



REPUBLIC OF KENYA



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Mbatian & 3 others (Administrators of the Estate of – Johanna Nkiruiya alias Johana Mpatiany –Nkkoiya (Deceased)) v Waithaka & 2 others (Originating Summons E007 of 2023) [2025] KEELC 3464 (KLR) (25 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3464 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ORIGINATING SUMMONS E007 OF 2023

MD MWANGI, J

APRIL 25, 2025

**IN THE MATTER OF APPLICATION FOR AN ORDER TO ALLOW
THE CANCELLATION OF THE TITLE OVER PROPERTY TITLE
NUMBER KAJIADO/LOODARIAK/1768 (PREVIOUSLY 894)**

AND

IN THE MATTER OF THE LAND ACT NO. 6 OF 2012 LAWS OF KENYA

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012 LAWS OF KENYA

BETWEEN

AGNES NJOKI MBATIAN 1ST APPLICANT

ALICE NASERIAN NGI'RUIYA 2ND APPLICANT

ESTHER SIMBANO MBATIANY 3RD APPLICANT

TUPANGA ENE NGI'ROIA 4TH APPLICANT

**ADMINISTRATORS OF THE ESTATE OF – JOHANNA NKIRUIYA ALIAS
JOHANA MPATIANY –NKKOIYA (DECEASED)**

AND

SIMON H IGECHA WAITHAKA 1ST RESPONDENT

DISTRICT LAND REGISTRAR, KAJIADO – WEST 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

*(In respect of the preliminary objection dated 4th December
2023 by the 1st Respondent on the ground of time-bar)*



RULING

Background.

1. The suit herein was initiated by way of an originating summons dated 2nd June 2023. The Plaintiffs/Applicants pray for various orders, namely;
 - a. An order compelling the 2nd Respondent (District Land Registrar –Kajiado West) to cancel and revoke the title as well as the legal interest created over the said land register registered as entry number twelve (12) in favour of the 1st Respondent as owner in relation to Title No. Kjd/Loodariak/1768 (formerly 894) as well as entry No. 1 and 2 of the register and on the green card.
 - b. A permanent injunction restricting the 1st Respondent/Defendant either by himself, his agents, employees, personal representatives or assigns from encroaching upon, entering into, developing, surveying, subdividing, or conveyance of whatever kind over the suit property being land registration no. KJD/Loodariak/1768 (previously 894).
 - c. Orders to compel the 2nd and 3rd Defendant to cancel and forthwith revoke the subsequent resurvey of KJD/Loodariak/894 which resulted in the enhancement of already erroneously and fraudulently apportioned acreage of thirty five (35) acres or 14.0 Ha instead of thirty (30) acres (12.14 Ha) to read fifty five (55) acres or 22.20 Ha currently known as land registration number KJD/Loodariak/1768 without following due procedure particularly issuance of summons and involvement of neighbors on either side.
 - d. An order compelling the District Surveyor to visit the affected lands, establish and/or re-establish the boundaries therein and/or further carve out the said suit land measuring 12.14 Ha or thirty (30) acres.
 - e. General damages for trespass.
 - f. Costs to be in the cause.
2. The Plaintiffs' claim was based on the grounds that the suit property was hived out of the share of the deceased's parcel of land No. 47 during the adjudication and parcellation in 1980s pursuant to a sale agreement dated 1988 whereby the 1st Respondent purchased a portion measuring thirty (30) acres or 12.14 ha. The Plaintiffs asserted that it had come to their knowledge the 1st Respondent is registered as proprietor of land registration No. 1768 which measures approximately 22.2 ha. or 55 acres following a resurvey exercise by the 2nd Respondent and reissuance of a new title by the 3rd Defendant devoid of due process.
3. The Plaintiffs believe that the 1st Respondent's move to resurvey the land in January 2012 a few months after the demise of the registered proprietor and his spouse amounts to mischief, fraud and a perpetration of illegalities.
4. The 1st Respondent's preliminary objection is dated 4th December 2023. He asserts that the originating summons is totally misconceived, frivolous, scandalous, vexatious and an abuse of the court process. The 1st Respondent challenges the court jurisdiction to entertain the originating summons on the basis that it is time barred. It ought to have been filed 34 years ago after the cause of action arose. The Applicants are therefore guilty of laches and did not even bother to seek leave of the court to file the



suit out of time. The title to the land in dispute was issued under the *Land Adjudication Act* as read with the Registration of *Land Act* (now repealed).

