

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ELC LOS NO E015 OF 2023

DANIEL MAKOKHA SIDIALO

PLAINTIFF

= VERSUS =

BUSIA COUNTY GOVERNMENT

DEFENDANT

R U L I N G

1. **DANIEL MAKOKHA SIDIALO** (the Plaintiff) has approached this Court vide his Originating Summons dated 29th September 2023 and filed on 7th December 2023 anchored under **Order 37** of the **Civil Procedure Rules**. He has impleaded the **BUSIA COUNTY GOVERNMENT** (the Defendant) seeking the main remedy that the Defendant holds the land parcel **NO BUKHAYO/LUPIDA/75** (the suit land) in trust for the Plaintiff. That the trust should now be determined and the suit land reverted to the Plaintiff as Administrator to the Estate of his late father **SIDIALO KULUNDU OKECHI**. The full particulars of the trust are set out in the Plaintiff's supporting affidavit and are not relevant for purposes of this ruling.

2. What is important is that in opposition to the Originating Summons, the Defendant vide the replying affidavit of it's Chief Officer and Accounting Officer Department of Lands and Housing one **VINCENT WANJALA** and dated 31st May 2024 has deposed, inter alia, that the suit land is public land reserved for **KAPIMA BAPTIST CHURCH** and has never been registered in the name of the Plaintiff. That the Plaintiff's allegations that the suit land is held by the Defendant in trust for the Plaintiff are false. That a Preliminary Objection would be raised that this suit is time barred and should be struck out.
3. The Defendant followed up by filing a Preliminary Objection dated 30th May 2024 seeking the striking out of the Plaintiff's suit on the following grounds:
 - a) That the suit is fatally defective and an abuse of the Court process.
 - b) That the suit is time barred under the **Limitation of Actions Act.**
 - c) That the suit is filed in contravention of **Section 7** of the **Limitation of Actions Act.**
4. That Preliminary Objection is the subject of this ruling and the Court directed that the same be canvassed by way of written

submissions. Those submissions have been filed by **MS NEKESA** instructed by the firm of **ABK ADVOCATES LL.P** for the Plaintiff and by **MR BRANWEL KENNEDY AKOTSI** the Legal Counsel for the Defendant.

5. I have considered the Preliminary Objection and the submissions by counsel.
6. It is common ground that the Plaintiff's claim to the suit land is hinged on trust. It is also common ground that the Defendant's Preliminary Objection is hinged on the **Limitation of Actions Act** and specifically, that the suit is statute barred under **Section 7** of the said **Act** and is therefore an abuse of the Court process. The main issue for this Court to consider is whether a claim to land based on trust can be defeated by the provisions of **Section 7** of the **Limitation of Actions Act**. The provision reads:

7: "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 not in doubt that limitation is a jurisdictional issue and once the Court determines that a suit is statute barred, then it must down it's tools for want of jurisdiction - **OWNERS OF THE MOTOR VESSEL "LILLIAN S" -V- CALTEX OIL (KENYA) LTD CIVIL APPEAL NO 50 of 1989 [1989 KECA 48 KLR]**. Further, as correctly submitted by counsel for the Defendant citing the case of **IGA -V- MAKERERE UNIVERSITY 1972 EA 62**,

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

Therefore, once it is demonstrated that a suit is time barred, the plaintiff must be rejected.

7. As already stated above, however the Plaintiffs claim is anchored on trust. In paragraphs 1 and 2 of his Originating Summons, he has pleaded thus:

1. "That the Plaintiff is cestui que trust of land parcel NO BUKHAYO/LUPIDA/75."

2. "That even if the said piece of land is currently registered in the name of the Defendant, there is evidence that it is thus held only in trust for the

Plaintiff and that the trust should now determine and the property held directly and legally by the Plaintiff as the Administrator of the estate of the late Sidialo Kulundu Okech since the trust is no longer necessary or desirable.”

However, notwithstanding the provisions of **Section 7** of the **Limitation of Actions Act, Section 20(1)** of the same **Act** provides that:

20(1) “None of the periods of Limitation prescribed by this Act apply to any action by a beneficiary under a trust, which is an action -

- (a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or**
- (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.**

Of course, whether or not the Defendant is a trustee holding the title to the suit land in trust for the Plaintiff is a matter which will

be determined by the trial Court on the available evidence. That is not an issue to be determined in this ruling and I need not venture into it at this stage. All I can say is that **Section 7** of the **Limitation of Actions Act** does not defeat a claim based on trust. That was also clearly set out in the case of **STEPHENS & 6 OTHERS -V- STEPHENS & ANOTHER C.A.** Civil Appeal **NO 18** of **1987** [**1987 KECA 54 KLR**] where the Court of Appeal per **NYARANGI JA**, stated thus:

“Philosophy underlying the English Limitation Act seems to be, that where confidence is reposed and abused, a defaulting fiduciary in possession of trust property or which he converted to his use, should not be shielded by time bar. So no plea of limitation is available to a fiduciary in such a case (see Section 19(1) of the Limitation Act 1939). The Parliament of Kenya clearly shares that policy and in the Limitation of Actions Act (cap 22) enacted a similar provision almost identical in language.”

It follows therefore that the plea of limitation is not properly invoked in the circumstances of this case where the claim is founded on trust. The suit should proceed to hearing to enable

the trial Court make a finding as to whether or not the Defendant is a trustee holding the suit land in trust for the Plaintiff. Of course if, as deponed in paragraph 4 of the replying affidavit, the suit land is indeed public land and which is an issue of evidence, the Plaintiff will have a herculean task proving his claim. I leave that to the trial Court.

8. The up-shot of all the above is that the Preliminary Objection dated 30th May 2024 is devoid of merit. It is accordingly dismissed with costs to the Plaintiff.

BOAZ N. OLAO
JUDGE

26TH FEBRUARY 2026

Ruling dated, signed and delivered by way of electronic mail on this 26th day of February 2026 with notice to the parties.

BOAZ N. OLAO
JUDGE

26TH FEBRUARY 2026

Explanatory Notes:

This ruling was due on 22nd January 2026. However, following my transfer from Busia to Iten Court w.e.f 15th January 2026, I had to prioritize the hearing of my part heard cases. That has contributed towards the delay which is regretted.

BOAZ N. OLAO
JUDGE
26TH FEBRUARY 2026

ORIGINAL