



Okoko (Suing as the Administrator of the estate of the late Peerlis Ojino Saoke) v Oyuko (Sued as the Administrator of the estate of the late Peter Oyuko Odero Deceased) & 2 others (Environment and Land Appeal E001 of 2020) [2022] KEELC 2426 (KLR) (6 May 2022) (Judgment)

Neutral citation: [2022] KEELC 2426 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E001 OF 2020**

A OMBWAYO, J

MAY 6, 2022

BETWEEN

**ZABLON OBURU OKOKO APPELLANT
SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE PEERLIS
OJINO SAOKE**

AND

**ELIZABETH AUMA OYUKO (SUED AS THE ADMINISTRATOR
OF THE ESTATE OF THE LATE PETER OYUKO ODERO
DECEASED) 1ST RESPONDENT
ELIZABETH AUMA OYUKO 2ND RESPONDENT
THE DISTRICT LAND REGISTRAR NYANDO/MUHORONI/NYAKACH
DISTRICT 3RD RESPONDENT**

*(Appeal from Judgment and decree of Honourable S. Temu, the
Senior Principal Magistrate at Nyando PMCC ELC No. 37 of 2018)*

JUDGMENT

Brief Facts

- 1 The appellant herein by way of a Plaint filed a suit on behalf of Peterlis Ojino Saoke (deceased) on March 20, 2017 which was later on amended on April 13, 2018 where he averred that deceased Peterlis Ojino Saoke was the registered proprietor and equitable owner of land parcel number Kisumu/Wangaya 1/3893 and upon his demise, his survivors continued residing and making use of the suit property. He pleaded that when the deceased's survivors went to conduct a search of the suit property for purposes of carrying out succession of the estate, they discovered that the deceased Respondent



Peter Oyuko Odera had lodged a caution against the suit property on March 23, 2003. It was the appellant's case that after that after the death of the deceased 1st respondent, the deceased appellant's survivors obtained a green card of the suit property for purposes of removing the caution but were shocked to find out that the green card and upon purchasing a map, it did not disclose the existence of the suit property.

- 2 He further averred that with the assistance of a qualified surveyor, he was able to locate the suit property in the map as land parcel number Kisumu/Wangaya 1/4776 and on the green card it indicated that the land initially belonged to the deceased Plaintiff as the first registered owner but later changed to the deceased 1st Defendant's name.
- 3 The appellant alleged that the 1st and later the 2nd respondents with the assistance of the 3rd respondent manipulated and fraudulently changed the upper part of the plaintiff's land from Kisumu/Wangaya 1/3893 To Kisumu/wangaya / 4776 before transferring the same to the respective names of the 1st and 2nd respondents.
- 4 The appellant therefore prayed for the following orders:
 - (a) A deceleration that the change of numbers of land parcel Kisumu/Wangaya 1/3893 To Kisumu/wangaya 1/4776 is illegal.
 - (b) An order compelling the 3rd defendant to revert the title Kisumu/Wangaya 1/4776 Back To Read Kisumu/Wangaya 1/3893.
 - (c) An order cancelling the names of the 1st and 2nd defendant from the title and the land revert back to the name of the deceased plaintiff Peterlis Ojino Saoke.
 - (d) Cots of this suit.
- 5 The respondents herein filed a joint defence and denied all the allegations on the plaint and stated that the plaintiff deceased Peterlis Ojino Saoke had sold them the suit property and he moved to Migori in the year 1985.

Grounds of Appeal

- 6 Aggrieved by the decision of the lower court, the appellant herein filed a Memorandum of Appeal which was based on the grounds that the Learned Trial Magistrate erred in both fact and law by:
 1. Dismissing the appellant's suit despite the fact that the appellant had demonstrated sufficient evidence to be entitled to the prayers sought and that the respondent never obtained any valid consent form the Land Control Board and no proper transfer documents were executed to enable the respondent hold any valid title deed.
 2. Finding that the suit was time barred under section 7 of the *Limitation of Actions Act* (cap 22) Laws of Kenya despite the overwhelming evidence that the Appellant only came to learn of the irregularity in the land parcel on 3rd September 2015 which was within the time frame set by law to bring this action.
 3. Finding that the appellant lacked locus to bring the suit and failed to appreciate that the appellant was the Administrator of the estate of the late deceased Appellant with legal authority to collate the estate and institute any suit on behalf of the estate as per the provisions of the *Law of Succession Act* (cap 160) Laws of Kenya.
 4. Misapprehending the evidence and determining the suit on no evidence.



