



**Eremoto v Omolo & 2 others (Environment & Land Case 128 of 2015)
[2023] KEELC 20635 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20635 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 128 OF 2015
BN OLAO, J
OCTOBER 12, 2023**

BETWEEN

STEPHEN EKENYA EREMOTO PLAINTIFF

AND

LETISIA NAFULA OMOLO 1ST DEFENDANT

WILFRED OMUKALA THUMAH 2ND DEFENDANT

PATRICK AMANGOGA MATENDECHERE 3RD DEFENDANT

RULING

1. It is really unfortunate that this Court is being called upon in 2023 to determine an application seeking to strike out a suit filed in 2015 and in which one witness has already testified. Unless the parties and their counsel play their rightful role, the objective of expeditious disposal of cases may remain a mirage. It is not lost to this Court that the issue of Limitation of Actions being raised by the 1st Defendant Letisia Nafula Omolo in her Notice of Motion dated 20th January 2023, and which is the subject of this ruling, has infact already been pleaded in paragraph 9 of the Defendants defence and counter-claim. That is therefore an issue which this Court will definitely have to consider in it's final judgment. While there is a constitutional right to be heard, judicial time should not be squandered. However, since the application is before me, I am also obliged to determine it and make a decision thereon so that the parties can move on.
2. This suit was initially commenced by way of an Originating Summons filed way back on 5th November 2015 before being converted into a plaint dated 17th November 2021. A defence and counter-claim was subsequently filed on 25th January 2022. After many delays caused by change of counsel and several interlocutory application, the hearing commenced on 6th December 2017 when Maurice Ekisa Omanyala (PW1) testified and was cross-examined by Mr Ashioya counsel for the Defendants. During



- the course of that cross-examination, the witness referred to a sale agreement with respect to the suit land having been executed on 21st January 1995.
3. That appears to have jolted the Defendants to move this Court vide their Notice of Motion dated 19th April 2023 in which they seek the following remedies:
 1. That the Plaintiff's suit be struck out for being an abuse of the due process of the Court and the law having been over-taken by the [Limitation of Actions Act](#) which renders this suit incompetent ab initio.
 2. That the Plaintiff's suit be struck out for being duplicitous to Busia CMC ELC 112 of 2018 between the Plaintiff herein and the 2nd Defendant herein.
 3. That costs of this application and of the suit be borne by the Plaintiff herein.
 4. The application is predicated upon the provisions of Sections 1A, 1B, 3, 3A and 8 of the [Civil Procedure Act](#), Order 52 of the [Civil Procedure Rules](#), Sections 27 and 28 of the [Limitation of Actions Act](#), Section 8 of the [Land Control Act](#) and Article 159(2) (d) of [the Constitution](#) of Kenya 2010.
 5. The application is based on the grounds set out therein and on the affidavit of the 1st Defendant.
 6. The gravamen of the application is that the agreement the subject of this suit was executed in 1995 and there has been no extension of time to file this suit. Further that the issue of ownership of the suit land between the Plaintiff and 1st Defendant should have been heard and determined in BUisia High Court Succession Cause No 6 of 2011.
 7. In her supporting affidavit, the 1st Defendant goes on to add that there is also a live suit between the Plaintiff and the 2nd Defendant in Busia CMC ELC NO 112 of 2018 and also the subject of Busia High Court ELC Appeal No E001 of 2020. That the occupation of the suit land by the Plaintiff cannot be effectuated through this suit and no extension of time has been sought by the Plaintiff for purpose of fulfilling Section 8 of the [Land Control Act](#).
 8. The following documents have been annexed to the application:
 1. Copy of proceedings in this case.
 2. Copy of plaint and documents filed in Busia CMC ELC CASE NO 112 of 2018.
 3. Memorandum of appeal filed in Busia ELC APPEAL NO E001 of 2020.
 9. The application is opposed and the Plaintiff has filed grounds of opposition dated 2nd May 2023 in which he has raised the following issues:
 1. That Sections 7 and 8 of the [Statute of Limitation Act](#) are not mandatory in nature and those are exceptions of recovery of land.
 2. That Section 26 of the [Statute of Limitation Act](#) has an exception where fraud is alleged.
 3. That this Honourable Court has wide latitude and discretionary jurisdiction to deal with such land matters to serve the ends of justice.
 4. That the provisions of Sections 1A and 1B of the [Civil Procedure Act](#) apply.
 10. There is also a replying affidavit by one Maurice Ekisa Omanyala dated 2nd May 2023 sworn purportedly in opposition to the said application. The said MAurice Ekisa Omanyala is only a witness for the Plaintiff, not a party in these proceedings and it is not clear on what basis he has sworn that replying



affidavit. I have no alternative but to peremptorily strike out the said affidavit and expunge it from this application. I can see from the record that he has already recorded a witness statement dated 17th November 2021. That is as far as his role in these proceedings is concerned.

