



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nadrea v Chiwaya & 13 others (Civil Suit E050 of 2023)  
[2024] KEELC 4265 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4265 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
CIVIL SUIT E050 OF 2023  
EK MAKORI, J  
MAY 23, 2024**

**BETWEEN**

**SAUMU MBURA NADREA ..... PLAINTIFF**

**AND**

**NATHANIEL NYALE CHIWAYA ..... 1<sup>ST</sup> DEFENDANT**  
**DAVID M. CHIWAYA ..... 2<sup>ND</sup> DEFENDANT**  
**PETER A. CHIWAYA ..... 3<sup>RD</sup> DEFENDANT**  
**GIDEON S. CHIWAYA ..... 4<sup>TH</sup> DEFENDANT**  
**WASHE MULANDA ..... 5<sup>TH</sup> DEFENDANT**  
**CHIRO LEWA ..... 6<sup>TH</sup> DEFENDANT**  
**OMAR ABDALLA OMAR ..... 7<sup>TH</sup> DEFENDANT**  
**CHRISTINE MWAZENGE ..... 8<sup>TH</sup> DEFENDANT**  
**JEREMIAH KINTUA KIRATHE ..... 9<sup>TH</sup> DEFENDANT**  
**FLORENCE KOMBO DAVID ..... 10<sup>TH</sup> DEFENDANT**  
**SEITOMO INVESTMENTS LIMITED ..... 11<sup>TH</sup> DEFENDANT**  
**NOBERT SHLACHTER (THE ADMINISTRATOR AND EXECUTOR OF THE  
WILL OF THE LATE CHRISTOPHER JOHN KIRUBI) ..... 12<sup>TH</sup> DEFENDANT**  
**THE REGISTRAR OF LANDS, KILIFI ..... 13<sup>TH</sup> DEFENDANT**  
**THE ATTORNEY GENERAL ..... 14<sup>TH</sup> DEFENDANT**



## RULING

1. The 13<sup>th</sup> and 14<sup>th</sup> defendants, supported by the 1<sup>st</sup> to 6<sup>th</sup> and 11<sup>th</sup> defendants, have raised a Preliminary Objection in this matter, significantly, stating that the claim by the plaintiff as drawn touching on title Kilifi/Mtwapa/182, initially registered in the name of the late Christopher John Kirubi, in as far as it seeks to claim the land in question, is statutorily barred and offends the provisions of Sections 4(2) and 7 of the *Limitation of Actions Act* and therefore the entire claim should be struck out with costs as the Court, lacks jurisdiction to hear the same by dint of the provisions of the cited law.
2. I directed the parties to file written submissions, which they duly complied with, ensuring a comprehensive review of the case.
3. From the materials placed before me and the submissions by the parties, the key issues I have identified for the determination of this Court are:
  - (1) whether the Preliminary Objection meets the threshold,
  - (2) whether it is sustainable by the in view of the provisions of Sections 4(2) and 7 of the *Limitation of Actions Act*, and
  - (3) who should bear the costs of the application and or the suit.
4. The 13<sup>th</sup> and 14<sup>th</sup> defendants aver that from the plaint dated 30<sup>th</sup> June 2023, the cause of action as disclosed relates to land parcel Kilifi/Mtwapa/182, registered in the name of the late Christopher John Kirubi in 1995. His father discovered the fraudulent registration in 2010. It is further alleged that the plaintiff, in 2018, found other duplicitous subdivisions of the suit land and transfer to other parties.
5. The 13<sup>th</sup> and 14<sup>th</sup> respondent hinge their Preliminary Objection from the plaint as drawn and state that the cause of action arose more than 12 years ago; on page 12 of the plaint, the plaintiff averred that the late Christopher John Kirubi transferred to himself the whole parcel Kilifi/Mtwapa/182 without the knowledge and consent of his late father Julius Balloson Mbura thereby depriving his father and his estate, 14 acres. A caution was lodged by his father. In 2010, there were proceedings to remove the same by the Land Registrar, who decided in favour of the late Christopher John Kirubi.
6. The 13<sup>th</sup> and 14<sup>th</sup> defendants believe that the cause of action arose 28 years ago upon the transfer of the suit land to the 12<sup>th</sup> defendant and 13 years after the discovery of the transfer to the 12<sup>th</sup> defendant. The 13<sup>th</sup> and 14<sup>th</sup> defendants assert that this is a suit fit for dismissal for being statutory barred.
7. The 13<sup>th</sup> to 14<sup>th</sup> defendants have cited several judicial decisions on the parameter of preliminary Objection and what it entails – see *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited* [1969] E. A 696, *Edward Moonge Lengusuranga v James Lanaiyara another* [2019] eKLR, *Avatar Singh Bhamra & another v Oriental Commercial Bank* HCC No. 53 of 2004 and *Sobanlaldurgadass Rajput & another v Divisional Integrated Development Programmes Co Ltd* [2021] eKLR.
8. On the specific limitation of 12 years for the recovery of land, the 13<sup>th</sup> and 14<sup>th</sup> defendants have quoted the decision in *Naitawang v Matara & 4 others* (Environment & Land Case E004 of 2022) [2022] KEELC 15559 (KLR) (8 December 2022) (Ruling), 8 December 2022., which emphasizes the time within which fraud should be reckoned. They believe that the same was reckoned as early as 1995 when the land was transferred and registered in the name of Christopher John Kirubi (deceased). The defendant had up to 2007 to originate a suit for recovery of land.



9. The 13<sup>th</sup> and 14<sup>th</sup> defendants argue further that fraud is a tort that must be reckoned within three years under Section 4(2) of the *Limitation of Actions Act*. This is fortified by the *Edward Moonge Lengusuranga*(*supra*) and *Peter Kimani Njenga v Mugo Kamabuni Mugo & 3 Others* [2018] eKLR.
10. The 13<sup>th</sup> and 14<sup>th</sup> defendants reiterate that the purpose of the limitation is to prevent the prosecution of stale demands by a plaintiff and that it is geared to protect a defendant from the rigmaroles of defending a suit when evidence could have been lost due to lapse of time.
11. The plaintiff, on the other hand, disputes the defendants' claims and asserts that the suit is not about the recovery of land but compensation from the estate of the 12<sup>th</sup> defendant. They further argue that the cause of action, as per paragraph 14 of the plaint, arose on 11th May 2014, and therefore, 12 years had not lapsed by the time of filing this suit, if it were for recovery of land as alleged in the Preliminary Objection. Thus, they contend that Section 7 of the *Limitation of Actions Act* has not been contravened.
12. On Section 4(2) of the Act, the claim by the plaintiff is on cancellation of title in the names of the 1<sup>st</sup> to the 6<sup>th</sup> defendants; therefore, the suit is not based on tort. The claim falls under Section 7 of the *Act*. Fraud could only be detected by the assistance of the 13<sup>th</sup> defendant, who ordinarily is the custodian of title documents. The titles can be probed by tracing the history and entries in a register. The decision on tracing the root of the title is enunciated in the Supreme Court decision in *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment)
13. A Preliminary Objection as held in *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited* [1969] E. A 696: where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, consists of:

Law, J.A.:

“So far as I am aware, a Preliminary Objection consists of a pure 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 on the jurisdiction of the Court or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold, P.:

“A Preliminary Objection is in the nature of what used to be a demurrer. 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 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 issues. This improper practice should stop.”



14. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also captured the legal principle when it stated as follows:

“ A Preliminary Objection 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 the exercise of judicial discretion.”
15. The Preliminary Objection raised here is based purely on points of law under Sections 7 and 4(2) of the *Limitation of Actions Act*. The same falls within the parameters set in the two judicial decisions I have cited in paragraphs 13 and 14.
16. What I need to check from the pleadings is whether the claim by the plaintiff runs afoul of the cited Sections of the Law. If I find the plea by the 13<sup>th</sup> and 14<sup>th</sup> defendants are true, the plaintiff’s claim will be struck out. If it is negative, it will be sustained as we proceed to full trial.
17. Section 7 of the *Limitation of Actions Act* provides as follows:

“ An action may not be brought by any person to recover the 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.”
18. The plaintiff’s claim is captured from paragraphs 11 to 14 of the plaint, which in summary states that in 1995, in total disregard of the proprietary interest of the plaintiff’s father, the late Julius Balloson Mburu, one Christopher John Kirubi (deceased), transferred to himself all the entire parcel of land known as Kilifi/Mtwapa/182, this was without the knowledge of his father. His father became aware of it sometime in 2010 when he lodged a caution. The removal of the caution proceedings was conducted by the Land Registrar the same year, and the caution was removed in favour of Christopher John Kirubi (deceased). In 2018, the plaintiff discovered further subdivisions done on the parcel of land into several other plots, as enumerated in paragraph 14 of the plaint. It follows that from the averments in the plaint the cause of action arose in 1995 when the land was transferred to Christopher John Kirubi (deceased). That was 28 years before filing the current suit. The fraud (sic) was allegedly discovered in 2010, thirteen years before the present suit was instituted.
19. The plaintiff alleges that he would be seeking compensation for the loss of the land by the estate of his late father and, at the same time, the cancellation of titles. The cancellation of the titles will mean the recovery of land. Whichever facet of the coin we look at the matter clearly, even if we go by the discovery of the fraud as having been detected in 2010, the current claim runs contra Section 7 of the *Limitation of Actions Act* and is, therefore, time-barred by the operation of the law. Compensation cannot be decreed on a stale demand
20. The purpose of the Law of Limitation was stated in the case of *Mehta v Shah* [1965] E. A 321, as follows:

“ The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”



21. This was further restated in the case of *Gathoni v Kenya Co-operative Creameries Ltd* [1982] KLR 104, where the Court of Appeal held:

“...The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

22. In this matter, the predecessor of the title, the father of the plaintiff, had all the time to sue from 1995. He did not. He allegedly discovered the fraud complained of in 2010, he lodged a caution. The Land Registrar heard him and the other parties. The caution was found to have been placed without reasonable cause. It was removed. This was the opportune time to sue. The father of the plaintiff died in 2014 without bringing any action. The subsequent subdivisions in 2018 were done after the parent title had been transferred in 1995, and caution thereafter was placed on the suit property, which was removed in 2010. The 2018 discovery(sic) by the plaintiff cannot be said to have been a new phenomenon. It dates back to 1995.

23. As can be garnered from the plaint, several transfers have arisen from the alleged transfer in 1995. Going back to undo what has already happened will be an uphill task. The plaintiff had all the time to bring up the action in good time. It is, in my view, a stale demand. The statute bars it. I need not discuss Section 4(2) of the *Act*. I have already found that Section 7 of the *Act* was sufficient to dislodge the current claim. The *Dina Management Limited* (*supra*) cannot come to the aid of the plaintiff since we are not dealing with the root of the title in this matter.

24. The plaintiff's suit is hereby struck out with costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI ON THIS 23<sup>RD</sup> DAY OF MAY 2024. SINCE THE COURT WAS AWAY ON OFFICIAL DUTIES WHEN THE JUDGMENT WAS DUE, THE PARTIES SHOULD BE SUPPLIED WITH A SOFT COPY OF THIS RULING VIA EMAIL.**

**E. K. MAKORI**

**JUDGE**

