



**Wasike v Jowe & 5 others (Environment & Land Case 110 of 2014)
[2024] KEELC 5898 (KLR) (17 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5898 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 110 OF 2014**

BN OLAO, J

SEPTEMBER 17, 2024

BETWEEN

WASHINGTON NAMWAYA WASIKE PLAINTIFF

AND

DIXON JOWE 1ST DEFENDANT

ANDREW AGWANDA OWUOR 2ND DEFENDANT

STEVEN OGOLA OMOLO 3RD DEFENDANT

LIVINGSTONE WANDERA WASIKE 4TH DEFENDANT

THE CHIEF LAND REGISTRAR, BUSIA 5TH DEFENDANT

THE ATTORNEY GENERAL 6TH DEFENDANT

JUDGMENT

1. This judgment was due for delivery on 7th March 2024. However, I was attending to my ailing step-mother who unfortunately passed away a week later on 14th March 2024. After her interment on 30th March 2024, I resumed duties briefly before proceeding on my pre-scheduled annual leave followed soon thereafter by the vacation which ended on 15th September 2024. This judgment has been delivered soon after the vacation.
2. The delay in delivery of the judgment was therefore occasioned by circumstances beyond my control. The same is highly regretted.
3. Washington Namwaya Wasike (the Plaintiff herein) approached this Court vide his plaint dated 3rd July 2012. He impleaded Dixon Jowe, Andrew Agwanda, Steven Ogola, Livingstone Wandera Wasike (now substituted with Ruth Akoth Wandera), The Chief Land Registrar, The County Land Registrar (Busia) and The Attorney General (the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants respectively). He



sought judgment against them jointly and severally in the following terms with respect to the land parcel No Bukhayo/mundika/445 (the suit land):

- i. The Plaintiff's title to the land parcel NoBukhayo/mundika/445 being a first registration is indefeasible in law.
 - ii. The purported cancellation by the 5th Defendant and/or the 6th Defendant of the Plaintiff's title to the land parcel No Bukhayo/mundika/445 amounts to a violation of the Plaintiff's constitutional right to property as covered by Article 40 of *the Constitution*.
 - iii. The purported cancellation by the 5th and/or 6th Defendant of the Plaintiff's title to the land parcel No Bukhayo/mundika/445 is null and void in law.
 - iv. The purported transfer – by the 5th and/or 6th Defendant – of the land parcel No Bukhayo/mundika/445 from the Plaintiff to the 1st Defendant is null and void in law.
 - v. Any and all transactions and entries in the relevant register – which transactions and entries were made subsequent to the fraudulent, illegal, unlawful, irregular and/or unprocedural transfer of the land parcel NoBukhayo/mundika/445 from the Plaintiff to the 1st Defendant – are equally null and void in law.
 - vi. The revocation, cancellation and/or annulment of:
 - a. The purported sub-division of the land title No Bukhayo/mundika/445 into land titles No Bukhayo/mundika/8566;
 - b. The 4th Defendant's purported title to land parcel No Bukhayo/mundika/445;
 - c. The 4th Defendant's purported title to the land parcel No Bukhayo/mundika/8565; and,
 - d. The 4th Defendant's purported title to the land parcel No Bukhayo/mundika/8566.
 - vii. In the alternative, and without prejudice to pray (ii) above, an award of damages equivalent to the value of all the land that was initially comprised in land title No Bukhayo/mundika/445 together with interest acquiring thereon at Court rates.
 - viii. Costs of this suit together with interest acquiring thereon at Court rates from the date of delivery of the judgment till the date of full and final settlement.
 - ix. Any other and/or alternative relief that this Honourable Court may deem fit and just to grant in the circumstances.
4. The basis of the Plaintiff's case is that at all material time since 23rd March 1971 or thereabout, he was the sole registered proprietor of the land parcel No Bukhayo/mundika/445 measuring 2.0 Hectares and which, being the first registration, was indefeasible in law. However, on 5th January 1972 or thereabouts, the 5th and/or 6th Defendant fraudulently, illegally, unlawfully, irregularly and/or unprocedurally purported to cancel the said title. Particulars of the fraud, illegality and/or irregularly were pleaded in paragraph 19 (a) to (c) as follows:
- a. Purporting to cancel the Plaintiff's title to land parcel No Bukhayo/mundika/445 in the full knowledge that the Plaintiff's title was a first registration.
 - b. Purporting to cancel the Plaintiff's title to land parcel No Bukhayo/mundika/445 in the full knowledge that the Plaintiff's title was an indefeasible and un-impeachable title since it was a first registration.



c. Purporting to cancel the Plaintiff's title to the land parcel No Bukhayo/mundika/445 in blatant contravention of the clear provisions of Section 143 (1) of the Registered Land Act. That on 23rd December 1972 or thereabouts, the 1st Defendant in apparent collusion with the 5th and or 6th Defendant fraudulently, illegally, unlawfully, irregularly and/or unprocedurally effected the transfer of the title to the land parcel No Bukhayo/mundika/445 to the 1st Defendant. Particulars thereof have been pleaded in paragraph 20 (a) and (b) in respect to the 1st Defendant as follows:

- a. Forging the Plaintiff's signature in documents appurtenant to the registration of a transfer.
- b. Submitting documents to the 5th and/or 6th Defendant for registration in the full knowledge that the submitted documents were defective forgeries.

Particulars of fraud on the part of the 5th and/or 6th Defendant have been pleaded in paragraph 20}} (a) and (b) as follows:

- a. Accepting and registering defective documents in deliberate ignorance of the glaring defects in the submitted documents.
- b. Deliberately over-looking some of the essential requirements that the transferor was by law required to satisfy before the title to the land parcel No Bukhayo/mundika/445 could be lawfully transferred from the Plaintiff to the 1st Defendant.
- c. Failure to ascertain the authenticity of the consent of the relevant Land Control Board before effecting the transfer of the title to the land parcel No Bukhayo/mundika/445 from the Plaintiff to the 1st Defendant.
- d. Registering forged and/or fabricated documents.

That on or about the 5th day of January 1972 the 5th and/or 6th Defendant fraudulently, illegally, unlawfully, and un-procedurally proceeded to issue the 1st Defendant with the title to the land parcel No Bukhayo/mundika/445.

5. The Plaintiff pleaded further that the said fraudulent, illegal, unlawful, irregular and/or unprocedural transfer to the 1st Defendant of the title to the land parcel No Bukhayo/mundika/445 could only have been possible with the facilitation, participation and/or involvement of the 5th and/or 6th Defendant. Further, that the said transfer could only have been possible with collusion of the 1st Defendant, the 5th and / or 6th Defendant and the same was done in furtherance of an illegality and is null and void.
6. The Plaintiff added that the purported transfer of the said title to the 2nd, 3rd and 4th Defendants was equally null and void owing to the inherent defect of the transfer of the title to the 1st Defendant. The Plaintiff therefore contends that the purported sub-division of the title to the land parcel No Bukhayo/mundika/445 into titles No Bukhayo/mundika/8565 and 8566 is null and void. Therefore, the very existence of the titles No Bukhayo/mundika/8565 and 8566 is null and void in law hence this suit.
7. Together with the plaint, the Plaintiff filed his statement dated 15th July 2012. The Plaintiff reiterated that he was the sole registered proprietor of the suit land which had been allocated to him by his late father one Wasike Ogeya. That all his brothers including the 4th Defendant (now deceased and substituted with his Administratrix Ruth Akoth Wandera) were also given their own parcels of land. However, following the frequent deaths of his children, he relocated to Munongo area. All along, he had not collected the title deed to the suit land as he saw no need to do so since he had no intentions of carrying out any transactions thereon. It was not until 14th October 2010 when he visited the Busia Lands Office and applied for the Certificate of Official Search that he was informed that the title No Bukhayo/mundika/445 had long ceased to exist and that new titles No Bukhayo/mundika/8565 and



8566 had been created therefrom and were both registered in the name of the 1st Defendant. Upon perusal of the register, he was surprised to discover an entry showing that he had sold and transferred the suit land to the 1st Defendant whom he had never known nor transacted with. When he asked for any documents evidencing the transactions involving him and the 1st Defendant, he was supplied with copies of applications for the Consent of the Land Control Board and Letter of Consent neither of which were signed by himself or the 1st Defendant. His suspicion is that while he was away from home the 1st Defendant who is his brother conspired with officials in the Land Department Busia to make false entries in the relevant register so as to defeat his interest in the suit land.

8. In support of his case, the Plaintiff filed a list of documents dated 10th July 2012 containing the following:
 1. Certificate of Official Search for the land parcel No Bukhayo/mundika/445 dated 14th October 2010.
 2. Register for the land parcel No Bukhayo/mundika/445.
 3. Application for consent to transfer the land parcel No Bukhayo/mundika/445 from the Plaintiff to the 1st Defendant.
 4. Letter of consent dated 28th December 1971 in respect of the land parcel No Bukhayo/mundika/445.
 5. Application for consent for the land parcel No Bukhayo/mundika/445 ref No270/1998.
 6. Letter of consent for land parcel No Bukhayo/mundika/445 S/No391974.
 7. Certificate of Official Search for the land parcel No Bukhayo/mundika/8565 dated 19th June 2012.
 8. Certificate of Official Search for the land parcel No Bukhayo/mundika/8566 dated 19th June 2012.
 9. Notice to the Attorney General dated 15th May 2012.
 10. Certificate of posting a Registered Article dated 3rd July 2012.
9. The 1st, 2nd and 3rd Defendants did not file any defence.
10. The 5th, 6th and 7th Defendants filed a joint statement of defence dated 3rd May 2013 in which they denied all the allegations of fraud, illegality or irregularity levelled against them. They pleaded further that the Plaintiff has no locus standi, to sue in respect to the suit land and that the cause of action is statutory time barred and should be struck out.
11. The 4th Defendant filed a defence dated 4th September 2012 in which he too denied all the allegations of fraud, illegality, irregularity, unlawful or unprocedural conduct levelled against him with respect to the transfer of the suit land. He pleaded that on or about 18th March 1998 he had purchased the suit land from the 4th Defendant at a consideration of Kshs.125,000 which amount was paid in full and acknowledged. That the suit land was duly transferred to him after consent was granted by the Land Control Board.
12. On 4th December 2010, he was summoned to the Busia Municipality Land Disputes Tribunal to answer a claim lodged by the Plaintiff with respect to the suit land. The said Tribunal found in favour of the Plaintiff and ordered that the suit land be sub-divided into two parcels to be shared between the Plaintiff and himself. The 4th Defendant challenged the decision which was subsequently quashed by



the High Court. That this suit is therefore both res judicata and statutorily time barred. He denied the Plaintiff's claim that on 5th January 1972 and also on 23rd December 1972 he had colluded with the 5th and 6th Defendants to cancel the Plaintiff's title to the suit land or transfer the same. He therefore prayed that the Plaintiff's suit be dismissed with costs.

13. The 4th Defendant also filed his un-dated statement which is basically a rehash of his defence and I need not regurgitate it.
14. Following the demise of the 4th Defendant he was substituted with Ruth Akoth Wandera who also filed an affidavit dated 4th August and which she adopted as her evidence during the plenary hearing. In the said affidavit she deposed, inter alia, that on or about 18th March 1998 one Stephen Ogola Omollo (the 3rd Defendant) sold to the deceased 4th Defendant the land parcel No Bukhayo/mundika/445 at a consideration of Kshs.125,000 which was paid in full. The transaction was consented to by the Land Control Board and on 7th November 1998, the deceased 4th Defendant was registered as the proprietor of the suit land.
15. The Plaintiff filed a suit against the deceased 4th Defendant at the Busia Land Disputes Tribunal which ordered that the suit land be sub-divided into two portions one for the Plaintiff and the other for the 4th Defendant. The decision was adopted as a judgment of the Court but was later quashed by the High Court in Judicial Review Application NO 4 of 2011.
16. The 4th Defendant filed two lists of documents one dated 4th September 2012 and a further list of documents dated 28th June 2022. By the list of documents dated 4th September 2012, the following documents were filed:
 1. Copy of sale agreement between the 4th Defendant and the 3rd Defendant dated 18th March 1998.
 2. Application by the 3rd Defendant to the Land Control Board.
 3. Consent of the Land Control Board.
 4. Register for the land parcel No Bukhayo/mundika/445.
 5. Award of the Busia Municipal Land Disputes Tribunal.
 6. Court order adopting the Tribunal's award.
 7. Court order quashing the award.

By the further list of documents dated 4th June 2022, the 4th Defendant filed the following:

1. Copy of Transfer Form for the land parcel No Bukhayo/mundika/445 from the Plaintiff to the 1st Defendant.
17. The hearing commenced before OmolloJ on 23rd February 2022 when the Plaintiff testified. He adopted as his evidence the contents of his statement filed herein and also produced the documents filed as his documentary evidence. And although he had filed a list of other witnesses, he was the only witness who testified in support of his claim.
18. Similarly Ruth Akoth Wandera was the only witness who testified before me on 20th November 2023 in support of the 4th Defendant's case. The 5th, 6th and 7th Defendants filed a joint defence but did not attend Court during the trial. The 1st, 2nd and 3rd Defendants, as stated earlier, neither filed any defence nor attended the trial. This Court therefore has only the evidence of the Plaintiff and 4th Defendant in this case.



19. After the plenary hearing, submissions were filed both by Mr Mogi instructed by the firm of Manwari & Company Advocates for the Plaintiff and by Mr Otanga instructed by the firm of Bogonko, Otanga & Company Advocates for the 4th Defendant.
20. I have considered the evidence by the Plaintiff and the 4th Defendant as well as the submissions by counsel.
21. The Plaintiff's case is that the suit land was registered in his name on 23rd March 1971. However, the 1st Defendant in collusion with the 5th and 6th Defendants fraudulently, unlawfully, irregularly and unprocedurally transferred it to the 1st Defendant and subsequently to the 2nd, 3rd and 4th Defendants after being sub-divided to create the land parcels No Bukhayo/mundika/8565 and 8566. The 5th, 6th and 7th Defendants, although they did not testify, denied all the allegations of having fraudulently, unlawfully, irregularly and unprocedurally colluded with the 1st Defendant in doing so and also pleaded that the Plaintiff's suit is statutorily time barred. The 4th Defendant similarly denied those allegations and also pleaded in paragraph 9 of his defence that the Plaintiff's claim is res judicata and statutorily time barred. I consider the following to be the issues for my determination:
 1. Whether the suit is res judicata.
 2. Whether the suit is statutorily time barred.
 3. Whether the Plaintiff has proved the allegations of fraud, unlawfulness, irregularity, illegality and that in fact the suit land was unprocedurally transferred from his name to the name of the 1st Defendant and subsequently to the 2nd, 3rd and 4th Defendants.

I shall consider 1 and 2 above because they go to the jurisdiction of this Court and if I up-hold them, then there will be nothing more to discuss in this judgment.

Whether the Suit is Res-judicata:

22. The doctrine of res judicata is provided for under Section 7 of the [Civil Procedure Act](#) in the following terms:
 - 7: "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

Res-judicata can be pleaded by way of estoppels to protect the parties from endless litigation. For it to apply, the person invoking it must prove that:

- a. The matter in dispute in the former suit between the parties must be directly and substantially in dispute between the parties in the suit in which the plea of res judicata is being raised.
- b. The former suit must be between the same parties or those under whom they or any of them claim litigating under the same title.
- c. The former suit must have been heard and finally determined.
- d. The Court or Tribunal which determined the former suit must have been competent.

See *Karia-v- A.G* 2005 I E.A. 83. See also *Kamunye & OTHERS -v- Pioneer General Assurance Society Ltd* 1971 E.A. 263, and [JOHN FLORENCE MARITIME SERVICES LTD & ANOTHER -](#)



23. In invoking the plea of res judicata, the 4th Defendant was relying on the award of the Municipal Land Dispute Tribunal Busia Case No 16 of 2010 in which the Plaintiff had filed a complaint against the 1st, 2nd, 3rd and 4th Defendants over the ownership of the suit land. The Tribunal ordered that the suit land be sub-divided into two parcels in the names of the Plaintiff and the 4th Defendant. The award was adopted by the sub-ordinate Court but it is common ground that the said award was quashed following judicial review proceedings in Busia High Court Judicial Review Application *On No 4 of 2011*. Although the full judgment of that case was not filed, the 4th Defendant produced as part of his documentary evidence the order issued by F. N. Muchemi J on 2nd November 2011 following the Judicial Review Application. It reads:

1: “That an order of certiorari do and is hereby issued to call into the High Court and quash the proceedings, findings and award of Busia Municipality Land Dispute Tribunal cancelling the registration of the exparte applicant as proprietor of L.R No Bukhayo/mundika/445 as adopted by the Senior Principal Magistrate’s Court case number 20 of 2011”.

2: “That each party to bear it’s own costs.”

I have no doubt in my mind that the main reason why the Judge in those proceedings quashed the award of the Tribunal was because it had no jurisdiction to cancel the title of the Plaintiff, who was the Exparte Applicant therein, with respect to the land parcel No Bukhayo/mundika/445.

24. Since the High Court had found that the Tribunal had no jurisdiction to arrive at the award which it did and proceeded to quash it’s decision, it means that the plea of res judicata cannot apply in this case. This is because, an award of a Court or Tribunal without jurisdiction cannot operate as res judicata. The authority for that proposition is found in Mulla the Code of Civil Procedure 18th Edition Page 285 wherein it is stated that:

“A judgment delivered by a Court not competent to deliver it cannot operate as res judicata since such judgment is not of any effect. It is well settled position in law that if a decision has been rendered between the same parties by a Court which had no jurisdiction to entertain and decide the suit, does not operate as res judicata between the same parties in subsequent proceedings.”

Res judicata can therefore only apply where the previous suit was heard and determined by a Court of competent jurisdiction. The Tribunal which cancelled the title to the suit land was not competent and that is why it’s award was quashed by F. N. Muchemi J. This suit cannot therefore be defeated by the plea of res judicata. That plea has not been properly invoked and must be rejected.

2: Whether the Suit is Statute Barred:

25. The Plaintiff’s counsel did not address this issue in his submissions. The 4th Defendant pleaded in paragraph 9 of his defence as follows:

9: “The 4th Defendant avers that the Plaintiff’s claim herein is res judicata and statutory time barred and the same should not be granted.”

In paragraph 16 of his un-dated statement, he stated:

16: “That the Plaintiff’s suit is misconceived, an abuse of Court process and statutory time barred.”



In his submissions at page 6, the 4th Defendant's counsel has submitted as follows on the same issue:

“The Plaintiff having surrendered possession of L.R No Bukhayo/mundika/445 to Dixon Jowe in 1970 and having lost possession thereof to date, the claim to recover the same is clearly statutory time barred by the operation of Section 7 of the Limitation of Actions Act.”

The Plaintiff pleaded in paragraph 17 of his plaint that he became the registered proprietor of the suit land on 23rd March 1971. He then adds in paragraph 19 that:

19: “On the 5th day of January 1972 or thereabouts, the 5th Defendant and/or the 6th Defendant fraudulently, illegally, unlawfully, irregularly and/or unprocedurally purported to cancel the Plaintiff's title (of 1st registration) to Land Title No Bukhayo/mundika/445.”

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 some person through whom he claims, to that person.”

If, as the Plaintiff has himself pleaded, the 5th and 6th Defendants fraudulently, illegally, unlawfully, irregularly and/or unprocedurally purported to cancel the title to the suit land on 5th January 1971, then time for purposes of filing this claim expired after 12 years which was on 5th January 1983.

26. In paragraph 20 of the plaint, he pleads that:

20: “On the 23rd day of December 1972 or thereabouts, the 1st Defendant in apparent collusion with the 5th Defendant and/or the 6th Defendant fraudulently, illegally, unlawfully, irregularly and/or unprocedurally effected the transfer of land title No Bukhayo/mundika/445 (measuring 2.0 Ha or thereabouts) from the Plaintiff to the 1st Defendant.”

He then goes on to plead how the suit land was subsequently sub-divided to create the land parcels No Bukhayo/mundika/8565 and 8566. Basically therefore, the first fraudulent, illegal, irregular and unprocedural activity with regard to the title to the suit land was on 5th January 1972 when it was cancelled and thereafter on 23rd December 1972 when it was transferred to the 1st Defendant. This suit was filed forty (40) years later on 16th July 2012 long after the statutory twelve (12) years period stipulated in Section 7 of the Limitation of Actions Act.

27. However, in paragraph 4 of his statement dated 15th July 2012, the Plaintiff states that:

“On 14/10/2010, I went to Busia Lands Office and applied for an official search in respect of my land parcel No Bukhayo/mundika/445. To my surprise I was informed that the said title had long ceased to exist and that at that time new numbers namely titles Nos Bukhayo/Mundika/8565 and Bukhayo/Mundika/8566 had been created and both registered in the names of the 1st Defendant.”

The Plaintiff having pleaded fraud and other irregularities, it would mean that his claim could be saved by the provisions of Section 26 of the Limitation of Actions Act which reads:

26: “Where in the case of an action for which a period of limitation is prescribed, either –

- a. the action is based upon the fraud of the Defendant or his agent, or of any person through whom he claims or his agent; or
- b. the right of action is concealed by the fraud of any such person as aforesaid; or



c. the action is for relief from the consequences of a mistake.

the period of limitation does not begin to run until the Plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it:” Emphasis mine.

28. This suit was filed, as I have already stated above, on 16th July 2012. If the Plaintiff, as he claims, only discovered the fraud, illegality and irregularity on 14th October 2010 when he visited the Busia Lands Office, then this suit which was filed on 16th July 2012 is well within the twelve (12) year limitation period for under Section 7 of the *Limitation of Actions Act*.

29. However, Section (c) of the same *Limitation of Actions Act* is clear, as I have already stated above, that the period of limitation does not begin to run until the Plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it. My understanding of the above is that even if a party, who is faced with the hurdle of his claim being caught up by the *Limitation of Actions Act*, purports to have discovered the fraud mistake, illegality or irregularity on a particular date, the Court must go further and investigate whether, “with reasonable diligence”, the party could have discovered it earlier than on the date which he purports to have discovered it. When he was cross-examined by Mr Otanga on 23rd February 2022 during the plenary hearing before Omollo J, this is what the Plaintiff said:

“Livingstone was brother. I was registered as owner in March 1971. In 1970 I stopped using the land and came to live in Buringala (Mundika). From Buringala to Mayenje is about 2km. This is where I have lived since today (sic). I returned to the suit land in 1995 and found Livingstone using the land.”

Livingstone is of course the 4th Defendant herein and it is clear from the Plaintiff’s own testimony that he knew as far back as 1995 that the 4th Defendant was in occupation and possession of the suit land yet he did nothing about it. The register to the suits shows that it was registered in the name of Stephen Ogolla Omollo the 3rd Defendant on 9th December 1986. On 7th November 1998 it was transferred to the 4th Defendant before being cancelled on 2nd April 2007 to create the land parcels No Bukhayo/mundika/8565 and 8566. That means that “with reasonable diligence”, if the Plaintiff had visited the Busia Land Registry in 1995 when he saw the 4th Defendant utilizing it, he would have discovered that infact the suit land had been transferred to the 1st Defendant as far back as 23rd December 1972 and that is when he should have moved to Court seeking the orders in this plaint. He was not outside the country or in any way unable to access the suit land. He was living only 2 km away from the suit land which he says he left in 1970. It does not add up that it took him up to 1995 (25 years later) to discover that the 4th Defendant was utilizing it. Then it took upto 2010 (another 5 years) to file a complaint at the Busia Municipal Land Disputes Tribunal. Thereafter, it took him another 2 years (2012) to file this suit originally in the High Court before transfer to this Court in 2014. The cumulative effect of all this is that by the time the Plaintiff moved to this Court beseeching it to grant him the orders which he now seeks, it was a whole 40 years from the time when, “with reasonable diligence,” he could have discovered that he was no longer the registered proprietor of the suit land.

30. The purpose which the law of limitation is intended for was captured in the case of Mehta -v- Shah 1965 E.A. 321 as follows:

“The object of any limitation enactment is to prevent a Plaintiff from prosecuting state claims on the one hand, and on the other hand, protect a Defendant after he has lost evidence for his



defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”

Further, Potter JA in the case of *Gathoni -v- Kenya Co-operative Creamaries Ltd* 1982 KLR 104 described the rationale of the law of limitation in the following terms:

“The law of limitation of actions is intended to protect Defendants against unreasonable delay in bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

In the case of *MTANA LEWA -V- KAHINDI NGALA MWANGANDI C.A. CIVIL APPEAL NO 56 of 2014* [2015 eKLR], the Court (per Makhandia J.A) citing Halsbury’s Law Of England stated thus on the issue:

“Limitation of time for land claims, as with claims of any other nature, exist for three main reasons which are:

- i. A Plaintiff with good cause of action ought to pursue it with reasonable diligence (equity does not aid the indolent).
- ii. A Defendant might have lost evidence over time to disprove a stale claim; and
- iii. Long dormant claims have more cruelty than justice in them (Halsbury’s Laws of England 4th Edition).”

It is of course correct that the 1st, 2nd and 3rd Defendants did not file any defence to the Plaintiff’s claim. Therefore, the Plaintiff’s assertion that he did not sell the suit land to the 1st Defendant on 23rd December 1972 as reflected in the register has not been rebutted. That would of course suggest that the 1st Defendant had no interest in the suit land to pass to the other Defendants. However, a defence of limitation, once established, means that the merits, if any, of the Plaintiff’s claim becomes moot. As soon as limitation is established, this Court cannot proceed further to interrogate the allegations of fraud illegality, irregularity or want of procedure as levelled against the Defendants. This is because, limitation goes to the jurisdiction of the Court and bars it from examining the merits of the claim.

31. It is clear from the above that the 4th Defendant’s defence raising the issue of limitation is well founded. This suit was filed well beyond the limitation period provided for in Section 7 of the *Limitation of Actions Act* and from the evidence before me, it cannot be cured by the provisions of Section 26 of the same Act. This Court cannot now consider issue NO 3 above as to do so would be superfluous. The Plaintiff’s suit is for dismissal.
32. On the issue of costs, the Plaintiff and the Defendant who are the only protagonists who filed pleadings and prosecuted their cases in this matter are siblings. The order which comments itself to me on the issue of costs given the above circumstances is to direct that each party meets his costs.
33. The up-shot of all the above is that having considered the evidence herein, this Court makes the following disposal orders:
 1. The Plaintiff’s suit is dismissed.
 2. Each party shall meet their own costs.

BOAZ N. OLAO

JUDGE



17TH SEPTEMBER 2024

**JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 17TH DAY OF SEPTEMBER 2024
BY WAY OF ELECTRONIC MAIL AND WITH NOTICE TO THE PARTIES.**

Right of Appeal.

BOAZ N. OLAO

JUDGE

17TH SEPTEMBER 2024

