



REPUBLIC OF KENYA



Sang v Galaiya Properties Ltd & 6 others (Environment & Land Case E028 of 2022) [2024] KEELC 3576 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3576 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E028 OF 2022**

**LA OMOLLO, J
APRIL 11, 2024**

BETWEEN

MARGARET CHEMOS SANG PLAINTIFF

AND

GALAIYA PROPERTIES LTD 1ST DEFENDANT

FIRST AMERICAN BANK OF KENYA LTD 2ND DEFENDANT

CAXTON GICHIMU MWANGI 3RD DEFENDANT

GEORGE LM GICHUMU 4TH DEFENDANT

ZEINWAY COMPANY LIMITED 5TH DEFENDANT

CHIEF LAND REGISTRAR, NAIROBI 6TH DEFENDANT

THE HON ATTONEY GENERAL 7TH DEFENDANT

RULING

1. This ruling is in respect of the 1st Defendant’s Preliminary Objection dated 24th May, 2023 and the 3rd, 4th and 5th Defendant’s Preliminary Objection dated 30th June, 2022.
2. The 1st Defendant’s preliminary objection is on the following grounds:
 - a. That the Honourable Court lacks jurisdiction to hear this matter.
 - b. That the suit is time barred under Section 7 of the *Limitation of Actions Act*.
 - c. That the suit is bad in law, incurably defective, frivolous and vexatious and an abuse of the court process.
3. The 3rd, 4th and 5th Defendant’s preliminary objection is on the following grounds:



- a. This court has no Jurisdiction to entertain or try this suit.
- b. This entire suit is time-barred under the *Limitation of Actions Act*.
- c. The Plaintiff has no locus standi.
- d. This suit is bad in law, inept, incompetent, fatally defective, unsustainable, scandalous, vexatious and an abuse of court process. The suit is null and void ab initio.

Factual Background.

4. This suit was commenced by way of a Plaint dated 19th May, 2021 and amended on 16th November, 2022. The Plaintiff seeks the following prayers:
 - a. A permanent injunction or issue against the Defendants jointly and severally whether by themselves their agents, servants, Representatives, Assigns and anybody acting for them restraining them from entering, dealing in whichever manner or way with the plaintiff's parcel of land known as LR 11964/4 currently LR 11964/27 and fraudulently altered/ changed to (IR 174248/1 LR 11964/27).
 - b. An order cancelling all fraudulently entries Nos 4, 5, 6, 7, 8 made on 7th April, 1995, 29th November, 2010, 22nd December, 2010, 7th April 2016 and 1st February, 2018 and any other fraudulently transaction and restore the suit parcel No LR 11964/4 currently LR 11964/27 in favour of the plaintiff.
 - c. An order compelling the Defendants to jointly and (severally remove all the illegal structures erected thereon on the suit parcel No LR 11964/4 Currently Registered LR 11964/27 IR 174248) and an order cancelling all the fraudulent subdivision of the plaintiff's parcel No LR 11964/4 OR 11964/27 IR 174248 and in default the plaintiff to demolish and remove all the illegal structures standing or erected on the suit parcel at the Defendants cost.
 - d. Costs of this suit.
5. The 3rd, 4th and 5th Defendants filed grounds of opposition dated 21st January, 2023 wherein they indicate that further to their Notice of Preliminary Objection dated 30th June, 2022, they oppose the Plaintiff's Notice of Motion dated 19th May, 2022. They state that the said application and the entire suit is fatally incompetent, bad in law, frivolous, vexatious and unsustainable.
6. On 25th October, 2022 when the matter came up before court, the suit against the 2nd Defendant was marked as withdrawn with no order as to costs.
7. On 4th July, 2022, when the matter came up in court, counsel for the 3rd, 4th and 5th Defendants indicated that they have filed a preliminary objection which is on the ground that this court lacks jurisdiction.
8. On 6th June, 2023 when the matter came before court, counsel for the 1st Defendant indicated that he had also filed a Notice of preliminary objection dated 24th May, 2023 and it has been served on all parties.
9. The court directed that the preliminary objection dated 30th June, 2022 and 24th May, 2023 shall be heard by way of written submissions.
10. On 3rd July, 2023 when the matter came up for mention for submissions, counsel for the 3rd, 4th and 5th Defendant indicated that he had not filed submissions. Counsel for the 1st Defendant confirmed



filing his submissions and the court directed the 1st Defendant to serve the Plaintiff. The matter was re-scheduled for mention on 19th July, 2023.

11. The matter came up in court on 24th July, 2023 and counsel for the 3rd, 4th and 5th Defendants confirmed filing submissions. The court directed that the 3rd, 4th and 5th Defendants to serve their submissions and again rescheduled the matter for mention on 11th October, 2023 to confirm filing of submissions.
12. On 11th October, 2023, counsels for the 1st, 3rd, 4th and 5th Defendants confirmed filing their submissions. Counsel for the 1st Defendant indicated that he has not seen the Plaintiff's submissions. The court, nevertheless, scheduled the matter for ruling.

Issues for Determination.

13. The 1st Defendant filed submissions on 19th June, 2023 and identifies the following issue for determination:

a. Whether the Honourable Court has jurisdiction?

14. The 1st Defendant submits that it is the Plaintiff case that on 7th April 1995 without the consent of the Plaintiff (and her siblings and administrators to her father's estate and even before incorporation of the 1st Defendant on 5th August, 1997) it obtained an unlawful, fraudulently and irregular registration of the plaintiff's parcel into their name without obtaining a transfer from the Plaintiff and/or her co-registered owners.
15. It submits that the Plaintiff further stated that upon the 1st Defendant obtaining the illegal registration of the Plaintiff parcel in 7th April, 1995, the 1st Defendant fraudulently charged the suit property on the 8th September, 1995 in favour of the 2nd Defendant and thereafter effecting transfer.
16. The 1st Defendant submits that the suit having been filed after 25 years, it is their submission that it is in contravention with section 7 and 8 of the *limitation of actions act*. It submits that the suit has been overtaken by events and has suffered laches and therefore the plaint and the application thereof are untenable.
17. It submits that the Plaintiff has never brought any action against the 1st Defendant since they took possession of the suit land in the year 1997 and therefore any remedy against him for trespass and mesne profit had been extinguished at the expiry of time pursuant to the provisions of Section 7 and 8 of the *Limitation of Actions Act*.
18. The 1st Defendant relies on the judicial decisions of Damaris Kondoro vs Gachanja Gitere & Another HCCC No 127 of 2004 and *Lilian Njeri Muranja & John Muranja Mabinda v Virginia Nyambura Ndiba & Kajiado County Government* [2014] eKLR.
19. It submits that even after the Plaintiff became aware that the 1st Defendant had been registered as the proprietor of the suit land, she didn't raise any claim at the time, however she filed the present suit herein without seeking leave for extension of time.
20. It submits that the limitation of time goes to the jurisdiction of the court and since the same is statutory provided for, the Plaintiff suit cannot be sustained. It submits that the 1st Defendant has already transferred the suit property to other Defendants as from the year 1997 and the same suit has been subjected to may transfers.



21. The 1st Defendant submits that the Plaintiff suit has been overtaken by events and it relies on the judicial decisions of *Beatrice Wambui Kiarie & v Beatrice Wambui Kiarie & 9 others* [2018] eKLR and *Bosire Ongero vs Royal Media Services* [2015] eKLR.
22. It submits that this Court lacks jurisdiction and the matter is at its ends and therefore the Honourable Court should down its tools and take no further step. It further relies on the judicial decision of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1.
23. The 1st Defendant submits that its point of preliminary objection to the effect that the Plaintiff suit should be struck out for reasons that the Plaintiffs have no locus standi to institute the present suit, that the court lacks jurisdiction over this matter and finally that the suit was time barred by limitation of statute.
24. The 1st Defendant relies on the judicial decision of *Mukisa Biscuits Manufacturing Ltd vs West End Distributors* (1969) EA 696 and submits that if the 1st Defendant decided to tabulate the limitation time from period when the 1st Defendant was put into possession of the suit land, to when the suit was filed, the time sums up to twenty-five years (25), on the other hand the 1st Defendant is not in possession of the suit property, and either way the Plaintiff's case is statutorily time barred. The 1st Defendant prays that this Honourable Court dismiss this suit with costs.
25. The 3rd, 4th and 5th Defendants filed their submissions on 18th July, 2023. They submit that the grant of letters of administration and Certificate of Confirmation of Grant availed by the Plaintiff show that the joint Administrators of the Deceased's Estate are Talai Tapsabei and Jamini Kiptoo Arap Choge and not the Plaintiff. They submit that she has no locus standi to bring any suit on behalf of or over the Deceased's Estate.
26. They rely on Section 82 of the *Law of Succession Act* and submit that it specifically clothes only the personal representatives with the power to file and pursue suit on behalf of the Estate. They rely on Section 3 of the *Law of Succession Act*.
27. They also submit that the Plaintiff not being a personal representative, has no locus standi and this suit is hence bad in law, fatally incompetent, unsustainable, null and void ab initio.
28. The 3rd, 4th and 5th Defendants rely on the judicial decisions of *Trouistik Union International & another v Jane Mbeyu & another* [1993] eKLR, *Virginia Otieno v Joash Ougo and another* [1988] 1 KAR 1048 and *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] eKLR. They urge the court to find that the Plaintiff herein has no right to be heard at all.
29. They submit that a representative suit filed without Authority and without leave of court, this suit, though it does not expressly state so, is sought to be a representative suit, brought supposedly on behalf of the Plaintiff's family and siblings, brothers/sisters.
30. They submit that not only is there no disclosure of the identities of these persons whom the Plaintiff purports to represent, no authority by such persons been availed or filed in court and most crucially, no leave of court has been sought or obtained to file a representative suit, as provided for under Order 1 rule 8 of the *Civil Procedure Rules*. They submit that this renders the suit incompetent and only amenable to being struck out.
31. The 3rd, 4th and 5th Defendants rely on Order 1, Rule 8 of the *Civil Procedure Rules* and Order 1 Rule 13 of the *Civil Procedure Rules*. They submit that no such leave of Court, or Notice to those purportedly represented herein, nor their consent or authority was obtained, issued or filed in Court herein.



32. They submit that courts have severally restated this position that a representative suit filed without first seeking leave of court is incompetent and ought to be struck out. They rely on the judicial decision of *Moses Lesiamon Ole Mpoie & Another v Commissioner of Lands & 4 others* [2005] eKLR. They submit that the court in the above matter rightly held that it does not matter even if the Plaintiff has not expressly stated in the Plaint that they bring the suit as a representative suit. They submit that a reading of the Plaint shows that the suit seeks to represent other people and should be struck out because leave of the Court has not been obtained to institute the suit.
33. The 3rd, 4th and 5th Defendants rely on the judicial decisions of *George O Ochola v Ngina Kenyatta & another* (2013) eKLR and *Kabindi Katana & Another vs Cannon Assurance (K) Ltd* (2013) eKLR. They submit that this instant case too is incompetent and incurably defective for offending the afore-quoted provisions of the law. They submit that the Plaint herein does not state the capacity in which the Plaintiff sues. They urge this Court to similarly strike out the suit.
34. They submit that the Plaintiff's suit is time-barred under Section 7 of the *Limitation of Actions Act* and the Plaintiff's alleged cause of action having arisen in 1995, the limitation period in favour of the Plaintiff expired in 2007. They submit that this suit was brought in 2022, 15 years too late.
35. They submit that indeed, the Plaintiff's cause of action as pleaded at paragraph 12 of the Amended Plaint dated 16th November, 2022 is clearly her alleged dispossession and transfer of the suit land in 1995.
36. They submit that further, at paragraph 18 (i), (ii) of the Amended Plaint, the Plaintiff specifically plead particulars of fraud are: the transfer and charge of the suit property, in 1995.
37. They also referred to paragraph 20 (i) of the amended Plaint and prayer No 2 of the same plaint, the specific claim/prayer as pleaded therein is for cancellation of the Transfer of the suit property to the 1st Defendant, and restoration of the property to the Plaintiff. They submit that restoration here denotes reverting the property to the pre-1995 title position, a position that changed in 1995, 28 years ago. They submit that claim/prayer by the Plaintiff is no doubt long time-barred.
38. They rely on the judicial decisions of *Dickson Ngige Ngugi v Consolidated Bank Ltd (Formerly Jimba Credit Corporation Limited & another* [2020] eKLR, *Gathoni vs Kenya Co-operative Cremires Ltd* (1982) KLR 104, *Rawal vs Rawal* (1990) KLR 275, *Lishamba v Spencon Company Ltd & Another* (Environment & Land Case 594 of 2014) [2022] KEELC 131 (KLR) and *Anaclet Kalia Musau v Attorney General & 2 others* [2020] eKLR, Civil Appeal 111 of 2017.
39. They submit that the court has no jurisdiction to entertain a suit that is time-barred by statute. They submit that the 6th and 7th Defendants in this suit are the Chief Land Registrar and the Attorney General. They submit that the cause of action against the two, as pleaded at paragraphs 15 and 16 of the Amended Plaint, is that they, without legal capacity to do so, allocated the suit land to the 5th Defendant on 7th April, 2016 vide, "Entry made on 1st February, 2018 alleging to transfer suit property to the 6th Defendant from the government of Kenya. They submit that by dint of Section 3 (1) of *Public Authorities Limitation Act* the claim being one founded on allegations of fraud, which is a tort, the suit ought to have been instituted within twelve months from the date the cause of action accrued.
40. The 3rd, 4th and 5th Defendant's submit that on whether the cause of action against the government is taken to have accrued on 7th April, 2016 or on 1st February, 2018 and whether the claim can be based on tort or on contract, either way, the suit was time-barred by the time this suit was first filed on 16th May, 2022.



