



REPUBLIC OF KENYA



**Onyoni v Siro (Donor) Sued Through Janet Siro (Donee) (Civil Appeal  
154 of 2018) [2023] KECA 1495 (KLR) (8 December 2023) (Judgment)**

Neutral citation: [2023] KECA 1495 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 154 OF 2018  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
DECEMBER 8, 2023**

**BETWEEN**

**ANDREW MAYAKA ONYONI ..... APPELLANT**

**AND**

**MESHACK MOTURI SIRO (DONOR) SUED THROUGH JANET SIRO  
(DONEE) ..... RESPONDENT**

*(Being an appeal from the Judgment and Order of Kisii Environment  
and Land Court dated 28th September 2018 in ELC 143 of 2015)*

**JUDGMENT**

1. The appeal herein is against the ruling and order of Mutungi, J, dated 28th September 2018 in Kisii ELC 143 of 2015, rendered in respect to a Notice of Preliminary Objection dated the 3<sup>rd</sup> of August, 2017. The genesis to this appeal was a suit filed by the appellant, against the respondent, claiming to be the registered owner of land parcel No Nyaribari Chache/B/B/Boburia/2632 measuring 0.7 hectares, whilst the respondents owned Nyaribari Chache/B/B/Boburia/2632, measuring 0.7 hectares. His complaint was that part of his land had been illegally transferred to the respondent; and he wanted it back. He thus, sought inter alia the following reliefs:
  - i. An order declaring the respondent's occupation of the suit land unlawful.
  - ii. An order cancelling the respondent's name as the proprietor of the suit land and the same be registered to the plaintiff.
  - iii. An order of eviction of the defendant from the suit land.
2. The respondent, in defence, was categorical that the issue of ownership of the suit property, and dimensions of the parcels had been the subject of previous proceedings in Kiogoro Land Disputes



Tribunal Case No 7 of 2011 and Kisii CMCC Misc. Application No 72 of 2011 where the respective disputes were determined; with the said decisions never being challenged, appealed and/or reviewed.

3. The respondent further filed a preliminary objection dated 3<sup>rd</sup> August 2017 raising several grounds inter alia that the suit was barred by dint of section 4 of the *Limitations of Actions Act*, CAP 22; and was *res judicata* by virtue of section 7 of the *Civil Procedure Act* the appellant had concealed material facts in violation of the provisions of Order 4 Rule 2 of the *Civil Procedure Rules, 2010*, to the extent that there were previous proceedings in respect of the subject matter.
4. In opposing the preliminary objection, the appellant argued that the suit was properly before the court and does not offend the Limitations statute as the respondent only became the registered owner of the suit land on 1<sup>st</sup> September 2011, thus rendering his claim within the recognized twelve years; the decision of the defunct Kiogoro Land Dispute Tribunal was made in total violation and contrary to the tribunals mandate under section 3 of the Land Disputes Tribunal Act No 18 and the subsequent orders thereto were null and void.
5. Vide a ruling dated 28<sup>th</sup> September 2018, the trial court in upholding the respondent's preliminary objection, was persuaded that the appellant's suit was statute barred by reason of the *Limitation of Actions Act*, pointing out that the pleadings disclosed that the appellant's suit was basically for the recovery of the suit land from the respondent, who had been in occupation thereon, and was also utilizing it; that the suit property LR No Nyaribari Chache/B/B/Boburia/2632 was adjudicated upon during the land adjudication process in favour of the respondent's father and was subsequently registered in the respondent's name. Further, that the evidence established that the respondent had occupied and utilized the suit land since the 1970's.
6. The learned Judge, recognizing the provisions of section 7 of the *Civil Procedure Act*, pointed out that the suit property which the appellant wanted to recover, was registered in the name of the respondent's father in 1971 immediately following the land adjudication; the respondent occupied and cultivated the land since the 1970s; the appellant returned to the land in 1973, by which time the respondent's family was cultivating the land, and that they had not only purchased the land, but it had been adjudicated to their late father. On account of the identified state of things, the learned Judge held that:

