



Siparo & 5 others (Suing as the Next Kin & Legal Representatives Of The Estate Of Sakaja Lenkoi Ololamala) v Ombane & 17 others (Environment & Land Case E004 of 2021) [2022] KEELC 12755 (KLR) (27 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12755 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE E004 OF 2021
EM WASHE, J
SEPTEMBER 27, 2022**

BETWEEN

**DAVID KIPILLAH SIPARO 1ST APPLICANT
WILSON SABARA SIPARO 2ND APPLICANT
PURKEL PAUL 3RD APPLICANT
DANIEL LETEIPA LENKOI 4TH APPLICANT
JULIUS RAEN SIPARO 5TH APPLICANT
KIKON PERERE DAVID 6TH APPLICANT
SUING AS THE NEXT KIN & LEGAL REPRESENTATIVES OF THE ESTATE
OF SAKAJA LENKOI OLOLAMALA**

AND

**MATHEW MENGE OMBANE 1ST DEFENDANT
SIBIA KWAMBOKA 2ND DEFENDANT
HEZRON MOMANYI 3RD DEFENDANT
DANIEL ONTOBO MOCHORWA 4TH DEFENDANT
PETERSON OTINGA BITANGE 5TH DEFENDANT
OTAYO NYABERU 6TH DEFENDANT
HENRY OMAO NYARERU 7TH DEFENDANT
DOUGLAS NYABUTO CHRISAUNTUS 8TH DEFENDANT
ELIZABETH MORAA MOGAKA 9TH DEFENDANT
PRISCA KWAMBOKA MOGAKA 10TH DEFENDANT**



MARY MORAA OMUGA	11 TH DEFENDANT
JOSEPH OMWOYO ONSANDO	12 TH DEFENDANT
ORIOKI NYACHAE	13 TH DEFENDANT
CHARLES OBUYA MAGERO	14 TH DEFENDANT
SAMWEL MENGE	15 TH DEFENDANT
WILLIAM PARSHOYIA PUYA	16 TH DEFENDANT
LAND REGISTRAR TRANSAMARA WEST SUB-COUNTY	17 TH DEFENDANT
THE HON. ATTORNEY GENERAL	18 TH DEFENDANT

RULING

1. The 1st and 15th defendants (hereinafter referred to as “the applicants”) herein have moved the court by way of a preliminary objection dated May 18, 2022 (hereinafter referred to as “the present preliminary objection”) seeking the suit herein to be dismissed because of the following reasons; -
 - i. That the plaintiff’s claim is statutory time-barred by dint of section 7 of the *Limitation of Actions Act*, cap 22 Laws of Kenya, hence untenable.
 - ii. That the plaintiffs herein lack the *locus standi* to bring this suit on behalf of the deceased Sakaja Lenkoi Ololamala.
2. The applicant upon filing the present preliminary objection also filed their submissions on the July 5, 2022.
3. On the other hand, the plaintiffs who are the respondents in the present preliminary objection filed their submission in opposition on the June 30, 2022.
4. The issues for determination in the present preliminary objection are only two; -
 - a. Whether or not the plaintiffs/respondents herein have *locus standi* to institute these proceedings on behalf of the late Sakaja Lenkoi Ololamala.
 - b. Whether or not this suit is time-barred by dint of section 7 of the *Limitation Of Actions Act*, cap 22.

Issue No 1 Whether Or Not The Plaintiffs/respondents Jherein Have Locus Standi To Institute These Proceedings On Behalf Of The Late Sakaja Lenkoi Ololamala.

5. The applicant in this present preliminary objection pleaded in the submissions that the respondents herein have not obtained the necessary authority to institute thus proceeding on behalf of the estate of Sakaja Lenkoi Ololamala.
6. The applicant submitted that the substantive plaint herein was filed without attaching the relevant limited grant ad litem as provided by law.



7. The applicants have further relied on the finding in the case of *Julian Adoyo Ongunga v Francis Kiberenge Abano* CA No 119 of 2015 where the court held as follows:-

“The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings”

8. The applicant further submitted that the respondents have no locus standi in the absence of the relevant limited grant *ad litem* to file and/or sustain this suit against the defendants.
9. The respondents in their submissions filed on the June 30, 2022 indicated that the relevant limited grant *ad litem* was obtained on the November 4, 2021 pursuant to the proceedings known as Kilgoris Principal Magistrate’s Court at Kilgoris Miscellaneous Succession Cause No E 057 OF 2021.
10. The respondents have attached a copy of the relevant limited grant *ad litem* dated November 4, 2021 to their submissions as an authority.
11. Consequently thereof, the respondents submitted that this suit is properly instituted by the authorised persons on behalf of the estate of Sakaja Lenkoi Ololamala and should not be struck out as prayed by the applicant.
12. Looking at the plaint, it is clear in paragraph 1 that the plaintiffs who are the respondents in this present preliminary objection claim to be the legal representatives of the estate of Sakaja Lenkoi Ololamala.
13. However, the plaint fails to annex and/or attach a copy of the relevant limited grant *ad litem* authorising the respondents to institute this suit.
14. In the submissions filed on the June 30, 2022 by the respondents, a copy of the said limited grant *ad litem* has been attached therein in the form of an authority in support of the fact that it was obtained.
15. The court has gone through the said limited grant *ad litem* issued on the November 4, 2021 and confirm that all the respondents were duly authorised to file and defend this suit on behalf of the estate of Sakaja Lenkoi Ololamala.
16. It therefore confirms that at the time of filing this suit on the November 15, 2021 as indicated by the payment receipt generated in the court registry, the respondents had legal authority to institute and sustain proceedings on behalf of the estate of Sakaja Lenkoi Ololamala.
17. In essence therefore, this court has the relevant jurisdiction to hear and determine any issues raised in this suit.

