



**Atika (Suing as the Legal Representative of the Estate of Rispa Atika)  
& another v Ombat & 2 others (Environment and Land Appeal  
E010 of 2023) [2023] KEELC 21237 (KLR) (1 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21237 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E010 OF 2023  
GMA ONGONDO, J  
NOVEMBER 1, 2023**

**BETWEEN**

**RODA ATIKA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE  
OF RISPA ATIKA) ..... 1<sup>ST</sup> APPELLANT**

**JENIFA OTEYO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE  
OF SYPROSA GOGA) ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOHN HARRISSON OMBAT ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, RACHUONYO ..... 2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the ruling of Hon. C. Okore, Principal  
Magistrate, delivered on 9th February 2023 in Oyugis Senior Principal  
Magistrate's Court Environment and Land Case No. 28 of 2022)*

**JUDGMENT**

1. The instant appeal radiates from the learned trial magistrate's ruling rendered on 9<sup>th</sup> February 2023 where she held that the plaintiffs' suit is bad in law. Thus, she proceeded to uphold the 1<sup>st</sup> respondent's preliminary objection dated 23<sup>rd</sup> August 2022 and dismissed the entire suit with costs.



2. In arriving at the decision, the trial court observed in part thus;

“That the plaintiffs were aware of the appeal window but failed to take advantage of the same. That the plaintiffs waited for over twenty (20) years to bring this action against the defendants”
3. The appeal was commenced by way of a memorandum of appeal dated 20<sup>th</sup> February 2023 and lodged on 20<sup>th</sup> November 2022 through the firm of O. J. Okoth and Company Advocates, founded upon ten (10) grounds which include:
  - a. The learned trial magistrate erred in law and fact in holding that the appellants’ suit is time barred under Section 7 of the [Limitation of Actions Act](#).
  - b. The learned trial magistrate erred in law and fact in holding that it lacked jurisdiction to hear and determine the appellants’ suit.
  - c. The learned trial magistrate erred in law and fact in failing to find that the appellant’s suit was on fraud as a cause of action.
  - d. The learned trial magistrate erred in law and fact when it failed to find that the statutory time of limitation under Section 7 of the [Limitation of Actions Act](#) started to run against the appellants from the year 2022 when they discovered the fraud by the respondents.
  - e. The learned trial magistrate erred in law and fact in holding that the appellants’ suit offended Section 26 (1) and Section 29 of the [Land Adjudication Act](#).
4. Therefore, the appellant prays that;
  - a. This appeal be allowed and the costs of this appeal be awarded to the appellants.
  - b. The ruling in the Senior Principal Magistrate’s Court sitting at Oyugis in SPM ELC No. 28 of 2022 be set aside and the 1<sup>st</sup> respondent’s preliminary objection dated 23<sup>rd</sup> August 2022 before the subordinate court be dismissed.
  - c. The appellants’ suit before the trial court be reinstated for hearing and determination before another court.
  - d. The costs of the preliminary objection before the subordinate court be awarded to the appellants.
5. On 14<sup>th</sup> June 2023, the court directed that the appeal be heard by way of written submissions.
6. So, by the submissions dated 24<sup>th</sup> July 2023, the appellant’s counsel made reference to the grounds of appeal and submitted that the claim was filed within time by dint of the provision in Section 26 of the [Limitation of Actions Act](#). Thus, counsel implored the court to find the preliminary objection raised by the 1<sup>st</sup> respondent and dated 23<sup>rd</sup> August 2022 to be unmerited and the ruling of the trial court delivered on the 9<sup>th</sup> February 2023 be set aside and the suit in the trial court be set down for hearing. Counsel relied on various authorities, including the case of Mukisa Biscuit Manufacturing Co. Ltd - vs- West End Distributors Company Limited (1969) E.A. 696, to buttress the submissions.
7. The 1<sup>st</sup> respondent through C’Ombat and Ombat Company Advocates filed submissions dated 2<sup>nd</sup> September 2023. Learned counsel submitted that by their pleadings, the appellants indicated that the cause of action arose in the year 2001. That the suit was therefore, time barred and the trial court acted within the law in upholding the preliminary objection. That further, the claim was lodged at



