



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Okonjo (Suing as the administrator of the Estate of Michael Okonjo
(Deceased) & another v Agola & 6 others (Environment & Land Case
E14 of 2022) [2023] KEELC 18259 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18259 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E14 OF 2022**

LA OMOLLO, J

JUNE 19, 2023

BETWEEN

**JAMES OKELLO OKONJO (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF MICHAEL OKONJO (DECEASED) 1ST PLAINTIFF
ECHAFAN MWARIRI KAMAU 2ND PLAINTIFF**

AND

**JOSEPH ODINGO AGOLA 1ST DEFENDANT
NAKURU LAND REGISTRAR 2ND DEFENDANT
KENYA COMMERCIAL BANK LIMITED 3RD DEFENDANT
THE LAND CONTROL BOARD 4TH DEFENDANT
LEGACY AUCTIONEERING SERVICES 5TH DEFENDANT
PETER MANONO MECHA 6TH DEFENDANT
MARION WAIRIMU MECHA 7TH DEFENDANT**

RULING

Introduction

1. This ruling is in respect of the 6th and 7th defendants preliminary objection dated July 4, 2022 which is on the following grounds;
 - a. The claim is filed out of time contrary to the express provision of the [Limitation of Actions Act](#).



- b. The plaintiffs claim is *res judicata* Nakuru High Court civil appeal No 64 of 2003.
- c. The plaintiffs claim is *res judicata* Nakuru Court of Appeal civil application No 124 of 2006.
- d. No cause of action has been made against the 6th and 7th defendants.
- e. The 6th defendant is an innocent purchaser for value without notice.

Factual Background.

2. This suit was commenced by way of a plaint dated March 3, 2022. The plaintiffs seek the following prayers;
 - a. Declaratory orders that the registration of the 1st defendant 2nd defendant 3rd defendant, as the absolute owner of 33 acres Rongai/Lengenet Block 2/12 Mawe Farm plot No 10024 was fraudulent thus be divested and vest in the 1st plaintiff's name acres and in the 2nd plaintiff name his 5 acre. (sic)
 - b. The 6th defendant be evicted from the suit land 10 acres portion and perpetual injunction order do issued restraining the defendant from encroaching on the same 10 acres of 1st plaintiff Mr James Okello Okonjo and 2nd plaintiff Mr Echfan Mwariri Kamau.
 - c. Court costs and or with any other costs incidental there to be borne by the defendants or with any other order that court deems fit and just to grant.
3. The 6th and 7th defendants filed their statement of defence dated May 24, 2022 wherein they state their intention to raise a preliminary objection at the earliest opportunity and that the plaintiffs suit is bad in law and should be dismissed with costs.
4. The 2nd defendant filed its statement of defence dated May 24, 2022 on June 7, 2022. The 2nd defendant denies the plaintiffs averments in their plaint and states that no cause of action has been raised against it.
5. The 6th and 7th defendant's preliminary objection first came up for hearing on November 9, 2022 and was adjourned to December 13, 2022.
6. Subsequently, the preliminary objection came up for mention severally before it was heard on March 1, 2023.

1st Plaintiff's Response to the Preliminary Objection.

7. The 1st plaintiff filed his response to the preliminary objection on January 26, 2023. His response is as follows;
 - a. That in CMCC case No 1624 of 2001 I was the first defendant. The plaintiff did not appear and the matter was adjourned and interim injunction obtained.
 - b. The limitation of right and fundamental freedom in the bill of rights and justifiable in an open and democratic on human dignity, equality and freedom taking into account all relevant factors including;



- a. The nature of the right or fundamental freedom to the portion of owner land.
- b. The importance of the purpose of the limitation is, every person to get his 23 acres 6&7 defendant and me as 1st plaintiff to get his 4 acres.
- c. I urge the court to hear my cry and on behalf of 2nd plaintiff as out 10 acres has been grabbed by the 1st, 2nd, 5th defendants.
- d. A truth and justice it is our constitutional right our case No E 14 of 2022 to be heard at this time to get the truth.
- e. At this juncture we urge the court honorable judge to go through the plaintiffs' plaint and verified affidavit of ELC case No E 14 of 2022 it has the true information pertaining to the conduct of the defendants i.e the acres of 1st plaintiff and 5 acres for 2nd plaintiff.
- f. The 5th defendant legacy auctioneering on October 5, 2002. They made and announce that the property is 33 acres and it has about 2 acres are tiled and is under develop refer action J.O.P.9.
- g. In the view of the plaintiff ELC case No E.14 of 2022 note to the matter of the civil appeal 64 of 2003 from the trial courts ruling in CMCC No 246 of 2003 wherein the court upheld a preliminary objection raised by counsel for second respondent who is now 1st defendant of ELC case No E.14 of 2022 and he was the one who grabbed the 10 acres of land and his parcel was 23 but not 33 acres.
- h. In our plaintiffs' views the ELC case No E.14 of 2022 suit is good and true in law and should be deemed fit and court should just grant our petition. Our case should not be made about the preliminary objection of counsel of 6th and 7th defendants. That was raised by counsel for the second.

