



Onyango & another (Both suing as the Legal Representatives of the Estate of Grace Okumu Onyango) v Otoy & 17 others (Environment and Land Case Civil Suit 44 of 2020) [2022] KEELC 2390 (KLR) (2 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2390 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND CASE CIVIL SUIT 44 OF 2020
AY KOROSS, J
JUNE 2, 2022
FORMERLY KISUMU ELC E3 OF 2020**

BETWEEN

**MARY GORRETY AKINYI ONYANGO 1ST PLAINTIFF
MILLICENT ATIENO HESMER 2ND PLAINTIFF
BOTH SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF
GRACE OKUMU ONYANGO**

AND

**JAMES ONYANGO OTOYI 1ST DEFENDANT
PETER ONYANGO ODUNDO 2ND DEFENDANT
PRISCAH ANYANGO OMONDI 3RD DEFENDANT
JENNIFER N. OMWANDA 4TH DEFENDANT
WILKISTER ADHIAMBO OGAMBI 5TH DEFENDANT
PAUL ANYIGO ONYUOGO 6TH DEFENDANT
WALTER OWUOR NYAMOLO 7TH DEFENDANT
CHARLES OGARA AUNGO 8TH DEFENDANT
PATRICIA AWUOR OKOTH 9TH DEFENDANT
SAMSON AULO OORO 10TH DEFENDANT
JOSEPH AGWINGI ONYANGO 11TH DEFENDANT
EDWARD ODHIAMBO WERE OLOO 12TH DEFENDANT
MICHAEL OTIENO OLANGO 13TH DEFENDANT**



GEORGE NDONGA SIRRO	14 TH DEFENDANT
STEPHEN JACOB OTUKA	15 TH DEFENDANT
ALICE OKUMU RAWAGO	16 TH DEFENDANT
NOMIYA CHURCH BONDO-JERUSALEM DIOCESE	17 TH DEFENDANT
BONDO SUBCOUNTY REGISTRAR OF LANDS	18 TH DEFENDANT

RULING

1. On 23/09/2020, the plaintiffs filed a plaint dated 22/09/2020 against the 1st, 2nd and 3rd defendants. With leave of the court, it was later amended to include the 4th to 18th defendants as additional defendants. The claim is on fraud and illegality against the defendants for excising and subdividing land parcel number North Sakwa/Nyawita/1709 (“the suit property”) into several parcels of land.
2. The 7th and 16th defendants raised a preliminary objection dated 24/01/2022 on the following grounds;
 - a) Within the provisions of section 7,26 and 27 of the *Limitation of Actions Act*, the suit is statutory barred;
 - b) The suit offends article 40(2) of the *Constitution* and section 26(1) of the *Land Registration Act*;
 - c) The suit offends section 82 (a) of the *Law of Succession Act*; and
 - d) The suit is frivolous, vexatious and an abuse of the court process.
3. As directed by the court, parties disposed of the preliminary objection by way of written submissions.

Defendant’s written submissions _

4. The 7th and 16th defendants filed written submissions dated 30/3/2022.
5. On the 1st ground they contended that the plaintiffs’ claim against the 1st defendant on recovery of land parcel number North Sakwa/Nyawita 1976 was statutory barred for being filed outside the statutory period of 12 years. He placed reliance on the authority of *Edward Moonge Lengusuranga v James Lanaiyara & another* (2019) and that limitation of action started running afresh each time there were changes in title. On this he relied on the case of *Kimani Rubine & anor v Swift Rutherford & Co. Ltd & anor* (1980) KLR 1. He submitted that pegging on various parameters, the 7th defendant had either been in occupation and possession of a portion of the suit property for a period of either 36, 28 or 14 years. He asserted that if the claim was on fraud, then the suit was statutory barred.
6. On the 2nd ground, he contended by virtue of section 26 of the *Land Registration Act*, he was the absolute and indefeasible owner of North Sakwa/Nyawita 1976 because he was the registered owner. He relied on the authority of *Propwa Company Limited v Justus Nyamo Gatondo & another* (2020) eKLR. He abandoned the ground on article 40(2) of the *Constitution*.
7. On the 3rd ground, he submitted that the plaintiffs had contravened the provisions of section 82 of the *Limitation of Actions Act* by failing to obtain of letters of administration in respect of the estate of Grace Okumu Onyango and they relied on the case of *Touristic Union International & another v Jane Mbeyu & another* 1993 (eKLR) which stated that plaintiffs who do not have locus standi cannot institute suit on behalf of an estate of a deceased person.



8. None of the authorities cited were availed to this court and as it is, this court will not belabour in referring to them. He concluded that as demonstrated by the three grounds, the suit was frivolous, vexatious, did not disclose a cause of action and was an abuse of the court process; this was his 4th ground.
9. In support of the preliminary objection, the 2nd, 10th and 17th defendants filed written submissions dated 21/03/2022. Because of the similarity of the two submissions, this court will not belabour in reiterating them.
10. The 15th defendant associated himself with the submissions of the 7th and 16th defendant.

