



**Endo Holdings Company Limited v Peter Njuguna t/a Njupe Enterprises & 2 others
(Environment & Land Case 14 of 2024) [2024] KEELC 5496 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5496 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 14 OF 2024**

**A OMBWAYO, J
JULY 26, 2024**

BETWEEN

ENDO HOLDINGS COMPANY LIMITED PLAINTIFF

AND

PETER NJUGUNA T/A NJUPE ENTERPRISES 1ST DEFENDANT

MONG'ARE GEKONGA 2ND DEFENDANT

NAKURU LAND REGISTRAR 3RD DEFENDANT

RULING

1. Endo Holdings Co Ltd (hereinafter referred to as the plaintiff) has come to this court against Peter Njuguna T/A Njupe Enterprises Ltd, Mong'are Gekonga and the Nakuru Land Registrar (hereinafter referred to as the defendants) claiming that at all material times relevant to the suit, the plaintiff was the legal and rightful owner of all that parcel of land known and fully described as Nakuru Municipality Block 4/ 355 measuring approximately 0.1536 hectares (hereinafter referred to as the suit property).
2. According to the plaintiff, the suit parcel of land was registered in the Plaintiffs name on the 8th February, 1993 after being lawfully acquired by the Plaintiff's initial Director/ shareholder that is the late Ishmael Kiplagat Juma Chelanga. The Plaintiff's initial Director/ shareholder that was the late Ishmael Kiplagat Juma Chelanga died in the year 1996 and his property including the suit property herein was subject of Nairobi High Court Succession Cause NO. 2258 OF 1996. The said succession took a period of 10 years and grant was issued and confirmed on October, 2006.
3. The plaintiff states that immediately after the death of Ishmael Chelanga, who was a well-known public figure and considering the vastness of his wealth that was distributed all over the country, third parties and fraudsters including the 1st defendant herein took advantage of the situation and went on the rampage to fraudulently transfer the Plaintiffs property in his name.



4. That in the year 2021, it came to the plaintiffs attention that according to records held in the 3rd defendants offices, the 1st defendant caused the suit property to be transferred into his name and was issued with a certificate of lease on 7th May, 2005.
5. The plaintiff claims that the defendants fraudulently caused the property to be registered in their names in collusion with the Land Registrar Nakuru. The time of the said transfer the suit property was still subject of Nairobi High Court Succession Cause No. 2258 of 1996 and grant had not yet been confirmed thus there was no capacity for the same to be transferred.
6. The plaintiff alleges that she has never sold the suit property to the 1st defendant or any other party for that matter. The plaintiff and its directors have never executed any transfer documents for the purpose of having the suit transferred to the 1st defendant. The plaintiff and its directors have never issued any completion documents to the 1st defendant for the purpose of having the suit transferred to the 1st defendant. The Plaintiff and its Directors are indeed still in possession of the original Title of the suit property.
7. The particulars of fraud against the 1st and 2nd defendants are inter alia, entering, occupying and retaining possession without authority or consent of plaintiff and acquiring the suit property without any valuable consideration. Moreover, colluding with the Ministry of Lands Official to illegally transfer the suit property into their names and purporting to transfer the suit property in absence of any transfer forms executed by the Plaintiff. Furthermore, purporting to transfer the suit property in absence of any certificate of confirmation of grant in respect of the estate of the late Ishmael Chelanga. Lastly, taking advantage of the death of the Plaintiffs director to quickly move in and grab the plaintiff's property.
8. The 3rd defendant is alleged to have connived with the 1st and 2nd Defendants to transfer the plaintiff's property in absence of executed transfer forms or completion documents and in absence of certificate of confirmation of grant. Moreover, facilitated the 1st and 2nd Defendants underhand maneuvers to illegally disposes the Plaintiff of its property and Deliberately failed to protect land records from fraudsters.
9. The plaintiff prayed for a declaration that the registration of the 1st defendant as the absolute owner of Nakuru Municipality Block 4/355 is illegal and hence null and void and that the transfer of Nakuru Municipality Block 4/355 from the 2nd Defendant to the 1st Defendant is a result of unauthorized, unprocedural and irregular process and is thus illegal null and void and.
10. The plaintiff prays for an order for revocation and/or cancellation of the titles in the names of the 1st defendant and consequently an order for rectification of the Lands register to reflect Endo Holdings Company Limited as the registered owner of Nakuru Municipality Block 4/355, which order is to be effected by the 3rd Defendant.
11. The plaintiff further prays for an order for permanent injunction restraining the 1st and 2nd defendants either by themselves, servants, agents or anybody claiming under them, howsoever from, selling, transferring, disposing, alienating, constructing or continuing with construction or in any way dealing with Nakuru Municipality Block 4/355.
12. Lastly, the plaintiff prays for orders of eviction to issue as against the 1st Defendant and mesne profit since the year plus costs.
13. The 1st defendant filed a defence denying the allegations by the plaintiff and raised a preliminary objection that the suit was statute barred under section 7 of the Limitation of Actions Act Caps 22 Laws



