



REPUBLIC OF KENYA



Kuria & 27 others v Mott & 12 others (Environment & Land Case 23 of 2021) [2024] KEELC 4220 (KLR) (14 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4220 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 23 OF 2021**

FO NYAGAKA, J

MAY 14, 2024

BETWEEN

DAUDI A KURIA & 27 OTHERS PLAINTIFF

AND

GW MOTT & 12 OTHERS DEFENDANT

RULING

1. The 9th, 12th and 13th Defendants, represented by the Office of the Attorney-General, raised a Preliminary Objection dated 24/10/2023, which they filed on 25/10/2023. The points of law raised were:-
 1. That this suit is time barred, having been brought outside the statutory limitation of 12 years in view of Section 7 of The Limitation of Actions Act, Chapter 22 of the laws of Kenya.
 2. The Plaintiffs' suit is incompetent as it offends the mandatory provisions of Section 3 of the Public Authorities Limitation Act, Chapter 39, Laws of Kenya.
 3. The plaintiffs' is null and void *ab initio* and cannot be sustained since they lack *locus standi* to institute this suit contrary to the Law of Succession Act, Chapter 160 of the Laws of Kenya.
 4. That the plaintiffs' suit and order sought herein are procedural and substantive legal nullity, abuse of the process of the court, vexatious, mischievous and a proper candidate for dismissal and striking out with costs.
2. The preliminary objection was in relation to the entire suit as amended in the Further Amended Plaint dated 12/11/2021 filed on 15/11/2021.
3. The Preliminary Objection was disposed of by way of both written and oral submissions. The 9th, 12th and 13th defendants filed their submissions dated 11/12/2023 the same date. They submitted that the



Amended plaint to dated 12/11/2021 was supported by a verifying affidavit sworn and filed the same date.

4. On whether this Court had jurisdiction pursuant to Section 7 of the *Limitation of Actions Act* they sighted and reproduced the provision 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 or, if it first accrued to some person through whom he claims, to that person.”

5. Then they submitted that the plaintiffs alleged that their forefathers purchased the disputed land from white settlers between October, 1988 and December, 1998. Further, that the Plaintiff's claimed that they were unable to transfer their parcels of land due to a caveat placed on the title by the Government on 19/10/1974.
6. The 9th, 12th and 13th Defendants argued that therefore this suit was brought 32 years after the alleged agreements of purchase. Therefore, it offends Section 7 of the *Limitation of Actions Act. Dickson Ngige Ngugi v. Consolidated Bank Limited (formerly Jimba Credit Corporation Limited) and another* [2020] eKLR, where the court held that under Section 7 of the *Limitation of Actions Act* an action to recover land cannot be brought up after the expiry of 12 years. For that reason, in the instant case, the Court lacked jurisdiction to determine the matter because it had been defeated by time. They relied on the case of *Owners of the Motor Vessel "Lillian S" v Caltex (Kenya) Ltd* [1989] KLR 1, and also the case of *Bosire Ongero v. Royal Media Services* [2015] eKLR. Further, they relied on the case of *Sobanlaldurgadass Rajput & Another v Divisional Integrated Development Programs Co Ltd* [2021] eKLR where the court upheld a Preliminary Objection stating that the suit was time barred and defeated by time, and therefore, the court lacked jurisdiction to determine it.
7. On whether the plaintiffs suit offended Section 3 of the *Public Authorities Limitation Act* they cited the provision of which Sub-section 1 stipulates that:-

“(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.”

8. They submitted that the instant suit was instituted against the Chief Land Registrar, the National Land Commission, the National Highway Authority, the Director of Survey and the County Commissioner, all who were government agencies and therefore Section 3 of the *Act* covers actions against them. They relied on the Court of Appeal case of *Francis Njenga vs. James Muraya and Another* [2021] eKLR, where the court stated that proceedings against a government agency brought in violation of Section 3 of the *Public Authorities Limitation Act* should be dismissed.
9. On whether the plaintiffs or applicants have had capacity to file suit, they submitted that none of the plaintiffs had locus to institute the suit, the reason being that they had not established that they were the owners of the suit property on whose behalf they brought the action and or under which power the instituted suit. Further, they submitted that the estate of a deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of that estate. Further, only a person who had been issued with a Grant of Letters of Administration had the capacity to represent the estate.