Issue No 2 Whether Or Not This Suit Is Time-barred By Dint of Section 7 of The *Limitation Of Actions Act*, cap 22.

18. The second issue in the present preliminary objection is whether or not this suit is time-barred in view of section 7 of the *Limitations of Actions Act*, cap 22.
19. The applicant’s position is that the properties which the respondents are seeking a cancellation of were issued with Title documents way back in the years 2000 and 2002.
20. Consequently therefore, any claim by the respondents should have been filed within twelve (12) years thereafter.
21. Any claim against the respondents beyond the year 2014 would be time -barred by the provisions of section 7 of the *Limitations of Actions Act*, cap 22.



22. On the other hand, the applicants plead that the respondents process of obtaining the Title documents of the suit properties was done in a concealed and fraudulent manner.
23. The respondents submit that it was only in the year 2021 when they conducted official searches on the said suit properties and discovered that their property known as Moyoi Plot No 40 had through concealments and fraudulent means registered to the defendants in this suit.
24. The respondents further submit that section 26 of the *Limitation of Actions Act* cap 22 provides that in instances of claims based on fraud and mistake, time is computed from the time of discovery of the alleged fraud or mistake.
25. In essence therefore, the time of the twelve (12) years period in this instant case began running from the date of obtaining the Official Post Searches of the suit properties and not when the title documents were issued.
26. For reference purposes, section 7 of the *Limitation of Actions Act*, cap 22 reads as follows; -
- “An action may not be brought by any person to recover land after the end of twelve (12) years from the date on which the right to action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
27. Section 26 of the *Limitation of Actions Act*, cap 22 also provides as follows; -
- “Where, in the case of an action for which a period of limitation is prescribed, either—
- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
 - (b) the right of action is concealed by the fraud of any such person as aforesaid; or
 - (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:
- Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—
- i. in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
 - ii. in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.
28. In determining this present application, the main issue is when to start computing time.
29. Computation of time can be done from either when the cause of action arose as provided under section 7 of the statute or section 26 of the statute.



30. The applicant's position is that time began running from the date which the defendants obtained their title documents from the offices of the 17th respondent.
31. Using this approach, then the respondents can not initiate this suit as the period of twelve (12) years has lapsed.
32. The respondents approach is that the process and issuance of the applicants title documents was done through concealment, misrepresentation and/or fraud.
33. The only time the respondent became aware that the applicants as well as the other defendants have obtained titles of the suit properties was when certificate of official searches were obtained in the year 2021.
34. The plaint provides for the allegations of interference, misrepresentation and irregularities in paragraph 27.
35. Looking at the diverse approaches which the applicants and the respondents have used to compute time in this suit, the court is of the view that when time starts to run in itself is an issue for determination.
36. The respondents in the plaint claim that the applicants as well as the other defendants have never taken possession of suit properties despite the obtaining title documents thereof.
37. In essence therefore, the respondents were not aware of the alienation of property known as Plot No 40 within Moyoi adjudication section until after obtaining the searches from the 17th defendant.
38. The applicants and the other defendants have not yet filed their defences in response to the plaint and in particular the issue of occupation raised by the respondents.
39. Occupation is one of the key parameters that courts apply in establishing when time starts to run under the Limitation of Actions Act, cap 22.
40. In this particular suit, the court has not had the benefit to know the applicants and/or defendants position on the issue of occupation.
41. The applicant's two authorities namely (Sobanlaldurgadass Rajput & Soral Sobanlala Rajput v Divisional Intergrated Dyt Programme Company Limited (2020) eKLR and Edward Moonge Lengusuranga v James Lanaiyara & Another (2019) eKLR) are distinguishable.
42. In both authorities, the dates of disposition of the properties was an agreed fact by both parties in their pleadings.
43. Secondly, the issue of occupation by the purchasers was also an agreed fact by the parties in their pleadings.
44. In the celebrated case of *Mukisa Biscuits Manufacturers Limited v Westend Distributors Limited* (1969) EA, 696, One Learned Judge emphasized the nature of a preliminary objection as follows; -

“A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law which is urged on the assumption that all the facts pleaded by the other sides are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”
45. Evaluating the pleadings of this suit as well as the submissions by the parties in discussion of the present preliminary objection, the court is of the view that the pleadings before court cannot be assumed to be



correct as envisaged in the findings contained in the case of (*Mukhisa Biscuits Manufacturers Limited v Westend Distributors Limited*).

46. Similarly, the issue of occupation raised by the respondents in the plaint is to be ascertained through oral and/or documentary evidence by the parties.
47. Lastly, the determination of when time began to run for purposes of calculating the twelve (12) years period is now an issue of discretion to be exercised by the court upon evaluating both oral and documentary evidence placed before it.
48. This court is therefore of the considered view that the present preliminary objection cannot be sustained.
49. In conclusion, this honourable court makes the following orders as appertains the preliminary objection dated May 18, 2022; -
 - i. The preliminary objection dated May 18, 2022 be and is hereby dismissed.
 - ii. The applicants shall bear the costs of this application.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 27TH SEPTEMBER 2022.

EMMANUEL.M.WASHE

JUDGE

In the Presence of

Court Assistant: Ngeno/Elisha

Shira for Plaintiff/Respondent

Mavoko for 1st and 15th Defendant/Applicant

Ondari for 4th and 8th Defendant (N/A)

Attorney General for 17th, 18th and 19th Defendant (N/A)

