



**Mwachinga v Bunei & 2 others (Environment & Land Case
E041 of 2022) [2023] KEELC 18574 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18574 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E041 OF 2022**

EK MAKORI, J

JULY 6, 2023

BETWEEN

SAID ATHMAN MWACHINGA PLAINTIFF

AND

HOSEA KIPRONO BUNEI 1ST DEFENDANT

KILIFI LAND REGISTRAR 2ND DEFENDANT

HON ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. A Preliminary Objection has been raised in this matter as follows:
 - i. That the Plaintiff's claim offends Section 7 of the *Limitation of Actions Act*.
 - ii. The entire suit be struck out with costs
2. To canvass, parties agreed to have the Preliminary Objection by way of written submissions.
3. The 1st Defendant averred that title deed Chembe/Kibambamshe/223 was issued to one Hosea Kipimo Bunei (now deceased) on 21st April 1982 after transfer on 16th December 1980 from one Said Athman Mwachinga. There is a fully executed Transfer of Land Document in place. The title had been in possession of the deceased until his demise. Succession already took place. The 1st defendant averred that to compute time for purposes of Limitation of Actions, time should be reckoned from 16th December 1980 when the late Bunei acquired the land.
4. The 1st Defendant cited the landmark ruling in *Mukisa Biscuit Manufacturing Limited v. West End Distributors* [1969] EA 696, where Law JA. laid forth the test and requirements to be met before successfully raising a Preliminary Objection.



5. 1st Defendant submitted that the clear implication that arose from the pleadings, in this case, is that the Plaintiff herein is seeking to recover land that was acquired by the deceased way back in 1980. Section 7 of the *Limitation of Action Act* sets out a statutory limit of 12 years for such action to be mounted. Such that the Plaintiff had 12 years from 1980 to seek to challenge the Deceased's acquisition of the land and by coming to court some 43 years after the deceased acquired title to land, the Plaintiff is in breach of Section 7 of the *Limitation of Actions Act*.
6. The 1st Defendant cited the case of *Sobanaldurgadass Rajput & another v Divisional Integrated Development Programmes Co Ltd* [2021] eKLR while addressing similar issues as raised by the 1st Defendant in this case, Nyukuri J, in that case, reiterated the purpose of limitation as to prevent a Claimant from bringing up stale demands and forbidding any Claimant from disturbing a Defendant who could have long lost evidence by the passage of time. To file such a lawsuit, a Claimant is required by law to do so with reasonable diligence.
7. The 1st Defendant proceeded further and stated that the court will note that the Plaintiff has not made any allegation of fraud against the deceased hence Section 26 of the *Limitation of Actions Act* does not provide any aid to him. The claim herein is statute-barred and the same ought to be struck out with costs.
8. On the other hand, the Plaintiff submitted that the Government of Kenya placed an embargo on all the parcels in Chembe/Kibambamshe in 1986, and no transactions or dealings were to be conducted within the scheme. The embargo was lifted on 17th July 2017 vide a Gazette Notice Number 6862.
9. Plaintiff contended that time started running from 17th July 2017 and not on 16th December 1980 and the 1st Defendant sought to mislead the court. That the suit is within time as only six years had elapsed since the title was available to be challenged.
10. The issue for the determination of this court is whether the present suit is time-barred and ought to be struck out with costs.
11. The threshold to be attained for Preliminary Objection to be successful is as held by Law JA. in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] thus:

“...so far as I'm 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 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.”
12. The stab of the Preliminary Objection repose squarely on the jurisdiction of this court, because whenever limitation is raised, then the jurisdiction of this court comes into play as held by Nyarangi JA. in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”



