



**Oketch & another (Both suing as the legal representatives of the Estate of Opiyo Nyaoke (Deceased)) v Okoth & another (Environment and Land Appeal E002 of 2022) [2022] KEELC 15380 (KLR) (19 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15380 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E002 OF 2022  
GMA ONGONDO, J  
DECEMBER 19, 2022**

**BETWEEN**

**CONSOLATA OGIRA OKETCH ..... 1<sup>ST</sup> APPELLANT**

**ANJELINA ADHIAMBO ODINDO ..... 2<sup>ND</sup> APPELLANT**

**BOTH SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF  
OPIYO NYAOKE (DECEASED)**

**AND**

**CHARLES ODHIAMBO OKOTH ..... 1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF LANDS, KOSELE REGISTRY ..... 2<sup>ND</sup> RESPONDENT**

*((Being an appeal from the ruling of Hon. C. A. Okore, Principal  
Magistrate, delivered on 26th August, 2021 in Oyugis Senior Principal  
Magistrate's Court Environment and Land Case No. 27 of 2021))*

**JUDGMENT**

1. The instant appeal arose from the trial court's ruling delivered on the August 26, 2021 by the Honourable C A Okore, Principal Magistrate, in Oyugis Senior Principal Magistrate's Court Environment and Land Case No 27 of 2021 where the learned trial magistrate held, inter alia;

“It is clear the plaintiffs' suit is time barred and cannot be entertained in this court as it offends the provisions of the law as provided under section 7 of the [Limitation of Actions Act](#). In conclusion therefore I find and hold that the PO is meritorious and is hereby allowed.”



2. The appellants through the firm of Obach and Partners Advocates mounted the appeal by way of a memorandum of appeal dated January 24, 2022 and duly filed on February 1, 2022. The appeal is anchored on grounds 1 to 4 as set out on the face thereof and these include:
  - a) The learned trial magistrate erred in law and fact in failing to satisfy the principles to be applied in coming to her impugned ruling pursuant to section 26(c) of the *Limitation of Actions Act* which provides for extension of limitation period in case of fraud or mistake.
  - b) That the learned magistrate erred in law and in fact by failing to notice that the appellant learnt of the said fraud by the 1<sup>st</sup> defendant in the year 2016 hence the period for limitation was supposed to begin running from the year 2016 which is still within the seven year period provided under section 7 of the *Limitation of Actions Act* while filing for recovery of land.
3. Wherefore, the appellant has sought the orders that:
  - a) The appeal herein be allowed and an order be made setting aside the subordinate court's decision/order striking out the appellants' suit against the defendants and substitute the same with an order dismissing the defendants' preliminary objection dated June 2, 2021.
  - b) The appellant's case against the respondents be reinstated and the matter be ordered to proceed on its merits.
  - c) Costs of the appeal be provided for.
4. The appeal was heard by way of written submissions pursuant to this court's directions of July 18, 2022.
5. Accordingly, the appellant's counsel filed submissions dated September 19, 2022 on September 20, 2022. Counsel identified three issues for determination, to wit, whether there was fraud by the 1<sup>st</sup> respondent in transferring the whole suit land, West Kasipul/Kodera Kamiyawa/233, in his name, whether the principles to be applied pursuant to section 26(c) of the *Limitations of Actions Act* that provides for extension of limitation period in case of fraud or mistake were met in arriving at the now impugned ruling and whether by failing to notice that the appellant learnt of the fraud in 2016, the learned magistrate's decision affected the outcome of the case.
6. Learned counsel submitted, inter alia, that the 1<sup>st</sup> respondent registered himself as the bona fide purchaser of the suit land. That the appellants only became aware of the fraud in the year 2016 hence, the provisions of section 26(c) of the *Limitation of Actions Act* ought to apply. Counsel relied on various authorities including the case of *Zachary Omondi Odongo v Bernard Stephen Omollo & 2 others (2022) eKLR*, to fortify the submissions.
7. Kisaka and Associates Advocates, learned counsel for the 1<sup>st</sup> respondent, filed submissions dated October 17, 2022 on October 18, 2022 and identified three issues for determination infra: Was the claim herein statute barred as envisaged under section 7 of the *Limitation of Actions Act*? If yes, was there room for extension under section 26 of the same act and since the claim is based on fraud does it mean that section 4(2)(a) is to be applied or is the extension limitless?
8. Counsel submitted that fraud is a tort which falls under the provisions of section 4(2) of the *Limitation of Actions Act* thus, a claim ought to be instituted within three years. That it would be absurd if the extension of the limitation period as stipulated under section 26 of the same Act is unlimited since that would subject the defendants to abuse, which the *Limitation of Actions Act* sought to cure. Learned Counsel cited the case of *Gathoni v Kenya Co-operative Creameries Ltd [1982] eKLR* among other authoritative pronouncements, to buttress the submissions.



