



**Andadi Oyatsi & 2 others v Peter Ignatius & 3 others (Environment and Land Case Civil Suit E022 of 2021) [2022] KEELC 4770 (KLR) (2 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4770 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND CASE CIVIL SUIT E022 OF 2021  
MAO ODENY, J  
SEPTEMBER 2, 2022**

**BETWEEN**

**DESTERIO ANDADI OYATSI ..... 1<sup>ST</sup> APPLICANT  
KENETH HAMISH WOOLER KEITH ..... 2<sup>ND</sup> APPLICANT  
ELISABETH KLEM (UING AS EXECUTORS OF THE ESTATE OF THE LATE  
KIPYATOR NICHOLAS ) ..... 3<sup>RD</sup> APPLICANT**

**AND**

**PETER IGNATIUS VAG ..... 1<sup>ST</sup> RESPONDENT  
FARIDA VAZ ..... 2<sup>ND</sup> RESPONDENT  
THE LAND REGISTRAR, KILIFI ..... 3<sup>RD</sup> RESPONDENT  
HON ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of a notice of motion dated March 24, 2021 by the plaintiff/applicants seeking the following orders:
  1. Spent.
  2. Spent.
  3. Spent.
  4. That this honourable court do issue an order of temporary injunction pending the hearing and determination of the main suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents, their servants, employees, agents, heirs and dependents restraining them from transferring, alienating and/or carrying out any further development of all that property known as Kilifi/Jimba/362.



5. That this honourable court be and is hereby pleased to grant an order directing the officer commanding station Kilifi Police Station to ensure compliance with prayers 2 and 4 above; and
  6. Costs of this application be provided for.
2. The 3<sup>rd</sup> and 4<sup>th</sup> defendant/respondents filed a Notice of Preliminary Objection dated May 10, 2021 on the ground that the suit is statute barred under section 7 of the Limitation of Actions Act cap 22.

The application was supported by the grounds on the face of the application and the supporting affidavit of Elisabeth Klem sworn on March 24, 2021. According to Elisabeth, the land known as Kilifi/Jimba/362 (the suit property) was allocated to Nicholas Kiprono Biwott (deceased) on June 21, 1979 by way of adjudication and title issued to him.

3. That on July 19, 2008, the 3<sup>rd</sup> defendant/respondent issued to the 1<sup>st</sup> and 2<sup>nd</sup> defendant/respondents a second title over the suit property. As a result, the plaintiff/applicants have been unable to access the suit property due to the presence of goons planted on the suit property.

The 2<sup>nd</sup> defendant opposed the application and *vide* a replying affidavit dated November 29, 2021 where she deponed that she purchased the suit property together with the 1<sup>st</sup> defendant/respondent and took possession from the year 2008 by constructing a perimeter wall and a servants' house who have been in continuous occupation without any interference. According to the 2<sup>nd</sup> defendant, they undertook due diligence prior to purchasing the suit property and there was no parallel title against the same

Counsel agreed to canvas the application and the preliminary objection *vide* written submissions which were duly filed.

### **plaintiffs/applicants' Submissions**

4. Counsel identified three issues for determination namely; whether the court should issue an order of temporary injunction against the 1<sup>st</sup> defendant/respondent; whether the suit is statute barred; and who should bear the costs of the application.

On the first issue, the plaintiff/applicants relied on order 40(1) (a) and (b) of the Civil Procedure Rules, the Black's Law Dictionary 8<sup>th</sup> edition for the definition of an injunction; the cases of Giella v Cassman Brown & Company Limited [1973] EA 358 and Robert Mugo wa Karanja v Ecobank [Kenya] Limited & another [2019] eKLR on the conditions to be met in granting an injunction.

5. Counsel submitted that the applicants have met the conditions for grant of injunction further that the 2<sup>nd</sup> defendant admitted being in occupation of the suit property.

On the issue whether the plaintiffs have established a *prima facie* case, counsel relied on the case of Moses C Mubia Njoroge & 2 others vs Jane W Lesaloi and 5 others, (2014) eKLR and stated that there is a dispute as to who is the rightful owner of the suit land which each party has a duty to explain how they acquired the suit property. Counsel further cited the case of Shiva Carriers Limited v Imperial Bank Limited & another [2018] eKLR where the court held thus:

That need for an explanation is enough for a court to say that let the *status quo* now prevailing be maintained by way of a temporary injunction pending such explanation at the hearing and determination after the explanation.”

6. On whether the plaintiffs/applicants will suffer irreparable harm which would not adequately be compensated by way of damages, counsel cited the cases of Banis Africa Ventures Limited v National Land Commission [2021] eKLR and Charity Njeri Kanyua v Trevor Kent [2016] eKLR and submitted



that the applicants are likely to suffer irreparable harm since the 2nd defendant/respondent is likely transfer, alienate or carry out further developments on the suit property.

Mr Odoyo submitted that the balance of convenience tilts in favour of the applicants on the grounds that the 2nd defendant/respondent might dispose of the property and that the defendant will not be capable of compensating the plaintiff/applicants for any loss incurred. Counsel relied on the case of [Paul Gitonga Wanjau vs Gathuthis Tea Factor Company Ltd & 2 others](#) (2016) eKLR, where the court explained the issue of balance of convenience.

7. On the preliminary objection, Mr Odoyo submitted that time started running on February 15, 2019 when the National Land Commission took over the matter to review grants issued in Kilifi County. The decision of the NLC confirming ownership of the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> defendants was delivered and communicated on the February 15, 2019.

