



REPUBLIC OF KENYA



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**Vikiru v Kihugwa & another (Environment & Land Case E001 of 2021)
[2022] KEELC 13363 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13363 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VIHIGA

ENVIRONMENT & LAND CASE E001 OF 2021

E ASATI, J

SEPTEMBER 29, 2022

IN THE MATTER OF EVICTION FROM L.R. NO. KAKAMEGA/KEGOYE/35

BETWEEN

HESBON OBOTE VIKIRU PLAINTIFF

AND

MICHAEL MUGERA KIHUGWA 1ST DEFENDANT

EZEKIEL UDIRA LUKA 2ND DEFENDANT

JUDGMENT

Introduction

1. Hesbon Obote Vikiru, the plaintiff sued Michael Mugeru Kuhugwa and Ezekiel Udira Luka the 1st and 2nd defendants herein *vide* the plaint dated November 12, 2021. He sought the following relief against them:
 - a) A declaration that the defendants herein are trespassers to land registration Kakamega / Kegoye/35.
 - b) A declaration that the restriction registered on suit No Kakamega/Kegoye/35 be removed or withdrawn.
 - c) An order directly the Vihiga Land Registrar and Surveyor to visit land parcel Kakamega/kegoye/35 and restore the land boundary between LR Kakamega/Kegoye/35 and Kakamega/ Kegoye/32
 - d) An eviction order be issued to remove the Respondents from suit land by themselves, their family members or relatives, agents and servants and or anybody else claiming under them from the suit land and all illegal structures be removed or demolished.



- e) An order be issued to Officer Commanding Mbale Police Station provide security during execution of eviction order.
 - f) That injunction orders be issued to restrain the defendants and their family, relatives, agents, servants or by themselves from further trespass to the suit land upon eviction
 - g) An order compelling the defendants to pay individually for trespass by invasion, occupation and conversion for over 14 years at 1.5 million each (one million five hundred thousand shillings only)
 - h) An order for special damages for jointly interring their kin on suit land at jointly 500,000/= (five hundred thousand shillings only)
 - i) Cost of eviction is they fail to carry out the exercise by themselves
 - j) Costs of the suit and interest
 - k) Any other relief that this honourable court may deem fit.
2. The plaintiff's case is that he is the absolute registered owner of land parcel known as Kakamega/Kegoye/35 measuring 0.32 hectares (herein called the suit land). That the defendants encroached onto the suit land and despite several demand notices to vacate, they have failed to do so. He now seeks the courts intervention in terms of the relief outlined hereinabove.
 3. The defendants denied the plaintiff's claim vide their statement of defence dated December 14, 2021. Their case is that the plaintiff does not hold a good title to the suit land as he acquired the same illegally. They pray that the suit be dismissed.

The Evidence

4. The plaintiff's evidence was that he is the registered owner of the suit land and the defendants are supposed to be his neighbours on an adjacent land parcel known as Kakamega/Kegoye/32 sharing a common boundary with the suit land. That sometime in the year 2003 the defendants removed the boundary features between the two parcels of land, invaded the suit land and started tilling and building houses thereon.
5. That thereafter the defendants filed a claim against him in the Land Disputes Tribunal at Vihiga. The tribunal decided that the land be shared equally between the parties. The decision of the tribunal was filed in court vide Vihiga SPMCC Misc Appl No 32 of 2010 and adopted as a judgement of the court and a decree extracted. However, being dissatisfied with the decision of the tribunal, the plaintiff appealed to the Provincial Appeals Committee and later to the High Court *vide* Kakamega HCC Appeal No 177 of 2010. The High court allowed the appeal and ruled that the suit land should remain in the plaintiff's name. That subsequently, the defendants sued him in the Environment and Land Court at Kakamega *vide* Kakamega ELC Case No 82 of 2018 which suit was dismissed for being res judicata Kakamega HCC Appeal No 177 of 2010.
6. That he has severally requested the defendants to move out of the suit land but they have failed to do so.
7. On cross examination, the plaintiff stated that the only suit he had previously filed against the defendants was Vihiga PMCC 149 of 2018 where he was protesting against the defendants' attempt to bury the remains of their mother on the suit land. That most of the prayers in the plaint are similar to the prayers in an application in respect of which a ruling was delivered on October 28, 2021 in this court. That the damages claimed in the present case are his own approximation of the damage he has suffered. That the defendants have been using the land illegally for the past 14 years. That



