



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KILGORIS**

**APPEAL CASE NUMBER 24 OF 2021**

**PETER KOIPEITAI NENGISOL.....APPELLANT**

**-VERSUS-**

**WILLIAM NYAMARI**

**ISAAC OLE TURETI Sued as the Legal Representatives**

**of the Estate of JUSTUS TURETI OBARA, DECEASED.....RESPONDENT**

**JUDGMENT**

The Appeal for determination emanates from the Judgement and Decree of Hon.D.K.Matutu- Principal Magistrate dated and delivered on the 28<sup>th</sup> May 2019 in the proceedings known as KILGORIS PMCC ELC NO.97 OF 2018.

The Appeal's main prayer is as follows;-

***“The Judgement and Decree of the Learned Trial Magistrate dated 28<sup>th</sup> May 2019 , be set-aside and/or quashed and the same be substituted with an Order dismissing the Respondents’ suit vide KILGORIS PMCC ELC 97 OF 2018.”***

The Appellant has pleaded 11 grounds in support of the prayer outlined hereinabove which can be summarized in three (3) aspects;-

- a) The First aspect in the grounds of Appeal relate to the capability or locus standi for the Respondents to prosecute these proceedings on behalf of the Late JUSTUS TURETI OBARA (Deceased) against the Appellant in the Lower Court Matter known as KILGORIS PMCC ELC 97 OF 2018.
- b) The Second Aspect in the grounds of Appeal relates to the issue of Limitation of Actions Act, Cap 22, laws of Kenya.
- c) The Third Aspect in the grounds of Appeal relate to the merits of the evidence adduced both orally and documentary which the Trial Court evaluated in the trial proceedings and the pronounced judgement of 28<sup>th</sup> May 2019.

Counsel for the Appellant filed their submissions in support of the Appeal on the 14<sup>th</sup> of October 2021 while the Respondents’ filed their submissions on the 29<sup>th</sup> November 2021.

The Honourable Court has taken time to peruse the Record of Appeal in detail, the Submissions of the Appellant and Respondents, the evidence adduced at the hearing in the Trial Court, the evidence of the Parties and their witnesses thereof which are key in the determination of this Appeal.

As earlier summarized, the Honourable Court shall now evaluate three broad aspects of the Appellant’s Appeal dated 27<sup>th</sup> June 2019.

**A) LOCUS STANDI ISSUE.**

The Appellant’s first ground is that the Respondents’ herein were not seized and/or possessed with the requisite Locus Standi to prosecute before the Trial Court.

The Appellant’s contention is that the Respondents’ did not adduce and/or produced the requisite Grant of Letters of Administration.

Section 82 of the Law of Succession Act, Cap 160 Laws of Kenya was therefore contravened and the proceedings after the death of the Late JUSTUS TURETI OBARA (Deceased) were irregular and hence void ab initio.

A perusal of the Record of Appeal filed on the 31<sup>st</sup> August 2020 confirms that the suit herein was filed by the Late JUSTUS TURETI OBARA (Deceased) on the 31<sup>st</sup> August 2011 in the High Court of Kenya at Kisii and was assigned Civil Suit Number 126 of 2011.

Pursuant to the establishment of the Environment and Land Court in the 2011, the suit known as HIGH COURT CASE NUMBER 126 of 2011 was transferred to the Environment and Land Court in Narok and was re-assigned ELC Case Number 551 of 2017.

Unfortunately, the Plaintiff passed away on the 04.04.2017 as per the Certificate of Death provided on Page 151 of the Record of Appeal dated 27<sup>th</sup> June 2019.

On Page 148 of the Record of Appeal, the Respondents herein filed an Application dated 28<sup>th</sup> March 2018 seeking under Prayer ( c ) to substitute the name of deceased Plaintiff JUSTUS TURETI OBARA with those of the present Respondents.

