Chweya v Chweya & 7 others (Environment & Land Case 52 of 2017) [2023] KEELC 17411 (KLR) (16 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17411 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND CASE 52 OF 2017

M SILA, J

MAY 16, 2023

BETWEEN

MARGARET KERUBO CHWEYA ..... PLAINTIFF

AND

AGNES KERUBO CHWEYA ..... 1ST DEFENDANT

CHARLES MOGARA CHWEYA ..... 2ND DEFENDANT

MARTHA KIANGOI ..... 3RD DEFENDANT

HELLEN MORAA ABEA ..... 4TH DEFENDANT

DANIEL MOGOBA ..... 5TH DEFENDANT

ZEDEKIAH ONDARI ..... 6TH DEFENDANT

THE COUNTY LAND REGISTRAR KISII COUNTY ..... 7TH DEFENDANT

THE HON. ATTORNEY GENERAL ..... 8TH DEFENDANT

JUDGMENT

(Suit by plaintiff seeking orders on four parcels of land; plaintiff contending that the suit properties belonged to her late father and that her step-mother, the 1st defendant illegally transferred the same; insufficient evidence to demonstrate that the deceased owned three of the four properties claimed; on the last parcel of land of the deceased; plaintiff contending that she is entitled to half of the land being the share of her late mother; plaintiff relying on an award and judgment made in her favour in 1987, the judgment awarding the plaintiff 1/3rd and not ½ of the land; judgment not executed; in 2014, 1st defendant moving court to lift a restriction placed on the land and proceeding to subdivide the land; 1st defendant cannot be faulted as the judgment in favour of the plaintiff lapsed in 1999 on

expiry of 12 years; Section 4(4) *Limitation of Actions Act* providing for a 12 year period to execute judgments; plaintiff's suit dismissed with costs)

A. IntroductIon And Pleadings

1. This suit was commenced through a plaint which was filed on 2 March 2017. The original plaint was subsequently amended on 2 August 2017. In the amended plaint, the plaintiff has pleaded to be the daughter of the first wife of the late David Chweya who died on 3 July 1970. The 1st defendant is the second wife of the deceased and was appointed legal administrator of his estate. The plaintiff pleads that at the time of his death, the late David Chweya owned the land parcels Central Kitutu/Daraja Mbili/458 (measuring 3.4 Ha), Daraja Mbili Plot No. 23, Plot No. 48 'B' Wanjare Nyambunwa, and LR No. 613 Mwamyagetinge. She contended that prior to his death, the deceased had demarcated the land parcel Central Kitutu/Daraja Mbili/458 (hereinafter simply referred to as land parcel No. 458) into two equal halves and allocated the plaintiff a portion hitherto utilized by the plaintiff's mother (Priscilla Moraa) who was first wife to the deceased, whereas the 1st defendant and her then only son, one Micah Manyange, were allocated the other half. She pleaded that these two portions were delineated on the ground by a well fixed boundary. The plaintiff added that her portion constituted the place where her late mother (Priscilla) had a homestead and was buried and that it is the portion that she utilized before she relocated to the United States of America (USA).

2. She pleaded that vide Kisii Civil Suit No. 34 of 1987 and Kisii Miscellaneous Application No. 12 of 1987, the court issued an order for the partitioning of the land parcel No. 458 and the land was subdivided into the parcels Central Kitutu/Daraja Mbili/ 1503, 1504 and 1505 (hereinafter simply referred to as land parcels No. 1503, 1504 and 1505) and the register was closed on subdivision. She pleaded that she got registered as the owner of the land parcels No. 1504 and 1505, which was one half of the original land parcel No. 458, while the 1st defendant got registered as proprietor of the land parcel No. 1503, which comprised the other half of the parcel No. 458. She pleaded that despite the parcel No. 458 ceasing to exist, in the year 2014, the 1st defendant and the Land Registrar, fraudulently caused the records of the land parcels No. 1503, 1504 and 1505 to disappear so as to afford them opportunity to have the land revert back to parcel No. 458. She averred that they then proceeded to subdivide the said land parcel No. 458 into the land parcels Central Kitutu/Daraja Mbili/4973 – 4987 in favour of the 1st – 4th defendants. It is pleaded that to perfect the fraud, the defendants filed the suit Kisii High Court Miscellaneous Application No. 282 of 2013 and duped the court to obtain a fraudulent consent order which was used to facilitate subdivision of the non-existent parcel No. 458 into the parcels No. 4973-4987. She avers that the effect was to superimpose these new subdivisions on land comprised in the land parcels No. 1503, 1504 and 1505.

3. It is pleaded that even if it was to be assumed that the parcel No. 458 was still in existence, with the 1st defendant as registered owner, the registration of the 1st defendant as proprietor was pursuant to succession proceedings and the interest of the 1st defendant, pursuant to Section 35 and 40 of the *Law of Succession Act*, was merely a life interest limited by Section 37 of the said Act. It is pleaded that the 1st defendant remarried and thus her life interest in the estate of the late Chweya terminated pursuant to Section 35 (1) (b) of the Act. In the alternative, it is contended that the registration of the 1st defendant as proprietor of the parcel No. 458 was as trustee by virtue of the succession proceedings, and the entire estate of the deceased was held under a trust, and that it was therefore illegal for the 1st defendant to cause the land parcels No. 1503, 1504 and 150, Daraja Mbili Plot No. 23, Plot No. 48 Wanjare 'B' Nyambunwa, LR No. 613 Mwamyagetinge Gusii County Council, to be transferred and gifted to the defendants who are neither heirs, dependants or benefactors of the late Chweya.

4. In the suit, the plaintiff seeks the following orders (slightly paraphrased for brevity) :-

    a. An order revoking, nullifying and/or cancelling all titles purportedly created and subdivided from a non-existent title number Central Kitutu/Daraja Mbili/458 vide the entry No. 7 and 8 of 2 September 2014 and 20 November 2014 respectively, that is title numbers Central Kitutu/Daraja Mbili/4973 – 4987.

    b. That the fraudulent entries and registration relating to parcels number Central Kitutu/Daraja Mbili/4973-4987 be expunged from the Land Registry records and the Land Registrar be directed to forthwith avail and/or create the records in respect of the land parcels Central Kitutu/Daraja Mbili/1503, 1504 and 1505, as hitherto created.

    c. The Land Registrar be ordered to forthwith issue the plaintiff with her title deed in respect of her land parcels Central Kitutu/Daraja Mbili/1504 and 1505, forming half share of the original parcel No. Central Kitutu/Daraja Mbili/458.

    d. That in the event that the court orders, gazette notice, mutations, consent and transfers and any instrument used to create the parcel numbers Central Kitutu/Daraja Mbili/1504 and 1505 cannot be traced from the parcel file, the County Land Surveyor and the Land Registrar, do visit the ground, resurvey the plaintiff's land, prepare appropriate mutations and the register and issue title deed in favour of the plaintiff in respect of her share and/or entitlement.

    e. An order of eviction evicting the defendants, their agents, employees, and/or servants from the land parcels Central Kitutu/Daraja Mbili/1504 and 1505.

    f. An order revoking and nullifying the transfer and registration of Daraja Mbili Plot No. 23, Plot No. 48 'B' Wanjare Nyambunwa, LR No. 613, Mwamyagetinge Gusii County Council, to the 5th and 6th defendants and the Land Registrar to revert the said parcels of land to the estate of the late David Chweya.

    g. An order directing the 5th and 6th defendants to give vacant possession in respect of the land parcels Daraja Mbili Plot No. 23, Plot No. 48 'B' Wanjare Nyambunwa, LR No. 613, Mwamyagetinge Gusii County Council.

    h. Costs of the suit and interest.

    i. Any other relief the court may deem fit and expedient to grant.