- the defendants were born and brought up on parcel No Kakamega/Kegoye/32. That there are two houses on the suit land which belong to the defendants and that the grave of their late mother is on the suit land. That the suit land belonged to his late grandmother by the name of Birisira Mideva. That the grandmother transferred the land to him. That he obtained title to the land in the year 2006 by which time the defendants were already in occupation. The plaintiff stated further that the first registered owner of the suit land was his great grandmother. That the suit land has never belonged to a person known as Kazingaa Kamalichi who was the defendant's grandfather. That Birisira Mideva was a daughter of Lubai Cheledi, the first registered owner of the suit land. That it was Birisira Mideva who succeeded the estate of her late mother Lubai Cheledi and transferred the land to him.
8. The defence evidence comprised of the testimonies of the 1st and 2nd defendants. The 1st Defendant stated that his late father one Samson Kihugwa was the son of one Kazingaa Kamalichi who was the owner of land parcels known as Kakamega/Kegoye/32 and Kakamega/Kegoye/35. That since he was born in 1973, he has always lived on the suit land and has been in occupation and utilization of the land to date. That the suit land was registered in the name of Lubai Cheledi to hold in trust for the family. That Lubai Cheledi was a sister to Kazingaa Kamalichi and that when Lubai Cheledi got married elsewhere, the defendants' father, Samson Kihugwa, took over the land, occupied and utilized both parcels No 32 and 35 without any disturbance.
 9. That Lubai Cheledi bore 3 daughters one of whom was Birisira Mideva who upon the death of Lubai Cheledi secretly succeeded the estate of Lubai Cheledi *vide* Vihiga SRM Cause No 47 of 2003 without the defendant's knowledge or consent. That Birisira Mideva was the grandmother of the Plaintiff and that she never at any time claimed ownership of the suit land. That the defendants' entire family occupies the suit land and that they have buried their deceased relatives thereon. In addition they have developed the suit land extensively. That he built his house on the suit land in 1980 while his brother built his in the year 2001. That they have planted trees thereon.
 10. That it was in the year 2010 when he discovered that the suit land had been transferred to the plaintiff by Birisira Mideva. That he filed a claim at the Land Disputes Tribunal namely Vihiga Land Disputes Tribunal Case No 2 of 2010 but the decision of the Tribunal was overturned on appeal. That a suit namely Kakamega HC ELC No 68 of 2014 which he filed subsequently seeking ownership of the suit land by adverse possession was dismissed for being *res judicata*.
 11. He testified further that since then, they have had numerous cases involving the same parties, touching on the same subject matter which include Kakamega HCCA No 177 of 2010, Vihiga HC ELC No 4 of 2021, Kakamega HC ELC No 82 of 2019, Vihiga PMC EL No 149 of 2018, Kakamega HC ELC No 68 of 2014 (OS) and Vihiga SRM Misc Appl No 32 of 2010. That in Vihiga ELC No 4 of 2021 the court ruled that it was *functus officio*.
 12. The 1st Defendant stated further that the plaintiff merely holds a piece of paper being title deed in respect of the suit land but has never occupied or utilized the suit land as he lives in his own land. That the claim for special damages and compensation was misplaced.
 13. On cross examination, he stated that the decision in the Appeal No 177 of 2010 was that the land remains in the plaintiff's name. That they never appealed the decision. That his father shared out the two parcels of land to his sons. That both his parents were buried on the suit land.
 14. DW2 was the 2nd defendant. He adopted the contents of his witness statement dated December 14, 2021 as his evidence in chief. The contents of his witness statement were similar to those of DW1. On cross examination, he stated that there are 3 houses on the suit land belonging to the 1st defendant, himself and the plaintiff herein each. That the plaintiff's house on the suit land is a small house which he built in the year 2015 after arresting the defendants' family members.