“... the law bars the bringing of such an action after the expiry of twelve years. Even assuming that the plaintiffs discovered the defendants were unlawfully using the suit land on [sic] 26<sup>th</sup> July 1979 when he is shown to have been registered as the proprietor of land parcel Nyaribari Chache/B/B/Boburia/1752, he ought to have instituted recovery action against the defendant on or before 26<sup>th</sup> July 1991 when the twelve years elapsed. At the time of registration as proprietor on 26<sup>th</sup> July 1979, the plaintiff must have noted his land measured 0.7 hectares and did not comprise the portion he claims the defendant was occupying and hence he ought to have initiated recovery proceedings of the land before the expiry of twelve years from then.”

The appellant's action was thus found to be statute barred by reason of the *Limitation of Actions Act*.

7. As to whether the suit was *res judicata* in relation to the Kiogoro Land Disputes Tribunal decision and the subsequent adoption of the tribunal's decision by the Chief Magistrate's Court in Kisii CMCC Misc. App. No 72 of 2011, the learned trial Judge considered Section 7 of the *Civil Procedure Act*, which embodies the doctrine of *res judicata*, and was of the view that the tribunal properly found that the respondent's father had purchased the suit land before land adjudication took place; that upon adjudication, the portion which the respondent's father had purchased was split into parcels 1751 and 2632, and were the names of his family members. In addition, the learned Judge held that the tribunal



- did not confer any ownership interest nor make any decision that affected any title to the land; rather they merely confirmed the ownership in line with the titles held by the respective parties.
8. Consequently, the preliminary objection was upheld, resulting in the suit being struck out.
  9. The appellant, aggrieved by the decision of the trial court, filed his memorandum of appeal challenging the judgment of the Superior Court on two grounds of appeal: whether the preliminary objection was merited; and whether the suit was indeed *res judicata*.
  10. With regard to whether the learned Judge erred in law and in fact in upholding the preliminary objection lodged by the respondent, the appellant contends that the suit was properly before the trial court and did not offend the provisions of section 4 and 7 of the *Limitation of Actions Act*; and that the issue of Limitation could only have been determined upon hearing the parties and not on a preliminary objection.
  11. Drawing from the oft cited case of *Mukisa Biscuits Co. v West End Distributors* [1969] EA 606 at pg. 701, the appellant submits that the trial court misapprehended the nature of a preliminary objection which is argued on the assumption that all facts pleaded by the other side are correct; and it may not be raised if any fact has to be ascertained. The appellant faults the trial court, contending that contrary to the scope set out for a preliminary objection, the learned Judge went into great lengths to examine and analyze matters of evidence and facts to arrive at the impugned ruling, that in any event, what the appellant had challenged, was the registration of the respondent over the subject suit parcel of Land on or about the year 2011; and the suit having been filed in April 2015, then appellant's cause of action was well within the stipulated.
  12. On the issue of the suit being *res judicata*, the appellant submits that proving *res judicata* requires probing of evidence and cannot be handled as a preliminary objection; In support of this argument, we are urged to be persuaded by the holding of the High Court in the case of *Henry Wanyama Khaemba v Standard Chartered Bank Ltd & another* [2014] eKLR, which held that issues of *res judicata* require the probing of evidence and cannot be handled as preliminary objections; that this position was emphasized in the case of *George Kamau Kimani & 4 others v County Government of Trans Nzoia & another* (2014), eKLR, where the High Court emphasized that one cannot raise a ground of *res judicata* ought to be raised by way a Notice of Motion where pleadings can then be annexed for the Court's consideration; and not as a preliminary objection, but rather by way of. The Court was of the opinion that such an issue requires ascertainment of facts by way of evidence.
  13. It is further argued that the appellant was not barred from lodging suit in court by dint of the decision rendered by the Tribunal, as the scope of the Tribunal's jurisdiction was limited as opposed to the jurisdiction of the court.
  14. We are thus urged to find that the learned Judge erred in holding that the grounds raised by the respondent met the threshold of a preliminary objection; and that striking out the appellant's suit preliminarily was a draconian action, which deprived him of the right to be heard; that the ruling be set aside and the case be remitted to the Environment and Land Court for hearing on merit.
  15. The respondent on the other hand submits that the appellant's argument that the issue of limitation could only be determined at the hearing is erroneous, as limitation goes to the root of the jurisdiction of the court; and ought to have been determined first, as without jurisdiction, the court must down its tools and not proceed any further. The respondent also submits that contrary to the appellant's view the Kiogoro Land Disputes Tribunal did not cancel any titles.
  16. It is the respondent's contention that the appellant's case is basically for recovery of the suit property from the respondent, who has been in occupation and possession since the 1970's; that the appellant's



own pleadings justify invoking the provisions of sections 4 and 7 of the Limitation of Actions Act which resolves the issue regarding accrued rights within the 12 years period; and confirms that the appellant ought to have filed suit in 1985 and not 30 years later in 2015.

17. This being a first appeal, and has been reiterated in several decisions of this Court, it is this Court's primary duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law. That is also the purport of Rule 31 (1) (a) of the Court of Appeal Rules. It is clear that in this appeal, the main issue is whether the learned Judge erred in upholding the respondent's preliminary objection.
18. The case of *Mukisa Biscuits Manufacturing Limited v West End Distributors* (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection, it states thus:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation (emphasis mine) or a submission that the parties are bound by contract giving rise to the suit to defer the dispute to arbitration.”

The respondent submits that the preliminary objection raised goes to the root of the jurisdiction of the court in Owners of the Motor Vessel 'Lillian S' v Caltex Kenya Limited [1989] KLR 1 the court held:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of Law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

19. The crux of the appellant's case is twofold, firstly that the suit was filed timeously and as such was properly before the court and secondly that the suit was not *res judicata*.
20. The main contestation was whether the respondent's father bought the suit land then gifted and registered it in the respondent's name; and the legality of the respondent's possession and occupation of the land.
21. It is admitted in the appellant's own witness statement, that he left his home in 1963 and returned in 1973, thereupon, he started laying claim on the respondent's portion of the suit property. Subsequently the appellant lodged a complaint before the Kiogoro Land Disputes Tribunal for the respondent's title to be canceled and transferred to the appellant. The complaint was heard by the Land Disputes Tribunal and the appellant's claim was dismissed and the property decreed to belong to the respondent. Following the decision of the tribunal the appellant filed suit in Kisii CMCC Misc. Application No 72 of 2011 and the lower court duly ratified and adopted the award of the tribunal.
22. On the issue of limitation, sections 7 of CAP 22 is instructive. It 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.
23. In the case of Gathoni v Kenya Co-operative Creameries Ltd [1982] KLR 104, Potter JA stated the rationale of the Law of Limitation as follows:

“the law of limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence to take reasonable steps in his own interest.”



- 24. The question of limitation is indeed, as rightly put by the respondent, a question that goes to the jurisdiction of the court. In *Bosire Ongero v Royal Media Services* [2015] eKLR, the court stated:
 

“the question of limitation touches on the jurisdiction of the court, which means that if a matter is statute barred the court would lack jurisdiction to entertain it.”
- 25. In *Anaulet Kalia Musau v Attorney General & 2 others* [2020] eKLR Civil Appeal 111 of 2017, this Court quoted from *Iga v Makerere University* (1972) E.A 62 where the East African Court of Appeal stated:
 

“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 expiry of the period of limitation the claim must be rejected.”
- 26. We are in agreement with the learned Judge of the ELC that the respondent clearly demonstrated that the suit was filed out of time. It is clear from the appellant’s pleadings that he left his home in 1963 and returned in 1973. The respondent then is right that, if any rights accrued it should have been claimed in 1985 and not 30 years later in 2015.
- 27. From this conclusion and supported by the cited authorities, we find that the trial court did not err in law or fact in finding that it lacked jurisdiction by dint of the *Limitation of Actions Act* and was correct in upholding the respondent’s preliminary objection.
- 28. As a result of the foregoing, this appeal fails and the same is dismissed with costs to the respondent.

**DATED AND DELIVERED AT KISUMU THIS 8<sup>TH</sup> DAY OF DECEMBER, 2023.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