5. The gist of the preliminary objection is that the Plaintiffs' suit is therefore time barred under the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
6. The 1st Respondent further asserts that the supporting affidavits in support of the originating summons are incurably defective and incompetent as they comprise of hearsay and are speculative, argumentative and lacking in candour.

Directions by the court.

7. The court's directions were that the preliminary objection be canvassed by way of written submissions. Only the 1st Respondent complied by filing the submissions dated 10th October 2024. The court has had the opportunity to read and consider the said submissions in making this ruling.

Issues for determination.

8. The preliminary objection by the 1st Respondent is two pronged. There is first the issue of time bar and the 2nd issue on the defective affidavits. I will handle the two issues in that order.

Analysis and determination.

Whether the suit is time – barred.

9. Section 7 of the *Limitation of Actions Act* bars the filing of a claim to recover land after the end of 12 years from the time the right of action accrued. In this case, the 1st Respondent submits that the cause of action arose 34 years ago when he effectively took possession of the suit property in its entirety. That was in the year 1990 as pleaded in his replying affidavit to the originating summons, following the sale and transfer by the late Johanna Mbatiany. The 1st Respondent insists that he has been in possession of the suit property in its entirety since then.
10. The 1st Respondent pointed out to the mutation form attached to his affidavit and dated 11th November 2011 which confirms that the land was already well defined by hedging and had no boundary dispute(s) with its neighbors.
11. The Plaintiffs' claim put in its proper context is a claim to recover the "extra land" allegedly occupied by the 1st Respondent. The issuance of the title in 2012 and the alleged resurvey were processes simply affirming the 1st Respondent's claim over the suit property otherwise he has been in occupation of it since 1990.
12. I agree with the 1st Respondent's assertion therefore that the Plaintiffs' suit is simply and squarely a suit for recovery of land. The introduction of the issue of resurvey and issuance of the title in the year 2012 is just but an attempt to reinvent a cause of action through the art and craft of drafting pleadings.
13. Limitation is not concerned with the merits of a case as aptly stated in the case of *Hilton –vs- Sultan S. Team Laundry* (1946) LKB 61, where Lord Greene M.R. stated that,

"...the statute of limitation is not concerned with merits, once the axe falls, it falls and a Defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled to insist on his strict rights."



14. The decision in the case of *Iga -vs- Makerere University* (1942) EA 65 cited with approval in the case of *Haron Onyancha -vs- National Police Service* (2017) eKLR, too affirmed the position that once the time has expired, an action cannot legitimately be brought to court. The court in the said case stated that,

“The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand and protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”

15. The Plaintiffs/Applicants’ case is obviously time barred. This court is therefore barred under Section 7 of the *Limitation of Actions Act* from entertaining the matter.

Whether the supporting affidavits are defective.

16. There was the 2nd issue of defective affidavits. The 1st Respondent refers to rule 3 of Order 19 of the Civil Procedure Rules that specifies that affidavits shall be confined to such facts as the deponent is able on his own knowledge to prove except on interlocutory applications, on which statements of belief may be admitted provided that the grounds thereof are stated.

17. The 1st Respondent isolates paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16 17 and 18 in the supporting affidavit as containing statements that suggest beliefs or information derived from others without specifying the grounds for their belief.

18. While the submissions by the 1st Respondent may be true, the specific paragraphs can be simply be expunged and I do not think that expunging the offending paragraphs would render the originating summons incompetent as such.

19. Before I conclude this ruling, I wish to state that originating summons as a form of legal proceedings are designed for certain specified circumstances to allow a quick, summary and inexpensive remedy for such minor matters that can be disposed of without the formality or expense of an ordinary suit. An originating summon is inappropriate for complex or obscure matters which require intensive inquiry. One cannot for example purport to institute a suit alleging fraud by way of an originating summons.

20. That said, and having already held that the Plaintiffs suit is time barred, I hereby strike out with costs to the 1st Respondent.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 25TH DAY OF APRIL 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Mong’are for the Plaintiffs/Applicants

Mr. Kimani Horeria for the 1st Respondent

N/A by the 2nd to 4th Defendants

Court Assistant: Mpoye

