



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, GATEMBU & SICHALE, JJA)

CIVIL APPEAL NO. 3 OF 2018

BETWEEN

MARGARET WAIRIMU MAGUGU.....1ST RESPONDENT

(Suing as the Administratrix of the estate of Late Arthur K. Magugu)

AND

KARURA INVESTMENT LIMITED1ST RESPONDENT

CHIEF LANDS REGISTRAR2ND RESPONDENT

KAMWERE & ASSOCIATES3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

NATIONAL LAND COMMISSION5TH RESPONDENT

(An appeal arising from the Ruling of the Environment and Land Court of Kenya at Nairobi delivered by (Obaga, J) on 20th November, 2017

in

ELC. CASE NUMBER 159 OF 2017)

JUDGMENT OF THE COURT

Introduction

1.This appeal arises from a ruling and order of the Environment and Land Court (E.O. Obaga, J) delivered on 20th November 2017 striking out the appellant’s suit against the respondents’ on the ground that it was barred by the Limitation of Actions Act and on the further ground that the suit was an abuse of the process of the court.

Background

2. The appellant, Margaret Wairimu Magugu, is the widow and administrator of the estate Arthur K. Magugu, deceased, who died on 15th September 2012. By a plaint dated 19 January 2017, the appellant filed suit against Karura Investment Ltd; Chief Land Registrar; Kamwere & Associates; the Attorney General, and the National Land Commission, the 1st to 5th respondents respectively, claiming that the deceased’s property known as L. R. No. 12422/9 was in 1993 subdivided on instructions of the deceased into two portions, namely L. R. No. 12422/203 and L. R. No. 12422/204; that the portion known as L. R. No. 12422/204 was then fraudulently and illegally subdivided into two other portions, namely L. R. No. 12422/318 registered in the name of the deceased and L. R. No. 12422/319 (the suit property) registered in the name of the 1st respondent, Karura Investment Ltd.

3. The appellant averred that the registration of parcel L. R. No. 12422/318 in the name of the deceased “was meant to hoodwink,

deceive, cleanse and cleverly conceal the element of fraud that the 3rd defendant had perpetrated on all the land known as L. R. No. 12422/204, to the benefit of the 1st defendant who was illegally and fraudulently registered as the proprietor of L. R. No. 12422/319...

4. The appellant pleaded that subsequent to the death of the deceased, she learnt that suit property had been invaded by the 1st respondent, its employees, agents, appointees, nominees and servants “*who had trespassed on the suit property*” and that subsequent to the death of the deceased, she dealt with the property known as L.R. No. 12422/318

“... by way of sale, to bona fide purchasers for value...honestly believing the same to be legitimate and legal documents thereto, as an honest mistake of facts, without knowledge of the defect of title.”

5. She accordingly sought judgment against the respondents jointly and severally for: a declaration that the subdivision of L. R. No. 12422/204 was fraudulently, irregularly and unlawfully undertaken; a declaration that any other subsequent subdivisions arising from L. R. No. 12422/204, namely L. R. No. 12422/318 and L. R. No. 12422/319 is a nullity; an order directed to the 2nd respondent to revoke and cancel L. R. No. 12422/318 and L. R. No. 12422/319 and to restore L. R. No. 12422/204 in the name of the deceased; a permanent injunction to restrain the 1st respondent or its employees or servants from entering, taking possession, or laying claim to or transferring or dealing in any manner whatsoever with L. R. No. 12422/204; general damages; mesne profits and costs.

6. Alongside the plaint, the appellant lodged an application, under certificate of urgency, seeking temporary restraining orders stopping, prohibiting and forbidding the respondents from entering, taking possession, trespassing or evicting the appellant from L. R. No. 12422/319.

7. In response to the appellant’s suit and application: the 1st respondent filed a notice of preliminary objection dated 2nd February 2017 contending that the appellant's claim was time-barred under the Limitation of Actions Act and that the same was an abuse of the process of the court. The 2nd and 4th respondents filed grounds of opposition dated 2 February 2017 contending that the suit was time-barred having been filed 24 years after the cause of action allegedly arose; and that the appellant was guilty of laches.