The Supporting Affidavit filed together with the Application dated 28<sup>th</sup> March 2018 attached the Limited Grant Ad Litem under Section 54 and 5<sup>th</sup> Schedule duly issued on the 28<sup>th</sup> of March 2018.

The Limited Grant Ad Litem issued on the 28<sup>th</sup> March 2018 expressly authorized the Respondents to pursue Narok ELC Case Number 551 of 2017- Justus Tureti Obara -Vs- Peter Koipeitai Nengiso ( Formerly Kisii ELC 126 of 2011).

Page 24 of the Record of Appeal dated 31<sup>st</sup> August 2020 indicates that the Application dated 28<sup>th</sup> March 2018 was heard on the 17<sup>th</sup> of May 2018 wherein the Court by Consent allowed the same.

In essence thereof, the Respondents duly adduced and/or produced the relevant Limited Grant Ad Litem dated 28<sup>th</sup> March 2018 and indeed the Court granted leave for the Respondents to take over the matter on behalf of the Estate of JUSTUS TUETI OBARA.

In Conclusion therefore, the proceedings before the Trial Court conducted by the Respondents were lawful and legal in all aspects and the Appellant's Ground regarding LOCUS STANDI accordingly fails.

## **B) LIMITATION OF ACTIONS ISSUE.**

In the cluster of grounds of Appeal regarding the issue of Limitation of Actions Act, Chapter 22 Laws Of Kenya, the Appellant has advanced various arguments in Support of the Appeal.

The Appellant argument is that the Plaint dated 29<sup>th</sup> June 2011 was filed outside the prescribed time allowed by the Law.

According to the Appellant, the suit was based on Fraud which was pleaded under Paragraph 6 of the Plaint thereof.

The Appellant states that Fraud in law is a Tort which Section 4(1) of the Limitation of Actions Act, Cap 22 provides that litigation should be commenced within Three (3) years from when the said Fraud was discovered.

The Appellant is of the view that the original late Plaintiff namely JUSTSU TURETI OBARA (Deceased) having discovered the fraud in the year 2001, any proceedings thereof should have been brought within Three (3) years and the filing of the Plaint in the year 2011 is irregular and time barred.

In the alternative and without prejudice to the above, the Appellant further argue that even if the suit by the Respondents was for the recovery of land, which allowed a filing period of up to Twelve (12) Years as per the provisions of Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya, then the period of computation was to begin in the year 1994 when the first entry of the Appellant's name was entered in the adjudication records and not the year 2001 when the Title was issued to the Appellant.

The net effect of the argument above is that the original Plaint filed in the year 2011 was still time barred having been filed about 17 years from when the suit property known as TRANSMARA/MOYOI/139 was adjudicated to the Appellant.

It is clear that the area known as Moyoi within the Transmara Adjudication Area in Narok District was declared an Adjudication Section through a Gazette Notice Number LA/5/1/69/26 dated 11<sup>th</sup> November 1977 contained in Page 72 of the Record of Appeal dated 31<sup>st</sup> August 2020.

It is not a disputed fact that the original Plaintiff JUSTUS TURETI OBARA (Deceased) was allocated Parcel Number 139 in the Adjudication Record Number 72540 in the year 1977.

The Original Plaintiff JUSTUS TURETI OBARA (Deceased) testified on the 24/2/2016 that having been duly recognized as the beneficial owner of the Parcel Number 139 within the Moyoi Adjudication Section, he continued to occupy the same awaiting the regularization of the adjudication exercise to enable him pay for the registration and issuance of the title documents.

It is clear from the evidence of the Original Plaintiff JUSTUS TURETI OBARA (Deceased) that there was no communication either from the

Adjudication Committee or the Adjudication Officer informing him of any changes to the interests and/or beneficial ownership of Parcel No.139.

It is only in the year 2001 when the Original Plaintiff JUSTUS TURETI OBARA (Deceased) in an effort to pay for the registration and issuance of his title documents discovered that the Adjudication Record issued in 1977 was altered by deleting his name and the name of the Appellant inserted therein.

