



**Hongo (Suing as Legal Representative of Julius Hongo Ombogo - Deceased)
v Hayer & another (Environmental and Land Originating Summons
E009 of 2023) [2023] KEELC 20334 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20334 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2023
E ASATI, J
SEPTEMBER 28, 2023**

BETWEEN

**DAUDI OTIENO HONGO (SUING AS LEGAL REPRESENTATIVE OF JULIUS
HONGO OMBOGO - DECEASED) PLAINTIFF**

AND

CHARANJIT SINGH HAYER 1ST DEFENDANT

HAYER BISHAN SINGH & SONS LIMITED 2ND DEFENDANT

RULING

1. This ruling relates to the defendants' notice of motion application dated May 2, 2023 stated to be brought pursuant to the provisions of sections 7 and 9 (2) of the Limitations of Actions Act cap 22 Laws of Kenya. The application seeks for orders that: -
 - a. The application be heard on priority basis.
 - b. The suit be struck out with costs for being incompetent, incurably defective and misconceived as the cause of action is statutorily time barred.
 - c. Costs of the application be provided of
2. The grounds upon which the application is brought are that: -
 - a. To the extent that the 1st defendant is not Administrator of the estate of the late Bishan Singh, the plaintiff is nonsuited, to the 1st defendant who is described as a son to the late Bishan Singh and grandson to the late Naranjan Singh Hayer.



- b. The plaintiff has instituted this suit in his capacity as the Administrator of the estate of the late Julius Hongo Ombogo having obtained Limited Grant of Letters of Administration of the estate of the deceased.
 - c. The deceased passed on May 30, 2021.
 - d. The 2nd defendant who is the current registered owner and proprietor of the suit parcel of land took possession of L.R No. Kisumu/Ojola/1769 and have been working on it for over twelve years.
 - e. The deceased was in possession of the said land before the Defendants took over possession of the same.
 - f. The cause of action for recovery of the suit land arose on the date of the death of the deceased as set out in section 7 and 9(2) of the *Limitation of Actions Act* (cap 22)
 - g. This suit is statutorily time barred and hence misconceived, misbegotten, incurably defective and an abuse of the court process.
3. The application was supported by the averments in the Supporting Affidavit and the annexures thereto.
 4. In response to the application, the respondent filed a replying affidavit sworn by himself on May 10, 2023. His case is that he is the son of Julius Hongo Ombogo the registered owner of the suit land. That his father leased the suit land to Bishan Singh in the year 1977 for a period of 20 years. That upon expiry of the lease the lessee ignored to seek for extension of lease and refused to vacate and hand over vacant possession and unlawfully and punitively stayed put and instead caused the land to be fraudulently registered in the name of Gulbux Singh Hayer and Charanjit Singh Hayer contrary to the provisions of section 54(1) of the *Land Registration* No. 3 of 2012. That the defendants /respondents continuously placed the Land lease certificate dated October 30, 1978 as collateral to acquire loans from financial institutions without consent or authority of the lesser contrary to section 55(a) and (b) of No. 3 of 2012. That the case before court is a claim of fraud in defrauding the Plaintiff's father of possession of the suit land through an illegal, un-procedural and corrupt scheme contrary to section 26(1) and (b) of *Land Registration* No. 3 of 2012. That section 7 of the *Limitation of Actions Act* should be read together with section 26(a) (b) thereof. The plaintiff relied on the document attached to the replying affidavit.
 5. Directions were given on 5th of July 2023 that the application be argued by way of written submissions.
 6. Written submissions dated July 8, 2023 were filed on behalf of the defendants/applicants by the firm of Onsongo & Company Advocates. Counsel submitted that the facts as pleaded by the parties and contained in the witness statements reveal that; -
 - a. On 21/7/1978 L.R No Kisumu/Ojola/1768 was registered in the name of the late Hongo Ombogo.
 - b. That on 27/10/1978 the land was transferred to Gurbux Singh Hayer and Charanjit Singh Hayer.
 - c. That on 27/11/1998, the land was transferred in favour of and in names of Charanjit Singh Hayer and Hayer Bishan Singh and sons Company.



- d. There is an instrument of transfer dated October 2, 1978 between Hongo Ombogo as vendor and Charanjit Singh Hayer and Gurbux Singh Hayer as purchaser. That the instrument of transfer has not been disputed.
 - e. The transfer of the land from the name of the deceased was on October 27, 1978, about 45 years ago. If there had been any fraud, the late Hongo Ombogo would have raised it before his demise on 30/5/2021.
 - f. The defendants have been in occupation, possession and use of the suit land often carrying out quarry activities publicly and hence the plaintiff has always been aware of the defendants' claim to the land
 - g. That the plaintiff cannot allege that he only discovered that the defendants are the registered owners of the land in the year 2021.
7. Counsel further submitted that the application is founded on the provisions of section 7 of the Limitation of actions Act. Counsel relied on the case of *Mehta v Shah* (1965) E.A 321 and *Gathoni vs Kenya Co-operative Creameries Ltd* (1982) KLR 104 to submit that the law of Limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. Counsel further relied on the case of *Bosire Ongero v Royal Medic Services* (2015) eKLR where the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims; that where the claim is time barred the court has no jurisdiction to handle. That Limitation being a substantive issue, the provisions of sections 1A and 1B Civil Procedure Act cannot be invoked with a view to disregard provisions of an Act of Parliament. Counsel also relied on the case of *Owners of the Motor Oil (Kenya) Limited* (1989) KLR 1 to support the submissions and prayed that the application be allowed.
 8. Written submissions dated 17/7/2023 were filed on behalf of the Respondents by the firm of S.B Otieno Advocates. Counsel submitted that Gurbux Singh Hayer having entered into a 20 year lease agreement in 1977 over the suit property with Julius Hongo Ombogo deceased, he never remitted any rents. Counsel invited the court to pronounce itself on entry No.s 2 and 3 on 27/10/1978 and 30/10/2978 fraudulently entered by the Defendants.

Counsel relied on the cases of *Kenya Commercial Bank Ltd v Stage Coach Management Ltd* (2014) eKLR to submit that the defendants' advocates had filed pleadings without directions, minutes, valid resolution or appointment letter duly signed and sealed with the Company seal. Counsel urged the court to strike out the pleadings filed. Counsel relied on the cases of *Affordable Homes Africa Ltd v Ian Anderson & 2 others* HCCC No 524 of 2004 to support the submission.
 9. Relying on Order 4 Rule 1(4) of the Civil Procedure Rules Counsel submitted that Dilvaj Singh Hayer and Jane Betty Atieno did not have valid authority or resolution to depose to the Supporting Affidavit on behalf of the Defendants herein rendering the pleadings without merit and unreasonably defective.
 10. On whether or not the property was lawfully acquired by the Defendant, Counsel relied on the provisions of sections 25 and 26 of the Land Registration Act and article 40 of the Constitution and submitted that the title was obtained through fraud. Counsel also relied on section 45 of the Law of Succession Act and the case of *Benson Muthuma Muringi v CEO Kenya Police Sacco and another* (2016) eKLR To submit that the applicant had intermeddled with the property of the deceased.
 11. On whether he suit is time barred, counsel relied on the provisions of section 26 of the Limitations of Actions Act and submitted that the period of Limitations does not start to run until the fraud is discovered. Counsel relied on the case of *Samuel Odhiambo Oluoch and 2 others v Jubilee Jumbo Hardware Limited and another* (2012) eKLR to support the submissions. Counsel submitted that



upon invalidation of the pleadings filed by the applicants, the relief sought by the plaintiff be granted as the suit is undefended.

12. I have considered the application. The sole issue raised by the applicant and upon which the application is anchored is limitation of actions as provided for in section 7 of the *Limitation of Actions Act* cap 22 Laws of Kenya. From the plaintiff's pleadings the plaintiff obtained Limited Grant of Letters of Administration – Ad Litem dated April 20, 2022. He thereafter filed the suit on March 16, 2023 in his capacity as the Administrator of the estate of John Hongo Ombogo. The Grant shows that Julius Hongo Ombogo died on May 30, 2021.
13. The cause of action complained of occurred in the year 1978 when the suit land was transferred away from Julius Hongo Ombogo. This was in the lifetime of the said Julius Hongo Ombogo. The Plaintiff alleges that the relationship that existed between his late father and the defendants was a 20-year tenancy that commenced in the year 1977. Firstly, by 1977 the suit land had not become the property of the deceased as the land was registered in his name on July 21, 1978. He could therefore not have leased the land in the year 1977. There is no evidence that the deceased took any action after the alleged lease expired in the year 1997. There is no evidence that the deceased was not aware of transfer of the suit land in favour of the defendants. The instrument of transfer of the suit land from the deceased to the defendants has not been denied by the plaintiff. The provisions of section 7 of the *Limitation of Actions Act* prohibit filing of suits to recover land after the expiry of 12 years from the date the cause of action arose. Even assuming that there was a 20 year tenancy from the year 1977 as claimed by the plaintiff, the cause of action for recovery of the land accrued from the year 1997 when the alleged tenancy expired and by the time the deceased passed on in the year 2021, more than 12 years had elapsed.
14. The defendants had all those years been on the land carrying out quarry activities, using the title as collateral for loan facilities and generally using the land as theirs. It is not believable, in the circumstances, that the deceased, his estate or the plaintiff was not aware of the registration of the land in the names of the defendants until the year 2021. Hence the provisions of section 26 of the *Limitation of Actions Act* and the submission that time begun to run from the time the plaintiff discovered the fraud is not applicable in the circumstances of the case.
15. I find that the suit was filed well after the limitation period under section 7 of the *Limitation of Actions Act* had expired. I find that the application has merit and allow it. The suit is hereby struck out. Each party to bear own costs.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 28TH DAY OF SEPTEMBER 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

**E. ASATI
JUDGE.**

