



Juma (Suing as legal representative of Ochier Owando (Deceased) v Hayer & another (Environment & Land Case E010 of 2023) [2023] KEELC 20304 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20304 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E010 OF 2023**

**E ASATI, J
SEPTEMBER 28, 2023**

BETWEEN

**ISAYA OMONDI JUMA (SUING AS LEGAL REPRESENTATIVE OF OCHIER
OWANDO (DECEASED) PLAINTIFF**

AND

CHARANJIT SINGH HAYER 1ST DEFENDANT

HAYER BISHAN SINGH & SONS LIMITED 2ND DEFENDANT

RULING

Introduction

1. This ruling relates to the Defendants' Notice of Motion application dated 2nd May 2023 stated to be brought pursuant to the provisions of Section 7 and 9 (2) of the *Limitations of Actions Act* Cap 22 Laws of Kenya.
 - a. The application be heard on priority basis.
 - b. The suit be struck out with costs for being incompetently 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 Napanjan Singh Hayer.



- b. The Plaintiff has instituted this suit claiming to be the Administrator of the estate of the late Ochier Owando yet he has not obtained a Grant of Letters of Administration of the estate of the deceased and hence the plaintiff lacks the capacity to institute and or prosecute the suit.
 - c. The deceased passed on, on 3rd January 1978. Which means that the cause of action if any arose on the said date.
 - d. The 2nd defendant is the current registered owner and proprietor of the suit parcel of land took possession of L.R No. Kisumu/Ojola/1768 and have been working on it for over twelve years.
 - e. The deceased was in possession of the said land before the Defendant 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 averment in the Supporting Affidavit sworn by Jane Betty Atieno on 2nd May 2023 and the annexures thereto.
 4. In response to the application, the Respondent filed a Replying Affidavit sworn by himself on 10th May 2023. His case is that he is the grandson of Ochier Owando, Deceased, the registered owner of land parcel No. Kisumu/Ojola/1768, the suit land. That the deceased died on 3rd January 1978. That the deceased leased the suit land to Bishan Singh s/o Charanjit Singh Hayer on 21. 5. 1977 for a fixed period of 20 years. That immediately after signing of the lease agreement, the lessee took possession and occupation of the suit property, housed the 2nd Defendant as a registered company and built permanent structures thereon. That upon expiry of the lease the lessee ignored to renew the of lease and decided to continue with occupation. That on 27th October 1978, nine (9) months after the death of the proprietor the lessee inserted their names in the land register contrary to the provisions of Section 54(1) of the Land Registration No. 3 of 2012.
 5. That the Defendants /Respondents continuously placed the Land lease certificate as collateral to acquire loans from Habib bank without consent or authority of the lesser contrary to section 55(a) and (b) of No. 3 of 2012.
 6. That the Defendant's failure to have the lease renewed, unlawful transfer of the suit property into their names and getting issued with lease certificate and continuing to occupy the land and use of the certificate of title as collateral are all fraudulent. That he came to learn of the fraud in February 2023 when he conducted a search on the land for succession purposes.
 7. That time for purposes of the limitation period does not start to run in cases of fraud until the fraud is discovered. That Jane Betty Atieno had no power of Attorney or Grant of Letters of Administration to enable have capacity to swear the Supporting Affidavit. That the Defendants' land rights over the suit property are not protected under article 40 of the Constitution as the land was not acquired procedurally.
 8. Directions were given on 5th of July 2023 that the application be argued by way of written submissions.



