



REPUBLIC OF KENYA



KENYA LAW
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Okere v Mumias Outgrowers Sacco Society Limited & 10 others (Environment & Land Case E006 of 2023) [2024] KEELC 274 (KLR) (30 January 2024) (Ruling)

Neutral citation: [2024] KEELC 274 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE E006 OF 2023
DO OHUNGO, J
JANUARY 30, 2024

BETWEEN

ISAAC MAKOKHA OKERE PLAINTIFF

AND

MUMIAS OUTGROWERS SACCO SOCIETY LIMITED 1ST DEFENDANT

THE COUNTY GOVERNMENT OF KAKAMEGA 2ND DEFENDANT

STEPHEN OKERE OMULONGA 3RD DEFENDANT

OMOTO S WANZETSE WABUYABO 4TH DEFENDANT

DANIEL MAELO MUNJUMA 5TH DEFENDANT

SAMUEL OTIENO NDALO 6TH DEFENDANT

RAJAB MAERO OTIENDE 7TH DEFENDANT

MARGARET MUKOYA MMINI 8TH DEFENDANT

THE COUNTY LAND SURVEYOR KAKAMEGA COUNTY ... 9TH DEFENDANT

**THE COUNTY LAND REGISTRAR KAKAMEGA COUNTY 10TH
DEFENDANT**

THE HON ATTORNEY GENERAL 11TH DEFENDANT

RULING

1. Litigation in this matter commenced on 22nd March 2023 when the plaintiff filed plaint dated 22nd February 2023. He averred in the plaint that Washifunzwa Shikunyi (deceased) who was his brother who passed away on 15th August 1969 was the registered proprietor of land parcel number South Wanga/Lureko/65 (the suit property) and that succession in respect of his estate was done in 1978.



That on 12th March 1999 the first to eighth defendants in collusion with the ninth and tenth defendants fraudulently caused the suit property to be transferred and registered in the names of the first to eighth defendants and further fraudulently subdivided the suit property into South Wanga/Lureko/948, 949, 2231, 2232, 2233, 2234, 2235, 2306, 2307, 2664, 2665, 2666, 2792, 2793, 2874, 2875, 3194, 3195, 3196, 3197, 3483, 3484, 3635, 3636, 4408, and 4409. In terms of paragraph 18 of the plaint as well as the prayers in the plaint, the plaintiff sought judgment against the defendants jointly and severally for cancellation of the subdivisions, reversion to the suit property and a permanent injunction restraining the defendants from dealing with the suit property.

2. Together with the plaint, the plaintiff filed Notice of Motion dated 22nd February 2023, seeking the following orders:
 - a. [Spent]
 - b. [Spent]
 - c. That this honourable court be pleased to issue an order restraining or inhibiting any registration, dealing with L.R. South Wanga/Lureko/948, 949, 2231, 2232, 2233, 2234, 2235, 2306, 2307, 2664, 2665, 2666, 2792, 2793, 2874, 2875, 3194, 3195, 3196, 3197, 3483, 3484, 3635, 3636, 4408, and 4409 pending the final hearing and determination of the suit.
 - d. [Spent]
 - e. That this honourable court be pleased to issue an order of injunction restraining Respondents herein, their agents, servants, relatives and or assigns from dealing interfering, cultivating erecting houses and fences, planting, selling and or dealing in any manner whatsoever with L.R. South Wanga/Lureko/948, 949, 2231, 2232, 2233, 2234, 2235, 2306, 2307, 2664, 2665, 2666, 2792, 2793, 2874, 2875, 3194, 3195, 3196, 3197, 3483, 3484, 3635, 3636, 4408, and 4409 pending the final hearing and determination of this suit.
 - f. That costs of this application be provided for.
3. The application is supported by an affidavit sworn by the plaintiff. Among other documents, he annexed a copy of the register for the suit property. Entry number 5 in the proprietorship section shows that the register was closed on 12th March 1999 upon subdivision.
4. The first, third, fifth and sixth defendants did not respond to the application. On its part, the second defendant filed a replying affidavit sworn by Christabell M Ashiono, its Principal Legal Officer. The second defendant also filed Notice of Preliminary Objection dated 20th April 2023 against the application and the entire suit. The following grounds are listed on the face of the objection:
 1. The suit as filed against the 2nd Defendant/Respondent offends the mandatory provisions of Section 3(2) of the [Public Authorities Limitation Act](#) cap 39 laws of Kenya.
 2. The suit as filed against the 1st Defendant/Respondent offends the mandatory provisions of Section 7 of the [Limitation of Actions Act](#) cap 22 laws of Kenya.
 3. The suit is time barred under the said provisions.
5. The fourth, seventh, and eighth defendants also objected to the application and the suit through Notice of Preliminary Objection dated 26th April 2023 on the following grounds:
 1. The plaintiff's suit is statute or time-barred, incompetent, a non-starter, incurably defective, untenable and improperly before the court.



