



**Ngayuni v Ngayuni (Sued as the administratrix of the Estate of Elijah Ngayuni – Deceased)
(Environment & Land Case 5 of 2021) [2023] KEELC 17038 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17038 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 5 OF 2021**

**JO OLOLA, J
APRIL 27, 2023**

BETWEEN

JOHN WAGURA NGAYUNI APPLICANT

AND

**MARGARET NJOKI NGAYUNI (SUED AS THE ADMINISTRATRIX OF THE
ESTATE OF ELIJAH NGAYUNI – DECEASED) RESPONDENT**

RULING

1. By the Originating Summons dated 31st May, 2021 as filed herein on 9th June, 2021 John Wagura Ngayuni (the Applicant) prays for the following:
 - (a) A declaration that the deceased Ngayuni Kariuki alias Elijah Ngayuni Kariuki (deceased) held the parcel of land L.R No. Tetu/Muthuaini/611 (the suit land) in trust for the benefit of Naomi Kirigo (deceased);
 - (b) A declaration that the administrator of the estate of Ngayuni s/o Kariuki alias Elijah Ngayuni Kariuki should be done subject to the pleaded trust;
 - (c) An order that the pleaded trust be determined within the administration of the estate of Ngayuni s/o Kariuki alias Elijah Ngayuni Kariuki (deceased) in favour of the Applicant to hold the same in trust for the children of Naomi Kirigo (deceased); and
 - (d) Costs and interests.
2. The Originating Summons is supported by an Affidavit sworn by the Applicant in which he avers that the Respondent is the Administrator of the Estate of Ngayuni s/o Kariuki alias Elijah Ngayuni



- Kariuki who passed away on 25th July, 2003. At the time of his death, the deceased was still the registered proprietor of the suit property.
3. The Applicant avers that during his lifetime, the deceased had three wives, namely Naomi Njoki (the Applicant's deceased mother) Muthoni Ngayuni (also deceased) and the Respondent herein who was the 3rd wife. The Applicant further avers that the suit land originally belonged to his mother's father Gichiru Kiboi who left the same to his mother during the period of land consolidation and registration as a gift.
 4. The Applicant asserts that after being gifted the land, his mother married the deceased and as women were not allowed to be registered, the land was registered in the name of her husband for and on her behalf. The Applicant avers further that in 1964, his mother and the deceased got separated after the deceased chased her and her children including the Applicant from the suit land.
 5. The Applicant avers that his mother filed Nairobi HCCC NO. 2249 of 1977 against the deceased in an attempt to recover the land. His mother however died in 1988 before the case was heard. He asserts that the registration of the deceased as proprietor of the land was upon trust in favour of his mother and hence the orders sought in the Originating Summons.
 6. Margaret Njoki Ngayuni sued as the Administratrix of the Estate of Elijah Waguna Ngayuni – the deceased (the Respondent) is opposed to the grant of orders sought in the Summons. In her Replying Affidavit sworn and filed herein on 15th September 2022, the Respondent asserts that the Originating Summons is misconceived, incompetent, bad in law, frivolous and vexatious.
 7. The Respondent denies that the suit property was registered in the name of her deceased husband in trust for the Applicant's mother Naomi Njoki. She further denies that the land originally belonged to Githiru Kiboi as stated by the Applicant.
 8. The Respondent avers that the claim which is based on trust is too remote and that the same is statutorily barred under the [Limitation of Actions Act](#).
 9. In addition to her Replying Affidavit, the Respondent has by her Notice of Preliminary Objection dated 12th September, 2022 objected to the suit and urges the Court to strike it out on the grounds:
 - (a) That the Plaintiff's claim set out in the Originating Summons seeking equitable relief in the nature of the declaration of a trust of property and orders of account is statute-barred as it offends Sections 4(1) (e) and 20(2) of the [Limitation of Actions Act](#), Cap. 22 since the said claim was brought/filed the said claim was brought/filed well in excess of 6 years from the date that the cause of action arose in 1988; and
 - (b) The Plaintiff has no capacity and/or locus standi to file this suit.
 10. By directions given herein on 19th September 2022, it was agreed that the Preliminary Objection be disposed of first by way of written submissions. I have accordingly carefully perused the Originating Summons as filed by the Applicant as well as the Respondent's Replying Affidavit. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
 11. The Respondent's Preliminary Objection is based on two grounds, one, that the claim based on a declaration of a trust is statute-barred as the same was filed more than 6 years from the date the cause of action arose, and two, that the Applicant lacks the locus standi to bring the claim.



