



**Ogaga (Suing as the Legal Representative of the Estate of Turufena
Kemunto Ogaga-Deceased) v Ogaga & 3 others (Civil Appeal
45 of 2018) [2022] KECA 1422 (KLR) (16 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1422 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 45 OF 2018
PO KIAGE, S OLE KANTAI & M NGUGI, JJA
DECEMBER 16, 2022**

BETWEEN

**GRACE ADHIAMBO OGAGA (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF TURUFENA KEMUNTO OGAGA-DECEASED) .. APPELLANT**

AND

**WILLIAM OCHIENG OGAGA 1ST RESPONDENT
TOM OCHIENG OGAGA 2ND RESPONDENT
ELKANA OKOTH AJUOGA 3RD RESPONDENT
THE HON. ATTORNEY GENERAL 4TH RESPONDENT**

*(Being an Appeal from the ruling of the Environment and Land Court
in Migori (G.M.A Ong’ondo J.) dated 1st February, 2018 in ELC
Case Number 290 of 2017 Formerly Kisii ELC Case No. 96 of 2016)*

JUDGMENT

JUDGMENT OF MUMBI NGUGI JA

1. This appeal arises out of a ruling of the Environment and Land Court (ELC) sitting in Migori in which the court struck out the appellant’s suit with costs to the respondents. In so doing, the court (Ong’ondo J) upheld a preliminary objection by the 4th respondent that it had no jurisdiction to hear and determine the appellant’s claim against the respondents; that the claim is res judicata, disclosed no reasonable cause of action, and was barred by the statute of limitation.
2. Dissatisfied with the ruling, the appellant has lodged the present appeal challenging the ruling of the court. In her memorandum of appeal dated April 26, 2018, she asserts that the trial court erred in all



respects in ruling in favour of the 4th respondent on all the grounds set out in the notice of preliminary objection.

3. The appellant was further aggrieved that the trial court found that it has no jurisdiction to entertain the suit. She prays that the ruling be set aside and her suit reinstated, and that the costs in this and the trial court be awarded to her.
4. The appellant had filed a suit by way of plaint dated April 11, 2016 against the respondents. She alleged in her suit that one Turufena Kemunto Ogaga (deceased), who died on March 2, 2005, was the absolute owner of land parcel number 855, now known as Lambwe West/Lambwe West 'B'/855. She further alleged that on September 19, 2005, the 4th respondent fraudulently inserted the names of the 1st, 2nd, and 3rd respondents in the land adjudication record, as a result of which they were registered as co-owners of the suit land and a title deed issued to them.
5. Accordingly, the appellant sought a declaration that the insertion of the 1st, 2nd and 3rd respondents in title number Lambwe West/Lambwe West 'B'/855 was done irregularly, illegally, unlawfully and unprocedurally, and was therefore null and void; an order directing the Land Adjudication Officer, Homa Bay County, and the Land Registrar, Ministry of Lands, Homa Bay Land Registry, to cancel the names of the 1st, 2nd and 3rd respondents in the land adjudication records and land registry records with respect to the suit property; and an order directed at the Land Adjudication Officer and Land Registrar, Ministry of Lands, Homa Bay Land Registry, to have the suit land parcel revert into the name of Turufena Kemunto Ogaga as the sole and absolute owner. The appellant also sought the costs of the suit and any other relief that the court would see fit and just to issue.
6. The 1st and 2nd respondents each filed a memorandum of appearance dated August 19, 2016 together with a notice of admission of the suit of the same date. The 3rd respondent did not enter appearance or file a response.
7. The 4th respondent, the Office of the Attorney General, who was sued on behalf of the Land Adjudication Officer and the Lands Registrar, Homa Bay, entered appearance and filed a statement of defence dated December 22, 2016 denying the plaintiff's claim. The 4th respondent further stated that in the event that any registration was done on the suit land, which was denied, then it was done in good faith. Further, that he was not an expert in detecting fraud and could not and is not mandated to either investigate or detect if the documents presented for registration at his office were forgeries. Additionally, the 4th respondent issued a notice of preliminary objection dated December 22, 2016 raising the points of law aforesaid, which were upheld by the trial court.
8. In her written submissions dated May 19, 2020, the appellant submits that the trial court erred in relying solely on the 4th respondent's submissions and thereby arriving at the conclusion that objections in relation to the adjudication were recorded on the adjudication record without any proceedings of the objections being furnished to the court. That being the custodian of the said documents, the 4th respondent failed to produce the said documents to ascertain whether the objections recorded on the adjudication record were between the owner of the land and the respondents. The appellant further submits that the trial court failed to take into consideration that the 1st and 2nd respondents admitted to the facts of fraud enumerated in the plaint, which she submits confirms that indeed there were no proceedings that took place between the appellant or the deceased whom the appellant represents.
9. Regarding the finding that the suit was time barred, the appellant submits that upon discovering fraud on February 2, 2016, she had requested for the land documents in respect of the suit land, and the documents were supplied on February 4, 2016. She had filed the suit two months later, so her claim was not time barred.



