REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CAUSE NO. 36 OF 2019 (O.S)

PETER MBWE KIBIRITI.....APPLICANT

VERSUS

THE BOARD OF MANAGEMENT,

KABARE GIRLS SECONDARY SCHOOL.....1ST RESPONDENT

THE BOARD OF MANAGEMENT, KABARE HEALTH CENTRE...2ND RESPONDENT

COUNTY GOVERNMENT OF KIRINYAGA.....3RD RESPONDENT

THE CABINET SECRETARY, MINISTRY OF EDUCATION.....4TH RESPONDENT

THE CABINET SECRETARY, MINISTRY OF HEALTH.....5TH RESPONDENT

THE NATIONAL LAND COMMISSION.....6TH RESPONDENT

THE HON. ATTORNEY GENERAL.....7TH RESPONDENT

AND

MILKA MUTHONI WAGOKO.....INTERESTED PARTY

RULING

INTRODUCTION:

1. On 30th August, 2019, the Applicant instituted the suit herein by way of Originating Summon. He brought it under ***Articles 162(2) (b), 40 of the Constitution of Kenya, Part VIII & Sections 150, 152A, and 152B of the Land Act, 2012; Sections 24, 25 and 26 of the Land Registration Act, 2012; Sections 13, 18 & 19 of the ELC Act; Order 37 of the Civil Procedure Rules 2010.***

2. The Applicant seeks the following orders:

a. Spent

b. This Honourable Court be pleased to order that the 1st and 2nd Respondents herein be evicted from all that parcel of land known as land parcel LR NO. KABARE/KIRITINE/637 OR in the alternative, this Honourable Court be pleased to order the Respondents jointly and/or severally herein to justly compensate the applicant for the acquisition of all that parcel of land known as land parcel LR NO. KABARE/KIRITINE/637 at the current market value.

c. This Honourable Court be pleased to order the respondents jointly and/or severally herein to justly compensate the applicant herein for all the developments carried out on land parcel LR NO. KIRINYAGA/GITHIGIRIRI/151 from the year 2004 to 2019.

d. The Honourable Court be pleased to order the Respondents jointly and/or severally herein to justly compensate the applicant

herein in general damages for causing inhumane eviction.

e. Cost of this application be provided for.

3. The Originating Summons were supported by the Affidavit of the Applicant which was sworn on 29th August, 2019 and is premised on the following grounds:-

a. The applicant is the registered proprietor of all that parcel of land known as land parcel LR NO. KABARE/KIRITINE/637 however the 1st and 2nd respondents are in occupation currently.

b. The interested party is the registered owner of land parcel LR NO. KIRINYAGA/GITHIGIRIRI/151.

c. In the 2004 at the request by the 3rd Respondent's predecessor (the now defunct Kirinyaga County Council) and for the public good, the applicant entered into a land exchange arrangement with the 3rd Respondent.

d. Pursuant to the arrangement and in good faith, the applicant agreed to vacate and/or surrender his land parcel LR NO. KABARE/KIRITINE/637 in 2004 in exchange with land parcel LR NO. KIRINYAGA/GITHIGIRIRI/151 which he was given by the 3rd respondent and which he took immediate possession of.

e. The applicant proceeded to develop LR NO. KIRINYAGA/GITHIGIRIRI/151 extensively while the 3rd respondent proceeded to grant land parcel LR NO. KABARE/KIRITINE/637 for public use and consequently, the 4th and 5th respondent proceeded to authorize the construction of a school and a health Centre which are under the management of the 1st and 2nd respondents respectively.

f. In the year 2012, the interested party filed a suit at the Kerugoya environment and land court claiming that she was the registered proprietor of LR NO. KIRINYAGA/GITHIGIRIRI/151 and praying that the applicant be evicted from the land which prayers were allowed and a court order to that effect issued on 14th May, 2019.

g. On 29th August, 2019, the Applicant was inhumanly evicted from land parcel LR NO. KIRINYAGA/GATHIGIRIRI/151 and his life time investment destroyed including houses.

h. The predecessor of the 3rd Respondent did not act in good faith when it approached the applicant for the land exchange arrangement knowing very well that the land parcel it was giving in exchange already belonged to another person.

i. The applicant lost both his land and his life time investment for which he has tirelessly worked for owing to the under dealings of the 3rd respondent's predecessor for which the 3rd respondent is now liable.

j. It is only fair and just that the applicant be allowed to enjoy his proprietary rights over land parcel LR NO. KABARE/KIRITINE/637 as the law prescribes and for which he is still the registered owner.

