



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT BUSIA**

**Civil Suit 9 of 2004**

**JOSEPHINE AKWARE.....PLAINTIFF**

**VS**

**1 NICHOLAS IKOL ADUNGO.....1<sup>ST</sup> DEFENDANT**

**2 PATRICK BARASA OMUSUNGU.....2<sup>ND</sup> DEFENDANT**

**REASONS FOR RULING**

On 28<sup>th</sup> November, 2006, I heard submissions on behalf of counsel for the defendant and the plaintiff in person. I struck out the suit and reserved my reasons for doing so, which I now give but first the background:

By a plaint dated 26<sup>th</sup> April, 2004 the plaintiff sought judgment against the defendant for:

- a) *The ruling/orders of the registration title sub-division No. S.TESO/CHAKOL/1166 if any created thereof in the names of the purchaser's 1<sup>st</sup> and 2<sup>nd</sup> defendant to pave way for succession by the plaintiff the rightful administrator of the estate of the deceased.*
- b) *That the acts of fraudulent and forgery means by the defendants be declared null and void forthwith and if any title deeds issued to them be cancelled forthwith and the original title be maintained until succession process is completed by the plaintiff and restrictions of this court be placed on this land until the heading and process of this suit.*
- c) *Any other relief which this Honourable Court may deem fit and just to grant.*
- d) *Costs of this suit.*
- e) *Any other relief this Honourable Court may deem fit and just to grant.*

By a statement of defence dated 21<sup>st</sup> June, 2004, the defendant:

- a) *denied the fraud;*
- b) *raised the issue of lack of locus-standi;*
- c) *and prayed that the suit may be struck out.*

When the matter came up for hearing, the defendant raised preliminary objection vide a notice thereof dated 11<sup>th</sup> October, 2006 on eight (8) grounds:

1 *THAT the suit herein is statute barred under the Limitation of Actions Act, Cap 22 of the Laws of Kenya*

*THAT the plaintiff herein lacks capacity to sue in law in the matter herein.*

3 *THAT the plaintiff herein has failed to establish her interest in the suit property hence is a busy body and has no locus standi to sue herein.*

4 *THAT the plaintiff is guilty of delay and/or laches, as the suit property was transferred to the 1<sup>st</sup> and 2<sup>nd</sup> defendants as purchasers for value in 1996 by a court order upon the issue of letters of administration for one Xaverio Ekakoro.*

5 *THAT registration of the 1<sup>st</sup> and 2<sup>nd</sup> defendant as first proprietors of land by the court in 1984 vested in them absolute ownership rights and privileges over the suit property, the said rights are indefeasible and the proprietors are free from any other interests whatsoever under the Registered Land Act, Cap 300, Laws of Kenya.*

6 *THAT the land parcel title number TESO/CHAKOL/1166 does not exist hence the plaintiff's claim cannot stand in law.*

7 *THAT the plaintiff's suit is defective in the face of the law as the plaintiff is purporting to sue the 2<sup>nd</sup> defendant who is deceased.*

8 *THAT the suit herein is an abuse of the court process and should be struck out with costs.*

It was argued, on behalf of the defendant, that the plaintiff lacks the requisite capacity to bring the suit by reason of having not taken out letters of administration of the estate of Xaverio Kakoro.

Secondly, that the suit is statute barred by reason of the provisions of Limitation of Actions Act [Cap 22 Laws of Kenya] in that the contract and registration of the suit property was in 1984 and the transfer was in 1996. That this suit was filed on 24<sup>th</sup> May, 2004, a period of over 20 years.

Thirdly, that the plaintiff lacks the legal or equitable interest in the suit property. The subject property at all material times belonged to Xaverio Karani Kakoro who sold it during his lifetime.

Fourthly, that the plaintiff had sued the 2<sup>nd</sup> defendant who passed on before the institution of the suit.

For the plaintiff, it was conceded that she had not taken out letters of administration.

Once it is conceded that the plaintiff had not taken out letters of administration at the time of filing this suit, that in itself is an admission that the suit was brought without *locus-standi* (See *TROUISTIK UNION INTERNATIONAL INGIRIDURSULA HEINZ v. MRS JANE MBEYU & MRS ALICE MBEYU CIVIL APPEAL NO.145/90.[C. A]*).

That is the main reason why I struck out the suit.

DATED and DELIVERED at BUSIA this 22<sup>nd</sup> day of October, 2006.

N.R.O. OMBIJA

JUDGE

Mr. Ashioya for Onsongo for the applicant.

Mr. Angima for Aluoch Awino for the respondent.