



**Ebel (Suing as the Administrator of the Estate of Amolo Agenga
- Deceased) v Magwanga & 3 others (Environment & Land Case
E002 of 2022) [2023] KEELC 17716 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17716 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE E002 OF 2022**

GMA ONGONDO, J

MAY 30, 2023

BETWEEN

**HENRY ONDIEK EBEL (SUING AS THE ADMINISTRATOR OF THE ESTATE
OF AMOLO AGENGA - DECEASED) PLAINTIFF**

AND

JOHN MALAGO MAGWANGA 1ST DEFENDANT

MATATA NURSING AND MATERNITY HOME 2ND DEFENDANT

LAND REGISTRAR HOMABAY COUNTY 3RD DEFENDANT

THE HONOURABLE ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. In an application by way of a notice of motion dated September 6, 2022 and filed in court on September 7, 2022 under, *inter alia*, Order 2 Rule 15 (1) of the [Civil Procedure Rules, 2010](#) and sections 1A, 1B and 3A of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya, the 1st and 2nd defendants/applicants through Messrs O M Otieno and Company Advocates, are seeking the orders *infra*;
 - a) The Honourable Court be pleased to strike out the plaintiff's suit herein vide the plaint dated the 19th day of April 2022.
 - b) Costs of the suit and costs of the application be awarded to the defendant/applicant.
2. The application is anchored in grounds (a) to (l) set out on the face of it alongside the 1st applicant's 29-paragraphed affidavit sworn on even date and documents marked as Exhibits JM 1 to JM 6 (a) and (b) annexed to the affidavit. In a nutshell, the applicants' complaint is that this suit is statutorily time barred by virtue of section 7 of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya (The CPA herein) and section 3 of the [Public Authorities Limitation Act](#) Cap 39 Laws of Kenya (The PALA herein). That



the plaintiff/respondent's suit namely Oyugis MELC No E16 of 2021 was struck out on July 2, 2022. That the 2nd defendant is a non-legal entity thus, incapable of being sued or suing on personal account. That the plaintiff's claim is scandalous, incurable, frivolous, vexatious and or an abuse of the court process hence, the application be allowed in the interest of justice.

3. By a replying affidavit of 18 paragraphs filed herein on November 7, 2022, the plaintiff/respondent opposed the application, termed the same unmeritorious and not made in good faith. He deposed, inter alia, Oyugis MELC No E16 of 2021 was struck out as the court lacked pecuniary jurisdiction to entertain the same thus, the respondents cannot plead *res judicata*. That therefore, he filed afresh suit in this court of competent jurisdiction. That section 26 (c) of the *Limitation of Actions Act* Chapter 22 of the Laws of Kenya (The LAA herein) provides for extension of time to bring an action to recover land in certain circumstances and that in instances of fraud, time does not run until the plaintiff has discovered fraud or mistake. That in the instant case, he discovered fraud in July 2019 as stated in the plaint.
4. The respondent further deposed that the 1st defendant cannot hide behind the defence of bona fide purchaser for value without notice as discerned in Exhibit JM1 dated August 16, 1992 whereas the purported seller, Amolo Agenga (deceased herein) died on December 4, 1980 as revealed in the death certificate (HOE 1) annexed to the replying affidavit. That the said defence cannot be raised at a preliminary objection stage but through proper hearing of the suit. That the purported transaction between the deceased and the 1st defendant/applicant, was fraudulent and amounts to intermeddling of the estate of the deceased.
5. The parties in this application were afforded a fair opportunity to be heard by way of written submissions pursuant to this court's directions given on November 7, 2022; see Order 51 Rule 16 of the *Civil Procedure Rules, 2010*, Practice Direction 33 of the Environment and Land Court Practice Directions, 2014 and Halsbury's Laws of England 5th Edition 2010 Volume 61 paragraph 639.
6. By the submissions dated December 2, 2022 and filed herein on even date, learned counsel for the applicants set out background facts of the matter and deposed, inter alia, that the 1st applicant was registered as proprietor of the suit land, Central Kasipul/Kamuma/2821 on August 16, 1992 as a purchaser under a contract of sale and was immediately put into possession of the same. That the respondent admits that the alleged fraud was discovered on February 28, 1996. That the prescribed period of three years thereof expired on February 28, 1999 yet the suit was lodged on June 20, 2022.
7. Moreover, counsel submitted that paragraph 15 of the plaint is falsehood as the plaintiff/respondent concealed previous suit that had been struck out. That therefore, the respondent's conduct in form of this suit is an abuse of the court process. To fortify the submissions, counsel cited the case of *Gathoni v Kenya Cooperative Creameries Ltd* [1982] KLR 104 alongside the case of *Edward Moonge Lengusuranga v James Lanalyara and another* [2019] eKLR.
8. On the other hand, learned counsel for the respondent filed submissions dated February 20, 2023 on even date and reference was made to the orders sought in the application, the replying affidavit in opposition to the application and identified triple issues for determination including whether the suit is *res judicata* and statutorily time barred. It was the respondent's submission that there was an earlier case, Oyugis MELC No E016 of 2021 which was struck out for want of jurisdiction of the court and time barred by the CPA and the PALA. That the said suit was not heard and determined on merits by a court of competent jurisdiction hence, this suit is not *res judicata*. Counsel cited section 7 of the CPA, *Michael Bett Siror v Jackson Koech* (2019) eKLR and *Black's Law Dictionary* 10th Edition, among others, on that aspect.