8. The 3rd respondent also filed grounds of opposition dated 25th January 2017 contending that the entire suit and the application are incompetent and that the suit is time-barred under the Limitation of Actions Act “*the alleged transactions and the alleged subdivisions having taken place about 25 years ago*” and that the same was frivolous, vexatious, scandalous and malicious and meant to embarrass the 3rd respondent in his long career spanning a period of 43 years and an abuse of the process of the court. In addition, the 3rd respondent filed a replying affidavit tracing the history of his involvement in the subdivision of LR. No. 12422/9 from the time he was instructed by the deceased in 1988 and how LR. No. 12422/9 gave rise to LR. No. 12422/203 and LR. No. 12422/204 and how the latter gave rise to L. R. No. 12422/318 and L. R. No. 12422/319.

9. One Sureshchandra Raichand Shah, a director of the 1st respondent filed a replying affidavit in which he deposed that the 1st respondent purchased L. R. No. 12422/319 from the deceased in 1993; that the 1st respondent was registered as the owner in the same year, 1993; that the 1st respondent took possession of the property the same year and has remained in possession since that time; that it has since paid the requisite land rates and electricity charges; and that it has tended the coffee thereon since that time and that the question of the 1st respondent trespassing on the property does not therefore arise.

10. Hasmukhrai Manilal Parekh, a partner in the law firm of Shah and Parekh advocates swore a replying affidavit in which he deposed that his law firm handled the sale transaction relating to L. R. No. 12422/319 between the deceased and the 1st respondent in 1993 that resulted in the registration of the 1st respondent as the proprietor of that property on 25th October 1993 after the purchase price of Kshs. 24,727,170.00 was paid to the deceased. Annexed to that affidavit was the pertinent documentation including the relevant consents and the transfer executed by the deceased in favour of the 1st respondent.

11. Faced with that material, the appellant appears to have changed tact. She abandoned the application for temporary injunction and applied to have it withdrawn. The 1st respondent resisted the withdrawal of the application but in a ruling given on 14th June 2017, the court allowed the appellant to withdraw the application. The court then directed that the preliminary objections to the suit be disposed of by way of written submissions.

12. The parties then filed written submissions on the preliminary objections after which the learned Judge delivered the impugned ruling on 20th November 2017 in which it determined that the appellant’s suit “*is not only an abuse of the process of the court but also statute barred*” and proceeded to strike it out with costs to the respondents paving way for the present appeal.

The appeal and submissions by counsel

13. Based on the memorandum of appeal and submissions by counsel during the hearing of the appeal, the issue arising is whether the learned Judge was right in concluding that the appellant's claim is barred under the Limitation of Actions Act and whether the appellant’s suit is an abuse of the process of the court.

14. For the appellant, represented at the hearing of the appeal by a team of three lawyers, namely Mr. J.M Kariuki, Mr. Ndegwa Njiru and Mr. Mwangi Ndegwa, it was submitted that the Judge was wrong to dispose of the matter on the basis of a preliminary objection; that whether a suit amounts to an abuse of the court process is a question of fact; that there ought to have been an application supported by affidavit on the basis of which the question of whether the suit was an abuse of the process of the court would have been interrogated; that in disposing of the matter on the basis of a preliminary objection and grounds of opposition, the appellant was denied her right to a fair hearing under Articles 25 and 50 of the Constitution; that there was no material or sufficient material on the basis of which the Judge could reach the decision that the suit was an abuse of the process of the court. As to what amounts to an abuse of the process of the court, counsel cited the

case of **Graham Rioba Sagwe & 2 others v Fina Bank Ltd & 5 others [2017] eKLR** and urged that the required threshold was not met in the present case.

15. On the issue of limitation it was submitted that the Judge failed to appreciate that the appellant's suit was founded on fraud and that the time limit prescribed under Section 7 of the Limitation of Actions Act did not run until the discovery of the fraud by dint of Section 26 of the Limitation of Actions Act; and that it was incumbent on the respondents on whom the burden of proof lay to adduce evidence to prove at what point in time the appellant discovered the fraud.

