



Aroko & 2 others (Suing as the Personal Representatives and Administrators of the Estate of Gonda Elkana Syongoh- Deceased) v Macharia (Environment & Land Case E05 of 2021) [2023] KEELC 18247 (KLR) (22 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18247 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E05 OF 2021
OA ANGOTE, J
JUNE 22, 2023**

BETWEEN

**ROSE ALUOCH AROKO 1ST PLAINTIFF
NANZALA SIWENKOLO GONDA 2ND PLAINTIFF
KANDIRE NJERI NAKATONDA GONDA 3RD PLAINTIFF
SUING AS THE PERSONAL REPRESENTATIVES AND ADMINISTRATORS
OF THE ESTATE OF GONDA ELKANA SYONGOH- DECEASED**

AND

ANGELINE NJERI MACHARIA DEFENDANT

RULING

Background

1. Before this Court for determination is the Plaintiff's Notice of Motion application dated 30th August, 2022 brought pursuant to the provisions of Section 7 of the *Civil Procedure Act*, Order 2 Rule 15(1) (c) and (d) and Order 7 Rule 3 of the *Civil Procedure Rules*, 2010 and Sections 4, 7 and 35 of the *Limitation of Actions Act* seeking the following reliefs;
 - i. That the Counterclaim in the Amended Defence and Counterclaim indicated to have been amended on the 26th October, 2020 be and is hereby struck out with costs.
 - ii. That the Costs of this Application be borne by the Defendant/Respondent.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Ruth Wanyonyi of an even date, the Advocate with conduct of the matter on behalf of the Plaintiffs.



3. The Plaintiffs' advocate deposed that the suit herein commenced as CMCC No 6427 of 2002 but remained pending following a Ruling by the Court on 9th October, 2002 and that the aforesaid Ruling cited HCCC No 1804 of 1999, a suit then pending between the Defendant herein and Fidelity Commercial Bank Limited (now SBM Bank Kenya) who is styled as the 2nd Defendant in the Counterclaim.
4. It was deposed that in HCCC No 1804 of 1999, which was previously HCCC No 2443(or 2433) of 1998, the Defendant, Angeline Njeri Macharia together with Zahra Spares Limited (as Plaintiffs) sued Fidelity Commercial Bank Limited, seeking, inter alia, a prayer of injunction restraining the Defendant, the Bank, from transferring and/or alienating LR Nairobi/Block93/31(the suit property) and a declaration that the attempted sale of the suit property was premature and illegal.
5. It is the Plaintiffs' advocate's case that the suit was later transferred to Milimani Court and renamed HCCC No 1804 of 1999 and the Defence and Counterclaim amended on 18th May, 2000 was filed; that in its Counter claim, the bank prayed for a declaration that it held a valid and proper charge over L.R Nairobi/Block 93/91 and that following the determination of HCCC No 1804 of 1999, the Plaintiff proceeded with the suit in the trial Court, CMCC No 6427 of 2002.
6. According to the Plaintiffs' advocates, during the pendency of Milimani HCCC No 1804 of 1999, several applications were filed and orders granted; that the suit was initially dismissed and reinstated before being finally determined and that no appeal has been filed against the decision of the Court in HCCC No 1804 of 1999 although the Plaintiffs therein had filed Civil Applications 82 of 2005 and 266 of 2005(consolidated) in the Court of Appeal seeking stay of execution which were marked as settled as the suit property had already been sold.
7. It was deposed that the Counterclaim herein raises the same issues as those that were determined in HCCC No 1804 of 1999 and other issues that arose from the same transaction and that this Court is being invited to re-open issues in a determined suit, which is irregular and unlawful and is tantamount to the Court being asked to adjudicate on a matter already decided on by another Court of competent jurisdiction.
8. According to counsel, the cause of action in the Counterclaim is also statutorily time barred as the registration of the suit property in favour of the Plaintiffs took place on 8th March, 2002, and the same has been brought 19 years later contrary to Section 7 of the Limitation of Actions Act and that notwithstanding the Counterclaim being res judicata, it being a separate claim and enjoining a new Defendant to the Counterclaim, SBM Bank(Kenya) Limited, the prayers sought especially as against the new Defendant are being brought too late in the day and will only serve to prejudice and compromise the suit as envisaged under Order 2 Rule 15 (c) of the Civil Procedure Rules.
9. According to the Plaintiffs' counsel, the Counterclaim as against the Plaintiffs is for an alleged sum for mesne profits over the period 23rd August, 2002 to December, 2002; that this too is statutorily barred pursuant to Section 4 (d) of the Limitations of Actions Act and that in view of the above, the Counterclaim is bad in law and ought to be struck out forthwith.
10. The Defendant filed Grounds of Opposition in which it averred that the application is fatally defective having been supported by an Affidavit sworn by the Plaintiffs' Counsel on contentious matters and that the application is *sub judice* since it seeks similar prayers as the Plaintiffs' Notice of Preliminary Objection, dated 18th February 2022, which they have not yet marked as abandoned or withdrawn.
11. It was averred by the Defendant that the application is an abuse of the process of court as it is intended to circumvent and subvert the Plaintiffs' Notice of Preliminary Objection; that the issues forming the



