



**Sol & 2 others v Bomet Water and Sanitation Co. Ltd & 3 others (Environment & Land Case 18 of 2015) [2022] KEELC 2741 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2741 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 18 OF 2015**

**MC OUNDO, J**

**JULY 14, 2022**

**BETWEEN**

**EUNICE CHEPKORIR SOL ..... 1<sup>ST</sup> APPLICANT**

**EMILY CHEPTONUI NGETICH ..... 2<sup>ND</sup> APPLICANT**

**EDNA CHEPNGENO BII ..... 3<sup>RD</sup> APPLICANT**

**AND**

**BOMET WATER AND SANITATION CO. LTD ..... 1<sup>ST</sup> RESPONDENT**

**LAKE VICTORIA SOUTH WATER SERVICE BOARD ..... 2<sup>ND</sup> RESPONDENT**

**MINISTRY OF WATER AND IRRIGATION ..... 3<sup>RD</sup> RESPONDENT**

**COUNTY GOVERNMENT OF BOMET ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. Vide an order of 21<sup>st</sup> June 2017, the court allowed the Defence to amend their Defence to join the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the suit wherein subsequently via a ruling dated the 12<sup>th</sup> September 2018, the court granted leave to the 1<sup>st</sup> Plaintiff to amend her Plaintiff to join the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs as well as the 4<sup>th</sup> Defendant to the suit.
2. Basically the Plaintiffs in the suit seek for orders that the Defendants herein by themselves their agents employees servants and any person working under them do vacate the parcel of land known as Kericho/ Mogogosiek/527 and in default eviction orders to issue. They also seek for permanent injunctive orders against the Defendants, interest on mesne profit as well as costs of the suit.
3. Pursuant to amending the Plaintiff and a Defence, the 1<sup>st</sup> and 4<sup>th</sup> Defendants herein filed their Notice of Preliminary Objection dated 10<sup>th</sup> December 2021 on 14<sup>th</sup> December 2021 stating firstly that the suit herein was time barred as it offended the provisions of Section 7 and 9 of the [Limitation of Actions Act](#),



secondly that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs lacked the locus standi to institute suit, and third that the Plaintiff ought to have instituted their claim before the National Land Commission. The Defendants' position was that since the suit was frivolous and/or vexatious, the same ought to be dismissed with costs.

4. The application on the Notice of Preliminary Objection was disposed of by way of written submissions. There was no response from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

#### **1<sup>st</sup> and 4<sup>th</sup> Defendants' written submissions.**

5. The Defendants' submission was to the effect that the Plaintiffs filed suit for recovery of land allegedly belonging to Kiplangat Arap Soi (deceased) despite the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs not having obtained the limited grant of letters of administration ad litem. That the letters of administration intestate could not be used for the purpose of filing suit as the same were for the purposes of the administering and distributing the deceased's property in case they were perishable or of precarious nature. That the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs therefore not having been issued with Letters of Administration ad Litem, had no locus standi to institute the suit on behalf of the estate of Kiplangat Arap Soi (deceased). Reliance was placed on the decided cases in [Julian Adoyo Ongunga vs Francis Kiberenge Abano](#) CA No. 119 of 2015 and [Rajesh Pranjivan Chudasama vs Sailesh Pranjivan Chudasama](#) [2014] eKLR.
6. On the second issue on their Preliminary Objection, the 1<sup>st</sup> and 4<sup>th</sup> Defendants herein submitted that the compulsory acquisition occupation and possession and use of the suit land herein by the National Government, where a water treatment plant had been constructed had occurred in the year 1978, wherein time started running and 12 years lapsed in 1990 or thereabout. The suit was filed in 2015 some 37 years later which was outside the limitation period. That the suit was therefore statute barred and the court had no jurisdiction to entertain the same. Reliance was placed on the decided case in [Bosire Ongero vs Royal Media Services](#) [2015] eKLR and on the provisions of Section 7 and 9 of the [Limitation of Actions Act](#).
7. Lastly the 1<sup>st</sup> and 4<sup>th</sup> Defendants submitted that the Plaintiffs' claim did not disclose any cause of action as the Plaintiffs failed to follow the statutory framework for claim of compensation on account of compulsory acquisition of property by the Government, as was stipulated under Article 67 of [the Constitution](#). That they ought to have lodged a formal complaint with the National Land Commission who have jurisdiction to hear and determine claims on compulsory acquisition of land by the National Government as was provided for under Section 5 of the [National Land Commission Act](#). The 1<sup>st</sup> and 4<sup>th</sup> Defendants sought that their Preliminary Objection be upheld.

