



Koros (Suing as Personal Representative of The Estate of Anthony Kipkoros Towett) v County Government of Kericho (Environment & Land Case 50 of 2016) [2022] KEELC 3126 (KLR) (9 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3126 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 50 OF 2016**

MC OUNDO, J

JUNE 9, 2022

BETWEEN

PHILIP KIMUTAI KOROS (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ANTHONY KIPKOROS TOWETT) PLAINTIFF

AND

COUNTY GOVERNMENT OF KERICHO DEFENDANT

RULING

1. The deceased, Plaintiff Anthony Kipkoros Towett filed suit against the County Government of Kericho vide a Plaint dated the 2nd August 2016 seeking to be declared the owner of plot number 94 Sondu Market within Kericho County and that the Defendant be compelled to demarcate and survey the said suit property and thereafter hand him possession. He also sought for damages, interest and any further relief the court deemed fit to grant.
2. In response to the Plaint the Defendant filed their defence dated 12th October 2016 on 13th October 2016 denying the contents as disposed in the Plaintiff's Plaint thereby seeking that the same be dismissed with costs.
3. On the 5th April 2017, the court was informed that the parties had agreed to negotiate an out of court settlement wherein they were granted time to reach the said settlement. The matter was thereafter mentioned several times to allow parties to pursue negotiations without any progress.
4. It was in the pendency of the suit, that the original Plaintiff passed away and was substituted, on the 30th April 2019, by his legal representative, Antony Towett, pursuant to an application dated the 20th March 2019. Thereafter both the Plaintiff and the Defendant were granted leave to amend their pleadings.
5. On the 26th November 2019, Counsel for the Defendant informed the court that they were still trying to settle the matter out of court and sought for more time which was granted and the matter scheduled



- for mention on the 12th February 2020 on which day the Plaintiff's Counsel informed the court that they had not made progress in trying to settle the matter. He sought for a hearing date which was scheduled for the 1st April 2020.
6. The matter did not proceed for hearing as scheduled but the record indicates that on 10th July 2020 the matter was fixed for hearing in the registry, by the Plaintiff's Counsel, in the absence of the defense Counsel, for the 4th November 2020 and on which day the same did not proceed yet again. A date was then taken for hearing in the registry, by the Plaintiff's Counsel for the 16th February 2021.
 7. On the date in question, the court was once again informed that the parties were engaged in an out of court settlement whereby they had sought for more time. The court having noted that despite parties having been trying to negotiate an out of court settlement since the 26th November 2019 (which was over 1 year) without any success that parties do comply with the provisions of Order 11 of *Civil Procedure Rules*. They had then been granted one more chance to reach a settlement and in default the matter proceeds for hearing. The matter was thus scheduled for mention to confirm compliance, and/or settlement for the 20th April 2021.
 8. Due to the Corona epidemic the matter did not proceed on the date scheduled but on the 7th December 2021, Counsel for the Defence informed the court that they had filed their amended defence as well as a Notice of Preliminary Objection both dated the 30th March 2021 seeking for the dismissal of the suit for not only being statute barred, but that the Plaintiff had no locus standi to bring the suit against them. The court thus directed for both the amended defence and the Notice of Preliminary Objection to be served upon Counsel for the Plaintiff. Further orders were that the preliminary objection be disposed of in the first instance through written submissions, which forms the subject of this ruling.
 9. The Notice of Preliminary Objection dated the 30th March 2021 is premised on the grounds that the suit herein is barred by the *Limitation of Actions Act* and further that the Plaintiff lacks the locus standi to institute the suit on behalf of the deceased. Parties complied.
 10. The Defendants' submission is to the effect that whereas the suit was instituted vide a Plaint dated 2nd August 2016 and amended on 17th June 2019, yet the cause of action, as per paragraph 4 (four) of the amended Plaint, arose on 19th February 1998 on which date the County Council of Kipsigis, the Defendant's predecessor, had issued a letter of allotment of plot No. 94 Sondu market, to the deceased Plaintiff.
 11. The Defendants' submission while relying on Section 7 of the *Limitation of Actions Act* is to the effect that the suit was subsequently instituted more than 18 years after the time of the alleged allotment. That the Plaintiff ought to have instituted suit within 12 years after the alleged allocation and therefore by virtue of Section 7 of the Limitations of Actions Act, the current suit was time barred.
 12. On the second issue raised in their Notice of Preliminary Objection, the Defendant submitted that the Plaintiff lacked the locus standi to institute the suit on behalf of the deceased for reasons that the Limited Grant of Letters of Administration Ad Litem issued on 20th March 2019 by the Kericho Magistrates' court in Succession Cause No, 37 of 2019, were issued to one Eunice Chelangat Sige to continue with the suit herein and not to Phillip Kimutai Koros, and therefore it could not be said that Phillip Kimutai Koros had the locus standi to bring suit on behalf of the deceased. Reliance was placed on Section 3 and 82(a), of the *Law of Succession Act* and on the decided case in *Trousik Union International & Another vs Jane Mbeyu & Another* [2008] 1KLR to submit that the preliminary objection had merit and the same ought to be upheld.



