



Ngimu Farm Limited v Kariuki & 5 others (Environment & Land Case 28 of 2022) [2024] KEELC 5459 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5459 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 28 OF 2022**

LN GACHERU, J

JULY 25, 2024

BETWEEN

NGIMU FARM LIMITED PLAINTIFF

AND

PATRICK NJUGUNA KARIUKI 1ST DEFENDANT

FRANCIS MABU MURIGI 2ND DEFENDANT

**MURANG'A COUNTY TEACHERS CO-OP SOCIETY LIMITED 3RD
DEFENDANT**

MUYENGA 2040 SELF-HELP GROUP 4TH DEFENDANT

WALLACE MAINA MICHIRE 5TH DEFENDANT

REGISTRAR OF LANDS, MURANG'A 6TH DEFENDANT

RULING

1. The 1st Defendant/Objector filed a Notice of Preliminary Objection, dated 15th December, 2022, against the Plaintiff's Plaint dated 28th November, 2022 on averred that:
 1. That there is a serious joinder of causes of action by the Plaintiff which causes cannot be tried together.
 2. That the joinder of the Defendants in one suit shall prejudice the fair hearing of the 1st Defendant's case.
 3. That the suit is hopelessly defective as none of the annexed searches indicate ownership of the land by the Plaintiff.



4. That no transfer documents are annexed to the application to show any nexus between the Plaintiff and the Defendants. THAT the suit (Plaint) founded on fraud is barred under the *Limitation of Actions Act*.
 5. That the annexed search documents do not support the Plaintiff's claim as set out in the Plaintiff."
2. The Court Notice of Preliminary Objection was canvassed by way of written submissions.

1ST Defendant's Submissions

3. The 1st Defendant filed written submissions on 26th February, 2024, through the Law Firm of G.M. Muhoro & Co. Advocates, and submitted that from the Plaintiff's Plaintiff, the 1st to the 5th Defendants are listed as the registered proprietors of separate parcels of land, which parcels of land were registered on various dates spread out over a twelve (12) year period thereby, lacking a common question of law or fact to justify the joinder of the 1st to the 5th Defendants in the same suit.
4. The 1st Defendant/ Objector relied on the provisions of Order 1, Rule 3 of the Civil Procedure Rules to anchor the proposition that the 1st to 5th Defendants were improperly enjoined in the suit.
5. It was further submitted that in paragraph 8 of the Plaintiff, the Plaintiff failed to particularize its claims of fraud against the 1st to the 5th Defendants separately, and it is not clear who committed the alleged fraud. Further, it was argued that each of the transfers of land which are subject to challenge in the Plaintiff's Plaintiff must have had its own "modus operandi" and the Defendants cannot simply be lumped together without pleading the particular fraud committed by each of them.
6. The 1st Defendant also submitted that he acquired his parcel of land in year 2001, therefore, he cannot be party to fraudulent activity that was allegedly committed subsequently by other persons and prayed that the suit against him be dismissed.
7. Further reliance was placed on the provisions of Section 4(2) of the *Limitation of Actions Act*, to anchor the proposition that the Plaintiff's claim against the 1st Defendant is time-barred. He submitted that he was registered as the owner of the parcel of land in question on 23rd February, 2001, whereas the Plaintiff suit was filed on 22nd November 2022, which means that the two events are separated by about 20 years whereas Section 4(2) of the *Limitation of Actions Act*, stipulates that claims founded on tort, such as the present suit which alleges fraud, should be filed within three (3) years from the date of when the cause of action accrued.
8. It was further submitted that the Plaintiff failed to obtain the court's leave to extend the time pursuant to the provisions of Section 27(1) of the *Limitation of Actions Act*, which leave if secured would have allowed the Plaintiff to dispense with the provisions of Section 4(2) of the *Limitation of Actions Act*.

Plaintiff's Submissions

9. The Plaintiff filed written submissions on 5th March, 2024, through the Law Firm of Ombati Otieno Opondo & Awino Advocates, and raised (2) issues for resolution as follows:
 1. Whether the Preliminary Objection raises pure points of law?
 2. Whether the notice of Preliminary Objection is merited?
10. On the issue of the nature of a Preliminary Objection, the Plaintiff sought reliance in the decision of the Court in the cases of: *Mukisa Biscuits V West End Distributors Ltd (1969) E.A. 696*; *Henry Wanyama*



Khaemba V Standard Chartered bank Ltd & Another (2014) eKLR; George Kamau Kimani & 4 others V County Government of Trans Nzoia & Another (2014) eKLR; Quick Enterprises Ltd V Kenya Railways Corporation, Kisumu HCCC No.22 of 1999; United Insurance Co. Ltd V Scholastica A. Odera Kisumu HCCC No.6 of 2005.

11. In response to the 1st Defendant's claim that the present suit is statutorily-barred, reliance was placed in the holding of the Court in the case of Owners of Motor Vessel 'Lilian S' V Caltex Oil (Kenya) Ltd (1989) eKLR to buttress the argument that the claim raises an issue of the Court's jurisdiction.
12. On the issue of limitation, the Plaintiff submitted that the 1st Defendant failed to provide evidence that of the party from whom he allegedly purchased land parcel number Makuyu/kimorori/1599, in year 2001, such as a sale agreement, transfer documents or receipts in respect of the statutory payments made in that transaction.
13. The Plaintiff further submitted that upon carrying out an official search on land parcel number Makuyu/Kimorori/1599, the Plaintiff discovered that the 1st Defendant is registered as the proprietor thereof, whereas the said parcel of land was registered in the Plaintiff's name and reserved for use as a Coffee farm, with the implication that the 1st and 6th Defendants herein colluded to defraud the Plaintiff of the same.
14. Further, that the Plaintiff had particularized the fraud committed by the Defendants on paragraphs 6 to 9 of his Plaint, and the said fraud involving the 1st Defendant was discovered on 26th October, 2022, after undertaking an official search in respect of land parcel number Makuyu/Kimorori/1599.
15. Further, the claimed that pursuant to Section 26 of the *Limitation of Actions Act*, the cause of action accrues when fraud is discovered; therefore, the present suit is not statute-barred because three (3) years from the date of discovery of the fraud in question on 26th October, 2022, will lapse on 26th October, 2025. It was the Plaintiff's submissions that the period of limitation starts running afresh whenever discoveries of fraud are made.
16. The court has considered the argument in favour and against the instant Preliminary Objection and finds the issues for determination are;
 - I. Whether there is a mis-joinder of the Defendants in the suit?
 - II. Whether the Plaintiff's suit is statute-barred?
 - III. Whether 1st Defendant/ Objector is entitled to the Orders sought?

i) Whether there a mis-joinder of the Defendants in the suit?

17. According to the Black's Law Dictionary a Preliminary Objection is defined as follows:

“... an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary...”.

18. In the case of Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Limited [1969] EA 696, the Court reasoned as follows:

“...A preliminary objection is in the nature of what used to be a demurer 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 in the exercise of judicial discretion...”



19. The Plaintiff's sought the following reliefs against the Defendants vide the Plaint dated 28th November, 2022:

A declaration that the Plaintiff is the legal owner of the properties known as Makuyu/Kimorori/1599, 1601, 1625, 1629 and 1632.

- I. A declaration that the transfer of the suit properties to the Defendants and the issue of a land certificate on the same is null and void the same having been obtained by fraud. An order directed to the Land Registrar Murang'a to cancel the transfers of the suit premises to the Defendants and rectify the register by transferring the suit premises back to the Plaintiff.
- II. A permanent injunction restraining the Defendants whether by themselves their servants and/or agents or otherwise howsoever from trespassing on, offering for sale, leasing, mortgaging, charging, transferring or assigning and/or otherwise dealing with the properties known as Makuyu/Kimorori/1599, 1601, 1625, 1629 and 1632.
- III. General damages.
- IV. Costs and interests.
- V. Any other or further relief that this Honorable Court may deem necessary."

20. The test for determining the question of who is a necessary party in a suit was established in the case of *Werrot and Company Ltd & Others v Andrew Douglas Gregory & Others* [1998] eKLR, as follows:

"For determining the question of who is a necessary party there are two tests;

- i. there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and
- ii. it should not be possible to pass an effective decree in the absence of such a party."

21. Further, in the case of *Kizito M. Lubano v KEMRI Board of Management & 8 Others* [2015] eKLR, the Court declared as follows:

"The question should then be whether the current respondents are properly joined herein and if so whether such presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all the questions involved in the suit. There must be a demonstration by the Petitioner that there is a direct and real interest in the reliefs sought against the listed respondents and thus necessary parties herein..."

22. In the case of *Zephir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Maztagaro & Ezekiel Misango Mutisya* [2014] eKLR, the Court held that: -

"A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually



and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties."

23. Again, in the case of Lucy Nungari Ngigi & 128 others vs National Bank of Kenya Limited & Another (2015) eKLR, the Court held that:

"Joinder is to be refused if, it will lead to practical problems of handling existing cause of action together with one of the party being enjoined; it is unnecessary and finally if it will occasion unnecessary delays or costs on the parties in the suit."

24. From a reading of the reliefs sought by the Plaintiff herein against the Defendants in the suit, it is evident that the Plaintiff's claim concerns several parcels of land which previously used to belong to the Plaintiff, which parcels of land were transferred to the 1st to the 5th Defendants.

25. Consequently, this Court finds and holds that the subject-matter of the suit is the same as between the Defendants herein. Accordingly, it is the finding and holding of the Court that the Defendants were not wrongfully joined in the suit.

ii) Whether the Plaintiff's suit is statute-barred?

26. The 1st Defendant claimed to have acquired ownership of land parcel number Makuyu/Kimorori/1599, in year 2001 whereas the present suit was commenced by the Plaintiff in year 2022, therein rendering the suit statute barred pursuant to the provisions of Section 4(2) of the [Limitation of Actions Act](#).

27. In response to that objection, the Plaintiff asserted that it discovered the fraud complained of on 26th October 2022, therefore, the suit herein is not statute barred, according to the provisions of Section 26 of the [Limitation of Actions Act](#), since the instant suit was lodged on 15th December, 2022.

28. The Plaintiff having allege that it discovered fraud in the year 2022, the same year that the suit was filed, this Court holds and finds that the instant suit is not statute-barred.

29. Having carefully considered the argument for and against the instant Preliminary Objection, and the rival written submissions, this court further holds and finds that the instant Notice of Preliminary Objection dated 15th December, 2022, is not merited and accordingly, the same is dismissed entirely.

30. On the issue of costs, the court finds that Costs to abide the outcome of the suit.

31. Accordingly, the instant Preliminary Objection is dismissed. Let the suit be determined on merit.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANGA, THIS 25TH JULY 2024.

L. Gacheru

Judge

25/ 7/2024.

Delivered online in the presence of;

Joel Njonjo - Court Assistant

Mr Otieno for Plaintiff

N/A for 1st Defendant/ Objector



N/A for the Other Defendants

L. Gacheru

Judge

25/ 7/2024.

