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| Case Number: | Land Case 21 of 2011 |
| Date Delivered: | 23 Apr 2018 |
| Case Class: | Civil |
| Court: | Environment and Land Court at Kitale |
| Case Action: | Ruling |
| Judge: | Mwangi Njoroge |
| Citation: | Ebby Musimbi Mwenesi v Saul Egunza Bunyali & 2 others [2018] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | Civil |
| History Magistrates: | - |
| County: | Trans Nzoia |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Application dismissed |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |
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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 21 OF 2011

ESTATE OF JOHN MWENESI ADULU *Represented by*

EBBY MUSIMBI MWENESI.....PLAINTIFF/RESPONDENT

VERSUS

SAUL EGUNZA BUNYALI

EBRAHIM OMWENYI AMBWERE

HARRY CITY AMBERE.....DEFENDANTS/APPLICANTS

RULING

1. By an application dated 10/1/2018 the defendants apply for orders that this suit be struck out with costs for being time barred.
2. The application is supported by the affidavit of the 2nd defendant sworn on 10/1/2018. In it, he states, on the basis of advice by his advocates on record, that the right of action in this matter accrued in the year 1995, 16 years before this suit was filed, and that this period is in excess of the 12 year limitation period prescribed for actions for recovery of land. The suit, he states should be struck out.
3. The application is opposed. The plaintiff filed her sworn affidavit dated 13/1/2018. She avers that she only discovered the fraud that she alleges in the plaint in the year 1999 and that the suit was filed within the limitation period. She states that the evidence at the hearing of the main suit will, if taken establish this fact. She denies that the cause of action accrued to her in the year 1995.
4. The defendants filed their submissions on the application on 9/2/2018.
5. I have considered the two sets of submissions. The issue for determination in this application is whether the plaintiff's suit is time barred by statute. The provisions of *Section 7* of the *Limitation of Actions Act* prohibit the institution of any action after the expiry of 12 years from the date of accrual of the cause of action.
6. It is true that the plaintiff's claim is under "fraud". The defendant points to a letter dated 26/2/1999 which was written by the Director of Land Adjudication to the Land Registrar Bungoma and the Chief Land Registrar stating that they have confirmed that there was apparent irregularity or fraud in the transfer of the suit land to the first defendant and subsequently to the 2nd and 3rd defendants. However the letter was not copied to the plaintiff and, it is submitted by the plaintiff that the issue of when he received the letter is a matter of evidence.
7. The position of the defendants is, however, different. The defendants aver that by mere fact of the existence of that letter the plaintiff must have been aware of the fraud on or before the date of the letter. They state then that this suit should have been filed within 12 years from the date 26/2/1999, that is on or before 26/2/2011. This suit was filed on 7/3/2011.
8. I find that the defendants have not established in this application that the plaintiff knew of the fraud before 26/2/1999. I also find that the defendants have not established the date on which the plaintiff received the letter dated 26/2/1999. I agree with both parties that where fraud is pleaded time begins to run from the date of the discovery of the fraud. The letter dated 26/2/1999 confirmed

there was fraud. However that letter though emanating from the very authorities that were confirming that according to their records there was possibility of fraud, was not addressed to the plaintiff. No matter how much one looks at it, it does not look plausible that the plaintiff can be held to have discovered the fraud before receipt of the letter dated 26/2/199.

9. In the case of *Justus Tureti Obara -vs- Peter Koipeitai Nengison* cited by the plaintiff, the court stated as follows:-

“The defendant’s last objection was based on the issue of time bar. The defendant argued that the plaintiff’s suit is based on fraud and that since the alleged acts of fraud were committed between 18th October, 1994 and 2nd March, 2001, the plaintiff’s suit should have been brought within 3 years from those dates when the cause of action accrued. The defendant contended therefore that the plaintiff’s suit that was filed on 26th June, 2011 was filed way out of the prescribed limitation period. I am in agreement with the plaintiff’s submission that the plaintiff’s claim is for the recovery of the suit property from the defendant and as such the limitation period for such a claim is 12 years as provided for in Section 7 of the Limitation of Actions Act, Cap. 22, Laws of Kenya. I would wish to point out further that the plaintiff’s case although for recovery of land is based on fraud. The proviso to Section 26 (a) of the Limitation of Actions act, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the defendant or his agent, the period of limitation does not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the plaintiff’s herein discovered the fraud alleged against the defendant is a matter to be ascertained at the trial. The defendant’s objection based on time bar also fails.

10. In the case of *Philip Kimutai Langat -vs- John Kibet Maina, Kericho High Court Civil Case 100 of 20105* also cited by the plaintiff the court had this to say:-

“The issue for determination by this court is whether the plaintiff’s suit is time barred. The plaintiff pleaded that the defendant fraudulently transferred the suit land to himself in 1976. He further averred that the defendant fraudulently subdivided the suit land in 2001 without following the requisite procedure of seeking the consent of the Land Control Board. The plaintiff’s suit is based on fraud. Whereas I agree with the defendant that any suit for the recovery of land ought to be filed within twelve years as provided for by Section 7 of the Limitation of Actions Act. Section 26 of the said Act provides that where fraud, mistake or ignorance of material facts is pleaded time will run from the moment such a litigant discovered the fraud or mistake. In the present case, the plaintiff did not plead when he discovered the fraud. It is further evident from the plaint that the plaintiff has brought the suit on behalf of his father Kiplangat Maina who has donated to him a power of attorney. He did not annex the said power of attorney to the plaint.

However, I have taken into consideration that the subject matter of the suit is land. The Court of Appeal has directed courts to hear and determine matters dealing with disputes involving land, in so far as possible, on its merits and not on technicalities. In the present case, the fact that the plaintiff did not plead the time which he discovered the fraud is not fatal to his case. He can plead such a time after amending his pleadings. As earlier stated in this ruling, the plaintiff’s suit is predicated on allegations of fraud. It is imperative that the plaintiff be allowed to ventilate his case by establishing or otherwise the allegations of fraud against the defendant”.

11. I am in agreement with the two decisions cited above. It will be a matter of evidence at the hearing as to whether the suit was filed within time or not. This court is inclined to allow the suit to proceed to hearing so that such evidence may be adduced.

12. I therefore find that the application dated 10/1/2018 has no merits and it should fail. I therefore dismiss the same with costs to the plaintiff.

Dated, signed and delivered at Kitale on this 23rd day of April, 2018.

MWANGI NJOROGI

JUDGE

23/4/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bisonga for the Defendant

N/A for the Plaintiff

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

23/4/2018



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