#### **Plaintiffs' submissions**

8. The Plaintiffs in opposing the 1<sup>st</sup> and 4<sup>th</sup> Defendant's Notice of Preliminary Objection submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs had obtained a grant of Letters of Administration Intestate which formed the list of their documents. That through these Letters of Administration Intestate, the suit land had been transferred to their joint names to hold in trust for the estate of the deceased. On this account the 1<sup>st</sup> and 4<sup>th</sup> Defendants' Preliminary Objection ought to be dismissed.
9. On the second issue as to whether the suit was time barred, the Plaintiff submitted that the registered proprietor died in 1968, wherein had the 1<sup>st</sup> and 4<sup>th</sup> Defendants assumed possession of the suit land, then they had been intermeddlers with the estate of the deceased as provided for pursuant to the provisions of Section 45 of the [Law of Succession Act](#). That further since the 4<sup>th</sup> Defendant had challenged the title held by the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs on allegation of fraud, that such allegations (of fraud) had no time limitation and therefor this went against the Preliminary Objection raised. Further



that although the 1<sup>st</sup> and 4<sup>th</sup> Defendants had averred that they had taken over the suit subject in 2014 or thereabout, there were no orders vesting the subject property to them.

10. That the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs having been issued with the letters of administration intestate, and the subject suit had been subsequently registered to their names, brought to close the law on administration and give them a new lease of 12 years in which to sue. They therefore had been bestowed with the locus standi to institute suit over the suit property. That this was a matter that ought to be heard at a full hearing to establish when the 1<sup>st</sup> and 4<sup>th</sup> Defendants got onto the suit land and also to establish the issue of fraud.
11. That since the Defendants had submitted that the suit land had been compulsory acquired by the National Government, the Plaintiffs' submission was that the acts of the state had no limitation of action. That the suit land was private property where a title deed had been issued and therefore the subject matter did not fall within the ambit of Article 67 of *the Constitution*. This was not a matter to be referred to the National Land Commission. The Plaintiffs sought for the Preliminary Objection to be dismissed with costs.

### Determination

12. I have considered the 1<sup>st</sup> and 4<sup>th</sup> Defendants' application on a point of Preliminary Objection to the effect that firstly, that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs lacked the locus standi to institute suit given that they had filed the current suit for recovery of land allegedly belonging to Kiplangat Arap Soi (deceased) despite them not having obtained the Limited Grant of Letters of Administration ad Litem.
13. Secondly that the suit herein was time barred as it offended the provisions of Section 7 and 9 of the *Limitation of Actions Act*. That the compulsory acquisition, occupation and possession and use of the suit land herein by the National Government, where a water treatment plant had been constructed had occurred in the year 1978, by which time, time started running and 12 years lapsed in 1990 or thereabout. The suit was filed in 2015 some 37 years later which was outside the limitation period.
14. Lastly, the Preliminary Objection was based on submissions that the Plaintiffs ought to have instituted their claim before the National Land Commission who had the jurisdiction to hear and determine claims on compulsory acquisition of land by the National Government as is provided for under Section 5 of the *National Land Commission Act*. The Defendants' position was that the suit was frivolous and/or vexatious and the same ought to be dismissed with costs.
15. There had been no response to either the Replying affidavit or the Preliminary Objection instead the Plaintiffs filed their written submissions dated the 23<sup>rd</sup> March 2022.
16. Before I analyze my finding, I wish to point out that pursuant to the service of the Notice of Preliminary Objection upon the Plaintiffs, they chose not to file a response to the same but instead filed their submissions challenging the Preliminary Objection. The Supreme Court of Kenya in *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR held as follows:

“A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence of this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1<sup>st</sup> Respondent on 17<sup>th</sup> August, 2018 are of no effect.”
17. That said and done, I find that the Plaintiffs' written submissions of 23<sup>rd</sup> March 2022 are of no effect without a Replying Affidavit.



18. I find the matters arising for my determination as follows;
- i. Whether the Preliminary Objection raised is sustainable.
  - ii. Whether the said Preliminary Objection has merit and should be upheld
19. It is on record that the suit land herein being LR No. Kericho/Mogogosiek/527 measuring 4.2 hectares was registered to Kiplangat Arap Soi on the 12<sup>th</sup> May 1975. That the said Kiplangat Arap Soi had passed away earlier on the 28<sup>th</sup> July 1968. Subsequently letters of Administration ad litem were issued to the 1<sup>st</sup> Plaintiff herein, on the 9<sup>th</sup> February 2015 in the High Court sitting at Kericho in Succession Cause No.10 of 2015. I also note from the pleadings that on the 14<sup>th</sup> March 2017 title to the suit land had been issued to both the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs therefore constituting them as the registered proprietors of the suit land pursuant to the provisions of Section 26(1) of the [Land Registration Act](#).
20. The Plaintiffs have via their amended suit sought to have the Defendants evicted there from LR No. Kericho/Mogogosiek/527 for being trespassers since 1978. The 1<sup>st</sup> and 4<sup>th</sup> Defendants in their defence have stated that they were on the land by virtue of the acquisition of the same by the National Government in 1978. That the suit land was registered to the deceased Kiplangat Arap Soi 7 years after his demise wherein after, the Plaintiffs had registered themselves as its proprietors. That the said registration had been fraudulent. That secondly since the cause of action occurred in 1978, this suit was time barred by virtue of the provisions of Section 7 and 9 of the [Limitation of Actions Act](#).
21. The law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the [Land Registration Act](#) provides as follows:
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner .....and the title of that proprietor shall not be subject to challenge...”
22. These provisions empowered the Plaintiffs, by virtue of being registered as the owner of the suit land, with vested rights and privileges therein and which no person could interfere with unless it could be proved that the said title was procured on the grounds of fraud or misrepresentation and this can only be achieved through a full hearing.
23. Secondly, the Plaintiffs’ claim is that acts of trespass started in 1978 to date which to me was a continuation of the previous acts.
24. In the case of [Isaack Ben Mulwa vs Jonathan Mutunga Mweke](#) [2016] eKLR, the Court of Appeal held as follows:-
- “ Each action of trespass constitutes a fresh and distinct cause of action. It is inconceivable that a claim based on an action for trespass committed in 2015 would be res – judicata simply because the same parties or their parents litigated over the same matter in 1985. It is well settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts.”
25. It is trite law that continuous injuries to land create separate actions and therefore the statute of limitation does not extinguish a suit or action based on trespass.



26. In the case of *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696 where their Lordships observed thus:

“----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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

27. Having considered the pleadings, the submissions by counsel, I find that the Preliminary Objection by the 1<sup>st</sup> and 4<sup>th</sup> Defendants are matters that are not strictly speaking pure points of law but are issues that ought to be ascertained in a full hearing and therefore the said Preliminary Objection lacks merit and is dismissed with costs to the Plaintiffs.

28. The parties to fast track the hearing the case by complying with the provisions of Order 11 of the [Civil Procedure Rules](#) within 30 days.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 14<sup>TH</sup> DAY OF JULY 2022**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

