



Sosio & another v District Land Registrar, Transmara & 2 others (Civil Suit 24 of 2022) [2023] KEELC 18188 (KLR) (21 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18188 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
CIVIL SUIT 24 OF 2022
M SILA, J
JUNE 21, 2023
(FORMERLY KISII HCCC NO. 73 OF 2005)**

BETWEEN

JOHN KADY SOSIO 1ST PLAINTIFF

CHRISTOPHER KIRUI 2ND PLAINTIFF

AND

DISTRICT LAND REGISTRAR, TRANSMARA 1ST DEFENDANT

**DISTRICT LAND ADJUDICATION OFFICER, TRANSMARA 2ND
DEFENDANT**

ATTORNEY GENERAL 3RD DEFENDANT

RULING

(Application to set aside judgment and to have the applicant joined either as interested party or substantive defendant; plaintiffs filing suit in June 2005 against the District Land Registrar and District Land Adjudication Officer and the Attorney General seeking orders inter alia that they be issued with titles arising out of adjudication of a group ranch; group ranch being the registered proprietor at the time the suit was filed but not joined as a party; plaintiffs and defendants filing a consent on 30 June 2005 compromising the suit and orders issued that plaintiffs be issued with titles out of the land of the Group Ranch; Group Ranch now filing an application in the year 2022 to set aside the consent and decree on basis that it was in the year 2021 that it found out that such suit existed; clear that applicant ought to have been made a party to the suit as she was the registered proprietor of the land; the parties could not proceed to agree to a consent relating to land of which the registered owner was not a party; the application not caught up by limitation as 12 years had not lapsed since the applicant came to know of the suit and the consent judgment; application allowed; plaintiffs ordered to amend the plaint within 14 days or else the suit be struck out)



1. The application before me is that dated 28 January 2022 filed by Olalui Group Ranch. There are two substantive orders sought which are that Olalui Group Ranch be joined as interested party or alternatively as 4th defendant and secondly, that the decree passed on 4 July 2005 be set aside so that the case can be disposed of on merits. The application is opposed.
2. By way of background, this suit was commenced on 8 June 2005 by two persons, that is, John Kady Sosio and Christopher Kirui, against the District Land Registrar Transmara, the District Land Adjudication Officer Transmara, and the Attorney General, as the 1st to 3rd defendants respectively. The two plaintiffs pleaded to be members of Olalui Group Ranch, the registered proprietor of the land parcel Narok/Transmara/Olalui/13. They pleaded that in October 1989, they informed the 2nd defendant that subdivision of the Group Ranch was complete and that all deserving members of the Group Ranch had been allocated a portion of the land. They averred that they submitted all relevant documents respecting the subdivision of the Group Ranch to the 2nd defendant and contended that by virtue thereof, the 1st defendant was liable to register and issue the plaintiffs with title deeds in respect of their land. They averred that they had requested for their title documents in vain. In the suit, they asked for the following orders :-
 - (a) A declaratory order that the subdivision and adjudication process in Olalui Adjudication Section in respect of Olalui Group Ranch is complete and finalized.
 - (b) A declaratory order that the plaintiffs and all other beneficiaries are entitled to be registered and issued with title deeds in respect of their portions of land.
 - (c) A mandatory order directed at the defendants requiring them to register the plaintiffs and all other beneficiaries' ascertained interest in their respective land and to issue them with title deeds.

Any other or further order that the court may deem just and fit to grant.
 - (d) Costs and interest of this suit.
3. On 13 June 2005, the Attorney General, entered appearance for all the defendants and filed a statement of defence. It was a brief defence that comprised a general denial of all the claims of the plaintiffs.
4. On 30 June 2005, there was filed a consent dated 24 June 2005, whereby the plaintiffs and defendants compromised the entire suit. The consent was as follows :-

By consent judgment be and is hereby entered for the plaintiff (sic) in the following terms:-

1. That a declaratory order be and is hereby issued that the sub-division and adjudication process in Olalui Adjudication Scheme in respect of Olalui Group Ranch is complete and finalised.
2. That a declaratory order be and is hereby issued that the Plaintiffs and all other members of Olalui Group ranch are entitled to be registered and issued with title deeds in respect of the portions of land that have been adjudicated, to be belong to them (sic) as per the adjudication register after the completion and finalization of the sub-division and adjudication process in respect of Olalui Group Ranch.
3. That the District Land Registrar Transmara and District Land Adjudication Officer Transmara do register the Plaintiffs, and all other members of the Olalui Group Ranch and issue them with the title deeds in respect of the



individual portion of land in Olalui Group Ranch which have been ascertained to belong to them as per the adjudication register after the sub-division and adjudication process.