basis of HCCC No. 1804 of 1999 - Zabra Spares Limited & Angeline Njeri Macharia Versus Fidelity Commercial Bank Limited are different from the issues raised/claimed in the Counterclaim herein and that the doctrine of *res-judicata* is not applicable in the instant suit.

12. The Defendant also filed a Replying Affidavit in which she deposed that the issues forming the basis of HCC No 1804 of 1999 are different from the issues raised/claimed in the Counterclaim herein; that HCCC No 1804 of 1999 was a commercial claim as against the 2nd Defendant in the Counterclaim and that the Counterclaim herein targets the illegal registration of the suit property in the name of the Plaintiffs' late husband contrary to Court orders.
13. According to the Defendant, HCCC No 1804 of 1999 was filed prior to the illegal sale and transfer of the suit property; that the Counterclaim before this Court is premised on the discovery of the fact that the Chief Land Registrar, in cahoots with the 2nd Defendant has unlawfully registered the suit property in the name of the Plaintiffs late husband and that the cause of action, prayers and the basis of the claims in the two suits are different.
14. It was deponed that the cause of action is not statute barred as it arose in the year 2002 when the Interested Party and the Chief Land Registrar illegally transferred the suit property herein; that as advised by Counsel, claims relating to land disputes ought to be brought within 12 years and upon filing of the suit in 2002, time stopped running and that all factors remaining constant, this suit should have been filed in 2014 noting that the transfer occurred in March, 2002.
15. According to the Defendant, the issues raised in the Plaintiff's application are issues which can best be dealt with by way of evidence and testimony and that the interests of justice dictate that the matter is heard on merit. The Plaintiffs' and the Defendant's advocate filed written submissions and authorities which I have considered.

Analysis and Determination

16. The Defendant contends that the present application is incompetent and should be dismissed. She seeks to impugn the application on two fronts, first, that the application contravenes the principles of *sub judice* and second, that the application is defective because the affidavit in support thereof has been sworn by an Advocate contrary to the provisions of the Advocates Act.
17. The principle of *sub judice* is provided for under Section 6 of the Civil Procedure Act as follows;

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed”
18. This concept acts to bar a Court from trying a matter that is before another Court of competent jurisdiction by way of a previously instituted suit as long as it is between the same parties, or parties canvassing under the same title.
19. Courts have established certain conditions that must exist for the principle of *sub-judice* to apply. In Edward R. Ouko vs Speaker of the National Assembly & 4 Others [2017] eKLR, the Court held as follows:

This then leads me to the issue whether the said principles apply to this case. For the doctrine to apply the following principles ought to be present:



- (1) There must exist two or more suits filed consecutively.
- (2) The matter in issue in the suits or proceedings must be directly and substantially the same.
- (3) The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title.
- (4) The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

20. The rationale for this principle was well expressed by the Supreme Court in [Kenya National Commission on Human Rights vs Attorney General and in Independent Electoral & Boundaries Commission & 16 others \(Interested Parties\)](#) [2020] eKLR who stated thus;

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

21. According to the Defendant, this motion is *sub judice* the Preliminary Objection of 18th February, 2022. The Plaintiff’s advocate on the other hand asserts that the Preliminary Objection was withdrawn on the 28th September, 2022. This appears to be the position from the proceedings.

22. Nonetheless, a keen consideration of Section 6 of the [Civil Procedure Act](#) as well as the case law aforesaid makes it apparent that sub judice is contemplated where there is another “suit,” be it in the same court or a different one. Indeed, as stated by the Supreme Court in the case of Kenya National Human Commission on Human rights (*supra*), the first consideration is the existence of “more than one suit over the subject matter.” The Defendant cannot therefore be heard to say that this Motion is sub judice the earlier filed Preliminary Objection. This objection fails.

