



Naker & another (Suing in their Capacity as the Legal Representatives of the Estates of Kantaben Ramniklal Naker & Ramniklal Manishanker Naker) v Munene (Sued as Legal Representative of the Estate of James Flavian Chege Munene) & 3 others (Environment & Land Case E030 of 2023) [2024] KEELC 5389 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5389 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E030 OF 2023**

**SM KIBUNJA, J
JULY 24, 2024**

BETWEEN

**NEETA NAKER 1ST PLAINTIFF
PALLAVI NAHESHCHANDRA NAKER 2ND PLAINTIFF
SUING IN THEIR CAPACITY AS THE LEGAL REPRESENTATIVES OF
THE ESTATES OF KANTABEN RAMNIKLAL NAKER & RAMNIKLAL
MANISHANKER NAKER**

AND

**LIBEY NJOKI MUNENE (SUED AS LEGAL REPRESENTATIVE OF THE
ESTATE OF JAMES FLAVIAN CHEGE MUNEN)] 1ST DEFENDANT
SEALINE LIMITED 2ND DEFENDANT
THE LAND REGISTRAR, MOMBASA 3RD DEFENDANT
THE ATTORNEY GENERAL 4TH DEFENDANT**

RULING

1. The 2nd defendant moved the court through the notice of motion dated 30th January 2024 seeking for inter alia that the plaintiff's suit to be struck out for laches and being time barred. The application is premised on the nineteen grounds marked (i) to (XiX) respectively, on its face and supported by the affidavit Dharmesh Chandulal Shah, director, sworn on the 30th January 2024, in which he inter alia deposed that the suit land was registered in the name of the late James Flavian Chege Munene on the 8th May 1975; that the said James died on the 23rd December 2007 while Ramniklal Manshanker Naker died on the 10th April 1999; that the plaintiffs are guilty of laches for they rely in their claim on



- an agreement purportedly entered on 14 August 1991, between the late James and late Ramniklal to establish a joint ownership over the suit property; that the late Ramniklal did not sue the late James over the said agreement during their lifetimes; that the plaintiffs did not also sue the late James over the agreement during his lifetime; that the 2nd defendant bought the suit property at Kshs.90 million from the 1st defendant, and her late son James Chege Munene, who were legal representatives of the late James, without any objections being raised; that equity aids the vigilant and not the indolent and the suit should be struck out as it prejudices the 2nd defendant.
2. The application is supported by Libey Njoki Munene, the 1st defendant, through her affidavit sworn on the 11th March 2024, inter alia deposing that the suit property was acquired by her late husband in 1975; that the plaintiffs never lodged any claim about it by the time he died on the 23rd December 2007; that as the legal representative of her late husband's estate, they lawfully disposed the suit property to the 2nd defendant; that the plaintiffs suit is time barred.
 3. The plaintiffs opposed the application through the replying affidavit of Neeta Naker, the 1st plaintiff, sworn on the 28th February 2024, inter alia deposing that though the late James got registered with the suit property in 1975, the cause of action arose, sometimes in October 2015, when the illegality and fraud of the 1st and 3rd defendants removing the caveat lodged on 12th June 1998, by Ramniklal to protect his 50% interest was discovered; that the agreement of 1991 refers to the Mombasa land which was the only property the partnership between the late James and late Ramniklal had; that the 1st to 3rd defendants illegally and fraudulently transferred the suit property, including the half share of the late Ramniklal, to the 2nd defendant, without notifying Kantaben Ramniklal Naker, the executrix of the estate of the late Ramniklal Manshaker Naker; that the caveat was removed without following the procedure under section 57 of the Registration of Titles Act chapter 281 of Laws of Kenya, now repealed; that the late Kantaben Ramniklal Naker, as executrix of the estate of the late Ramniklal Manshaker Naker had sought to highlight the misdeeds of the 1st defendant and her son in Milimani H,C Succession Cause No. 333 of 2008, but was directed to follow that up with this court; that the late James and the late Ramniklal were long time friends and business partners who habitually undertook joint investments and owned properties including the suit property together; that the suit property was registered with the late James to hold in trust for himself and the late Ramniklal in equal shares; that the suit is not time barred, and the application should be dismissed with costs.
 4. Directions on filing and exchanging submissions were issued on the 20th February 2024, following which the learned counsel for the 2nd defendant and plaintiffs filed theirs dated the 22nd March 2024 and 30th April 2024 respectively, which the court has considered.
 5. The issues for the court's determinations are as follows:
 - a. When the cause of action arose and whether the plaintiffs' suit is statute time barred.
 - b. Who pays the costs?
 6. The court has carefully considered the pleadings filed, grounds on the application, affidavit evidence filed, submissions by the learned counsel, superior court's decisions cited thereon and come to the following determinations:
 - a. That the averments in the plaintiff's² plaint dated the 11th October 2023, through which this proceeding was commenced, is the primary document for the court's reference in determining the cause of action. At paragraphs 14 thereof, the plaintiffs avers that the late James was registered with the suit property on 8th May 1975 as trustee for self and the late Ramniklal in equal shares. At paragraph 15, the plaintiffs averred that the two deceased entered into an



