



REPUBLIC OF KENYA



**Koei (Suing as the Administrator of the Estate of Kipro Arap Busienei – Deceased) v Agina & 6 others (Environment & Land Case 48 of 2021) [2023] KEELC 22629 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 22629 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 48 OF 2021**

**E ASATI, J  
MARCH 16, 2023**

**BETWEEN**

**TABELGA KOIE ALIAS TABELGA KOIE BUSHENEI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF KIPROP ARAP BUSIENEI – DECEASED) ..... PLAINTIFF**

**AND**

**WESLEY AYEGO AGINA ..... 1<sup>ST</sup> DEFENDANT  
JOSEPH OLUOCH AGANGE ..... 2<sup>ND</sup> DEFENDANT  
LAWRENCE KIPKORIR NGENO ..... 3<sup>RD</sup> DEFENDANT  
GEORGINAH MUTHONI ..... 4<sup>TH</sup> DEFENDANT  
THE DISTRICT LAND REGISTRAR, NYANGO ..... 5<sup>TH</sup> DEFENDANT  
THE HON. ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT  
DON OGALLOH RAROR ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of two preliminary objections raised in this suit.
2. The first preliminary objection was raised by the 2<sup>nd</sup> Defendant vide the Notice of Preliminary Objection dated 7<sup>th</sup> November, 2022 through the firm of Sala and Mudany Advocates. The Preliminary Objection is based on the grounds that the court lacks jurisdiction to hear and determine the matter because: -
  - a. pursuant to the provisions of Section 7 of *the Civil Procedure Act* (Cap 21), this matter is res Judicata and an abuse of the court process as against the 2<sup>nd</sup> Defendant.



- b. pursuant to the provisions of Section 38 of the *Limitation of Actions Act*, this court lacks jurisdiction to hear and determine this matter.

He prayed that the suit be struck out with costs.

3. The second Preliminary Objection was raised by the 7<sup>th</sup> Defendant vide the Notice of Preliminary Objection dated 17<sup>th</sup> November, 2022 through the firm of Owiti, Otieno & Ragot Advocates. The Preliminary Objection is based on the grounds that, the suit is time-barred under the provisions of Section 7 of the Limitation of Actions Act.

#### **Preliminary objection by the 2<sup>nd</sup> Defendant.**

4. The doctrine of res judicata is anchored on the provisions of Section 7 of the *Civil Procedure Act*. The ingredients of the doctrine as itemised by the 2<sup>nd</sup> Defendant in his submissions are that the matter directly and substantially in issue has been directly and substantially in a former suit, between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.
5. The 2<sup>nd</sup> Defendant submitted that the doctrine of res judicata as set out in section 7 of the *Civil Procedure Act* ousts the jurisdiction of the court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. He contended that the issues in the current suit were the same issues that were decided in Tamu PMCCR. C NO. 106 of 2013 where the accused persons were convicted of the offence of trespass and ordered to remove themselves from the suit land. That also in Kisumu CMCC E&I Case No 89 (formerly Kisumu ELC Case No. 135 of 2014) where the Plaintiff's sons were sued by the 2<sup>nd</sup> defendant and the court allowed the claim by awarding injunctive orders and damages. That this suit is therefore res judicata and a gross abuse of the process of the court as the issues raised namely; ownership of the suit land are the same ones that were directly and substantially in issues in the former suits.
6. The plaintiff's take is that the former suit was not heard exhaustively, that she was not a party in the former suit and that the issues raised herein were not finally decided in the former suit. That there is an element of trust in the present case in accordance with section 28 of the Land Registration Act.
7. I have read the pleadings and judgement in case No.89 of 2017 Kisumu CMCC (formerly Kisumu ELC Case No. 135 of 2014). The issues in the case were ownership of the suit land. Vide the plaint dated 26<sup>th</sup> May, 2014, the 2<sup>nd</sup> Defendant claimed ownership of the suit land. That he bought the suit land parcel No.LR Kisumu/Fortenan – 68/455 at Kshs.370,000 and got registered as owner on 29<sup>th</sup> January, 1987 and took occupation.