5. The 1st, 2nd and 4th defendants filed a joint statement of defence through the law firm of M/s J.O Soire & Company Advocates. They averred that the estate of the late Chweya comprised only of the land parcel Central Kitutu/Daraja Mbili/458 and did not include the plots Daraja Mbili No. 23, Plot No. 48 Wanjare 'B' Nyambunwa and LR No. 613 Mwanyagetinge, Gusii County Council. They denied that the deceased demarcated the parcel No. 458 into two equal halves or settled the plaintiff in any portion of the land. They pleaded that at the time the late Chweya died, the plaintiff was still a minor, and since her mother had died previously, she and her elder sister Mary, and the 3rd defendant (Martha) remained under the care and custody of the 1st defendant. They denied that the plaintiff's portion constitutes the place where her mother is buried.

6. The 1st defendant admitted the existence of Kisii Civil Appeal No. 34 of 1987 and Miscellaneous Application No. 4 of 1987 but pleaded that the orders and decrees issued therein were not executed and are now statutorily time barred and unenforceable. The 1st defendant denied knowledge of the parcel No. 458 being subdivided into the land parcels Nos. 1504 and 1505 and denied that they were registered in the name of the plaintiff. She denied fraudulently causing the disappearance of the parcels No. 1503, 1504 and 1505. She denied perfecting any fraud in the case Kisii High Court Miscellaneous Application No. 282 of 2013. She denied that subdivision of the parcel No. 458 into thirteen subdivisions was fraudulent. She denied depriving the plaintiff of her share in the land and pleaded that she allotted the plaintiff 0.19 Hectares in the parcel No. 458 which portion is now registered as the land parcel Central Kitutu/Daraja Mbili/4974.

7. M/s J.O. Soire & Company Advocates filed separate defences for the 3rd and 5th defendant. On behalf of the 3rd defendant, it was also pleaded that the estate of the deceased only comprised of the land parcel No. 458 and not the other parcels pleaded in the plaint. She pleaded that allocation and settlement of beneficiaries did not amount to a will under Section 42 of the *Law of Succession Act*. She admitted that the said land parcel No. 458 was transmitted to the 1st defendant as administrator of the estate of the deceased and that she carried out her mandate by subdividing the land and distributing it to the beneficiaries, though some are yet to be registered owing to some orders of inhibition. She herself is registered as owner of the parcel No. 4980.

8. On his part, the 5th defendant denied that the Plot No. 48 'B' Nyambunwa belonged to the estate of the late David Chweya. He denied that it was unlawfully transferred to him and pleaded that he purchased the plot from one David Kenyanya Magere way back in the year 1973. He owned it until the year 2000 when he transferred it to a third party.

9. The 6th defendant appointed M/s G.M Nyambati & Company Advocates and filed a defence and a preliminary objection. The preliminary objection was to the effect that the suit is time barred by dint of Section 7 of the *Limitation of Actions Act*, Cap 22, Laws of Kenya. I have seen two defences, one filed on 6 March 2018 and the other filed on 29 January 2019. In the first defence, it was pleaded that the 6th defendant bought the land parcel Daraja Mbili Plot No. 23 from one D.C Nyamasege and transferred the same to his names through the Gusii County Council. He pleaded to have been in occupation of the land for the last 48 years without interruption and the suit is thus time barred. In the defence filed on 29 January 2019, the 6th defendant pleaded that the plaintiff is operating under the illusion that LR No. 613 Mwanyagetinge Gusii County Council and Daraja Mbili Plot No. 23 constituted part of the estate of the late David Chweya. He stated that the two plots were leased to him by the Gusii County Council. He pleaded that the plaintiff has no locus standi as she holds no letters of administration. He averred that LR No. 613 Mwanyagetinge Gusii County Council and the plot Daraja Mbili No. 23 have no relation with the parcels Central Kitutu/Daraja Mbili/458 or the parcels Central Kitutu/ Daraja Mbili/1503, 1504 and 1505 and that it is uncalled for, for the plaintiff to seek an order revoking these two titles.

10. The State Law Office on behalf of the Land Registrar, Kisii and the Attorney General, sued as the 7th and 8th defendants, filed a defence where it was inter alia pleaded that no transfer of the suit land has been done and if it was done then it was pursuant to a court order. It was also pleaded that the suit is time barred. The allegations of fraud were denied.

11. On 6 March 2018, my predecessor, Mutungi J, directed that all issues be tried within a hearing and that dispensed of the preliminary objection raised.

12. In the course of time, the 5th defendant died and the suit against him abated.

B. Evidence Of The Parties

i. Plaintiff's evidence

13. PW-1 was the plaintiff. She stated that she left Kenya in the year 1984 and has been living in the USA though she occasionally visits her mother country. Before the date that she gave evidence, which was on 6 March 2018, she averred that the last time she was in Kenya was in the year 2009. She was born in the year 1954. She mentioned that her late father owned the land parcel No. 458, Daraja Mbili Plot No. 23, Wanjare Plot No. 48 'B', and LR No. 613 Mwanyagetinge (the four plots). She stated that the family resided in the land parcel No. 458. Her father had two wives; her mother Priscilla Moraa and the 1st defendant, Agnes Kerubo. Priscilla, her mother, died in the year 1957. She did not know when the 1st defendant got married to her father. She contended that during his lifetime, her father demarcated the land parcel No. 458 equally to his two wives, identified their shares, and marked the boundary by planting euphobia. According to her, this partitioning was done in 1969/1970. Her father died on 3 July 1970. She mentioned that her mother had three other children apart from her (plaintiff); a brother who is now deceased, and two sisters who are married.