5. Failing to consider the Appellant’s submissions before arriving at his decision.
6. The Judgment was against the weight of evidence.

The appellant prayed for the following orders:

- (a) The Appeal be allowed with costs.
- (b) The Judgment of the Honourable S. Temu , Senior Principal Magistrate in Nyando SPMC ELC No. 37of 2018 delivered on 27th August 2018 be set aside in its entirety and substituted with an order allowing the Appellant’s suit as pleaded in the Amended Plaintiff amended on April 13, 2018 that:
 - (i) A declaration that the change of numbers of the upper portion of land parcel Kisumu/Wangaya 1/3893 to Kisumu/Wangaya 1/ 4776 is illegal.
 - (ii) An order compelling the 3rd Defendant to revert the title Kisumu/Wangaya 1/4776 to read Kisumu/Wangaya 1/3893.
 - (iii) An order cancelling the names of the 1st and 2nd defendant from the title and the land to revert back to the name of the deceased plaintiff Peterlis Ojino Saoke (deceased).
 - (iv) An order compelling the District Land Registrar, Nyando to release the missing green card for land parcel Kisumu/Wangaya/1 /3893 to the Plaintiff.
 - (v) Costs of the suit.
- (c) The appellants be awarded the cost in the subordinate court.

The matter came up for Mention on November 8, 2021and the court ordered the Appeal be canvassed by way of written submissions and parties were to file and exchange submissions.

Appellant’s Submissions

- 7 The appellant filed his submissions on December 10, 2021 where he stated that this being a first Appeal, the court has to consider the evidence, evaluate it and draw its own conclusion and he relied in the case of *Kenya Ports Authority vs Kusthon (Kenya)Limited* 2000 2 EA 212.

The appellant raised the following issues for determination:

(i) Whether the Learned Trial Magistrate erred in law and fact in finding that the Appellant lacked locus to bring the suit.

- 8 It was submitted that as per section 39 of the *Law of Succession Act*, the appellant was of lesser priority to the deceased plaintiff’s children but the deceased children voluntarily granted their consent to the plaintiff to proceed with the matter on their behalf and the Limited Grant of Letters of Administration was issued to him. That the Appellant had locus to bring this suit having brought the same after obtaining legal authority to collate the estate and institute the suit on behalf of the deceased’s estate.

(ii) Whether the Learned Trial Magistrate erred in law and fact in holding that the Appellant had not proved the element of fraud.

- 9 The appellant relied on section 26 of the *Land Registration Act* and the case of *Elijah Makeri Nyangwira v Stephen Mungai Njuguna & another* (2013) eKLR where Munyao J held that “the title



- holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions”
- 10 He stated that he challenged the change of numbers of the upper portion of land parcel number Kisumu/Wangaya 1/3893 to Kisumu /Wangaya 1/4776 and produced evidence to the same which evidence indicated that as at August 28, 2015 and September 3, 2015, the suit parcels were still registered in the name of the deceased and that the change of ownership of land parcel number Kisumu/Wangaya 1/4776 was done in 2016 after the death of the deceased appellant.
- 11 It was the appellant’s submission that the 1st and 2nd respondents did not adduce any evidence showing that transmission was done prior to the transfer of the suit property to the name of the deceased 1st respondent and 2nd respondent. that the 1st and 2nd respondents maintained that the suit property was sold to them during the deceased appellant’s lifetime and produced a sale agreement to show the same and there was no proof that section 6 of the Land Control Act was complied with.
- 12 He further stated that the transfer document relied by the 1st and 2nd respondent was never executed by the deceased nor presented to the Land’s office for registration and the green card showed that land parcel Kisumu/Wangaya 1/4776 was transferred to the deceased 1st respondent on April 2, 2008 and the 2nd respondent on May 3, 2015 which differs from the certificate of official search of the parcels of land which show that the deceased 1st respondent placed a caution on both parcels on 17th February 2010 claiming purchaser’s interest.
- 13 It is the appellant’s submission that his documents were disregarded by the trial court despite being produced as exhibits. The admissibility and/or proof of a document is determined at time of production and once it is produced as an exhibit, the document is deemed as formally proved, admitted in evidence and forms part of the court records. The appellant placed reliance in the case of South Nyanza Sugar Co Ltd v Mary A Mwita & another (2018) eKLR. He submitted that if the trial court considered the documents, it would have established the aspect of fraud as presented by the appellant as DW1 admitted that transfer of the suit property was done after the death of the deceased appellant and she failed to explain how the transfer was done after the deceased appellant was dead.
- 14 He further submitted that the creation of land parcel number Kisumu/Wangaya 1/4776 and its transfer to the 1st and 2nd respondents was done after the death of the deceased appellant, there was no succession proceedings instituted with respect to the deceased appellant’s estate before the said transfer. He relied in the case of Zacharia Wambugu Gathimu & another v John Ndungu Maina (2019) eKLR.