8. The 2nd plaintiff filed his response to the preliminary objection on March 1, 2023. I am constrained to reproduce the response as hereunder;

- a. That the nature of the right or fundamental freedom to the portion of owner land but not the land grabbers, mostly for this ELC case No E 14 of 2022 The title deed for that 33 acres it has issued contrary to the law of Kenya.
- b. That the preliminary objections dated July 4, 2022 to be stop to be heard until the hearing case No E14 2022 to be heard and the said fake title deed to be cancelled and every one to have his title for me to get my land title 5 acres and the 1st plaintiff Mr James Okonjo to get his title deed for his 5 acres and the 6th and 7th defendant Mr Peter Manono Mecha and Marion Wairimu to get their title deed for their 23 acres only. With good faith I urge the court to hear my cry because I am telling the truth about my 5 acres and it is truth I am telling the



court what it had been doing by the 1st defendant Mt Joseph Odingo Agola. As he knows he grabbed 10 acres as he bayed 23 acres out of 33 acres.

- c. A truth and justice it is our constitutional fight for our case No E14 2022 to be heard at this time to get the truth in good faith.
- d. That at this juncture I urge the court honorable judge to go through the plaintiffs plain and verified affidavit of ELC case No E 14 of 2022 it have the whole true information pertaining to the conduct of the 1st defendant for grabbed 10 acres.
- e. That the 5th defendant legacy auctioneering on October 5, 2002 it has made announce that the property is 33 acres and it has about 2 acres are tiled and is under development refer auction J.0.P.G.
- f. That in the view of the 2nd plaintiff ELC case No E 14 of 2022 note that the matter of the CMCC No 246 of 2003 and the civil appeal No 64 of 2003 from the trial court ruling let me tell the truth before the God the many days I went to the court at the court registry always told me that your file case is missing they always told me to come another day for them to find that file.
- g. That in my view as 2nd plaintiff the ELC case No E 14 of 2022 the suit is good and true in Law and should be deemed fit and court should just grant my preliminary objection our case to be heard first before to hear the preliminary objection of July 4, 2022. As the truth title deed they have is a fake up to now.

Submissions.

9. The preliminary objection was heard orally.
10. Counsel for the 6th and 7th defendants submits that the suit and claim against the defendants has been filed outside the provisions of the Limitations Act.
11. It is his submissions that the plaintiffs acknowledge that the property was sold to the 6th and 7th defendants in a public auction in the year 2002.
12. It is also his submissions that the sale was in exercise of a chargee's right to sell.
13. He further submits that the plaintiffs were involved in litigation which culminated in the judgement in Nakuru High Court HCC 64/2003 and civil appeal No 124 of 2006 where the chargee's right to sell was determined in the said two cases.
14. It is his submissions that the plaintiffs claim is therefore *res judicata* and that the 6th and 7th defendants have stated that they are innocent purchasers for value which issue has been resolved in the High Court and the Court of Appeal.
15. He then seeks that the suit be struck out as the 6th and 7th defendants continue to be harassed with litigation.
16. The 1st plaintiff submits that he agrees with the 6th and 7th defendants even though the title deed of the suit property was never received by his father.
17. The 1st plaintiff also submits that he is the administrator of his father's estate and so he wants the title.



18. The 1st plaintiff further submits that the 1st defendant bought twenty-three acres and he wrote a letter asking him to process the title deed which title deed he got without involving Mzee Okonjo's family.
19. He concludes his submissions by stating that he does not have a problem with the 6th and 7th defendants and wants the correct title deed.
20. The 2nd plaintiff submits that he does not agree that the suit be dismissed as he bought the parcel in the year 1986 from the mother of the 1st plaintiff.
21. The 2nd plaintiff also submits that he was summoned to appear before the chief and when he did, he was informed that the 1st defendant was claiming that he was on his land.
22. The 2nd plaintiff further submits that the 1st defendant was told to leave by the elders because he had been away for eleven years.
23. The 2nd plaintiff submits that when the 1st defendant came back, the parcel of land was up for auction but the auctioneers removed the board and left.
24. The 2nd plaintiff also submits that the elders and the District Officer resolved the case and he knew that the property belonged to him.
25. The 2nd plaintiff further submits that if at all time had lapsed as alleged by the 6th and 7th defendants, he was not involved in those proceedings.
26. The 2nd plaintiff submits that he put a caution on the suit property as the 1st defendant was involved in corrupt deeds.
27. The 2nd plaintiff also submits that as at the year 2003, he was looking for a court order and reiterates that he doesn't understand the question of time that the 6th and 7th defendants are bringing up.
28. The 2nd plaintiff seeks that the suit should not be dismissed as they were not involved and so the time does not run against them.
29. The 2nd plaintiff submits that the suit property was taken from him fraudulently as he had bought it in the year 1986 and the pending issues were resolved in the year 1988.

