



**Marindany v Kiplangat & another (Environmental and Land Originating  
Summons E014 of 2021) [2024] KEELC 3395 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3395 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E014 OF 2021**

**MC OUNDO, J**

**APRIL 25, 2024**

**N THE ENVIRONMENT AND LAND COURT OF KENYA AT KERICHO  
ELC SUIT NO. E014 OF 2021 (O.S)  
IN THE MATTER OF THE LAND PARCEL L.R NO. KERICHO/LITEIN/875**

**AND**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT**

**BETWEEN**

**JOHN KIPKIRUI MARINDANY ..... APPLICANT**

**AND**

**JOEL KONES KIPLANGAT ..... 1<sup>ST</sup> RESPONDENT**

**SAMUEL MUTAI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Vide an Originating Summons dated 3<sup>rd</sup> June, 2021 and Amended on 22<sup>nd</sup> November, 2022, brought pursuant to the provisions of Order 37 rule 7 of the *Civil Procedure Rules* and Section 38 of the *Limitation of Action Act*, Cap 22 Laws of Kenya, the Applicant had sought for the determination that he was entitled, on behalf of the estate of Lucio Talai Arap Narok, to 0.36 hectares (0.9 acres) comprised in the land parcel LR No. Kericho/Litei/875 registered in the name of the 1<sup>st</sup> Respondent by virtue of the late Lucio Talai Arap Narok's adverse possession of the quiet and peaceful occupation of the same for a period of over 40 years, and thereafter he be registered as the proprietor/trustees thereof, of the entire parcel LR No. Kericho/Litein/875 measuring 0.36 hectares (0.9 acres) and the Respondents be ordered to execute the transfer and all the requisite forms and perform all acts necessary for effective transfer of his registration as proprietor thereto, and in default the Deputy Registrar of the court be authorized to execute the same. He also sought for a permanent injunction restraining the



Respondents and whosoever is claiming through them from in any way dealing with the said parcel of land and orders directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and their assigns to vacate from the land within 45 days and in default an eviction order to issue, as well as costs of the suit.

2. In response, the Respondents filed a Notice of Preliminary Objection dated 23<sup>rd</sup> June, 2023 on grounds that the court lacked jurisdiction to hear and entertain the Originating Summons as the same had expressly been ousted by the provisions of Section 7 of the [Limitation of Actions Act](#). That further, the application was in contravention of the provisions of Order 4, Rule 4 of the Civil Procedure Rules, Section 45 of the [Law of Succession Act](#) and Section 54 of the [Law of Succession Act](#) as read with Section 14 of the corresponding fifth schedule to the Act, and thus the amended Originating Summons should therefore be struck out in limine with costs.
3. In rebuttal, the Applicant's Counsel, through a Replying Affidavit dated 28<sup>th</sup> September, 2023 deponed that the Preliminary Objection had been made in bad faith, for wrong purpose, was unmerited and should be dismissed with costs.
4. The Preliminary Objection was canvassed by way of written submissions which I shall herein summarize as follows:

### **Respondents' Submissions.**

5. The Respondents vide their submissions dated 21<sup>st</sup> November, 2023 in support of their Notice of Preliminary Objection dated 23<sup>rd</sup> June, 2023 summarized the factual background of the matter before framing two (2) issues for determination as follows; -
  - i. Whether the 1<sup>st</sup> Respondent's Preliminary Objection is merited.
  - ii. Who should bear the costs of the Preliminary Objection Application
6. On the first issue for determination as to whether their Preliminary Objection was merited, the Respondent submitted in the affirmative to the effect that the same had raised a pure point of law that should be argued at the preliminary stage of the suit. They hinged their reliance on a combination of decisions in the decided cases of *Mukisa Biscuits Manufacturing CO. Ltd v West End Distributors Limited* (1969) E.A. 696 and *Quick Enterprises Limited v Kenya Railways Corporation*, Kisumu High Court Civil Case No. 22 of 1999 to submit that the plea of limitation in the instant case had given rise to a pure point of law that could be disposed off through a Preliminary Objection.
7. That pursuant to the holding in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR and the provisions of Section 7, and 9(2), of the [Limitation of Actions Act](#), the Applicant having claimed that the deceased Lucio Talai Arap Narok had been in possession of the suit property for over 40 years, his action for recovery of land by way of adverse possession ought to have been brought before the end of 12 years. That the limitation period begun to run from the date on which the right of action in land accrued on the claimant or to some person through whom he claimed; or the date of death of a deceased person where an action was brought to recover the deceased person's land.
8. That in the instant case, the Applicant's cause of action had accrued to him upon the death of his mother Lucio Talai Arap Narok who died on 6<sup>th</sup> October, 2005. Subsequently, the cause of action for the recovery of the suit land ought to have been brought on or before 6<sup>th</sup> October, 2017. Reliance was placed on a combination of the decisions in the case of [Dickson Ngige Ngugi v Consolidated Bank Ltd](#) (Formerly Jimbo Credit Corporation Limited) & another [2020] eKLR where the court had quoted with authority the case of [Gathoni v Kenya Co-operative Creameries Ltd](#) (1982) KLR 104 and



*Sobanlaldurgadass Rajput & another v Divisional Integrated Development Programmes Co Ltd* [2021] eKLR. That to this effect, the amended Originating Summons as filed as well as the initial Originating Summons having been filed in the year 2021 were filed out of time and were hence an abuse of the court's process.

9. That pursuant to the provisions of Order 4 Rules 4 of the *Civil Procedure Rules*, the Plaintiff/Applicant herein had instituted the instant suit based on a Grant of Letters of Administration ad Litem and not based on a Grant of Letters of Administration Intestate hence were he to be granted the relief sought in his Amended Originating Summons in the absence of the letters of administration intestate, the court would be enabling him intermeddle with the deceased's property.
10. That pursuant to the provisions of Section 45(1) of the *Law of Succession Act*, the Applicant herein had no capacity to cause the suit property to be registered in the name of the deceased since the Succession Cause had not been completed and he (Applicant) was not an Administrator of the deceased's estate. Reliance was placed on a combination of the decisions in *Re Estate of John Gakunga Njoroge* [2015] eKLR and *Morris Mbiti Mburugu v Denis Kimathi M'Mburugu* [2016] eKLR to submit that until the Applicant obtained a grant of representation over the deceased estate, the court should not entertain prayers seeking and/or purporting to distribute the deceased's estate.
11. That the provisions of Section 54 of the *Law of Succession Act* and Section 14 of the 5<sup>th</sup> Schedule to the *Law of Succession Act* were clear that a Limited Grant was only limited for purposes of suing and being sued hence the court could not entertain prayers that purported to confer the deceased's property upon the Applicant. That it was for these reasons that the court lacked jurisdiction to determine the instant suit and therefore their objection should be sustained while the Plaintiffs suit be dismissed with costs.

#### **Applicant's Submissions.**

12. The Applicant, vide their submissions dated 17<sup>th</sup> November, 2023 framed one issues for determination to wit; whether the court has or lacks jurisdiction to hear and determine the instant suit.
13. The Applicant's reliance was hinged on the Mukisa Biscuit's case (supra) to submit that the instant Preliminary Objection was ambiguous in its formulation as one could not easily discern the grounds on which the Respondents were seeking to strike out the amended Originating Summons. That reliance on the provisions of Section 7 of the *Limitation of Actions Act* by the Respondents to submit that the instant suit was time barred was farfetched and spurious since the Applicant's claim against the 2<sup>nd</sup> Respondent had first arisen in the year 2019 thus 12 years had not lapsed from the date when the right of action accrued to the Applicant.
14. That further, the acts of trespass had continued from the year 2019 to date even after the filing of the instant suit since on or about the 2<sup>nd</sup> July, 2022, wherein the 2<sup>nd</sup> Respondent had forcefully made entry into the suit property and demolished the houses that were therein. Reliance was placed on the decision in the case of *County Government of Laikipia v James Kimani Mburu & 3 others* [2020] eKLR.
15. That the 2<sup>nd</sup> Respondent had cited Section 9(2) of the *Limitation of Actions Act* in his submissions although the same had not been cited in the Preliminary Objection. That the correct interpretation of Section 9(2) of the *Limitation of Actions Act* was that the time started running against any person seeking to recover possession of land of a deceased person from the time of the dispossession of land wherein in this case, the Applicant's claim against the 2<sup>nd</sup> Defendant first rose in the year 2019. He placed reliance in the decided case of *Peter Chepkochoi Mitei v Esther Jelagat Ng'eny & 3 others* [2014] eKLR to submit that the instant suit was not time barred as had been alleged by the Respondents.



16. On the issue as to whether the Applicant had capacity to sue, there was submissions that the Amended Originating Summons as filed had not offended the provisions of Order 4 Rule 4 of the *Civil Procedure Rule* as the Applicant had clearly indicated in his Affidavit in support of the said Amended Originating Summons that he was suing on behalf of the estate of Lucio Talai Arap Narok (Deceased) because he possessed a Limited Grant of Letters of Administration *ad Litem*. That the failure to indicate the Applicant's capacity in the description of the parties to a suit that he was suing on behalf of a deceased person, was a genuine mistake that could be cured by an amendment and would not prejudice, embarrass or cause any injury to the Respondents. That subsequently, dismissing the instant suit on the aforementioned ground would be tantamount to punishing the Applicant for excusable mistakes of his advocate. He placed reliance on the decision in the case of *Juma Abdalla Matata v Ali Changoma & 5 others* [2014] eKLR.
17. The Applicant submitted that a court of law should not allow the prescriptions of procedures and form to triumph the primary object of dispensing substantive justice, as envisaged by the provisions of Article 159 (2) of *the Constitution*, Sections 1A and 1B of the *Civil Procedure Act* and Section 19 of the Environment and *Land Act*, as well as the decided case of *Philip Chemwolo & another v Augustine Kubende* [1986] eKLR.
18. That the filing of the instant suit against the Respondents was not an act of intermeddling as envisaged by the provisions of Section 45 of the *Law of Succession Act*, but that was to preserve the property of the deceased person until the beneficiaries and their respective shares could be identified, ascertained and distributed.
19. That Applicant, while relying on the provisions of Section 54 of the *Law of Succession Act* and paragraph 14 of the fifth schedule to the *Law of Succession Act*, reiterated that he had been issued with a Limited Grant of Letters of Administration on 25<sup>th</sup> February, 2022 and hence the Respondents' assertion that the instant Application as filed had offended the above provisions of law was fabricated and untrue. That from the foregoing, the instant Preliminary Objection had been made in bad faith, for wrong purpose, unmerited and should be dismissed with costs since the court had the requisite jurisdiction to hear and determine the instant suit.

#### **Determination.**

20. I have given due consideration to the rival arguments and the authorities cited, I find that the Defendant has raised weighty issues which go to attack the jurisdiction of the Court.
21. Applying the principles in *Mukisa Biscuit Manufacturing Co. Ltd. vs West End Distributors Ltd.* (1969) EA 696 to wit that an objection must consist of a point of law which if argued as a preliminary objection is capable of disposing of the suit, the Defendant herein has argued that the Plaintiff cannot bring a suit against them because the same is time barred by virtue of the provisions of Section 7 of the *Limitation of Actions Act*, secondly that the suit was in contravention of the provisions of Order 4, rule 4 of the *Civil Procedure Rules*, Section 45 of the *Law of Succession Act* and Section 54 of the *Law of Succession Act* as read with Section 14 of the corresponding fifth schedule to the Act and should therefore be struck out in limine.
22. I therefore find the matters that arise for determination as being:
  - i. Whether the Preliminary Objection raised is sustainable.
  - ii. Whether the said Preliminary Objection has merit and should be upheld.



23. To begin with, the Plaintiff/Applicant herein seeks for orders that on behalf of the estate of Lucio Talai Arap Narok, he be registered, by adverse possession, as proprietor to 0.36 hectares (0.9 acres) comprised in the land parcel LR No. Kericho/Litei/875 registered in the name of the 1<sup>st</sup> Respondent by virtue of the late Lucio Talai Arap Narok's quiet and peaceful occupation of the same for a period of over 40 years.
24. The court is mindful of the legal attribution to the doctrine of Adverse Possession in Kenya which is embodied in Section 7 of the [Limitation of Actions Act](#), which stipulates 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...”
25. However Section 13 of the [Limitation of Actions Act](#) provides that:
- A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor the period of limitation can run (which possession is in this Act referred to as Adverse Possession) and, where under sections 9, 10, 11 and 12 (of the Act) a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.
26. Sections 37 and 38 of the [Limitation of Actions Act](#) stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in Adverse Possession until he/she shall have obtained and registered a High Court (Read Environment and Land) Order vesting the land in him/her.
27. It is to be remembered that the principle in the doctrine of adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a period of twelve (12) years. Time does not run against the adverse possessor. This doctrine thus extinguish the right of the registered proprietor in favour of an adverse possessor. The provisions of Section 38 of the [Limitation of Actions Act](#), and Order 37 Rule 7 of the [Civil Procedure Rules](#) are elaborate procedure to apply to become entitled by Adverse Possession to land.
28. The provisions of Section 9(2) of the [Limitation of Actions Act](#) stipulate as follows;
- “Where a person brings an action to recover land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of his death in possession of the land, and was the last person entitled to the land to be in possession of the land, the right of action accrues on the date of death.”
29. These provisions of the law are clear to the effect that where the deceased was on the date of his/her death in possession of the land, and was the last person entitled to the land to be in possession of the land, the right of action accrues on the date of death. It is on record that the deceased Lucio Talai Arap Narok died on 6<sup>th</sup> October 2005 wherein her legal administrator has filed suit on behalf of her estate as an adverse possessor as this right of action accrued upon her death. As to whether or not the deceased had acquired the impugned suit land by way of adverse possession is a matter that shall be determined on trial and is therefore not within the ambit of this application.



30. On the issue as to whether the Applicant had capacity to sue, having filed suit on his behalf and not on behalf of the estate of the deceased, I find that although the provisions of Order 4 Rule 4 of the Civil Procedure Rules are couched in mandatory terms to the effect that;

“Where the plaintiff sues in a representative capacity the plaintiff shall state the capacity in which he sues and where the defendant is sued in a representative capacity the plaintiff shall state the capacity in which he is sued, and in both cases it shall be stated how that capacity arises.”

31. Yet the failure by the Applicant to state in what capacity he filed suit, I find was not fatally defective such that an amendment would not cure the oversight. Indeed at the introductory paragraph of the supporting affidavit to the Amended Originating Summons, he had clearly stated that he was suing on behalf of the estate of Lucio Talai Arap Narok (Deceased) by virtue of the grant of letters of administration ad litem granted on the 25<sup>th</sup> February 2020.

32. The Preliminary Objection dated 23<sup>rd</sup> June, 2023 to the Applicant’s Amended Originating Summons of the 22<sup>nd</sup> November, 2022 herein lacks merit and the same is dismissed with costs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 25<sup>TH</sup> DAY OF APRIL 2024**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

