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Case Action:	Ruling
Judge:	Jane Muyoti Onyango
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Advocates:	-
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Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELC CASE NO. 411 OF 2014

NYAKUNDI OKERIO1ST PLAINTIFF

OTUNDO OKERIO2ND PLAINTIFF

VERSUS

ELIJAH SOKOBE OBOT.....1ST DEFENDANT

JOSEPH ANGWENYI SURE.....2ND DEFENDANT

GLADYS MATOKE 3RD DEFENDANT

RULING

INTRODUCTION

1. By a Plaint dated 23rd October, 2014 and amended on 6th November, 2019 the Plaintiff filed a suit against the Defendants contending that they were sons of the late **OKERIO NYANGAU**, whereby the deceased was the registered owner of **L.R WEST KITUTU/BOGUSERO/975**.
2. It was the Plaintiff's case that sometimes in the year 1998, their deceased father sold a portion of the said property to one John Bosco. After the said sale, the property **LR WEST KITUTU/BOGUSERO/975** was subdivided into **LR WEST KITUTU/BOGUSERO/3532** and **LR WEST KITUTU/BOGUSERO/3533**.
3. They also contended that **LR WEST KITUTU/BOGUSERO/3532** was subsequently registered in the name of their late father who accordingly subdivided it equally among his sons.
4. It is the Plaintiff's further contention that sometime in the year 2008, the Defendants encroached into the property, known as **LR WEST KITUTU/BOGUSERO/3532** and caused the same to be sub divided into two namely **LR WEST KITUTU/BOGUSERO/4926** and **4927** whereby they were registered as the owners of the former.
5. They pleaded fraud on the part of the Defendants and contended that they had filed a suit against John Bosco Mboga regarding a boundary dispute.
6. They therefore prayed for an order of cancellation of the title documents in respect of **LR WEST KITUTU/BOGUSERO/4927** so that the same could revert to the original parcel **LR WEST KITUTU/BOGUSERO/3532** in the names of the Plaintiffs.
7. The Defendants on the other hand filed their Amended Statement of Defence on 17th April, 2021 denying the Plaintiff's claim. The 2nd Defendant pleaded that he was the registered owner of **LR WEST KITUTU/BOGUSERO/3152**, the 4th Defendant pleaded that he was the registered owner of **LR WEST KITUTU/BOGUSERO/6568** whereas the 5th Defendant pleaded that she was the registered owner of **LR WEST KITUTU/BOGUSERO/7006**.
8. In the Amended Statement of Defence, the Defendants at paragraph 16 therein raised a Preliminary Objection on grounds that the suit was barred by the provisions of section 4 of the Limitation of Actions Act Chapter 22.

9. The parties agreed to canvass the Preliminary Objection by way of written submissions. The Defendants filed their written submissions on 18th November, 2020 while the Plaintiff filed his submissions on 30th November, 2020.

THE RESPONDENT'S SUBMISSION

10. Learned counsel for the Defendants submitted that from the Plaintiff's averments, it was apparent that by the year 2008 they were aware of the transfer and registration of LR WEST KITUTU/BOGUSERO/4927 in the name of a third party and that for clarity purposes the Defendants had all conceded that none of them was the registered owner of the said parcel of land. Counsel submitted that the Plaintiff had also averred that between 2006 and 2008, there was a suit concerning the suit property in court and in the Land Dispute Tribunal. Counsel therefore argued that from the Plaintiffs' own averments, it was clear that they were as early as 2006 aware of the process that resulted into the emergence of LR WEST KITUTU/BOGUSERO/4927 and the transfer of the same to a third party yet they waited for 8 years to seek cancellation of the said titles. Counsel argued that the Plaintiff had up to 2009 to lodge a suit against the third parties for fraudulent transfer of the suit property namely, LR WEST KITUTU/BOGUSERO/4927. He therefore contended that the instant suit was statute barred by dint of section 4 of the Limitation of Actions Act which is to the effect that an action in tort may not be brought after the end of 3 years after the cause of action accrued. He submitted that even though section 26 of the Act provides for extension of the limitation period in case of a fraud, whereby time starts running from time of discovery of the alleged fraud, the plaintiff cannot seek protection from it. This is because they demonstrated that they were aware of the alleged fraud from the moment the transfer is alleged to have taken place. Counsel also submitted that besides the said provisions of the Act, the Plaintiff never sought leave of the court to file the suit out of time. Counsel relied on the cases of **Mwangi Kanyingi v Francis Kariuki Kanyingi and another (2008) eKLR**, **Javed Abdul Rahman and another Vs Benard Alfred Sambu and another CACA NO. OF 2001** and **Patrick S.K Kimili V John Ngugi and another (2015) eKLR** and urged the court to consider them in its decision.