9. The 2<sup>nd</sup> respondent did not participate in the instant appeal.
10. In the foregone, the issues for determination are as captured in the grounds of appeal and compressed thus:
  - a) Whether the appellant has demonstrated that the appeal is tenable to attract the orders sought in the memorandum of appeal;
  - b) Depending on the outcome in (a) above, what final orders can this court make to meet the ends of justice?
11. I have carefully considered the parties' respective pleadings, the trial court's proceedings inclusive of evidence as well as the ruling of the learned trial magistrate. Notably, it is the duty of this court to reconsider the evidence on record afresh and come to its conclusions and inferences; see *Selle and another v Associated Motor Boat Co Ltd and others* [1968] EA 123 and *Williamson Diamonds Ltd v Brown* [1970] EA .
12. The 1<sup>st</sup> respondent who was the 1<sup>st</sup> defendant before the trial court lodged a preliminary objection dated June 8, 2021 on the ground that the suit was incompetent and an abuse of the court process. That it should be struck out with costs at the earliest possible opportunity since the same is time barred and/or statute barred in accordance with the provisions of section 7 of the [Limitation of Actions Act](#) (chapter 22 Laws of Kenya).
13. In their submissions dated June 21, 2021 in respect to the preliminary objection, the plaintiffs'/ appellants' counsel submitted that the plaintiffs' late father entered into a verbal agreement with the 1<sup>st</sup> defendant sometime in the year 1983 for the sale of a portion of the suit land measuring approximately one (1) acre. That the 1<sup>st</sup> defendant took advantage of the plaintiff's father's illiteracy and fraudulently transferred the whole of the suit land in his name instead of the one acre he had bought. That the plaintiffs only learnt of the fraud in 2016 thus, occasioning the delay in filing of the suit. Counsel cited article 159(2) (c) of the [Constitution](#) of Kenya, 2010 and section 26 of the [Limitation of Actions Act](#).
14. In arriving at the impugned ruling, the learned trial magistrate noted that the suit land was acquired in 1984 yet the suit seeking to recover the same was filed on March 16, 2021, about 37 years later. That therefore, the same offends the provision under section 7 of the [Limitation of Actions Act](#).
15. section 26 of the [Limitation of Actions Act](#) 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.
16. So, according to the said section, the cause of action accrues when the fraud is discovered. In the instant case, I find that the alleged fraud was discovered in the year 2016 and a period of three years ended in 2019. Interestingly, the proceedings at the trial court were filed on March 16, 2021.
17. The plaintiffs discovered the fraud in the year 2016 as stated in paragraph 8 of the plaint.



18. Section 7 of the *Limitation of Actions 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 right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

19. In essence, the above section provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. In the present case, the 1<sup>st</sup> defendant's father having bought the suit land in the year 1984 and transfer effected in the same year, the appellants herein could only seek to recover it from the 1<sup>st</sup> respondent, within twelve years after the sale agreement.

20. Quite clearly, a period of about thirty seven years have lapsed from 1984 when the 1<sup>st</sup> respondent's deceased father was registered as proprietor of the suit land. The period of limitation starts running a fresh whenever there are changes in the title as was held in the case of *Kimani Ruchine & Anor v Swift Rutherford & Co Ltd and Another (1980) KLR 10*.

21. The appellants needed to commence their claim within the time prescribed under section 7 of the *Limitation of Actions Act*. Thus, by the time the appellants filed the suit at the trial court, the claim was statute barred.

22. In the case of *Bosire Ogero v Royal Media Services [2015] eKLR*, the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims. Therefore, if a matter is statute barred the court has no jurisdiction to entertain the same; see also *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Co Ltd. (1969) EA 696*.

23. In the circumstances, I would endorse the learned trial magistrate's reasoning, especially to the effect that the appellants' suit at the trial court was time barred and that the preliminary objection was meritorious.

24. In conclusion, it is the finding of this court that the learned trial magistrate's ruling is faultless at law. I proceed to uphold the same.

25. A fortiori, the instant appeal originated by way of a memorandum of appeal dated January 24, 2022 and duly filed on February 1, 2022 herein, be and is hereby dismissed.

26. By dint of the proviso to section 27(1) of the *Civil Procedure Act*, chapter 21 Laws of Kenya, costs of this appeal and the court below to be borne by the appellants.

27. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 19<sup>TH</sup> DAY OF DECEMBER 2022.**

**G M A ONG'ONDO**

**JUDGE**

**Present**

1. Ms Ochieng holding brief for Mr Obach, learned counsel for the appellants

2. Ms Odhiambo holding brief for Mr Kisaka, learned counsel for the 1<sup>st</sup> respondent

**3. Okello, Court Assistant**

