



Herber Investment Limited & another v Ouko & 3 others (Environment & Land Case 778 of 2014) [2025] KEELC 4964 (KLR) (3 July 2025) (Ruling)

Neutral citation: [2025] KEELC 4964 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 778 OF 2014**

CA OCHIENG, J

JULY 3, 2025

BETWEEN

HERBER INVESTMENT LIMITED 1ST PLAINTIFF

BERNADETTE WANJIRU MVVANI 2ND PLAINTIFF

AND

ROSELYN DOLA OUKO 1ST DEFENDANT

AARON TAFARI OUKO 2ND DEFENDANT

DIRECTOR OF SURVEYS 3RD DEFENDANT

THE HON ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. The Plaintiffs commenced this suit by a Complaint dated the 13th June 2014 and amended on 13th May 2024. The 1st and 2nd Defendants have raised a Preliminary objection dated the 20th June 2024 contending that the Plaintiffs' suit is statutory time-barred and that it does not disclose any reasonable cause of action.
2. Before the preliminary objection could be heard, the Plaintiffs filed a Notice of Motion application dated 29th January 2025 seeking the following orders:
 - a. That the Plaintiffs be granted leave to amend the amended complaint herein.
 - b. That the costs of the application be provided for.
3. The application is premised on grounds on its face and on the supporting affidavit of the 2nd Plaintiff, who is also a director of the 1st Plaintiff. She avers that the Plaintiffs' suit seeks to enforce rights over Plot 24 on the amended subdivision scheme of I-R No. 3589/6, which she acquired together with her



late husband through the 1st Plaintiff Company, from Mr. Jason Atinda Ouko around the year 1990 but the said vendor passed away before he could process title in their favour.

4. She contends that upon filing their amended plaint on 13th May 2024, the Plaintiffs were served with the 1st and 2nd Defendants, List of documents dated the 19th June 2024, which list contains two Certificates of title for land parcels LR Nos. 3589/40 and 3589/41 respectively, registered in the names of the 1st and 2nd Defendants. They contend that they were not aware of the two Certificates of title until after the service of the supplementary List of documents. She asserts that the two Certificates of title were illegally and/or fraudulently procured during the pendency of the instant suit to defeat the Plaintiffs' claim thus they should be cancelled. To this end, she seeks leave to effect further amendments to the Plaint to properly capture the said issue and seeks orders to cancel the alleged fraudulent Certificates of title registered over the suit land.
5. The application is opposed by the 1st and 2nd Defendants vide the 2nd Defendant's replying affidavit. He claims that the application for amendment is only filed to defeat their Preliminary objection. He asserts that the Plaintiffs seek to reframe their claim by an amendment of the Plaint in such a manner that the Defendants would be deprived of their right to rely on Limitation of Actions Act. Further, that LR No. 3589/40 and 3589/41 have been in existent and Certificates of titles are clear proof that there has never been any amalgamation of the said plots. He asserts that there is no evidence to confirm that Plot number 24 exists and forms part of the Estate of Jason Atinda Ouko. He reiterates that the Plaintiff's suit is statutory time-barred and cannot be cured by way of amendment.
6. The Preliminary Objection and the instant Notice of Motion were canvassed by way of written submissions. The Plaintiffs submit that the Preliminary Objection is premature to the extent of the application for further amendment of the amended Plaint dated 13th May 2024. Further, that it is not a pure point of law as it is based on contested facts. They point out the existence and validity of contracts in this suit are contested facts, thus they cannot be the basis of a preliminary objection.
7. The Plaintiffs further submit that since the suit has not been heard, the Defendants will not suffer any prejudice at all, as they will have an opportunity to file an amended defence. They further submit that the Plaint is not statute barred as it was triggered by the Defendants' actions of illegally entering the suit land on 9th June 2014, while they [Plaintiffs] had been in possession of the said land since 1990. Further, that the proposed amendments seek to cancel Certificates of title issued in the year 2020 and which came to the Plaintiff's knowledge in 2024.
8. To buttress their averments, the Plaintiffs relied on the following decisions: John Wangusi v Busolo Wabuyele 2 Others [2015] eKLR, Zipporah Njoki Kangara v Rock and Pure Limited 3 Others [2021]eKLR, Coffee Board of Kenya v Thika Coffee Mills Limited 2 Others [2014] eKLR, Mohamed Godana Jarso t/a Dal International Hotel v Maxwell Otieno Odongo [2017] eKLR, Central Bank Limited v Trust Bank Limited [2000] 2EA 365 and Coffee Board of Kenya v Thika Coffee Mills Limited 2 Others [2014] eKLR .
9. The Defendants in their submissions contend that the 1st Plaintiff's suit is incompetent, since there is no resolution filed to institute suit or grant authority to the 2nd Plaintiff to swear the verifying affidavit. Further, that since the suit is pegged on an alleged agreement between the 1st Plaintiff and the late Jason Atinda Ouko entered into, in the year 1990, then a suit to enforce the said agreement ought to have been filed by the year 1996 pursuant to Section 4 of the Limitation of Actions Act, which provides that an action based on a contract may not be brought after six years, hence the 1st Plaintiff's case is statutory time-barred.



10. They claim that there was no legally enforceable agreement between the 2nd Plaintiff and the Estate of the late Jason Atinda Ouko for disposition of a portion of LR No. 3589/40, thus this court cannot be called upon to enforce an illegal agreement. Further, that the Plaintiffs' claim is for a non-existent land known as plot No. 24 and there is no Certificate of official search confirming its existence.
11. To buttress their averments, the Defendants relied on the following decisions: Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited 120171 KECA 152 [KLR] para 30]; Alexander Mutunga Wathome v Peter Lavu Tumbo & Another [2015] eKLR; and Muriuki Muriithi & Another v James Mwani Gerald & 2 Others 2016 KEELC 331.

Analysis and Determination

12. Upon consideration of the instant Notice of Motion and Notice of Preliminary Objection including the respective affidavits and rivaling submissions, the following are the issues for determination: Whether the Plaintiffs should be granted leave to further amend their Plaint. Whether the Plaintiffs' suit is statute barred. Whether there is a cause of action against the 1st and 2nd Defendants
I will deal with the issues jointly.
13. The Plaintiffs seek leave to re -amend their Plaint to enforce rights over Plot 24 on the amended subdivision scheme of I-R No. 3589/6, which she acquired together with her late husband through the 1st Plaintiff Company, from Mr. Jason Atinda Ouko [deceased] around the year 1990. She explains that the said vendor passed away before he could process title in their favour. The Defendants have vehemently opposed the instant application and contend that the suit is statute barred and does not disclose any cause of action.
14. The legal provisions governing amendment of pleadings are contained in section 100 of the *Civil Procedure Act* and Order 8 Rule 3[5] of the Civil Procedure Rules. Order 8 Rule 3 [1] and [2] of the Civil Procedure Rules provide that:
 - “ 1. Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings. [2] Where an application to the court for leave to make an amendment such as is mentioned in subrule [3], [4] or [5] is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.”
15. Further, Order 8 Rule 5 of the Civil Procedure Rules provides as follows:
 - “ 1. For purposes of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”



16. In the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR, the Court of Appeal while dealing with issues of amendment held as follows:

“The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's *Precedents of Pleading - 12th Edition*, in the case of *Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991* as follows:- “The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings [including appeal stages]; that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

17. While in the case of *Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago* [1995] eKLR the Court of Appeal held as follows:

“.....if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the Defendant would be deprived of his right to rely on Limitation Acts but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation: that the court has powers even [in special circumstances] to allow an amendment adding or substituting a new cause of action if the same arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to seek the amendment.”

18. In *K. K. Lodgit Limited v Geminia Insurance Company Ltd & Another* [2021] eKLR the court held that:

“... it is clear that courts will readily grant leave to amend pleadings in order to determine the real issue[s] in dispute. The only caveat is that a proposed amendment should not cause prejudice or an injustice to the opposing party. Such prejudice or injustice must be one that cannot be compensated by an award of costs. Further, the Court will not permit an amendment that completely changes the nature of a party's case.”

19. Further, in the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR, the Supreme Court observed as follows:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may



be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

20. From the Court record and pleadings, I note the Plaintiffs’ claim to have entered into an Agreement with Jason Atindo Ouko [deceased] in 1990, but the vendor passed away in 1996, before effecting the transfer. The 1st and 2nd Defendants who are the deceased Vendor’s wife and son respectively and also administrators of the estate, have procured two Certificates of title to the suit land, during the pendency of this suit. The Plaintiffs hence seek leave to reamend their Plaint to include the titles and to have the said titles obtained by the 1st and 2nd Defendants revoked.
21. The 1st and 2nd defendants insist that this suit is statute barred as it was based on contract. However, it is trite that where the vendor who sold the suit land is deceased, time will stop running until the administrators of the estate are appointed. It is also trite that once administrators of a deceased’s estate are appointed, they represent the said estate and are also responsible for its liabilities. From the foregoing while associating myself with decisions quoted, I find that there is indeed a reasonable cause of action against the 1st and 2nd Defendants, who are administrators of the deceased vendor’s estate. Further, I opine that this suit is not statute barred as claimed as the dispute over suit land raised herein, including processing of titles without the Plaintiffs’ knowledge, will require viva voce evidence to enable the court make a proper determination of the same. I hence find the Notice of Preliminary Objection unmerited and will dismiss it.
22. Further, since the Plaintiffs seek to reamend the Plaint to bring in the new title numbers to the suit land, I find that the amendments sought are not going to substitute a new cause of action because the said cause of action arose out of the same facts or substantially the same facts as the instant one, in respect of which relief has already been claimed in this suit. I will hence allow the Plaintiffs to reamend their Plaint.
23. In the circumstances, I find the instant Notice of Motion application merited and will allow it. I however find the Notice of Preliminary Objection unmerited and will dismiss it.
24. I grant the Plaintiffs leave of fourteen [14] days to file and serve the Amended Plaint. Upon service, I grant the Defendants leave of fourteen [14] days to file and Serve an Amended Defence if need be.
25. Costs will be in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF JULY 2025.

CHRISTINE OCHIENG

JUDGE

In the presence of:

Kamau holding brief for Thuku for Plaintiffs

Ms Lukoye holding brief for Ngeno for Defendants

Court Assistant: Joan.