THE PLAINTIFF SUBMISSIONS

11. Learned counsel for the Plaintiffs on his part submitted that under section of 26 of the Limitation of Actions Act Cap 22 the period of limitation only starts to run from the time the fraud is discovered or ought to have been discovered. He submitted that the Plaintiffs had not met the requirement set out in the case of **Mukisa Biscuit Manufacturing Co. limited vs West End Distributors limited (1969) EA 696** where it was stated that;

A preliminary objection raises a point of law which is argued on assumption that all facts pleaded by the other side are correct. It cannot be raised if any of the fact has to be ascertained or if what is sought is the exercise of judicial discretion,

12. He further argued that LR WEST KITUTU/BOGUSERO/3532 was obtained through fraud and was subdivided to give rise to 4926 and 4927. There was need for evidence to be presented in court in order to unearth the truth.

ISSUES FOR DETERMINATION

13. Having considered the Preliminary Objection filed by the Defendants, the written submissions filed herein, I deduce the following to be the main issues for determination:-

a) Whether the Preliminary Objection is properly before this court

b) Whether the suit is barred by the provisions the Limitation of Actions Act.

ANALYSIS AND DETERMINATION

a) Whether the Preliminary Objection is properly before this court.

14. The Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696** laid down the principle as to what constitutes a preliminary objection. A preliminary objection to be valid must be on a point of law and must be founded on facts that are not in dispute. If evidence would require to be adduced to establish the facts, then a preliminary

objection would not be sustainable. In the *said case* Law, JA stated as follows: -

“so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

15. In the present matter the Defendants have hinged their preliminary objection on the fact that the plaintiffs cause of action was time barred and that the suit was brought after the expiry or lapse of the period of limitation. The preliminary objection is on a point of law and the court is satisfied it has been properly and validly taken. The question whether or not the plaintiffs’ suit is barred by statute on account of limitation goes to the jurisdiction of the court to entertain the suit. If the suit is statute barred on account of limitation, then the court lacks the jurisdiction to entertain the same. If the court were to proceed to hear and adjudicate the suit when it lacked the jurisdiction, its decision would be null and would be voidable.

Whether the suit is barred by the provisions the Limitation of Actions Act.

16. At the heart of defendants’ Preliminary Objection and the opposition thereto is contestation on the interpretation and application of *Sections 4 and 26* of the **Limitation of Actions Act (Cap 22 of the Laws of Kenya)**.

17. Section 4 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya prescribes the limitation period for the institution of suits in regard to various causes of action. In regard to actions founded on contract the limitation period is six years whereas in regard to actions founded on tort the limitation period is three years.

18. *Section 26* of the **Limitation of Actions Act** on the other hand provides for an extension of the limitation of time in case of fraud or mistake wherein time starts running at the point when the fraud is discovered by the plaintiff. The section provides thus:

“Where, in the case of an action for which a period of limitation is prescribed, either:

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”

19. Before determining whether this suit is statute barred by dint of section 4 of the Limitation of Actions Act and whether the plaintiff can seek refuge in section 26 of the same Act, it will be important to first and for most to establish the main cause of action in the suit. In the case of **Edward Moonge Lenguuranga vs James Lanaiyara & another (2019) eKLR**, the court defined a cause of action as a set of facts sufficient to justify a right to sue to obtain property or enforcement of a right against a party. The court defined a cause of action to be the legal theory upon which a Plaintiff brings a suit. That being the case, it is important to look at the averments and the prayers contained in the plaint to determine the cause of action raised by the Plaintiff.

