



REPUBLIC OF KENYA



**KENYA LAW**  
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**Khanani & 3 others v County Government of Busia & another (Environment and Land Appeal E015 of 2022) [2024] KEELC 7486 (KLR) (12 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7486 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT AND LAND APPEAL E015 OF 2022**

**BN OLAO, J**

**NOVEMBER 12, 2024**

**BETWEEN**

**STANLEY DAVIES KHANANI ..... 1<sup>ST</sup> APPELLANT**

**CHARLES OKWARO KHANANI ..... 2<sup>ND</sup> APPELLANT**

**JOHNSTONE ODWORI WANDERA ..... 3<sup>RD</sup> APPELLANT**

**AMOS NANYANGA WANDERA ..... 4<sup>TH</sup> APPELLANT**

**AND**

**COUNTY GOVERNMENT OF BUSIA ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR BUSIA COUNTY ..... 2<sup>ND</sup> RESPONDENT**

*(Arising from the ruling of Hon Lucy Ambasi Chief Magistrate Busia delivered on 30th August 2022 in Busia Chief Magistrate's Court ELC Case No E002 of 2022)*

**JUDGMENT**

1. If there were any awards for “The shortest ruling delivered in August 2022”, then the ruling subject of this appeal will certainly be a leading contender – to win that trophy. I would certainly vouch for it. It reads:

“Ruling

Preliminary objection upheld and suit is struck out with costs.

1. Limitation for filing land cases.
2. Lack of Notice to sue statutory under cap 40 Mukisa Biscuits.

Hon Mrs L. Ambasi



Chief Magistrate

30.8.2022”

While there is no standard of how long or short a judgment or ruling should be, the law under Order 21 Rule 4 of the Civil Procedure Rules is that a judgment must contain a statement of the case, points for determination, the decision and reasons thereof. A similar rule must apply to a ruling.

2. Stanley Davies Khanani, Charles Okwako Khanani, Johnstone Odwori Khanani And Amos Odwori Wandera (the Appellants) herein were the Plaintiffs in Busia Chief Magistrates Court Elc Case No. E002 of 2022. They impleaded The County Government Of Busia And the Land Registrar Busia (the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively) seeking judgment against them in the following terms:
  - a. A Declaration that the Respondent’s annexation of parts of parcels of land No L.R Samia/Luanda-Mudoma/214 and 215 was irregular, illegal, unconstitutional, null and void.
  - b. An order of injunction restraining the Respondents from claiming or continuing to claim the annexed part of the said parcels of land No Samia/Luanda-Mudoma/214 and 215 by themselves, their employees, servants or agents.
  - c. An order directing the Respondents to up-root and/or remove the beacons placed on the said land parcels No Samia/luanda-mudoma/214 and 215.
  - d. Compensation by way of General Damages.
  - e. Any further or alternative order as may be deemed fit and just.
3. The basis of the Appellants’ case was that the land parcel No Samia/Luanda-Mudoma/214 was owned by one Khanani Namalia (now deceased and whose Estate is represented by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants) while the 3<sup>rd</sup> and 4<sup>th</sup> Appellants are the owners of the land parcel No Samia/Luanda-Mudoma/215. That on or about 23<sup>rd</sup> May 1979, the Respondents jointly and severally caused portions of the said parcels of land (the suit land) to be hived off to form part of the public market. Then on 11<sup>th</sup> August 2021, the 2<sup>nd</sup> Respondent caused beacons to be installed thereby actualizing the annexation of the portions.
4. The 1<sup>st</sup> Respondent filed a defence denying those averments and pleaded that the portions of land hived off from the suit land are public land reserved for a market. Further, the 1<sup>st</sup> Respondent gave notice that the Appellants suit is time barred and an application would be made for it’s striking out.
5. By a Preliminary Objection dated 12<sup>th</sup> May 2022, the 1<sup>st</sup> Respondent raised the following grounds:
  1. That the suit herein is statutorily time barred under Section 7 of the *Limitation of Actions Act* cap 22 Laws of Kenya.
  2. That the Appellants had not sought or obtained prior leave of the Court to institute the suit as provided under Sections 27 and 28 of the *Limitation of Actions Act*.
  3. That the Appellants did not serve a Notice of Intention to institute these proceedings against the 1<sup>st</sup> Respondent as required under Section 13A of the *Government Proceedings Act* cap 40 Laws of Kenya.

