



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT BUNGOMA

ELC CASE NO. 117 OF 2014

WYCLIFFE MASASABI NASIUMA (Suing as the Administrator of the

Estate of NASHION NASIUMA KISONGOCHI.....PLAINTIFF/APPLICANT

VERSUS

KASEMBELI WAFULA NASIUMA & DOUGLAS WAFULA

KISONGOCHI (Administrators of the Estate of

JOHN WAFULA NASIUMA.....1ST DEFENDANT/RESPONDENT

DAVID KHACHECHE WANYONYI.....2ND DEFENDANT/RESPONDENT

JACK WYCLIFFE MAKOYI WANYONYI.....3RD DEFENDANT/RESPONDENT

LAND REGISTRAR BUNGOMA DISTRICT....4TH DEFENDANT/RESPONDENT

R U L I N G

By a Plaintiff dated 27th June 2014 and filed herein on the same day, **WYCLIFFE MASASABI NASIUMA** (the plaintiff herein and suing as the Administrator of the Estate of **NASHION NASIUMA KISONGOCHI**) sought Judgment against **KASEMBELI WAFULA NASIUMA, DOUGLAS WAFULA KISONGOCHI, DAVID KHACHECHE NASIUMA, JACK WYCLIFFE MAKOYI WANYONYI** and the **LAND REGISTRAR BUNGOMA** (the defendants herein) seeking the following main remedy in paragraph 9 thereof:-

9 “The plaintiff’s claim therefore against the 1st, 2nd, 3rd and 4th defendants jointly and severally is for cancellation of the new numbers SOUTH MALAKISI/NORTH KULISIRU/828, 829, 830, 831 and 832 issued from land parcel NO SOUTH MALAKISI/NORTH/KULISIRU/381 as per paragraph 7 above and it’s ownership to revert to the deceased NASHION NASIUMA KISONGOCHI to allow succession.

The basis of the claim is that the land parcel **NO SOUTH MALAKISI/NORTH KULISIRU/381** (the suit land) was registered in the names **NASHION NASIUMA KISONGOCHI** (the deceased) who passed away on 30th October 1997. However, on 16th September 1998, the 1st, 2nd and 3rd defendants fraudulently sub – divided it into parcels **NO 828, 829, 830, 831 and 832** for which the 4th defendant issued new title deeds.

It is the plaintiff’s case that the sub - division of the suit land into parcels **NO SOUTH MALAKISI/NORTH KULISIRU/828, 829, 830, 831 and 832** was done fraudulently particulars of which are stated in paragraph 8(a) (b) (c) (i) and (j) of the plaintiff.

I could not trace the defendants defence in the record although there is Notice of Appointment by counsel for the 1st, 2nd and 3rd defendants and a list of documents dated 24th July 2014. This demonstrates the need by counsel and parties to bind their pleadings as have been directed before. Hopefully counsel will ensure that the defence is on record. For purposes of the application subject of this ruling, the absence of the 1st, 2nd and 3rd defendants defence is not of any significance neither is it fatal to their case.

What is important for purposes of this ruling is that on 22nd November 2019, the 1st, 2nd and 3rd defendants filed a Notice of Preliminary Objection to the entire on the following grounds: -

1. **The plaintiff herein lacks the requisite locus standi to institute this suit and application.**
2. **The plaintiff herein is not the Legal Administrator of the Estate of the late NASHION NASIUMA KISONGOCHI.**
3. **The plaintiff herein lacks the legal capacity to sue and institute this suit and therefore the same should be struck off with costs.**
4. **The entire suit and application filed before this Court is barred by the Limitation of Action Act Cap 122 Laws of Kenya.**
5. **The issue raised is time barred since the same arose 17 years ago when the late NASHION NASIUMA KISONGOCHI passed on.**
6. **The entire suit raises nor discloses any reasonable cause of action and the entire suit is an abuse of the process of the Court and the same should be struck out.**
7. **The plaint and entire application is fatally defective in law and seriously incurable and cannot be ventilated before this Honourable Court.**

When the parties appeared before me on 26th November 2019, it was agreed that the plaintiff's application dated 14th November 2019 in which they sought orders of temporary injunction to restrain the 1st, 2nd and 3rd defendants, their agents assignees or employee from cultivating the suit land and the 1st, 2nd and 3rd defendant's Preliminary Objection dated 18th November 2019 and filed herein on 22nd November 2019 be canvassed simultaneously by way of written submissions.

Submissions were subsequently filed both by **MR SITUMA** instructed by the firm of **SITUMA & COMPANY ADVOCATES** for the plaintiff and **MR OGETO** instructed by the firm of **NELSON OGETO ADVOCATES** for the 1st, 2nd and 3rd defendants.

I have before me the application by the plaintiff seeking injunctive reliefs against the 1st, 2nd and 3rd defendant with respect to the suit land and the Preliminary Objection by the 1st, 2nd and 3rd defendants questioning the plaintiff's locus in this matter and raising the plea of limitation.

