



**Koinange v Board of Directors, Senior Chief Koinange High School & another; The Kiambu County Director of Education & another (Interested Parties) (Environment & Land Petition E010 of 2022) [2024] KEELC 3698 (KLR) (7 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3698 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ENVIRONMENT & LAND PETITION E010 OF 2022**

**JG KEMEI, J**

**MAY 7, 2024**

**IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION**

**OF KENYA, 2010**

**AND**

**IN THE MATTER OF AN ALLEGED CONTRAVENTION OF**

**FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40, 47**

**OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 2(1), 3 AND 10 OF THE**

**CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 115 OF THE LAND ACT, 2012**

**AND**

**IN THE MATTE OF THE CONSTITUTION OF KENYA (PROTECTION**

**OF RIGHTS AND FUNDAMENTAL FREEDOMS, PRACTICE AND**

**PROCEDURE RULES, 2013**

**BETWEEN**

**BETWEEN**

**ESTATE OF EDWIN MBIYU KOINANGE ..... PETITIONER**

**AND**



**BOARD OF DIRECTORS, SENIOR CHIEF KOINANGE HIGH SCHOOL ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KIAMBU ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KIAMBU COUNTY DIRECTOR OF EDUCATION ..... INTERESTED PARTY**

**NATIONAL LAND COMMISSION ..... INTERESTED PARTY**

## **RULING**

1. To place the Preliminary Objection in context, a brief background of this case is necessary. The Petition before Court dated 6/9/2022 is filed by the Estate of the Edwin Mbiyu Koinange alias J. Edwin Koinange. It is expressed under Articles 40, 47, 2(1), 3 and 10 of *the Constitution* of Kenya and Section 115 of the *Land Act*.
2. In the body of the Petition, it is stated that Lucy Nyambura Koinange represents the Petitioner as the administrator of the estate of Edwin Mbiyu Koinange. That the late Edwin Mbiyu Koinange was the registered owner of Land Reference Number Kiambaa/Kiambaa T/40 (hereinafter the suit land) which devolved to him upon the demise of his parents as decided in Civil Suit No. 66 of 1984. That the 1<sup>st</sup> Respondent's claim over the suit land through donation by the late Charles Karuga Koinange, was overruled by the Court in Civil Suit No. 66/1984. Accordingly, the Petition levels accusations of violations of *the Constitution* by the Respondents in the acquisition of the suit land and failure to compensate the Petitioner and without following due process. The prayers sought are;
  - a. A declaration that the deceased's land was not donated to the 1<sup>st</sup> Respondent.
  - b. A declaration that the Respondents did not follow the due process of law by failing to compensate the deceased for the acquisition of his land.
  - c. A declaration that the Respondent breached the Deceased's right to protection of property.
  - d. The 2<sup>nd</sup> Respondents be ordered to adequately, just fully and promptly compensate the Petitioner, with monetary compensation at the current market value of the land, KSHS. 10,000,000/=, for the acquisition of Kiambaa/Kiambaa/T.40.
  - e. The Respondents jointly pay to the Petitioner additional costs of Kshs. 10,000,000/= for deprivation of their property for the 49-year period.
  - f. The 1<sup>st</sup> Respondent compensates the Petitioner Kshs. 10,000,000/= for the developmental value of the property and disturbance for relocation.
  - g. The Respondents be and hereby directed to bear the costs of this Petition jointly and severally.
  - h. That this Honorable Court be pleased to grant such further Order or orders as may be just and appropriate.
3. Opposing the Petition, the 2<sup>nd</sup> Interested Party filed its Grounds of Opposition and Preliminary Objection both dated 29<sup>th</sup> March 2023.



4. The subject of this Ruling is the 2<sup>nd</sup> Interested Party's Preliminary Objection to the effect that the suit offends the provisions of Section 4(2) of the *Limitation of Actions Act* Cap 22 and as such it ought to be struck out with costs.
5. The Petitioner filed her response to the Preliminary Objection styled as submissions dated 23/5/2023 filed by Grace, Associates & Co. Advocates. Regarding the doctrine of laches, it was submitted that Constitutional Petitions raising Constitutional violations are not time barred. On the Petitioner's capacity to sue, it was argued that as the widow of the deceased and administrator of her husband's estate, the Petition is properly filed as the suit land is in the deceased's name. That the cause of action has not expired because the deceased and his late mother frequently attended meetings held by the Respondents aimed at compensating aggrieved land owners but all in vain. That the Petitioner's rights to own property have been infringed under Article 40 Constitution of Kenya.
6. On 29/5/2023 directions were taken to canvass the Preliminary Objection by way of written submissions. Six issues were drawn for determination to wit; whether the Petition offends Section 4(2) of the *Limitation of Actions Act*; Petition is defective for having been filed in the name of a deceased person; Petition is unsustainable on account of acquiescence; whether any Petitioner's rights were violated; whether the Petitioner has a cause of action against the 2<sup>nd</sup> Interested Party and whether the Petitioner is entitled to reliefs sought.
7. Defending the Preliminary Objection, Learned Counsel Matilda Kisengese on behalf of the 2<sup>nd</sup> Interested Party filed submissions dated 5/9/2023. It was submitted that the claim is a civil action which is overtaken by limitation of time but camouflaged as a Petition to defeat timelines provided for in civil cases. That the Petitioner has not explained the inordinate delay of 49 years since the cause of action arose in 1973, if at all. That the Petition is unsustainable having been brought in the name of a deceased person despite having been presented by Lucy Koinange who has letters of administration but does not state that the Petition is for and on behalf of the estate of the late Edwin.
8. In addition, it was contended that having been filed late in the day after 49 years, the doctrine of acquiescence applies herein to show that the conduct by the Petitioner amounts to acceptance. That no evidence has been presented to proof the alleged acquisition to warrant compensation by the 2<sup>nd</sup> Interested Party. That the 2<sup>nd</sup> Interested Party has not been approached with any compensation claims in respect of the suit land. That if any acquisition took place, the 2<sup>nd</sup> Interested Party was not yet in operation and cannot be faulted for failure to compensate. That ultimately the Petition is lacking in merit and the Petitioner is not entitled to the reliefs sought.
9. Opposing the Preliminary Objection, the Petitioner's counsel filed submissions dated 28/9/2023. It was submitted that the Petition is filed by the legal representative of the estate of Mrs. Lucy Nyambura Koinange (sic) whose details are in the Petition. Denying acquiescence on their part, it was stated that they will call for evidence for the Court to consider and determine. That the original certificate of title is in the deceased's name yet the school is occupying the suit premises without a title in its name. On compensation it was argued that the 2<sup>nd</sup> Interested Party undertook the mandate that previously vested with the Commissioner of Lands and cannot therefore escape liability. Lastly that a valuation of the property will be promptly availed to justify the reliefs sought.
10. The parameters of consideration of a preliminary objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal



in the case of Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd [1969] EA 696. At page 700 Law JA stated:

“ A Preliminary Objection 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.”

11. At page 701 Sir Charles Newbold, P added:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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 ...”

12. For a Preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit. See the case of David Karobia Kiiru Vs. Charles Nderitu Gitoi & Another [2008]eKLR.

13. Additionally, in the case of Avtar Singh Bhamra & Another Vs. Oriental Commercial Bank, Kisumu HCCC No.53 of 2004, the Court held that:-

“ A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

14. Applying the above tests, the 2<sup>nd</sup> Interested Party raised a Preliminary Objection hinged on Section 4(2) *Limitation of Actions Act* which provides;

“ 4. Actions of contract and tort and certain other actions

(1) ...

(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

15. In the Black’s Law Dictionary a tort is defined as a private or civil wrong or injury for which a Court will provide a remedy in the form of an action for damages.

16. The gist of the Petition as outlined in para. 2 above is that the Petitioner claims that the suit land belonged to the late Edwin Koinange who inherited it from his parents as determined in Civil suit 66 of 1984. That the 1<sup>st</sup> Respondent occupation over the suit land on account of donation was overruled in the said suit and therefore its occupation thereon is wrongful for want of following due process and compensation.

17. From the foregoing facts, I am not persuaded that the facts of the Petition revolve of an action founded of tort as provided under Section 4(2) *Limitation of Actions Act*.



18. As to whether the Petition is fatally defective for having been instituted in the name of the Estate of a deceased person. It is trite that a suit instituted in the name of a deceased person is dead on arrival. This is because a dead person has no capacity to so bring a claim in a Court of law. However the deceased may sue through the personal representative of the estate. In this case it has been clearly disclosed that the Petition has been brought by Lucy Nyambura E Koinange, the representative of the estate of the deceased. Alongside the supporting affidavit the confirmation of grant issued on the 31/5/17 has been annexed in support. The Court finds that the Petitioner is properly before the Court.
19. On the question of whether this is a Constitutional violation, affidavit evidence was led that the Respondents have occupied the land belonging to the Petitioner. The title in the name of the estate of the Petitioner is dated the 25/2/1998. *The Constitution* guarantees among other rights the right to property. The Respondents have not denied the claim of the Petitioner save to state that the same is an ordinary claim framed as a Constitutional violation of the bill of rights. Whilst acknowledging that at the prima facie stage the Petitioner has demonstrated that it owns the land, the Court is of the view that the merits or otherwise of the Petition is best left to the trial Court to determine. The Court finds that on the face of it this is a matter that falls inquiry by the Court exercising its constitutional jurisdiction.
20. Is this Petition time barred? It has been vigorously argued by the Respondents that the claim as drawn in the Petition is time barred, the cause of action having arisen in 1973 and no explanation has been proffered by the Petitioner why she is moving the Court 49 years later. The Petitioner blames the Government agencies for the delay. She averred that she is aware that the deceased and his mother frequently attended meetings and forums held by the Respondents where they received empty promises to resolve the matter. It is also her position that this is an issue that should be subjected for inquiry by the Court.
21. In the case of Chief Land Registrar & 4 Others Vs. Nathan Tirop Koech & 4 Others [2018] eKLR; the Court stated as follows;
- “Guided and convinced of the sound jurisprudence that there is no time limit for filing a Constitutional Petition, we find the ground that the trial judge erred in failing to dismiss the Petition on account of delay, acquiescence and laches has no merit. Unless expressly stated in *the Constitution*, the period of limitation in the *Limitation of Actions Act* do not apply to violation of rights and freedoms guaranteed in *the Constitution*. The law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights. (See Dominic Arony Amolo Vs. Attorney General Nairobi HC Misc. Civil Case No. 1184 of 2003 (O.S) [2010] eKLR; Otieno Mak’Onyango vs. Attorney General & another Nairobi HCCC No. 845 of 2003).”
22. The said bench further stated that ;
- “In our view, subject to the limitations in Article 24 of the 2010 Constitution, fundamental rights and freedoms cannot be tied to the shackles of *Limitation of Actions Act*. However, each case is to be decided on its own merits and a caveat need to be stated as correctly observed in Johnstone Ogechi vs. The National Police Service [2017] eKLR.”
23. In the circumstances of this case the Petitioner has moved the Court claiming violations of Constitutional rights on the ground that her land was acquired by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in violation of Article 40 of *the Constitution* and without according her the due process contemplated in



