



REPUBLIC OF KENYA



KENYA LAW
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Kiptalam v Bitok (Sued as the Administrator of the Estate of the Late Teresa Bitok alias Teresa Jemaiyo Bitok - Deceased) (Environment & Land Case E020 of 2023) [2023] KEELC 21627 (KLR) (16 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21627 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E020 OF 2023
MN MWANYALE, J
NOVEMBER 16, 2023

BETWEEN

LINUS KIPOR KIPTALAM PLAINTIFF

AND

ELIZABETH CHEPKIRUI BITOK (SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE TERESA BITOK ALIAS TERESA JEMAIYO BITOK - DECEASED) DEFENDANT

RULING

1. Before Court for determination, is the Notice of Motion application dated 4th October, 2023 seeking orders as follows;
 - i) Spent
 - ii) Spent
 - iii) That pending the hearing and determination of the main cause, the Land Registrar, Nandi County be restrained from in any manner dealing with the register of all those parcels of land known as L.R. No. Nandi/kipkaren Salient 243/ and L.R. No. Nandi/kipkaren Salient 245.
 - iv) That in the alternative to prayers 2 and 3 above there be an order of status quo on both the ground and the register of all those parcels of land known as L.R. No. Nandi/kipkaren Salient/243 and L.R. No. Nandi/kipkaren Salient/245 pending the hearing and determination of the original summons filed herewith.
2. The application is founded on grounds interalia;
 - i) That the suit properties, to wit, Nandi/kipkaren Salient 243 and Nandi/kipkaren Salient 245 were purchased from proceeds of an ancestral land at Moiben which belonged to the late



Emmanuel Kiptallam Bosen, the father and mother grandfather to the parties, and was thus purchased for the benefit of the Applicant.

- ii) The suit parcels were registered in the name of the late Teresa Bitok Alias Teresa Jemaiyo Bitok (Deceased) an elder sister to the Applicant and the registration was purely in trust for the Applicant.
3. There is bad blood between the Applicant and Respondent and Respondent although is aware that the suit parcels did not belong to her late mother has threatened to transfer the same to third parties, yet the Applicant has been in use, occupation and/or possession of the suit parcels of land since 1965 to date and his claim is based on generational trust.
4. The application is supported by the supporting affidavit of Linus Kibor Kiptallam, the Applicant who depones and reiterated the grounds in support of the application and urges the Court to allow the application.
5. The Respondent has filed grounds of opposition dated 16/10/2023 to the application and the said grounds are also a preliminary objection to the suit.
6. The grounds being inter alia, that the suit is time barred by virtue of Section 7 of the Limitation of Actions Act. That the Applicant was aware of registration of suit parcels at least 15 years back in Eldoret High Court P & A No. 53/2008.
7. That there exists a suit to wit Eldoret High Court P & A No. 53/2008 hence the application and suit offends Section 6 of the Civil Procedure Act; thus, Court lacks jurisdiction to deal with the suit as well as the application.
8. The Respondent cites Order 37 (2) (ii) and 12 of the Civil Procedure Rules, and indicates that the suit property is not Trust property under the Trustees Act and hence Applicant lacks *locus standi*.
9. Parties were directed to proceed by way of oral submissions, when the matter come up for directions on 30/10/2023 and ruling reserved for 16/11/2023.

Applicants Submissions: -

10. It was the Applicants submission that his case is pegged on intergenerational Trust the suit properties having been purchased from proceeds of ancestral land at Moiben, which belonged to Emmanuel Kiptallam Bosen the father of the late Teresa Bitok and the Applicant herein.
11. The Applicant submits that the registration of the suit properties was in Trust for the Applicant who was yet to obtain a National identity card and could not be registered abintio.
12. The proceedings pending in Eldoret P & A No. 53/20008 now transferred to Kapsabet High Court No. 11/2021 were commenced before the established of the Environment and Land Court and the claim ought to be ventilated before the Environment and Land Court.
13. The Applicant submits that he had filed an application for stay before the High Court in P & A Kapsabet 11/2021 hence there is no danger of proceedings to be held concurrently.
15. The Applicant further submits that under Section 20 of Cap 22, Section 7 of Cap 22, would not apply; since a claim of Customary Trust is not subject to Limitation of Action Act.
15. With regard to Order 37, the Applicant submits that the claim is based on intergenerational Trust thus he had Locus to commence the proceedings, Miss Isiaho Learned Counsel for the Applicant urged the Court to allow the application.