10. With respect to the finding of the trial court that it had no jurisdiction to entertain the claim, the appellant submits that the trial court failed to appreciate that at the time of filing of the suit and/or discovery of fraud by the appellant, the suit land was already registered and was not under adjudication. She relies in support of this submission on the case of *Fredrick Tureisa Lekesike v Iman Dahir & 3 others (2019) eKLR*.
11. The appellant further submits that the trial court erred in holding that the suit was time barred, noting that the events complained of took place in 2005 while the suit was filed in 2016, a period that is within the period of limitation for recovery of land. It is her submission that the trial court had failed to consider that the suit was for recovery of land and not a tort; that even though the tortious claim of fraud was raised, the suit was for recovery of land that had been illegally registered in the names of the respondents.
12. In highlighting the appellant's submissions at the hearing of the appeal, learned Counsel, Mr PD Onyango, emphasised that the trial court had erred in holding that the appellant's suit was res judicata. He observed that the deceased had passed away in 2002 and the objections relied on by the trial court had been raised in 2005. The issues raised in the trial court dealt with fraud and illegality which were not the issues raised in the objection proceedings. If there had been objection proceedings, they had not been supplied to the appellant by the 4th respondent.
13. To the question whether the suit was statute barred, Mr Onyango submitted that this was a claim for land, the limitation period in respect of which was 12 years. The suit was filed when the appellant discovered the fraud pursuant to a letter to the Land Registrar, Homa Bay, dated February 2, 2016. The suit was therefore filed within the 12 years' statutory period.
14. For the 4th respondent, learned Counsel, Mr Wabwile, submitted that there were two objection proceedings before the 1st and 2nd respondents were registered jointly with another as co-owners of the suit property. Further, that a party who was aggrieved by the objection proceedings was required under the *Land Adjudication Act* to lodge an appeal to the Minister within 60 days after the determination of the proceedings or by way of judicial review to challenge the decision of the Land Registrar. The appellant had failed to do this, and her suit was therefore unsustainable.
15. In submissions in reply, Mr Onyango argued that the suit land was registered pursuant to section 29 of the *Land Adjudication Act*. This, therefore, paved the way for the dispute to be handled by the Environment and Land Court. Further, that section 13 of the *Environment and Land Court Act* gives the court jurisdiction to hear and determine the issues that were before it.
16. Before considering the arguments made in support of and in opposition to the appeal, I observe that there are a few intriguing facts in this matter. From the pleadings before the Court, the appellant and the 1st and 2nd respondent are siblings, daughter and sons, respectively, of the initial owner of the land, Turufena, who passed away in 2002. From the record, at the time of her demise in 2002, she was registered, with the 1st to 3rd respondents, as the owner of the suit land. It appears that adjudication and titling of the land took place in 1986, though there are entries made in the adjudication record in 2005. The land was registered as Lambwe West/Lambwe West 'B'/855 and title issued in the names of the 1st, 2nd and 3rd respondents.
17. According to the appellant, she discovered that the land had been registered in the names of her siblings in February of 2016, eleven (11) years after the registration, as a consequence of which she filed her claim before the trial court. She alleged fraud against the respondents-that the land was fraudulently registered in the said names, before succession proceedings to the estate of the deceased owner had taken place. I note that she applied and obtained letters of administration ad litem on February 22, 2016.



18. A third intriguing aspect is the response of the 1st and 2nd respondents to the suit. They each filed a notice of admission of the claim-essentially saying that 'Yes, there was fraud in our registration, with the 3rd respondent, as proprietors of the suit land.'
19. This appeal raises the question whether the trial court erred in allowing the 4th respondent's preliminary objection and finding that the appellant's suit was res judicata, statute barred, and that the trial court had no jurisdiction to hear and determine it, there being an alternative remedy that the appellant should have pursued.
20. In reaching the decision to allow the 4th respondent's preliminary objection, the trial court considered the appellant's contention that no objection had been heard by the Land Adjudication officer, Homa Bay after the death of the proprietor of the suit land and that the names of the 1st, 2nd and 3rd respondents had been entered into the register fraudulently and unprocedurally. The trial court noted the position of the 4th respondent that a first objection, number 966/1.083, had been lodged by one Ramadhan Maftal Ondur and allowed on September 19, 2005 but later reversed. A second objection, No 967, was lodged on 11th October, 2005 by the 3rd respondent and was allowed, resulting in the registration of the 1st -3rd respondents as the proprietors of the suit land. I will revert to this finding later in this judgment.
21. The court observed that the appellant was also one of those registered with the 1st -3rd respondents as proprietors of the suit land, but this appears to be an error. The 1st and 2nd respondents were children of the deceased while the 3rd respondent was a buyer, apparently of one and a half acres of the suit land. The objections had been determined by the Adjudication Officer in accordance with the provisions of section 26 of the [Land Adjudication Act](#) Cap 284 Laws of Kenya (now repealed).
22. A party dissatisfied with the decision of the Adjudication Officer on an objection could appeal to the Minister under the Act. Section 26 to 29 of the [Land Adjudication Act](#) set out the procedure for resolution of disputes arising under the Act/ Under section 29 (1), it was provided that:

'(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by: -

 - a. Delivering to the Minister .an appeal in writing specifying the grounds of appeal; and
 - b. Sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.'
23. Under these provisions, a party dissatisfied with the decision of the Adjudication Officer was required to lodge an appeal to the Minister. The trial court noted that the decision of the Minister could be appealed against in the Environment and Land Court which is seized of appellate jurisdiction under section 13 (1) of the [Environment and Land Court Act](#) ELC Act 2015 (2011). I observe, however, that this avenue was not open in 2005, the Environment and Land Court having come into operation in 2012. A dissatisfied party also had the option of filing an application for judicial review of the decision of the Adjudication Officer.
24. The appellant did not file an appeal or lodge an application for judicial review following the registration of her brothers, the 1st and 2nd respondent, as well as the buyer, the 3rd respondent, as the proprietors of the suit land.



25. The objection against the appellant's suit was based on four main limbs- that the court had no jurisdiction to hear the suit, that the suit was res judicata and statute barred, and that it disclosed no reasonable cause of action, objections that the trial court upheld. It observed at paragraph 27 that:

' The instant matter was heard and determined by the adjudication officer under section 26 of the *Land Adjudication Act* Cap 39 Laws of Kenya. There was no appeal to the Minister within the prescribed period of time or at all. This is neither an appeal from the decision of the Minister nor an application for judicial review of the decision. There is no reasonable cause of action disclosed in this suit which is otherwise an abuse of the court process.'

26. In considering the application of res judicata under section 7 of the *Civil Procedure Act*, this Court in *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR* stated as follows:

' The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.'

27. As I observed earlier in this judgment, the appellant and the 1st and 2nd respondent are siblings. The 1st, 2nd and 3rd respondents were registered as proprietors of the suit land following an objection by the 3rd respondent which was heard and determined in his favour by the Land Adjudication Officer, Homa Bay, according to the 4th respondent, in 2005. There was no objection by the appellant, nor was there an appeal filed against the decision of the Land Adjudication Officer to the Minister. While the appellant alleges that the registration of the 1st -3rd respondent was procured by fraud, she does not deny that there were objection proceedings resulting in the current registration status of the suit land, nor does she assert that she was unaware of the objection proceedings or the resulting registration. She did not appeal against the decision of the Land Adjudication Officer, nor did she file a judicial review application against it.

28. Section 7 of the *Civil Procedure Act* 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 can 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.



29. In considering the above provisions, the Supreme Court in *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR* held that for the doctrine of res judicata to be invoked, all the elements outlined thereunder must be satisfied conjunctively, that is:
- ' (a) The suit or issue was directly and substantially in issue in the former suit;
 - (b) That former suit was between the same parties or parties under whom they or any of them claim;
 - (c) Those parties were litigating under the same title.
 - (d) The issue was heard and finally determined in the former suit.
 - (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.'
30. A perusal of the Adjudication Record dated November 12, 1986 placed before the trial court by the 4th respondent shows that there was an objection, No 967, by the 3rd respondent, Elkana Okoth Ajuoga, a buyer in respect to the suit property. The Adjudication Record indicates that after the objection was allowed, the owners of the suit property were indicated as being Turufena Ogaga, William Ochieng Ogaga, Tom Ochieng Ogaga and the objector, Elkana Okoth Ajuoga. The Adjudication Record indicates that the objection was heard in 1986, not 2005 as the 4th respondent asserts. The names of the 1st -3rd respondents were entered into the record, together with that of the deceased, Turufena Ogaga, on November 12, 1986.
31. There is also an entry dated September 19, 2005 in the Adjudication Record, No 14, titled 'Action taken as a result of objection (if any)' which shows that the objection No 967 was allowed. A title for the suit property was subsequently issued in the names of the deceased, Turufena Ogaga, and the 1st, 2nd and 3rd respondents.
32. The appellant is a daughter of the deceased, Turufena. She is a sister of the 1st and 2nd respondents. Had she an objection to the registration of the respondents as owners of the property, she could have lodged an objection, as the 3rd respondent did, in 1986. She could not, however, do so as, at that time, the registered owner was still alive-her date of death is indicated as March 2, 2002. The issue of the ownership of the property at the adjudication stage having been determined during the lifetime of the deceased, it is quite disingenuous of the appellant to lodge a claim, thirty years later, alleging fraud on the part of her brothers and the 3rd respondent.
33. One, indeed is inclined to read deceit and mischief on the part of the appellant and her siblings when one considers the response of the 1st and 2nd respondents to the suit. The trial court, in my view, properly found that the 4th respondent's preliminary objection was well merited and the appellant's suit was res judicata.
34. The trial court also considered the question whether the appellant's suit was properly before it, that is whether it had jurisdiction to determine the suit. The law is that before a party makes a claim before a court, it must exhaust all available remedies provided