(iii) Whether the Learned Trial Magistrate erred in law and fact in holding that the suit is statute barred under section 7 of the Limitation of Actions Act.

- 15 It is the Appellant’s submission that the trial court agreed with the submissions of the 1st and 2nd respondents that the suit is statute barred. the 1st and 2nd respondents began using the suit property with permission of the deceased appellant as the appellant believed that they were using the land based on the agreement the deceased appellant had with the deceased 1st respondent’s father. That it was until 2016 that the appellant discovered the fraudulent change of the suit parcel land and the subsequent transfer.
- 16 It was stated that the time stipulated under section 7 of the Limitations of Actions Act did not begin to run until after the discovery of fraud on the part of the Respondents. Reliance was placed in the case of Daniel G Mwangi & another v Leiyan Tumuti (2018) eKLR. The Appellant submitted that the Learned Trial Magistrate erred in law and fact in holding that the suit is statute barred.



17 The appellant further stated in his submissions that the trial court erred in failing to properly evaluate the entire evidence on record and therefore this court has a duty to re-evaluate, re-assess and re-analyze the evidence of record to determine whether the conclusions of the trial court should stand or be varied and set aside. He therefore prayed that the Appeal be allowed, the Judgment of the trial court be set aside and Judgment be entered in his favour.

1st and 2nd Respondents Submissions.

18 The 1st and 2nd respondents filed their submissions on February 22, 2022 where the following issues were raised for determination:

(a) Whether the 1st and 2nd Respondents legally acquired the parcels of land in question.

19 It was stated that the parcels in question were sold to the 1st respondents (deceased) by the deceased appellant in 1985 through and Agreement for Sale dated June 18, 1985. That land parcel number Kisumu /Wangaya 1/3893 measuring ½ an acre was sold at Kshs. 750/= while land parcel number Kisumu/Wangaya 1/4776 measuring 4 acres was sold at Kshs. 6000/=. The Agreement was signed by both parties in the presence of the then Resident Magistrate at Nyando Law Court and later on transfer was effected by the parties and the parcels were transferred to the 1st respondent. that the 2nd respondent acquired the suit parcels by her husband transferring the same to her before his demise and a title deed was issued.

20 That even though the appellant has raised issues of change of land parcels to read two different parcels, failure of the parties to execute the transfer forms and lack of the land control board consent, it is the 1st and 2nd respondent's submission that the Agreement for Sale clearly indicated the parcels were located at Maska Wangaya One Sub Location . East Kano Location and had different acreages. On the issue of execution of the transfer forms and the land control board forms, the 2nd respondent during trial stated that all transactions were handled by her deceased husband.

21 The deceased appellant died on 1997 and had sold the two parcels to the 1st respondent in 1985 making it 12 years and no issues were raised that the 1st and 2nd respondents were illegally occupying the land. The appellant also testified that he never saw or heard the family of the deceased appellant make any claims about the suit properties.

22 It was submitted that the transfer of land from the deceased appellant to the 1st and 2nd respondents was done procedurally and the 2nd respondent is the lawful owner of the suit properties therefore the appellant is not in any way entitled to the same.

(b). Whether the Appellant has locus to institute these proceedings?

23 It was stated that the Trial court held that the Appellant did not have locus to institute these proceedings as required under section 29 of the *Law of Succession Act*. He also sought for orders that the suit parcels be registered in his name which is irregular as the deceased appellant had children who ought to represent the estate. That the appellant has not established how he was aggrieved in the case herein and therefore the suit parcels cannot be registered in his name.



(c) Whether the Appellant’s case is time barred.

24 As per section 7 of the *Limitations Act*, the suit is time barred and in the case of *Gathoni v Kenya Cooperative Creameries Ltd* (1982) KLR 104 the court held as follows:

...The Law of Limitation of Actions is intended to protect respondents’ against unreasonable delay in the bringing of suits against them. The statute expects the intending appellant to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound .But, rightly or wrongly, the Act does not help persons like the applicant who whether through dilatoriness or ignorance, do not do what the informed citizen would reasonable have done”

25 In the case of *Mehta v Shah* (1965) EA 321, Grabbie JA in his Judgment stated as follows:

The object of any limitation enactment is to prevent an Appellant from prosecuting stale claims on the one hand, protect a Respondent 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 f the particular case”.