11. The application has been canvassed by way of written submissions. These have been filed by Mr Ashioya instructed by the firm of Ashioya & Company Advocates for the 1st and 2nd Defendants and by Mr Malalah instructed by the firm of Malalah & Company Advocates for the Plaintiff.
12. I have considered the application, the supporting affidavit by the 1st Defendant, the grounds of opposition by the Plaintiff and the submissions by counsel.
13. As counsel for the Plaintiff has rightly submitted, it is not clear if what the Defendants are raising is a Preliminary Objection. The Defendants have simply clothed it as a Notice of Motion predicated under the provisions of the law cited therein. However, they have gone on to add that it is an abuse of the process of the law having been over taken by the [Limitation of Actions Act](#). Their counsel then goes on to submit that the Plaintiff's suit is both res judicata and sub-judice. He adds in paragraph 2 of the submissions thus:

“Your Lordship, this suit is mission ceived (sic); the basis on which it is founded is the agreement dated 21st of January 1995; this is the instrument the Plaintiff herein exclusively relies upon to agitate his perceived rights to the suit property; notably, this claim has been overtaken by [Limitation of Actions Act](#) and in particular Section 7...”

Counsel then proceeds to cite the provisions of Sections 27 and 28 of the [Limitation of Actions Act](#), Section 3 of the [Law of Contract Act](#), Section 6 and 8(1) of the [Land Control Act](#) and Section 6 of the [Civil Procedure Act](#).

14. If this application is indeed a Preliminary Objection, then it does not meet the threshold set out in the case of *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors LTD* 1969 E.A. 696 where it was held, inter alia, that it must raise “a pure point of law which is argued on the assumption that all the fact pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion.”
15. The Defendants hinge their application on the issue that the sale agreement subject of this case was drawn in 1995 and therefore this suit has been defeated by the statute of Limitation. 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.”

However, Section 26 of the same [Act](#) has a proviso that where the cause of action is based on the fraud of the Defendant, 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. In paragraph 13 of his plaint, the Plaintiff appears to suggest that he discovered the fraud in 2015 and caused a caution to be placed on the suit land. This suit, as I have already stated at the commencement of this ruling, was originally filed vide and Originating Summons on 5th November 2015. It cannot therefore be contra [Limitation of Actions Act](#) by any stretch of imagination. In any event, the period when the fraud was discovered is not really a matter of law. It is a matter of fact and which therefore brings this application beyond the purview of a Preliminary Objection or any other objection for that matter.



16. On the issue of this suit being duplicitous to Busia CMC ELC Case No 112 of 2018 between the Plaintiff and the 2nd Defendant herein, is clear from the memorandum of appeal filed in Busia ELC Appeal No E001 of 2020 that the proceedings in Busia CMC ELC Case No 112 of 2018 have been stayed. It is not clear what the 1st Defendant meant by claiming that this suit is “duplicitous to Busia CMC ELC 112 of 2018” the term “duplicitous” is defined in the concise Oxford English Dictionary as:

“deceitful. Of a charge or plea containing more than one allegation.”

In *Black’s Law Dictionary 10th Edition*, the same word is defined as:

“Given to a tricky doubleness in character, speech or conduct; esp deceitful in behaving or speaking differently with different persons in relation to the same matter, with the intent of fooling one or more of them (of a pleading esp an indictment) alleging two or more matters in one plea.”

I believe the 1st Defendant is trying to suggest that this suit is sub-judice Busia CMC ELC Case No 112 of 2018. That is because, at page 4 of the submissions by her counsel, it is stated thus:

“Your Lordship, the above mentioned paragraph is the concession that the present case is sub-judice given the fact that the 2nd and 3rd Defendants were enjoined in this matter on the 24th of July 2018 by an order of Justice Kaniaru. Section 6 of the *Civil Procedure Act* prohibits a Court from proceeding with a matter that is either sub-judice or res judicata.”

17. The rule of sub judice is provided for in paragraph 6 of the *Civil Procedure Act* as follows:

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.” Emphasis mine.

In *Black’s Law Dictionary 10th Edition*, the same term is defined as:

“Under a judge. Before the Court or Judge for determination.”

As is now already clear, Busia CMC ELC Case No 112 of 2018 has been “stayed”. This Court was not informed why the said suit has been stayed. I can only hazard a guess that it has been stayed pending the determination of this suit or perhaps the pending appeal. The term stay is defined in the Black’s Law Dictionary 10th Edition as:

“The postponement or halting of a proceeding, judgment or the like. An order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding.” Emphasis mine.

18. Therefore, if by the word duplicitous the 1st Defendant is suggesting that this suit is sub-judice, it is clear that Busia CMC ELC Case No 112 of 2018 is not proceeding in any other Court. This suit is therefore not an abuse of the process of this Court for being sub-judice Busia CMC ELC Case No 112 of 2018.



19. Similarly, the term res-judicata is defined in the same *Black's Law Dictionary* 10th Edition as:

“Latin, a thing adjudicated. An issue that has been definitively settled by judicial decision. An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are (1) an earlier decision on the issue (2) a final judgment on the merits, and (3) the involvement of the parties, or parties in privity with the original parties.”

Section 7 of the *Civil Procedure Act* provides that:

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.” Emphasis mine

This Court has not been shown any previous judgement or ruling delivered by any other Court touching on the issue now raised in this Court. The onus was on the Defendants to prove the plea of res-judicata by availing any such earlier judgments or rulings by a competent Court in which the matter herein has been “heard and finally decided”.

20. The up-shot of all the above is that the Defendants’ Notice of Motion dated 19th April 2023 is devoid of any merit. The same is hereby dismissed with costs to the Plaintiff.

RULING DATED, SIGNED AND DELIVERED ON THIS 12TH DAY OF OCTOBER 2023 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

