kimaiyo obtained registration of the suit land by way of fraud, and that it is he (the plaintiff), who is entitled to be registered as proprietor of the suit land. That to me is not an action for the recovery of possession to land, but rather an action for the recovery of the land itself, which then would be covered by Section 7, rather than Section 9, of the Limitation of Actions Act.

The right to recover the land, in my view, accrued when Kimaiyo became the registered proprietor of the suit land. This was on 30 June 1989. The plaintiff had 12 years to file suit for recovery of the land from that date. It matters not that in between there were transfers to other persons. A fresh transfer did not revive the period of limitation, for the basis of the suit, and indeed the basis for vitiating the subsequent transfers, is the initial alleged fraudulent registration which occurred in the year 1989. There could have been an extension of the limitation period depending on when the plaintiff discovered the fraud. This is covered by Section 26 of the Limitation of Actions Act, which provides as follows :-

S. 26 Extension of limitation period in case of fraud or mistake

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.*

But there is no question that S. 26 above cannot assist the plaintiff since he knew of the alleged fraud almost immediately Kimaiyo became registered as proprietor. That is why he placed a caution on 16 October 1989 and indeed filed suit in the year 1991, claiming the land.

From the above, I do find that the plaintiff's action is time barred by dint of Section 7 of the Limitation of Actions Act.

(b) Is the suit res judicata?

The applicants have contended that this suit is res judicata owing to the suit Eldoret CMCC No. 31 of 1991. The plaintiff does not deny filing this suit. His argument is that the suit stalled after the demise of Kimaiyo in the year 2009. Res judicata in our jurisprudence is captured by the provisions of Section 6 & 7 of the Civil Procedure Act. The same provide as follows :-

S. 6 No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

S. 7 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 decided by such court.

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Under Section 6 above, a court is precluded from proceeding with a matter which is substantially in issue in a former suit. Under Section 7, a court is barred from hearing a matter which has been decided in a former suit. The argument of Mr. Miyianda is that the suit Eldoret CMCC No. 31/91 has not yet been decided as it stalled at the defence hearing stage when Kimaiyo died. I agree that probably Section 7 may not be applicable, but I do not see how this suit can escape the provisions of Section 6 of the Civil Procedure Act. It is not denied that the issues in this suit are the same issues in the suit Eldoret CMCC No. 31 of 1991 which is a previously instituted suit and therefore this suit is squarely caught up by Section 6 above. The death of Kimaiyo, as defendant in that suit, does not give the plaintiff permission to file a subsequent suit. The avenue is to continue the said suit against the personal representatives of Kimaiyo. This is indeed the essence of the provisions of Order 24 of the Civil Procedure Rules which advises a litigant what to do when a party to a suit dies. It follows that if the suit Eldoret CMCC No. 31 of 1991 has not abated, then it may be continued, and the subsequent suit (this suit) must be caught up by Section 6 of the Civil Procedure Act. But if it has abated, the plaintiff still has no licence to file a fresh suit by dint of the provisions of Order 24 Rule 7 which provides as follows :-

Effect of abatement or dismissal [Order 24, rule 7.]

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. (1 Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same) cause of action.

Either way, the filing of this suit offends the mandatory provisions of the res judicata rule. It is my view therefore that this suit is res judicata.

(c) Can there be a fair trial owing to death of the defendants' witnesses ?

The applicants contend that the demise of most of the witnesses will militate against a fair trial. I do agree, that there could be instances where the death of certain witnesses may dilute the quality of the trial. But I would hesitate striking out a plaint, on the basis that the defence witnesses have died. To do so, would be to deny the plaintiff a right to prosecute his grievances against the person he has sued, and neither do I see why a defendant ought to benefit from the death of his witnesses. I am therefore not in agreement with the applicant that the death of certain witnesses will lead to an unfair trial.

It will be discerned that I am of the firm view that this suit is both out of time and is res judicata. Given that position, I do hold that this suit is liable to be struck out as being an abuse of the process of court. I have little option but to strike out the plaint, and with it the suit, and hereby proceed to do so. The defendants shall have the costs of this suit.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF JUNE 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Mr. E.O. Miyiinda present for Plaintiff/respondent

Mr. N. Tororey present for 1st & 4th defendants and holding brief for Mrs Bor for 2nd and 3rd defendants.