I shall commence with the Preliminary Objection by the 1st, 2nd and 3rd defendants because if it is sustained, then there will be no need to proceed and consider the plaintiff's application as it will be rendered otiose.

The Preliminary Objection by the 1st, 2nd and 3rd defendants raised two issues for my consideration: -

1. **The plaintiff's locus standi.**
2. **That this suit, and therefore the plaintiff's application for injunctive relief, are infact statute barred.**

PLAINTIFF LACKS THE NECESSARY LOCUS STANDI TO FILE THIS SUIT.

The plaintiff, as is clear from his plaint dated 27th June 2014 and filed on the same date, has moved to this Court as the Administrator of the Estate of the deceased. However, he has not produced, as part of his documentary exhibits, any grant appointing him as the Administrator of the said Estate. Similarly, in his statement dated 27th June 2014, he has not indicated when, if at all, he obtained any such grant. Even assuming, for purposes of argument, that the failure to disclose that he is the Administrator of the deceased's Estate was an oversight, his counsel has not referred to any such grant yet that is the central issue in this Preliminary Objection. This Court can therefore only conclude, which I hereby do, that the plaintiff filed this suit before obtaining the necessary grant of Letters of Administration to enable him prosecute this case on behalf of the Estate of the deceased. In **OTIENO V. OUGU & ANOTHER 1986 – 1989 EALR 468**, the Court of Appeal addressed itself as follows on that issue: -

“ an administrator is not entitled to bring any action as administrator before he had taken out Letters of Administration. If he does, the action is incompetent as of the date of inception.”

See also **TROUSTIK UNION INTERNATIONAL & ANOTHER .V. JANE MBEYU & ANOTHER 2008 1 KLR (GIF) 730** which also makes it clear that only a personal representative which means the Executor or Administrator of the Estate of a deceased person can file a suit on behalf of that Estate.

Clearly therefore, without the grant of Letters of Administration to the Estate of the deceased, the plaintiff lacks the capacity to move this Court for any remedies in respect to the said Estate. That limb of the Preliminary objection is well taken and I up – hold it.

CLAIM IS BARRED BY STATUTE OF LIMITATION

Section 7 of the Limitation of Actions Act 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.”

It is clear from the plaintiff’s own pleadings that the fraudulent sub – division by the 1st, 2nd and 3rd defendants and the registration of the resultant sub – divisions into the names of other proprietors occurred in 1998. This is what the plaintiff has pleaded in paragraph 8 of the plaint: -

“That on 16/09/1998, the 1st, 2nd and 3rd defendants fraudulently got land parcel NO SOUTH MALAKISI/NORTH KULISIRU/381 to be sub – divided into new numbers namely 828, 829, 830, 831 and 832 when the original proprietor the deceased herein NASHION NASIUMA KISONGOCHI had already passed on in 30/10/1997.”

There is nothing in the plaint or even the plaintiff’s own statement to show that the fraudulent activities were discovered subsequent to 1998 which would have provided the plaintiff with a window under **Section 22 of the Limitation of Actions Act**. This suit therefore ought to have been filed before 16th September 2010. It was instead filed on 27th June 2014 long after the statutory period prescribed by **Section 7 of the Limitation of Action Act**. It is therefore statute barred and that Preliminary Objection is also well founded.

This Preliminary Objection has raised the issues of the plaintiff’s lack of locus standi to file this suit and also that it is statute barred. These are issues of law which can form the basis of a Preliminary Objection as defined in the case of **MUKISA BISCUITS MANUFACTURING CO LTD.V. WEST END DISTRIBUTORS LTD 1969 E.A 696** where Sir Charles Newbold (P)said: -

“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 on 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.

Apart from the plea that this suit is statute barred, it is clear from the case law cited above that without the grant of Letters of Administration, the plaintiff lacks the necessary locus standi to file this suit agitating this claim on behalf of the Estate of the deceased. Locus standi is defined in **BLACK’S LAW DICTIONARY 9TH EDITION** as: -

“the right to bring an action or to be heard in a given forum.”

It follows therefore that without the grant of Letters of Administration in respect to the Estate of the deceased, the plaintiff has no right of audience in this Court for as long as he is agitating any claim on behalf of the said Estate.

The up – shot of the above is that the Preliminary Objection dated 18th November 2019 and filed by the 1st, 2nd and 3rd defendants on 22nd November 2019 is merited. I allow it and make the following orders: -

1. The Plaint dated and filed herein on 27th June 2014 together with the Notice of Motion dated and filed herein on 14th November 2019 are both struck out.

2. The plaintiff shall meet the costs of the 1st, 2nd and 3rd defendants.

Boaz N. Olao.

J U D G E

20th February 2020.

Ruling dated, delivered and signed in Open Court this 20th day of February 2020 at Bungoma.

Mr Kundu for plaintiff present

Mr Wekesa for Mr Ogeto for 1st defendant present

Plaintiff present

1st defendant present

2nd defendant present

Joy/Okwaro – Court Assistants

Boaz N. Olao.

J U D G E

20th February 2020.