14. She stated that her father built two houses on the land, a semi-permanent house on her mother's side and the other house on the 1st defendant's side, and that her father used to reside in the house on her mother's side. She claimed that before her father died, he gave her the house where he was residing, which was on her mother's side, while the 1st defendant was residing on the side allocated to her. She was then in school in Form 2. She testified that at the time of her father's death, the 1st defendant had one son and five daughters. She alleged that after her father's death, she had great difficulties and could not finance her education. She stated that succession for the estate of her father was undertaken in 1974 and the parcel No. 458 got registered in the name of the 1st defendant. She continued that she was not aware of the succession proceedings as she was not involved. In 1974, she placed a caution after approaching the 1st defendant to avail her portion of the land which she refused. She consulted her uncle and elders and the matter was arbitrated through the Land Disputes Tribunal. She stated that the tribunal awarded her, her portion of the land, and the award was adopted by court. She produced the proceedings. She testified that the 1st defendant refused to sign the transfer to give effect to the court order and she made an application for the Executive Officer to sign.

15. She proceeded to aver that the land was then subdivided, with the mutation form indicating her portions as B and C, and that the Executive Officer signed the transfer forms leading to subdivision of the land parcel No. 458 into the land parcels No. 1503, 1504 and 1505, with her portions being the parcels No. 1504 and 1505. Before the registration, the land was gazetted vide Gazette Notice No. 3888 of 21 August 1987. She lodged the documents and travelled back to the USA. She left her attorney, one Osoro, to obtain registration on her behalf. She testified that she was not aware of other transactions after her registration. She stated that there was the suit Kisii ELC Miscellaneous Application No. 282 of 2013 which she was not aware of, and she could not have been served at Daraja Mbili as alleged, since she was in the USA. She testified that she was not party to the consent dated 9 June 2014 and the order dated 15 August 2014 in that suit and she was of the view that this was part of the fraudulent scheme to deprive her of her land. After she came to know of the case, she filed an application dated 15 March 2016 to challenge it. On the other three plots, she stated that a google search indicates that her father owned them as well.

16. Cross-examined by Mr. Soire, she affirmed that she has two sisters who are older than her. On the tribunal award, she insisted that the tribunal awarded her half the land and not 1/3rd of it, but she had nothing to show how come the land was being subdivided into three, and not two, portions. Her sisters

were not involved in her pursuit of the land on the basis that they were married and they told her that she can pursue the matter if she wishes. She asserted that she was following what her father left for her. She testified that the 3rd defendant, Martha, was her younger sister. She sued her as she was given a share by the 1st defendant. She stated that one of the subdivided plots was given to Charles Mogaka Chweya, a son of the 1st defendant. She did not know where the 1st defendant resides. She did not have titles to the parcels No. 1504 and 1505 and was not aware that the registration was rejected. She had no idea that the 1st defendant allocated her some land.

17. Cross-examined by Mr. Nyambati for the 6th defendant, she was not aware that her father had obtained the title deed. She stated that she was alone when her father gave her half the land. She averred that she has not seen the certificate of confirmation of grant (in respect of the estate of her late father) and did not know whether the Plot No. 23 was included as part of the assets of the deceased. She had nothing to show that her father was paying rates for this plot. She testified that she has not brought any action against the 6th defendant respecting the plots No. 23 and 613 though she claimed that the 6th defendant was part of the broad fraud. She acknowledged not being administrator of the estate of her late father.

18. Cross-examined by Ms. Opiyo, Counsel for the State, she reiterated that her father died in 1970, and by then, she had not seen the title deed to the parcel No. 458. She never saw the grant issued to her step-mother. She did not have copies of green cards to the parcels No. 1503, 1504 and 1505, nor searches for them. She stated that her advocate died before he had obtained registration documents from the Lands office.

19. PW-2 was Joyce Nyabate. She is sister to the late David Chweya thus an aunt to the plaintiff. She testified that before his death, the late Chweya told her that he had subdivided the parcel No. 458 into two portions, one each for his two wives. She averred that the late Chweya was staying with the 1st defendant on the land. As for Priscilla, the 1st wife, she stated that she had a homestead on the land and that when she died, her children continued living in her house while the 1st defendant occupied the other portion of the land. She testified that the 1st defendant does not want the children of Priscilla to be on the land. She contended that before he died, the late Chweya declared that Priscilla should keep her portion and likewise for the 1st defendant. She stated that it was his intention that the children of Priscilla take her (Priscilla's) portion. She added that according to the deceased, the 3rd born (probably meaning the plaintiff) was not to get married and was to be beneficiary of the portion of Priscilla.

20. Cross-examined by Mr. Soire, she could not recall when Chweya died and could not tell if it was in the year 1970. At the time Chweya died, she was already married. She affirmed that the 1st defendant got married to the late Chweya after Priscilla, his first wife, had died. She testified that there were two houses on the land and that the 1st defendant entered into one of them. She claimed to be present when Chweya subdivided his land and that he was bedridden for some time before he died. She testified that the plaintiff is not married. She could not tell whether she was married to a son of one Andrew Mokaya.

21. Cross-examined by Mr. Nyambati, she stated that the land was ancestral land and Kisii women in the 1970s were not inheriting land. She testified that when Chweya spoke to her before his death, they were just the two of them and the plaintiff was not present. She stated that there were two houses, one where Priscilla lived, and the other was built for the 1st defendant after she got married into the home. Chweya also had another sister by name of Bisieri Mokama who was alive when Chweya died. Re-examined, she stated that the land was subdivided after Priscilla died.

22. PW-3 was Steve Mokaya, the Land Registrar, Kisii. He had the records with respect to the parcel No. 458. He testified that the land was first registered in the name of David Chweya on 9 August 1973. It was transferred to the 1st defendant on 7 December 1974. The record shows that this was pursuant

to succession though he did not have the grant in his records. In 1984, a caution was registered by the plaintiff claiming a beneficial interest. The caution was withdrawn on 5 August 1987. On the same day, there was recorded an entry of subdivision of the land into the parcels No. 1503, 1504 and 1505, though the entries are not signed by the Land Registrar. Subsequently, on 5 July 1988, there was a restriction by the Land Registrar indicating that there should be no dealings on the original parcel No. 458 until the suit HCCC No. 37 of 1987 is heard.

23. In the year 2014, the Land Registrar made an entry that the restriction entered in 1988 is removed through the suit Miscellaneous Application No. 282 of 2013. On 20 November 2014, there was registered a subdivision of the parcel No. 458 to open 15 new parcels being Nos. 4973 – 4987 all registered in the name of the 1st defendant. Subsequently, parcel No. 4976 was transferred to Charles Mogaka Chweya, and parcel No. 4982 to Hellen Moraa Abeya. The other numbers were inhibited until the suit Miscellaneous Application No. 282 of 2013 is finalized. The inhibition is still in place. He produced the Green Card to parcel No. 458 as an exhibit. His view on entries No. 5 and 6 was that they were null and void as they were not signed by the Land Registrar. He pointed out that there were two No. 6 entries, one dated 5 August 1987, and the other 5 July 1988. He testified that there is no register for the subdivisions No. 1503, 1504 and 1505. He testified that there is a certificate of succession dated 11 November 1974 which describes the parcel No. 458 as the property of the deceased. The beneficiaries are listed as Mika Manyange and Agnes Kerubo (1st defendant) and that the person who was to be registered as sole beneficiary of the parcel No. 458 was the 1st defendant.