4. The 1st, 4th, 5th and 7th Respondents filed a Notice of Preliminary Objection dated 23rd October, 2019 whereby they prayed that this suit be dismissed with costs on the ground that:

a. The suit offends the provisions of *Section 7 of the Limitations of Actions Act, Cap 22* which provides that an action to recover land may not be brought by any person 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.

5. On 11th May, 2021 the Advocates for the parties herein by consent agreed that the said Preliminary Objection be disposed of by way of written submissions.

1ST, 4TH, 5TH AND 7TH RESPONDENTS' SUBMISSIONS:

6. The 1st, 4th, 5th and 7th Respondents through their advocates on record filed their submissions on 23rd February, 2021.

7. They submitted that the Applicant's suit is time barred as provided for under *Section 7 of the Limitation of Actions Act.*

8. They urged that it was trite law that limitation goes to the jurisdiction and once it is raised it ought to be resolved at the earliest opportunity. They relied on the cases of *Thuranirakarari Versus Agnes Nchche (1997), Harrison Ndung'u Mwai & 500 others Versus Attorney General (2018).*

9. It was their submission that the cause of action arose in 2004 when the purported exchange of the land parcels between the parties took place. Therefore, in 2004, the Applicant lost his right to the land parcel since the applicant ceased to possess the land and that the Applicant's continued possession of the land parcel was discontinued from 2004 to date which is over 12 years.

10. They further submitted that the 1st Respondent had already engaged in acts which are inconsistent with the Applicant's enjoyment of land

parcel No. LR NO. KABARE/KIRITINE/637 since 2004, thereby defeating the Applicant's title. They relied on the cases of *Wambugu versus Njuguna (1983) KLR 17, Cyrus Ndungu Kingoori Versus Mary Njoki Kiriaku (2019) e K.L.R, Littledale versus Liverpool College (1900) 1 CL 19 at p. 21, Lindle MR, Leigh versus Jack (1879) Ex D 264 at page 273 and Margaret Wairimu Magugu Versus Karura Investment Limited & 4 others (2019) e K.L.R.*

11. They also submitted that the title issued to the Applicant on 1st February, 2018 is void for the reason that his title to the land had extinguished after a period of 12 years continued dispossession. To support this, they relied on ***Section 17 of the Limitation of Actions Act*** which provides as follows:-

> ***"****Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished."*

12. They urged that this Honourable Court dismisses the suit with costs to the 1st Respondent.

APPLICANT'S SUBMISSIONS

13. The Applicant through his Advocates on record filed his submissions on 15th June, 2021.

14. The applicant contended that his suit is not time barred and is properly before the court. This was mainly because according to the applicant, the cause of action arose on 28th August, 2019 when he was evicted from land parcel no. Kirinyaga/Gathigiriri/151.

15. The applicant submitted that since it was in dispute as to when the cause of action arose, then this suit ought to proceed to full hearing as issues that touch on law need not be ascertained by evidence as the law speaks for itself. He relied on the authorities *of Nitin Properties Ltd Vs Jagit S. Kalsi & Another (1995) e K.L.R. and Independent Electoral and Boundaries Commission Vs Jane Cheperenger & 2 others (2015) e K.L.R.*

16. He further submitted that in as much as in the past 53 years the plaintiff was living in diverse parcels of land by the 3rd respondent, he was following up with the ownership documentation from the said 3rd Respondent. Thus his argument is that the cause of action arose on 28th August, 2019 when he was evicted from land parcel No. Kirinyaga/Gathigiriri/151.

ANALYSIS:

17. I have considered the Preliminary Objection and the rival submissions and pleadings of the parties herein. The following facts are not in dispute:-

a. The Applicant has not been living on land parcel No. LR NO. KABARE/KIRITINE/637 for approximately 53 years now.

b. During this period the 1st and 2nd Respondents have been in occupation of the said land.

c. In the year 2004 the 3rd Respondent's predecessor and Applicant entered into a land exchange agreement whereby the Applicant surrendered his land parcel No. LR NO. KABARE/KIRITINE/637 for land parcel no. Kirinyaga/Gathigiriri/151.

d. In the year 2012 vide Kerugoya ELC CAUSE NO. 34 OF 2012 the interested party herein sued the Applicant herein whereby she claimed to be the registered proprietor of land parcel No. Kirinyaga/Gathigiriri/151.

e. The interested party was successful in the said suit which resulted in the eviction of the Applicant.

f. The applicant now seeks eviction of the 1st and 2nd Respondents from land parcel No. LR NO. KABARE/KIRITINE/637 or in the alternative that the respondents jointly and/or severally compensate him.

ISSUES FOR DETERMINATION:-

i. Whether the suit herein is properly before the Honourable Court and liable to be struck out.

ii. Who should pay the costs?

WHETHER THE SUIT HEREIN IS PROPERLY BEFORE THE HONOURABLE COURT AND LIABLE TO BE STRUCK OUT

1. *The definition of a Preliminary Objection is set out in the case of* ***Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696****, where it was held that:*

> ***"****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."

18. I am persuaded that the 1st, 4th, 5th and 7th Respondents Preliminary Objection raises a point of law and is thus sustainable. This is because the issue of Limitation goes to the jurisdiction of this Honourable Court. This position was held in the case of ***Bosire Ogero Vs Royal Media Services [2015] e KLR*** whereby Honourable **Justice R.E. Aburili** held that:

"The law of limitation of actions is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in the bringing of suits against them. The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a Matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over. See the case of Pauline Wanjiru Thuo Vs David Mutegi Njuru C.A 2778 of 1998. It is for that reason that the issue of jurisdiction must be raised at the earliest opportunity. As has been severally held, jurisdiction is everything, without which, a court of law downs its tools in respect of a matter before it the moment it holds the opinion that it is without it. (See Owners of Motor Vessel "Lillian S" Vs Caltex Oil (k) Ltd (1989) KLR 1 Per Nyarangi J.A. See also the Court of Appeal decision in Owners and Masters of Motor Vessel "Joey" VS Owners and Masters of the Motor Tugs "Barbara" and "Steve B." [2008]1 E.A 367 where, echoing the decision in the case of Owners of Motor Vessel "Lillian S", the Court of Appeal held, inter alia:

"The question of jurisdiction is threshold issue and must be determined by a judge at the threshold stage, using suck evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step……"

19. The Applicant has admitted that he has not been living on land parcel No. L.R NO. KABARE/KIRITINE/637 for the last 53 years. During this period, he submitted that the 1st and 2nd Respondents have been in possession of the said land. He on the other hand had been living in diverse parcels of land given to him by the 3rd Respondent in exchange of this parcel of land.

20. It appears that the land exchange arrangements he has been having with the 3rd Respondent have not been successful over the last 53 years. In the year 2004 he entered into a fresh agreement with the 3rd Respondents whereby he traded the said land with land parcel No. Kirinyaga/Gathigiriri/151.

21. However, the said land parcel no. Kirinyaga/Gathigiriri/151 belonged to the interested party herein who sued him vide Kerugoya ELC CAUSE NO. 34 OF 2012 which resulted in his eviction.

22. From the foregoing and as submitted by the applicant in his submissions, I am of the considered view that the Applicant got dispossessed of land parcel No. LR NO. KABARE/KIRITINE/637 in the year 1968, that is 53 years ago, when the defunct Kirinyaga County Council acquired the same and gave it to the 1st and 2nd Respondents herein.

23. I am further of the opinion that a period of 12 years has already lapsed since 1968 when he gave up his land parcel for the utilization by the 1st and 2nd Respondents herein. Thus, his claim to recover the same offends ***Section 7 of the Limitation of Actions Act*** which 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."

24. The applicant has also made a claim for compensation for the acquisition of land parcel No. LR NO. KABARE/KIRITINE/637. He entered into an agreement with the 3rd Respondent in the year 2004.

25. Having found hereinabove that the applicant was dispossessed his parcel of land in the year 1968, his title became extinguished by virtue of Section 18 of the Limitation of Actions Act in or about the year 1980. I am therefore of the view that no valid agreement could have been entered into between him and the 3rd Respondent involving land parcel No. LR NO. KABARE/KIRITINE/637 in the year 2004.

26. Be that as it may, even assuming that a valid agreement was entered into in the year 2004, the applicant ought to have sought redress of the same no later than 6 years from the date of the breach of the said agreement. This is as per S***ection 4(1) of the Limitation of Actions Act*** which provides that: -

The following actions may not be brought after the end of six years from the date on which the cause of action accrued — (a) actions founded on contract;…"

27. The parcels of lands involved in the said agreement are agricultural lands. The provisions of the ***Land Control Act*** therefore applied. *Section 6 (1)* of the said act provides that:

"Each of the following transactions that is to say — (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area; (b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of [Rev. 2012] Land Control CAP. 302 L7-7 [Issue 1] (c) Deleted by Act No. 22 of 1987, Sch. is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act."