A perusal of the entire Record of Appeal fails to identify any correspondence, communication and/or documents that might have notified the Respondents of the change of particulars in the Adjudication Records issued in the year 1977.

It is therefore clear in the mind of this Honourable Court that the Original Plaintiff JUSTUS TURETI OBARA (Deceased) discovered the cancellation and/or alteration of the Adjudication Record issued in the year 1977 upon visitation of the Lands Offices in Transmara in the year 2001.

Having settled on the date upon which the original Plaintiff JUSTUS TURETI OBARA (Deceased) came to know of the alteration in the Adjudication Records issued in the year 1977, the next issue is whether the Respondents suit is based on TORT and guided by Section 4 of the Limitation of Actions Act, Cap 22 or is a claim to recover land which is guided by Section 7 of the Limitation of Actions Act, Cap 22.

In a determined case which falls on all fours with this proceeding, i.e **KISII ENVIRONMENT & LAND COURT NUMBER 127 OF 2011 between RICHARD NYAMAO ORUOBA -VERSUS- JOHN KIRANGAS KORINKO**, which has also been included in the Record of Appeal at pages 121 to 134, the Learned Court exhaustively discussed a similar issue.

The Learned Judge held as follows:-

*“As I have stated at the beginning of this judgment, the Plaintiff’s claim is for a declaration that he is the owner of the suit property and an order for the eviction of the defendant therefrom. Whereas I am in agreement with the defendant that the Plaintiff’s claim is based on the tort of fraud, am not persuaded that the Plaintiff’s suit is time barred. The Plaintiff has accused the defendant of falsifying the records and causing the suit property which the plaintiff claims to belong to the Plaintiff to be registered in his (defendant’s) name. This suit has been brought by the plaintiff to recover the suit property from the Defendant who has a title to the property and is also occupying a portion thereof. I am of the view that for the purposes of Limitation of Actions Act, Cap 22 Laws of Kenya, the Plaintiff’s claim falls under Section 7 of the said Act rather than Section 4 thereof. The Limitation period within which one can recover 2001 while the suit was filed on 29<sup>th</sup> June 2011. In the circumstances, it is my finding that the suit was filed within time.”*

This Honourable Court fully concurs with the Learned Judge’s finding with nothing more usefully to add.

According to the Letter dated 3<sup>rd</sup> October 2001 from the District Land Registrar-Transmara District to The Chief Land Registrar disclosing the cancellation and/or alteration of the Adjudication Records issued in the year 1977, provided in Page 217 of the Record of Appeal dated 31<sup>st</sup> August 2020, it is clear that the date of discovery was October 2001 and the period of Twelve (12) years had not lapsed by 29<sup>th</sup> June 2011.

On the alternative argument that the period of computation should begin from 1994 when the Appellant’s name was inserted in the Adjudication Record of 1977, the Honourable Court respectively disagrees with the Appellants submissions thereof.

The reasoning is that the inserting and/or alteration of the Adjudication Record issued in 1977 is in dispute and cannot used as the date of computation under the Limitation of Actions Act, Cap 22 , Laws of Kenya.

It is therefore the finding of this Court that the Plaintiff dated 29<sup>th</sup> June 2011 was filed within the prescribed time lines issued under Section 7 of the Limitation of Actions Act, Cap 22 of the Laws Of Kenya.

### **C) EVALUATION OF EVIDENCE ADDUCED AT TRIAL.**

The third cluster of grounds of Appeal relate to the evaluation of the oral and documentary evidence tendered by the parties during the hearing at the Trial Court.

The Respondents evidence during the trial was that original Plaintiff (JUSTUS TURETI OBARA) Deceased was a teacher in Transmara during the period in which adjudication was taking place.

Consequently, he approached the local Maasai community and requested to be allocated land for his occupation.

The local Maasai Community indeed accepted his request and was successful allocated Parcel No. 139 within the Moyoi Adjudication Section and an Adjudication Record duly prepared and retained by the Area Adjudication Officer. (This record was produced as P Ex 1) on Page 44 of the Record of Appeal filed on 31<sup>st</sup> August 2020.