9. Also, counsel submitted that this suit is not time barred by virtue of section 7 of the CPA and section 3 of the PALA. That it was in July 2019 when he wanted to succeed the estate of the Deceased that he discovered that the suit land had been fraudulently registered in the name of the 1st defendant/ applicant, among other things. Counsel relied upon section 26 (c) of the LAA, *Lazarus Estates Ltd Beasley* (1956) 1 QB 702, 712 and *Geminia Insurance Co. Ltd v Kennedy Otieno Onyango* [2000] eKLR, to reinforce the submissions.
10. The 3rd and 4th defendants did not file any submissions in respect of the application.
11. It must be noted that the plaintiff commenced the instant suit by way of a plaint dated April 19, 2022 seeking the orders infra;
 - a. A declaration that Amollo Agenga (deceased) is lawful registered proprietor of the suit land measuring approximately 0.2 Ha situated in HomaBay County within the Republic of Kenya having been registered as such as the first registration property.
 - b. That the registration of the 2nd defendant be cancelled and the register be rectified to revert back to the name of Amolo Agenga (deceased).
 - c. An order that the 2nd defendant do vacate the suit land or in the alternative be evicted using lawful means.
 - d. Costs of the suit.
 - e. Mesne profit
 - f. General damages for trespass
 - g. Interests on (c) above.
12. The 1st and 2nd defendants denied the plaintiff's claim in their statement of defence dated September 6, 2022. They stated in part that the suit is barred sections 7 and 26 of the LAA and section 3 of the PALA thus, this court is devoid of jurisdiction in respect of the same.
13. The 3rd and 4th defendants denied the plaintiff's claim by their statement of defence dated July 26, 2022 and filed on July 27, 2022. They stated that the plaintiff has no reasonable cause of action against them. So, they sought that the suit be dismissed with costs.
14. I have carefully considered the entire application, the replying affidavit and the parties' respective pleadings in this matter. Therefore, is the application tenable?
15. On one hand, the 1st and 2nd defendants/applicants contend that since Oyugis MELC No E16 of 2021 was struck out on account of want of jurisdiction and being statutorily time barred, the defect went to the root of the claim. That thus, the defect cannot be cured by a fresh suit.
16. On the other hand, the respondent asserted otherwise. He stated that Oyugis MELC No E016 was not heard and determined on merit. That therefore, *res judicata* is not applicable in this suit.
17. The principle of Res Judicata is founded upon section 7 of the CPA. This court is guided by the definition and the essentials of the said principle in Black's Law Dictionary 10th Edition at page 1504.
18. Indeed, the plaintiff fraud at paragraph 9 of the plaint. This informed relief number (b) sought at the foot of the plaint.