(d) Whether the Appellant has proved fraud

26 It was submitted that the appellant never proved fraud to the required standard and reliance was placed in the case of *Kibiro Wagoro Makumi v Francis Nduati Macharia & another* (2018) eKLR, *RG Patel v Lalji Makanji* (1957)EA 314, *Koinange & 13 others* (1986) e KLR and *Mutsonga v Nyati* (1984) EA 425.

(e) Whether the Respondents have a claim through adverse possession.

27 It was the 1st and 2nd respondents’ submissions that they are entitled to the suit property through adverse possession as was in the case of *Mtana Lewa vs Kabindi Ngala Mwagandi* (2015) eKLR where the court held that adverse possession was neither arbitrary nor an unconstitutional limitation of the right to property. In *Mate Gitabi v Jane Kabubu Muga alias Jane Kaburu Muga & 3 others* (2017) eKLR the court stated as follows:

For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. The elements are contained in the Latin maxim *nec vi, nec clam, nec precario*.”They also relied in the case of *Kasuve vs Mwaani Investments Limited & 4 others* (2004) 1 KLR.

(f) Whether the Appellant is entitled to the remedies sought.

28 The 1st and 2nd respondents relied on section 107 of the *Evidence Act* and submitted that the appellant has failed to prove his case on a balance of probability as he failed to produce evidence to show that the suit parcels belong to him or were illegally acquired.

29 The 1st and 2nd respondents therefore prayed that the Appeal be disallowed and Judgment of the Trial Magistrate be upheld against the appellant and costs be awarded to them.



Analysis and Determination

- 30 This court has looked into the Pleadings, the evidence on record and the submissions filed by the parties and is of the view that the following issues need to be determined:
- (a) Whether the appellant has locus to institute these proceedings.
 - (b) Whether the appellant has proved fraud on the part of the respondents.
 - (c) Whether the 1st and 2nd respondents have a claim through adverse possession.
 - (d) Whether the appellant's case is time barred.

Whether the Appellant has locus to institute these proceedings?

31 The appellant alleged to be an uncle to the deceased Peterlis Ojino Saoke who moved to Migori together with his family in 1986. His children are over 30 years and are in a position to take out letter of administration so as to sue or be sued on behalf of the estate of their father.

32 The *Succession Act* under section 29 defines who is a dependant, it states, For the purposes of this part, "dependant" means-

- a) the wife or wives, or former wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- b) such of the deceased's parents, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- c) where the deceased was a younger woman, her husband if he was being maintained by her immediately prior to the date of her death.

33 In the case of *Law Society of Kenya v Commissioner of Lands & others*, Nakuru High Court Civil Case No.464 of 2000, the court held that :-

Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in Court of Law". Further in the case of *Alfred Njau and others v City Council of Nairobi* (1982) KAR 229, the Court also held that:-

"the term *Locus Standi* means a right to appear in Court and conversely to say that a person has no *Locus Standi* means that he has no right to appear or be heard in such and such proceedings".

34 During hearing at the trial court, the appellant confirmed that he is an uncle to Peterlis Ojino Saoke and not his biological father and in his witness statement, he indicated that the children of the late Peterlis Ojino Saoke requested him to pursue the land matter. The appellant has also stated in his submissions that the children of the late Peterlis Ojino Saoke voluntarily gave him consent to pursue the matter but he failed to prove via documentation whether the said consent was granted to him as required under the *Law of Succession Act*. The children of the late Peterlis Ojino Saone did not appear before the trial court to prove the allegation that the appellant herein was pursuing the matter on their behalf.

35 I have also seen that there is a Limited Grant of Letters of Administration issued to the appellant herein in order for him to administer the estate of Peterlis Ojino Saoke. It is this court's view that since the



children of the deceased are alive, they are the ones to take out Letters of Administration for the estate of the Late Peterlis Ojino Saoke and therefore he does not have locus to institute this suit.

Whether there was fraud on the part of the Respondents.

36 The appellant in paragraph 10 of the plaintiff averred that the 1st and 2nd respondent with the assistance of the 3rd respondent fraudulently changed the deceased's land from Kisumu /Wangaya 1/3893 to Kisumu /Wangaya 1/4776 by manipulating the cards at the lands office, transferring the deceased's land to their names without succession, trespassing to the deceased's land and altering the details of parcel numbers in the registry index map.

