



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, JJ.A)**

**CIVIL APPEAL NO. 32 OF 2014**

**BETWEEN**

**FREDRICK KIURA NYAGA & 2 OTHERS.....APPELLANTS**

**AND**

**JUSTINO NJUE M'MBUCHI & 24 OTHERS.....RESPONDENTS**

*(An appeal from the ruling of the High Court of Kenya at Kerugoya (Oloo, J.) dated 27<sup>th</sup> November, 2013*

**in**

**H.C.ELC No. 114 of 2013)**

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**JUDGMENT OF THE COURT**

This is an appeal against the ruling of the High Court wherein the appellants' Originating Summons was dismissed for being time barred. The brief background of the matter is that Fredrick Kiura Nyaga, Waweru Mugo Rimunya and Ernest Mugo Kivuti (hereinafter referred to as the appellants') filed an Originating Summons in the High Court against the respondents seeking for orders inter alia:-

- ***That the Honourable court be pleased to order the cancellation of the all the registered proprietors of the titles (sic) the subject of the Summons namely, Title Nos. Nthawa/Riandu 130, 1291, 1376, 1397, 1398, 1399, 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1409, 1410, 1428, 1429, 1443,1450, 3332, 3333, 1468, 3799, 3800, 3707, 3708, 3710 & 3711(suit parcels).***
- ***That the Honourable court be pleased to authorize the distribution of the said parcels of land among the members of Marigu Clan as had been decreed on 9th July, 1993 in Embu SPMCC No. 70 of 1984 which decree to date stands valid.***

The appellants contended that the matter was adjudicated upon before the subordinate court in SPMCC No. 70 of 1984 in which a decree dated 9<sup>th</sup> July, 1993 was issued. That decree directed the suit parcels of land be shared amongst members of the Marigu clan. The said decree was never challenged on appeal.

Despite the existence of the court order, the respondents unlawfully and irregularly caused themselves to be registered as proprietors of the suit parcels of land after the decree dated 9<sup>th</sup> July, 1993 had been issued.

The respondents in their replies claimed that their titles were indefeasible. Subsequently, the 9<sup>th</sup> respondent therein filed a preliminary objection against the appellants' suit on the following grounds:-

- ***The suit is statute barred and it offends the provisions of Section 4(4) of the Limitations of Actions Act, Cap 22, Laws of Kenya.***
- ***The suit herein offends the provisions of Section 7 of the Civil Procedure Act.***

The aforesaid preliminary objection was argued by way of written submissions. It was the 9<sup>th</sup> respondent's case that the appellants sought cancellation of the titles of the suit parcels of land and distribution of the same to the members of Marigu clan. The said distribution was premised on the decree dated 9<sup>th</sup> July, 1993 which the appellants sought to enforce. It was the respondent's case that the said decree could not be executed; **Section 4(4)** of the **Limitation of Actions Act** prohibits execution of a decree after 12 years; the appellant's suit had been brought 17 years after the said decree had been issued.

The respondents further argued that the suit was also *res judicata*; the decree sought to be executed had been issued in SPMCC No. 70 of 1984; the matter(s) directly and substantially in issue in the High Court suit was directly in issue in the former suit filed and determined in the subordinate court. The appellants ought to have sought execution of the decree in the subordinate court wherein it was issued. The respondents thus urged the High Court to dismiss the suit before it.

On the other hand, the appellants maintained that the suit before the High Court was proper. According to the appellants, the respondents founded the preliminary object on the wrong provisions of the law. **Section 4(4)** of the **Limitation of Actions Act** dealt with limitation of actions of contract and tort. The proper provision was **Section 7** of the **Limitation of Actions Act** which provides as follows:-

***“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.”***

The appellants argued that the cause of action in the High Court arose when the decree was extracted on 14<sup>th</sup> September, 2005. Therefore, the suit was competently before the High Court. The filing of the Originating Summons was necessitated by the fraudulent transfer of the suit parcels to the respondents after the said decree had been issued and the realization that it is only the High Court that can cancel the titles.