13. When should time start running in this matter? From the record title document for the land, Chembe/Kibambamshe/223 was issued to the deceased Hosea Kiprono Bunei on 21st April 1982 and after transfer on 16th December 1980 from one Said Athman Mwachinga. This is clear from the green card. The deceased held the title and took possession of the land until his demise. His beneficiaries have long done succession on it. It has never been transferred from his lineage.
14. The Plaintiff alleged there was an embargo in dealings placed on land parcels within Chembe/Kibambamshe, which fleeced dealings in land transactions, the National Land Commission by Gazette Notice No. 6862 dated 17th July 2017 lifted the same. I have probed That Gazette Notice, which largely dealt with the determination of grants and disposition of public land with respect to specific grants and orders pursuant to the powers conferred by *the Constitution* on the Commission under Article 68 (c) (v) - to review all grants or dispositions of public land to establish their propriety or legality; as read with section 12 of the *National Land Commission Act*, 2012 which provides:
- “Review of grants and dispositions.
- (1) Subject to Article 68 (c)(v) of *the Constitution*, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality. (2) Subject to Articles 40, 47 and 60 of *the Constitution*, the Commission shall make rules for the better carrying out of its functions under subsection (1).
 - (3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.
 - (4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination.
 - (5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall direct the Registrar to revoke the title.
 - (6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may make consequential orders.
 - (7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.
 - (8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of *the Constitution*.
 - (9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1).”
15. The National Land Commission is a creature of *the Constitution* 2010. The review it did on the grants and dispositions within Chembe/Kibambamshe, whereas it touched on the propriety and legality of titles backward, in this case, its findings were that land title No. Chembe/Kibambamshe/223 was legally and properly acquired by one Hosea Kiprono Bunei after the execution of a transfer from one Said Athman Mwachinga. From the record, nobody raised any complaint on the propriety and legality of this particular title. Not even the current Plaintiff. Counsel for the Plaintiff was not candid enough on when the embargo he submitted was placed, and its effect on the limitation of actions for purposes



of computation of time. I have tried to check on how the embargo affected the computation of time from 16th December 1980 to no avail.

16. In my humble view then, I see nowhere the embargo affected the running and computation of time as established by Section 7 of the *Limitation of Actions Act* on claims based on recovery of land which ought to be brought within 12 years after accrual. Time could not start running from 17th July 2017 but certainly from 16th December 1980 when the deceased got a transfer of the suit land, and has had its title till his demise and thereafter transmission to his heirs.
17. For a Preliminary Objection to remain so, the court need not do an inquiry or call for evidence. The pleadings and attachments on record suffice. The Plaintiff in his pleadings has not implored fraud and perhaps stated that there was discovery of fraud in the acquisition of the title subject of this suit, which the National Land Commission for example failed to address in the year 2017 to fall within the purview of Section 26 of the *Limitation of Actions Act*.
18. What is it that the plaintiff has been waiting for from 1980 to 1922 to bring up this suit? 42 years down the line! Is he the Said Athman Mwachinga who transferred the suit property to the deceased and has now changed his mind?
19. This is the scenario Section 7 of the *Limitation of Actions Act* abhors and as correctly submitted by Counsel for the 1st defendant citing the case of *Sobanaldurgadass Rajput & another v Divisional Integrated Development Programmes Co Ltd [2021]* eKLR, where Nyukuri J. citing several other authorities on the limitation of actions based on the recovery of land she stated thus:

“The purpose of the Law of Limitation was stated 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 stale 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.”

37. In *Gathoni v Kenya Co-operative Creameries Ltd [1982]* KLR 104, the Court of Appeal held as follows;

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

38. A suit barred by limitation is a claim barred by law; hence, by operation of law, the Court cannot grant the relief sought. In the case of *Iga v Makerere University [1972]* EA, the Court had this to say on the Law of Limitation;

“A Plaintiff which is barred by limitation is a Plaintiff barred by law. Reading these Provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The Limitations Act does not extinguish a suit or action itself but operates to bar the claim or



remedy sought for and when a suit is time barred the Court cannot grant the remedy or relief sought.”

20. Concisely, time started running from 16th December 1980. This being a recovery of land matter, 12 years lapsed on 16th December 1992. The Plaintiff is way behind the clock. To be exact the plaintiff is 30 years late. The Preliminary Objection is hereby sustained. The Plaintiff’s suit is hereby struck out with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 6TH DAY OF JULY 2023

E.K. MAKORI

JUDGE

In the presence of :

Mr. Kiplagat for the 1st Defendant

Ms Bwanaadi for the Plaintiff

Court Clerk: Happy

