



**Mwachinga v Bunei (Sued as administrator of the Estate of Hosea Kiprono Bunei) & 2 others  
(Environment & Land Case E041 of 2022) [2024] KEELC 4913 (KLR) (19 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4913 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE E041 OF 2022**

**EK MAKORI, J  
JUNE 19, 2024**

**BETWEEN**

**SAID ATHMAN MWACHINGA ..... PLAINTIFF**

**AND**

**DEBORAH JEROTICH BUNEI (SUED AS ADMINISTRATOR OF THE ESTATE  
OF HOSEA KIPRONO BUNEI) ..... 1<sup>ST</sup> DEFENDANT**

**KILIFI LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**HON ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. On the 6<sup>th</sup> of July 2023, this Court struck out the plaintiff's suit due to the operations of the Statute of *Limitation of Actions Act*:

“Concisely, time started running from 16<sup>th</sup> December, 1980. This being recovery of land matter, 12 years lapsed on 16<sup>th</sup> December 1992. The plaintiff is way behind the clock. To be exact, the plaintiff is 30 years late. The Preliminary Objection is hereby sustained. The plaintiff's suit is hereby struck out with cost.”

2. The application, dated 1st November 2023, is a request to review the orders that dismissed the suit as mentioned above, to present new evidence and arguments to support the plaintiff's case.
3. The grounds, as set in the affidavit deposed on 1<sup>st</sup> November 2023 by the applicant, Said Athan Mwachinga, are that the National Land Commission placed an embargo on dealings in land within the Chembe/Kibabamshe Land Adjudication Section in 1986. The same was lifted on 17<sup>th</sup> July 2017, when time could not be reckoned for computing time for purposes of the *Limitation of Actions Act*. The timelines have been provided vide attached Gazette Notice No. 6862 of 17<sup>th</sup> July 2017 and the



- one disclosed to have been issued in 1986, where individuals were asked to surrender their titles for cancellation due to alleged fraud within the Chembe/Kibabamshe Land Adjudication Section.
4. The 1<sup>st</sup> respondent, Deborah Jerotich Bunei, filed a Replying affidavit sworn on 26<sup>th</sup> February 2024 opposing the applicant's application as the Administrator of the Estate of Hosea Kiprono Bunei
  5. 1<sup>st</sup> respondent contends that where a review application is based on the fact that there is the discovery of fresh evidence, the Court must exercise the greatest of care as it is easy for a party who has lost to see the weak part of his case and the temptation to procure evidence which will strengthen that weak part and put a different complexion. In such an event, to succeed, the party must show that there was no dereliction on his part in adducing all possible evidence at the hearing. See - [\*D. J. Lowe & Company Limited v Banque Indosuez\*](#) [1998] eKLR,
  6. The 1<sup>st</sup> respondent avers this Court, in its ruling of July 6<sup>th</sup> July, 2023, did consider the applicant's allegations that an embargo affected lands within Chembe/ Kibabamshe. The Court further interrogated Gazette Notice No. 6862. In paragraph 16 of this Court's ruling, the Court formed the view that the applicant, despite having failed to prove the existence of an embargo, further was unable to demonstrate how the embargo, if any, would have affected the running of time as prescribed in the [\*Limitation of Actions Act\*](#). What the applicant is now trying to do with the current application is to patch up its response to the 1<sup>st</sup> respondent's preliminary objection. The Gazette Notice that he has annexed is not new evidence; the 1<sup>st</sup> respondent in its defence had referred to it, and the Court considered the same in its ruling.
  7. The 1<sup>st</sup> respondent contends that the applicant is inviting this Court to hear an appeal arising from its ruling. The applicant exhibited no diligence during the prosecution of the 1<sup>st</sup> respondent's preliminary objection, and even in the application before the Court, the applicant is inviting the Court to reconsider evidence and facts pleaded in the pleadings. Hence, no new evidence has been introduced.
  8. The applicant also failed to demonstrate what part of the ruling should be reviewed or the proposed resultant order. 1<sup>st</sup> respondent submits that an invitation to review without stating the manner of the proposed review or the resultant order is an omnibus order that invites the Court and parties to speculate. The application thus lacks specificity and is liable for dismissal. It is worth noting that the property subject to this litigation was acquired by a deceased person.
  9. I frame the questions for this Court's determination as whether the applicant has disclosed grounds that can necessitate this Court to review its earlier ruling dated 6<sup>th</sup> July 2023 and who should bear the costs of the application.
  10. The relevant provisions of the law giving powers to this Court to review its earlier orders are as laid in Section 80 of the [\*Civil Procedure Act\*](#), which provides thus:

