



**Tuiser & 10 others v Attorney General & 2 others; Chepkoga (Suing on their own behalf and on behalf of the members of the Changach) & another (Interested Parties) (Environment and Land Appeal 7 of 2022) [2022] KEELC 14500 (KLR) (2 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14500 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT ITEN**  
**ENVIRONMENT AND LAND APPEAL 7 OF 2022**  
**L WAITHAKA, J**  
**NOVEMBER 2, 2022**

**BETWEEN**

**WILSON KIPROP TUISER ..... 1<sup>ST</sup> PETITIONER**  
**HATHAN KIPKURGAT LIMO ..... 2<sup>ND</sup> PETITIONER**  
**DAVID KIGEN ..... 3<sup>RD</sup> PETITIONER**  
**JOHN KIPLAGAT SAWE ..... 4<sup>TH</sup> PETITIONER**  
**KIPTANUI CHEMWENO ..... 5<sup>TH</sup> PETITIONER**  
**JONATHAN CHEMWENO ..... 6<sup>TH</sup> PETITIONER**  
**JONATHAN AYABEI ..... 7<sup>TH</sup> PETITIONER**  
**WILSON KIPRONO ..... 8<sup>TH</sup> PETITIONER**  
**BARMASAI SAWE ..... 9<sup>TH</sup> PETITIONER**  
**GABRIEL MAMET ..... 10<sup>TH</sup> PETITIONER**  
**WILSON KIPROP CHEMJOR ..... 11<sup>TH</sup> PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**  
**LAND REGISTRAR ELGEYO MARAKWET COUNTY ..... 2<sup>ND</sup> RESPONDENT**  
**COUNTY LAND ADJUDICATION OFFICER, ELGEYO MARAKWET**  
**COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**KIPROP KAPSOT, KIPTALAM RUTTO, PHILEMON KIPKURGAT**  
**SAWE, WILSON BARMAO, JOHN CHEPKOGA (SUING ON THEIR**



OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE  
CHANGACH) ..... INTERESTED PARTY  
JOSEPH KURUI LEKEG ..... INTERESTED PARTY

## JUDGMENT

### Introduction

1. By a plaint dated September 3, 2020, the appellants herein instituted a suit in the lower court to wit Iten SPMCC ELC Case No 25 of 2020 seeking to compel the Land Registrar Elgeyo Marakwet County to issue them with title deeds for land parcels number 51, 98, 99, 100, 101, 102, 103 and 272 (suit properties). The appellant also sought an order of permanent injunction to restrain the 3<sup>rd</sup> respondent from undertaking any adjudication process in respect of the suit properties.
2. Simultaneously with the plaint, the appellants filed a notice of motion of an even date seeking to restrain the 3<sup>rd</sup> respondent from demarcating, resurveying, adjudicating or in any other manner whatsoever dealing with the suit properties pending the hearing and determination of the application and the suit.
3. Vide a notice of preliminary objection dated September 18, 2020, the respondents urged the court to strike out or dismiss the suit on the grounds that the court lacks jurisdiction to hear and determine the suit as the suit properties fall within an ongoing adjudication process yet no consent of the Land Adjudication Officer (LAO) was obtained before filing the suit; that the suit is a none starter as it is time barred and that the appellants had not exhausted all remedies provided for under the [Land Adjudication Act](#), Cap 284 Laws of Kenya.
4. By a ruling delivered on July 5, 2015, the Trial Magistrate (TM), upheld the notice of preliminary objection on the ground that the court lacked jurisdiction to determine the suit and that the suit was time barred. See the relevant parts of the ruling which are as follows:-

“...As the land parcels appear to fall within an ongoing adjudication, I find that the plaintiffs needed the consent of the adjudication officer to institute this suit. There is no such consent on record....

The plaintiffs state that the 3<sup>rd</sup> defendant issued a notice of completion of the adjudication register of Lower Segoo on June 12, 2001. They were however not satisfied with the decision and in 2002 brought a judicial review application in the High Court which was dismissed in the year 2014. It is therefore clear that the cause of action herein arose in the year 2001. This claim ought to have been instituted within 12 years of the said date, that is 2013 as per the provisions of the Limitation of Actions Act. It is now more than 20 years. No leave was sought to institute the claim out of time..

I therefore find that the preliminary objection raised by the defendant has merit. This court lacks the jurisdiction to determine this matter, and the suit is time barred. There is therefore no need to proceed to pronounce myself on the application filed by the interested parties. The suit filed by the plaintiff is hereby dismissed with costs to the defendants.”

5. Aggrieved by that decision, the appellant appealed to this court on 12 grounds that can be condensed to three as follows:-



- (i) That the Learned TM erred by holding that the suit properties fall within an ongoing land adjudication area hence consent of the LAO was required before the suit was instituted;
  - (ii) That the Learned TM erred by holding that the suit was time barred; and
  - (iii) That the TM erred by failing to take into account that the proposed Changach Adjudication Section had not been gazetted as an adjudication area.
6. Pursuant to directions given on June 14, 2022, the appeal was disposed of by way of written submissions.

### **Appellant's Submissions**

7. In the appellant's Submissions filed on 19<sup>th</sup> of August 2022, an overview of the plaintiff's/appellants' case is given and two issues identified as the issues for the court's determination namely whether the court had jurisdiction to hear and determine the suit and whether the suit was time barred.
8. On whether the court had jurisdiction to hear and determine the suit, it is stated that the suit land fall within Lower Segoo Adjudication Section whose adjudication process had been completed; that what was before the court was not a preliminary objection but a counter application which should be determined upon investigation of facts during hearing and that the suit properties were not subject of any objection proceedings. It is contended that there were no disputes over ownership of the suit properties to warrant invocation of Section 30 of Land Adjudication Act (LAA) as the register for Lower Segoo Adjudication Section had become complete in all aspects.
9. It is submitted that the adjudication having become final in all aspects, to reopen it in the intended way would be a grave injustice.
10. It is further stated that the appellants are agitating for their rights and interests in Segoo Sub location and not Changach sub location which is yet to be declared an adjudication section and that the suit properties were in the process of being wrongly included in the proposed Emsea Adjudication section.
11. Maintaining that they are not disputing any ascertainable interest in land but seeking an order compelling the Land Registrar to issue them with their respective titles deeds and to restrain the respondents from subjecting the suit parcels to any further adjudication process, the plaintiffs/appellants fault the TM for holding that consent of the Land Adjudication Officer was required before instituting the suit.
12. The TM is said to have erred by failing to find that there was no evidence that Emsea-Changach had become an adjudication section under Section 5 of LAA.
13. Maintaining that there was no notice declaring Emsea Changach an adjudication area, the appellant submits that the suit lands were not under any known adjudication section with ongoing adjudication process to warrant requirement of consent of the LAO.

### **1st,2nd And 3rd Respondent's Submissions**

14. In their submissions filed on September 29, 2022, the respondents have identified three issues for the court's determination; namely whether the land parcels in dispute appear to fall within an area of ongoing adjudication; whether the ruling of the TM was unfair and unjust and who should be condemned to pay costs?
15. On whether the parcels of land in dispute appear to fall within an area of ongoing adjudication, it is explained that the suit parcels were found to have been erroneously created when Lower Segoo



Adjudication section was adjudicated and surveyed. As a result, the parcels were cancelled by the LAO; that the error was communicated to the appellants on several occasions; that the register for Lower Segoo Adjudication Section was closed on June 12, 2001 and made open to the public for 60 days; that any persons affected by the register were to lodge their complaints within the 60 days and that no complaint was raised concerning the alleged error in the register.

16. Arguing that the suit lands were never available for allocation to the appellants, the respondents maintain that the parcels fall within Emsea-Changach Adjudication Section, in which adjudication is ongoing. Based on the provisions of Section 30 of LAA, it is submitted that the consent of the Land Adjudication was required before the suit was instituted.
17. On whether the decision of the TM was unfair and unjust, it is pointed out that the suit was filed over 20 years after the cause of action arose and submitted that the suit was time barred. In that regard, reference is made to Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya which limits time for bringing any action to recover land to 12 years.
18. According to the respondents, the appellants' right to institute action against the decision of the respondents complained of accrued on June 12, 2001 when the register for Lower Segoo Adjudication Section was closed and opened for public inspection.
19. Maintaining that the appellants have not made up a case for being granted the reliefs sought, the respondents urge the court to dismiss the appeal with costs to them.

#### **Determination**

20. The sole issue arising from this Appeal is whether the TM erred by upholding the preliminary objection raised by the respondents.
21. With regard to this question, I have carefully considered and evaluated the issues arising from the suit and the application. I note that the suit and the application raises complex issues of fact and law. For instance, there is the contested issue as to whether the suit properties fall in an ongoing adjudication section. Whereas the respondent claim that the suit properties fall within an ongoing adjudication section, the plaintiffs deny that contention and maintain that the suit properties were adjudicated in Lower Segoo area. The respondents admit that the properties were adjudicated in Lower Segoo adjudication section whose adjudication was completed but claim that the adjudication was cancelled. Since there was contest as to whether or not the suit properties fall under an ongoing adjudication section, I am of the considered view that the issue could not be determined preliminary as evidence was required to determine the issue as to whether or not the suit lands fall in an ongoing adjudication section. In that regard see the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was, had this to say:

"...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."

At page 701 paragraph B-C Sir Charles Newbold, P added the following:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side



are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...."

22. In the case of *Charles Onchari Ogoti v Safaricom Limited & another* [2020] eKLR while discussing the emerging jurisprudence on preliminary objections, the court held:-

"I would respectively agree that although the general principle is that as found by the Supreme Court in Independent Electoral & Boundaries Commission vs. Jane Cheperenger & 2 others [2015] eKLR, that preliminary objection procedure should be invoked (as with Mukisa Biscuits' case) where facts are not in dispute, it may it seems the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement (and) it is distinctly improper for a party to resort to the preliminary objection as sword, for winning cases otherwise destined to be resolved judicially, and on the merits".

23. I note that the TM did not make a conclusive determination on the issue. She determined that the land parcels appear to fall within an ongoing adjudication section. Appearing to fall within an ongoing adjudication section is not the same thing as determining that the land parcels fall within an ongoing adjudication section.
24. A determination that the suit lands fall within an ongoing adjudication as opposed to appear to fall within an ongoing adjudication section is what was required before the TM could conclude that the consent of the LAO was required before instituting the suit.
25. On the question of alleged time bar, whereas it is true that the appellants were by operation of law required to institute any claim concerning the suit property within 12 year from the time their right to bring action against the action or inaction complained of accrued, in the special circumstances of this case, where evidence is required to prove when time accrued in favour of the defendants, I am not convinced that the TM was justified in determining that the right of action of the appellants accrued in 2001 when no evidence was adduced capable of proving that fact. Since evidence was required to proof when time accrued in favour of the appellants, the alleged issue of time bar unless ascertainable from the pleadings ought not to have formed the basis of determination that the appellants suit was time barred.
26. Although the appellants were duty bound to exhaust the remedies provided under the LAA before approaching the court, in the circumstances of this case where the appellants inter alia seek to restrain the respondents from undertaking any adjudication process with respect to the suit properties on grounds that the properties were subject of an earlier adjudication process, I am not convinced that the doctrine of exhaustion of remedies vitiates there suit.
27. The upshot of the foregoing is that the appeal has merit and is allowed as prayed.
28. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ITEN THIS 2ND DAY OF NOVEMBER, 2022.**

**L. N. WAITHAKA**

**JUDGE**

**Judgment delivered virtually in the presence of:**

Mr. Kigen for the Appellant

Ms. Tigoi for the 1st, 2nd and 3rd Respondents



**Christine Towett: Court Assistant**