10. They argued that the powers of a personal representative were set out in Section 8(a) of the Law Succession Act, Chapter 160 of the Laws of Kenya which stipulates as follows:-

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative.”

11. For the reasons above they submitted that the Preliminary Objection was merited.

12. The plaintiffs filed a document the titled “Reply of Preliminary Objection and the Ground of Opposition.” Although it was not clear whether it was directed to the primary objection or the application the Plaintiffs had filed for recusal the Plaintiffs stated orally that they relied on it, stating that it was in reference to the Ground of Opposition dated 24/10/2023 and 11/12/2023. When the Court examined the record, it found that what the Plaintiff referred to as Grounds of Opposition of that date were actually the Preliminary Objection filed the following date.

13. Therefore, the Court will treat them as an answer to the Preliminary Objection of the 9th, 12th and 13th Defendants. For the reason that the document was unclear in terms of the argument it posed, this court will reproduce it verbatim and endeavour to discern the meaning.

14. Through the document the Plaintiffs then submitted:

1. This reply of preliminary objection and the ground of opposition dated on 24 October 2023 and 11th December 2023. It has not been certified by the court and written on difference dates. Are just like dreaming up a blind in daylight, but not an application, just a draft.
2. The premium injection and ground of opposition I was served. On 17th January at 3:25 PM. I was taken by event. And. Also is not satisfied by the court and cannot be addressed by the court of the rule of law.
3. That it is not supported with accused persons statement and affidavit duly signed by the accused persons. The preliminary objection? Stroke Ground of Opposition is a copy of the one dated 19th February 2021, which was dismissed by Honourable Justice Dr. Mrs. Madeny on March 2021 because it was not filed procedurally and was brought out of timeline. Thereafter the court has closed off pleadings.

In the Act Order 2 section 14 no technical objection may be raised to any pleadings on the ground of want of form. That our matter is for the Land Act 2012, private land and land compulsory acquisition of interests in Land chapter #6 of Land Act which occurred on. That. May 2019 as per as it meant and it is not in the record. But. Not 12 years of. Cap 22 Cap 160.

4. It is not for recovery under limitation of actions are cap 22, Section 7, as the Council's inhaled thought. And cup 160 of prohibit.
5. That it is abuse of court process for knowledge, various composed and the challenge thereafter thought.
6. That the counsel is a stranger who is unauthorized by the 9th to 13th defendants as per court record.
 - a. She has not filed an appointment letter from the defendant as required by law and.



- b. No filed notice of appearance up to date.
7. It is unconstitutional of rule and unlawful for a court of rule of law can entertain illegal counsel to address in a court of law without filed a letter of appointment and notice of appearance.
8. This application should not be addressed in a court of rule of law without filed a letter of appointment and should be dismissed with costs.
15. The document was dated 07/02/2024. It was supported by an affidavit sworn by the Daudi Adan Kuria the same date. He deposed that he was an adult of sound mind and disposition, and hence competent to swear the affidavit; he had read the content (sic) of preliminary objection and grounds of opposition and he had confirmed (sic); the prayer sought herein had been overtaken by events and was brought late and ditisist (sic) certified by the court of law and should be dismissed. That the costs and the interest of this suit (sic). Such a further as the honourable court may deem fit and just expedient in the course.
16. This court endeavored to understand the document that the plaintiffs filed, which they termed as the “Reply of preliminary objection.” In order to fully comprehend the Plaintiffs’ arguments the court has first looked at the court record. Specifically, the record of 03/03/2021. On that date the matter was placed before Honourable Justice M. A. Odeny and after brief submissions by both parties the Court ordered as follows:-

“The Suit land is in Trans Nzoia County where there is an ELC Court. This matter is hereby transferred to Kitale ELC for hearing and determination. The Plaintiff is granted 21 days to amend the plaint. Mention on 8th April 2021.”

17. The above record contradicts the point of argument that the plaintiffs raise that the issues raised by the 9th, 12th and 13th defendants were determined and dismissed. The transfer of a matter from one court to another is not similar to a dismissal. Further, I have looked at the record and I do not find anywhere where the preliminary objection which was raised herein and placed before me for determination had been raised before. Therefore, the Plaintiff’s argument on that score fails, leaving the Court with the jurisdiction to determine the Preliminary Objection now.
18. This leads the Court to defining a preliminary objection. In the case of *Mukhisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696, Sir Charles Newbold defined it as follows:

“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 or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

19. In *Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others* [2004] e KLR, the Court of Appeal held that,

“We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other



side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”

20. Also, in *Susan Wairimu Ndiangui v Pauline W. Thuo & Another* [2005] eKLR, Musinga J as he then was held as follows:-

“a preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”

21. It is clear that a Preliminary Objection arises on a point of law only. The Court needs only to examine the pleadings and compare the issues raised therein with the law in issue and make a finding as to whether the failure to comply with what the law requires or provides is so fundamental that it goes to the root of the claim, defence, petition or plaint. This is what this Court will do in regard to the objection raised.
22. In the instant case the Defendants raised four points they termed as Preliminary Objections to the Plaintiff's suit, as reflected in the Amended Plaintiff. But in their submissions, they limited themselves to three, which this Court will also examine because the fourth point they raised was not a preliminary point of law properly so called. For it to succeed it required adduction of evidence.
23. It is worth noting that a point of law need not always be raised by parties only. Even the Court itself can on its own motion call on parties to address on it so as to be satisfied that as the proceedings are conducted it is being done within the parameters or limits of the law.
24. In the instant suit it needs to be noted that since the time the Plaintiffs filed their claim, the Plaintiff has only been Amended once, *vide* the Ruling of this Court delivered on 30/06/2021. By the Ruling the Court directed that the Amended Plaintiff be filed within fourteen (14) days of the deliver.
25. The record should that the Plaintiffs filed an Amended Plaintiff dated 08/07/2021 on 15/07/2021. This was done out of time by a difference of a day but it appears that parties did not raise issue with it. In the pleading, the Plaintiffs were 28 while they introduced the 10th - 13th Defendants.
26. On 26/10/2021 the 1st Plaintiff addressed the Court, in absence of the Defendants whom he had not served and informed the Court that he wished to add as Plaintiffs other people who had been affected by the caveat complained of in the matter. The Court proposed to him to seek legal advice on how to go about it.
27. On 12/11/2021 the Plaintiffs, without leave of the Court, filed a Further Amended Plaintiff dated 12/11/2021 which was verified by an Affidavit sworn by the 1st Plaintiff only. The Further Amended Plaintiff purported to introduce 205 people. None of these signed any authority to be enjoined or any verifying affidavits to that effect. This was a serious anomaly, in addition to the incurable defect of the purported Further Amended Plaintiff being illegally before the Court.
28. As indicated before, this Preliminary Objection was disposed of by way of both written and oral submissions. I have taken them into account when preparing the ruling herein. Further, I have considered the issues raised in this matter, the law and the submissions by the parties.
29. It is clear that the 9th, 12th and 13th Defendants raised a Preliminary Objection to the entire suit. Whereas the filed objection indicated that it was directed to the Further Amended Plaintiff dated 12/11/2021 but



filed on 15/11/2021, the Court finds that since the document was a strange one on the record, having been filed without leave of the Court, the Preliminary Objection was not designed to address it but the Amended Plaintiff filed pursuant to the Court order following the delivery of the ruling on 30/06/2021. Thus, since this Court is one that always seeks to do substantive justice rather than determining issues on technicalities, in terms of Article 159(2)(d) of the Constitution of Kenya, it determines the Objection vis-à-vis the duly Amended Plaintiff.

30. As for the Further Amended Plaintiff which was filed without leave of the Court, the only appropriate step and order this Court can make is to expunge it because such a document is a nullity. This is because under Order 50 Rule 7 of the Civil Procedure Rules 2010, documents filed outside of timelines given by either the law or Court and without Leave of the Court are a nullity and must be expunged. The Court ought not to legality what is illegal. It would rather it strikes them out and sends the party who filed them to the drawing board. If he comes back for extension of time convinces the Court as to the delay the Court may at that time consider enlarging time to file new ones.
31. The decision of the Supreme Court of Kenya in the case of Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR, is instructive on this. The judges of the Supreme Court observed as hereunder;

“What we hear the applicant telling the Court is that he is acknowledging having filed a ‘document’ he calls ‘an appeal’ out of time without leave of the Court. Pursuant to rule 33(1) of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court’s Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do. To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court.

32. Thus, the document dated 12/11/2021 is hereby struck out or expunged. What is left of this Court is to, then find out to which document the Preliminary Objection was rightly made. As stated above, in terms of the Article 159(2)(d) of the Constitution, it is imperative for a Court determine disputes based on substantive merits rather than mere technicalities as the circumstances of each case may require. Thus, in the instant case, one of the points the Defendants raise is that the Plaintiffs have no capacity to bring this suit as required by Section 82(a) of the Law of Succession Act. The provision is to the effect that only personal representatives of a deceased person’s Estate may, subject only to any limitation imposed by their grant, enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative.
33. In terms of Section 3 of the Act, “a “personal representative” means the executor or administrator, as the case may be, of a deceased person,” an “administrator” means a person to whom a grant of letters of administration has been made under this Act” while an “executor” means a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided.”
34. In the instant case, all the 28 Plaintiffs stage their claim in paragraph 1 of the original Plaintiff and still the Amended Plaintiff by giving their ‘capacity’ or status in relation to the ownership of the suit lands



over which they sue as follows, “... the Plaintiffs are the descendants of purchasers of the said land estates...” In paragraph 2 they plead further that “the Plaintiffs state that in or about the year 1988 the suit property was under the white settlers on sale in the office of the District Commissioner, Endebess which remains under them even after they sold it to the fore grandfathers and fathers to date.” At paragraph 3, “the purchasers tried all ways to request the vendors to transfer the properties but in vain as a result of caveat place.” At paragraph 5, “the Plaintiffs aver that their fore grand fathers bought the said suit properties from the vendors between October, 1988 and December, 1988 where they paid the final payment.”

35. In the entire Amended Plaintiff, none of the Plaintiffs claims to be either an executor of any will of their fore grandfathers or fathers or to have obtained a grant of letters of administration to their Estates of the said fore grandfathers or fathers, in terms of Section 82(a) of the *Law of Succession Act* or Section 6 of the *Act* in regard to appointment of executors of wills. None can lawfully claim to be enforcing the claims of the forefathers who are alleged to have bought the suit lands contemplated herein, in terms of the Act. It goes without saying that therefore that none has the *locus standi* or capacity to sue. Thus, the preliminary objection by the 9th, 12th and 13th Defendants succeeds on this point. To repeat, a person who does not have letters of administration whether limited for purposes of suing or enforcing the rights of a deceased person’s Estate or is not an executor of a will does not have capacity to so act. The Plaintiffs herein did not demonstrate this at all hence have no capacity to institute this suit.
36. Since this Court has found that none of the Plaintiffs had the capacity to institute this suit hence the entire suit was incompetent and incurably defective, it needs not consider the other preliminary points because it would be an academic exercise.
37. The upshot is that the Preliminary Objection succeeds on account of the incapacity of the Plaintiffs and it is hereby struck out with costs to the Defendants.
38. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 14TH DAY OF MAY, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