23. The general rule as regards Affidavits is that they should be limited to facts within the deponent’s own knowledge. Order 19 Rule 3 (1) of the [Civil Procedure Rules](#), 2010 is instructive in this regard and provides as follows:

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”



24. With respect to deposition of Affidavits by Advocates, Rule 9 of the [Advocates \(Practice\) Rules](#) states as follows:

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

25. In discussing the above rule, the Court of Appeal in [Hakika Transporters Services Ltd vs Albert Chulah Wamimitaire](#) [2016] eKLR, cited its decision in *Salam Beach Ltd vs Mario Rossi*, CA 10 of 2015 in which it stated;

“As regards the appellant’s objection regarding the affidavit supporting the application, it is clear that Mr. Muniyithya has deponed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See *Pattni v. Ali & 2 Others*, CA. No. 354 of 2004 (UR 183/04). Rule 9 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters.”

26. The foregoing makes it clear that there is no blanket prohibition on the swearing of Affidavits by counsel, but they should not, when acting on behalf of their clients, swear affidavits on behalf of their clients deponing to contested facts. In view of the above, the question that lends itself to this Court is what is the nature of the averments by the deponent herein.

27. The Court has perused the Affidavit in question. Counsel has set out the history of the matter, the chronology of the events therein and the issues in HCCC No 1804 of 1999 which she claims are similar issues as in the present Counterclaim.

28. The factual averments by counsel are not disputed. The contention is whether the doctrines of res judicata and limitation come into play. In the circumstances, the court is of the view that the Affidavit raises issues of law and fact which are within the deponent’s knowledge as the advocate handling the suit on behalf of the Plaintiff. There is no mistake or error in the Affidavit that can render it defective. This objection fails

29. *Vide* the present Motion, the Plaintiffs seek to have the Counterclaim dismissed. Whereas the Plaintiffs cites Order 2 Rule 15(c) and (d) of the [Civil Procedure Rules](#) which provides that the Court may dismiss a matter on the basis that it may, prejudice, embarrass or delay the fair trial of the action, or is otherwise an abuse of court process, the objections to the Counterclaim are primarily on account of res judicata and limitation.

30. The substantive law on res judicata is found in Section 7 of the [Civil Procedure Act](#) which provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between



parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

31. The Court of Appeal in the case of The *Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others*, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR), discussed this concept thus;

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

32. In outlining the rationale behind the doctrine of *res judicata*, the Court of Appeal in *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* (2015) eKLR held as follows:

“the rationale behind *res judicata* is based on the public interest that there should be an end to litigation over the same matter. *Res judicata* ensures the economic use of the court’s limited resources and timely termination of cases. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law.”

33. As aforesaid, the Plaintiffs are seeking to have the Defendant’s Counterclaim dismissed on account of it being *res judicata*. The Plaintiffs’ counsel assert that the Counterclaim raises the same issues as those determined in HCCC No 1804 of 1999 and other issues that arose from the same transaction and ought to have been raised in that suit notwithstanding that the suit property is the same subject as herein.



