



Karaya & another (Sued as the Legal Representatives of the Estate of James Karaya Kiragu – Deceased) v Gusii Mwalimu Investment Co. Ltd & 4 others (Environment & Land Case E006 of 2022) [2023] KEELC 318 (KLR) (19 January 2023) (Ruling)

Neutral citation: [2023] KEELC 318 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE E006 OF 2022**

**YM ANGIMA, J
JANUARY 19, 2023**

BETWEEN

JAMES KIRAGU KARAYA & THOMAS KIRAGU KARAYA (SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JAMES KARAYA KIRAGU – DECEASED) PLAINTIFF

AND

GUSII MWALIMU INVESTMENT CO. LTD 1ST DEFENDANT

DAVIS OGEKA (CHAIRMAN) EVANS ATEI MASIRA (SECRETARY) JAMES GEOFFREY OMWOCHA (TREASURER) (SUED AS OFFICIALS OF GUSII MWALIMU INVESTMENT CO. LTD) 2ND DEFENDANT

DAVIS NYAMU NJOKA 3RD DEFENDANT

NDUTI TEA FACTORY COMPANY LIMITED 4TH DEFENDANT

THE LAND REGISTRAR, LAIKIPIA WEST SUB-COUNTY ... 5TH DEFENDANT

RULING

A. Introduction

1. By a plaint dated May 10, 2022 the plaintiffs sued the defendants seeking the following reliefs against the Defendants jointly and severally:
 - a. The cancellation of entries 2, 3, 4, 5, 6, 7, 8, 9 and 10 in the register for LR No. Marmanet/North Rumuruti Block 2/1289 (Ndurumo) measuring approximately 38.02 ha, and replacement of the same with the names of James Karaya Kiragu (deceased) the originally entitled owner and a fresh title deed be issued in that regard.



- b. General damages and exemplary damages for fraud and interest thereon at court's rate.
 - c. Costs of the suit and interest thereon at the court's rate.
2. The plaintiffs sued in their capacity as administrators of the estate of their deceased father James Karaya Kiragu (the deceased). They pleaded that the deceased was a member of Laikipia West Farmers (Ndururumo) Ltd during his lifetime and as such was entitled to Title No. Marmanet/North Rumuruti Block 2/1289 (Ndururumo) (the suit property). It was further pleaded that due to fraud and collusion on the part of the 1st and 5th defendants the suit property wrongfully registered in the name of the 1st defendant which transferred it to the 2nd defendant. It was further pleaded that the 2nd defendant later on sold the suit property to the 3rd defendant who ultimately transferred it to the 4th defendant who was the current registered proprietor.
 3. Simultaneously with the filing of the suit, the Plaintiffs filed an application for interim orders dated May 10, 2022 pending the hearing and determination of the suit. Before the application could be heard, however, the 3rd defendant raised a preliminary objection to the application and the entire suit seeking to have it struck out with costs.

B. The 3rd Defendant's Preliminary Objection

4. By a notice of preliminary objection dated June 15, 2022 the 3rd defendant raised the following objections:
 - a. That the instant suit and interlocutory application herein are statute barred as per the provisions of section 7 of the *Limitation of Actions Act*, cap. 22 of the Laws of Kenya, the Plaintiffs having discovered the alleged fraud during the administration of their deceased father's estate in 1994.
 - b. That the Plaintiff's alleged proprietary interest in the suit property, if any, has in addition been extinguished as per the provisions of section 17 of the *Limitation of Actions Act*, cap 22 of the Laws of Kenya and therefore the plaintiffs lack any cause of action.
 - c. That it reasonably follows that there is no competent suit before this honourable court and the current suit, as drawn, is void ab-initio.

The 3rd defendant consequently urged the court to strike out or dismiss the Plaintiff's suit and application with costs.

C. The Plaintiff's Response

5. In apparent response to the preliminary objection, the plaintiffs filed a supplementary affidavit sworn by the 1st plaintiff on September 30, 2022. The Plaintiffs contended that although they were issued with letters of administration for the estate of the deceased in 1994, they did not discover the existence of the suit property and the alleged fraud until 2021 when they stumbled upon a friend of the deceased who was also a member of Laikipia West Farmers Ltd. The Plaintiffs therefore asserted that the limitation period could only start running against them from the date of discovery of the alleged fraud and not from the date of issuance of the letters of administration.

D. Directions on submissions

6. When the matter was listed for directions it was directed that the preliminary objection shall be canvassed first. It was also directed that it shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions.



The record shows that the 3rd defendant filed its submissions on July 19, 2022 whereas the plaintiffs filed theirs on October 3, 2022.

E. The issues for determination

7. The court has considered the 3rd defendant's notice of preliminary objection dated June 15, 2022, the plaintiffs' grounds of opposition thereto as well as the affidavits and material on record. The court is of the opinion that the main question for determination is whether or not the suit is time barred under the *Limitation of Actions Act* (cap.22).

F. Analysis and Determination

8. The 3rd defendant contended that the plaintiffs' claim for recovery of the suit property on behalf of the estate of the deceased was time-barred under section 7 of the *Limitation of Actions Act* (cap.22) because more than 28 years had lapsed since the plaintiffs were issued with letters of administration for the estate of the deceased in 1994. It was submitted that the Plaintiffs discovered the alleged fraud during the administration of the estate in 1994 hence the suit was time barred under the law.
9. The 3rd defendant relied upon section 7 of the *Limitation of Actions Act* and the cases of *Bosire Ongero v Royal Media Services* [2015] eKLR and *Mukuru Munge v Florence Shingi Mwawana and 2 others* [2016] eKLR in support of the preliminary objection and urged the court to allow the same and strike out the suit with costs.
10. The plaintiffs, on the other hand, submitted that they only discovered fraud on the part of the defendants in 2021 and not in 1994 when they were issued with letters of administration. They submitted that under section 26 of the *Limitation of Actions Act* time does not begin to run until the discovery of the Defendant's fraud. They cited the cases of *Edward Moonge Lesunguranga v James Lanaiyana and another* [2019] eKLR and *Kenya Ports Authority v Timberland (K) Ltd* [2017] eKLR and urged the court to dismiss the preliminary objection with costs.
11. Section 7 of the *Limitation of Actions Act* stipulates 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.”
12. The court is of the opinion that even though a preliminary objection may be taken to a suit on the basis of the *Limitation of Actions Act*, the same cannot properly be raised or adjudicated upon where the date on which the cause of action arose is disputed. It is evident that there is a dispute between the plaintiffs on one hand, and the 3rd defendant on the other, as to when the right of action accrued. There is also a dispute as to when the plaintiffs discovered the alleged fraud. Whereas the plaintiffs contended that they became aware of the existence of the suit property and the alleged fraud in its alienation in 2021, the 3rd defendant contended that they must have been aware of the alleged fraud in 1994 when they were issued with letters of administration.
13. In the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 it was held (per Sir Charles Neubold P) that:

“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.”

14. The court is thus of the opinion that the 3rd Defendant’s preliminary objection ought to fail for at least two reasons. First, under section 7 of the Limitation of Actions Act there is a dispute as to when the right of action arose. Second, there is a dispute on a matter of fact as to when the Plaintiffs discovered the alleged fraud in terms of section 26 of the Limitation of Actions Act. In the case of Kenya Ports Authority -vs- Timberland (*supra*) the Court of Appeal held, inter alia, that:

“It is the finding that the appellant’s conduct was fraudulent that provided the basis for the learned judge’s holding that the respondent’s delay was cured under section 26(b) of the Limitation of Actions Act which we have earlier set out. That provision expressly states that a prescribed period of limitation for a cause of action does not begin to run where the right of action is concealed by the fraud of the Defendant or his agent until the Plaintiff has discovered the fraud. Our reading of the same does not at all suggest that the limitation period has to be one prescribed by the Limitation of Actions Act alone and so the exception or extension triggered by fraud would apply to any time statutory limitation wherever prescribed. Indeed, that much is clear from Section 31 of the Limitation of Actions Act...”

G. Conclusion and Disposal Order

15. The upshot of the foregoing is that the court finds no merit in the 3rd defendant’s preliminary objection. The question of when the Plaintiffs’ right of action accrued is a disputed question of fact which can only be established at the trial. Accordingly, the court makes the following orders for disposal of the preliminary objection:
- a. The 3rd defendant’s notice of preliminary objection dated June 15, 2022 is hereby overruled.
 - b. Costs shall be in the cause.

It is so ordered.

RULING DATED AND SIGNED AT NYAHURURU THIS 19TH DAY OF JANUARY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Maina Kairu holding brief for Mr. Mathea for the Plaintiff

N/A for the 1st Defendant

Mr. Mose for the 2nd Defendant

Mr. Tebino for the 3rd defendant

Ms. Lucy Mwai for the 4th Defendant

Y. M. ANGIMA

JUDGE