13. In response to the Defendants' submissions, the Plaintiff via their submissions dated 11th February 2022 opposed the preliminary objection for reason that it had not been in contention that the Defendant had allocated the suit property to the Plaintiff who continued to pay the yearly rates so demanded by the Defendant who had subsequently failed to survey, demarcate and issue the property to the Plaintiff. That the turn of events therefore and the fact that the Plaintiff seeks for the survey, demarcation and issuance of the suit land, removed this case from the ambit of section 7 of the [Limitation of Actions Act](#) since the suit was alive.
14. On the second issue, the Plaintiff's contention was that pursuant their application seeking for substitution of the deceased original Plaintiff, there had been filed an amended Limited Letters of Administration ad Litem dated the 20th March 2019 which had been granted to Phillip Kimutai Koros and not Eunice Chelangat Sige and therefor the preliminary objection in relation to the locus standi herein was baseless and the suit was neither incurably incompetent nor fatally defective.

Determination

15. I have given due consideration to the rival arguments and the authorities cited, I find that the Defendant has raised weighty issues which go to attack the jurisdiction of the Court.
16. Applying the principles in *Mukisa Biscuit Manufacturing Co. Ltd. vs West End Distributors Ltd.* (1969) EA 696 to wit that an objection must consist of a point of law which if argued as a preliminary objection is capable of disposing of the suit, the Defendant herein has argued that the Plaintiff cannot bring a suit against them because the same is time barred by virtue of the provisions of Section 7 of the [Limitation of Actions Act](#) and secondly that the Plaintiff has no locus standi to bring suit against them.
17. I therefore find the matters that arise for determination as being:
 - i. Whether the Preliminary Objection raised is sustainable.
 - ii. Whether the said Preliminary Objection has merit and should be upheld.
18. To begin with, Locus standi is a primary point of law almost similar to that of jurisdiction and is therefore within the first principle in the Mukisa Biscuit case. It is a point of law capable of disposing of the application. The Defendant has submitted that the Limited Grant of Letters of Administration Ad Litem issued on 20th March 2019 by the Kericho Magistrates Court in Succession Cause No, 37 of 2019, were issued to one Eunice Chelangat Sige to continue with the suit herein and not to Phillip Kimutai Koros, and therefore it could not be said that Phillip Kimutai Koros had the locus standi to bring suit on behalf of the deceased. I have considered the application dated 20th March 2019, that was filed seeking to substitute the original Plaintiff with his legal representative, the supporting affidavit and the annexed as therein. I note that the annexure marked as 'JK2' is an amended Limited Grant of Letters of Administration Ad Litem dated the 20th March 2019 issued to Phillip Kimutai Koros by the Kericho Chief Magistrates Court in Cause No. 37 of 2019.
19. I therefore find that the Plaintiff herein is properly on record as an administrator of the estate of the deceased and therefore has locus standi to bring the suit against the Defendant. The preliminary objection on this line therefore fails.
20. On the second issue of objection, the Defendant submitted that whereas the Plaintiff's cause of action arose on 19th February 1998 when the County Council of Kipsigis, the Defendant's predecessor, issued a letter of allotment of plots No. 94 Sondu market, to the deceased Plaintiff, this suit had been instituted vide a Plaint dated 2nd August 2016 and amended on 17th June 2019, which was more than



- 18 years after the time of the alleged allotment, and which was in contravention of the provisions of Section 7 of the [Limitation of Actions Act](#).
21. The Plaintiff on the other hand has submitted that after the Defendant allocated the suit property to him, he continued to pay the yearly rates so demanded and now seeks that the Defendant surveys, demarcates and issues the property to him. That the turn of events therefore and the fact that the Plaintiff seeks for the survey, demarcation and issuance of the suit land, removed this case from the ambit of Section 7 of the [Limitation of Actions Act](#).
22. A cause of action, is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a Plaintiff brings suit.
23. Section 7 of the [Limitation of Actions Act](#) provides:
- “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person
24. Section 7 of the [Limitation of Actions Act](#), provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the Plaintiff having been allotted the suit land on the 19th February 1998 (as per paragraph 4 of the Plaint and amended Plaint), he could only sue to recover it from the Defendant, but only if he did so within twelve years after the allotment.
25. Quite clearly the Plaintiff’s claim is for the recovery of land, which he had cleverly drafted as “issuance”, of the suit property by the Defendant. There is no doubt that the period of about eighteen (18) years have lapsed since 1998 when the Plaintiff was allotted the suit land by the Defendant. The effect of the allocation and allotment by the Government was to divest the latter of its legal interest in the suit land and to constitute the Plaintiff the new owner thereof who for more than 18 years did not cause any survey, demarcation or registration of the same into his name.
26. The Court of Appeal in [Mukuru Munge v Florence Shingi Mwawana & 2 others](#) [2016] eKLR held that:
- “The purpose of the law on limitation of actions is to avoid stale claims, based on the sensible and rationale appreciation that over time memories fade and evidence is lost. The law of limitation therefore seeks to compel claimants not to sleep on their rights and to bring their claims to court promptly. Secondly, the law on limitation of actions ensures that claims are instituted within reasonable time after the cause of action has arisen, so as to secure fair trial when all the evidence is available and to ensure that justice is not delayed. In our minds, those are important constitutional values and principles, which are underpinned by legislation on limitation of actions.”
27. The Plaintiff needed to commence his claim within the time prescribed under Section 7 of the [Limitation of Actions Act](#). It follows therefore that by the time the Plaintiff filed this suit, the claim was already statute barred.
28. In the case of [Bosire Ongero vs Royal Media Services](#) [2015] eKLR the court had held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.



29. The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Justice Nyarangi of the Court of Appeal had held as follows

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

30. Clearly, this Court lacks jurisdiction and the matter is at its end. I will have to down my tools and take no further step. The preliminary objection on this point succeeds with the result that the Plaintiff's suit is herein struck out with costs to the Defendant.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 9TH DAY OF JUNE 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

