



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Okello & 11 others v Leting & another; Sombo (Applicant) (Environment & Land Case 136 of 2015) [2023] KEELC 20495 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20495 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**  
**ENVIRONMENT & LAND CASE 136 OF 2015**  
**JM ONYANGO, J**  
**OCTOBER 4, 2023**

**BETWEEN**

**BOAZ OKELLO ..... 1<sup>ST</sup> PLAINTIFF**  
**JEREMIAH ABINA ONGARO ..... 2<sup>ND</sup> PLAINTIFF**  
**DUKE NYABUTI ..... 3<sup>RD</sup> PLAINTIFF**  
**JAIRO OMWOYO ..... 4<sup>TH</sup> PLAINTIFF**  
**STEPHEN OMBATI ..... 5<sup>TH</sup> PLAINTIFF**  
**JOSEPH OGETO ..... 6<sup>TH</sup> PLAINTIFF**  
**PETER NDUNGU ..... 7<sup>TH</sup> PLAINTIFF**  
**RASHID TOO ..... 8<sup>TH</sup> PLAINTIFF**  
**JAMES NYANGAU ..... 9<sup>TH</sup> PLAINTIFF**  
**SIMON SOMBO ..... 10<sup>TH</sup> PLAINTIFF**  
**NICHOLAS LIMERA ..... 11<sup>TH</sup> PLAINTIFF**  
**SAMWEL NDUNGU MUCHERU ..... 12<sup>TH</sup> PLAINTIFF**

**AND**

**DAVID KIMELI LETING ALIAS KOKWAS ..... 1<sup>ST</sup> DEFENDANT**  
**EQUITY BANK LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**HARUN MURABU SOMBO ..... APPLICANT**



## RULING

1. What is before me is the application dated 14<sup>th</sup> March, 2023 and amended on 14<sup>th</sup> April, 2023 brought by one Harun Morabu Sombo seeking the following orders:
  - a. Spent
  - b. Spent
  - c. That the Applicant herein be enjoined as one of the Plaintiffs herein in place of the 10<sup>th</sup> Plaintiff now deceased.
  - d. That upon being enjoined as the 10<sup>th</sup> Plaintiff, the Applicant be supplied with the pleadings and all court process to enable full participation.
2. The grounds upon which the application based are enumerated in the Notice of Motion. The main grounds are that the Applicant is the son and administrator of the estate of Simon Sombo (deceased) who had been included in the suit as the 10<sup>th</sup> Plaintiff but he was subsequently struck off from the suit as it was discovered that he had died before the suit was filed. It is the Applicant's contention that the deceased owned one acre of the suit property and it is necessary for his interest to be protected.
3. The application is opposed by the Defendants. In his Replying Affidavit sworn on 29<sup>th</sup> March, 2023 David Letting, the 1<sup>st</sup> Defendant herein avers that the court had already found that the 10<sup>th</sup> Defendant's case was incompetent as it was filed six years after the deceased died. He contended that the Applicant's only remedy lay in filing a separate suit not substitution as the inclusion of the deceased in the suit was null and void ab initio.
4. The 2<sup>nd</sup> Defendant opposed the application through the affidavit of its advocate Daniel L. Were sworn on the 26<sup>th</sup> April, 2023. In the said Affidavit he avers that the application is incompetent, bad in law, misconceived and an abuse of the court process. He avers that the Applicant cannot be enjoined in the suit as one of the Plaintiffs in place of the 10<sup>th</sup> Plaintiff as the said Plaintiff has legally never been a party to the suit as he had died long before the suit was filed.
5. It is his further deposition that the Applicant has not demonstrated that the deceased owned one acre of the suit land and that the intended suit by the deceased's estate is barred by section 7 of the [Limitation of Actions Act](#) as more than 13 years have elapsed since the deceased died on 9<sup>th</sup> October, 2009.
6. The application was disposed of by way of written submissions.
7. In his submissions learned counsel for the Applicant urged the court to invoke its jurisdiction under Order 1 Rule 1 of the *Civil Procedure Rules* which provides that;

“ All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if such person brought a separate suit any common question of law or fact would arise.”
8. He submits that the Applicant's application falls within the provisions of Order 1 rule 1 of the [Civil Procedure Rules](#).



9. He contends that if the Applicant was to institute a separate suit against the Defendants, the provisions of section 6 of the [Civil Procedure Act](#) would not permit as the cause of action would be found to be the same as that in the instant suit.
10. With regard to the issue of limitation, he relies on section 9 (2) of the [Limitation of Actions Act](#) and argues that the cause of action accrued to the Applicant on 9<sup>th</sup> October 2009. He further contends that the cause of action which relates to fraud had not been discovered when the Applicant's father died and the Applicant will therefore rely on the proviso to section 26 of the [Limitation of Actions Act](#).
11. He submits that the Defendants have not demonstrated what prejudice they will suffer if the application is allowed and urges the court to invoke its powers under section 3A of the [Civil Procedure Act](#).
12. On his part learned counsel for the 1<sup>st</sup> Defendant submits that the Applicant has not demonstrated what right his late father had over the suit land as he has not exhibited any sale agreement signed by his late father. He further contends that none of the deceased's family members are living on the suit land. He argues that since the suit is part heard, allowing the application will delay the hearing of the case.
13. In his Supplementary Submissions filed on 2<sup>nd</sup> August, 2023, he contends that section 9 of the [Limitation of Actions Act](#) is not applicable as the deceased's right to claim accrued on 9<sup>th</sup> October, 2009 and became time barred on 9<sup>th</sup> October, 2021. Further, that section 6 of the [Civil Procedure Act](#) only applies where there is a previous suit over the same subject matter between the same parties. He adds that each of the Plaintiffs has a separate claim and they did not buy the land jointly. The estate of the deceased is therefore at liberty to file a separate suit. However, he maintains that the suit is time barred and there is no competent claim to be pursued by the Applicant.
14. Learned counsel for the 2<sup>nd</sup> Defendant submits that the application does not fall within the provisions of Order 1 Rule 1 of the [Civil Procedure Rules](#) as the Applicant has failed to demonstrate that the existence of a right to relief as he did not attach any document of ownership like a title deed or sale agreement. The deceased's interest is therefore unsubstantiated.
15. Secondly, he submits that the Applicant cannot be joined in the suit in place of the 10<sup>th</sup> Plaintiff as the 10<sup>th</sup> Plaintiff was struck off from the suit and is therefore not a party.
16. Thirdly, it is his contention that the claim by the Applicant is time –barred as it is more than 13 years since the deceased died. He adds that in any case, the applicant has not demonstrated when the cause of action arose and the law does not support his prayer to be enjoined in the suit.

### **Analysis And Determination**

17. The only issue for determination is whether the application should be granted.
18. It is not in dispute that the 10<sup>th</sup> Defendant was struck off from the suit as he was found to have been wrongly impleaded since he had died 6 years before the suit was filed. The effect of the said ruling is that the 10<sup>th</sup> Plaintiff is no longer a party to the suit.
19. The application by the Applicant is made on the basis that the Applicant is the administrator of the estate of the deceased and he therefore wants to pursue the case in place of his deceased father.
20. The Applicant cannot replace his father who was wrongly included as a Plaintiff in the suit for the following reasons; First the Applicant has not demonstrated what interest his father had in the suit property as no document is annexed to his application to show that he is one of those who entered into a sale agreement in respect of the suit property. There is no indication, nor was it pleaded in the



plaint that the Plaintiffs bought the land jointly. Paragraph 2C of the Further, Further Amended Plaint amended on 14<sup>th</sup> December 2018 states in part that:

“on diverse dates between the years 2003 -2006 the plaintiffs entered into sale of land agreements with the original registered proprietor for the purchase of that parcel of land namely Eldoret Municipality /block 24 (kipkenyo)/176...”

21. If indeed the Applicant’s father was one of the purchasers of the suit property, nothing would have been easier than to annex a sale agreement to his application to demonstrate that indeed he has a stake in the land. This is what would have qualified him to be joined in the suit in accordance with the provisions of Order 1 rule 1 of the Civil Procedure Rules.
22. Secondly, the Applicant’s father died on 9<sup>th</sup> October, 2009 and in terms of Section 9 of the Limitation of Actions Act the right of anyone claiming on behalf on his estate accrued on the said date. This being a land matter, the suit ought to have been filed within 12 years form the date on which the cause of action arose. This means that the suit ought to have filed before 9<sup>th</sup> October, 2021. The claim is therefore statute barred.
23. The Applicant has alluded to Section 26 of the Limitation of Actions Act Cap 22 of the Laws of Kenya which provides that where an action is based on fraud on the part of the Defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the said fraud or could with reasonable diligence have discovered it. However, he has not indicated when the alleged fraud was discovered. It is trite that amendments should not be allowed if the effect will be to defeat a defence of limitation. See the case of James Ochieng Oduol T/A Ochieng Oduol & Co Advocates v Richard Kuloba (2008) eKLR.
24. Fourthly, the Applicant is not a necessary party to the suit. In the case of Elisheba Muthoni Mbae v Nicholas Karani Gichoe & 2 Others (2014) eKLR the court held that:

“The guiding principle in deciding whether to add a party is whether the presence of that party is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.
25. There is no suggestion that the instant case cannot be determined without the presence of the Applicant.
26. Finally, this is a part- heard matter that was filed in 2018 and re-opening it to add another party who is not a necessary party will result in delaying the case. As provided in Article 159 2 (b) of the Constitution, justice shall not be delayed. Additionally, this court is enjoined to further the overriding objective by facilitating the just, expedient, proportionate and affordable resolution of civil disputes. This cannot be achieved if this suit is reopened without any proper justification.
27. Having carefully considered the application, responses thereto, the rival submissions, applicable law and relevant authorities I am of the considered view that the application is devoid of merit and it is hereby dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED THIS 4<sup>TH</sup> DAY OF OCTOBER 2023**

.....

**J.M ONYANGO**

**JUDGE**



In the presence of;

Mr. B.F Odhiambo for the Plaintiff

Mr. Wainaina for Mr. Momanyi for the 1<sup>st</sup> Defendant

Mr. Bawazir for Mr. Otara for the Applicant Court Assistant: A. Oniala