16. Furthermore, counsel urged, evidence was required in order to determine when time began to run and consequently the matter was not suitable for disposal on the basis of a preliminary objection as it was not a pure point of law. In that regard reference was made to the case of **Justus Tureti Obara v Peter Koipeitai Nengiso ELC No. 126 of 2011** where Okongo J held that the inquiry as to when discovery of fraud is made is a matter to be ascertained at the trial.

Reference was also made to the case of **Mukisa Biscuit Manufacturers Ltd vs West End Distributors Ltd [1969] E A 969** as to the nature of a preliminary objection.

17. Opposing the appeal counsel for the 1st respondent Mr. Nganga submitted that what constitutes an abuse of the court process is a matter for determination on a case by case basis and that abuse of the process takes place where proceedings are used for purposes extraneous to pursuit of truth. In that regard reference was made to the case of **Muchanga Investments Ltd vs Safari Unlimited (Africa)Ltd & 2 others (2009)eKLR**.

18. It was submitted that the contention by the appellant that the Judge erred in disposing of the matter on the basis of a preliminary objection without a substantive application is misplaced; that in **Mukisa Biscuit Manufacturers Ltd vs West End Distributors Ltd** (above) the court indicated that a plea of limitation is one example of a pure point of law amenable for disposal on the basis of a preliminary objection; that there was indeed no need for a substantive application; that the question whether the action was statute barred is easily discernible from the pleadings as the nature of the cause of action and when the cause of action accrued is evident from the pleadings ; that it is clear that by the time the suit was filed in January 2017 approximately 24 years had lapsed since the registration of the 1st respondent as the proprietor of suit property.

19. It was submitted that the 1st respondent purchased the property from the deceased in 1993 for valuable consideration and that Section 26 of the Limitation of Actions Act does not afford the appellant protection having regard to the proviso thereto; that considering that the appellant did not include L. R. No. 12422/319 in the list of assets of the deceased' estate when applying for confirmation of grant of letters of administration of the estate of the deceased, her "discovery of fraud" allegedly perpetrated by the 1st respondent is an afterthought.

20. Counsel for the 2nd and 4th respondents by Mr. Eredi also opposed the appeal. He also relied on the case of **Mukisa Biscuit Manufacturers Ltd vs West End Distributors Ltd** (above) to urge that the preliminary objection was merited and the most appropriate way to dispose of the suit in the circumstances; that it is within the mandate of the court under the provisions of Order 2 Rule 15(1) of the Civil Procedure Rules, for instance, to deal with a matter in a summary manner especially where, as here, no cause of action is made out or to prevent abuse of the process of the court. Reference was made to numerous decisions of the High Court where suits have been struck out on the basis of being an abuse of the process of the court.

21. It was submitted the allegations of fraud made by the appellant are wholly unfounded, frivolous and an abuse of the court process as neither the deceased nor the appellant reported the same to the police. In support reference was made to the High Court decision in **Gitau Kamau v Ndung'u Kamau & another [2017] eKLR** where Emukule J stated that an action is frivolous when it is without substance or is unarguable or when a party is trifling with the court.

22. Counsel submitted that although the appellant did not specifically plead when she discovered the alleged fraud, it was evident from the plaint that she was aware that the 1st respondent was registered as proprietor of the property in 1993; that the 1st respondent purchased the property from the deceased and openly took possession and occupation of the property and neither the deceased nor the appellant (the deceased's wife) raised a complaint until 24 years later when she filed her suit. It was submitted that the court should not aid the indolent; that the suit was clearly time barred under Section 7 of the Act and to allow the appeal would occasion hardship and injustice to the respondents.

23. Opposing the appeal, Mr. J.P Machira for the 3rd respondent submitted that the Judge was right in ordering the appellant's suit to be struck out on the grounds that the same was an abuse of the process of the court and on account of the same being statute barred; that even though the deceased died on 15th September 2012, the appellant, his widow, waited for almost 5 years before presenting her claim to the court; that even though the appellant does not suggest that the deceased was under any incapacity so as to be able to manage his affairs when he was alive, the appellant nonetheless accuses the 3rd respondent of having fraudulently subdivided her husband's properties; that the 3rd respondent allegedly committed the fraud between the years 1982,1992 and 1993, a period ranging between 30 to 20 years.

24. Counsel posed the question "how come that during all this long period, and when he was alive, Mr. Magugu himself never raised this serious allegations against the 3rd respondent ?" He submitted that under section 7 of the Limitation of Actions Act, a claim to recover land is time barred after a period of 12 years; that Section 26 of the Limitation of Actions Act cannot aid the appellant as it is inconceivable that the alleged fraud and forgeries would not have been discovered over all those years bearing in mind that the appellant was not only the wife of the deceased, but also lived with the deceased.

25. Regarding the complaint that the Judge was wrong in disposing of the matter on a preliminary objection, counsel also referred to the case of **Mukisa Biscuit manufacturers Ltd vs West and Distributors Ltd** and urged that it was plain from the pleadings that the suit was statute barred; that since limitation goes to the jurisdiction of the court, the learned Judge was obliged to determine the issue at a preliminary stage

based on the material before it. Reliance for this proposition was placed on *Owners and Masters of the Motor Vessel „Joey? v Owners and Masters of the Motor Tugs „Barbara? and „Steve? (2008) 1 EA 367* as well as the case of the *Owners of Motor Vessel “Lillian S vs Caltex Oil Kenya Ltd [1989] KLR1*. Counsel added that in considering a preliminary objection reference to some facts is inevitable.

26. Learned counsel for the 5th respondent, Mr. Wahome did not submit on the matter stating that he was leaving the matter to the court.

Analysis and determination

27. We have considered the appeal and the submissions by counsel. As already stated, the main issue is whether the Judge was right in upholding the objection that the appellant's claim is statute barred under the Limitation of actions act and whether the Judge correctly determined that the appellant's suit was an abuse of the court process. Before addressing that issue, there is the question whether the Judge rightly disposed of the matter on the basis of a preliminary objection.

28. To start with, the Judge was faulted for entertaining the matter on the basis of a preliminary objection. We do not think there is any merit in that complaint. Depending on the circumstances in which the defence of limitation is raised, it is a matter capable of disposal on the basis of a preliminary objection. We need not look beyond the case of *Mukisa Biscuit manufacturers Ltd vs West and Distributors Ltd*, a common denominator in the cases cited by all the parties, where Law, JA stated:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to jurisdiction of the court or a plea of limitation...” [Emphasis]

29. In the present case the issue as to whether the appellant's claim was barred by limitation is one that was determinable with reference to the pleadings. There is no merit in the contention by the appellant that a substantive application supported by affidavit was necessary in order for the question as to whether the action was statute barred to be considered.

30. We turn to the question whether the Judge was right in upholding the respondents' objection that the appellant's claim is barred under the statute of limitation. In *Thuranira Karauri vs. Agnes Ncheche [1997] eKLR* this Court held that a suit that is time barred is incompetent and fit for striking out as limitation goes to jurisdiction. That decision was recently followed by the Court in *Harrison Ndung'u Mwai & 500 others v Attorney General [2018] eKLR* where the Court stated:

“It is trite law that limitation goes to the jurisdiction of a court. This Court so held in Thuranira Karauri vs. Agnes Ncheche [1997] eKLR. It follows therefore that whenever the question of jurisdiction arises, it ought to be resolved at the earliest opportunity because without jurisdiction a court has no authority to decide a matter before it.”

31. Based on the plaint and the reliefs sought in the plaint, the appellant, in her capacity as the administrator of the estate of the deceased sought nullification of LR No. 12422/204 and the subdivisions arising therefrom with a view to recovering the property registered in the name of the 1st respondent known as LR 12422/319. Her suit was in effect, an action to recover land. Section 7 of the Limitation of Actions Act provides that

“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.” [Emphasis]

32. We stress that the appellant instituted the action in her capacity as the administrator of the estate of her late husband. The appellant's husband died on 15th September 2012. The registration of the property in favour of the 1st respondent that the appellant sought to impeach was done in October 1993. The deceased, to whom the right of action first accrued, (if indeed the registration of the property in favour of the 1st respondent was irregular) was alive for approximately 19 years after the alleged irregular transfer of the property to the 1st respondent.

