



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 188 OF 2017**

**NELSON MACHOKA**

**(Suing as the Administrator of the Estate of**

**KENYANYA KERARO DECEASED) .....PLAINTIFF**

**VERSUS**

**LAND REGISTRAR KISII.....1<sup>ST</sup> DEFENDANT**

**ABEL ONTWEKA KIAGE (Administrator of the estate of**

**YUVENALIS KIAGE OMWEGA).....2<sup>ND</sup> DEFENDANT**

**JUMA OMOGA.....3<sup>RD</sup> DEFENDANT**

**ONGAGI OGWOKA.....4<sup>TH</sup> DEFENDANT**

**23/12/2019**

**Coram**

**J. Mutungi (J)**

**Court Assistant : Nelima**

My attention has been drawn to an error in regard to the case reference number in the ruling I delivered at Kisii on 31<sup>st</sup> May 2019, where the case was referred to as Kisii ELC No. 188 of 2015 instead of Kisii ELC No.188 of 2017. I have accordingly in terms of Section 99 of the Civil Procedure Act Cap 21 Laws of Kenya corrected the inadvertent error and re-issued the same ruling with the corrected case number.

This order to be transmitted to Kenya Law to enable them to effect the correction in the uploaded ruling.

**J. M. MUTUNGI**

**JUDGE**

**23/12/2019**

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**NELSON MACHOKA KERARO**

(Suing as the Administrator of the Estate of

KENYANYA KERARO DECEASED) .....PLAINTIFF

VERSUS

LAND REGISTRAR KISIL.....1<sup>ST</sup> DEFENDANT

ABEL ONTWEKA KIAGE (Administrator of the estate of

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### R U L I N G

1. This ruling is in regard to an application brought by the 2<sup>nd</sup> Defendant herein by way of a Notice of Motion dated 27<sup>th</sup> November 2017. The 2<sup>nd</sup> Defendant seeks orders that the Plaintiff's suit commenced by the Plaintiff dated 21<sup>st</sup> September 2017 and filed in court on 28<sup>th</sup> September 2017 be struck out and that the costs of the suit be provided for. The application is premised on grounds that the suit is fatally defective, scandalous, vexatious and an abuse of the process of the Court and further that the suit herein is time barred on account of the provisions of the **Limitations of Actions Act Cap 22 Laws of Kenya ("the LAA")**.

2. The 2<sup>nd</sup> Defendant, Yuvenalis Kiage Omwega, swore a supporting affidavit on the 27<sup>th</sup> November 2017 wherein he deposed that he was the duly registered proprietor of **LR. No. Majoge/Kanyimbo/ 2003** which was a subdivision from land parcel **Majoge/Kanyimbo/ 1391**. The Applicant stated the land parcel **Majoge/Kanyimbo/1010** was subdivided into parcels 1390 and 1391 in 1980 and hence was nonexistent. He averred that the plaintiff's assertions that the suit property was illegally transferred in his favour are mere falsehood since Peter Okemwa Keraro (Okemwa) obtained a valid certificate of succession in respect of the estate of Kenyanya Keraro (deceased) pursuant to which land parcel **Majoge/Kanyimbo/1010** was transmitted to him.

3. In reply, the plaintiff deposed that his father's sons were Okemwa, Obanga Keraro, Ombati Keraro, Kenyaya Keraro and himself. He averred that with the death of Kenyanya and all his other brothers he had a legitimate claim to the suit property. He averred that Okemwa fraudulently transferred the property to his name as there was no evidence that a succession cause had been filed in respect of the estate of Kenyanya (deceased). He further claimed that since Okemwa died in 1979 he could not have transferred the property to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants as Kenyanya died on 8<sup>th</sup> December 1980. The Plaintiff has therefore challenged the legality of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant's titles carved out of the suit property.

4. The Ministry of Interior and Co-ordination of National Government ("**the Ministry**"), department of Immigration and Registration of Persons vide a letter dated 18<sup>th</sup> September 2018 filed in court affirmed that there had been a double registration of death in regard to Peter Okemwa Keraro and clarified that he died on 22<sup>nd</sup> August 1982 as per death certificate serial number 0319124 issued to David Kenaro Okemwa which indicated that Okemwa died in 1982 and not in 1979 as alleged by the Plaintiff. The information availed by the Ministry therefore displaced the allegation by the plaintiff that Okemwa died before Kenyanya.

5. The deceased, Peter Okemwa Keraro died before the **Law of Succession Act Cap 160 Laws of Kenya ("the LSA")** came into force. The commencement date for the LSA was 23<sup>rd</sup> June 1981. Section 2(1) of the LSA provides: -

**"2.(1) Except as otherwise expressly provided in the Act or any other written law, the provisions of this Act shall constitute the Law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons."**

6. Though the LSA was not applicable, it was still necessary at the time to obtain a certificate of succession before a transmission could be effected. **Section 26** of the **Land Registration Act 2012** provides that proprietary rights can be obtained through transmission in the event of a deceased proprietor. What then is the effect of a succession certificate? This was discussed in detail in the case of the **Estate of Marete Kiunga (Deceased) J. K. Marete & Another -vs- Julius Marete Meru HC Succ. Cause No. 3 of 1978 [2019]eKLR** where Gikonyo, J. in considering the application of Section 120 Registered Land Act (repealed) cited with approval the judgment by Musyoka, J. in re **Estate of Nduati Mbuthia (Deceased) [2015] eKLR** where the learned judge held;