Respondents Submission: -

16. Mr. Aseo Learned Counsel for the Respondent submitted that the present application offended both Section 7 of the *Limitation of Actions Act* as well as Section 20 (2) of the same Act, which provides for a 6-year limitation period.
17. Since the parcels were registered in 1976 close to 50 years ago, Mr. Aseo Learned Counsel, submits, that the said period is an inordinate long delay period.
18. It is the Respondents submission that the Applicant was aware of the registration of the Respondent and it is an abuse of Court process to entertain this suit; yet another matter is pending before the High Court.
19. on locus, it is the Respondents submission that persons capable of bringing originating summons under Order 37 of the Civil Procedure Rules are listed under Order 37 (1) and (2) and there is no leeway to accommodate any other person as no trust can be implied under the *Trustees Act* and the Respondent cites Section 2 of the *Trustees Act*.
20. In a brief rejoinder Ms. Isiaho Learned Counsel, submits that the issue of Customary Trust has to be determined as a matter of fact while the registration of the trustees is governed under Section 28 of Cap 300 and Intergenerational Trust is one of them.
21. She further submits that Section 6 of the *Civil Procedure Act* does not preclude a former suit from being stayed and a latter suit from proceeding.

She further submits that Intergenerational Trust is not subject to Cap 22 and urged the Court to allow the application.

Issues For Determination:

21. Before framing the issues for determination, the grounds of opposition filed in opposition the application have also been deemed to be preliminary objection in respect of the main suit, and the determination herein will thus affect both the application and the main suit.
22. I have considered the application before Court; the grounds of opposition/preliminary objection, considered the submissions of the Learned Counsels as well as the provisions of the law cited in the rival submissions, and the Court frames the following as issues for determination: -
 - i) What is the cause of action in the suit? Is the cause of action time barred as submitted by the Respondents?
 - ii) Is the application in view of the cause of action merited?
 - iii) What reliefs ought to issue?
 - iv) Who bears the costs of the application?
23. At paragraphs 2, 3, 4 and 5 of the Originating Summons, the reliefs sought therein are declaratory in nature and the pleaded cause of action from the affidavit in support of the originating summons at paragraph 20 and 21 thereof, all point to the cause of action being an intergenerational trust and/or customary trust.
24. Having established the cause of action, the legal foundation for a claim under customary trust is Section 20 (i) (b) of the *Limitation of Action Act*, by virtue of the said section, the provisions of the *Limitation of Action Act* particularly Section 7 thereof would not apply as was held in the case of *Stephens & 6 others*



v Stephen & another Civil Appeal No. 18 of 1987 where the Court held that “the period of limitation as prescribed in the Limitation of Actions Act (Cap 22) Section 20 (i) (b) do not apply to actions by a beneficiary under a trust which is an action to recover from the trustee property and proceeds thereof converted by the trustee of his own use....”

25. From the above it is clear that Section 7 of the Limitation of Actions Act would not apply in this matter. The Respondent has cited Section 20 (2) of the Limitation of Action Act as imposing a Limitation period of 6 years.
26. The Applicant submissions were silent on the applicability of Section 20 (2) in this matter. In Civil Appeal No. 170/1993, *Macharia Kabiri v Ngigi Kabiri* the Court held as follows;