24. Cross-examined, he stated that he does not have all the documents relating to the succession proceedings. What he had was the Certificate of Succession and it does not bear the case number though it has the court seal. He could not tell how it came to being. He had no issue with entries 1 and 2 in the green card.

25. With the above evidence, the plaintiff closed her case.

ii. Defendants' evidence

26. DW-1 was the 1st defendant. She identified the 2nd defendant (Charles) as her son and the 4th defendant (Hellen) as her daughter, whereas the plaintiff and 3rd defendant are her step-daughters being daughters of her co-wife Priscilla Moraa. Priscilla had died before she got married to Chweya. She testified that the parcel No. 458 belonged to her husband and that before he died, he told her that he has bequeathed the whole of it to her. She stated that she filed a succession cause and subdivided the land to all the children of her husband including the children of her co-wife. She wondered why the plaintiff has sued her as she is also a beneficiary.

27. Cross-examined by Mr. Nyambati, she testified that the 6th defendant is not a son of the late Chweya and she did not know whether he had purchased land from him. She stated that her husband left no will where he bequeathed the land to the plaintiff. She added that nobody has challenged the grant that she got in the succession matter and that no child was left out in the distribution of the land. She was not aware of another case that the plaintiff filed over the land.

28. Cross-examined by counsel for the plaintiff, she testified that Priscilla died in 1956 and she got married to the late Chweya in the year 1957. Chweya died in 1970. She stated that she has 10 children with Chweya though the last four were sired after his death. This was in accordance with custom (Kisii custom) as she was taken over by the brother of Chweya upon his death. She averred that she was chosen by the elders to be the administrator of the estate of the deceased. She however did not have the grant with her but she stated that she distributed the land in accordance with the grant and in accordance with directions given by the brothers of her late husband. She denied having been charged with an

offence of giving false information. She could not recall signing documents for subdivision of the land. She distributed the land to all children even those she got after the death of Chweya. Some have titles and other titles are still in her name. She was not aware of any civil suit filed in 1987, nor any judgment that ordered cancellation of the parcel No. 458, nor any gazettement of the title.

29. DW-2 was Charles Mogaka Chweya, the 2nd defendant and son of the 1st defendant. He was born in 1980 way after the late Chweya had died. He however identifies the late Chweya as his father. The 4th defendant (Hellen) is his sister, whereas the 3rd defendant (Martha) is his step-sister. His evidence was that he was allotted one plot from the land parcel No. 458 and he is satisfied with that. He stated that distribution of the land was done by elders and that the plaintiff also has her share.

30. DW-3 was the 3rd defendant. She is sister to the plaintiff. She testified that they were three siblings, Mary, the plaintiff, then herself in that order. She stated that it is the 1st defendant who raised them since their mother had died. She was aware of the parcel No. 458 which she described as family land and it is here that they were raised. The land was subdivided and she got her share which is now plot No. 4980. She is satisfied with what she has. She stated that only the plaintiff remains unsatisfied by the distribution of the land. She did not agree that the plaintiff is the only one entitled to the land.

31. Cross-examined by Mr. Nyambati, she testified that her father left no will. She was 13 years old when he died and was left in the care of the 1st defendant. Her mother had no sons, and as daughters they would be entitled to inherit their mother's share. She saw no boundary demarcating the land amongst the two wives of his father. As far as she was concerned, the land was left for her step-mother who later subdivided it and distributed it to the children. Cross-examined by counsel for the plaintiff, she stated that they grew up in the knowledge that everything was left in the care of their step-mother. She thought that because his father had two wives, maybe the land ought to have been subdivided equally between the two houses. She testified that when the land was subdivided, the plaintiff claimed that she was the one who was supposed to take the share of her late mother. She was not aware of the other three plots mentioned in the suit.

32. DW-4 was Zedekiah Ondari Okenyo, the 6th defendant. He testified that he purchased the Plot No. 23 Daraja Mbili from Chweya. They were joint registered proprietors and he purchased his share. Regarding the Plot No. 613, he stated that he applied for this land and the same was allotted to him by the Government.

33. DW-5 was Hellen Moraa Abea the 4th defendant. She is daughter of the 1st defendant. She was aware that the parcel No. 458 was ancestral land. She stated that it was subdivided and they all got their shares. She is satisfied with what she got and satisfied with the manner of distribution. The plaintiff also got her share. She knew Zedekiah Ondari (6th defendant) as her uncle.

34. With the above evidence, the defence closed their case.

35. I invited counsel to file submissions and I have taken note of the submissions filed before arriving at my decision.

C. Analysis And Disposition

36. The case herein concerns four plots of land, being the original land parcel Central Kitutu/Daraja Mbili/458, the Plot No. 23 Daraja Mbili, the Plot No. 48 'B' Wanjare Nyambunwa, and LR No. 613 Mwanyagetinge Gusii County Council. I will first deal with the last three plots.

37. It is the plaintiff's contention that these three plots belonged to her late father. In her plaint, she sought orders to nullify the transfer and registration of these three plots to the 5th and 6th defendants, and for

the said land parcels to revert to the estate of the late David Chweya. There are a couple of problems with the plaintiff's case regarding these three titles. First, the 5th defendant died and no substitution was done. The plaintiff cannot now pursue any land that was under the proprietorship of the 5th defendant. Secondly, the plaintiff herself admitted that she is not the administrator of the estate of the late David Chweya. It follows that she has no locus standi to sue on behalf of the late David Chweya or sue to have properties revert to his estate. In addition, and most importantly, I have no evidence whatsoever that these three properties were ever owned by David Chweya at the time of his death. The plaintiff herself never brought a document relating to allotment of the said plots or any title that bore the name of David Chweya. You would expect that she will produce some documents demonstrating the allocation of this land, payment of rates, the transfer of the said titles, and such other documents of title which reveal the proprietorship of the late Chweya. Nothing of that sort was produced.

38. What the plaintiff relied on was something very thin, a google search, which indicates a Kenya Gazette of November 8, 1966 page 1357 showing Plot No. 23 and the name David Chweya against it. Such a document, I am afraid, cannot conclusively prove ownership of title. Proof of ownership is demonstrated through a document of title or document supporting issue of title, for example, an official search to a land title. You do not prove ownership of title through a google search of a Kenya Gazette. Without a title document of any sort, you cannot tell that the late David Chweya actually owned the three land parcels. Even just looking at the google search, one cannot conclude with authority that the David Chweya mentioned there is the same David Chweya who is father to the plaintiff. The said Kenya Gazette Notice, mentioned in the google search, was not even produced as an exhibit. One cannot therefore tell what sort of interest the mentioned David Chweya was getting in the said plot.