**"Was the certificate of succession issued under Section 120 of the Registered Land Act equivalent to a grant of representation? I think not. A grant of representation appoints a personal representative and vests the person so appointed with powers to administer the estate of the deceased with the mandate to eventually distribute it. The certificate of succession envisaged in Section 120 of the Registered Land Act did not appoint a personal representative and the same did not constitute the person named therein as proprietor or the administrator of the estate of the deceased. In holding so I have cognizance of the remarks by Harris J. in Mbuthi -vs- Mbuthi that the provision in Section 120 of the Registered Land Act did not bar the taking out of letters of administration."**[Emphasis Mine]

7. The record shows Peter Okemwa Keraro was registered as owner of land parcel **Majoge/Kanyimbo/1010** pursuant to a certificate of succession issued to him in regard to the estate of Kenya Keraro. The Plaintiff has urged this court to find the certificate of succession was a forged or fraudulent document on the basis that no succession cause was filed at the time. The certificate of succession was registered on 30<sup>th</sup> May 1980. The application for certificate of succession was made by the Land Registrar Kisii Land Registry and the application clearly indicates Kenya Keraro (deceased) died on 15<sup>th</sup> June, 1978 at Aturi village, Kanyimbo sub-location. The Land Registrar endorsed the Death Certificate No. 1600397/78 of 16<sup>th</sup> November 1979 on the application. The Certificate of succession was duly executed by the Magistrate on 1<sup>st</sup> March 1980. The certificate was duly stamped and paid for as per receipt No. 323298 of 8<sup>th</sup> April 1980. Under Section 26(2) of the Land Registration Act 2012, the Certificate of Succession constitutes prima facie evidence that it was validly registered. Section 26(2) provides:-

**26(2) A certified copy of any registered instrument signed by the Registrar and sealed with the seal of the Registrar, shall be received in evidence in the same manner as the original.**

The Plaintiff assertion that the certificate of succession could have been a forgery or fraudulent has no substantiation and has no proof. A generalized statement that the certificate of succession was forged cannot suffice in the absence of any proof. The evidence on record points to the certificate having been validly obtained and I accept it.

8. Other than contending that the Plaintiff's suit is scandalous, vexatious and an abuse of the court process, the 2<sup>nd</sup> Defendant has equally contended that the suit is statute barred and is unsustainable. The 2<sup>nd</sup> Defendant places reliance on Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya which provides that 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. Section 7 of the Act provides as follows:

#### **7. 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.**

9. The issue of limitation of action goes to the jurisdiction of a court to entertain the suit. Once the issue of limitation is raised it is incumbent upon the Court to consider the issue in as much as possible as a preliminary issue. This is because if the Court finds the action is statute barred or time barred it lacks the jurisdiction to entertain the suit. The statute of limitation bars the Court from entertaining the action such that where an action is shown to have been caught up by limitation the Court simply cannot grant the relief sought in the action and must reject the claim. The 2<sup>nd</sup> Defendant in his defence paragraph II inter alia pleaded that the Plaintiff's suit was statute barred under the provisions of the Limitation of Actions Act and contended that the suit was unsustainable and/or entertainable. The 2<sup>nd</sup> Defendant consequently indicated he would take a preliminary objection on the point amongst other points of law.

10. Bosire, J. (as he then was) in the case of **Rawal -vs- Rawal [1990] KLR 2** observed as follows;

**“ The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims.”**

In the case of **Iga -vs- Makere University [1972] EA 65** the Court of Appeal for Eastern Africa while considering the application of the Limitation Act (Uganda) which is similar to our own Limitation Act held that **“a plaint barred by limitation is barred by law and must be rejected”**. The Judges further in the same case stated as follows:-

**“...The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when the suit is time barred, the Court cannot grant the remedy or relief.”**

11. As observed a Court cannot grant any remedy or relief where the claim is time barred. In consequence where a party institute a suit where the action is time barred such an action would be liable to be struck out on account of being scandalous, frivolous and vexatious and/or otherwise an abuse of the process of court.

12. Order 2 Rule 15(1) of the **Civil Procedure Rules** pursuant to which the 2<sup>nd</sup> Defendant has brought the instant application provides:

**(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—**

**(a) it discloses no reasonable cause of action or defence in law; or**

**(b) it is scandalous, frivolous or vexatious; or**

**(c) it may prejudice, embarrass or delay the fair trial of the action; or**

**(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”**

13. I am mindful that striking out a suit before the parties are heard on merits is a draconian step, because it drives a party out of the seat of justice without affording him or her a hearing. The Court of Appeal in the case of **D.T Dobie & Company (K) Ltd -vs- Muchina [1982] KLR 1** provided guidance on the parameters a Court ought to consider before striking out a suit. The court stated as follows:-

**“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a semblance of a cause of action, provided it can be injected with life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”**

14. In this case, I find that time begun to run from 1980 when the suit property was transferred to Peter Okemwa Keraro. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have been in possession of the suit property for over 30 years and during all that time no action to recover the land has been brought. Since the issue is not whether there is a valid cause of action or whether the plaintiff's case is meritorious, but rather whether the suit is time barred in terms of **Section 7** of the **Limitation of Actions Act**, I find that on the basis of the facts and evidence presented before the Court, the suit against the 2<sup>nd</sup> Defendant and indeed against all the Defendants is statute barred. The suit against the Defendants is not sustainable and the Court cannot therefore grant any of the reliefs sought by the Plaintiff.

15. In the result, I agree with the 2<sup>nd</sup> Defendant that the claim by the Plaintiff is time barred. The Plaintiff's suit against the Defendants is accordingly struck out on account of being statute barred. As it is the 2<sup>nd</sup> Defendant who moved the court and there was no participation by the other defendants, I award the costs of the suit to the 2<sup>nd</sup> Defendant as against the Plaintiff.

16. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KISHI THIS 31<sup>ST</sup> DAY OF MAY 2019.**

**J. M. MUTUNGI**

**JUDGE**