of Kenya. On 26th April 2024 this court directed that the preliminary objection filed on 11th April 2024 and dated 25th March 2024 be heard first.

14. The gist of the Preliminary Objection is that the entire suit is incompetent being statute barred pursuant to section 7 of the *Limitation of Actions Act* Cap 22 of the laws of Kenya. Parties were directed to file submissions.

DEFENDANTS SUBMISSIONS

15. The 1st defendant submits that Section 7 of the *Limitation of Actions Act* Cap 22 laws of Kenya 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 whom he claims, to that person"

16. According to the 1st defendant the pertinent question, then is when the cause of action accrued. The Plaintiff is a juristic person separate and distinct from Ishmael Kiplagat Juma Chelanga who is alleged to have been its director and who died in the year 1996. If the grant was confirmed in the year 2006, then this suit was filed 18 years after the grant was confirmed. This was outside the statutory period of 12 years permitted for a party to institute a claim for recovery of land.
17. The 1st defendant contends that the allegation of the Plaintiff that the suit property was subject of the succession cause was plainly wrong in law as the Plaintiff is a limited liability company duly incorporated and therefore not covered by Section 3 of the *law of succession Act* which defines what constitutes an estate of a deceased person.
18. The Plaintiff in its list of documents No. 4 is a certificate of official search dated 15/12/2005. The said certificate of official search confirms that as at 15/12/2005 the suit property was registered in the name of Peter Njuguna , T/a Njupe Enterprises, the 1st Defendant herein.
19. The fact that that Plaintiff obtained a certificate of official search on the 15/12/2005 confirms that the Plaintiff as at 15/12/2005 was aware that the suit property was registered in the name of the 1st Defendant and it never instituted any case for the cancellation of the said certificate of lease that had been issued to the 1st Defendant.
20. The Plaintiff averred that it lodged a complaint with the Director of Criminal Investigation on the illegal registration of the 1st Defendant herein as the proprietor of the suit property. The Plaintiff does not specifically state when it lodged a complaint with the Director of criminal investigations.
21. The 1st Defendant further contends that he filed in his list of documents, letters showing that there was indeed a criminal complaint and other forms of complaints by and/or on behalf of the Plaintiff challenging his acquisition of the suit property. ■ The first letter is from the DCIO Nakuru to the land Registrar Nakuru dated 31/8/2004. The said letter is No. 8 on the 1st Defendant's list of documents. The 2nd letter was from the District Land Registrar Nakuru to the DCIO Nakuru dated 16/7/2005. It is listed as No. 9 in the 1st Defendant's list of documents. The Third letter is dated 29/9/2008 from the firm of Okundi & Company Advocates to the District Land Registrar Nakuru. It is No. 10 in the 1st Defendant's list of documents. The said letter stated as follows;

"We act for Endo Holdings Company Limited and we have instructions to write and address you as hereunder: -



22. That our said client was issued with a lease over the above parcel of land for a term of Ninety-Nine (99) years from the first of October 1992.
23. A search carried out by our client on 15/12/2005 revealed that one Peter Njuguna Trading as Njupe Enterprises was issued with a certificate of lease over the said parcel of land on 7th May, 2004".
24. The defendant relies on the case of Edward Moonge Lengasurang -vrs- Jame Lanaiyara & Another (2019) eKLR where Justice M.C Oundo held inter alia :-

“There is no doubt that the period of about fourteen years have lapsed from 2004 when the 1st Defendant was registered as proprietor of the suit land. The period of limitation starts running afresh whenever there are changes in the title as was held in the case of Kimani Ruchine & Anor —vs- Swift Rutherford & Co. & Another (1980) KLR 10”.