agreement dated the 14th August 1991 on the division of shares, properties and assets that had been acquired during the lifetime of their partnership. I have perused the said agreement and the second “3(a) to (d)” are the relevant clauses to this suit.

- b. That 2nd defendant has posited that considering the undisputed fact that the late James got registered with the suit in 1975, then in terms of section 7 of the Limitations of Actions Act chapter 22 of Laws of Kenya, one challenging that registration, and ownership thereof needed to commence legal proceedings before the expiry of 12 years from that date. No such claim was filed against the late James within that period or by the time he died in 2007.
 - c. The 2nd defendant has also taken the position that if the claim is to be taken to be based on contract under the 1991 agreement, then the claim ought to have been commence before the expiry of six years thereafter, and none was filed.
 - d. That in answer to the claims of the suit being time barred, the plaintiffs have deposed, and submitted that the cause of action is determined by the time when the cause of action was discovered. That it was in late October 2015 to early 2016 that the plaintiffs discovered that the 1st to 3rd defendants had fraudulently procured the illegal and irregular removal of the caveat filed by the late Ramniklal against the suit land title, to protect his 50% share. That where there is fraud, time for purposes of limitation under section 26 of the *Limitation of Actions Act*, starts to run from the time of discovery of the fraud, which was sometimes in 2016. Indeed, at paragraphs 30 and 31 of the plaint do contain averments of fraud, attributed to the 1st to 3rd defendants. That from 2016 to the 2023 when this suit was filed, the period that had lapsed is about seven years which period is short of the twelve years for limitation in adverse claim to kick in, and above the six years for claims based on contracts. It is difficult to make a determination one way or the other at this stage as the facts are disputed.
 - e. That the presence of plaintiffs and the 1st defendant, who are legal representatives of the estates of the late Ramniklal and Late James, and the 3rd defendant, in this suit will definitely help the other parties in understanding and appreciating whether the suit property was registered in the name of the late James, as the outright owner or trustee for self and the late Ramniklal, and or a partnership was created over the said land under the 1991 agreement among others. It is only fair that the suit be allowed to proceed to hearing for the parties to present their evidence, be cross examined and thereafter the court to make a determination thereof if no settlement is arrived at by the parties by then. I therefore find no merit in the application.
 - f. Though under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya costs follow the events unless where for good cause ordered otherwise, in this matter, I am of the view that the nature of the claim demands costs to follow the outcome of the suit.
7. Flowing from the above determinations, the court finds and orders as follows:
- a. That the 2nd defendant’s application is without merit and is hereby dismissed.
 - b. The costs to abide the outcome of the suit.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 24TH DAY OF JULY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:



Plaintiffs: M/s Nyaga for M/s Ongaki

Defendants Mr. Koech for 2nd Defendant

Mr. Otual for 1st Defendant

M/s Rukiya for 3rd & 4th Defendants

Leakey– Court Assistant

S. M. Kibunja, J.

ELC MOMBASA.

