



**Ouma (Suing on behalf of the Estate of Wanzala Mugoya) v County Government of Busia & 2 others (Environment & Land Petition 1 of 2018) [2022] KEELC 2745 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2745 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND PETITION 1 OF 2018**

**AA OMOLLO, J  
JULY 14, 2022**

**BETWEEN**

**SIMON OUMA ..... PETITIONER  
SUING ON BEHALF OF THE ESTATE OF WANZALA MUGOYA**

**AND**

**COUNTY GOVERNMENT OF BUSIA ..... 1<sup>ST</sup> RESPONDENT  
THE NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT  
THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> Respondent/Applicant filed a Preliminary Objection dated November 17, 2021 which raised points of law on the following grounds;
  - a) That the Petitioner’s petition is time barred under the provisions of the [Limitation of Actions Act](#), cap 22 of the Laws of Kenya.
  - b) That the Petitioner’s Petition is time barred under the provisions of Section 3 of the [Public Authorities Limitation Act](#), cap 39 of the Laws of Kenya.
2. The parties agreed to dispense with the hearing of the by way of written submissions. The 1<sup>st</sup> Respondent/Applicant filed their submissions on December 9, 2021 and submitted the preliminary objection is premised on limitation of action as the Petitioner’s suit is statutory time barred and should not be entertained by the Court whatsoever. They submitted that the cause of action arose between the years 1989 and 1990 when the Government through the Respondents acquired the said land. The Petitioner’s suit seeking the recovery of land and or compensation is anchored in Section 7 of the [Limitation of Actions Act](#) cap 22 Laws of Kenya. They submitted that Section 3 of the [Public Authorities](#)



Limitation Act cap 39 Laws of Kenya is emphatic as it states in mandatory terms that no suit for compensation against the Government or Local Authority as a result of a tort by the Government or local authority shall be filed after 12 months from the date when such cause of action accrued. They further submitted that the Petitioner's interest and cause of action seeking compensation, subdivision or lifting of the restriction suit land, the Petitioner's interest in the subject property had long been extinguished by the time he filed this suit in the year 2018. They finished by saying that the Court does not have jurisdiction to entertain this suit whose cause of action is statutory time bared hence the same should be dismissed with costs to the Respondents. They relied on the decisions in Kennedy Muriethi & Another v Peterson Karimi Gacewa [2016] eKLR, Edward Moonge Lengusuranga v James Lanaiyara & another [2019] eKLR, Joshua Ngatu v Jane Mpinda & 3 others [2019] eKLR.

3. The Petitioner/Respondent filed his submissions on March 1, 2022 in opposition of the preliminary objection and he submitted that the applicant does not point out the particular provision of the Limitation of Actions Act that renders the petition time barred and that the petition is a constitutional petition touching on the Bill of Rights and not contract or tort. He submitted that the claim arises from compulsory acquisition by the government and he has taken issue with the fact that the government registered a restriction/interest on the whole parcel of land L.R. No. Bukhayo/mundika/144 instead of registering their interest on only 0.2 hawich which was gazetted out of the entire 8.2ha. He submitted that he prays for a declaration that his rights have been violated as the government has now deprived him of entire 8.0ha instead of restricting itself to 0.2ha. He stated that he relies on Articles 19 to 40 of the Constitution of Kenya 2010 and the issue as to whether, indeed the rights of the petitioner have been violated, infringed, threatened or violated cannot be addressed unless the petition is heard. He cited Article 22(1) and 23(3) of the Constitution and they do not give any time limits for bringing up such a claim as the one before court. He urged the court that the preliminary objection lacks merit and should be dismissed with costs.
4. Having looked at the preliminary objection and submissions made by the parties, I opine that the single issue that comes up for determination is whether the petition is time barred. This goes to the jurisdiction of the court.
5. What constitutes a Preliminary Objection is set out in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, where it was held that:

“a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

6. The Preliminary Objection goes to the root of this court's jurisdiction to determine this suit. Should the court find that the suit is time barred as claimed, this court will not have jurisdiction to handle the matter. Jurisdiction is everything and where a court finds that it does not have jurisdiction, it must down its tools. This was stated in the classic case of The Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1. Where Nyarangi J.A. 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.’

7. The main ground of the objection is that the suit is time barred as per Section 7 of the [Limitation of Actions Act](#) and Section 3 of the [Public Authorities Limitation Act](#).
8. Section 7 of the [Limitation of Actions Act](#) provides as follows;

“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.”
9. Further, Section 3 (1) of the [Public Authorities Limitation Act](#) states as follows;

“No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.”
10. In this instant, the Petitioner is seeking judgment against the Respondents jointly and severally for orders that;
  - i) A declaration that the petitioner’s rights have been violated and abused in the circumstance.
  - ii) An order that the restriction placed on 22.10.90 or any other date on L.R. No. Bukhayo/mundika/144 be and is hereby lifted.
  - iii) An order that L.R. No. Bukhayo/mundika/144 of land be subdivided into two (gazetted 0.2ha for the government and 8.0ha for the petitioner) and transfer of the same be effected.
  - iv) In the alternative to the above, an order that the petitioner be paid by the Respondents Kshs.60,000,000/= in compensation.
  - v) Any other reliefs that this court may deem fit.
11. A brief overview from the pleadings is that the government compulsorily acquired 0.2ha of L.R. No. Bukhayo /mundika / 144 which land was registered in the name of Wanzala Mugoya-deceased. Consequent to the acquisition, a restriction was placed against the whole parcel by the government claiming purchaser’s interest. The restriction placed on the suit title is still subsisting to-date which in my opinion makes the cause of action to be continuous and in tandem with prayer (2) of the Petition. Secondly, the Petitioner is asking the court to determine if the Respondents are entitled to the entire suit parcel or a portion thereof which question had not been raised earlier to have the time running taking cognisance that there has been no change of name in the register of title conferring the entire land to the government.
12. Whether or not the registration of the restriction has violated the rights of the Petitioner in the manner pleaded is consequent to determination of prayer (2) seeking removal of the restriction. It is therefore not an open and closed case like in contracts or tort where when time begins to run is directed at a particular date. On the basis of the reasons I have provided, I hold that the preliminary objection is prematurely raised. It is ordered struck out with a rider that the Respondents are still at liberty to pursue the issue of time bar as part of their defence during the hearing of the petition.
13. Costs abide the winner of the suit.



**DATED, SIGNED AND DELIVERED AT BUSIA THIS 14TH DAY OF JULY 2022.**

**A. OMOLLO**

**JUDGE**