The Defendants in the suit were Joseph Kipkemboi Rob, Joel Kiptoo Rob, David Kimei Rob, Joel Kiplangat Rob and Musa Kibet Rob.

The complaint was trespass. That the Defendants had trespassed onto the suit land and the relief sought was orders of injunction.

The decree shows that the suit was heard and decided and the relief sought in the plaint granted.

8. However, as argued by the Plaintiff, she was not a party in the suit. The Plaintiff filed the present suit in her capacity as personal representative of the deceased who was the original registered owner.



9. As regards the 2<sup>nd</sup> ground of the objection by the 2<sup>nd</sup> Defendant it was submitted that pursuant to the provisions of Section 38 of the Limitations of Actions Act, the court lacks jurisdiction to hear and determine the matter.

Section 38 of the Limitation of Actions Act provides that;

- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land
- (2) An order made under sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

9. That the said section of law expects intending Plaintiff to exercise reasonable diligence and to take reasonable steps in their own interest. That his title is not impeachable as he had had open, continuous and uninterrupted occupation of the suit land for 19 years before the Plaintiff and his sons trespassed onto the land. That the suit is time barred and should have been filed within 12 years.
10. I find that the suit is not res judicata as the parties involved are not the same and the Plaintiff herein is suing in her capacity as the administrator of the estate of the original owner of the land.

#### **Preliminary objection by the 7<sup>th</sup> Defendant**

11. The preliminary objection by the 7<sup>th</sup> Defendant was that the suit was time barred pursuant to the provisions of section 7 of the Limitation of actions Act. it was submitted on behalf of the 7<sup>th</sup> Defendant that the documents filed together with the Plaintiff form part of the pleadings. That in the plaintiff's bundle of documents filed on 10.2.2016 there was a letter dated 28/4/1988 written at the Plaintiff's request by the chief Koru Location. That in the letter the Plaintiff had lodged a complaint that the land had been sold to someone they did not know and without their consent. That it means that the Plaintiff knew about the sub-division of the property in April 1988 when the letter was written. That Section 7 of the Limitation on Actions Act provides that actions may not be brought by any person to recover land after the expiry of 12 years from the date of which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

That for an action based on fraud under Section 27 of the Limitation of Actions Act, time begins to run from the time the fraud is discovered. That the Plaintiff was aware of the alleged fraud since April, 1988 and hence the suit was filed out of time.

12. That the law on limitation serves a critical purpose as it ensures that parties move to court as soon as possible when the evidence is fresh and readily available.
13. I have considered the preliminary objection. Although raised on a point of law, the same is based on the evidence contained in a document in the bundle of documents. It is now settled that the point of law must be apparent from the pleadings filed. Counsel submitted that a bundle of documents accompanying pleadings and filed pursuant to the rules of pleadings forms part of the pleadings. I am guided by the definition of pleadings in section 2 of the Civil Procedure Act to find that the bundle of



documents is not a pleading but evidence awaiting production. Section 2 *Civil Procedure Act* defines pleadings as

pleadings” includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence- of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

The Plaintiff pleads in the Plaint that she discovered the acts she complains of in the year 2015. This was well within the limitation period. Whether this is the true position or not will be a matter to be proved in the hearing.

14. The upshot is that this preliminary objection fails the test in *Mukisa Biscuits Manufacturing Ltd vs Westend Distributors* (1969) EA 696. as it invites the court to look beyond the pleadings.

For the above stated reasons, I dismiss both preliminary objections. Each party to bear own costs.

Orders accordingly.

**RULING DATED AND SIGNED AT KISUMU, DELIVERED VIRTUALLY THIS 16<sup>TH</sup> DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen Court Assistant.

Miss Otieno Advocate for the 2<sup>nd</sup> Defendant

Otieno David for the 7<sup>th</sup> Defendant