39. Be that as it may, the 6th defendant did adduce documentary evidence that the Plot No. 23 was jointly owned by himself and one Daniel Mogoba, and that the said Daniel transferred his interest to him in 1970. The other evidence adduced is the title to the Plot No. 613 which was said to now be registered as Kisii Municipality Block I/613. As far as I can see, it shows that the first proprietor is Zedekiah Ondari Kenyoru, the 6th defendant, who was first registered on 7 July 1995 under a leasehold title of 99 years from 1 January 1986. At this time, David Chweya was long deceased. There is no way he was obtaining a leasehold interest in the year 1986.

40. There is really no point of me saying more over these three plots. In fact, to me, the inclusion of these three plots in the plaint appears to be an afterthought for there is very little pleading on it. They are merely mentioned in a paragraph at the tail end of the plaint. There was also very little evidence adduced on these plots. Even the submissions of Mr. Muiruri, learned counsel for the plaintiff, on the same, was a sentence or two. The long and short of it is that the plaintiff has no locus standi to sue on the said plots to recover them on behalf of the estate of the late David Chweya, and even assuming that she had the requisite locus, the evidence adduced is not sufficient to demonstrate that the three plots (not including the land parcel No. 458) ever belonged to the late David Chweya. I therefore proceed to dismiss the plaintiff's case as against the 6th defendant. I already mentioned that the case against the 5th defendant has abated.

41. I will now turn to the Plot No. 458 which I think is what really forms the gist of the plaintiff's case. The plaintiff contends that this plot was subdivided into two equal halves by his late father so that each of his two houses gets an equal portion of the land. It is further her contention that the portion assigned to her mother was wholly allocated to her, so that half of the parcel No. 458 belongs to her alone. She of course mentioned that when her late mother died, her children continued living in the house where she resided and that the 1st defendant separately lived in the other portion of land.

42. I have serious doubts regarding this evidence. I observe that, Priscilla, the mother of the plaintiff died sometimes in the year 1956. The plaintiff was then two years old. The 3rd defendant is the younger sibling of the plaintiff meaning that she was probably just about a year old. I am unable to fathom how three children of such age can be left to fend for themselves and actually did fend for themselves until adulthood. That evidence of the plaintiff is extremely improbable. The more probable evidence is that of the 3rd defendant who testified that they were all raised by the 1st defendant.

43. In her evidence, the plaintiff stated that when her father died, she was in Form 2, and that she had great difficulties thereafter including raising school fees. That again is highly improbable. It in fact appears to me that the 1st defendant took reasonable care of all of the children left by the first wife, given that they are now professionals and hold good positions in society. The plaintiff cannot pretend to have dropped out of school in Form 2, for in her statement she describes herself as Vice Consul in the Kenyan Embassy in the USA. Her sister, the 3rd defendant, is a retired teacher. Surely, they could not have been abandoned by the 1st defendant. If indeed they were, you would expect the plaintiff to call a witness to support her allegations that she completed school through the help of well-wishers. No such witness was called. But whatever the case, we are not dealing with a case of a child suing her step-mother for child support and I will leave it at that.

44. Apart from the above, the evidence that the late Chweya partitioned his land to two, so that each wife resides on her own portion, is an impossibility because the two wives were never in the homestead at the same time. There is consensus that the 1st defendant got married after the demise of the first wife so there were never two houses running concurrently. There could not have been any partitioning of land between the two wives for the late Chweya only had one wife at a time. The plaintiff further contended that her father settled her on the portion hitherto utilized by her late mother before his demise. That again is highly improbable, since in the year 1970, the plaintiff was only 16 years old.

45. The plaintiff relies on Section 42 of the *Law of Succession Act*, which provides as follows :-

> 42. Previous benefits to be brought into account
>
> Where-
>
> (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
>
> (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

46. Section 42 of the *Law of Succession Act*, as I understand it, has the aim of taking into account what has already been distributed by the deceased during his lifetime so as to determine the share accruing to a beneficiary on distribution of an intestate estate. If there was an actual bequeathment of property to the plaintiff, then she needed to point this out during the distribution of the estate, so that it can be taken into account, but not after the estate has already been distributed. In the same vein, I also do not see how Section 35 of the *Law of Succession Act*, helps the plaintiff. That law provides as follows :-

> 35. Where intestate has left one surviving spouse and child or children

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.

(4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so what order, shall have regard to -

(a) the nature and amount of the deceased's property;

(b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;

(c) the existing and future means and needs of the applicant and the surviving spouse;

(d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;

(e) the conduct of the applicant in relation to the deceased and to the surviving spouse;

(f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and

(g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

47. Section 35 provides for the manner of distribution of the estate of a person who died intestate leaving a spouse and a child or children. It provides for what the spouse is entitled to, which is the personal and household effects, and she will have a life interest in the rest of the estate which can then be distributed. The law provides how the life interest terminates. What the plaintiff hinges on here is that the 1st defendant remarried and therefore the life interest terminated. I have no evidence that the 1st defendant remarried and the plaintiff never provided any evidence of a second marriage. At the very least she should have pointed out who the new husband was. What the evidence has demonstrated is that the 1st defendant continued having children under customary law, which children would be regarded as those of the deceased, and not of the biological father. Even assuming that the 1st defendant remarried and the life interest terminated, that does not mean that the plaintiff would be automatically entitled to half of the land. I really do not see how Section 35 of the *Law of Succession Act* is applicable in our case or how it helps the plaintiff.

48. Probably, the more serious assertion, and which requires deeper analysis, is the contention of the plaintiff that she was granted half the land in an award made by an arbitration Tribunal in the year 1987 upon which the land was subdivided into three portions identified as the land parcels Central Kitutu/Daraja Mbili/1503, 1504, and 1505. The plaintiff went further to assert that the partitioning of the land was effected through Kisii Civil Suit No. 34 of 1987 and Kisii Miscellaneous Application No. 12 of 1987. She contends that the defendants fraudulently filed the suit Kisii ELC Miscellaneous Application No. 282 of 2013 to defeat the orders in the previous two cases.

49. I have gone through the documents presented regarding these cases. From the same, I have discerned that the dispute between the plaintiff and her step-mother went for determination before a panel of elders. The elders made a decision that the plaintiff be awarded 1/3rd of the land and the 1st defendant to retain 2/3rds of it. The award was filed in the suit Kisii Magistrates' Court Miscellaneous Application No. 12 of 1987. There was objection to adoption of this award and the Magistrate, Hon. J.S Kaburu, in a ruling delivered on 24 July 1987, rejected the award for being res judicata. This provoked an appeal to the High Court, registered as Kisii High Court Civil Appeal No. 34 of 1987 (erroneously referred to by the parties herein as Kisii Civil Suit No. 34 of 1987). The appeal was heard by V.V Patel J on 28 July 1987 and he delivered judgment on the same day. He was of opinion that the Magistrate erred and he set aside the ruling of 24 July 1987 and allowed the appeal.

