



Njuguna (Suing as the Personal Representative of John Mwangi Ndungu, Deceased) v Kirunyu & another (Environment & Land Case 60 of 2019) [2024] KEELC 13463 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13463 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 60 OF 2019**

**JG KEMEI, J
NOVEMBER 22, 2024**

BETWEEN

**FRANCIS NDUNGU NJUGUNA PLAINTIFF
SUING AS THE PERSONAL REPRESENTATIVE OF JOHN MWANGI
NDUNGU, DECEASED**

AND

**GEOFFREY KIMANI KIRUNYU 1ST DEFENDANT
LAND REGISTRAR, KIAMBU 2ND DEFENDANT**

JUDGMENT

1. The Plaintiff filed suit against the Defendants on the 3/4/2019 seeking the following orders;
 - a. A declaration that the Plaintiff is the legal and lawful owner of 0.45 acres within land known as KOMOTHAI/GATHUGU/1320 by virtue of being the administrator of the estate of the deceased.
 - b. A permanent injunction against the 1st Defendant his agents, servants and or employees not to enter into sell transfer charge cultivate subdivide lease and or in any way deal with the suit land.
 - c. An order directed at the Land Registrar, Kiambu to cancel the current title deed in the names of the 1st Defendant and cause to be hived 0.45 acres from the suit land and the same be registered in the names of the Plaintiff herein
 - d. Damages for trespass
 - e. Costs of the suit and interest



2. This case has been brought by the Plaintiff as a personal representative to the Estate of John Mwangi Ndungu alias Gatama Ndungu, deceased who was alleged to own 0.45 acres within the suit land. He averred that the Defendants colluded to fraudulently cause an entry to combine parcel Nos. 1271 and 1273 to create parcel 1320 and issue it in the name of the 1st Defendant. Particulars of fraud and negligence on the parts of the 1st and 2nd Defendants have been particularized under para 5 of the plaint.
3. The 1st Defendant despite service having been effected failed to enter appearance nor file a defence in the suit.
4. The 2nd Defendant denied the Plaintiff's claim and in particular of negligence levelled against it in its statement of defence dated the 5/5/2021. In addition it moved the Court by way of a Preliminary Objection dated the 1/10/2019 on the grounds that the suit against the 2nd Defendant is time barred having been filed after the lapse of the statutory limitation period provided under Section 7 of the Limitation of Actions Act and that being the case the suit is grossly incompetent and an abuse of the process of the Court. On the 14/12/2020 the Court directed that the Preliminary Objection be heard alongside the main suit.
5. PW1- Francis Ndungu Njuguna led evidence and relied on his witness statement dated the 2/4/2019 and produced documents in support of his claim marked as PEX 1-6. He stated that his brother, the deceased was the registered owner of parcel 225 measuring 6.2 acres. That he subdivided the original land and sold two parcels leaving 2.25 acres for himself in 1987 comprised in parcel 1250. Subsequent partitions led to 3 parcels namely 1271, 1272 and 1273 measuring 0.8, 1.0 and 0.45 acres respectively. That the parcel that belonged to the deceased was parcel 1273 measuring 0.45 acres while the 1st Defendant purchased parcel 1271 measuring 0.80 acres. That the 1st Defendant fraudulently combined parcels 1271 and 1273 to create parcel 1320. That the combination was without the consent of the family of the deceased.
6. In cross he stated that his brother sold a parcel of land to the 1st Defendant but died before the transaction was concluded. That his claim of 0.45 acres is within the suit land that was fraudulently combined with parcel 1271 to create the suit land. He added that he went to the suit land last in 2008 but he could not file the suit earlier because his wife was unwell. That his late brother never lived on the suit land as he had another parcel of land elsewhere. That he learnt from the district officer's office in the area that his brother sold the suit land to the 1st Defendant. That when the District Officer summoned the 1st Defendant he produced a title for the suit land which he noted included the 0.45 acres belonging to the deceased.
7. The 1st Defendant failed to appear for the hearing despite service.
8. The 2nd Defendant too elected not to call any witnesses despite witness summons having been issued against the Land Registrar who failed to attend Court for the hearing.
9. Parties filed written submissions which I have read and considered in the Judgement.
10. Key issues for determination are;
 - a. Whether the suit is time barred;
 - b. Whether the Plaintiff has proved fraud;
 - c. Costs of the suit.
11. The gist of the Preliminary Objection raised by the 2nd Defendant is that the suit is time barred on the grounds that the cause of Action arose in 1988 and the suit was filed in 2019, way of out of time.



12. The Plaintiff has explained that he only went to the suit land in 2008 and was unable to file the suit since he was busy caring for his wife who was unwell. He however did not lead any evidence to show the period within which his wife was unwell and or when he discovered the alleged fraud.
13. The question of Preliminary Objections are now settled. In the case of Quick Enterprises Ltd Vs. Kenya Railways Corporation, Kisumu HCCC No.22 of 1999, the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”
14. Similarly in the United Insurance Co. Ltd Vs. Scholastica A. Odera, Kisumu HCCA No.6 of 2005, the Court held that:-

“A Preliminary Objection must be based on a point of law which is clear and beyond doubt and Preliminary Objection which is premised on facts which are disputed cannot be used to determine the whole matter as facts must be precise and clear to enable the Court to say the facts are not contested or disputed.”
15. It is clear that for a Preliminary Objection to succeed, it must be a pure point of law; capable of disposing the suit in its finality without the Court exercising discretion or ascertaining facts. In the circumstances therefore the Court holds that time bar is a pure point of law and if founded it will oust the jurisdiction of the Court from determining the matter before it.
16. The next question is whether the objection is merited. 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 12years from the date on which the right of action accrued to him and if it first accrued to some person through whom he claim to that person”
17. The purpose of the Law of Limitation was stated in the case of Mehta Vs Shah [1965]E.A 321 where the Court held 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.”
18. It is trite that the Law of Limitation is aimed at protecting Defendants from unreasonable delay in bringing suits against them. An aggrieved party is expected to move with reasonable speed and take reasonable steps to protect his interest. See the decision in Gathoni Vs. Kenya Cooperative Creameries Ltd [1982] eKLR.
19. In this case the Plaintiff’s claim is centered around the entries in the Register (green card) and in particular parcel 1250 in which the deceased sold 0.8 acres (parcel 1271) to the 1st Defendant and retained parcel 1273 measuring 0.45 acres for himself. This was in 1988. The cause of action therefore arose in 1988. The current suit having been filed in 2019 was brought 31 years later. The Plaintiff alluded to his wife having been unwell however no evidence was led to show the Court that he suffered a disclosed disability that prevented him from filing the suit within the statutory period.



20. From the above the Court finds that the suit is time barred.
21. The answer to the above issue is sufficient to determine the suit. However even if the Court were to be wrong, the suit would still suffer the same fate on the issue of fraud.
22. Fraud is defined at in the Black's Law Dictionary as follows;-

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

23. As regards standard of proof of fraud, the law is quite clear. In R. G. Patel Vs. Lalji Makanji [1957]EA 314, the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

24. The gist of the Plaintiff's case is that part of the land measuring 0.45 acres was fraudulently combined with parcel 1320. The Plaintiff however failed to annex the title for the suit land and therefore in the absence of the title for parcel 1320, the Court finds that there was no proof to show that; (a) The suit land contained parcel 0.45 acres and (b) The 1st Defendant acquired it fraudulently. This would have been made possible by adducing documentary evidence to support the claim of the Plaintiff. It is trite that the Court cannot infer fraud as fraud is determined based on evidence, which evidence the Plaintiff has proffered none.
25. For the above reason the Court finds that the Plaintiff has failed to proof fraud.
26. Ultimately the Plaintiff's case is dismissed. I make no orders on costs.
27. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 22ND DAY OF NOVEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Gachoka for the Plaintiff

1st and 2nd Defendants - Absent

Court Assistant – Phyllis