41. They rely on Section 3 (1) and (2) of the *Public Authorities Limitation Act*, Cap 39 Laws of Kenya and the judicial decision of *Haron Onyancha v National Police Service Commn & another* [2017] eKLR and urge the Court to strike out this suit for being in contravention of the *Public Authorities Limitation Act*.
42. They also submit that this entire suit is clearly bad in law, inept, incompetent, fatally flawed, unsustainable, brought without locus standi is statute barred and this Court lacks jurisdiction to entertain the same. They pray that the Plaintiff herein and this entire suit be struck out or dismissed with Costs.
43. The Plaintiff did not file any submissions.
44. The 6th and 7th Defendant's also did not file any submissions.

Analysis and Determination.

45. After considering the 1st Defendant's preliminary objection dated 24th May, 2023 and the 3rd and 4th and 5th Defendants' preliminary objection dated 30th June 2022 and the submissions, the only issue that arises for determination is whether the preliminary objections dated 24th May, 2023 and 30th June, 2022 have merit.
46. Both preliminary objections are premised on one ground. It is as follows;
 - a. That the court lacks jurisdiction to hear the matter and further the suit is time barred under Section 7 of the *Limitation of Actions Act*.
47. The 3rd, 4th and 5th Defendants challenge on the court's jurisdiction to hear the matter and it stems from the argument that the suit is statutorily time barred. The 1st Defendant equally submitted that limitation of time goes to the jurisdiction of the court and it is argued that the Plaintiff suit cannot be sustained.
48. In the judicial decision of *Oraro vs Mbaja* 2005 1 KLR 141 the court said:

“A ‘Preliminary Objection’, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof, or seek to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”
49. A preliminary objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained. Further, a preliminary objection must stem from the proceedings and raise pure points of law and should not deal with disputed facts nor should it derive its foundation from factual information.
50. Section 7 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya provides:

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 action accrued to him or, if it first accrued to some person through whom he claims, to that person.



51. On whether an issue of limitation of time can be raised through a preliminary objection, the court in the judicial decision of *Sichuan Huashi Enterprises Corp. Limited v Micheal Misiko Mubindi* [2019] eKLR at paragraph 13 and 14 stated as follows:

The law as I understand it is that the defence of limitation of time is a matter for determination at the trial; it cannot be dealt with in a summary manner or at preliminary stage or as a preliminary objection. The court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial. (Emphasis Mine) On this see the case of *Oruta & Another v Nyamato* [1998] KLR 590, where the court held that limitation of action:-

”... could only be queried at the trial but not by... a preliminary objection... The appellant could raise the objection at the trial and the trial judge would have to deal with the matter on the evidence to be adduced at the trial”

See also the case of *Divecon Ltd vs Shirinkhanu S. Samani* Civil Appeal No. 142 Of 1997, where the court quoted with approval the words of Gachuhi, J.A., the leading judge in the *Oruta* case (ibid) that:

‘It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the *Limitation of Actions Act*...’

Disposition.

52. The question of limitation of actions should not be raised by way of a preliminary objection for the reason that it requires interrogation of evidence.
53. For the foregoing reasons, I find that the 1st Defendant’s preliminary objection dated 24th May, 2023 and the 3rd and 4th and 5th Defendants’ preliminary objection dated 30th June 2022 lacks merit and is hereby dismissed with no orders as to costs.
54. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 11TH DAY OF APRIL, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

No appearance for the Plaintiff.

No appearance for the 1st Defendant.

Mr. Deenambo for Miss Magana for the 3rd, 4th and 5th Defendant.

No appearance for the 6th and 7th Defendants.

Court Assistant; Mr. Joseph Makori.

