



Mageto (Suing as administrator of the Estate of Thomas Ogwangi alias Mageto Ogwangi - Deceased v Mogoba & another (Environment & Land Miscellaneous Case E007 of 2024) [2025] KEELC 384 (KLR) (4 February 2025) (Ruling)

Neutral citation: [2025] KEELC 384 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND MISCELLANEOUS CASE E007 OF 2024**

M SILA, J

FEBRUARY 4, 2025

BETWEEN

FRANCIS NYAKERI MAGETO (SUING AS ADMINISTRATOR OF THE ESTATE OF THOMAS OGWANGI ALIAS MAGETO OGWANGI - DECEASED) APPLICANT

AND

MARY SIRO MOGOBA 1ST RESPONDENT

JOHN KENNEDY SIRO 2ND RESPONDENT

RULING

1. Before me is a notice of motion dated 7 February 2024 and filed on 9 February 2024 which commences this action as a miscellaneous suit. The motion seeks the following orders :
 - I. That the honorable court be pleased to set aside the decision of Marani Land Disputes Tribunal No. 11 of 2006 adopted as the decision of the court in Misc. Application No. 117 of 2007 and the consequential orders flowing therefrom.
 - II. The costs of this application be provided for in any event.
2. The application is based on the following grounds :
 - a. That the tribunal lacked jurisdiction to entertain a claim based on ownership of land contrary to Section 3 (1) of the Land Disputes Tribunal Act, Cap 303A (repealed).
 - b. That the court adopted the decision of the tribunal in Tribunal Case No. 11 of 2006 without taking into account that the decision was irregular and null and void;
 - c. That the tribunal ventured into a contract for sale of land which was not within its purview;



- d. That the judgment of the tribunal did not mention the parcel of land thus irregular;
 - e. That the irregular judgment has caused injustice to the estate of Thomas Mageto Ogwangi.
3. The application is supported by the affidavit of the applicant in which he has deposed that he holds a grant of letters of administration ad litem for the estate of the late Thomas Mageto Ogwangi issued on 20 December 2023. It is deposed that Thomas Mageto Ogwangi was jointly registered with his brother John Angwenyi Ogwangi as proprietors of the land parcel West Kitutu/Mwagichana/1490 (parcel No. 1490) in undivided shares. It is averred that the respondents are administrators of the estate of Julius Siro Mogoba (deceased). The applicant states that Julius Siro Mogoba (Julius) sued Thomas Mageto Ogwangi (Thomas) in respect of the land parcel No. 1490 before the Marani Land Disputes Tribunal in case No. 11 of 2006 and an award was made on 9 November 2007 in favour of Julius but without indicating the land parcel number that he purchased and its measurements. He contends that the judgment did not conform to Section 3 (8) of the Land Disputes Tribunal Act (now repealed) and is therefore irregular, null and void, and could not be adopted as a judgment of the court. He deposes that the court made a serious error in adopting that award. He avers that the land parcel No. 1490 was subdivided into the land parcels West Kitutu/Mwagichana/3219 and 3220 (parcels No. 3219 and 3220) with the respondents claiming the land parcel No. 3219. He has annexed copies of the green cards for these parcels of land. He avers that the family of Thomas has suffered and continues to suffer injustice if the court does not set aside the award of the tribunal and its adoption as a judgment.
 4. The respondents filed Grounds of Opposition to oppose the application. The following is raised :
 - i. That the application is bad in law since no substantive suit has been filed.
 - ii. That the applicant has not sought leave pursuant to Section 7 of the *Limitation of Actions Act*.
 - iii. That the respondents lack capacity to be sued in respect of the estate of Julius Siro Mogoba.
 - iv. That the application be dismissed with costs.
 5. The application was argued through written submissions.
 6. In his submissions, Mr. Morigori, learned counsel for the applicant, more or less submitted that the tribunal had no jurisdiction to entertain the dispute and its decision was a nullity. He submitted that the subdivision of the land parcel No. 1490 into the land parcels No. 3219 and 3220 was based on a judgment that was a nullity and that the title should be restored. On the other hand, Mr. Nyambati, learned counsel for the respondents, submitted that the current pleadings are incompetent as there is no plaint, Originating Summons, Petition, Judicial Review, or Declaratory Suit and it should be struck out. He also submitted that the suit is res judicata by virtue of the suits ELC No. 105 of 2019 and Miscellaneous Application No. 117 of 2007. Counsel further submitted that the claim is barred by the *Limitation of Actions Act*, Cap 22, Law of Kenya, as the award was adopted on 27 February 2008 which is more than 15 years ago. In addition he submitted that the claim before the tribunal was filed by Julius Siro Mogoba, and not the respondents, and therefore the respondents are wrongly sued. He submitted that the court lacks jurisdiction to deal with the estate of a deceased person.
 7. I have taken all the above into account.
 8. It is apparent that what the applicant seeks is the setting aside of the award in Marani Land Disputes Tribunal Case No. 11 of 2016 and the judgment that adopted the award which was done in the suit Kisii CMCC Miscellaneous Application No. 117 of 2007.



9. I observe that the award was made on 9 October 2007 and it was adopted as a judgment of the court on 26 March 2008. This miscellaneous application was filed on 9 February 2024 which is more than 16 years after the award and more than 15 years after the award was adopted as a judgment of the court. Section 4 (4) of the *Limitation of Actions Act*, Cap 22, Laws of Kenya, provides as follows :
- (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.
10. There is no question that more than 12 years from the time of adoption of the award as a judgment of the court have lapsed. Therefore if ever there was any cause of action, the same has been extinguished by effluxion of time. For that reason alone, this application is a non- starter and must be dismissed.
11. But the above aside, if ever there was a cause of action, the same could not have been entertained in the manner brought forth by the applicant. The applicant has merely filed a miscellaneous application yet the orders sought would involve the cancellation of a title to land. You cannot bring such an action through a miscellaneous application and indeed I wonder how a court can make a decision that can lead to cancellation of a title through a miscellaneous application. Civil suits need to be commenced through plaint, originating summons, or petitions, not through miscellaneous applications. Nowhere in his submissions did Mr. Morigori, learned counsel for the applicant, address the issue of procedure employed despite it being raised by the respondents, and on my part, I do not see how a suit such as this can be determined through a miscellaneous application. Yet again for want of proper procedure, this miscellaneous application deserves to be dismissed.
12. The other issue raised by the respondents is that they have been improperly sued and the applicant has not justified why he has sued them. The respondents were not parties before the tribunal nor in the application that adopted the award as the judgment of the court. The applicant and beneficiary of the award was Julius Siro Mogoba and it is him who is now registered as proprietor of the land parcel No. 3219. If he is deceased, it has not been shown that the respondents are his legal representatives. Thus, even assuming that the applicant has a cause of action which he could file through a miscellaneous suit, he had an obligation to sue the correct parties. Again for failing to sue the correct party this application must be dismissed.
13. There is really no point of belabouring the point. There is no merit in this miscellaneous application and it is hereby dismissed with costs to the respondents.
14. Orders accordingly.

DATED AND DELIVERED THIS 4TH DAY OF FEBRUARY 2025.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