19. Moreover, I subscribe to the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR, it was held that;
- “.....It is trite law that any allegation of fraud must be pleaded and strictly proved in case where fraud is alleged
20. Based on the parties’ respective pleadings and having heard them herein by written submissions, this suit is time barred by section 26 of the LAA taking into account the proviso thereof. Therefore, the plaintiff had knowledge of the sale of the suit land to the 1st defendant in 1992 as discerned in the 1st and 2nd defendants’ pleading, application and submissions herein and the same is not firmly rebutted by the plaintiff in the replying affidavit submissions. Furthermore, the suit is time barred by virtue of section 3 of the PALA.
21. So, the import of the applicants’ assertion is that the 1st defendant is a purchaser of the suit land for valuable consideration; see also *Katende v Haridar & Company Ltd* [2008] 2 EA 173.
22. In the case of *Alfred Njau and others v City Council of Nairobi* [1982-88] 1 KAR 229, the Court of Appeal noted that;
- “locus standi is the right to appear or be heard in court or other proceedings.....”
23. In the instant suit, the 1st and 2nd defendants asserted that the latter is not a legal entity hence not capable of being sued and suing on personal count as disclosed in paragraph 2 of their statement of defence and paragraph 15 of the 1st defendant’s affidavit in support of the application. On that score, the suit is not maintainable against the 2nd defendant.
24. It is crystal clear that the plaintiff/respondent deliberately left out the previous suit namely Oyugis MELC No. E016 of 2021 in his averment at paragraph 15 of the plaint. This conduct offends article 10 (2) (b) and (c) of the *Constitution of Kenya, 2010* as regards the principles of equity, transparency and accountability which bind all persons including the plaintiff/respondent in the application of the law, inter alia, the commencement of the present suit.
25. Notably, Order 2 Rule 15 (1) of the *Civil Procedure Rules, 2010* stipulates that a suit can be struck out on grounds including lack of cause of action and for being an abuse of the process of the court. This is discerned in paragraphs 19, 22 and 24 of the 1st and 2nd defendants’ statement of defence.
26. An examination of the parties’ respective pleadings and submissions as well as the application solidly point to the plaintiff’s action to recover the suit land being time barred by dint of section 7 of the LAA which provides;
- 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 actions accrued to him or, if it first accrued to some person through whom he claims, to that person.
27. In *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors* [1969] EA 696, the Court of Appeal observed;
- “..... A preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of the pleadings and if argued as a preliminary objection, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission.....”



28. It is trite law that a preliminary objection is a threshold question and best taken at inception of a case. It calls for a determinative and prompt pronouncement; see *Kakuta Maimai Hamisi v Peris Pesi Tobiko and 2 others* [2013] eKLR.
29. Clearly, the 1st and 2nd defendants raised a preliminary objection on points of law inclusive of a plea on limitation in consonant with *Mukisa Biscuit* and *Kakuta Hamisi* cases (*supra*) in the present application. I am of the considered view that the suit is mounted in bad faith, statute barred by dint of sections 7 and 26 of the *LAA* and section 3 of the PALA, not maintainable and abuse of the process of the court, among others. The same must be struck out at this stage as the application has attained the threshold provided for under Order 2 Rule 15 (1) (*supra*).
30. To that end, I find the preliminary objection as captured in the application tenable. Therefore, the instant suit cannot stand.
31. A fortiori, the application dated September 6, 2022, be and is hereby allowed in terms of orders 1 and 2 sought therein and as set out in paragraph 1 (a) and (b) hereinabove.
32. It is so ordered.

DATED AND DELIVERED AT HOMABAY THIS 30TH DAY OF MAY 2023.

G.M.A ONG'ONDO

JUDGE

Present:

1. Aluoch Odera holding brief for O.M Otieno learned counsel for the 1st and 2nd defendants/applicants
2. Okello, Court Assistant.