Submissions

15. At the close of the evidence, the parties elected, by consent, to file written submissions in respect of the case.
16. The plaintiff filed written submissions dated July 22, 2022. He submitted that he is the sole registered owner of the suit land. That the caution registered on the suit land *vide* Kakamega ELC No 68 of 2014 (OS) later changed to ELC 82 of 2019 does not serve any useful purpose because the suit was dismissed. That the caution should be removed. That since the defendants removed the common boundary between the suit land and their land an order should issue to the County Surveyor Vihiga to reinstate the boundary. That there is no evidence that the title was acquired by fraud.
17. On the claim for damages and or compensation, the plaintiff submitted that the defendants planted maize and beans on the suit land throughout the period of 14 years. That according to farming knowledge from farmbizafrica.com, infospace.co.ke, w.wgrrenlife.com and oxfarm.co.ke, mixed farming of maize and beans on ½ acre of land yields 10 bags of 90 kgs of maize and 5 bags of 90 kgs each. He did calculations and concluded that because of unforeseen climatic changes the defendants have denied him a minimal profit of a total 1.5 million for the period dating back up to date.
18. The plaintiff further submitted that upon eviction the court should issue an order of injunction to restrain the defendants from further trespass onto the suit land. He prayed that the suit be allowed.
19. Written submissions dated July 25, 2022 were filed on behalf of the defendants by the firm of Osango & Company Advocates. Counsel proposed 4 substantive issues for determination. These are: whether or not the suit is statute barred, whether or not the suit is *functus officio*, whether or not the suit is *res judicata* and whether or not the claim based on special damages and or compensation for trespass are unfounded and baseless in law hence time barred.
20. On whether or not the suit is time barred, counsel submitted that since the plaintiff acquired title to the suit land in the year 2006 which was about 15 years to the time of instituting the present case, the plaintiff is barred by the provisions of section 7 of the [Limitation of Actions Act](#) from filing the suit. To support this submission, Counsel relied on the cases of [Intamba Freights SA v Kenya Revenue Authority & 3 others](#) [2018] eKLR and [Dickson Ngige Ngugi v Consolidated bank Ltd \(Formerly Jimba Credit Corporation limited\) & another](#) [2020] eKLR.
21. Counsel submitted that in view of the various decisions, judgements, rulings and or orders made by various competent jurisdictions involving the same parties and subject matter, the suit is *res judicata*. Counsel listed the previous decisions as; judgement dated May 12, 2015 and delivered on June 18, 2010, judgement delivered on February 20, 2020 in Kakamega HC ELC No 82 of 2019, Ruling made on July 20, 2018 in Vihiga PM ELC No 149 of 2018, order made on November 12, 2014 in Kakamega HC ELC 68 of 2014(OS), ruling delivered on October 28, 2021 in Vihiga ELC Case No E001 of 2021. Counsel relied on the provisions of section 7 of the [Civil Procedure Act](#) and submitted that this matter was *res judicata* because the matters in issue are similar to those previously in dispute between the same parties and the same having been determined on merit by a court of competent jurisdiction. Counsel submitted that the plaintiff's case is misplaced, misconceived, bad in law, incompetent and a mere abuse of the due process of the court.
22. Counsel submitted further that in view of this court's ruling delivered on October 28, 2021 in Vihiga ELC Case No E001 of 2021 the suit is *functus officio*. That the plaintiff ought to have lodged an appeal instead of filing the present suit. That the prayers sought in the application dated July 12, 2021, in in



which the court ruled that it was *functus officio*, were identical, replica and similar to the prayers being sought in the current claim and that amounts to abuse of court process.

23. Counsel submitted that the plaintiff does not hold a clean title because as at the time he got registered as owner, the defendants were already in occupation thereof. That the court cannot issue orders for the eviction of the defendants from their ancestral land.
24. On the claim for special damages and or compensation for trespass, Counsel submitted that the same is unfounded and baseless in law. That there is no way the court can award a party special damages and or compensation for trespass for a period of 14 years. That no particulars of special damages were pleaded with certainty and particularity for the court to award the same. That it is trite law that a claim based on special damages must be specifically pleaded and strictly proved. Counsel relied on the provisions of section 4 of the *Limitation of Actions Act*, the case of *Dickson Ngige Ngugi (supra)* and Vihiga ELC Case No 4 of 2021 to submit that the claim is time barred. Counsel prayed that the suit be dismissed.

Issues For Determination

25. From the pleadings filed, the evidence adduced and the submissions made, the following emerge as the issues for determination herein:-
 - a. Whether or not the court is *functus officio* in respect of this matter.
 - b. Whether or not the plaintiff's herein claim is *res judicata*.
 - c. Whether or not the plaintiff has obtained a good title to the suit land.
 - d. Whether or not the plaintiff's claim is time barred.
 - e. Whether or not the plaintiff proved his claim for special damages and or compensation.
 - f. What order to make on costs.