Therefore, the deceased had all the time between October 1993 up to October 2004 (a period of 12 years) within which to challenge the registration of the 1st respondent as the owner of the property. He did not do so and by the time he died 19 years had lapsed with the 1st respondent as the registered proprietor in possession of the property. Could the appellant, as the administrator claiming through the deceased do so approximately 24 years later?

33. The appellant contends that as the action is founded on fraud, time under Section 7 of the Limitation of Actions Act could not, by dint of Section 26 of that Act begin to run until the fraud was discovered, and that fraud was not discovered until when she commenced gathering the deceased's estate for purposes of administration. The relevant part of Section 26 of that Act provides as follows:

“Where, in the case of an action for which a period of limitation is prescribed, either—

- 1. (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***
- 2. (b) the right of action is concealed by the fraud of any such person as aforesaid; or***
- 3. (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.”***

34. There is no doubt that under that provision, where the action is based on fraud the period of limitation prescribed does not begin to run until the plaintiff discovers the fraud. (see for instance *Kenya Ports Authority vs Timberland(K) Ltd [2017] eKLR*). However, having regard to the proviso to Section 26 of the Act as highlighted above, it is inconceivable that for 19 years, in the case of the deceased, and 24 years in the case of the appellant, they would have failed to discover, with the exercise of due diligence, the alleged fraud and to act if indeed the acquisition of the property by the 1st respondent was fraudulent.

35. Due diligence entails the exercise of care required from a given person in a given situation. It entails proactivity and absence of carelessness or idleness. In the English case of *Paragon Finance vs D B Thackerar & Co [1999] 1 All ER 400* at 418B-D, Millett LJ of the Supreme Court of England opined that:

“The question is not whether the plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take.”

36. Considering that the 1st respondent was registered as the owner of the property on 25th October 1993 and has since been in possession, it is unthinkable that the deceased and the appellant could not, for 19 and 24 years respectively, have discovered the alleged fraud with the exercise of due diligence. We are therefore fully in agreement with the learned Judge of the High Court when he stated in his ruling thus:

“17. The plaintiff claims to have discovered the fraud after the demise of the deceased. This is when she was trying to collect the properties of the deceased for purposes of obtaining letters of administration. In the instant case, discovery of fraud is not confined to the Plaintiff herself. It also goes to the deceased during his lifetime. The first defendant took possession of LR No. 12422/319 in the 90’s. The property was registered in its name on 25th October 1993. The first defendant has provided utility bills dating as far back as the year 2000. There is affidavit evidence that the first defendant took possession of LR

No. 12422/319 in the 90’s. The first defendant did not enter the property on lease basis. The deceased was alive. If the property had not been transferred to the first defendant, the deceased would have questioned the first defendant’s occupation.

18. The first defendant did not seek to enter the property after the demise of the deceased as to arouse the suspicion of the plaintiff. What the plaintiff is trying to do is to circumvent Section 7 of the Limitations of Actions Act by purporting to claim that she discovered the alleged fraud after the demise of the deceased. Even if the plaintiff’s claims were true, still the law expected that time for purposes of limitation would have started running when the deceased would have with reasonable diligence discovered the alleged fraud. The occupation of the first defendant would have aroused the suspicion of deceased if indeed the occupation was as a result of fraudulent activities.” [Emphasis added]

37. We respectfully agree. Being of that persuasion, and as limitation goes to jurisdiction we need not consider the question whether the claim was otherwise an abuse of the process of the court.

38. The result is that the appeal is devoid of merit. It is accordingly dismissed with costs to the 1st to 4th respondents.

Dated and delivered at Nairobi this 5th day of April, 2019.

W. KARANJA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR