



**Matoya & another v Attorney General & 4 others (Environment & Land Case 24 of 2020) [2023] KEELC 16038 (KLR) (1 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16038 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 24 OF 2020**

**M SILA, J  
MARCH 1, 2023**

**BETWEEN**

**BEATRICE MATOYA ..... 1<sup>ST</sup> PLAINTIFF**

**TABITHA BONARERI MATOYA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT**

**COMMISSIONER OF LANDS ..... 2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR, KISII ..... 3<sup>RD</sup> DEFENDANT**

**HENRY MANYANGE MATOYA ..... 4<sup>TH</sup> DEFENDANT**

**JAMES MANYANGE OBIRI ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

(Ruling on preliminary objections filed that this suit is res judicata and that there is no subject matter as the title in issue has expired; preliminary objections dismissed)

1. There are two preliminary objections which are subject of this ruling.
2. The first preliminary objection dated 10 June 2022, is filed by the 4<sup>th</sup> defendant. It is drawn as follows :-
  - a. The plaintiff's suit offends the mandatory provisions of Section 7 of the [Limitation of Actions Act](#).
  - b. The plaintiff's case offends the res judicata doctrine in light of Kisii High Court Succession Cause No 290 of 2000, Kisii High Court Civil Case No 54 of 2004, Kisii High Court Civil Case No 255B of 2009, Kisii High Court Civil Case



No 270 of 2013, Kisii High Court Civil Case No 272 of 2013, and Kisii High Court Miscellaneous Application No 124 of 2014; and

- c. The 5<sup>th</sup> defendant lacks the capacity to sue or to be sued as he has been sued in his capacity as a representative of the late Zakaria Matoya.
3. The second preliminary objection is dated 27 July 2022 and is filed by the Attorney General, who is the 1st defendant, and who acts for the 2nd and 3rd defendants, respectively being the Commissioner of Lands and the Land Registrar, Kisii. The preliminary objection is as follows :-
    1. That the Honourable Court lacks jurisdiction to entertain the suit herein.
    2. That the plaintiff's suit is defective, statutory time barred, res judicata, incompetent, and untenable in law.
    3. That the suit filed via a plaint dated December 27, 2019 be dismissed with costs.
  4. The objections were argued by way of written submissions and oral highlights. Before I go to these, the background is that the plaintiffs, who are acting in person, commenced this suit through a plaint filed on 3 January 2020. The 1<sup>st</sup> defendant is the Attorney General, the 2<sup>nd</sup> defendant the Commissioner of Lands (which office does not exist anymore), the 3<sup>rd</sup> defendant is the Land Registrar, Kisii; the 4<sup>th</sup> defendant is sued as administrator of the estate of Francis Obaga Matoya alias Otwori Matoya (deceased); the 5<sup>th</sup> defendant is sued as 'the only surviving 1<sup>st</sup> line beneficiary of Zacharia Obiri Matoya (deceased)'. The plaint is pretty long and winded going to 72 paragraphs and covering 15 pages and I will try my best to bring out what exactly is in issue. It is averred that on 28 October 1967, the Gusii County Council issued a letter of allotment for the Plot No Z1, Section II, Township Kisii (under trust land) to Kisii Vegetable and Fruit Supplies Store for a period of 30 years from 1 May 1967. It is averred that a grant was subsequently registered, being IRN Grant No 2447/1, for LR No 1436/287 under the *Registration of Titles Act*, Cap 281 (repealed), which land is now Kisii Municipality/Block III/140. It is said that Kisii Vegetable and Fruit Supplies Store was under the sole proprietorship of one Walter Otwori Matoya but later he introduced his two brothers, Matieka Obiri Matoya and Francis Matoya, into the business. She contends that the partnership only extended up to the expiry of the first lease on 30 April 2000. It is claimed that in June 2009, the Government approved the extension of lease for a further period of 66 years effective May 1, 2000. It is pleaded that to date, the Commissioner of Lands has not drawn the approved extension of lease as none of the beneficiaries hold a confirmed grant. She pleaded that there has been a previous suit, HCCC No 54 of 2004, HCCC No 255B of 2009, and Miscellaneous Application No 124 of 2014 on conversion of 1/3<sup>rd</sup> share of the property. There is also mention in the plaint of Miscellaneous Application No 272 of 2013. In the suit, she seeks a rectification of the register of the parcel Kisii Municipality/Block III/140 to have the name of Walter Otwori Matoya, and cancel lease to Zacharia Matoya and Francis Matoya, and have the expired lease redrawn to be held by the three partners, Walter Otwori Matoya, Matieka Obiri, and Francis Matoya as tenants in common in equal shares; special damages against the 4<sup>th</sup> and 5<sup>th</sup> defendant; general damages and costs.
  5. The plaintiff filed an affidavit of service to demonstrate that she has served the defendants and was granted liberty to proceed ex parte, which she did before my predecessor Onyango J, and judgment was delivered on 23 September 2021. The honourable judge found that the letter of allotment, dated 28 October 1967, was issued in the names of three persons, being Walter Otwori Matoya, Zacharia Matoya and Francis Matoya, but the grant/leasehold title was only issued in the names of Zacharia and Francis, leaving out Walter. She thought this to have been irregular since the business name bore the



three names. On whether the court could order rectification of the register, the judge found that the interest expired in the year 2000 which is more than 20 years ago, and she opined that the property has reverted back to the County Council of Gusii (now the County Government of Kisii). In the circumstances, she held that the court cannot issue an order of rectification of the register. She opined obiter that the Commissioner of Lands (sic) ought to consider including the administrators of the estate of the late Walter when renewing the lease.

6. There followed an application dated 3 February 2022, filed by the 4<sup>th</sup> and 5<sup>th</sup> defendants, seeking to set aside the judgment of 23 September 2021 on the basis that they were never served with summons. The application was allowed in a ruling delivered on 4 May 2022 and the court allowed the defendants liberty to file their respective defences. The 4<sup>th</sup> defendant filed defence and counterclaim. In his counterclaim, he wishes to have an order to compel renewal of the lease to the joint name of the 4<sup>th</sup> defendant and legal representative of the late Zakaria Matoya. The Attorney General also filed defence. *Inter alia*, it is pleaded that the parties have no proprietary rights to claim against the 1<sup>st</sup> – 3<sup>rd</sup> defendants. Those defences were followed up by the preliminary objections.
7. I have taken note of all submissions filed and the oral submissions made in court. In his oral address in court, Mr Wabwire, learned State Counsel, pressed the point that the lease in issue expired in 2000 and there is no basis for the litigation. He urged that on expiry of the lease the land reverted to be public land.
8. In my opinion, there are two issues here. First, is whether the suit is *res judicata*. Secondly, is whether there is subject matter to be tried.
9. On the first issue, various cases have been presented. The decisions in these cases were filed together with the list of documents of the 4<sup>th</sup> defendant and I have gone through them. Kisii High Court Succession Cause No 290 of 2000 was in respect of the estate of Francis Obaga Matoya. The plaintiff herein filed summons for revocation of this grant which application was denied as the court thought that what the applicant had filed was more of a dispute over ownership of the land and not a succession issue and she therefore ought to file her claim before the Environment and Land Court. That case cannot be said to have determined the issues herein. The other suit mentioned is Kisii HCCC No 255B of 2009(OS). That suit was an Originating Summons which again sought an annulment of a grant of letters of administration. The suit was withdrawn and a subsequent application to revive it was dismissed on 10 April 2019. That suit cannot be said to have determined what is at stake herein. The third case mentioned is Kisii ELC No 272 of 2013. From the ruling attached by the 4<sup>th</sup> defendant herein, I note that what was sought in that case was re-beaconing of the land parcel Central Kitutu/Daraja Mbili/508 and for orders of injunction relating to the plots Central Kitutu/Daraja Mbili/507 2031 and 2139. The land parcel herein, which is Kisii Municipality/Block III/140 was not part of what was in litigation therein. It is obvious that the said suit cannot therefore qualify to make this *res judicata*. In as much as other suits were mentioned in the preliminary objection being, Kisii HCCC No 54 of 2004, Kisii HCCC No 270 of 2013 and Kisii High Court Miscellaneous Suit No 124 of 2014, nothing was provided to this court for this court to assess whether the issues therein related to what is in issue here.
10. In my opinion, the applicants have failed to demonstrate that this suit is *res judicata*.
11. The other limb is that there is no subject matter to be tried since the lease expired. I will also add to this the claim that the suit is time barred and that the suit is defective. Despite, what I will not be afraid to say to be poor and inelegant drafting by the plaintiffs, I think, if you wade through the chaff, you will see that what the plaintiffs are actually contending is that the expired lease needs to be renewed to three persons and not two. The plaintiff can of course benefit from better drafting but I think it will



be farfetched to say that there is no subject matter. Mr Wabwire urged that the land reverted back to public land upon expiry of the lease. That in my view, is something to be litigated upon and I do not wish to make any pronouncement at this stage. This is because there has not been any demonstration that the land is now being used by the public. In fact, the land is in the active hands of the 4<sup>th</sup> and 5<sup>th</sup> defendants and they collect rent from the premises. They have also applied for the lease to be renewed in their names excluding the plaintiffs. On whether or not the suit of the plaintiffs is time barred, I would wish that this be canvassed within the main suit. I cannot, at this stage in time, confirm, without having heard the evidence, whether or not a claim that a lease should be renewed is one that is caught up by limitation of time. That is an issue best left for hearing. In those circumstances, I do not think that it can be said that there is no subject matter to be tried.

12. From the foregoing, it will be seen that I find no merit in the preliminary objections and they are hereby dismissed with costs.
13. Orders accordingly.

**DATED AND DELIVERED THIS 1<sup>ST</sup> DAY OF MARCH 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