20. It is clear from the Amended Plaint that the Plaintiffs’ main cause of action against the Defendants is that of **fraud**. The same is clearly highlighted under paragraph 7 of the Amended Plaint. In the said paragraph the Plaintiff avers that towards the end of 2008, the Defendants encroached upon their land. The 1st Defendant (who in the Amended Plaint has been removed probably because they had sued him posthumously) fraudulently subdivided parcel LR WEST KITUTU/BOGUSERO/3532 into LR WEST KITUTU/BOGUSERO/4926 and LR WEST KITUTU/BOGUSERO/4927 leaving parcel No. 4926 for the Plaintiff while he caused 4927 to be transferred to himself in 2010. They went on to particularise the elements of fraud as follows:

a) The 1st Defendant through foul means and concealment subdivided land parcel 3532 without their consent.

b) The 1st Defendant did not obtain land consent from the Land Control Board.

- c) The 1st Defendant did not obtain transfer of land from them.
- d) The 1st Defendant sub-divided the land on the pretext that he was the registered owner.

21. Besides the above averments, the Plaintiffs avers in paragraph 10 of the Amended Plaint that in 2008 vide Kisii CMCC NO 654 of the 2008 they filed a suit against on Bosco Mbogo regarding the boundary between parcels No.3532 and 3533. The court directed that the Surveyor visits the suit property to establish the boundary. They aver that the Defendants took advantage of the Surveyor's visit and subdivided parcel No. LR WEST KITUTU/BOGUSERO/3532 resulting into the current subdivisions.

22. From the above averments of the Plaintiff, it appears that at the suit property that is the subject of this suit is LR WEST KITUTU/BOGUSERO/4927 and its subsequent subdivisions. No wonder, the Plaintiff in one of their prayers prays for preservation of parcel 4926 pending the hearing and determination of the suit. From the exhibits before the court, it's apparent that parcel 4927 has since been registered in the names of the 2nd, 3rd 4th and 5th Defendants.

23. A close examination of the above averments by the Plaintiff, it clearly shows that the cause of action which I have established to be fraud arose in 2008. This means that the suit has been filed 6 years after the alleged fraudulent subdivision of parcel 3532 into parcels 4926 and 4927. It is clear therefore that the Plaintiff ought to have instituted a claim against the 1st defendant by 2011 as provided for under section 4 (1) of the Limitation of Actions Act.

24. The next issue is whether the Plaintiff can take refuge in the provisions of section 26. I agree with counsel for the Defendants that the Plaintiffs from their own averments had full knowledge of the alleged fraud and therefore they cannot convince this court that time started running in 2014 when they filed the suit. Further the Plaintiffs having decided to amend the Plaint to remove the 1st Defendant who was posthumously sued, they failed to demonstrate how the other Defendants were party to the fraud. Furthermore, the 2nd 4th and 5th Defendants under provision (i) and (ii) of section 26 of the Limitation of Actions Act would be absolved of any wrong doing, as they were not party to any fraudulent dealing affecting the suit property. The provision to section 26 provides as follows: -

Provided that this section

*i) in the case of fraud, has been purchased for valuable consideration by a person **who was not a party to the fraud** and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or*

(ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made

CONCLUSION

25. In the final result it is my finding that the Preliminary Objection is well founded. I therefore uphold it. Consequently this suit is dismissed as it is not sustainable on account of being statute barred under the Limitation of Actions Act. I order the suit struck out with costs to the 2nd, 4th and 5th Defendants.

DATED, SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF APRIL 2021.

J.M ONYANGO

JUDGE



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