



Mutembei & another (Suing as personal representatives of the Estate of Ardlin Kageni Nue alias Ardline Kageni Mutembei - Deceased) v Kinyanjui & 4 others (Environment & Land Case E022 of 2022) [2024] KEELC 3525 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3525 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E022 OF 2022
LC KOMINGOI, J
APRIL 11, 2024**

BETWEEN

**LEILA KATHURE MUTEMBEI AND BELINDA KAIMURI PLAINTIFF
SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF ARDLIN
KAGENI NUE ALIAS ARDLINE KAGENI MUTEMBEI - DECEASED**

AND

**JOYCE NJAMBI KINYANJUI 1ST DEFENDANT
SAMUEL KIARIE MBURU 2ND DEFENDANT
DISTRICT LAND REGISTRAR, KAJIADO 3RD DEFENDANT
DR DAVIS NYAMU NJOKA 4TH DEFENDANT
BEATRICE WAIRIMU KAGIRI 5TH DEFENDANT**

RULING

1. The Preliminary Objection dated 17th October 2023 by the 2nd Defendant is on grounds that the Plaintiff's suit is time barred under the Statute of *Limitation Act* because it was brought 20 years after the alleged sale agreement dated 1st September 2001 was entered into.
2. The Preliminary Objection was canvassed by way of written submissions.

The 2nd Defendant's Submissions

3. Counsel for the 2nd Defendant submitted that the Plaintiffs pleaded that the late Ardlin purchased the suit property Kajiado/Kaputiei North/1792 from one John Muturi Mwangi vide a sale agreement dated 1st September 2001 and was given the completion documents. However, by 14th June 2021 when



she passed away she had not lodged the duly executed transfer forms to transfer the ownership. As such, this is not an action to recover land under Section 7 of the *Limitation of Actions Act* because it never belonged to her. Similarly, the suit was also statute barred under Section 4(1), which bars actions founded on contracts from being instituted after lapse of 6 years from the date the action accrued. Counsel went on to submit that although the Plaint is based on allegation of fraud, it was not clear how the alleged fraud was never detected in over 20 years since the late Ardline allegedly acquired the property. Pointing out that it was not in contention that the 1st Defendant was the registered owner of the suit property since 30th October 1994 and the 2nd Defendant registered on 27th November 2013 which is twelve years after the alleged sale in 2001. As such, the suit is stale and should be dismissed.

The Plaintiffs' submissions

4. Counsel submitted that the suit is founded on fraud which the Plaintiffs discovered in 2021 pending the completion of the succession proceedings. Therefore, time began to run when the said fraud was detected as espoused under Section 26 (vii) of the *Limitation of Actions Act*. This was also held by the Supreme Court of Kenya in *Kenya Ports Authority vs Timberland(K) Ltd* [2017] eKLR.

Analysis and determination

5. I have considered the Preliminary Objection and the grounds, the rival submissions and the authorities cited. The issues for determination are:
 - i. Whether the Preliminary Objection is merited.
 - ii. Who should bear costs?
6. It is not in contention that a Preliminary Objection should be on a pure point of law which can be discerned and determined on the face of the pleadings. This was embedded in *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696. Similarly, the Supreme Court in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR pronounced itself as follows on the preliminary objection issue:

“(78) ...“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

(16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”
7. To confirm whether the preliminary objection is on a point of law that is discernible from the pleadings, this court has perused the pleadings filed.
8. The Plaintiffs' case is that the late Ardlin Kageni purchased property Kajiado/Kaputiei North/1792 from John Muturi Mwangi vide a sale agreement dated 1st September 2001. Upon payment of the purchase price, she was given the original title deed and duly executed transfer forms and possession granted sometime in 2003. She however never lodged the transfer forms for registration. It was until 2021 after her demise that the Plaintiffs in the course of consolidating her properties for the purpose



of Grant of Letters of Administration, discovered that the suit property had been fraudulently and illegally transferred to the 1st Defendant who in turn transferred it to the 2nd Defendant.

9. The 2nd Defendant contested the allegation on grounds that he purchased the suit property from the 1st Defendant (now deceased) sometime in 2009 and had been the proprietor until its subdivision to Kajiado/Kaputiei North/116443-116447 and had since sold off parcel numbers 116443-116446. And that the alleged John Muturi Mwangi has never been a registered owner of the suit property as per the Land Register.
10. From the above brief summary of the suit, this court finds that whereas the 2nd Defendant's objection on Section 7 of the *Limitation of Actions Act* is a matter of Law, the Plaintiffs plead that they discovered the fraud in 2021 and thus time started running when the said fraud was discovered. Therefore, to determine this application, this court would have to look at the facts of the case and thus the Preliminary Objection cannot be sustained as it does not meet the set threshold.
11. I find no merit in Preliminary Objection and the same is dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 11TH DAY OF APRIL 2024.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Ms. Njoki Gachihu for the Plaintiff.

N/A for the 1st & 3rd Defendants.

Mr. Githuka for the 2nd Defendant.

Mr. Tebino for the 4th & 5th Defendants

Court Assistant – Mutisya.

