



**Ogalo v Oyoko & 2 others (Environment and Land Miscellaneous Application
E004 of 2023) [2024] KEELC 3535 (KLR) (8 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3535 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E004 OF 2023
GMA ONGONDO, J
APRIL 8, 2024**

BETWEEN

DAMARIS OMOGI OGALO APPELLANT

AND

GEORGE OTIENO OYOKO 1ST RESPONDENT

THOMAS OCHIENG BOSO 2ND RESPONDENT

REGISTRAR OF LANDS, HOMABAY REGISTRY 3RD RESPONDENT

RULING

1. The 1st respondent, George Otieno Oyoko through M/S Ongoso and Company Advocates raised a preliminary objection dated 2nd November 2023 on points of law to have this entire notice of application dated 9th of June 2023 dismissed and or struck out at the first instance on the grounds infra;
 - a. The entire application offends the provisions of section 79G of the *civil procedure act* with the appeal being filed 8 months later from the date of judgment.
 - b. The court lacks jurisdiction to entertain the said appeal and application as the same is statute Barred.
 - c. The entire appeal and application offend section 7 of the *Limitation of actions Act* Cap 22 laws of Kenya.
2. In the application by way of a Notice of motion dated 9th June 2023, the applicant/appellant is seeking the orders infra;
 - a. Moot



- b. That this Honourable court be pleased to grant leave to the Applicant/Appellant to file Memorandum of appeal out of time.
 - c. That this Honourable court be pleased to grant an order for stay of execution of the judgment and the consequential order issued on the 26th October 2022 by Hon. Magistrate E.M Onzere delivered judgment in Ndhiwa Principal Magistrate ELC No 34 of 2018 pending the hearing and determination of this application.
 - d. The costs of the Application be provided for.
3. Briefly, the applicant contends that she is aggrieved by the trial court's judgement that the suit was time barred and struck it out. That she wishes to appeal against the judgment but time has since expired. That in the interest of justice, the orders sought in the application be granted.
 4. In a replying affidavit of thirty-two paragraphs sworn on 22nd August 2023 by the 2nd respondent, the application is opposed. He deposed in part that the application suffers from unexplained delay of about one year and intended to deprive of the respondent from enjoyment of the fruits of the trial court's judgment. That the application is devoid of merit as it is mischievous, vexatious and or an abuse of the record of the court hence, should be dismissed.
 5. The 3rd respondent didn't respond to the application.
 6. On 23rd January 2024, the court directed that the preliminary objection be heard by way of written submissions.
 7. So, learned counsel for the 1st respondent filed submissions dated 5th February 2024 referring to sections 4 and 7 of the [Limitation of Actions Act](#) Chapter 22 Laws of Kenya. That the purpose of the law of limitation is to prevent a plaintiff from stale claim and prevent defence from being disturbed after along lapse of time. That the suit was lodged 28 years after the cause of action hence the court has no jurisdiction over it as the same is extinguished by operation of law. That there was delay of eight months to file the application hence, it offends section 79G of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya. Counsel cited *IgavMakerere University* (1972) EA and *MehtauShah* (1965) EA 321, to fortify the submissions.
 8. On the other hand, H. Obach and Partners Advocates for the applicant filed submissions dated 8th March 2024 stating the background information including grounds of the preliminary objection, the application and identified two issues for determination namely whether the appeal and the application can be determined by the preliminary objection and whether the preliminary objection should be struck out. To reinforce the submissions, counsel relied upon sections 7 and 79G (both supra) and [Re Estate of Julius Ndubi \(deceased\)](#) (2018) eKLR as well as [Dilpack Kenya Limited v Muthama Kitoyi](#) (2018) eKLR. That the applicant is elderly, sickly and entitled to the property in dispute under Article 40 (1) of the [Constitution](#) of Kenya 2010 thus, should not be condemned unheard.
 9. The 2nd and 3rd respondents did not file submissions in regard to the preliminary objection.
 10. I have duly considered the preliminary objection, the application, the replying affidavit and the rival submissions in entirety. Therefore, are the grounds of the preliminary objection merited?



11. Notably, the preliminary objection is based on points of law which include the court's jurisdiction over the dispute. In the case of *Mukisa Biscuit...quote Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors* (1969) EA 696, the Court of Appeal held;

“.....A preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings and if argued as a preliminary objection will dispose of the suit. Examples are an objection to jurisdiction of the court.....”
12. Sections 75 and 79G of *Civil Procedure Act* Chapter 21 Laws of Kenya provide for orders from which an appeal lies and timelines for filing an appeal from subordinate courts respectively. The proviso to the latter section gives this court the discretion to extend time for lodging an appeal if there is good and sufficient cause.
13. Order 50 of the *Civil Procedure Rules, 2010* governs time. In the present application, there is unexplained delay of 8 months to lodge the application taking into consideration the length of delay and the reasons thereof as held in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR.
14. It is trite that in application for extension of time, the whole period of delay should be declared and explained satisfactory to the court; see *County Executive of Kisumu v County Government of Kisumu & 8 others* (2017) eKLR.
15. In *Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and others* (2012) eKLR, the Supreme Court of Kenya held thus;

“ A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law....”
16. Evidently, the suit was statute barred under section 7 of the *Limitation of Actions Act* as observed in the judgment by the trial court. Therefore, the trial court had no jurisdiction over the same.
17. In the case of *Owners of Motor Vessel Lillian "S" v Caltex Oil (Kenya) Ltd* (1989) KLR 1, Nyarangi JA remarked;

“.....Jurisdiction is everything. Without it, a court has no power to take one more step.....”
18. Clearly, the trial court struck out the suit. So, there are negative orders in place and nothing to stay in the circumstances; See *Joseph Opondo v Isaiah Onyango* (2023) eKLR.
19. It is therefore, the finding of this court that there is merit in the preliminary objection and the same is hereby upheld accordingly.
20. A fortiori, the application, be and is hereby dismissed with costs to the respondents.
21. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 8TH DAY OF APRIL 2024

G.M.A ONG'ONDO

JUDGE

PRESENT.

1. Ms B. Ochieng holding brief for Obach for applicant.



2. Mr. A. Ongoso for 1st respondent and holding brief for O. M Otieno for 2nd respondent.
3. Fiona Mutiva, court assistant.

