



REPUBLIC OF KENYA



**Makokha & 3 others v Masinde & 11 others (Environment & Land
Case E012 of 2022) [2024] KEELC 5138 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5138 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E012 OF 2022**

BN OLAO, J

JULY 10, 2024

BETWEEN

**FREDRICK BARASA MAKOKHA 1ST PLAINTIFF
JOSEPH NYONGESA MAKOKHA 2ND PLAINTIFF
SILVIA MAKOKHA AKUMU 3RD PLAINTIFF
PASCAL WABWIRE MAKOKHA 4TH PLAINTIFF**

AND

**EVANS MAKOKHA MASINDE 1ST DEFENDANT
RODGERS OUMA MASINDE 2ND DEFENDANT
PHILIP WAFULA MASINDE 3RD DEFENDANT
CALEB JAKAIT MASINDE 4TH DEFENDANT
PHANICE N. BARASA 5TH DEFENDANT
CAROLYNE A. MASINDE 6TH DEFENDANT
JANET ADHIAMBO MASINDE 7TH DEFENDANT
RUTH NABWIRE 8TH DEFENDANT
CATHERINE KADOGO MASINDE 9TH DEFENDANT
RODA MAKOKHA 10TH DEFENDANT
CHRISTIAN WIONO MUNJALA 11TH DEFENDANT
WASIKE NAMUROTISO 12TH DEFENDANT**



RULING

1. This ruling was due on 9th April 2024. However, I was out of the station following a bereavement. The delay is regretted.
2. The plaintiffs approached this Court vide their plaint dated 28th July 2022 seeking judgment against the defendants in the following terms with respect to the land parcels No Bukhayo/Buyofu/142 and Bukhayo/Buyofu/141 (the suit land):
 1. A declaration that the plaintiffs are the rightful owners of the suit land.
 2. A mandatory injunction compelling the defendants to discharge the charge over the suit land and release title to the defendants.
 3. An order compelling the Land Registrar to register the plaintiffs as the registered owners of the suit land.
 4. An order compelling the Land Registrar Busia to revoke the title to the suit land.
 5. Costs and interest
6. Any other further relief(s) that this Honourable Court may deem just and fit to grant.
3. The basis of the plaintiff's case is that they are the bonafide and rightful owners of the suit land measuring approximately 7.6 Hectares having lived thereon with their late father David Makokha Matsukhu (hereinafter the deceased) who had regularly paid poll tax in respect of the suit land on his own behalf and on behalf of the plaintiffs. That sometimes in 1971, the deceased secured a job in Uganda which forced the plaintiffs to go and live with their grandmother and one Noah Etianga Jakait alias Jakait Itianga. The defendants took advantage of the plaintiffs' absence and illegally trespassed onto the suit land where they settled without any colour of right. Upon the demise of the said Noah Etianga Jakait, the 1st to 11th defendants, through the 10th defendant, took out succession proceedings in Busia High Succession Cause No 92 of 2003 and allocated the suit land to themselves after subdividing it. It is the plaintiffs' case that the acquisition of the suit land by the defendants was through a fraudulent succession process. Particulars of that fraud have been pleaded in paragraph 10 (a) to (c) of their plaint.
4. The defendants filed a joint defence dated 15th December 2023 in which they denied all the allegations of fraud against them and put the plaintiffs to strict proof thereof. They added that the suit land is ancestral which their late patriarch Noah Etiang Jakait acquired through the first registration process during the Land Adjudication. They also pleaded that the suit is bad in law for want of locus standi on the part of the plaintiffs and that a Preliminary Objection would be raised on points of law to have it struck out.
5. Simultaneously with the defence, the defendants filed a Preliminary Objection dated 15th December 2023 in which they raised the following issues:
 1. The plaintiffs lack locus standi to commence these proceedings.
 2. The defendants' titles having been acquired through a first registration are indefeasible and cannot be challenged in accordance with the provisions of Sections 26, 29 and 30 of the [Land Adjudication Act](#).



3. The plaintiffs' cause of action is time barred.
4. The plaintiffs' suit is totally misconceived, bad in law, incompetent and an abuse of the due process of the court.
6. The Preliminary Objection is the subject of this ruling. Directions were issued that the same be canvassed by way of written submissions. The submissions have been filed by Mr Lagat instructed by the firm of D. K. Korir & Associates for the plaintiffs and by Mr Ipapu instructed by the firm of Ipapu P. Jackah & Company Advocates for the defendants.
7. I have looked at the pleadings, the Preliminary Objection and the submissions by counsel.
8. The first issue which I need to determine is whether what the defendants have raised is indeed a Preliminary Objection as known in law.
9. A Preliminary Objection, as was defined by Law J.A in the case of *Mukisa Biscuit Manufacturing Co. Ltd -V- West End Distributors Ltd* 1969 E.A 696 at page 700;

“... consists of a pure 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.”

In the same case, Newbold P added the following:

“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...”

A preliminary Objection must therefore raise “a pure point of law”. From the Preliminary Objection raised herein, I can discern two points of law, i.e;

1. That the plaintiffs lack the requisite locus standi to file this suit, and;
2. That the plaintiffs' suit is statute barred

I shall consider those two issues

1. Plaintiffs' Lack of Locus Standi:

10. The term locus standi is defined in *Black's Law Dictionary* 10th Edition as follows:

“Place of standing. The right to bring an action or to be heard in a given forum.”

In the case of *Alfred Njau & Others -v- City Council of Nairobi* 1982 – 88 I KAR 229, the Court held that;

“The term locus standi means a right to appear in Court and conversely to say that a person has no locus standi, means that he has no right to appear or be heard in such and such proceedings.”



In the case of *Mumo Matemu -v- Trusted Society Of Human Rights Alliance & 5 Others* Supreme Court Civil Application No 29 of 2014 [2014 eKLR], the Supreme Court said the following at paragraph 39;

“The issue of locus standi raises a point of law that touches on the jurisdiction of the court and it should be resolved at the earliest opportunity”.

Similarly, in the case of *Mary Wambui Munene -V- Peter Gichuki Kingara*, Supreme Court Petition No 7 of 2013 [2014 eKLR], the same Court held at paragraphs 68 and 69 that the question of jurisdiction is “a pure question of law” and should be resolved on a priority basis. There is no doubt therefore that the issue of the plaintiff’s locus standi to file this suit is a pure question of law which touches on this Court’s jurisdiction and is therefore a proper Preliminary Objection.

11. In his submissions that the plaintiffs do infact have the requisite locus standi to file this case over the ownership of the suit land, their counsel has stated thus at paragraphs 7, 9, 10 and 11;

7 “My Lord it is our humble submission that the plaintiffs have an apparent proprietary interest in the parcels of land known as Bukhayo/Buyofu/141 and Bukhayo/Buyofu/142 (hereinafter referred to as the suit properties) hence he has standing to sue the defendants in these proceedings. In the circumstances, the issue as to whether or not the plaintiffs have proprietary interest over the suit properties has to be ascertained through evidence after a full hearing.”

9: “My Lord, via their plaint dated 28th July 2022, the plaintiffs contend that they are the bona fide and rightful owners of the suit properties, that the Defendants illegally trespassed thereon and subsequently registered the same in their names.”

10: “It is our submission that the determination as to whether the plaintiffs have proprietary interest over the suit properties so as to have standing to institute this suit can only be made after the Honourable Court has interrogated the evidence produced before it and ascertained the facts before reaching that conclusion. In the circumstances, we humbly submit that it would be premature to determine the question of locus standi at this point.”

11: “Your Lordship on the strength of the foregoing submission and cited authority we pray that you find and hold that the plaintiffs have locus standi to institute these proceedings.”

The basis of the plaintiffs claim to the suit land is clear from paragraphs 3 and 4 of their plaint where they have pleaded thus;

3: “The Plaintiffs aver that they are bona fide and rightful owners of a parcel of land situate in Bukhayo within Busia County which is currently known as Bukhayo/Buyofu/141 measuring approximately 15.0 Ha and Bukhayo/Buyofu/142 measuring approximately 7.6 Ha hereinafter referred to as the “suit property” having lived thereon with their late father David Makokha Matsukhu (deceased).”

4: “The said David Makokha Matsukhu (deceased) regularly paid poll tax in respect of the said parcel of land on his own behalf and on behalf of the plaintiffs herein.”

It is therefore clear that the plaintiffs are basically claiming the suit land on the basis that it belonged to their deceased father who paid the poll tax during the Land Adjudication process. Essentially, therefore, if the plaintiffs claim to the suit land is, as submitted by the defendants’ counsel, “derived from their deceased father then they ought first to have obtained Letters of Administration Ad Litem before filing this suit which they have not done. The failure by the plaintiffs to obtain Letters of Administration Ad Litem before filing of suit denied the plaintiffs locus standi to institute this (sic) proceedings.” That is a correct exposition of the law. The plaintiffs are claiming what they believe rightfully belonged to



their deceased father. And even though they have not pleaded that they have come to this court as the Administrators of the Estate of their deceased father, it is clear from their own pleadings that what they seek is land which they believe rightly belonged to the deceased. And as was held in the case of *Otieno -v- Ougo & Another* 1980-89 EALR 468, the plaintiffs were required to have taken out either a limited or full Grant to clothe them with the requisite locus standi, to file this suit. They have not done so. The plea that the plaintiffs lack the locus standi to file this suit is, in my view, well taken and I up-hold it.

Plaintiffs' Suit is Statute Barred

12. From the copies of Green card and certificate of official search filed herein, the land parcel No Bukhayo/Buyofu/141 was first registered in the name of Jakait Itinga on 26th November 1971. Then on 9th February 1987, it was registered in the name of Noah Etianga Jakait aka Jakait Etianga following a correction of name. On 26th July 2004 it was registered in the name of Roda Makokha Masinde the 10th defendant and thereafter on 29th June 2015 in the names of the other defendants following succession proceedings. Section 7 of the *Limitation of Actions Act* provides that:

7: "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."

In paragraph 6 of their plaint, the plaintiffs have pleaded;

6: "That upon the death of the said Noah Etianga's Jakait alias Jakait Itianga, the 1st to 11th defendants herein through the 10th defendants fraudulently took out succession proceedings in Busia High Court Succession Cause No 92 of 2003 and caused the said parcel of land to be allocated to themselves and the same was sub-divided to result into parcels of land known as Bukhayo/Buyofu/141 measuring approximately 15.0 Ha."

As I have already stated above, the land parcel No Bukhayo/Buyofu/141 was registered in the name of the 10th Defendant on 26th July 2004. The (12) twelve year period for purposes of filing a suit to recover land lapsed on 26th July 2016.

13. The Plaintiffs having pleaded fraud on the part of the defendants, the limitation period would, under Section 26 of the *Law of Limitation Act*, begin to run when they "discovered the fraud or mistake or could with reasonable diligence have dissolved it." Again from the plaintiffs' own pleadings, the fraud on the part of the 10th defendant commenced when she fraudulently took out succession proceedings in Busia High Court Succession Cause No 92 of 2003. That means that not only did the plaintiffs become aware about the fraud in 2003 but also, with due diligence, they could have discovered the same in 2003. This suit was filed on 4th August 2022 well after the statutory (12) year period.

14. Most significantly, the plaintiffs have pleaded in paragraph 5 of their plaint that:

5: "The plaintiffs aver that sometimes in 1971, their late father secured a job in Uganda whereof they were forced to go and live with their grandmother and one Noah Etianga Jakait alias Jakaiti Itianga and the defendants herein who were their neighbours then took advantage of their absence to illegally trespass and settle in, the said parcel of land without any colour of right".

The plaintiffs were therefore, by their own pleadings, dispossessed on the suit land way back in 1971 some fifty one (51) years before this suit was filed on 4th August 2022.

15. Similarly therefore, the objection that the plaintiffs' suit is statute barred is well taken. I also up-hold it.



16. The up-shot of all the above is that the Preliminary Objection dated 15th December 2023 and filed on 11th January 2024 is well merited. It is allowed. The plaintiffs' suit is hereby struck out with costs to the defendants.

BOAZ N. OLAO

JUDGE

10TH JULY 2024

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 10TH DAY OF JULY 2024 WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

10TH JULY 2024

