



REPUBLIC OF KENYA



Wanyonyi & another v Masoni & another (Environment & Land Case 160 of 2017) [2025] KEELC 968 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELC 968 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 160 OF 2017
EC CHERONO, J
FEBRUARY 27, 2025**

BETWEEN

ASHON SIKOLIA WANYONYI 1ST PLAINTIFF

LUKA M WANYONYI 2ND PLAINTIFF

AND

SELINA NAMALWA MASONI 1ST DEFENDANT

BUNGOMA COUNTY GOVERNMENT 2ND DEFENDANT

RULING

1. The Plaintiff/Applicant has moved this honourable court vide a Notice of Motion dated 9th December, 2024 seeking the following orders;
 - a. That it pleases the Honorable court to strike out the counter claim and the amended defence for lack of jurisdiction, res-judicata and abuse of the court process.
 - b. The suit is statute barred, stale and offends the limitation period.
 - c. That costs be provided for.
2. The application is based on grounds apparent on the face of the application and the supporting affidavit of Ashon Sikolia Wanyonyi sworn the same date as well as annexures thereto.
3. The application is opposed by the Defendant/Respondent who filed grounds of opposition and a replying affidavit dated and sworn on 24/12/2024.

Applicants' Summary Of Facts

4. The Plaintiffs/Applicants through the supporting affidavit of Ashon Wanyonyi Sikolia worn on 9th December 2024 deposed that the plot known as Webuye Municipality No.74 was initially succeeded



- and confirmed as part of the Estate of Reuben Wanyonyi in Bungoma Succession Cause NO.68 of 1997. A copy of the confirmed Grant was annexed and marked "ASW-1"
5. That long after the said confirmation, the Respondent filed Succession of her late husband Ben Masoni who is his brother and added the plot namely Webuye Municipality 74 to the Succession Cause NO. 51 of 2005.
 6. He stated that the said addition made them to file revocation and rectification proceedings to remove the said plot NO. 74 and 75 from the estate of Ben Masoni in Succession Cause NO.51 of 2005 and return them to Succession Cause NO. 68 of 1997 as initially confirmed and the Succession court gave its ruling, a copy of which was annexed and marked "ASW-2".
 7. He deposed that the Respondent never preferred an appeal against the said order to the Court of Appeal to reverse the impugned order but has now come to this court to declare that the plots belong to the estate of Ben Masoni. He stated that he has been advised by his advocate on record that this honourable court lacks jurisdiction to determine disputes relating to properties forming part of the estate of a deceased person as the same lies with succession court. That he has also been advised by his advocate on record that since the succession court has already dealt with the matter substantially and directly, it is re-judicata and an abuse of the honourable court process to review or revisit the same findings as they were before the succession court as that would amount to sitting on appeal of an judgment/decreed by the same court. A copy of an order and rectified grant was annexed and marked "ASW-3(a) & (b)".
 8. He stated that upon being served with this suit, the defendant/Respondent filed her first defence dated 23.05.2018, the second defence with a counter-claim dated 18.12.2023 and now third defence with another counter-claim dated 13.11.2024 which does not refer to the two previous defences and that the amended defence does not conform to the rules of amendment and does not show the amended clauses with red ink. He deposed that the entire defence and counter-claim is a total abuse of the court process as a similar suit was filed vide Bungoma ELC Case NO. 17 of 2006 and was later withdrawn in 2016 and that the current suit has been filed after 15 years which makes it statute barred and unmaintainable as the limitation period is 12 years only.
 9. In conclusion, the Applicant deposed that the suit as filed and counter-claim does not have the registered owners of plot NO.75 who are Scholastic Wekesa as an administratrix of Mary Nasimiyu, the lease holder.
 10. The application is opposed with grounds of opposition and a Replying affidavit sworn and filed by the Defendant/Respondent through the Firm of M/S Oira & Company Advocates dated and sworn on 24/12/2024 respectively on the following grounds;
 1. That the application is an abuse of the entire court process as orders delivered by Justice B.N Olao in his ruling dated 19th July 2018 were not complied to by the plaintiff/Applicants
 2. That the High court ruling in Succession Cause 51 of 2005 dated 25th April 2023 unequivocally states that the Environment & Land Court has the jurisdiction to interrogate the ownership of plot 74 and 75
 3. That a court with competent jurisdiction is yet to determine ownership of the subject plots rendering the application premature and misguided
 4. That a counterclaim was duly filed on the 18th December 2023 which the parties can proceed with to establish ownership of the suit properties.



5. That the civil Procedure Rules does not envisage a situation where the points of law can be determined through applications whereas can be raised through a Preliminary Objection.
6. That the application is frivolous, misconceived, ambiguous and intends to further delay and derail the hearing of this case on merit.