The Respondents rights to own Parcel 139 having been recognized by the area Adjudication Officer, the Respondents proceeded to occupy and develop the said Parcel Number 139.

However, in the year 1994, the Original Plaintiff (JUSTUS TURETI OBARA) relocated to Nyamasi but left some family members on the Parcel 139.

In the year 2007/2008, the Transmara Area generally was again faced with post-election violence and the remaining family members vacated Parcel No.139 due to security reasons.

It is at this point in time that the Appellant took occupation of the Parcel Number 139 and has since been occupying the same to the detriment of the Respondents.

As regards the Respondents documents adduced in the Trial Court, a total of 9 Exhibits were produced which are as follows;-

- i) Copy of the Adjudication Record Number 72540
- ii) Letter dated 3/10/2001 from Land Registrar Kilgoris to Chief Land Registrar.
- iii) Letter dated 14/12/2001 from Chief Land Registrar to Land Registrar Kilgoris.
- iv) Letter dated 18/01/2002 from Land Registrar Kilgoris to Chief Land Registrar.
- v) Demand Letter dated 04/05/2011 to the Appellant.
- vi) Reminder was issued on the 21/05/2012.
- vii) Letter dated 12/06/2012 from the Permanent Secretary to the Respondent.
- viii) Letter dated 25/05/2012 from the Department of Land, Adjudication & Settlement to the Public Complaints and Resolution Committee.
- ix) A copy of Parcel No.139 Green Card in the name of the Appellant.

The Respondents called one witness namely FRANCIS MUIRURI who was the Land Adjudication Officer- Transmara who testified on the 29/5/2016.

According to the Respondents witness, the Adjudication Record was altered by removing the Original Plaintiff's name (JUSTUS TURETI OBARA) and inserting the name of the Appellant.

According to Plaintiff Exhibit No.1, this alteration of the Adjudication Record was done on or about 1994.

The Respondent's witness who is the lawful custodian of Government Records appertaining the Moyoi Adjudication Section clearly stated that according to the Government Records, there was no Objection registered as No.321 before the Adjudication Committee.

The Respondent's witness stated that according to the Objection Register of Moyoi Adjudication Section, the last objection was registered as No.183.

The only objection that related to Parcel No.139 was Objection Number 9 filed by Samuel Mwangi as per Page 74 of the Record of Appeal which the adjudication Committee dismissed with costs.

The Respondent's witness produced an Extract of the Objection Register as Exhibit No.13.

On the other hand, the Appellant stated that he stays Olkiloriti within Moyoi Area and in particular the Parcel No.139.

The Appellant states that he acquired the Parcel No. 139 way back in 1994 when he filed an Objection against the ownership of the Respondents and the was found to be merited.

The Adjudication Record No.72540 was then altered by deleting the Original Plaintiff's name (Justus Tureti OBARA) Deceased and the Appellant's name inserted thereof.

Subsequently thereof, the Parcel No.139 was registered in the Appellant's name and the Title Deed issued on 7<sup>th</sup> March 2001.

The Appellant confirmed that he has been in occupation of Parcel 139 since 1994 to date and that the Respondents have never been in occupation.

On cross-examination, the Appellant stated that he was born in 1964 and is the holder of a Kenyan Identification Card No. 8751797.

The Appellant also stated that his name was not on the Adjudication Register published in the Adjudication Register published 1977.

Similarly, the Appellant was challenged to produce any documentary evidence of the nature and form of his Objection No.321 but failed to do so through either stating the grounds contained in the purported Objection or even a copy of the purported Objection No.321 which is alleged to have been upheld.

The Honourable Court in this proceeding has been moved as an Appeal Court and not a Trial Court.

The Trial Court in exercising its power and jurisdiction rendered its decision in favour of the Respondents on the 28<sup>th</sup> May 2019.