12. It was the Respondent's case that a beneficiary cannot bring any action against the personal representative to recover land or in respect of a breach of trust after the expiration of six (6) years from the date on which the right to receive the share or interest accrued. In this respect, the Respondent relies on Section 4(1)(e) and 20(2) of the *Limitation of Actions Act*, Cap. 22 of the Laws of Kenya. It is in this regard the Respondent's case that the cause of action herein did arise in the 1980s and that as at the year 2021 when this claim was filed, a period in excess of 6 years had elapsed thereby rendering the claim herein stale.
13. On the issue of capacity, the Respondent asserts that the Applicant herein is neither an executor nor administrator to the estate of the late Elijah Ngayuni Kariuki nor that of his late mother's in which he seeks a declaration of trust. It is therefore the Respondent's case that the Applicant lacks standing to prosecute the claim before the Court.
14. Section 4(1)(e) of the *Limitation of Actions Act* provides as follows:
- “4(1) The following actions may not be brought after the end of six years from the date on which the
- cause of action accrued –
- (a) ...
 - (b) ...
 - (c) ...
 - (d) ...
 - (e) Actions, including actions claiming equitable relief for which no other period of limitation is provided by this Act or by any other written law.”
15. On the other hand Section 20(2) of the Limitations of Actions Act provides thus:
- “
- “(2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of Limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action accrued:
- Provided that the right of action does not accrue to a beneficiary entitled to a future interest in the trust property, until the interest, falls into possession.”
16. Considering a near similar matter in *James M'Ngaruthi M'Rintari & Another -vs- Muguna M'Rintari* (2017) eKLR, Lady Justice L. N. Mbugua observed as follows:
- “
- “18. The Plaintiff's claim is based on trust. He (Plaintiff) avers that the Defendant holds the title to a portion of the land in trust for him. It follows that the trusteeship exists by virtue of the existence of the title, as long as the claim itself is proved.



19. In the case of *Macharia Kihari -vs- Ngigi Kihari* C.A No. 170 of 1993, it was held that:-

“We are unable to accept Mr. Thiong’s contention that the said suit was time barred. Limitation prescribed in Section 20(2) of the *Limitation of Actions Act*, will not apply to a trust coming into existence under customary law. Under customary law the land even after the right of action has accrued, is held in trust even for decades before any step is contemplated for a formal transfer or division. Limitation does not apply in customary law. We reject this ground of Appeal.

20. And in the case of *Stephens & 6 Others -vs- Stephen & Another*, Civil Appeal No. 8 of 1987, it was held that:

“... the period of limitation as prescribed in the *Limitation of Actions Act* (Cap. 22) Section 20(2)(b) do not apply to actions by a beneficiary under a trust which is an action to recover from the trustee property or proceeds thereof converted by the trustee for his own use.”

17. I have taken a careful look at the Applicant’s Originating Summons and it was apparent to me that even though the trust pleaded therein was not classified, the claim was based on a customary law trust. That can be discerned from the fact that the Applicant pleads that it was his mother who was gifted the land and that as customary or other laws allegedly prohibited women from being registered as beneficiaries of the land, his father had instead been registered as the owner thereof.
18. While the Respondent contends that the cause of action arose in the 1980s, I was unable to find any basis for such contention. The only reference to the 1980s in the pleadings is the Applicant’s averment that his mother died in 1988 and that the suit land was thereafter registered in the name of the Respondent who has since failed to determine the trust in his favour.
19. In my considered view, the Applicant’s claim squarely falls under Section 20(1)(b) of the *Limitation of Actions Act* as the same is pleaded as an action by a beneficiary under a trust to recover from the trustee what the Applicant deems to be trust property in the possession of a trustee. That being the case, it was clear to me that the Respondent cannot rely on the provisions of Section 4(1)(c) and 20(2) of the *Limitation of Actions Act* to have the suit struck out on the purport that the same is time barred.
20. On the issue of locus standi, the Respondent objects to this claim on the basis that the Applicant had not obtained a Grant and/or Letters of Administration to enable him so to do. At paragraph 20 of the Applicant’s Supporting Affidavit, he deposes as follows:
- “20. That it is thus apparent that the suit land belonged to my deceased mother and the registration of the deceased as the proprietor thereof was upon trust in favour of my deceased mother and her children including myself, Tabitha Wambui Muchemi, Elizabeth Mumbi Ngayuni and Charles Kariuki Ngayuni (deceased).”
21. While it may indeed be true as stated by the Respondent that the Applicant’s claim is rather remote, it was apparent from a perusal of the above paragraph that the Applicant brings this claim as a beneficiary of the pleaded trust and not as a heir of the estate of his father or mother. As such a beneficiary, it was my view that the Applicant is perfectly entitled to claim and that he has the requisite capacity to bring the instant suit.
22. Since the Applicant’s claim is not brought on behalf of the estate of his deceased mother, I did not think that the Applicant first ought to have been appointed as a personal representative of that



estate or that of his equally deceased father to institute this claim.

23. It follows that I did not find any merit in the Respondent's Preliminary Objection. The same is dismissed with costs to the Applicant.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THE 27TH DAY OF APRIL, 2023.

In the presence of:

Mr. Njogu for the Applicant

Mr. P. Muthoni holding brief for Gikonyo for the Respondent

Court assistant - Kendi

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J. O. Olola

JUDGE

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