Analysis And Determination

26. Under order 21 rule 4 *Civil Procedure Rules, 2010* the court should ensure that its judgements in defended suits contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. Rule 5 requires the court, in suits in which issues have been framed to state its findings or decision with the reasons therefor upon each separate issue. Guided accordingly, I proceed to analyse the evidence and law and determine the issues raised.
27. The first issue is whether or not this court is *functus officio* in respect of this case. The plaintiff in paragraph (j) of the plaint pleaded that the court has jurisdiction to hear and determine the suit.
28. The defendant pleaded in paragraph 13 of the statement of defence that the suit is *functus officio*. Counsel for the defendants submitted that in view of the ruling of this court in Vihiga ELC No E001 of 2021 the instant suit is *functus officio*. From a copy of the ruling filed the correct citation of the case is Vihiga ELC Appeal No 4 of 2021 (Formerly Kakamega HCC Appeal No 177 of 2010). As expounded in the said ruling, *functus officio* refers to a situation where the court has exhaustively handled and finally decided the matters placed before it and cannot revisit the matter. According to *Black's Law Dictionary* 11th edition Bryan A Garner Thomson Reuters *functus officio* means-

“having performed his or her office, without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”



In the case of *Menginya Salim Murgani v Kenya Revenue Authority* [2014] eKLR the Supreme Court of Kenya held that:

“It is a general principle of law that a court after passing judgment becomes *functus officio* and cannot revisit the judgment on merits or purport to exercise judicial power over the same matter, save as provided by law.”

29. The Court of Appeal discussed the doctrine of *functus officio* in the case of *Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR as follows:

“*functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th century. In Canadian case of *Chandler v Alberta Association of Architects* [1989] 2 SCR 848 Sopinka J traced the origin of the doctrine as follows:

“The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in *re St Nazaire Co*, (1979)12Ch D 88

The basis of it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered and was subject to two exceptions:

1. Where there had been a slip in drawing it up
2. Where there was an error in expressing the manifest intention of the court.”

The Court of Appeal in the *Telkom* case (*supra*) proceeded to clarify that:

“the doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once a final judgment has been entered and a decree issued.

There do exist certain exceptions and these have been captured in *Jersey Evening Post Ltd v Ai Thani* [2002] JLR 542 at 550 thus:

“a court is *functus officio* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded and the court *functus* when its judgment or order has been perfected. The purpose of the doctrine is to provide finality.”

30. It therefore true that this court did find that in as far as Vihiga ELC Appeal No 4 of 2021 was concerned the court had become *functus officio* because it had decided with finally all the issues in the appeal hence it could not handle an application seeking *inter alia* for orders of eviction. This however did not preclude the court from entertaining this suit. Clearly the doctrine of *functus officio* is not applicable herein as this was a fresh suit which was yet to be heard.



31. The second issue for determination is whether or not the plaintiff's suit is *res judicata*. The defendant submitted that in view of the various decisions, judgements, rulings and or orders made by various competent jurisdictions involving the same parties and subject matter, the suit is *res judicata*. The court discussed this issue in Vihiga ELCA No 4 of 2021. The judgement in the appeal was that the land remains in the name of the plaintiff. No appeal was preferred. The guiding law on the doctrine of *res judicata* is the provisions of section 7 of the [Civil Procedure Act](#).
32. The Court of Appeal while discussing the doctrine of *res judicata* in the case of [Accredo AG & 3 others v Steffano Uccelli & another](#) [2019] eKLR quoted the Supreme Court and stated that
- “the test for determining the application of the doctrine of *res judicata* in any given case is spelt out under section 7 of the [Civil Procedure Act](#). In *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:
- i) The suit or issue was directly and substantially in issue in a former suit
 - ii) That former suit was between the same parties or parties under whom they or any of them claim
 - iii) Those parties were litigating under the same title
 - iv) The issue was heard and finally determined in the former suit
 - v) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
33. I have keenly read and analysed all the previous court decisions just like I did in the ruling dated November 28, 2021 in ELC Appeal No 4 of 2021. I find that the matter herein is not *res judicata* in as much as it seeks to enforce the judgement in the appeal.
34. The other issue for determination is whether or not the plaintiff obtained a good title to the suit land. The plaintiff pleaded in paragraph (d) of the plaint that at all material times since 2006 he is the absolute registered owner of the suit land. He produced a copy of title deed dated May 19, 2006 as evidence of this. The defendants in paragraph 2 of the statement of defence dated December 14, 2021 denied that the plaintiff has a good title to the suit land. They stated that the plaintiff's title was obtained illegally, unlawfully and un-procedurally through fraudulent means, misrepresentation and corrupt scheme. It was submitted on behalf of the defendants that what the plaintiff has is just a piece of paper that does not confer a good title to him. They pleaded and itemized the particulars of fraud and misrepresentation as:
- i. Obtaining the title to the suit land secretly without the knowledge or consent of the defendants,
 - ii. Obtaining the title through corrupt scheme to disinherit the defendants and other family members their ancestral land- comprising of land parcel known as Kakamega/Kegoye/35,
 - iii. Obtaining title to the suit land through corrupt scheme purporting to have been transferred to him as a gift,
 - iv. Taking advantage and influence to initiate filing of Vihiga SRM Succession Cause No 47 of 2003 using the petitioner one Birisira Mideva Umbavo (now deceased) in total disregard and