50. The judge did not say what ought to happen to the award though the assumption would be that the award was adopted. On 30 July 1987, an application, filed within the suit Kisii SRMCC Miscellaneous Application No. 12 of 1987 was placed before the Magistrate (Hon. Ong'udi as she then was), for authority to be given to the Executive Officer to execute transfer documents. Counsel for the respondent therein (1st defendant in this suit) applied for adjournment, which application was allowed

and the matter adjourned to 3 August 1987. On that day, the Honourable Magistrate allowed the application and the Executive Officer of the court was authorized to sign all documents pertaining to the land. What happened after that is quite contorted.

51. I have seen a document said to be signed on 4 August 1987 by the Executive Officer of the Court. It is an instrument of transfer of an undivided share and the title mentioned therein is the land parcel Central Kitutu/Daraja Mbili/1505. That instrument provides that half share of the said title is transferred to Margaret Kerubo Chweya (plaintiff herein). I have seen a mutation document also signed by the Executive Officer of the Court, on 4 August 1987, which proposes to subdivide the land parcel No. 458 into three portions, which are clearly unequal, as one portion 'C' is very tiny and cannot be said to comprise 1/3rd of the land. I have seen payments made by the plaintiff on 4 August 1987 and I would assume that they were to effect transfer of the 1/3rd portion awarded to her. I have also seen the Gazette Notice No. 3888 of 21 August 1987. It is a gazette notice published by the Land Registrar Kisii, and it is titled 'Registration of Instrument.' In a nutshell, it provides that whereas Agnes Kerubo is registered proprietor of the land parcel Central Kitutu/Daraja Mbili/458, and whereas it was ordered in Kisii Civil Suit No. 34 of 1987 that the land be subdivided and a portion be transferred to Margaret Kerubo Chweya, and whereas the executive officer has executed transfer in favour of Margaret, and whereas efforts to have the registered proprietor surrender the land certificate have been in vain, notice is issued that after expiration of 30 days from the date mentioned, (21 August 1987) production of the said land certificate will be dispensed with and the registration of transfer will be effected and certificate issued to Margaret Kerubo Chweya and the title of Agnes will be deemed cancelled.

52. In the Green Card, to the parcel No. 458, the first entry is dated 9 August 1973 and is registration of David Chweya as proprietor and the register shows that he is deceased. This entry is signed. Entry No. 2, dated 7 December 1974, is registration of Agnes Kerubo Chweya as proprietor upon succession. This entry is signed. Entry No. 3 is also dated 7 December 1974 and is issue of Land Certificate; the entry is signed. Entry No. 4 is dated 27 January 1984 and is 'Caution: Lodged by Margaret Kerubo claiming Beneficiary Interest.' This entry is not signed. Entry No. 5 is dated 5 August 1987 and states 'Withdraw of Caution of Entry No. 4 above.' The entry is not signed. There are two entries bearing the number 6. The first is dated 5 August 1987 and states 'Title Closed on Subdivision. New Nos. 1503, 1504, 1505.' The second entry No. 5 is dated 5 August 1987 and states 'Restriction: No dealings with the title until High Court No. 37 of 1987 is finalized.' Entry No. 7 is dated 2.9.41 (must have meant '14' for the year 2014) and is 'Restriction Entry No. 6 removed by Misc. App No. 282 of 2013.' Entry No. 8 is dated 20 November 2014 and provides : 'Title Closed on Subdivision. New Nos. 4973-4987.'

53. There are several issues to flag here and I will proceed on the basis that there was judgment on 27 July 1987, in favour of the plaintiff herein, and that there was an order issued on 3 August 1987 authorizing the Executive Officer to sign the requisite documents to transfer the 1/3rd share of the parcel No. 458 to the plaintiff. First, the document purportedly signed by the Executive Officer on 4 August 1987 is certainly irregular. It is irregular for purporting to transfer an undivided share in the land parcel Central Kitutu/Daraja Mbili/1505. What ought to have been transferred is a 1/3rd share of the parcel Central Kitutu/Daraja Mbili/458. The other problem with this instrument is that it purports to transfer a half share. Assuming that what the Executive Officer wished to transfer was a portion of the parcel No. 458, what ought to have been transferred was a 1/3rd share and not a half share. In addition, there is no evidence of this instrument being registered. The registration page is not annexed, but even without it, the face of it has no presentation number and no date indicating when it was ever received in the Land Registry.

54. Again assuming that the Executive Officer wished to transfer the parcel No. 1505 to the plaintiff, this could not be, as the parcel No.1505 was yet to be prepared so that it can be transferred. The parcel

No. 1505 could not be in existence as at 4 August 1987 because the Land Registrar gazetted the lost title on 21 August 1987 and thirty (30) days needed to lapse from that day before any dealings could be registered against the title to the parcel No. 458. Secondly, the purported mutation form dated 4 August 1987 could not have created three parcels of land in accordance with the award. That mutation does not subdivide the parcel No. 458 into three equal portions, as the portion 'C' is very very small (at most it is a tenth of each of the other portions 'A' and 'B'). The plaintiff in her evidence testified that she is entitled to portions 'B' and 'C'. If that is her contention, this cannot be a reflection of the judgment in Kisii ELCA No. 34 of 1987, because portions 'B' and 'C' together will constitute about half the land and not 1/3rd of the land. It would appear that the plaintiff was hell bent to transfer half the property to herself despite the award only giving her 1/3rd of the land. This, to me, was a clear fraudulent scheme on the part of the plaintiff.

55. In addition, this mutation dated 4 August 1987 has no backing of a surveyor and no indication that survey was done in accordance to it. What the plaintiff has attached as being the sketch of the surveyor is dated 3 December 1984 and I am unable to reconcile how an instruction to survey given on 4 August 1987 led the surveyor to draw a sketch on 3 December 1984. Moreover, there is no evidence of registration of the mutation so that it can be shown that the portions A, B, and C, therein, resulted into the land parcels No. 1503, 1504 and 1505. Given that the gazette Notice was published on 21 August 1987, there could not have been created the parcels No. 1503, 1504 and 1505 before lapse of 30 days. It is only after these days lapsed that there could be registration of the mutation for the parcel No. 458, creation of three new titles, then transfer of one of the three titles to the plaintiff. As a result thereof, the payments made by the plaintiff on 5 August 1987 purporting to be payment for Plots Nos. 1504 and 1505 are irregular. In any case, the plaintiff was only entitled to one of three plots, not two of three plots. Furthermore, there is a problem with the Green Card in respect of entries, 4, 5, and the first entry No. 6. All these are not signed, meaning that the entries were merely typed but never endorsed by the Land Registrar.

56. Thus, in essence, there was really no caution registered on 27 January 1984, no registration of the withdrawal of the purported caution registered on 5 August 1987, and no entry made on 5 August 1987 indicating closure of the title on subdivision to create the parcels No. 1503, 1504, and 1505. There could in fact have been no creation of the parcels No. 1503, 1504, and 1505 on 5 August 1987 as I have demonstrated above, i.e, the Gazette Notice was published on 21 August 1987 and 30 days from the date thereof first needed to lapse before any registration affecting the title to parcel No. 458 could be made.

57. Flowing from the above, and bearing in mind that there is no proof of registration of the mutation form, it cannot be said that there were ever any titles created, bearing the registration Central Kitutu/ Daraja Mbili/1503, 1504, and 1505. The Land Registrar stated that there are no records concerning these purported parcels of land. The plaintiff herself has displayed no title deed and does not have any document to support her contention that these titles ever existed. I am aware that part of the case of the plaintiff is that the records were plucked out, but you would expect the plaintiff to have the primary documents, that is, the signed and registered mutation form, and the signed and registered transfers of at least one of these parcels of land. She has none. Moreover, if it was the case that the parcels No. 1503, 1504 and 1505 were actually created and that they existed at some point, you would expect this to be reflected in the Registry Index Map (RIM) which is not a record kept at the Lands registry but is one that can be obtained from the Director of Surveys. The plaintiff has not availed to this court any Registry Index Map that supports the allegation that the plots No. 1503, 1504 and 1505 were ever created. I have no evidence that these parcels No. 1503, 1504, and 1505 are recognized by the Director of Surveys. The claim of the plaintiff that the defendants colluded with the Land Registrar so as to

make the records for the parcels No. 1503, 1504 and 1505 to disappear is not supported by any evidence and must be dismissed.

58. From the above discourse, I must come to the finding that the alleged plots Central Kitutu/Daraja Mbili/1503, 1504 and 1505 were never created. Since they were never created, there was actually never any execution of the judgment in respect of Kisii Magistrates' Court Miscellaneous Application No.12 of 1987 and Kisii High Court Civil Appeal No. 34 of 1987.

59. It will be recalled that in their defence, the 1st – 4th defendants admitted the existence of Kisii Magistrates' Court Miscellaneous Application No. 12 of 1987 and Kisii High Court Civil Appeal No. 34 of 1987. They however pleaded that the decrees therein were not executed and/or implemented and that the decrees are now devoid of legal effect as they are statutorily time barred. I think that there is substance in this argument. Section 4 (4) of the *Limitation of Actions Act*, Cap 22, Laws of Kenya, pronounces the limitation period on judgments and it provides as follows :-

> An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

60. From the above, it will be observed that no action may be brought in respect of a judgment after lapse of 12 years. Where the judgment is for delivery of property, no action may be brought after 12 years from the date of default of delivery of the property. In this instance, the judgment was delivered on 28 July 1987 which must be considered to be the date when the order for delivery of 1/3rd of the property was made to the plaintiff. As I have demonstrated, there was never any execution of that judgment. No title for 1/3rd of the property was ever prepared in the name of the plaintiff. The benefit of this judgment in favour of the plaintiff lapsed after 12 years of 28 July 1987 which is 28 July 1999.

61. What I am saying above has support in various authorities. In the case of Republic vs Narkisho Okello Utende & 5 Others Ex Parte Philip Onyango Omollo (2021) Eklr the ex-parte applicant filed a notice of motion application on 18 July 2020 seeking an order of judicial review in the nature of mandamus against the respondents jointly and severally compelling them to pay him the judgment debt in the sum of Kshs. 187,467.80/= arising from the judgment of the Migori Chief Magistrate's Court delivered on 9/7/2003. In response the 4th Respondent therein filed a notice of preliminary objection claiming that the ex-parte applicant's application was time barred by dint of Section 4(4) of the Limitations of Actions Act. The 4th respondent contended that suit was statute barred as more than 12 years had elapsed since the applicant obtained judgement. In its determination the court held as follows;

Section 4(4) of the Statute of Limitations of Actions Act provides: -

> "
>
> "(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due."

In Alexander Mbaka v Royford Muriuki Rauni & 7 others [2016] eKLR the court held: -

"...it is clear that once a decree, judgment or order of a court has passed the 12th year of its issuance, it cannot be enforced. It becomes stale, nothing, it expires, the rights declared therein dissipate. It becomes as if it never existed. The rights declared therein cease to exist! Simply put, the life of a decree, judgment or order which remains unexecuted is simply 12 years and nothing more."

From the court record, judgement was delivered on 9/7/2003. The ex-parte applicant was to act upon, bring any necessary proceedings to execute the judgement within a period of twelve (12) years that on or before 9/7/2015. The instant notice of motion application was filed on 18/7/2020; a timeline of five (5) years after expiry of the limitation period.

There is no reason given by the ex-parte applicant on the delay of filing the instant notice of motion application to execute the judgment rendered on 7/7/2003.

In Owners of the Motor Vessel "Lilian s" vs Caltex Oil (K) Ltd (1989) KLR Nyarangi J held:-

"Where the court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given... Jurisdiction is everything. Without it, a court has no power to make one more step. Where the court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Having found that the instant application was filed outside the statute of limitation period, this court is devoid of jurisdiction and should down its tools. I uphold the preliminary objection. The ex-parte applicant's notice of motion application dated 7/7/2020 stands dismissed.

62. In the case of Willis Onditi Odhiambo vs Gateway Insurance Co Limited (2014) Eklr, the appellant, filed suit in the year 1994, against the respondents in the Chief Magistrates Court at Kisumu, claiming general and special damages following a road traffic accident. He succeeded and was awarded a total of Kshs. 271,600/- in a judgment delivered on 26 August 1996. The decree was not executed within 12 years. In the year 2009, the appellant filed another suit at Kisumu Chief Magistrate's against the respondent seeking declaratory orders compelling the defendant to satisfy the decree pursuant to the judgment in the 1994 matter. The 2009 matter was eventually struck out for being statute barred under the *Limitation of Actions Act*. The Appellant yet again lodged an Originating Summons in Kisumu High Court in 2011 seeking leave of the court to file a suit out of time against the respondents in order to enforce the same decree in the 1994 matter but did not disclose that his 2009 claim had been struck out for being time barred. The Judge granted the extension of time to file a suit on 17 October 2011. Pursuant to that leave so granted by the High court, the appellant filed a suit at Winam Principal Magistrate's Court seeking exactly the same reliefs he had sought in the 2009 matter, namely, declaratory orders compelling the respondent to satisfy the decree pursuant to the judgment in the 1994 matter. In response, the respondent denied the appellant's claim and pleaded that the same was statutorily time barred under the *Limitation of Actions Act* – Cap 22 Laws of Kenya. The respondent further averred that the suit was an abuse of the process of the court as the earlier suit, being the 2009 matter, had been dismissed for being statute barred. The respondent thereafter moved the High Court Kisumu in seeking two substantive orders namely that the order extending time to file suit made in favor of the appellant on 17 October 2011, be set aside, discharged or otherwise reviewed and a further order that Winam SRMCC No. 53 of 2012 was time barred. The Review Application was allowed, the same set aside the court's ruling in the originating summons and declared the Winam suit time

barred. This orders triggered the appeal to the Court of Appeal. The Court of Appeal upon analyzing the grounds of appeal and the above facts held as follows:-

> "Given the record of this matter which record we summarized at the beginning of this judgment, we do not see how the learned Judge's decision can be faulted. For the avoidance of doubt, we state that the appellant was not seeking to file suit out of time for damages in negligence. The suit which the appellant filed against Mr. and Mrs. Aoko, i.e. Kisumu CMCC No. 55 of 1994, did not contravene the provisions of the *Limitation of Actions Act*. The appellant therefore required no leave to extend time to file the same. The leave he sought was to file the declaratory suit out of time to compel the respondent to satisfy the decree he had obtained on 26th August, 1996 in Kisumu CMCC No. 55 of 1994. In other words, the appellant wanted to execute the said decree against the respondent out of time. Execution of judgments and/or decrees is governed by Section 4 (4) of the *Limitation of Actions Act* which is in the following terms: -
>
> "4 (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered.
>
> The judgment which the appellant sought to execute was passed on 26th August, 1996. The judgment should therefore have been executed on or before 27th August, 2008. The suit which was first filed by the appellant i.e. Kisumu CMCC No. 12 of 2009 and the second one, being Winam Principal Magistrate's Court Civil Case No. 53 of 2012, were both plainly filed out of time."

63. The same result ensued in the case of National Bank of Kenya Limited vs Devji Bhimji Sanghani & Another T/S Sanghani Builders (2016) Eklr. In this suit, the applicants vide a Notice of motion dated 15th November, 2010, moved the court of Appeal seeking an order from the court correcting its judgment dated 15th November, 1996. In response the Respondent opposed the Notice of Motion Application on grounds that the same was time barred and unmeritorious. The Respondent contended that the judgment sought to be reviewed was delivered more that fourteen years ago. The Respondent equally argued that the present Application was nothing but an attempt to re-open the appeal contrary to section 4 (4) of the *Limitation of Actions Act*. The Court of Appeal went on to state as follows;

> "12. This Court in Willis Onditi Odhiambo -vs- Gateway Insurance Co. Ltd (Supra) clearly expressed that execution of judgments and/or decrees is governed by Section 4(4) of the *Limitation of Actions Act* and an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered.
>
> 13. We have examined the nature, import and purport of the instant application. The present application is an indirect application to re-open and argue an appeal that has been heard and determined. The applicant requires this Court to re-open the appeal more than twelve years after delivery of the Judgment. The twelve years' limitation period applies and this Court has no jurisdiction to reopen a matter that has been determined."

64. The above authorities demonstrate that a judgment needs to be executed within 12 years or else it goes stale. In our case, it is apparent that after the plaintiff got judgment in 1987, and the order to have the Executive Officer sign the documents, the plaintiff went to sleep. She in fact appears to have forgotten all about the property until about the year 2016, when she started communicating with her counsel

on the matter. This suit was then filed in the year 2017, which is about 30 years from the date of the judgment. I am afraid that the plaintiff cannot now hinge on the judgment of 1987 to assert her case for entitlement to half (forget for a moment that the judgment was actually for a 1/3rd share) of the property. That judgment is now stale and has abated by operation of law.

65. In those circumstances, I am unable to find fault in the 1st defendant filing the suit Kisii High Court, Miscellaneous Application No. 282 of 2013 to have the restriction registered on 5 July 1988 lifted, so that there may be dealings on the land parcel No. 458. Pursuant to that suit, the court did allow the lifting of the restriction, and as a consequence, the 1st defendant could proceed with subdivision of the land. The plaintiff has claimed that the filing of the said suit was a perpetuation of fraud. I do not see it that way. Given that the judgment went stale, nothing stopped the 1st defendant from seeking to have the restriction lifted and from dealing with the land. Within this suit, the plaintiff has faulted the manner in which the proceedings in that case were conducted, especially contending that she was never served with the said application and that the process server swore a false affidavit. I am afraid that that is not an issue that I am competent to address within this case. If the plaintiff wishes to pursue the line that she was never served with the pleadings of that case then she will need to have that addressed within that suit.

66. Once, the restriction was lifted, the register of the parcel No. 458 reverted back to entry No. 2 and 3, as the entries number 4, 5 and the first entry No. 6, are not actual entries in the register for reasons that I have already discussed. Entry No. 2 was registration of the 1st defendant as proprietor pursuant to succession and entry No. 3 was issue of title deed to her. In other words, the land was now under the proprietorship of the 1st defendant. I am aware that in his submissions, counsel for the plaintiff did make submissions to the effect that the 1st defendant never obtained any grant of letters of administration. That was actually not an issue for trial, for in her amended plaint, paragraph 8 to be precise, the plaintiff did plead that upon the death of David Chweya, the 1st defendant was constituted as the Legal Administrator of the estate of the deceased, to manage, administer, and/or control and hold in trust the properties forming the estate of the deceased. Parties are bound by their pleadings and the case has proceeded on the basis that the 1st defendant holds a grant of letters of administration in respect of the estate of the late Chweya.

67. The position of the 1st defendant is that she subdivided the land parcel No. 458 so as to distribute it to the beneficiaries of the deceased, as is required of an administrator. She subdivided the land into 15 parcels which she states she intends to allocate to each of the children of the deceased. She has in fact proceeded to transfer three of the titles to the 2nd, 3rd and 4th defendants who are children of the deceased. She has stated that even the plaintiff has her share and she is willing to transfer title to her. If the plaintiff has a problem with the manner of distribution of an intestate, then the avenue is not to file a fresh civil suit. That is a succession dispute which ought to be addressed within the succession cause. I am in agreement with the submissions of counsel for the defendants that what is before court is a disguised succession cause.

68. This is apparent from the submissions of counsel for the plaintiff where he inter alia framed the issues whether the late David Chweya had determined the manner in which the land parcel No. 458 was to be shared out; whether the 1st defendant abused her status as administrator of the estate of the late David Chweya to gift away his property; whether the 1st defendant's remarriage extinguished her claim and/or interest over the estate of the late David Chweya. The plaintiff cannot purport to wish to have a succession dispute resolved through an ordinary civil suit. In the event that the plaintiff is of opinion that there was never any succession case and the registration of the 1st defendant as proprietor was thus improper, I still wouldn't interfere with her registration, because any case contesting that registration

would be time barred by dint of Section 7 of the *Limitation of Actions Act*, which provides for a 12 year limitation period on actions to recover land. It is drawn as follows :-

> 7. Actions to recover land
>
> 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 action accrued to him or, if it first accrued to some person through whom he claims, to that person.

69. So far as this court is concerned, the plaintiff may have to rest on the fact that she blew her chance of obtaining 1/3rd of the land parcel No. 458 (there was never any award for one half of the land as she contends) by failing to execute the judgment that was in her favour in the year 1987 and she may have to live with the consequences of her inaction.

70. From the foregoing, it will be seen that I do not find merit in the suit of the plaintiff. It is hereby dismissed with costs to the defendants.

71. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 16 DAY OF MAY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII