



**Rimpanson & another (Suing as Legal Representative of the Late Rimpason ole Santamu alias Impasol ole Kuraru Santamu) v Njenga & another (Environmental and Land Originating Summons E008 of 2023) [2024] KEELC 13631 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13631 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E008 OF 2023  
LC KOMINGOI, J  
DECEMBER 5, 2024**

**BETWEEN**

**NAIPANOI RIMPASON ..... 1<sup>ST</sup> PLAINTIFF**

**MARIA KITEMON ..... 2<sup>ND</sup> PLAINTIFF**

**SUING AS LEGAL REPRESENTATIVE OF THE LATE RIMPASON OLE  
SANTAMU ALIAS IMPASOL OLE KURARU SANTAMU**

**AND**

**JOYCE MUKUHI NJENGA ..... 1<sup>ST</sup> DEFENDANT**

**SILVANUS SHIGONDE MAKOTSI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. What is before this court for determination is the Preliminary Objection dated 16<sup>th</sup> February 2024. The grounds are;
  1. This suit being one for recovery of land is statute barred as the 1<sup>st</sup> Defendant/Respondent has been the registered owner of the land since 8/7/1993 when the same was transferred to her and the deceased transferor on whose behalf the suit has brought died way back on 2/5/2009.
  2. The suit as drawn and filed is fatally defective as the procedure of originating summons which has been adopted by the Plaintiff/Applicant is not available for determination of complex issues such as revocation of titles as sough therein.
2. The court with the consent of the parties directed that the Preliminary Objection be canvassed by way of written submissions.



### **The 1<sup>st</sup> Respondent's Submissions.**

3. They are dated 2<sup>nd</sup> August 2024. Counsel has submitted that the suit is statute barred under the relevant provisions of the Limitation of Actions Act. That under Section 7 and 9(2) of the Act, this suit is time barred as an action to recover land ought to be brought before the expiry of twelve (12) years from the date the right of action accrued.
4. It is further submitted that the 1<sup>st</sup> Defendant was registered as the proprietor of the land on 8<sup>th</sup> July 1993. That by the time of filing this suit thirty (30) years had gone by.
5. Counsel also submitted that the deceased died on 2<sup>nd</sup> May 2009 while this suit was filed on 22<sup>nd</sup> June 2023 which makes the suit more than two years out of the limitation period. This was the holding on Theresa Wanjiro (Suing as the administrator of the estate of Joseph Gichuki Ringe) Vs. Andrew Kimata Githaiga & Another (2021) eKLR.
6. It is also submitted that this court has been moved by way of Originating Summons while Originating Summons is designed to deal with simple matters which can be settled without expense of bringing an action in the usual manner. He has put forward the case of Cyril J. Haroo & Another Vs. Uchumi Services Limited & 3 others (2014) eKLR.
7. Counsel also submitted that Order 37 rule 8 of the Civil Procedure Rules provides instances where an Originating Summons may be filed in relation to land registered under the Registration of Land Act (now repealed). The Plaintiffs in their suit have among other reliefs sought orders directing the Land Registrar to revoke the title deed of the suit property in the name of the 1<sup>st</sup> Defendant.
8. It is also submitted that Order 37 Rule 8 of the Civil Procedure Rules excludes Section 143 of the Registration of Land Act (Repealed) from the applicability of the procedure of Originating Summons as it expressly prohibits the court from entertaining a claim for cancellation of a title registered under the Registration of Land Act by way of Originating Summons. He has put forward the case of Cyril J. Haroo Case (Supra).
9. Counsel also submitted that the issues raised herein are serious weighty. They include alleged fraud, corruption, missing documents etc. They require a full hearing founded on a plaint. That failure to commence the suit in accordance with the prescribed procedure goes to the jurisdiction of the court. Further that the Originating Summons cannot be converted to a Plaint hence the same should be struck out.
10. It is further submitted that this suit cannot be saved under Article 159 (2) (d) of the Constitution as the issue raised by the 1<sup>st</sup> Defendant is not just a mere procedural and/or a technical one.  
That the 1<sup>st</sup> Defendant who is a title holder and whose title was sought to be cancelled would be prejudiced by the procedure of Originating Summons hence makes it inappropriate.
11. It is also submitted that the Plaintiffs have raised serious allegations of fraud and corruption against the 1<sup>st</sup> Defendant. Other issues raised concern documentation for the property which can only be answered by the Land Registrar who is not a party to this suit.  
He prays that the Preliminary Objection be upheld and the suit be dismissed with costs to the 1<sup>st</sup> Defendant.

### **The Applicants' Submissions.**

12. They are dated 13<sup>th</sup> August 2024.



They raise two issues for determination;

- a. Whether the suit is statute barred?
  - b. Whether the suit as drawn and filed is fatally defective?
13. Counsel submitted that Section 26 of the [Limitation of Actions Act](#) provides for an extension of time for actions of recovery of land where the action for recovery is pegged on fraudulent acquisition of land. That the Plaintiff's suit challenges the acquisition of the title by fraudulent means hence the calculation of time ought to be done from when the fraud was discovered. That the fraud was discovered on 17<sup>th</sup> December 2018. That the suit is within the twelve (12) year Limitation period and ought to be heard and determined. He has put forward the cases of *In Lazarus Estate Limited Vs. Beasley (1956) (1) AER 341*; *Dina Management Limited Vs. County Government of Mombasa & 5 Others (2023)KESC 30 (KLR)*.
14. Counsel further submitted that Order 38 rule 19 of the Civil Procedure Rules empowers this court to direct than an Originating Summons do proceed as a Plaint and to proceed with the hearing of the matter as if the action had been commenced by way of a Plaint. That the 1<sup>st</sup> Defendant has not shown what prejudice she would suffer if the suit was permitted to proceed to trial as a Plaint.

Reliance is placed upon Sections 1A, 1B, and 3A of the [Civil Procedure Act](#) which implore courts to administer justice in a just expeditious efficient and cost effective manner. That this objective is mirrored in Section 3 of the [Environment and Land Court Act](#) while Section 19 of the [Environment and Land Court Act](#) restates the provisions of Article 159 (2) (d) of [the Constitution](#).

He prays that the Preliminary Objection be found to be without merit and the same be dismissed with costs.

### **Analysis and Determination.**

15. I have considered the grounds of the Preliminary Objection, the rival submissions and the authorities cited. The issue for determination is whether the Preliminary Objection is merited.

In the case of *Mukisa Biscuits Limited Vs. West End Distributors Limited (1969) EA 696* the court stated thus; as per for Charles Newbold P;

“..... A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all 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 exercised of Judicial discretion.”

Law JA further stated;

“.....So far as I am aware, 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 Objection may dispose of the suit.

Examples are on 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.”

I have gone through the Preliminary Objection herein and I find that it raises pure points of law as set out in the *Mukisa Biscuits Case (Supra)*.



16. It is the 1<sup>st</sup> Defendants'/Respondents' case that the suit herein is statute barred as it offends Sections 7 and 9(2) of the *Limitation of Actions Act*. It is her case that the Action to recover the said land has been brought more than thirty (30) years since she became the registered owner.
17. The Plaintiffs/Applicants on the other hand claim that the suit is based on fraud, which they discovered in the year 2018, when they started the process of collecting the assets of the deceased's estate.

**Whether the suit is Statute barred?**

18. Section 26 of the *Limitation of Actions Act* provides that;

“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 the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

- (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

19. At this point it will be upon the Plaintiffs/Applicants to prove that the title held by the 1<sup>st</sup> Defendant/Respondent was obtained through fraud and they discovered the fraud in 2018 as alleged. I will leave this limb of the Preliminary Objection at this.
20. Given this scenario, I am persuaded to give the Plaintiffs benefit of doubt and to state they ought to be given an opportunity to prove the foregoing grounds.

**Whether the suit is drawn and filed is fatally defective.**

21. This suit is commenced by way of Originating Summons dated 15<sup>th</sup> June 2023. I agree with the submissions of the 1<sup>st</sup> Defendant/Respondent that the procedure of the Originating Summons is designed to deal with simple matters which can be settled without the expense of bringing an action in the usual manner



22. Order 37 rule 8 of the Civil Procedure Rules provides that;

“An application under the [Land Registration Act](#), 2012 other than under Part VII and Part VIII thereof shall be made by originating summons unless there is pending a suit involving the same lands when the application may be made in that suit.”

In the case of *Cyril J. Haroo & Another Vs. Uchumi Services Limited & 3 Others* (2014) eKLR Angote J, explained the instances where the procedure of Originating Summons is to be applied; He stated thus;

“29 .....it has been held by the courts that a suit may be commenced by way of an Originating Summons to enable simple matters to be settled by the Court without the expense of bringing an action in the usual manner (See *Kibutiri Vs. Kibutiri* (1983) KLR 1 and *Re Gilas* (2) (1990) 43 Ch. D 391). In the *Kibutiri* case, Law J.A held as follows:-

“The scope of an inquiry which could be made on an Originating Summons and the ability to deal with a contested case was very limited. When it becomes obvious that the issue raise a complex and contentious questions of facts and law, a judge should dismiss the summons and leave the parties to pursue their claim by ordinary suit.”

23. The Plaintiffs/Applicants in this suit seek the cancellation of the title held by the 1<sup>st</sup> Defendant/ Respondent. This is under Section 143 of the Registration of [Land Act](#) (repealed) which is replicated in Section 80 of the [Land Registration Act](#), 2012.

The issue of cancellation of a title is not simple one. I rely on the case of *Cyril J. Haroo* case (Supra) where the court held;

“27. The simple explanation for this provision of the law is that a title can only be cancelled by the court after evidence has been tendered to show that the same was procured fraudulently, or by mistake. To prove fraud, one has to examine in detail the documents that led to the acquisition of the said title, examination and cross examination of the people involved in the processing of the title and sometimes the calling of expert witnesses or the officials from the Ministry of Lands and other relevant institutions.

28. It therefore follows that cancellation of a title deed on a Certificate of Lease is not a simple issue which can be decided by way of an Originating Summons thus the provisions of Order 37 rule 8.”

24. I agree with the Submissions of the 1<sup>st</sup> Defendant/Respondent that the issues raised herein are serious and weighty and cannot be cured by Order 37 rule 19 of the Civil Procedure Rules. The suit herein has not been lawfully commenced as an Originating Summons. The Originating Summons cannot be converted to a Plaintiff.

The Plaintiffs/Applicants ought to commence a suit in the proper manner.

25. I find that this limb of the Preliminary Objection succeeds. I find merit in the Preliminary Objection the same is upheld.



26. The upshot of the matter is that the Originating Summons herein is struck out with costs to the 1<sup>st</sup> Defendant/Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 5<sup>TH</sup> DAY OF DECEMBER 2024.**

**L. KOMINGOI**

**JUDGE.**

In the presence of:

Mr. Njogu for Mr. Karanja for the Plaintiffs/Applicants.

Mr. Wanjohi for the 1<sup>st</sup> Defendant/Respondent.

N/A for the 2<sup>nd</sup> Defendant/Respondent.

Court Assistant – Mutisya.

