



**Naitawang v Matara & 4 others (Environment & Land Case
E004 of 2022) [2022] KEELC 15559 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15559 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE E004 OF 2022**

EM WASHE, J

DECEMBER 8, 2022

BETWEEN

PAUL LEMAYIAN NAITAWANG PLAINTIFF

AND

SIMION MAGARE MATARA 1ST DEFENDANT

JULIUS AYUKA MANUGUTI 2ND DEFENDANT

GIDEON NYAKUNDI NYABERI 3RD DEFENDANT

LAND REGISTRAR, TRANSMARA WEST SUB-COUNTY 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

RULING

*****ARGUMENTS**

1. This Ruling appertains to the Preliminary Objection dated 2nd September 2022 (hereinafter referred to as “the present preliminary objection”) filed by the 3rd Defendant (hereinafter referred to as “the applicant”).
2. The present Preliminary Objection seeks to challenge the jurisdiction of the Court to hear and determine the Plaintiff’s (hereinafter referred to as “the Respondent’s”) suit filed on the 23rd March 2022 on the following grounds; -
 1. That the claim herein as mounted is statutorily time barred and contravenes the mandatory provisions of Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
 2. That the suit herein is fatally defective, incompetent and bad in law and the same ought to be struck out *Ex-debito justitiae*.



3. That the Complaint dated 23rd March 2022 is legally untenable and incurably defective and no amount of amendment can cure the defect.
 4. That the Complaint dated the 23rd March 2022 together with accompanying application of even date are fatally defective in so far as the same are premised on the suit which is non-starter and thus the prayers therein cannot issue in the circumstances.
 5. That the entire suit is otherwise an abuse of the due process of the Court.
3. The present Preliminary Objection was duly served on the Respondent and the Court directed the same to be canvassed by way of written submissions.
 4. The Applicant filed their submissions on the 17th October 2022 and the Respondent filed his on the 26th October 2022.
 5. The Court upon perusing the present preliminary objection and the submissions of the parties herein notes that the issue for determination is whether or not the Respondent's Complaint dated 23rd March 2022 is time barred in view of the provisions in Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
 6. Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya reads as follows; -

“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 actions accrued to him or, if it first accrued to some person through whom he claims to that person”
 7. The Applicant in the present preliminary objection submits that the Respondent's Complaint dated 23rd March 2022 is seeking the recovery of land known as Transmara/Moyoi/107 (hereinafter referred to as “the suit property”) allocated and/or registered in the names of the 1st, 2nd and 3rd Defendants.
 8. The Applicant's position is that the suit property was allocated to the 1st, 2nd and 3rd Defendants through Adjudication on the 14th of September 1987 and have referred to the Adjudication Record No. 72508 contained in their List of Documents dated 2nd September 2022.
 9. The Applicant has further pleaded that pursuant to the Adjudication Record No. 72508 issued by the Land Adjudication Officer in the year 1987, the 4th Defendant processed and issued a lawful title deed over the suit property on the 27th of June 2001 in favour of the 1st, 2nd and 3rd Defendants.
 10. In support of this averment hereinabove, the Applicant referred to the Title Deed issued on the 27th of June 2001.
 11. The Applicant's submission therefore is that the Twelve (12) years period provided under Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya should run from 14th September 1987 when the suit property was allocated to the 1st, 2nd and 3rd Defendants.
 12. In the alternative, at the very least, the twelve (12) years period should start running from 27th June 2001 when the 1st, 2nd and 3rd Defendants were issued with the Title Deed by the 4th Defendant.
 13. The Applicant's position is that either way, the Twelve (12) Years period provided under Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya has since lapsed and the Respondent cannot institute any lawful proceedings thereafter and the suit should therefore be struck out for being time barred.



14. The Respondent on the other hand submits that Section 26 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya provides exceptions to Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
15. The Respondent's submission is that where a party pleads Fraud in the suit, then the computation of the Twelve (12) years period provided under Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya will only start running upon discovery of the said fraudulent actions.
16. The Respondent had reference to the Complaint dated 23rd March 2022 and the Particulars of Fraud outlined therein.
17. According to the Respondent, the fraudulent activities by the Defendants herein were discovered in the 2019 when strangers entered into the suit property with an intention of occupying the same.
18. In essence therefore, the Respondent's submission is that the discovery of the Applicant's fraudulent actions was in the year 2019 and therefore the twelve (12) years period envisaged under Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya has not crystallized.
19. Based on the above two competing submissions, the Court will now evaluate and analyse the facts and law to arrive at its determination.
20. In the celebrated case of *Mukhisa Biscuits Manufacturing Co. Ltd v Westend Distributors* (1969) EA 696, the Court made the following observation; -

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as preliminary point, may dispose of the suit. Example is an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

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.”
21. Referring to the parties' pleadings in this suit, the Court takes note that the following facts have not been disputed.
 - i. The Certified Copy of the Adjudication Record No. 72508 relating to the suit property issued on 15/09/2022 is a true copy of the Records held by the Land Adjudication Officer, Moyoi Adjudication Section and the District Land Registrar-Transmara.
 - ii. The 1st, 2nd and 3rd Defendants are the duly registered owners of the suit property pursuant to the title deed issued on the 27th June 2001.
22. The Respondent challenges the above documents based on the averments contained in Paragraph 7 and 8 of the Complaint dated 23rd March 2022.
23. Paragraph 7 of the Complaint dated 23rd March 2022 provides the particulars of fraud and/or illegalities which were allegedly undertaken by the 1st, 2nd and 3rd Defendants in acquiring the suit property.
24. Paragraph 8 of the Complaint dated 23rd March 2022 outline the particulars of fraud and/or illegalities allegedly undertaken by the 4th Defendant to deprive the Respondent of the suit property.



25. Referring to the Plaintiff's Bundle of Documents dated 23rd March 2022, the Respondent has placed before the Court a copy of the Adjudication Record in respect of the suit property, a copy of the Certificate of Official Search of the suit property and a letter dated 21st February 2022 from 4th Defendants office.
26. The issue at this point is not to evaluate the merits of the averments contained in Paragraphs 7 and 8 of the Plaint dated 23rd March 2022 by the Respondent.
27. The issue is to figure out when the Respondent could have possibly became aware of the 1st, 2nd and 3rd Respondents fraudulent actions relating to the registration of the suit property.
28. According to the Respondent's Bundle of Documents filed on the 23rd March 2022, the first item contains a copy of a page with Plot.No. 104 appearing therein.
29. The copy of the Page with Plot.No. 104 produced by the Respondent as the Adjudication Record of the suit property contains a comment that the said Plot.No. 104 has been transferred and sub-divided among buyers pursuant to the outcome of Objection No. 216.
30. Turning to the Applicant's documents and in particular the Adjudication Record No. 72508 relating to Parcel No. 107, the Court notes that pursuant to Objection No. 221 submitted by the 1st Defendant, the said entire plot was transferred to the buyers who were the 1st, 2nd and 3rd Defendants.
31. Consequently therefore, the name of Paul Lemaiyan Ole Naitawang was cancelled thereafter on the 14th of September 1987.
32. The Respondent in their submissions under Issue No. 1 and in particular Paragraph 7, submit that suit property was adjudicated, demarcated and subsequently allocated to him.
33. The Respondents further submits that the Adjudication Records up to the time of filling this suit was still reflecting the name of the Respondent and not the 1st, 2nd and 3rd Defendants.
34. The only problem arises from the offices of the 4th Defendant which has fraudulently and illegally with collision of the 1st, 2nd and 3rd Defendants issued the title deed to the wrong people.
35. Unfortunately, this Court does not agree with the Respondent's submission.
36. Both the alleged Adjudication Records contained as Item No. 1 in the Respondent's Bundle of Documents dated 23rd March 2022 as well as the one contained in the Applicant's List of Documents dated 2nd September 2022 speak to one and the same thing.
37. The two documents confirm the existence of Objections proceedings against the Respondent by the 1st, 2nd and 3rd Defendants which were upheld in their favour.
38. The two documents also confirm that the 1st, 2nd and 3rd Defendants were awarded the entire property known as Plot No. 7 within Moyoi Adjudication Section.
39. According to the Certified Copy of the Adjudication Record No. 72508, rectification of the Adjudication Record No. 72508 removing the name of the Respondent and inserting the names of the 1st, 2nd and 3rd Defendants was done on the 14/09/1987.
40. The Respondent has not disputed by way of a Reply to the 3rd Defendants Statement of Defence dated 2nd September 2022 the existence of the said objections filed by the 1st, 2nd and 3rd Defendant and/or their outcome thereof.



41. Consequently therefore, this Court is of the considered view that time for computing the Twelve (12) years period under Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya began on the 14th of September 1987 when the 1st, 2nd and 3rd Defendants were recorded as the bonafide owners of Plot.No. 107 within Moyoi Adjudication Section.
42. The issuance of the Title Deed of the suit property to the 1st, 2nd and 3rd Defendants on the 27th of January 2001 simply signified the completion of the Adjudication Process provided under the *Land Adjudication Act*, Cap 284 Laws of Kenya and did not alter the rights and/or benefits that had been recognised in the Adjudication Records.
43. It is also critical to point out that under Section 25 (b) of the *Land Adjudication Act*, Cap 284, the Land Adjudication Officer is required to display the original adjudication record for inspection at a convenient place within the Adjudication Section.
44. The intent and purposes of displaying the original adjudication Record for inspection is to make public the Adjudication Records and allow any aggrieved person to file an appeal to the Minister.
45. The Respondent therefore cannot now claim that he was not aware of the purported fraudulent and/or illegal activities of the 1st, 2nd and 3rd Defendants having been recorded in the Adjudication Register of Plot.No. 107 within Moyoi Adjudication Section until the year 2019 yet the Adjudication Record was actually available for inspection since 1987.
46. In addition to the above, the Register for the suit property created on the 2nd of March 2001 and/or maintained by the 4th Defendant is a public record and/or document open to the general public to verify and/or inspect it at any given time on the particulars and/or details of the duly registered owners.
47. Clearly, Equity aids the vigilant and not the indolent.
48. In conclusion therefore, the Court is of the considered view that the Respondent filed the Plaintiff dated 23rd March 2022 after the lapse of the twelve (12) year period provided under Section 7 of the *Limitation of Actions Act*, Cap 22.
49. In the Applicants cited case of *Bosire Ongero v Royal Media Services* (2015) eKLR, the Court held as follows; -

“The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over it.”
50. Indeed, this Court having made a finding that the Plaintiff filed on the 23rd of March 2022 is time-barred, then this suit cannot proceed any further as the Court has no jurisdiction to entertain the same.
51. In conclusion therefore, the Court hereby makes the following Orders as appertains the Preliminary Objection dated 2nd September 2022; -
 - A. The Preliminary Objection dated 2nd September 2022 be and is hereby upheld.
 - B. The Plaintiff dated 23rd March 2022 be and is hereby struck out for being time barred.
 - C. The Sub-County Land Registrar, Transmara West, East and South is further Ordered to remove, cancel and/or vacate any caution placed by the Plaintiff/Respondent herein if any exists forthwith.



D. The 3rd Defendant shall be awarded costs of both suit and this Preliminary Objection filed herein.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 8TH DECEMBER, 2022.

EMMANUEL.M.WASHE

JUDGE

In the presence of:

Court Assistant: Mr. Ngeno

Advocate for the Plaintiff/respondent: Ms. Mireri (n/a)

Advocates for the 3rd Defendant/applicant: Ms. wekesa