“ Any person who considers himself aggrieved –(a)by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or(b)by a decree or order from which no appeal is hereby allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
  11. Order 45, Rule 1 (a) and (b) sets out the conditions that an applicant in an application for review must satisfy in order to get the application granted. Order 45, Rule 1 (2) expresses thus:

“ A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground



of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review.”

12. In the application beforehand, the applicant has brought in new evidence and seeks this Court to reevaluate the same and reach a different finding. In my earlier ruling, I had directed myself to why the claim by the applicant was time-barred. This is what I stated:

“The National Land Commission is a creature of the Constitution 2010. The review it did on the grants and dispositions within Chembe/Kibambamshe, whereas it touched on the propriety and legality of titles backward, in this case, its findings were that land title No.Chembe/Kibambamshe/223 was legally and properly acquired by one Hosea Kiprono Bunei after the execution of a transfer from one Said Athman Mwachinga. From the record, nobody raised any complaint on the propriety and legality of this particular title. Not even the current Plaintiff. Counsel for the Plaintiff was not candid enough on when the embargo he submitted was placed and its effect on the limitation of actions for purposes of computation of time. I have tried to check on how the embargo affected the computation of time from 16<sup>th</sup> December 1980 to no avail.

In my humble view, I see nowhere the embargo affected the running and computation of time as established by Section 7 of the Limitation of Actions Act on claims based on recovery of land, which ought to be brought within 12 years after accrual. Time could not start running from 17<sup>th</sup> July 2017 but certainly from 16<sup>th</sup> December 1980 when the deceased got a transfer of the suit land and has had its title till his demise and thereafter transmission to his heirs.

For a Preliminary Objection to remain so, the court need not do an inquiry or call for evidence. The pleadings and attachments on record suffice. The Plaintiff in his pleadings has not implored fraud and perhaps stated that there was discovery of fraud in the acquisition of the title subject of this suit, which the National Land Commission for example failed to address in the year 2017 to fall within the purview of Section 26 of the Limitation of Actions Act.

What is it that the plaintiff has been waiting for from 1980 to 1922 to bring up this suit? 42 years down the line! Is he the Said Athman Mwachinga who transferred the suit property to the deceased and has now changed his mind?

This is the scenario Section 7 of the Limitation of Actions Act abhors and as correctly submitted by Counsel for the 1<sup>st</sup> defendant citing the case of *Sobanlaldurgadass Rajput & another v Divisional Integrated Development Programmes Co Ltd* [2021] eKLR, where Nyukuri J. citing several other authorities on the limitation of actions based on the recovery of land she stated thus:

“The purpose of the Law of Limitation was stated in the case of *Mehtha v Shah* [1965] EA 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.”



37. In *Gathoni v Kenya Co-operative Creameries Ltd* [1982] KLR 104, the Court of Appeal held as follows;

“...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.”

38. A suit barred by limitation is a claim barred by law; hence, by operation of law, the Court cannot grant the relief sought. In the case of *Iga v Makerere University* [1972] EA, the Court had this to say on the Law of Limitation;

“A Plaint which is barred by limitation is a Plaint barred by law. Reading these Provisions together, it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The Limitations 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 sought.”

13. The time for limiting actions started running on 16<sup>th</sup> December 1980. I see nothing new or sufficient to warrant the review of the orders dated 6<sup>th</sup> July 2023. The embargo does not affect the computation of time. It is not a new and important matter that can alter the earlier findings that the Court can consider in its exercise of the review jurisdiction.

14. Application dated 1<sup>st</sup> November, 2023 dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 19<sup>TH</sup> DAY OF JUNE 2024.**

**E. K. MAKORI**

**JUDGE**

In the presence of:-

Mr. Kiplagat, for the 1<sup>st</sup> Respondent

Happy: Court Assistant

In the absence of:-

Mr. Obaga for the Applicant