It is therefore the Appellant's duty to provide evidence in support of the grounds contained in the Record of Appeal and persuade this Honourable Court to exercise its powers and set-aside the Judgement of the Trial Court issued on the 28<sup>th</sup> May 2019.

The main issue that the Appellant was required to address the Honourable Court was how the Objection registered as No.321 was conducted, the resultant outcome thereof and manner in which it was registered with the Adjudication Officer in charge of Moyoi Adjudication Section.

I have gone the evidence of the Appellant tendered on the 22/1/2019 together with the documentary evidence thereof and make the following various observations.

It is clear that the adjudication of Moyoi Adjudication Section was undertaken and the Adjudication register published in the year 1977.

At the time the Land Adjudication officer was publishing the Adjudication Register appertaining Moyoi Adjudication Section, the Appellant was a minor of 13 years having been born in 1964.

In essence therefore, the Appellant's name was never in the Adjudication Register of Moyoi Adjudication Section as at 1977.

The Second observation that the Honourable court has taken note of is that the Original Plaintiff (JUSTUS TURETI OBARA) Deceased relocated to Nyamasi in the year 1994 which is the same year that the purported Objection No.321 was inserted in favour of the Appellant.

The Third and critical observation by the Court is that the Appellant alleges to have filed an objection against the ownership of Parcel No.139 by the Original Plaintiff (JUSTUS TURETI OBARA) which was successful hence the cancellation of the original allottee (JUSTUS TURETI OBARA) deceased and insertion of the Appellants name.

According to the evidence adduced by the Appellant on the 22/1/19, there is no mention of when the Objection No.321 was lodged before the relevant and authorized forum for deliberations.

The Appellant during the hearing failed to disclose which forum under The Land Adjudication Act, Cap 284 Laws of Kenya the Objection was presented and adjudicated therein.

According to the evidence of the Respondents' witness namely Francis Muiruri who is the Land Adjudication Officer- Transmara, the Adjudication Register appertaining Moyoi Adjudication Section was published in the year 1977 with the Original Plaintiff (JUSTUS TURETI OBARA) Deceased being the lawful allottee of the Parcel No.139.

Under Section 26 of the Land Adjudication Act, Cap 284 Laws of Kenya, any person who is affected by the adjudication register by either considering it to be incorrect or incomplete is required to file an Objection to the Adjudication Officer in Charge on the Adjudication Section within Sixty (60) days from the date of the publication.

Keeping in mind that the Appellant was only 13 years in the year 1977 having been born in 1964, this Honourable Court is of the view that no objection was capable of being registered by the Appellant in the Objection Register or assigned Objection No.321 as alleged by the Appellant.

This position has been reconfirmed by the Objection Register provided by the Land Adjudication officer Francis Muiruri who clearly stated that the last objection was registered as No.183.

The purported registration and/or existence of an Objection No.321 by the Appellant is therefore irregular, illegal and/or unlawful ab initio.

On the same strength, although the Appellant obtained a first registration, the said process leading to the issuance of the said Title Deed was fraudulent and/or obtained through misrepresentation and therefore the said Title can not enjoy the protection of law.

This Honourable Court having come to the above conclusion, it is a finding of this Court that the alteration done on the Adjudication Record No.7254 by removing the name of the original allottee (JUSTUS TURETI OBARA) Deceased was illegal and unlawful.

It is the view of this Honourable Court that the Trial Court took into account all the appropriate pleadings and evidence placed before it and applied the correct law thereby arriving at the proper conclusion thereof.

This Honourable Court therefore dismisses this Appeal with Costs to the Respondents and uphold the Judgment of the Trial Court dated 28<sup>th</sup> May 2019.

**DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 14<sup>TH</sup> DAY OF DECEMBER, 2021.**

**HONOURABLE EMMANUEL.M.WASHE**

**JUDGE**

**In the Presence of:-**

1. Court Assistant – Matiko
2. Kipnetich for Appellant
3. Angina for Respondent