Counsel relied on the cases of [Desterio Andadi Oyatsi & others \(suing as the executors of the estate of late Kipyator Nicholas Kiprono Biwott\) v Stephen Charo Nzai & 2 others](#), Malindi ELC No 21 of 2021 and [Edward Moonge Lengusuranga v James Lanaiyara & another](#) [2019] eKLR where the courts explained that under section 7 of the [Limitation of Actions Act](#), time starts to run when an applicant discovers the fraud. Counsel therefore urged the court to allow the application and dismiss the preliminary objection with costs.

### 2nd Defendant/Respondent's Submissions

8. Counsel submitted that the plaintiff/applicants have failed to establish a *prima facie* case as defined in the case of [Mrao Ltd v First American Bank of Kenya Ltd](#) [2003] eKLR, on the grounds that they have failed to prove that they are the rightful owners of the suit property as required under section 107 of the [Evidence Act](#).

It was counsel's further submissions that the defendant/respondents stand to suffer irreparable loss since they commenced developments in 2008 hence the balance of convenience tilts in their favour and cited the case of [Paul Gitonga Wanjau v Gathuthi Tea Factory Co Ltd & 2 others](#) [2016] eKLR(supra).

9. On whether the suit is time barred, it was the 2<sup>nd</sup> defendant/respondent's submission that the cause of action arose in 2008 thereby making the present suit filed in 2021 statute barred by virtue of section 7 of the [Limitation of Actions Act](#).

### 3rd And 4th Defendants/respondents Submissions

10. Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> defendant/respondents submitted that from the reading of the plaint, the cause of action arose on July 29, 2008 thereby making the present suit time barred by virtue of section 7 of the [Limitation of Actions Act](#) and relied on the case of [Iga v Makerere University](#) [1972] EA 65}.

Counsel further submitted that section 26 of the [Limitation of Actions Act](#), which provides that the period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake and such burden to prove such discovery was upon the plaintiff as was held in the case of [Margaret Wairimu Magugu v Karura Investment Limited & 4 others](#) [2019] eKLR.

Counsel also cited the case of [Esther Chemutai Keter vs David Kipkorir Koeh & 3 Others](#) (2021) eKLR and urged the court to uphold the preliminary objection as the suit is time barred.

### Analysis And Determination

11. The court had given directions the application and the preliminary objection be heard together of which counsel filed submissions. I will therefore deal with the preliminary objection which has the



ability to dispose of a suit if it is upheld. What constitutes a preliminary objection was determined in *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* (1969) EA 696 where the court explained as follows:

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... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

12. The issues must be purely on points of law where the court will not go outside the pleadings to look for facts and other extraneous supporting evidence.

The issue for determination in this preliminary objection is whether the plaintiffs’ suit is time barred as stipulated under section 7 of the [Limitation of Actions Act](#) which provides as follows:

### **Actions to Recover Land**

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.”

13. An issue of limitation of actions is a point of law which can be dealt with as a preliminary objection. It is on record that this matter was subject of an inquiry in 2014 by the National Land Commission whereby the National Land Commission invited the public to make their representations in support of their claim for ownership of properties situate within Kilifi County as the newspaper advert dated January 22, 2016 which was annexed to a supplementary affidavit dated February 23, 2022. It is further averred that the public hearings were conducted on 8<sup>th</sup> to October 12, 2018 at Watamu CDF and that a determination was communicated *vide* a Gazette Notice Vol CXXI No 21 Number 1549 of February 15, 2019 confirming the 1<sup>st</sup> and 2<sup>nd</sup> defendants’ proprietorship. There is an ongoing process of ascertaining the rightful owner of the suit land which there is allegations of fraudulent registration.
14. It is trite that where there is an allegation of fraud, the time starts running when the plaintiff detected/ discovered the fraud. In this case the matter was handled by the National Land Commission from 2014 and the outcome of the public hearings culminated in a verdict which necessitated the filing of this suit for implementation of the said verdict.

Section 26 of the [Limitation of Actions Act](#) provides:

Extension of limitation period in case of fraud or mistake Where, in the case of an action for which a period of limitation is prescribed, either—

- a. the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- b. the right of action is concealed by the fraud of any such person as aforesaid; or
- c. the action is for relief from the consequences of a mistake,



15. The period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.

The plaintiffs are under a duty to explain when they detected the alleged fraud of which they have ably demonstrated that they discovered the alleged fraud sometime in September 2015 when they learnt of the claim on the suit property by the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents after the National Land Commission invited the public to make their presentations in support of their claims for ownership of properties within Kilifi County. It is evident therefore that NLC took over the matter in 2015 and delivered a verdict February 15, 2019, in favour of the 1<sup>st</sup> and 2<sup>nd</sup> defendants that necessitated the filing of the present suit. In the circumstances, it is evident that time started running on February 15, 2019 which in effect makes the suit within the statutory provision hence the preliminary objection lacks merit.

16. On the issue as to whether the plaintiff is entitled to an order of temporary injunction, the plaintiffs admitted that the 1<sup>st</sup> defendant is in occupation and the he may transfer the suit land to other parties to the detriment of the plaintiffs.

The purpose of interlocutory injunctions is to preserve the substratum of the case which is the suit land from being alienated or wasted by a party. I have considered the pleadings, the application and the preliminary objection and find that the order suitable to grant is that the status quo prevailing as the time of filing this suit be maintained and that the preliminary objection is dismissed with costs to the plaintiffs. Parties to comply with order 11 within 30 days.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 2ND DAY OF SEPTEMBER, 2022.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