Section 26 of the [Land Registration Act](#), Act No 3 of 2012 provide as follows:

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

37 In the case of [Denis Noel Mukhulo Ochwada & another v Elizabeth Murungari Njoroge & another](#) [2018] eKLR. The court stated that:-

As regards standard of proof of fraud, the law is quite clear. In *R G Patel v Lalji Makanji (supra)*, the former Court of Appeal for Eastern Africa stated thus:-

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

38 In the case of [Urmilla w/o Mahendra Shah v Barclays Bank International Limited & another](#) [1979] KLR 76; [1976-80] 1KLR 116B it was held that:

“allegations of fraud must be strictly proven and that although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. A higher standard of proof is required to establish such findings, proportionate to the gravity of the offence concerned”.

39 Pursuant to an Agreement for Sale dated June 11, 1985 between Peterlis Ojino and Peter Oyuko Odero, the Agreement clearly indicates that the late Peterlis Ojino Saoke sold the two parcels of land that is Kisumu Wangaya 1/3893 and Kisumu /Wangaya 1/4776 to the late Peter Oyuko Odero at a consideration of Kshs. 750/= and Kshs. 6,000/= respectively.

40 A copy of the green card produced indicates that land parcel number Kisumu /Wangaya 1/4776 was registered in the name of the Peterlis Ojino Saoke which was transferred to the Peter Oyuko Odero and later on transferred to Elizabeth Auma Oyuko. This court has also looked at the two searches produced by the Appellant during trial and for land parcel number Kisumu/Wangaya/1/3893 and Kisumu /



Wangaya 1/4776, it indicates that the suit property is registered in the name of Peterlis Ojino Saoke and a caution registered in favour of Peter Oyuko Odera.

- 41 Although the appellant has stated in his submissions that the search and the green card differ. This court has looked into the documents and is of the view that the green card indicates that land parcel number Kisumu /Wangaya 1/4776 was transferred to the 1st Respondent on April 2, 2008 while the search indicates that a caution was lodged by the 1st respondent on February 17, 2010. The 1st respondent died in the year 2015. I am of the view that the suit properties were transferred to the 1st respondent who later on registered a caution before he passed on.
- 42 It is the duty of the appellant to prove fraud on the part of the respondents. The 2nd respondent produced a transfer document which indicated that the suit property was transferred to her husband's name. Although the appellant alleged that the transfer document produced by the 2nd respondent was not executed but the property was transferred to the 1st respondent and later on to the 2nd respondent, he ought to have proved that the transfer was not rightfully done.
- 43 This court finds that the appellant has failed to prove fraud to the required standard since he alleged that there was change of title number of the suit properties but has failed to prove how the change was done. The appellant has also failed to prove how the 1st and 2nd respondents illegally acquired the suit properties. It is the finding of this court that the 1st and 2nd respondent legally acquired the suit properties.

Whether the 1st and 2nd Respondents have a claim through adverse possession.

- 44 The 1st and 2nd respondents in their submissions submitted on the issue of whether they have a claim through adverse possession. It is this court's view that the 1st and 2nd respondents are introducing a new claim which ought to have been made while filing their Defence. This court is not in a position to address the same as the issue of adverse possession was not raised at the trial court.

Whether the Appellant's case is time barred.

- 45 Section 7 of the *Limitation of Actions Act* provides as follows;

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."

- 46 In the case of *Edward Moonge Lengusuranga v James Lanaiyara & another* [2019] e KLR, it was held as follows;

Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the first defendant having bought the suit land in the year 1999 (as per Paragraph 6 of the Plaintiff) and taken possession of the same, the plaintiff herein could only seek to recover it from the 1st defendants, but only if he did so within twelve years after the Sale Agreement."

- 47 It is clear from the evidence on record that the 1st and 2nd respondents entered into the suit parcels in the year 1986 and they have been in occupation of the suit properties since then. The appellant had full knowledge that the 1st and 2nd respondents have been in occupation of the suit properties since then and that the deceased appellant moved to Migori with his family after selling the suit properties.



48 The late Peterlis Ojino Saoke sold the suit properties in the year 1985 as per the Agreement for Sale produced by the 2nd respondent herein. It is clear that this suit was brought to court in the year 2018 that is 30 years after the sale of property. It is the court's finding that this suit is time barred. Based on the above analysis, I do find that the appellant herein has failed to prove fraud on the part of the respondents, he lacks locus to institute this suit and that the suit is time barred. In the upshot, this Appeal is hereby dismissed with costs to the Respondents.

DATED AT KISUMU THIS 6TH DAY OF MAY, 2022

ANTONY OMBWAYO

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JUDGE

This judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE

