



REPUBLIC OF KENYA



**Wephukhulu & 4 others v Khauka (Environment & Land Case
E002 of 2023) [2024] KEELC 1369 (KLR) (11 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1369 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E002 OF 2023**

EC CHERONO, J

MARCH 11, 2024

BETWEEN

JAMIN WEPHUKHULU 1ST PLAINTIFF
ZEBEDAYO MATIAS KOROGOSI 2ND PLAINTIFF
ABRAHAM MABONGA 3RD PLAINTIFF
FRED WANYAMA KOROSIA 4TH PLAINTIFF
SAULO KHAEMBA WEPHUKULU 5TH PLAINTIFF

AND

ELIUD WEPHUKULU KHAUKA DEFENDANT

RULING

1. The application that is the subject of this ruling is dated 24th October, 2023 filed by the 4th defendant/
Applicant seeking the following orders; -
 - a. Spent
 - b. Spent
 - c. Spent
 - d. Spent
 - e. That pending the hearing of the suit inter-partes, the court be pleased to issue an order compelling the Land Registrar Bungoma County to cancel the following title deeds that arose from Bokoli/Chwele/250 which are Bokoli/Chwele/2459,2460,2461,2462 a further subdivision of Bokoli/Chwele/2459 which are 2597,2598,2599,2600,2601,2602.



- f. That the titles created from Bokoli/Chwele/250 be cancelled to allow other beneficiaries get rightful shares
 - g. That the Defendant/Respondent be compelled to include all beneficiaries in the subdivision and transfer process of all land known as Bokolo/Chwele/250 which is ancestral.
 - h. That upon granting the above orders the Officer Commanding Police station Chwele enforce the orders
 - i. The costs of this application be borne by the Defendants/Respondent.
2. The Application is supported by the grounds set out on the face of the application as well as the affidavit sworn on 26th July, 2023 by Jamin Wephukulu, the 1st applicant on his behalf and on behalf of his co-Applicants.
 3. It is the applicant's case that they are the sons of the late Isaiah Masabo Khauka who was a brother to the respondent. He deposed that their father was Paulo Khauka Sirengo who was the registered owner of Bokolo/Chwele/250 which is their ancestral land. He further stated that the respondent illegally and unprocedurally obtained the title deed of the said land without conducting succession and has since sub-divided the same with the intention of disposing it off to third parties thereby disinheriting the lawful beneficiaries of the land.
 4. In opposition to the said application, the respondent filed a replying affidavit dated 18th December, 2023. It is their contention that indeed one Isaiah Masaba was his brother. He stated that they were each given their own shares of land by their late father wherein they settled in the 1960's. He stated that he was bequeathed Bokoli.chwele/250 while his brother was given Bokoli.chwele/253.
 5. The respondent stated that the said Isaiah Masaba sold off his portion to one Kaptain Watesi and moved to Uganda. The said land is said to have later been sub-divided into Bokoli/Chwele 1091 and 1092. He further stated that sometime in the year 1967, plot 1092 was offered for sale and he purchased it. It was his statement that at the time the applicants were young, some of them lived with their father in Uganda while the others lived with him. He deposed that the applicants have severally sued him and as a result of the said law suits, he lost ownership of plot 1029.
 6. In addition to his replying affidavit, the respondents filed a notice of preliminary objection dated 4th October, 2023 where he raised the following points of law;
 - a. The matter is malades, res-judicata and statute barred.
 - b. The plaintiffs are ill-equipped as they lack locus standi and capacity to agitate this suit.
 - c. The suit is a replica of various claims that have been litigated in court and tribunals to wit;
 - i. Chwele Land District Tribunal case no. 9 of 2005 adopted as judgment of the court in Bungoma C LTD No.21 of 2005.
 - ii. Bungoma High Court Misc. Application No. 192 of 2005.
 - iii. Court of appeal at Eldoret No.47 of 2009.
 - iv. Bungoma ELC No. 169 of 2013
 - v. Court of Appeal at Kisumu Appeal case no. 84 of 2018.
 - d. All the aforesaid matters were between the same parties and same subject matter and they were heard and determined on merits.



- e. The entire suit is a total abuse of the court process, a non-starter and an afterthought.
7. The parties took directions to canvass both the application and the preliminary objection simultaneously.
 8. The applicants filed their submissions dated 19th January, 2024 and submitted on three issues. They submitted that they have demonstrated three requirements for granting of the orders sought as settled in *Giella v Cassman Brown* [1973] EA 358 i.e they have established a *prima Facie* case, they have demonstrated that they shall suffer irreparable losses if the orders sought are not granted and they have proved their case on a balance of probabilities.
 9. They relied on the following cases; *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR, *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018]eKLR, *Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 Others* (2016)eKLR, *Robert Mugo wa Karanja v Ecobank (Kenya) Limited & Another* [2019] eKLR.
 10. On the second issue, the applicants submitted that this matter is not res judicata as alleged by the respondent. They argued that the issues for determination in the previous cases was land parcel no. Bokoli/Chwele/1092 which was sub-divided from Bokoli/Chwele/253 and not Bokoli/Chwele/250 which is the subject of this suit thus this suit has not yet been heard and determined.
 11. On the third issue, the plaintiff submitted that they have filed this suit under Article 22 and 40 of *the Constitution* of Kenya. They argued that they have locus standi. They cited various case law on the issue such as *Alfred Njau & 7 Other v City Council of Nairobi* [1982] KAR 229, *Quick Enterprises Ltd v Kenya Railway Corporation*, Kisumu HCCC No. 22 of 1999. The applicants urged the court to allow the application.
 12. The defendant on the other hand filed his submissions dated 30th January, 2024 where he submitted that this suit is time barred for having been brought beyond the 12 year period as per Section 7 of the *Limitation of Actions Act*, Cap 22. It was his further submission that the applicants/plaintiffs claim is to enforce interest in land they say belonged to their father who died in the year 1980 which is beyond the 12 years limit for bringing such a claim. Further, he argued that the applicants have concealed the fact that there have been previous cases heard and determined over the same subject matter.
 13. It was also submitted by the respondent that the applicants have all along been claiming Land parcel No. Bokoli/Chwele/1092 to the exclusion of Land parcel no. Bokoli/Chwele/250 which they alleged belong to him. The respondent therefore argued that the applicants therefore cannot now turn around and claim interests over Bokoli/Chwele/250.
 14. The respondent went on to submit that Land Parcel Bokoli/Chwele/250 is non-existent since it was sub-divided and shared to his children on 12.3.2010 and new titles issued. It is argued that this suit has been filed 13 years after the sub-division and as such the applicants claim was not only res judicata but time barred.
 15. Lastly, the respondent submitted that the applicants who claim interest in their father's land lack the capacity to be before this Honourable Court since they have not taken out letters of administration for the estate of their deceased father.
 16. I have carefully read and critically put into account all the filed pleadings, the written submissions, cited authorities relied on and the relevant provisions of the appropriate and enabling laws with regard to both the notice of motion application and the preliminary objection. In order to arrive at an informed, fair and just decision, I have framed the following salient issues for determination as follows:



- a. Whether the Preliminary Objection raised by the Defendant meets the well established threshold as set out in law and precedents?
 - b. Whether the applicants have met the threshold for granting a temporary injunction against the defendants with regard to Land Parcel No. Bokoli/Chewele/250?
 - c. Whether the orders for cancellation of titles created from Land Parcel No. Bokoli/Chewele/250 can be issued at this stage?
 - d. Who bears the costs of the application?
17. It is important that I first and foremost commence by defining what Preliminary Objection means. According to the Black Law Dictionary, a Preliminary Objection is defined as follows;
- “In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
18. The above legal proposition was made graphically clear in the celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd.* [1969] EA 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure point of law. The Learned Judge then held that:—“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”
19. Additionally, I have relied on the decision of *Attorney General & Another v Andrew Mwaura Gitbinji & another* [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-
- (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
20. The preliminary objection is premised on various principles. It is argued by the defendant that one, this suit is res judicata since it is a replica of various other suits; two, that it was statute barred since the plaintiffs seek to enforce the rights of a deceased person on a piece of land over 12 years since his demise and lastly that the applicants lacked locus-standi to agitate the current suit.
21. The principle of res judicata which is defined under section 7 of the *Civil Procedure Act* stipulates 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 issue has been subsequently raised, and has been heard and finally decided by such court.”

22. The respondent asserts that the subject matter of the suits as attached is directly and substantially in issue in the current suit. I have however perused the proceedings, judgments and orders as attached by the respondent in his replying affidavit and I note that the parties were more less the same but the subject of the suits was Land Parcel No. Bokoli/Chwele/1092 and not Land Parcel No. Bokoli/Chwele/250 which is in contention in the current suit. I am therefore not convinced that this matter has been previously determined in another forum and therefore find that it is not res judicata as alleged by the respondent.
23. It has also been submitted by the respondent that this suit is statute barred for being in violation of Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya. The respondent contends that the applicants seek to enforce rights over land that they claim belonged to their deceased father who died in the year 1980 which is over 12 years. However, on paragraph 3 of the supporting affidavit and on perusal of the plaint which is the substantive suit, I note that the applicants allege that the respondent acquired title over the suit land fraudulently and unprocedurally. Notably, Section 26 of the Limitation of Actions Act allows extension of the limitation period where fraud is pleaded.
24. The said Section 26 of the Limitation of Actions Act provide as follows;

“Where in the case of an action for which a period of limitation is prescribed, either-

 - (a) The action is based upon the fraud of the Defendant or his agent, or of any person through whom he claims or his agent; or
 - (b) The right of action is concealed by the fraud of any such person as aforesaid; or
 - (c) The action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.
25. With the applicant’s case being one that is premised on fraud, it is my considered view that the suit has not been caught up by the limitation of time.
26. It is also argued that the applicants lack locus standi, a term which means. a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings
27. I have considered the grounds on which the application is premised on and also perused the plaint attached thereto and I note that the plaintiffs are claiming a share of what they believe belongs to their late father. Their claim is not based on right under customary law or built on the doctrine of trust. Therefore, as pleaded, the share the applicants seek if successful ought to vest in the estate of their deceased father and not to them in their personal capacities. As such, it is my considered view that they are legally required under the Law of succession Act to have Grant of letters of administration. See the case of George Mbiti Kiebia & another v Isaya Theuri M’lintari & another [2014] eKLR.
28. From the pleadings, the applicants/plaintiffs averred that they have instituted this suit, not on their own capacity but on behalf of an estate of a deceased person. However, they have not annexed a grant of letters of administration indicating that they have the locus standi to institute this suit on behalf of the deceased person. For that reason, I find that they lack locus standi to institute this suit. I therefore don’t see the need to delve into the other issues as raised for determination.



29. The upshot of the foregoing is that the objection raised by the respondent has merit and the same is hereby allowed. Consequently, this suit is hereby struck out as well as the Application dated 26th July, 2023 with costs to the defendant/Respondent.

30. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 11TH DAY OF MARCH, 2024

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Anwar H/B Sichangi for Respondent
2. Mr. Oira H/B for Motanya for applicant
3. Bett C/A.