- the trial court in contravention of Section 26(1) and 29 of the [Land Adjudication Act](#). To fortify the submissions, reliance was placed on the case of Grace Adhiambo Ogaga (suing as legal representative of the estate of Truphena Kemunto Ogaga -vs- Willian Ochieng Ogaga and 3 others (2018) eKLR.
8. Counsel for the respective parties highlighted their submissions on 27<sup>th</sup> September 2023. Learned Counsel for the appellant averred that the claim was not time barred as it is based on fraud and time starts to run upon discovery of fraud. That in the instant case, time started running on 19<sup>th</sup> January 2022 when the appellant discovered the fraud. That the suit challenges title of the suit parcels of land and the preliminary objection raised at the trial court did not meet the threshold in Mukisa Biscuits case (supra). Thus, counsel implored the court to allow the appeal.
  9. Learned counsel for the respondent affirmed that the trial court was right in striking out the suit. That the plaint did not ascertain the date when the cause of action arose. That the appellant is therefore, raising issues that were not pleaded. That the appellants did not appeal against the determination of the land adjudication hence, such determination was final. Thus, counsel urged the court to dismiss the present appeal with costs.
  10. In this regard, the issues for determination herein are as contained in the grounds of appeal which are condensed to;
    - a. Whether the appellant is deserving of the orders sought in the memorandum of appeal.
    - b. Who should bear the costs of this appeal and at the trial court?
  11. It is trite that an appellate court has the mandate to reconsider the evidence on record with caution and reach its own independent conclusions and inferences; see Kiruga-vs-Kiruga and another (1988) eKLR.
  12. At the trial court, the plaintiffs/appellants herein sued the 1<sup>st</sup> defendant/respondent and other two defendants by way of a plaint dated 22<sup>nd</sup> March 2022 and filed on 23<sup>rd</sup> March 2022 for;
    - a. A declaratory order that the adjudication officer's decision to strike out the plaintiffs' names from the adjudication register was unlawful.
    - b. A declaratory order that the ensuing title deed issued to the 1<sup>st</sup> respondent is null and void.
    - c. An order of rectification of the register be issued on the Land Registrar, Homabay County.
    - d. That an order of permanent injunction do issue restraining the 1<sup>st</sup> respondent from trespassing into the two suit parcels, constructing any structures or ejecting the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs from the suit parcels, to wit, Central Karachuonyo/Kotieno/874 and 931.
    - e. That an order of permanent injunction do issue restraining the respondent herein either by himself, his servants, employees/agents from disposing/wasting the suit premises and in any other manner interfering with the suit properties pending the hearing and determination of the suit.
    - f. Costs of the suit.
    - g. Any other relief as the court may deem fit.
  13. In his statement of defence dated 23<sup>rd</sup> August 2022, the 1<sup>st</sup> defendant denied the plaintiff's claim and prayed that the suit be struck out and/or dismissed with costs. Further, he filed a notice of preliminary objection of even date wherein he raised the following points of law:



- a. That the court lacks jurisdiction to entertain the claim since it is time barred under Section 7 of the *Limitation of Actions Act*.
  - b. That the suit offends Section 26(1) and Section 29 of the *Land Adjudication Act*.
14. In the said plaint, the plaintiffs/appellants contend that they were the registered owners of the suit parcels of land. That on 22<sup>nd</sup> February 2001, the 2<sup>nd</sup> respondent issued a notice informing the public that the adjudication register for Kotieno Land Adjudication Section was complete and called on affected persons to raise objections within 60 days from the date of the notice. That the 1<sup>st</sup> respondent raised an objection via a letter dated 17<sup>th</sup> April 2001 seeking to have the names of the plaintiffs struck off and replaced by his. That the said objection was allowed and a transfer of the land parcels effected in the name of the 1<sup>st</sup> respondent herein.
  15. In his statement of defence, the 1<sup>st</sup> defendant/respondent stated that he was gifted land parcel number 874 by his mother Rispa Atika (deceased) during her lifetime. That regarding land parcel number 931, he purchased the same from one Dina Achieng Aganyo, the 2<sup>nd</sup> plaintiff's mother.
  16. The alleged gift and purchase occurred more than 20 years ago. Clearly, the cause of action in the suit arose in 2001 when the 2<sup>nd</sup> respondent allowed the objection raised by the 1<sup>st</sup> respondent regarding the two parcels of land. Nowhere in the plaint did the appellants indicate that they became aware of the fraud in the year 2022.
  17. I, therefore, endorse the learned trial magistrate's finding that the claim was time barred under Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. Besides, the appellants failed to exhaust the remedy of appeal as stipulated under Section 26(1) and Section 29 of the *Land Adjudication Act*, Chapter 284 of the Laws of Kenya.
  18. Indeed, equity under Article 10 (2)(b) of *the Constitution* of Kenya, 2010, aids the vigilant and not the indolent and delay defeats equity. In the case of Ibrahim Mungara Mwangi -vs- Francis Ndegwa Mwangi (2014) eKLR, the court quoted the following passage from Snell's Equity by John MC Ghee Q.C. (31<sup>st</sup> Edition) at page 99:
 

“...The Court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time...”
  20. In Owners of Motor Vessel Lillian “S”-vs-Caltex Oil (Kenya) Ltd (1989) KLR 1, it was noted that jurisdiction is everything. That without it, a court has no power to take one more step; see also Republic-vs-Karisa Chengo and 2 others (2017) eKLR.
  21. So, did the trial court have jurisdiction in respect of the dispute in the first instance? Evidently, the answer is in the negative in light of the foregoing.
  22. Furthermore, I subscribe to the decision in the case of Geoffrey Muthiga Kabiru and 2 others-vs-Samwel Munga Henry and 1756 others (2015) eKLR on the exhaustion doctrine. Indeed, the doctrine was not met as no appeal was preferred as prescribed under Section 26(1) and Section 29 (supra).
  23. In the premises, the trial court was devoid of jurisdiction over the suit which is a non-starter. Thus, the same is hereby struck out.
  24. Accordingly, this appeal is devoid of merit and is hereby dismissed with costs to the 1<sup>st</sup> respondent.
  25. Orders accordingly.



**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 1<sup>ST</sup> DAY OF NOVEMBER 2023.**

**G.M.A ONG'ONDO**

**JUDGE**

Present

1. C. Ombat, learned counsel for the 1<sup>st</sup> respondent
2. O. J. Okoth, learned counsel for the appellant
3. Mutiva, Court Assistant