Submissions

9. Written submissions dated 10th July 2023 were filed on behalf of the Defendants/Applicants by the firm of Onsongo & Company Advocates. Counsel submitted that the Defendants seek that the suit be struck out on two grounds firstly that the plaintiff having not taken out Letters of Administration to the estate of the deceased Ochier Owando, he lacks capacity to institute and prosecute the suit. Secondly that the suit is statutorily time barred on account of the provisions of section 7 of the *Limitation of Actions Act*, Cap 22. That the 2nd Defendant is the registered owner of the suit land parcel No Kisumu/Ojola/1768 and that the 2nd Defendant got registered as owner and took possession thereof in the year 1979 and has been using the land to date. That accordingly the suit is statutorily time barred. That the entries in the extract of the register in respect of the suit land show that on 27/7/1978 the suit land was registered in the name of Ochier Owando, deceased. That on 30.1.1979 the land was transferred in favour of one Joseph Ombogo based on succession. That on the same day 30.1.1979 the parcel of land was transferred to Charanjit Singh Hayer and Gurbux Singh Hayer at a consideration of Kshs.15,000/-.
10. Counsel relied on a number of authorities including *Virginia Edith Wambui Otieno vs Joash Ochieng Ougo & Another* CA 31 of 1987 to submit that without Letters of administration to the estate of the deceased on whose behalf the plaintiff filed the suit, the plaintiff has no capacity to file and prosecute the suit. Secondly that such a suit is a nullity and the court has no jurisdiction to breathe life into an incompetent suit. Counsel relied on the case of *Macfoy vs United Africa Ltd* [1961] 3 ALL ER- 1169 to support the submission.
11. Counsel further submitted that pursuant to section 7 of the *Limitation of Actions Act*, the plaintiff's suit is time barred. That the Defendants acquired proprietary rights to the suit land in 1979 and the cause of action for recovery of the land if any, accrued then. Counsel relied on the case of *Edward Moonge Langusuranga vs James Lanaiyara & Another* [2019] eKLR to support the submission.
12. Counsel submitted further that the law of limitation is intended to protect Defendants against unreasonable delay in bringing actions against them. That a suit barred by limitation is a claim barred by law hence the court cannot grant the relief sought in it. Counsel prayed that the suit be struck out with costs.
13. No submissions were filed by the Respondent.

Issues for determination

14. The issues for determination are: -
 - a. Whether or not the plaintiff has capacity to bring the suit.
 - b. Whether or not the suit is statutorily time barred
 - c. Who pays the costs

Analysis and determination

15. The first issue for determination is whether or not the plaintiff has capacity to sue. The plaintiff described himself in paragraph 2 of the Affidavit in Support of Originating Summons as "one of the sons and heir beneficiary to the estate of Ochier Owando deceased and for purposes of prosecuting the suit herein I sought for Letters of grant of administration Ad-Litem annexed to the said Supporting Affidavit. There was no Grant of Letters of Letters of Administration attached to the Supporting



Affidavit”. There was also no such Grant of Letters of Administration attached to the Replying Affidavit. It is the true position of law that a party who has no Letters of administration has no capacity to sue on behalf of the estate of the deceased concerned. See section 82 Law of succession Act. A suit filed by such a party is a nullity.

16. Section 2 (1) of the Law of Succession Act provides that

Except where it is otherwise expressly provided in this Act or any other written law, the provision of the Act shall constitute the law of Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estate of the deceased person dying after the commencement of this Act and to the Administration of Estates of those persons.”

The meaning of this provision of the law is that an estate of a deceased person in Kenya can only be managed in accordance with the provisions of the Law of Succession Act (the Act). On filing of suits in respect of such estate, the Act, in Section 82, vests the power to file such suit (or for such suits to be filed against) in the personal representative of the deceased duly appointed through the process of succession as provided for in the Act. There is no evidence placed before the court that the Respondent has been duly appointed as personal representatives of the deceased through the process provided for in the Act.

17. A copy of the register (green card) in respect of the suit land exhibited shows that the suit land ceased to belong to the deceased on 30. 1. 1979 when it was transmitted to one Josephe Ombogo upon succession. This means that the estate of the deceased was already succeeded and that the successor/ administrator is the one who transferred the land to the Defendants. That administrator is the person who had capacity. If the plaintiff was aggrieved by the action of the administrator, then he should pursue the administrator.
18. It is also important to note that the plaintiff is not clear about his relationship with the deceased. While in the Affidavit in Support of Originating Summons he describes himself as son and heir beneficiary of the deceased, in paragraph 3 of the Replying Affidavit he describes himself as the grandson of the deceased.
19. I find that the plaintiff lacks capacity to file and prosecute the suit.
20. The suit land was transferred from the administrator of the estate of the deceased in the year 1979. The cause of action to recover the land, if at all, accrued to the said administrator then. This suit filed in the year 2023 is outside the limitation period under section 7 of the Limitation of actions Act.
21. I find that the suit herein is incompetent and a nullity for being filed out of time and by a party who had no capacity to sue. For this reason, the application has merit. It is hereby allowed and the suit struck out. Each party to bear own costs of both the application and the suit.

Orders accordingly.

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

E. ASATI

JUDGE