Analysis And Determination

30. After considering the 6th and 7th defendants preliminary objection, the responses thereto and the submissions the only issue that arises for determination is whether the preliminary objection dated July 4, 2022 has merit.
31. The case of *Mukhisa Biscuit Manufacturing Co Ltd v West End Distributors Limited*, 91969) EA 696, defined a preliminary objection as follows;

“.....a “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary



objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

32. A preliminary objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained. Further, a preliminary objection must stem from the proceedings and raise pure points of law and should not deal with disputed facts nor should it derive its foundation from factual information.
33. The 6th and 7th defendants in their preliminary objection contend that the present matter was filed out of time contrary to the express provision of the [Limitation of Actions Act](#).
34. The 6th and 7th defendants also contend that the plaintiffs claim is *res judicata* as there were previous litigations regarding the same issue which were Nakuru High Court civil appeal No 64 of 2003 and Nakuru Court of Appeal civil application No 124 of 2008.
35. On whether an issue of limitation of time can be raised through a preliminary objection, the court in the case of [Sichuan Huasbi Enterprises Corp Limited v Micheal Misiko Mubindi](#) [2019] eKLR held as follows;

“ 13. The law as I understand it is that the defence of limitation of time is a matter for determination at the trial; it cannot be dealt with in a summary manner or at preliminary stage or as a preliminary objection. The court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial.

On this see the case of *Oruta & another v Nyamoto* [1998] KLR 590, where the court held that limitation of action:-

“...could only be queried at the trial but not by...a preliminary objection...The appellant could raise the objection at the trial and the trial judge would have to deal with the matter on the evidence to be adduced at the trial”

14. See also the case of *Divecon Ltd v Shirinkhanu S. Samani* civil appeal No 142 Of 1997, where the court quoted with approval the words of Gachuhi, J.A, the leading judge in the Oruta case (ibid) that:

“It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the [Limitation of Actions Act](#)...”

36. As was held in the above case, issues of limitation of time can only be determined at the trial of the main suit and not a preliminary stage.
37. The other ground on the preliminary objection is that the plaintiffs case is *res judicata*. The court in the case of [Henry Wanyama Khaemba v Standard Chartered Bank Ltd & another](#) (2014) eKLR held as follows;

““That re-statement of the limited scope of a preliminary objection brings me to the point where I hold that the preliminary objection by the 1st defendant is not a true preliminary objection in the sense of the law. The issues of *res judicata*, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st defendant. They are incapable of being handled as preliminary objections because



of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections improperly”.

38. The court also in the case of *George Kamau Kimani & 4 others v County Government of Trans-Nzoia & another* [2014] eKLR held as follows;

“I have considered the points raised by the first defendant. All those points can be argued in the normal manner. They do not qualify to be raised as preliminary points. One cannot raise a ground of *res judicata* by way of preliminary objection. The best way to raise a ground of *res judicata* is by way of notice of motion where pleadings are annexed to enable the court to determine whether the current suit is *res judicata*. Professor Sifuna did not raise the issue of *res judicata* by way of notice of motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of raising the issue of *res judicata*. The other points raised in the preliminary objection are issues which require ascertainment of facts by way of evidence. They cannot be brought by way of preliminary objection.”

39. The decision in *Independent Electoral and Boundaries Commission v Maina Kiai and 5 others*, Nairobi CA No 105 of 2017 sets out the elements that must be satisfied for a plea of *res judicata* to be upheld:

- 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 issues was competent to try the subsequent suit or the suit in which the issue is raised.

40. The decision in *Uhuru Highway Development Ltd v Central Bank of Kenya* [1999] eKLR also offers useful guidance on the element of *res judicata*. It rendered the elements as;

- a. The former judgment or order must be final;
- b. The judgment or order must be on merits;
- c. It must have been rendered by a court having jurisdiction over the subject matter and the parties; and
- d. There must be between the first and the second action identity of parties, of subject matter and cause of action.

41. Therefore, in order for this court to determine whether this suit is *res judicata*, it would have to peruse the pleadings in the various suits referred to by the 6th and 7th defendants so as to satisfy itself that the aforementioned elements of *res judicata* have been satisfied.

Disposition.

42. The question of *res judicata* cannot and should not be raised by way of a preliminary objection as it requires, at the very minimum, a scrutiny of pleadings in the alleged former suit or suits. None has been availed to this court.



43. In the result, I find that the 6th and 7th defendants preliminary objection dated July 4, 2022 lacks merit and is hereby dismissed with costs.

44. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 19th DAY OF JUNE 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

No appearance for plaintiffs

No appearance for defendants

Court Assistant; Ms. Monica Wanjohi.