4. That each party to bear their own costs.
5. A decree conforming to the above consent was duly issued on 4 July 2005. It is this decree that the applicant wishes to have set aside.
6. The grounds upon which the application is based include the reasons that the orders are illegal and were fraudulently used to subdivide the applicant's land and titles issued to strangers; that the issue of adjudication of Olalui Group Ranch is subject of a dispute being Narok ELC No 335 of 2017, ELC No E14 of 2021 (formerly Narok ELC No 320 of 2017) and Court of Appeal Case No 80 of 2020; that the orders of 4 July 2005 came to the applicant's attention for the first time on 14 January 2021 when a copy of the order was filed in the suit ELC No E14 of 2021 (formerly Narok ELC No 320 of 2017); and that the applicant was a necessary party whose participation was required in this matter.
7. The application is supported by the affidavit of Michael Lekishon ole Risa, the Chairman of Olalui Group Ranch. He has deposed that this suit was filed by parties who were not officials of the Group Ranch and had no locus to institute the case; that the 1st plaintiff was an official until 25 June 1997 when the officials were replaced with the current crop; that the impugned orders were illegal and were fraudulently used to subdivide the land of the applicants and titles issued to strangers; that Olalui Group Ranch has never been legally and procedurally demarcated; that the applicant was a necessary party.
8. The 1st plaintiff, who averred to be the sole surviving plaintiff, filed a preliminary objection to the effect that the application is time barred by dint of Section 4 (4) of the Limitation of Actions Act; that the decree has been fully executed and the land parcel Narok/Transmara/Olalui/1 subdivided into the parcels No 2 – 607; that there is no fraud or mistake to satisfy the provisions of Section 26 of the Limitation of Actions Act to justify the extension of the limitation period from 12 years and that in any case Section 26 contemplates an action by a plaintiff, not an interested party to a closed and concluded suit; that the issues being raised are barred by Section 6 of the Civil Procedure Act as they are issues that are substantially in issue in the suits Narok ELC No 335 of 2017, Kilgoris ELC No E14 of 2021 (formerly Narok ELC No 320 of 2017), and Court of Appeal, Civil Appeal No 80 of 2020.
9. The Attorney General filed Grounds of Opposition to oppose the motion. Inter alia, it is contended that the application does not meet the parameters for review as provided under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules; that the applicant has not demonstrated any substantial loss it stands to suffer; that the applicant is guilty of laches; that the effect of allowing the application will be to vary the terms of consent which bears contractual effect; that the consent is incapable of being stayed or varied by dint of Section 4 (4) of the Limitation of Actions Act; that the application has not met the test of being joined as an interested party; that the application has been overtaken by events as the orders sought to be stayed have been overtaken by events; that the application is an afterthought.
10. What is before me is essentially an application to set aside a judgment and upon the judgment being set aside, for the applicant to be joined as interested party or defendant to this suit. The main contention of the applicant is that she ought to have been made a party to this suit. On this, I agree.
11. What was in issue in the suit was the land parcel Narok/Transmara/Olaloi/13. I have seen the record of this parcel of land which was in the supporting affidavit of Mr. Ole Risa, and indeed, at the time the suit was being filed, this land was owned by Olalui Group Ranch. I do not see how parties could file



suit over land owned by somebody else and seek orders relating to that land where the title holder was not a party in the case. Proprietary rights were vested in the registered proprietor, who is the applicant herein, and persons could not adversely proceed to affect her rights in a suit to which she was not a party. I also do not see how the plaintiffs and defendants could enter into a consent over land which none of them had proprietorship of. In my view, the whole suit was a non-starter and such a consent could not be validly entered as the owner of the land was not party thereto. You cannot have a situation where A sues B, over rights related to land which is owned by C, and without making C, a party to that suit, proceed to enter into a consent carving out C's land. Such suit and consent are clearly tainted by misjoinder and/or an element of fraud and/or mistake. I have no hesitation in reaching the conclusion that the present suit ought not to have been entertained without the presence of Olalui Group Ranch and also the consent herein ought not to have been allowed to be recorded and the decree herein ought not to have been passed, without the presence of Olalui Group Ranch.

12. The respondents have however raised issue that the action herein is time barred given the provisions of Section 4 (4) of the [Limitation of Actions Act](#). That law provides as follows :-

- (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.

13. What the above section provides is the limitation period in respect of judgments and I have no problem with the direction that no action should be brought upon a judgment after the lapse of 12 years. However, does this bind a person who was not aware of the judgment at all from seeking to have it set aside if it directly affects him despite the lapse of 12 years? It cannot be argued that such person ought to have filed his application to set aside the judgment within 12 years for he could not have proceeded to do so given his lack of knowledge of its existence. I think relief comes pursuant to Section 26 of the [Limitation of Actions Act](#) which provides as follows :-

26. Extension of limitation period in case of fraud or mistake 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.

14. From the above, it will be noted that there is an extension of the limitation period where an action is based on fraud and mistake. In such instance, time starts running from the time that such fraud or mistake was discovered. In our instance, the applicant contends that she only discovered of the consent on 14 January 2021. That is not disputed by the plaintiffs or defendants. I have found that the consent was fraudulent or entered by mistake thus the time to set aside the judgment started running from 14 January 2021, and 12 years had certainly not lapsed to the filing of this application. I therefore see no substance in the preliminary objection raised by the plaintiffs and the defendants.
15. On the whole, it is my view that this application is merited. I proceed to set aside the consent of the plaintiffs and defendants dated 24 June 2005 and filed on 30 June 2005 together with the decree issued on 4 July 2005. I do not see how the suit herein could have been properly filed without Olalui Group Ranch being a substantive defendant as she was/is the registered proprietor of the land parcel Transmara/Narok/Olalui/13. I order the plaintiffs to amend the plaint within the next 14 days and join Olalui Group Ranch as defendant. If no such amendment is done, within the specified period, this plaint be struck out. The applicant will also have the costs of this application jointly and/or severally against both the plaintiffs and defendants.
16. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 21 DAY OF JUNE 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

In the presence of:-

Ms. Chepkulul for the applicant, instructed by M/S Gordon Ogola, Kipkoech & Co. Advocates.

No Appearance on part of M/S Musalia Mwenesi Advocates for the plaintiffs

No Appearance on the part of the State Law office for the defendants

Court Assistant – Lawrence Chomba

