



**Oita v Emaero & 2 others (Civil Case 40 of 2001)  
[2024] KEELC 571 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 571 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
CIVIL CASE 40 OF 2001  
BN OLAO, J  
FEBRUARY 8, 2024**

**BETWEEN**

**NICHOLAS OTWANE OITA ..... PLAINTIFF**

**AND**

**RONALD OMODING EMAERO ..... 1<sup>ST</sup> DEFENDANT**

**REMIGIUS OKUBALA ELUNGATA (SUED IN HIS CAPACITY AS THE  
PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE JOSEPH  
OMOJONG EKALUGUT) ..... 2<sup>ND</sup> DEFENDANT**

**VINCENT EMAIRO EKARUGUT ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Article 159 (2) (b) of the [Constitution](#) is clear that:

“Justice shall not be delayed.”

Section 19 of the [Environment and Land Court Act](#) also behoves this Court to “act expeditiously”, in the disposal of disputes before it. Section 1B(1) (d) of the [Civil Procedure Act](#) similarly provides for “the timely disposal of the proceedings” before Court.

I therefore agree with the submissions by Ronald Omoding Emaero the 1<sup>st</sup> Defendant herein, wherein he laments that this suit, which was filed in 2001, has delayed. I did express my concerns on the same when the matter first came up before me on 3<sup>rd</sup> October 2023 and I was informed that this was due to the demise of one of the Defendants. It also turned out that there was a pending Preliminary Objection by the Defendants dated 24<sup>th</sup> April 2023 which was yet to be canvassed.

2. The Defendants must also be aware that they were at liberty to move this Court to dismiss this suit for want of prosecution. All parties in a dispute are at liberty to seek the dismissal of the same because all



of them have a role in the timely dispensation of justice. At the end of this ruling, I shall be making orders which I hope will have this dispute heard and finalized in the shortest time possible. For now, I shall not apportion blame for the delay.

3. Nicholas Otwane Oita (the Plaintiff) moved to this Court by way of his Originating Summons dated 19<sup>th</sup> November 2001 and filed on 22<sup>nd</sup> November 2001 seeking against Ronald Omoding Emaero, Joseph Omojong Ekalugut and Vincent Emairo Ekarugu (the 1<sup>st</sup> to 3<sup>rd</sup> Defendants respectively), the main remedy that he had acquired the land parcel No South Teso/amukura/1901 by way of adverse possession. Joseph Omojong Ekalugut is demised and has since been substituted with Remigus Okubala Elungata. The Originating Summons was responded to by way of a replying affidavit dated 25<sup>th</sup> August 2006 by the 1<sup>st</sup> Defendant and filed on 21<sup>st</sup> September 2006. It is already clear from the above, that the Defendants themselves took 5 years to respond to the Originating Summons. If there was an earlier response, then perhaps that will be made clear during the pre-trial. Indeed by a request dated 22<sup>nd</sup> February 2002, the Plaintiff sought and obtained a judgment on 11<sup>th</sup> March 2002. However, when the matter came up for formal proof on 28<sup>th</sup> February 2005, the Defendants sought and were granted time to file their responses. However, for various reasons and which this Court does not wish to re-visit the suit remains un-heard.
4. I now have for my determination the Defendant's Preliminary Objection dated 24<sup>th</sup> April 2023 in which they raise the following issues:
  - a. That the Plaintiff's case is a non-starter.
  - b. That the Plaintiff's list of documents are in admission.
  - c. That the Plaintiff does not have locus standi in whatsoever situation.
  - d. That the Plaintiff's case sands to be dismissed with costs.
5. I did issue directions that the same be canvassed by way of written submissions.
6. Those submissions were subsequently filed both by the 1<sup>st</sup> Defendant on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and by Mr Mwanwari instructed by the firm of Manwari & Company Advocates for the Plaintiff.
7. I have considered the Preliminary Objection and the submissions by the 1<sup>st</sup> Defendant and counsel for the Plaintiff.
8. A Preliminary Objection, as held by Law J.A. in *Mukisa Biscuit Manufacturing Company Ltd -v- West End Distributors Ltd* 1969 EA 696.

“.. consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are 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.”

9. In the same case, Sir Charles Newbold P said:

“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.”



10. See also *Oraro -v- Mbaja* 2005 KLR 141. I have looked at the issues raised by the Defendants in their Preliminary Objection and it is clear that the only point of law raised relates to whether the Plaintiff in fact has the locus standi, to prosecute this case. The other issues raised such as that the case is a non-starter or that the Plaintiff's documents are an admission are not pure points of law as set out in the case of *Mukisa Biscuit Manufacturing Company Ltd -v- West End Distributors (supra)* and which has been the path which Courts have continued to take on this issue.

11. The term locus standi, is defined in *Black's Law Dictionary* 10<sup>th</sup> edition as follows:

“Latin, ‘Place of standing’! The right to bring an action or to be heard in a given forum; standing.”

In the case of *Alfred Njau & Others -v- City Council of Nairobi* 1982-88 1 KAR 229 [1983 eKLR] the Court of Appeal stated the following about the same term as per HANCOX JA:

“The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi, means that he has no right to appear or be heard in such and such a proceeding.”

In his submissions on the issue of the Plaintiff's locus standi, the 1<sup>st</sup> Defendant has said the following in paragraphs 4.1, 4.2 and 4.3:

“4.1: Your Lordship, the Applicant states that it is his father who purportedly bought the suit properly.

4.2: It is clear that the said person is dead and if so, the certificate of grant was to be filed in the instant suit. If at all the person is alive then there is no authority whatsoever in this suit permitting the Plaintiff here to file the suit.

4.3: Therefore, it is our submission that the Applicant has no locus standi and thus the suit should not be entertained (*sic*)”.

12. I have looked at the Originating Summons by the Plaintiff herein He has not moved to the Court as a representative of his father's Estate. He has approached this Court as the person in possession of the suit land. In paragraphs 2 and 3 of his supporting affidavit dated 21<sup>st</sup> November 2021, he has deposed that he has

“been in possession of the land parcel No South Teso/amukura/1901”

and adds

“since 1983 have been cultivating the said parcel of land peacefully, openly and uninterruptedly (*sic*).”

Therefore, even if the land was first purchased by his father, as stated by the Defendants, the Plaintiff's case is that he has been in possession of the same since 1983. Whether his claim for the land by way of adverse possession will be established is really a matter to be determined on the evidence during the trial. However, having approached the Court as the person in possession, it cannot be true to allege that he lacks the locus standi to prosecute this case.

13. The Defendants have also in paragraph 4.4 of their submissions raised the issue that the suit be dismissed for want of prosecution. Having been in this Court since 2001, this suit would certainly



be a good candidate for dismissal for want of prosecution. Indeed I notice from the record that the Defendants did file an application on 26<sup>th</sup> October 2020 seeking the main remedy that this suit be dismissed for want of prosecution. The record shows however that on 27<sup>th</sup> October 2020 the Defendants abandoned the said application and with the consent of the parties, Omollo J gave them a hearing date of the suit for 30<sup>th</sup> November 2020 but on that date, the 1<sup>st</sup> Defendant sought an adjournment on the ground that the 3<sup>rd</sup> Defendant died in 2005. That application was never canvassed and is not the subject of this ruling.

14. The up-shot of all the above is that the Defendant's Preliminary Objection dated 24<sup>th</sup> April 2023 is without merit. It is for dismissal.
15. Accordingly, I make the following disposal orders:
  1. The Preliminary Objection dated 24<sup>th</sup> April 2023 is hereby dismissed with costs.
  2. Due to the age of this dispute, it be mentioned for pre-trial before the Deputy Registrar on 12<sup>th</sup> February 2024 so that the parties can confirm that all their pleadings are in order and that the matter is ready for trial.
  3. Hearing by way of viva voce evidence on 29<sup>th</sup> April 2024.
  4. Parties are cautioned that they must be ready for plenary hearing on that day and the Court will not allow an adjournment except on very good grounds.

**BOAZ N. OLAO**

**JUDGE**

**8<sup>TH</sup> FEBRUARY 2024**

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT ON THIS 8<sup>TH</sup> DAY OF FEBRUARY 2024.**

Mr. J. V. Juma for Mr. Manwari for plaintiff present

1<sup>st</sup> defendant – present in person

2<sup>nd</sup> defendant – present in person

3<sup>rd</sup> defendant – present in person

**BOAZ N. OLAO**

**JUDGE**

**8<sup>TH</sup> FEBRUARY 2024**