“Indeed I find that in the present case, that the Plaintiff has not proved that he dispossessed the 1st Defendant for a period of 12 years as it is clear that time started to run from 13th January 2004 when the 1st Defendant got registered as the proprietor of the suit land upto 20th August 2018 when the Plaintiff subsequently commenced legal proceedings that effectively stopped time from running which makes it about 14 years”.

25. The Honorable Lady Judge proceeded to strike out the suit with costs. The 1st defendant further relies on the case of Sohanaldurgadass Rajpur & Another —vs- Divisional integrated Development programmes Coltel (2021) eKLR Justice Nyukuli Observed;

“The question as to when the cause of action arose can be answered from the pleadings. The pleadings disclose the specific dates when the suit plots were sold to the Plaintiffs. Indeed, the Plaintiffs by their own admission, have stated in paragraph 12 of the plaint that the Defendant had failed to deliver title deeds to them for a period of over 12 years which resulted in loss of use, leading to loss and damage. A cause of action is a set of facts sufficient to justify a right to sue to obtain money, property or the enforcement of a right against another party. It also refers to a legal theory upon which a plaintiff brings suit. See Dickson Ngige Ngugi (Supra)”. Further, the 1st defendant argues that the suit is incompetent for lack of Company resolution to institute the suit.”

26. The 2nd defendant submits that the cause of action is based on fraud and therefore section 26 of the Limitation of Action Act applies. He submits that the plaintiff became aware of the cause of Action in 2005 when he carried out a search at the Land Registry and that this was cemented by the advocates letter in the year 2008 and therefore the plaintiff was aware of the state of the land in 2005. The suit was instituted on 4th March 2024, 28 years after instituting the succession proceedings and 19 years after conducting the official search.
27. The 2nd defendant further reiterates the 1st defendant’s argument that the suit was filed without a resolution or authority of the plaintiff. The 2nd defendant argues that the belated resolutions filed with the submission does not rectify the established principles of law. The resolution should have been filed with the plaint and not submissions. Moreover, that the verifying affidavit was filed without the authority of the plaintiff.

PLAINTIFFS SUBMISSIONS

PARA 28.



The plaintiffs submissions are guided by the leading authority on the issue of preliminary objections; *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969]EA 696 where A party raising preliminary objection must confine itself to points of law, it should be on the assumption that all the facts pleaded by the other side are correct and that it cannot be raised if any fact has to be ascertained.

29. Further, the plaintiff refers to the case of *Silvester Kaitany V Nyayo Tea Zones Development Corporation and another* (2020) e KLR where *Oraro -v- Mbaja* (2005) e KLR where it was held that: -

“Anything that purports to be a Preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”
30. According to the plaintiff, a Preliminary Objection should be based on disputed facts, the Defendants have disputed the facts herein. The subject preliminary objections herein are not the character and nature of a Preliminary Objection and on that ground alone it will be enough for this court to dismiss the said Preliminary Objections.
31. That notwithstanding, the plaintiff submits that the suit is not statute-barred. She refers to the case of *Peter Wekesa-vs-Peter Wangusi Wasike*, Court of Appeal at Eldoret, Civil Appeal No.62 of 2003, which was cited in approval in *Justus Tureti Obara v Peter Koipeitai Nengisoi* (2014) eKLR where the court stated that, in land matters, caution must be exercised to avoid determination of disputes on pure technicalities.
32. The plaintiff contends that if at all the plaintiff's suit fall under sections 4 and 7 of the [Limitation of Actions Act](#), then by dint of section 26 of the same Act, the court should dismiss the preliminary objection and allow the matter to proceed to trial. . . Since the issue raised by the plaintiff is fraud and the same is contested and would require to be ascertained through evidence, then it is not a matter on which a preliminary objection can be based.
33. Further the plaintiff relies on *Salim Mohamed Salim Tweshe v Khalid Salim Naaman & 5 others* (2020) e KLR which was cited with approval in *Delilah Ondari v Francis Ondieki Atandi* (2022) eKLR.
34. On whether the suit is incompetent for lack of a resolution the plaintiff relies on the case of *Leo Investments Ltd v Trident Insurance Company Ltd* (2014) eKLR where Odunga J. found that the mere failure to file the resolution of the Corporation together with the Plaint did not invalidate the suit and the associated himself with the decision of Kimaru J. in the case of *Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005* [2005] eKLR .The aforementioned precedent demonstrates that the absence of a company resolution, as argued by the 2nd Defendant, does not constitute an insurmountable bar to the Plaintiff's claim. Furthermore, that the Plaintiff has since filed a resolution vide a supplementary list of documents dated 17th May 24. Lastly, bearing in mind this fact that the subject preliminary objections herein are defective and the aforementioned issues the preliminary objections should be dismissed.

ANALYSIS AND DETERMINATION

35. I have considered the preliminary Objection, rival submissions and do find that suit parcel number LR Nakuru Municipality Block4/355 was acquired by the plaintiff on 8th February 1993. The property was sold to the 1st defendant on 5th June 2002 for a consideration of Kshs.800,000. The 1st defendant was issued with a certificate of lease on 7th May 2004. The 1st defendant disposed the property to the 2nd defendant on 13th May 2004 for a consideration of Ksh 1,400,000/=.



36. The plaintiff has brought this suit on 5th March 2024 approximately 19 years 10 months after the 1st defendant was issued with a certificate of lease and transferred the property to the 2nd defendant.
37. In the case of Edward Moonge Lengusuranga v James Lanaiyara & Another [2019] e KLR, it was held as follows;

“Section 7 of the [Limitation of Actions Act](#), provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the first Defendant having bought the suit land in the year 1999 (as per Paragraph 6 of the Plaint) and taken possession of the same, the Plaintiff herein could only seek to recover it from the 1st Defendants, but only if he did so within twelve years after the Sale Agreement.”

Section 7 of the [Limitation of Actions Act](#) 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.”

38. The purpose of the Law of Limitation was stated in the case of Mehta v Shah [1965] E.A 321, as follows;

“The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”

39. In Gathoni v Kenya Co-operative Creameries Ltd [1982] KLR 104, the Court of Appeal held as follows;

“...The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

40. A suit barred by limitation is a claim barred by law, hence by operation of law, the Court cannot grant the relief sought. In the case of Iga v Makerere University [1972] EA, the Court had this to say on the Law of Limitation;

“A Plaint which is barred by limitation is a Plaint barred by law. Reading these Provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the Court cannot grant the remedy or relief sought.”

41. Section 7 of the [Limitation of Actions Act](#) provides that an action for recovery of land may not be brought after the lapse of 12 years from the date the right of action accrued to the Plaintiff. The Plaintiffs therefore pleaded protection of Section 26 of the [Limitation of Actions Act](#) that allows extension of the limitation period where fraud is pleaded. Section 26 of the [Limitation of Actions Act](#) provide as follows;

“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.

42. It is clear that the plaintiff was aware of the fact that the property had exchanged hands on the 15/12/2005 when an official search was done and on the 29/9/2008 when his lawyer wrote to the Registrar of Lands Nakuru indicating that the property had exchanged hands fraudulently. It is clear that the plaintiff learnt of the alleged fraud in the year 2005 and therefore time started running in the year 2005. On the basis of section 7 of the *Limitation of Actions Act* Cap 22 Laws of Kenya, this court finds that the plaintiff had 12 years from the year 2005 to file the suit to recover the suit land but waited up to the 5th of March 2024, 19 years thereafter and precisely, 7 years after the expiry of the Limitation period.

43. I do find that the suit is time barred and cannot be entertained by the court. Moreover, the authority to sue was filed after the filing of the suit and therefore putting the cart before the horse. The director of the plaintiff ought to have received the authority to swear the verifying affidavit before the filing of the suit. This did not happen and therefore the suit is incompetent. The upshot of the above is that the preliminary objection is allowed and the suit is declared time barred and filed without the authority of the plaintiff and is hereby struck out with costs to the defendants.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAKURU THIS 26TH DAY OF JULY 2024.

A. O. OMBWAYO
JUDGE