in respect to the matter at issue. I have already alluded to the provisions of section 29 of the *Land Adjudication Act* which provided the procedure for determination of disputes arising from decisions on objections filed under section 26 of the Act.

35. As observed earlier, the objection in respect of the suit land was heard and determined in 1986. The appellant did not file an objection to that decision as was then required under section 29 of the Act. She also did not file an application for judicial review of the decision. She could not file a suit thirty years later seeking to reverse the decision of the Adjudication Officer made with respect to an objection properly lodged and determined in the lifetime of the deceased.
36. The appellant alleged fraud on the part of the respondents. She contends that she discovered the fraud in 2016, and her suit was filed in 2017. She was therefore within the requisite time frame as the limitation of time with respect to a claim alleging fraud is three years. She cites section 4 (2) of the Limitation of Action that provides that an action founded on tort should not be brought after the expiry of 3 years from the date on which the cause of action accrued.
37. Having considered the matters before this Court and in light of the finding with respect to the doctrine of res judicata, I find that the appellant's argument with respect to her claim not being statute barred as it is based on a tortious claim of fraud does not alter the final outcome in this matter. The appellant's case was that the respondents' names were fraudulently inserted in the adjudication record in 2005. However, as set out in the analysis above, a perusal of the Adjudication Record dated November 12, 1986 indicates that the owners of the suit land on that date were the deceased and the 1st 2nd and 3rd respondents. The 3rd respondent had been entered as an owner following his successful objection, No 967. The appellant is correct with regard to the law on limitation of time with respect to fraud- that time does not begin to run for purposes of limitation until the plaintiff discovers the fraud-see the decision of the Supreme Court in *Kenya Ports Authority Vs Timberland(K) Ltd (2017) eKLR*. However, in the present case, the trial court was correct in finding that the appellant's suit was res judicata.
38. I further find that the trial court was correct in upholding the preliminary objection with respect to jurisdiction to determine the issues raised in the suit. The proper procedure, as contended by the 4th respondent, was provided under the *Land Adjudication Act*, and the appellant was under an obligation to exhaust the remedy provided under the said Act. The objection by the 4th respondent was based, inter alia, on the doctrine of exhaustion of remedies, which requires that a party exhausts any alternative dispute resolution mechanism provided by law before resorting to the courts. In *Secretary, County Public Service Board & another v Hulbbai Gedi Abdille [2017] eKLR* this Court expressed the doctrine as follows:

' Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime.'
39. The appellant alleges that she was aggrieved by the fact that the 1st, 2nd and 3rd respondents' names had been inserted in the adjudication records and a title



subsequently issued in their names, which she alleges was done fraudulently. Under the Land Adjudication Act then in force, she ought to have followed the procedure laid down under section 29 of the said Act, under which she was required to appeal to the Minister within 60 days. The appellant has not given any reason why she did not pursue that avenue before filing her suit, nor has she explained why she came to court fourteen (14) years after the demise of the deceased, and thirty years after the entry in the Adjudication Record of the names that she now complains about.

40. I accordingly find no merit in this appeal. I would therefore dismiss it, but with no order as to costs, noting that the 1st and 2nd respondents in essence supported the appellant's case and the 3rd respondent did not participate in the proceedings either before this Court or in the trial court.

JUDGMENT OF KIAGE, JA

1. I have had the advantage of reading in draft the judgment of Mumbi Ngugi, JA with which I agree, and have nothing useful to add.
2. As Kantai, JA also agrees, the appeal shall be disposed of as proposed by Mumbi Ngugi, JA.

JUDGMENT OF KANTAI, JA

1. I have seen in draft the Judgment of my Sister Mumbi Ngugi, JA and I am in full agreement with the argument and conclusion reached. It is good law that where a certain procedure is prescribed in law a party aggrieved should follow it and only resort to the courts where that procedure has been followed and exhausted. The Land Adjudication Act had an elaborate procedure for dispute resolution. The appellant failed to follow that procedure at all. The appeal should be dismissed.

DATED AND DELIVERED AT KISUMU THIS 16TH DAY OF DECEMBER 2022

MUMBI NGUGI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