34. On her part, the Defendant maintains that the issues that form the basis of HCCC No 1804 of 1999 are different from what is sought in the Counterclaim herein and that the parties, the cause of action and the prayers in the two suits are totally different.
35. The Court has keenly considered the two suits. In HCCC No. 1804 of 1999, the Defendant herein was the 2nd Plaintiff, a Director of the 1st Plaintiff. They sought from the Defendant therein Fidelity Commercial Bank, an order that the Bank provides an account of sums due and the fixed deposit made by the Plaintiffs and that such accounts be settled; an injunction restraining the Defendant from in any way alienating L.R Nairobi/Block/93/31 and a declaration that the attempted sale of the suit property was illegal.
36. The dispute in HCCC No 1804 of 1999 arose from an overdraft facility granted to the 1st Defendant herein in which one of the securities was a charge over the suit property. The parties in that suit had differing positions over the amounts owed and the legality of the bank's attempts to sell the property.
37. The matter was determined *vide* a decree dated 6th October, 2004 in which the Court dismissed the Plaintiffs' suit and found in favour of the Bank, finding that it held a proper charge over the property and its intended sale of the property in exercise of its statutory power of sale was valid. In a ruling by the Court of Appeal on 19th July, 2006, it was noted that the property had been sold and as such an application for stay of execution had been overtaken by events.
38. *Vide* the current Counterclaim, the Defendant is seeking for a declaration that the registration of L.R No Block 93/31 in the name of the 1st Defendant (the Plaintiff herein) and the transfer thereof is a nullity, and for an order directed to the Chief Lands Registrar to rectify the register by reinstating her as the registered owner of the property, mesne profits and exemplary damages.
39. According to the Defendant, the alleged transfer and registration of the suit property to the Plaintiffs on 8th March, 2002 was illegal as at the time of the said transfer, and pursuant to orders granted on the 22nd October, 2001 in HCCC No 1804 of 1999, the court had issued status quo orders, and the Registrar of Titles had been directed to cease any registration of any transaction subsequent to the sale of the land by Fidelity Commercial Bank pending inter-partes hearing.
40. The Court has considered the circumstances of the two cases vis a vis the principles of res judicata. The Plaintiff herein was not a party in HCCC No 1804 of 1999. However, HCCC No. 1804 of 1999 was finally determined and a decision was rendered to the effect that Fidelity Commercial Bank had a proper charge over the parcel and that the intended sale of the property was valid.
41. *Vide* the present suit, the Plaintiffs are seeking to have the Defendant vacate the suit premises. The Defendant, by Counterclaim alleges that the transfer of the property to the Plaintiffs was a nullity on account of the orders issued by the Court in HCCC No 1804 of 1999 on the 22nd October, 2001 directing the Registrar of Titles to stop any registration and transfer or any entry consequent to the sale by Fidelity Bank.
42. According to the Defendant, the transfer of the suit property having occurred on 8th March, 2002 during the pendency of the orders of injunction was of no consequence. Essentially, the Defendant is now bringing to this Court by way of Counterclaim allegations of breach of the orders of the Court in HCCC No 1804 of 1999, which suit has since been determined. Is this tenable?



43. As stated by Kuloba Richard in his book: *Judicial Hints on Civil Procedure*: Law Africa Publishing (K) Ltd: 2nd Edition, at page 47;

“The test whether a suit is barred by res judicata is this: Is the plaintiff in the 2nd suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which had been adjudicated upon? If so, the plea of res judicata applies not only to the points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

44. Indeed, there can be no doubt that the question of non-compliance of the Court orders in HCCC No 1804 of 1999 and the consequences thereof are matters that belonged to that Court, and ought to have been raised in that suit. The Court therefore finds that the Plaintiff has sufficiently demonstrated that the Defendant's Counterclaim is *res judicata*.

45. Allowing the Counter claim to stand is not acceptable in law and will be tantamount to this Court wading into issues that were properly the subject of another court of competent jurisdiction, in so far as the legality of the sell of the suit property to the Plaintiff by the bank is concerned.

46. The Plaintiffs' second contention as against the Counterclaim is that the same is statute barred having been overtaken by the limitation period. The Defendant asserts that the same is not statute barred because time stopped running when the matter was filed in the lower Court in 2002.

47. A Counterclaim is an action brought by a Defendant after an original claim has been brought by the Plaintiff. Under Section 35 of the *Limitation of Actions Act*, a Counterclaim is subject to the statutory framework on limitation of actions. The Section provides as follows:

“For the purposes of the Act and any other written law relating to the limitation of actions, any claim by way of set-off or counterclaim is taken to be a separate action and have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.”

48. The Counterclaim herein relates to recovery of land. The same is governed by Section 7 of the *Limitation of Actions Act*. It provides as follows:

“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 occurred to some person through whom he claims, to that person.”

49. Section 26 of *Limitation of Actions Act* provides that:

“Where, in the case of an action for which a period of limitation is prescribed, either— (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or (b) the right of action is concealed by the fraud of any such person as aforesaid; or (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which— (i) in the case of fraud, has been purchased for valuable consideration



by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

50. The rationale of the statute of limitation was aptly captured by the East African Court of Justice at Arusha, Appeal Case No. 2 of 2012, *Attorney General of Uganda & Another vs Omar Awadh & 6 Others* (2013) eKLR where it was stated as follows;

“Both justice and equity abhor a claimant's indolence or sloth. Stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice. The overarching rationale for statutes of limitations, such as the time limit of Article 30 (2) of the EAC Treaty, is to protect the system from the prejudice of stale claims and their salutary effect on the twin principles of legal certainty and of repose (namely: affording peace of mind, avoiding the disruption of settled expectations, and reducing uncertainty about the future).”