Plaintiff/applicants' Submissions

11. The Applicants through the Firm of J.W Sichangi & Co. Advocates filed submissions dated 10/02/2025 where they submitted that the claim by the Defendant/Respondent through the proposed amended defence and counter-claim is statute barred, res-judicata and an abuse of the court process. They relied in the following cases; Virginia Kairigo Runji v Christopher Nthia Gacuthe & 17 Others (2020) 2020 KLR; Mary Osundwa v Nzoia Sugar Company Ltd (2002) eKLR; Bungoma ELC NO. 105 of 2016 (U.R); Section 7, 26, 27 & 28 of the [Limitation of Actions Act](#).

Respondent's Submissions

12. The Respondent through the Firm of M/S Oira & Co. Advocates submitted on numerous issues. The first issue is whether this court has jurisdiction to hear and determine the dispute between the parties which he answered in the affirmative. The learned counsel referred to Article 162(2) (b) of [the Constitution](#) and Section 13 (1) & (2) of the ELC Act. He also relied in the following cases; Owners of the Motor Vessel "Lillian S" V Caltex Oil (K) Ltd (1989) eKLR; Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd (1969) E.A 697.
13. The second issue is on res-judicata which like jurisdiction, can only be raised on a pure point of law. He submitted that it can be raised on the assumption that all the facts pleaded are correct and cannot be raised where any fact has to be ascertained. The learned Counsel submitted that no suit has been previously heard and determined in respect of the ownership of the suit properties being Webuye Municipality Plot NO. 74 and 75. He submitted that the suit that the plaintiff/Applicant has referred being ELC NO. 17 of 2006 was withdrawn on 22nd September, 2016 without determining the ownership of the suit properties.
14. The third issue is whether the defendant/Respondent's counter-claim is statute barred under Section 7 of the [Limitation of Actions Act](#). In his submissions, the learned counsel submitted that the Defendant/Respondent's case being ELC NO.17 of 2006 was withdrawn before it was heard.
15. He relied in section 7 of the [Civil Procedure Act](#). He cited the case of [Abdul Kassim Hassanah Gulambussein Khala v Southern Credit Banking Corporation Ltd, Mombasa HCCC NO.270 of 2005](#).

Legal Analysis And Decision

16. I have considered the application, the Supporting affidavit, the Replying affidavit and grounds of opposition as well as the submissions by the parties. The plaintiffs/Applicants in the said application are seeking an order to strike out the Defendant/Respondent's Amended defence and counter-claim for lack of jurisdiction, statute barred, res-judicata and being an abuse of the court process. The application is brought under Sections 3, 3A, 7, 63(1) CPA, Section 7 of the [Limitation of Actions Act](#) and Order 8 Rule 6 CPR.
17. On the issue of jurisdiction, the plaintiff/Applicant argued that as the administrators of the estate of Reuben Wanyonyi (deceased), they filed Succession proceedings in Bungoma HC Succession Cause NO. 68 of 1997 and were issued with a grant which was subsequently confirmed. They stated that after the grant was confirmed, the Defendant/Respondent filed Succession proceedings for the estate



of her husband Ben Masoni (deceased) in Bungoma HCC Succession Cause NO.51 of 2005 where she added the two disputed plots as part of his estate. They stated that the said addition made them to file revocation and rectification proceedings to remove the said plots NO. 74 & 75 from the estate of Ben Masoni and return them to the estate of Reuben Wanyonyi and the High court rendered itself vide a ruling annexed and marked ASW-2. They argued that the Respondent did not prefer an appeal against the order of the court and has now come to this court seeking a declaration that the plots belong to the estate of Ben Masoni.

18. The Plaintiffs/Applicants' argument is that the Environment and land court has no jurisdiction to determine the ownership of the suit properties after the High vide Bungoma HCC Succession Cause NO. 68 of 1997 determined that the two properties belonged to the estate of Reuben Wanyonyi (deceased).
19. Article 162 (2) (b) of *the Constitution* of Kenya stipulates that;
 - “(2) Parliament shall establish courts with the status of the High court to hear and determine disputes relating to-
 - b. the environment and the use and occupation of, and title to land.”
20. Section 13 (2) of the *Environment and land court Act* also gives jurisdiction to the Environment and land court to determine disputes relating to Environment and Land as follows;
 - “(2) In exercise of its jurisdiction under Article 162 (2) (b) of *the constitution*, the Court shall have power to hear and determine disputes-
 - a. Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. Relating to compulsory acquisition of land;
 - c. Relating to land administration and management;
 - d. Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. Any other dispute relating to environment and land.
21. From the above provisions of the law, it is trite that the jurisdiction of the Environment and land court is so wide and extends to disputes of title issued to a proprietor upon registration, transfer or transmission. Where there is a dispute over the manner in which a title was acquired, the law gives jurisdiction to the Environment and Land Court to investigate by evidence to determine if the same was acquired through fraud, misrepresentation, illegality, unprocedurally or through a corrupt scheme (see Section 26 of the *Land Registration Act*. No. 3 of 2012). It does not therefore matter that the plaintiffs/Applicants acquired title or ownership of the suit properties by transmission through succession proceedings since this court has jurisdiction to determine the dispute as to ownership of the same. In any event, the process in which the plaintiffs/Applicants are said to have acquired the suit properties by transmission after confirmation of grant was not a declaration of ownership as there was no dispute in play.



22. The second issue is whether this suit is res-judicata. The law pertaining to res-judicata is Section 7 of the [Civil Procedure Act](#) which provides as follows;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issues has been subsequently raised, and has been heard and finally directed by such a court.”

21. The plaintiffs/Applicants argued that they filed succession proceeding in HC Succession Cause NO. 68 of 1997 and were issued with a grant of Letters of administration which was subsequently confirmed. They further contend that the Defendant/Respondent later filed a succession Cause in respect of the estate of her husband Ben Masoni (deceased) and included the two properties in his estate. They averred that they challenged the inclusion of the two properties and the High Court removed the two properties from the estate of Ben Masoni. The removal of the two properties from the estate of Ben Masoni in my view was not a declaration that the plaintiffs/Applicants are the legitimate, genuine and bona-fide proprietors of the suit properties. In any event, the High court has no jurisdiction to determine disputes relating to title to land. The argument by the Plaintiff/Applicant that the High Court which is a court of concurrent jurisdiction has heard and determined a similar dispute over the same matter and parties is a hollow interpretation of the law. Whereas it is true that the High court is a court of concurrent jurisdiction, the jurisdiction of the High court and Environment and Land court are totally different.

22. The third and final issue relates to [Limitation of Actions Act](#). According to the plaintiffs/Applicants, the 1st Defendant/Respondent herein initially filed a suit vide Bungoma ELC Case NO. 17 of 2006 which sought similar prayers and involved same subject matter. They argued that the said suit was withdrawn and the 1st Respondent is now seeking to reinstate the same claim through the backdoor 18 years later by way of a counter-claim.

23. It is trite that the general power to amend pleadings is at the discretion of the court. Several decisions have enunciated the guiding principles to enable a court make a determination on whether to allow or refuse an order for amendment of pleadings. In the case of *Joseph Ochieng & 2 Others v First National Bank of Chicago* Civil Appeal NO. 149 of 1999, the court acknowledged the writings by the learned author in *Bullen and leake & Jacob's precedents of pleading*, 12th Edition and held as follows;

“The ratio that emerges out of what was quoted from the same book is that powers of the court to allow amendment is to determine the true substantive merits of the case, amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that, as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendments introduce a new case or new ground of defence. It can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action, that the plaintiff will not be allowed to reframe his case or claim if by an amendment of the plaint the defendant would be deprived of his right to rely on [limitation of actions Act](#).”

21. What I can discern from the above decision is that an application to amend pleadings ought to be allowed, irrespective of the delay in invoking the desire to amend, provided it is made in good faith. An application for amendment would however be disallowed if from the court perspective the proposed



amendment would change the action into one of a substantially different character which substantially makes the subject of a fresh action thereby occasioning a miscarriage of justice to the opposite party.

22. I have looked at the application and materials in support thereto and find no where the plaintiff/Applicants have stated that they will be prejudiced and how they would be prejudiced if the proposed amendments are allowed. I am also at pains to understand when the defendants/Respondent's alleged right over the suit land accrued under the *Limitation of Actions Act*. This is because at paragraph 10 of the present application, the applicant deposed as follows;

“10. That the entire defence and counter-claim is a total abuse of the court process as a similar suit was filed vide Bungoma ELC Case NO. 17 of 2006 and later was withdrawn in 2016. The current one has been filed after 15 years which makes it statute barred and unmaintainable as the limitation period is 12 years only.”

21. Section 7 of the Limitation of Action Act states 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.”

21. From the pleadings, the plaintiffs/Applicants have not stated when the defendants/Respondent's alleged right to the suit land accrued to them for purposes of determining when the statutory period of twelve (12) years started to run. There is no legal basis how the plaintiffs/Applicants concluded that the Defendant/Respondent's right/claim to the suit property accrued when they filed the initial suit being Bungoma ELC NO. 17 of 2006.

22. I have also looked at the court record and despite acknowledging that the Defendant/Respondent has filed numerous Amended defence and counterclaim, the Plaintiffs/Applicants have not filed a reply to those amended defences and defence to counter-claims.

23. For the foregoing reasons, I find the Notice of Motion application dated 9th December 2024 lacking merit and the same is hereby dismissed with costs to be in the cause.

24. Orders accordingly.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 27TH FEBRUARY, 2025.

HON. E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Oira for the Defendants/Respondents.

Mr. Sichangi for the plaintiffs/Applicants.

Bett C/A.