exclusion of all the dependants entitled to the suit land- known as Kakamega/Kegoye/35 with an ulterior and ill motive to disinherit all the dependants living on the suit land and

- v. Procuring the title of the suit land knowingly that the defendants were in actual and open occupation hence entitled to constructive trust and interest over the suit land.

35. I have considered the pleadings, the evidence and submissions on this issue. The law in section 26 of the *Land Registration Act* presumes all title to land good until same is impeached on grounds of fraud or misrepresentation to which the registered owner was a party or acquisition of the title through illegality, un-procedural ways or corrupt scheme. The burden to prove the fraud, misrepresentation or illegality is with the party alleging the same. (See sections 107 to 109 of the *Evidence Act*). In this case the burden is on the defendants. Allegations of fraud should not only be pleaded but also strictly proved. The defendants pleaded and particularized the elements of the alleged fraud and misrepresentation. However, what emerged from the evidence was that the suit land was, during the land adjudication, registered in the name of Lubai Cheledi as a first registration. Lubai Cheledi was the mother of Birisira Mideva. Upon the death of Lubai Cheledi, Birisira Mideva succeeded her (Lubai Cheledi's) estate and transmitted the suit land to her grandson, the plaintiff herein. The defendants fault this process and contended that since they were already on the land, they ought to have been consulted and their consent obtained. They claim that the title that the plaintiff holds was procured fraudulently.

36. Fraud has been defined in *Black's Law Dictionary* 11th edition as:-

“A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.”

Is there evidence on record that the plaintiff was involved in any fraud in acquiring the title to the suit land? The Court of Appeal in *Vijay Morjaria v Nansingh, Madbusingh Darbar & another* [2000] eKLR held that:

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

37. On the standard of proof required for claims based on fraud, courts have held that the standard of proof is higher than in the ordinary civil cases. In *Koinange & 13 others v Charles Karuga Koinange* [1986] KLR at page 23 the court held that:

“When fraud is alleged by the plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”

And in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated that:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* [2008] 1 KLR (G & F) 742 wherein the court stated that

“.. we start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since



the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases. In case where fraud is alleged it is not enough to simply infer fraud from the facts.”

38. In the present case, the defendants did not bring any evidence to connect the plaintiff to any acts of fraud, misrepresentation or illegality in acquiring the suit land. The defendants admitted that the suit land belonged to Lubai Cheledi, and that Birisira Mideva who succeeded the estate was her child. Under that *Law of Succession Act* she was the most immediate next of kin of the deceased and hence entitled to succeed the estate. The fact that the registered owner got married elsewhere did not terminate her right to own property.
39. I find that the plaintiff obtained a good title to the suit land.
40. The next issue is whether or not the suit is time barred. The defendants submitted that since the plaintiff became registered owner of the suit land in the year 2006, the suit filed in 2021 is time barred pursuant to the provisions of section 7 of the *Limitation of Actions Act*.

There is no dispute that the plaintiff became registered owner of the suit land in the year 2006 and that by then the defendants were already in occupation of the suit land. The occupation according to the plaintiff amounted to trespass as the same was unlawful. The plaintiff ought to have acted immediately so as to recover his land from the trespassers. The law provides maximum periods one can wait before filing a law suit. In Kenya the *Limitation of Actions Act*, cap 22 laws of Kenya is one of the laws that sets such periods. For a claim to recover land the maximum period is twelve (12) years, section 7 of the *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 cause of action accrued to him or, it first accrued to some person through whom he claims, to that person.”

The present suit was filed on November 12, 2021. This was obviously outside the twelve years since the cause of action arose. The cause of action arose to the plaintiff when he became registered owner of the suit land and found trespassers thereon.

The courts have had occasion to explain the purpose of the limitation of actions law. In the Ugandan case of *IGA v Makerere University* [1972] EA 65 Mustafa, JA held

“A plaint which is barred by limitation is a plaint “barred by law”. Reading these provisions together it seems clear to me that unless the appellant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The appellant was clearly out of time and despite the opportunity afforded by the Judge he did not show what grounds- of exemption he relied on presumably because none existed. The Limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for and when a suit is time barred, the court cannot grant the remedy sought.”

In *Gathoni v Kenya Co-operative Creameries Ltd* [1982] KLR 104 the Court of Appeal held that

“the law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise



reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But rightly or wrongly, the Act does not help persons like the applicant who whether through dilatoriness or ignorance do not do what an informed citizen would reasonably have done.”

And in *Mehra v Shah* [1965] EA 321 Grabbie, JA held

“the object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, protect the 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 a particular case.”

Guided by the law and the above cited authorities I find that the claim for recovery of land in the suit herein was filed outside the twelve years limitation period. The same is time barred by law and hence cannot be sustained.

41. The next issue is whether or not the plaintiff is entitled to the claim for damages. Among the prayers in the plaint are prayers for payment of compensation of Kshs 1.5 million each year for 14 years and special damages of kshs 500,000/= On this the plaintiff's evidence was that the damages claimed in the present case are his own approximation of the damage he has suffered. That the defendants have been using the land illegally for the past 14 years. He submitted that the defendants planted maize and beans on the suit land throughout the period of 14 years. That according to farming knowledge from farmbizafrica.com, infospace.co.ke, w.wgrrenlife.com and oxfarm.co.ke, mixed farming of maize and beans on ½ acre of land yields 10 bags of 90 kgs of maize and 5 bags of 90 kgs each. He did calculations and concluded that because of unforeseen climatic changes the defendants have denied him a minimal profit of a total 1.5 million for the period dating back up to date. The defendants in response pleaded in paragraphs 14 and 15 of the statement of defence that the special damages and compensation for trespass on the suit land is untenable and unsustainable for having been exaggerated and imaginary and that the same is misplaced and misconstrued. They submitted that it is trite law that a claim based on special damages must be specifically pleaded and strictly proved but this was not done. And that on the basis of the provisions of section 4 of the [Limitation of Actions Act](#) and the decision in the case of [Dickson Ngige Ngugi \(supra\)](#) and Vihiga ELC Case No 4 of 2021 the claim is time barred.
42. I have carefully considered this issue against the evidence adduced, submissions made and the law. It is trite law that special damages must not only be specifically pleaded but also proved. In the case of *Jogoo Kimakia Bus Services Ltd v Electronic International Ltd* [1992] KLR 177 the court held that

“special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”

The plaintiff did not adduce any evidence as to how he arrived at the figures claimed. I find that this claim has not been proved.
43. This court has determined the issues in the suit as follows: that the court is not *functus officio* as far as the case herein is concerned, that the claim is not *res judicata*, that the plaintiff acquired a good title to the suit land, that the plaintiff's claim for damages and compensation was not proved and that the plaintiff's claim for recovery of land is time barred.
44. And on costs, although under the provisions of section 27 of the [Civil Procedure Act](#) costs of any action, cause or other matter ought to follow the event, in view of the circumstances of the case namely; that the parties are relatives, the court considers it expedient that each party bears own costs.



45. In conclusion, I find that although the court is not *functus officio* and the suit is not *re judicata* and although the plaintiff obtained a good title to the suit land, the claim for recovery of land was filed out of time and the claim for special damages was not proved. In the premises, I dismiss the plaintiff's suit and order each party to bear its own costs of the suit.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT VIHIGA THIS 29TH DAY OF SEPTEMBER 2022.

E ASATI,

JUDGE.

In the presence of:

Juma —Court Assistant

Plaintiff present in person

1st and 2nd defendants present in person.

E ASATI,

JUDGE.