51. It is not disputed that the cause of action which forms the basis of the Counterclaim occurred in 2002. This means that the claim ought to have been filed sometime in 2014. The Defendant has argued that upon filing of the suit in the lower Court, time stopped running and as such, the matter is not statute barred.

52. In considering a similar question, the Court of Appeal in the case of *Donald Osewe Oluoch vs Kenya Airways Limited* (2017) eKLR held as follows:

“Part III of the *Limitation of Actions Act* dealing with “extension of periods of limitation” sets out the circumstances under which periods of limitation may be extended and with fresh accrual of right of action as well as the manner for doing so. Section 31 in Part III of the *Limitation of Actions Act* provides that “where a period of limitation is prescribed for any action or arbitration by any other written law, that written law shall be construed as if Part III of this Act were incorporated in it.”

There is no provision in the *Limitation of Actions Act* or in any other statute in Kenya providing that the time when a “plaintiff has been prosecuting...another civil proceeding [in a court] against the defendant...founded upon the same cause of action” shall be excluded in computing the period of limitation. The holding by the Judge that “the entire time the matter was pending at the High Court and at the Court of Appeal, time did not run for purposes of limitation of action” does not have statutory support.

The Judge however found support for that proposition in a passage extracted from a 1938 Butter worths & co publication; “The Law of Limitation and Adverse Possession”, Vol 1 by K. J. Rustomji thus: “In computing the period of limitation prescribed for any suit, the time during which the Plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of Appeal against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it.”

It would seem that it was not brought to the attention of the Judge that that passage was a verbatim reproduction of Section 14 of the Indian Limitation Act. In other words, the



principle which counsel for the respondent urges us to apply, namely, that where a litigant pursues litigation with due diligence, but that litigation fails because the court refuses to entertain such litigation by reason of defect of jurisdiction and that time taken in such proceedings should be taken into account and excluded when computing the period of limitation for later proceedings, is a codified legal principle in India. That is not the case in Kenya.

Limitation of actions in this country is, in our judgment, entirely a matter of statute. It was also not demonstrated that the statutory provisions underlying the decisions from the United States Courts of Appeals to which we were referred are in parimateria with our statute.”

53. Further, in *Lilian Njeri Muranja & John Muranja vs Virginia Nyambura Ndiba & Kajiado County Council* (2014) eKLR the court held as follows:

“For two reasons, I would not uphold that contention. Firstly, it would be stretching the law of limitation for one to argue that once a suit is filed time ceases to run. The only rider to a plaintiff being allowed to file another suit if the original suit is dismissed for want of prosecution is if the action is still within the limitation period. Certainly, if this were not so then any suit filed would mean time begun to run on the filing of the suit. Effectively, time would never stop. Secondly, I hold the view that merely bringing a suit does not stop statutory periods from running. If the suit is prosecuted of course time stops to run as the action is complete. If the suit is withdrawn or discontinued then, a fortiori, the parties revert to the same position as if the suit had never been filed. The same position would obtain where a suit is dismissed for want of prosecution. That means that time never stops running by the mere filing of the suit. It was counting.”

54. From the above-cited authorities, it is clear that time for purposes of the *Limitation of Actions Act* does not stop running against a party merely because he had filed a separate case in respect of the same transaction. The Counterclaim herein is a distinct suit, and the only way time would have stopped running was when the Defendant filed her Counterclaim.
55. While claiming that the delay in filing the Counterclaim was as a result of the transfer of the matter, this has not been demonstrated or indeed clearly explained. The Counterclaim having been brought 20 years after the cause of action occurred is statute barred.
56. As regards the claim for mesne profits, the same would in the circumstances of this case be anchored on a tenable plea for recovery of land. It therefore follows that if the Counterclaim for recovery of land is statute-barred under Sections 7 and 35 of the *Limitation of Actions Act*, the contemplated Counterclaim for mesne profits too has no basis.
57. In the end, the Court finds the Application dated 30th August, 2022 to be merited and proceeds to make the following determination:
- a. The Counterclaim in the Amended Defence and Counterclaim dated 26th October, 2020 be and is hereby struck out with costs.
 - b. The Costs of this Application will be borne by the Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 22ND DAY OF JUNE, 2023.

O. A. ANGOTE

JUDGE



In the presence of;

Mr. Musyoka holding brief for Kazungu for 2nd Defendant

Ms Millicent Small for Wanyonyi for Plaintiffs

Ms Ochieng holding brief for Ataka for Defendant

Court Assistant – Tracy.