28. Further ***Section 8 (1) of the Land Control Act*** provides that:

> *"An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:"*

29. From these provisions, it is therefore my opinion that since no Land Control Board Consent was acquired within the stipulated 6 months, the said exchange agreement became null and void.

30. What was left was for the Applicant to recover his valuable consideration as a debt as per ***Section 7 of the said Land Control Act*** which provides that:

> ***"****If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22."*

31. After the lapse of the 6 months within which land control board consent was supposed to be acquired the applicant had 6 years to recover the value of his parcel of land. That period lapsed in or about the year 2010. It is therefore too late in the day for the applicant to make a claim for compensation of his parcel of land. This is because the same was already caught up by section 4 of Limitation of Actions Act afore mentioned.

32. The applicant further made a claim for compensation for all the developments carried out on land parcel LR NO. KIRINYAGA/GITHIGIRIRI/151 from the year 2004 to 2019 and for general damages for inhumane eviction.

33. I find that this claim is res judicata and offends ***Section 7 of the Civil Procedure Act CAP 21*** which provides:

> *"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."*

34. The elements of res judicata are laid out in the case of ***Maina Kiai & 2 others Vs Independent Electoral and Boundaries Commission & 2 others [2017*****]*** whereby the Honourable Court held that:-

> *"The doctrine refers to the rule that a final judgment or decree on the merits by a court of competent jurisdiction is conclusive of the rights of the parties or their privies in all later suits on all points and matters determined in the former suit. The elements of res judicata are as follows:-*
>
> *a. The former judgment or order must be final;*
>
> *b. The judgment or order must be on merits;*
>
> *c. It must have been rendered by a court having jurisdiction over the subject matter and the parties; and*
>
> *d. There must be between the first and the second action identity of parties, of subject matter and cause of action."*

35. The Applicant stated that in the year 2012 vide Kerugoya ELC CAUSE NO. 34 OF 2012 whereby the interested party herein had sued him, the 3rd Respondent and 7th Respondent herein. Judgment in the said suit was delivered which resulted in his eviction.

36. I find that said judgment involved similar parties and similar subject matter as the one the applicant is claiming compensation of in this suit. The said eviction he claims was inhuman arose from a valid and final judgment of this Honourable Court which was made on merits.

37. The subject matter being similar in both cases, the Applicant ought to have exhausted his claim by filing a counter-claim in the said suit and pray for the reliefs he is currently seeking in this case.

38. Parties to a suit are required to exhaust all their claims in one particular suit. This position was held in the case of ***Kimitei Arap Chirchir Vs Kimutai Arap Kirui & another [2020] e KLR*** whereby the Honourable Judge held as follows:

> *"If litigants were to be allowed to commence litigation all over again on the basis of such allegations, litigation would never come to an end. All it would take is for a losing party to craft the most innovative allegations of fraud and once again engage the judicial process. Having been parties to Nakuru RMCC No. 764 of 1989, the parties herein must exhaust their claims and reliefs there. They cannot leapfrog to this court otherwise than by way of appeal."*

39. The applicant slept on his rights by virtue of the fact that he failed to raise a counterclaim and or cross petition seeking the redress of compensation in the former suit being Kerugoya ELC CAUSE NO. 34 OF 2012 to cover him in the event the claim by the Interested party

succeeded. His claim can therefore not be sustained before this Honourable Court as the same is res judicata and barred by ***Limitation of Actions Act.***

CONCLUSION:-

40. In the final analysis, it is therefore my view that this Honourable Court does not have jurisdiction to determine the applicant's Originating Summons on grounds that:

(a) Prayer 2 is time barred by Sections 4 and 7 of the Limitations of Actions Act and

(b) Prayers 3 & 4 are resjudicata.

The originating Summons therefore is hereby struck out with costs to the 1st, 4th, 5th and 7th Respondents. It is so ordered.

RULING DATED, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 17TH DAY OF SEPTEMBER, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Munyiri for Interested party

2. Mr. Munene for 1st, 4th, 5th and 7th Respondents and holding brief for Masinde for 6th Respondent

3. Peter Mbwe Kibiriti

4. Kabuta – Court clerk.