Plaintiffs' submissions

11. The plaintiffs filed written submissions dated 19/04/2022. They contended that the 1st ground required facts to establish the veracity of the 7th defendant's claim of possession and occupation. They submitted that they filed the claim in Kisumu ELC No. E3 of 2020 on 23/09/2020 before it was transferred to Siaya ELC and at that time, they did not know who the occupiers of the suit property were. They placed reliance on the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR where the court addressed its mind on adverse possession.
12. On the 2nd ground, they asserted that the defendants had acquired the suit property fraudulently, illegally, unprocedurally, through a corrupt scheme and or misrepresentation which required proof.
13. On the 3rd ground, they contended that they had obtained limited letters of administration ad litem for purposes of filing suit. His 4th ground was a summation of the other grounds.

Analysis and determination

14. The case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 has long settled the principle of what amounts to a preliminary objection as thus;

“So far as I am 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.” [Emphasis added].
15. Any allegation under a preliminary objection that professes to be one must not deal with facts in dispute and it must not be based on factual information which stand to be tested by normal rules of evidence. Against this backdrop, are the grounds pure points of law
16. On the 1st ground. It is not in doubt that determining whether or not a suit is statutory barred does not ordinarily require the court to ascertain the facts and or evidence and therefore it falls within the spectrum of a preliminary objection. This court is called upon to look at the cause of action vis a vis the relevant legal provisions on limitation of actions.
17. Section 7 of the *Limitation of Actions Act* limits the period of time for a cause of action in land to 12 years. Section 26 of the same Act provides that if the action is for a relief from the consequences of a mistake or fraud then the period of limitation does not begin to run until a plaintiff has discovered the fraud or the mistake or would with reasonable diligence have discovered it.
18. In the case of *Edward Moonge Lenguuranga v James Lanaiyara & another* (2019) eKLR, the court defined a cause of action as a set of facts sufficient to justify a right to sue to obtain property or



enforcement of a right against a party. Looking at the plaint, the main course of action was fraud over the suit property and consequently, the plaintiffs could seek refuge in section 26 of the Limitation of Actions Act. Being a tortious action within the provisions of section 4 (2) of the Limitation of Actions Act, time would have started running three years from when the plaintiffs discovered the fraud.

19. The plaintiffs claimed they discovered the fraud in 2017; the month and year was not indicated. The claim was filed on 23/09/2020 against the 1st to 3rd defendants and against the 18th defendant as an interested party. Three years had not lapsed. On 29/11/2021, the plaintiffs with leave of the court filed an undated amended plaint which joined the 4th to 18th defendants. Was the suit statutory barred against the 4th to 18th defendants?
20. From the plaint, the alleged fraudulent and illegal activities could all be traced to the suit property and the cause of action against the 4th to 18th defendants arose from the same facts raised by the plaintiffs in their initial claim and therefore I am of the considered view that their suit was not statutory barred. When handling a similar matter, Nambuye J as she then was in the case of Yusuf Abdallah Gitau v The Building Centre (K) Ltd (2007) eKLR stated thus;

“This means that all persons whose activities contributed to the action herein and those who claim through the defendant sued or through whom the defendant sued claims are covered by the action in so far as the action herein is concerned and the period of limitation does not affect them.”

It is my finding that the cause of action was not statutory barred and the 1st ground fails.

21. The 2nd ground, does not fall within the ambit of a preliminary objection. The 7th and 16th defendants contended that by virtue of section 26 of the Land Registration Act, they are the absolute and indefeasible owners of North Sakwa/Nyawita 1976 while the plaintiffs in their claim averred that the title documents held by the defendants were fraudulently acquired. The facts are disputed by the opposing parties and the court has to interrogate the evidence by a full hearing in order to disprove the contested facts.
22. The 3rd ground is on locus standi. Locus standi goes to the root of a case because lack of capacity to sue or be sued renders a suit incompetent and therefore falls within the ambit of a preliminary objection. Oundo J in the case of Ephantus Njuguna Mura v Lucy Wanjiru Njuguna & 5 others [2018] eKLR cited with approval the Court of Appeal decision of Alfred Njau & others v City Council of Nairobi [1982-88] 1 KAR 229 which stated thus;

“.....to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”

23. The 7th and 16th defendant contestation on the 3rd ground that the plaintiffs were not the administrators of the Estate of Grace have been rebutted by the plaintiffs who have asserted that they obtained letters of administration ad litem. Just as the 2nd ground, this disputed fact has to await a full hearing. See Lemitei Ole Koros & another v Attorney General & 3 others (2016) eKLR.
24. The upshot is that I find the preliminary objection not merited and because costs follow the event, I award costs to the plaintiffs and issue the following disposal orders;
 - a) The preliminary objection dated 24/01/2022 is hereby dismissed with costs to the plaintiffs.



- b) Plaintiffs to file a supplementary list of documents within 14 days from today containing all the registers of the suit property from the date of 1st registration and all other registers subsequent to the subdivision of the suit property.
- c) Plaintiffs to serve the defendants with all pleadings within 14 days from today and file a return of service 3 days before the mention date.
- d) Defendants at liberty to file their pleadings.
- e) Parties to fully comply with Order 11 of the [Civil Procedure Rules](#).
- f) Matter to be mentioned before the Deputy Registrar for pretrial directions on 27/07/2022

DELIVERED AND DATED AT SIAYA THIS 2ND DAY OF JUNE 2022.

HON. A. Y. KOROSS

JUDGE

2/6/2022

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

M/s Machio for the 15th defendant

Mr. Juma for 7th and 16th defendant

Mr. Bosire for the plaintiff

Mr. Ochieng for the 3rd defendant

Mr. Mulinge for the 6th defendant

Court assistant: Ishmael Orwa