“we are unable to accept Mr. Thiong’s contention that the suit was time barred. Limitations prescribed under Section 20 (2) of the Limitations of Actions Act will not apply to a trust coming into existence under customary law. Under customary law the land even after the right of action has accrued, is held in trust even for decades before or division. Limitation does not apply in customary law... we reject this ground of appeal....”
27. Accordingly this limb of objection by Mr. Aseso equally fails.
28. On locus, the Respondent submits that under Section 2 of the Trustees Act as read together with order 37 (1) and (2) the Applicant does not have locus to initiate the suit.
29. The Applicant submits that Customary/Intergenerational Trust is governed by Section 28 of Cap 300 and not under the Trustees Act.
30. The cause of action herein has been found to be founded on Section 20 (i) (b) of the Limitation of Action Act and an action on Customary Trusts, has foundation on Section 28 (b) of the Land Registration Act. Section 2 of the Trustee Act avails a cause of action to a trustee with “a beneficial interest in the trust property,” whereas in this cause the Applicant is not a trustee but has commenced the proceedings as a beneficiary as pleaded in the Originating Summons.
31. The Court finds that the course of action herein is Customary/Intergenerational Trust commenced by a beneficiary under the provisions of Section 20 (i) (b) of the Limitation of Action Act, which Customary Trust has foundation on Section 28 (b) of the Land Registration Act and the provision of the Trustees Act Cap 16, in so far as they relate to a suit by a Trustee and not a beneficiary do not apply.
32. Order 37 of the Civil Procedure Rules vide Sub Rule 1 and 2 lists the person with locus to institute Originating Summons.
33. The Respondent submits that the Applicant does not fall into a category listed therein.
34. However under Order 37 (i) affords “any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir or legal representative of a deceased.....may take out an originating summons.”
35. In the application and suit before Court the Applicant has described himself as a beneficiary of L.R. No. Nandi/kipkaren Salient/243 and 245 under a Customary Trust and would thus be a “heir” entitled to bring the cause of action.
36. The Court thus in answer to issue number 1, finds that the course of action is customary and/or Intergenerational Trust founded on Section 20 (1) (b) of the Limitation of Action Act and that the same



is not time barred by virtue of Section 7 of the said Act and certainly not by virtue of Section 20 (2) of the said Act.

37. The Court finds that the Applicant as a beneficiary of the Nandi/kipkaren/salient 243 and 245 to be a “heir” for purposes of Order 37 Rule 1 and has the requisite locus to take out the Originating Summons.
38. It has been submitted that there is a pending suit before the High Court of revocation of the Grant and that this suit is subjudice in terms of Section 6.
39. The pending suit as captured in the grounds of opposition 3 and 4 is Eldoret High Court P & A No. 53/2008, the same was filed before commencement of the ELC Court and as been found that the course of action herein is premised on Intergenerational Trust on Nandi/kipkaren/salient/ 243 & 245 is the ELC Court, hence the High Court would not be dealing of Intergenerational Trust/ Customary Trust founded on Section 28 (b) of the [Land Registration Act](#) and this suit is properly before Court, the parties thus need to seek a stay for the P & A matter pending determination of the issue of Customary Trust which may have a bearing in the P & A matter.
40. In answer to issue number 2, the Court finds that the factual depositions of the occupation by the Applicant to be uncontroverted as the Respondent did not file a replying affidavit but filed grounds of opposition and accordingly finds merit in the application before Court.
41. The upshot is that the grounds of opposition which were deemed as preliminary objection to the main suit are dismissed and the application dated 4th October 2023 is allowed in terms that;
 - i) An order of maintenance of status quo on the ground and on the register of Nandi/kipkaren Salient 243 and Nandi/kipkaren Salient 245 is issued allowing the Applicant to remain in possession and occupation of Nandi/kipkaren 243 and Nandi/kipkaren Salient 245 and the Register of the said parcels Nandi/kipkaren 243 and Nandi/kipkaren 245 to remain in the name of the current registered owner pending hearing and determination of this suit.
 - ii) Costs of the application are awarded to the Applicant.

RULING DELIVERED AND DATED AT KAPSABET THIS 16TH DAY OF NOVEMBER, 2023.

HON. M. N. MWANYALE,

JUDGE

In the presence of; -

1. Mr. Aseso for the Applicant
2. Mr. Isiaho for the Respondent