the Constitution and her rights under 47 and 48 have been and continue to be violated. The Court is satisfied that this Petition does not fall under the exemption stated in the above case.

24. The Respondents and the 2<sup>nd</sup> Interested Party inter alia have argued that the claim of the Petitioner has been adversely affected by laches and that in any case the Petitioner by her conduct did nothing for the period of 49 years thus acquiesced to the state of affairs over the years. That the letter dated 19/3/2021 relied on the Petitioner to demonstrate her efforts in agitating for compensation was done 48 years later after the cause of action arose and therefore she is disentitled to any relief on that basis.
25. Again, I am guided by the appellate decision in Chief Land Registrar (supra) where the Court stated as follows;

“We have considered submissions by counsel on estoppel and acquiescence. In our view, there can be no estoppel against the Constitution which is the paramount law of the land. Subject to the express provisions of Article 24 of the 2010 Constitution, no individual can barter away fundamental rights and freedoms enshrined in the Constitution. One can neither acquiesce nor waive the fundamental rights and freedoms protected in the Constitution. Fundamental rights were not kept in the Constitution simply for individual benefits - these rights were put up as a matter of public policy and therefore the doctrine of inordinate delay, estoppel, acquiescence or waiver cannot unequivocally be applied as a bar to enforcement of fundamental rights. We are cognizant that the doctrine of laches is a principle of general application that may apply in Constitutional Petitions for breach of fundamental rights. However, delay in enforcing a claim for violation of fundamental rights may be permitted or denied depending on the circumstances of each case. In Lt. Col. Peter Ngari Karume & Others vs. Attorney General, Nairobi Constitutional Application No. 128 of 2006 [2009] eKLR, Nyamu, J. expressed:

“The Petitioners had all the time to file their claim under the ordinary law and the jurisdiction of the Court but they never did and are now counting on the Constitution. None of the Petitioners has given any explanation as to the delay for 24 years. In my view, the Petitioners are guilty of inordinate delay and in the absence of any explanation on the delay, this instant Petition is a gross abuse of the Court process...In view of the specified time limitation in other jurisdictions, the Court is in a position to determine what a reasonable period would be for an Applicant to file a Constitutional application to enforce his or her violated fundamental rights. I do not wish to give a specific time frame, but in my mind, there can be no justification for the Petitioner’s delay for 24 years....”

65. In our consideration of laches, we observe Article 259 (8) of the Constitution stipulates that if a particular time is not prescribed for performing a required act, the act should be done without unreasonable delay. In line with Article 20 of the Constitution, respect for fundamental rights is a mandatory obligation on the State and all State Organs and the Bill of Rights applies to all and bind all citizens. No citizen can by his act or conduct relieve the State, a State Organ or any person of the solemn obligation to respect the Bill of Rights. It is in this context that no individual can acquiesce to violation or infringement of fundamental rights. Subject to express Constitutional provisions, such as the limitations in Article 24 of the Constitution, neither the state nor an individual



can arrogate to itself/himself a right or justification to commit a breach of fundamental rights of any citizen and resort to the doctrine of waiver, acquiescence, inordinate delay, estoppel or other similar principle as absolute defence or excuse.”

26. This Court concurs with the Appellate Court on the sound jurisprudential position posited above. I do find in the circumstances of this Petition that there cannot be estoppel, acquiescence and or time bar against the supreme law of the land.
27. Guided by the provisions of Article 50 of *the Constitution* which states that every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing by a Court, I direct that the Petition be heard on its merits so that each party may have their day in Court.
28. In the upshot, Preliminary Objection as drawn is unmerited and it be dismissed with costs to the Petitioner.
29. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 7<sup>TH</sup> DAY OF MAY, 2024 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Mwaura for Petitioner

Ms. Cheserek for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

1<sup>st</sup> Interested Party – Absent

Ms. Kisengese for 2<sup>nd</sup> Interested Party

Court Assistants – Phyllis & Oliver