On the issue of the matter being *res judicata*, the appellants contended that the parties in SPMCC No. 70 of 1984 were different from the parties in the Originating Summons; the suit parcels were illegally transferred to the respondents after the suit in the subordinate court had been determined hence the suit cannot be termed as *res judicata*. In the alternative, the appellants' argued that there are certain circumstances in a particular matter, which a court can consider and overlook the *res judicata* rule. In support of the aforementioned position the appellants relied on the case of;- ***Greenfield investments Ltd. –vs- Baber Alibhai Mawji – Civil Appeal No. 160 of 1997*** wherein Gicheru, J.A adopted the findings in ***Yat Tung Investment Co. Ltd. –vs- Dao Heng Bank Ltd & Another (1975) A.C. 581, 590 E:-***

***“The shutting out of a ‘subject of litigation’ - a power which no court should exercise but after a scrupulous examination of all the circumstances- is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless ‘special circumstances’ are reserved in case justice should be found to require the non-application of the rule.”***

The High Court considered the preliminary objection and submissions by parties and by a ruling dated 27<sup>th</sup> November, 2013 dismissed the appellants' suit for being time barred. It is that decision that has provoked this appeal grounded on the following:-

- ***The learned Judge erred both in law and fact in that he failed to appreciate that the 9<sup>th</sup> respondent's preliminary objection was not well taken (sic) since it was based under Section 4 that deals with limitations on actions on tort, contract and certain other actions instead of Section 7 of the Limitations of Actions Act Cap 22, that specifically deals with actions to recover land.***
- ***Having found as a fact and in law that the appellants suit was not res judicata, the learned Judge ought to have granted the appellants an opportunity for full hearing on merits instead of upholding the respondent's preliminary objection on one limb which in any event was not well taken.***
- ***Even if the preliminary objection may have been well taken under Section 7 of the Limitation of Actions Act, with the undisputed evidence of fraud and change of hands and/or ownership of many parcels that are the subject herein to other people not within Marigu clan within the 12 years of the validity of the decree in SRMCC No. 70 of 1984 dated 9<sup>th</sup> July, 1993 and issued on 14<sup>th</sup> September, 2005, he ought to have as well accorded the appellants the opportunity for full hearing instead of upholding the respondent's preliminary objection. sic***

Mr. Wambugu, learned counsel for the appellants, reiterated the appellants' position in the High Court. He submitted that the 9<sup>th</sup> respondent's preliminary objection ought to have been based on **Section 7** of the **Limitation of Actions Act**. The subordinate court's decree dated 9<sup>th</sup> July, 1993 was never challenged. He argued that the parcels of land were fraudulently acquired by the respondents within five years of the said decree; there was evidence of fraud in the dealings with the suit parcels. Consequently, it was incumbent upon the High Court to have set the suit down for hearing. Mr. Wambugu urged this Court to allow the appeal since an entire clan was seeking determination of ownership of the suit parcels.

M/s Mumo, learned counsel for the respondents, in opposing the appeal reiterated the respondents' position in the High Court. She argued that the appellants' suit before the High Court was time barred. According to M/s Mumo, the appellants should have extracted and executed the decree in the subordinate court in good time before the expiry of 12 years. On the other hand, she argued that the subordinate court's decree was a nullity because the said court had no jurisdiction to issue the said orders. She urged this Court to dismiss the appeal.

We are of the view that the learned Judge correctly held that the appellant's suit was not **res judicata** because the parties in the suit before the subordinate were different from the parties in the High Court suit. **Section 7** of the **Civil Procedure Act** provides:-

***“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.”***

Turning on the substantive matter of this appeal on whether the preliminary objection was well founded in the law, we wish to refer to the ancient case of; **Mukisa Biscuit Manufacturing Co. Ltd. -vs- West End Distributors Ltd. [1968] E.A. 697** where it was held at page 700 E that:-

***“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose***

***of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of Limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”***

It was the 9<sup>th</sup> respondent's contention that the appellant's suit was time barred because it sought enforcement of a decree dated 9<sup>th</sup> July, 1993. The respondent's preliminary objection was based on **Section 4(4) of the Limitation of Actions Act** which provides in part as follows:-

***“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or.....” Emphasis added.***

The appellants' suit in the High Court was filed on 7<sup>th</sup> July, 2011; if the respondent's contention was true that the suit sought for the enforcement of the decree dated 9<sup>th</sup> July, 1993, then the suit was filed 17 years after the decree. As per the aforementioned provision a party is barred from seeking execution of a decree after 12 years; hence the preliminary objection was based on the correct provisions.

The next issue for us to address is whether the preliminary objection was validly upheld in the circumstances of this matter. The learned Judge (Olao, J.) in holding that the appellants' suit was time barred found that the suit sought to enforce the decree in SPMCC No. 70 of 1984 dated 9<sup>th</sup> July, 1993. From the record, it is not in dispute that the parties in SPMCC No. 70 of 1984 and the parties in the High Court suit are different. It is the appellants' contention that the suit parcels of land were illegally and fraudulently transferred to the respondents who were named in the High Court suit after the aforementioned decree had been issued.

The appellants' contended that they could not enforce the decree because of the fraudulent transfers the order could not be executed as the transfers affected the substratum of the order. It was for that reason that they filed the High Court suit in order for the court to cancel the respondents' titles; moreover, it is only the High Court that is vested with the power to cancel titles based on fraud.

Without delving into the merits of the suit in the High Court, we have had to ask ourselves whether the suit therein was purely for the purposes of enforcement of the decree in the lower court. From the pleadings of the said suit, it is evident that it was also based on a cause of action for recovery of the suit parcels from the respondents' whom the appellants claimed acquired the same fraudulently. Perhaps, that was why the appellants' contend that the preliminary objection ought to have been based on **Section 7 of the Limitation of Actions Act** which deals with actions for recovery for land.

Therefore, the learned Judge ought to have also taken into consideration that the appellants' suit was also based on an action for recovery of land. Whether or not the action for recovery was within the requisite time frame was a matter that could only be determined after the examination of facts and evidence in a trial. This is because from the evidence the court would be able to determine when the cause of action arose as against the respondents and whether the cause of action was time barred. Also whether the appellants' were prevented from enforcing the decree due to the alleged fraudulent transfers ought to have been considered at the trial.

In **Mukisa Biscuit Manufacturing Co. Ltd. -vs- West End Distributors Ltd.(supra)** at page 701B it was held,

***“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 pleaded 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.”***

This was not a proper case for the learned Judge to have disposed by upholding the preliminary objection since there were contested facts which could only be ascertained at a trial.

We now turn to the issue of the validity of the decree dated 9<sup>th</sup> July, 1993. M/s Mumo submitted that the decree dated 9<sup>th</sup> July, 1993 was a nullity since the subordinate court had no jurisdiction to issue the same. It is not in dispute that the respondents never appealed against the said decree. Moreover if that argument that the decree was a nullity is taken to its logical conclusion, it would also have worked against the respondent's preliminary objection as the preliminary objection was on the age of the decree. We also note that the said issue is not the subject of this appeal. In *Ruben & 9 Others -vs- Nderitu & Another [1989] KLR 459*, this Court held that:

***“.....the Jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of appeal, the Court of Appeal would have no business to meddle in the business of the High Court.”***

See also *Nguruman Limited -vs- Shompole group ranch & Another – Civil Application No. 90 of 2013*.

Thus in our view, the validity or otherwise of the decree dated 9<sup>th</sup> July, 1993 does not fall for our consideration but for the trial court who will have an opportunity to interrogate the issues of fraud as alleged.

In conclusion we think we have said enough to demonstrate that this appeal has merit and the order that renders itself just is to allow the appeal and order the appellants' suit be reinstated for hearing before another Judge other than Olao, J. Costs of this appeal shall abide the outcome of the suit.

***Dated and delivered at Nyeri this 25<sup>th</sup> day of November, 2014.***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

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***JUDGE OF APPEAL***

***J. OTIENO- ODEK***

.....

***JUDGE OF APPEAL***

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

***DEPUTY REGISTRAR***