2. The plaintiff lacks the locus standi to institute the present or any suit in respect of the suit property.
3. This court is devoid of jurisdiction to entertain the plaintiff's suit and the said suit is vexatious, frivolous, unmaintainable, oppressive and fails to disclose any cause of action against the defendants/respondents.
6. The ninth to eleventh defendants opposed the suit through statement of defence dated 3rd April 2023 and opposed the application through grounds of opposition dated 3rd April 2023.
7. This ruling is in respect of both preliminary objections and the application which were canvassed through written submissions. All parties save for the first, third and fifth defendants filed submissions.
8. The second defendant argued that the suit is barred under Section 3 (2) of the Public Authorities Limitation Act and Section 7 of the Limitation of Actions Act and that consequently, this court lacks jurisdiction. Reliance was placed among others on the cases of Anadet Kalia Musau v Attorney General & 2 Others [2020] eKLR, Iga v Makerere University (1972) EA 65 and Gathoni v Kenya Cooperative Creameries Ltd (1982) KLR 104. The second defendant therefore urged the court to strike out the suit.
9. On their part, the fourth, seventh, and eighth defendants argued that the plaintiff's case is a tort claim based on allegations of fraud which is said to have occurred on 12th March 1999 and that the claim is therefore barred by virtue of the provisions of Section 4 (2) of the Limitation of Actions Act as well as Section 3 (1) of the Public Authorities Limitation Act. Relying on Kenya Farmers Association v Quasar Limited & 5 others [2021] eKLR, they urged the court to strike out the case with costs.
10. In response, the plaintiff argued that the defendants participated in fraud and that they cannot therefore hide behind the Limitation of Actions Act and the Public Authorities Limitation Act. That the two statutes cannot override the Constitution and that time for purposes of limitation could not start running against him since the defendants registered themselves secretly but did not take possession. He argued that this court has jurisdiction and urged the court to dismiss the preliminary objections.
11. I have considered the preliminary objections, the application, the affidavits, and the submissions. I will deal with the preliminary objections first. If they fail, I will then determine the application. On the other hand, there will be no need to determine the application if I uphold the preliminary objections.
12. As has been repeated severally by the courts, jurisdiction is everything. It is the very life and soul of any judicial proceedings. Without it, the proceedings come to a certain end and the court cannot make any further step. See Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR and Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR.
13. The plaintiff's case as pleaded is that on 12th March 1999 the first to eighth defendants in collusion with the ninth and tenth defendants fraudulently caused the suit property to be transferred and registered in the names of the first to eighth defendants and further fraudulently subdivided the suit property into other parcels. Thus, the pleaded cause of action arose on 12th March 1999. Going by paragraph 18 of the plaint as read with the prayers in the plaint, the plaintiff is seeking cancellation of titles in respect of the subdivisions so that the situation reverts to what it was prior to 12th March 1999. The suit is thus an action to recover land.



14. Section 7 of the *Limitation of Actions Act* provides:

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.

15. The cause of action having accrued on 12th March 1999, the plaintiff had until 12th March 2011 to file any suit for recovery of the suit property. This suit was filed on 22nd March 2023, some twelve years out of time.

16. The effect of *Limitation of Actions Act* on a claim was discussed in *Iga v Makerere University (supra)* thus:

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

The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the pleadings, and no grounds of exemption are shown in the pleadings, the pleadings must be rejected.

17. It follows therefore that the plaintiff's pleadings must be rejected since it seeks cancellation of titles in respect of the subdivisions issued way back on 12th March 1999 and reversion of the suit property as it existed on 12th March 1999. His argument that the defendants registered themselves secretly but did not take possession does not assist him at this point since this court is not considering an application for extension of the limitation period.

18. In view of the foregoing, I find merit in both preliminary objections. I therefore strike out the suit with costs to the second, fourth, seventh and eighth to eleventh defendants. I do not award any costs to the first, third, fifth and sixth defendants since they neither responded to the application nor participated in the hearing of the objections.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF JANUARY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Munyendo holding brief for Mr Athunga for the Plaintiff

No appearance for the 1st, 3rd, 5th and 6th Defendants

Ms Odeck for the 2nd Defendant

Mr Balusi holding brief for Mr Akwala for the 4th, 7th and 8th Defendants

Mr Juma for the 9th to 11th Defendants

Court Assistant: E. Juma