In response to that Preliminary Objection, the Appellants filed a response and raised the following issues:



1. The cause of action arose on 11<sup>th</sup> August 2021 when the Respondents placed beacons in purported demarcation of the land parcel NO SAMIA/LUANDA-MUDOMA/227.
2. That the creation of land is not a one-off process under the *Land Act* and involves:
  - a. Beaconing
  - b. Mutation
  - c. Numbering or registration
3. That it was not until 11<sup>th</sup> August 2021 when the Respondents purported to beacon the land having got the first number Samia/Luanda-Mudoma/227 even before beaconing.
4. That the certificate of Search for the land parcels No Samia/Luanda-Mudoma/214 and 215 show that they have a road of access crossing through them and it was on 11<sup>th</sup> August 2021 when the Respondents tried to plant the beacons and that is when the cause of action arose which is only four (4) months before the filing of this suit far short of the 12 years statutory period.
5. That the provisions of Section 13A of the Government Proceeding Act does not apply in this case where the Appellants are seeking declaratory orders and therefore the Preliminary Objection must fail.

The 2<sup>nd</sup> Respondent appears not to have filed any pleadings.

6. On 17<sup>th</sup> March 2022, the parties agreed to canvass the Preliminary Objection by way of written submissions. On 30<sup>th</sup> August 2022, the trial Magistrate delivered a short ruling up-holding the Preliminary Objection and striking out the suit.
7. That ruling provoked this appeal. By an amended memorandum of appeal dated 24<sup>th</sup> February 2024, the Appellants seek the following orders:
  - a. This appeal be allowed and order of the Chief Magistrate be set aside.
  - b. The Appellants' suit be restored to the Magistrates Court for hearing and determination on its merits.
  - c. The costs of the appeal be borne by the 1<sup>st</sup> Respondent.
  - d. Such further or other orders as this Honourable Court may deem fit, expedient and just.
8. The following seven (7) grounds of appeal have been raised in support of the appeal:
  1. That the Honourable Chief Magistrate erred in law and in fact in failing to find the Respondents' last act of taking away the Appellants' subject parcels of land was the beaconing of the same on the 11<sup>th</sup> August 2021.
  2. That the Honourable Chief Magistrate erred in law and in fact that the Appellants Court suit had been time barred by limitation under the *Limitation of Actions Act* cap 22 Laws of Kenya yet the Appellants filed suit only seven (7) months after the Respondents' offending act on 11<sup>th</sup> August 2021.
  3. That the Honourable Chief Magistrate erred in law and in fact in failing to find that under Section 13A (3) of the *Government Proceedings Act* cap 40 Laws of Kenya, and the suit bearing



a prayer for a declaration of the Appellants' rights in the subject lands, the Appellants were not obliged to give 30 days notice of intention to sue the Government.

4. That the Honourable Chief Magistrate erred in failing to analyse the facts, issues and the law pertinent to the case before the ruling and/or order appealed against.
  5. That the Honourable Chief Magistrate erred in failing to address herself to the fact that the subject cause of action started on the 11<sup>th</sup> August 2021 when the Respondents planted beacons on the Appellants subject lands hence the limitation period of 12 years did not apply.
  6. That the Honourable Chief Magistrate erred in failing to address herself to the provisions of Section 13A of the *Government Proceedings Act* cap 40 Laws of Kenya and failing to find that the same would exempt the Appellants' case from notice of intention to institute proceedings.
  7. That the Honourable Chief Magistrate erred in law in finding that the Appellants' suit was bad in law.
9. The appeal has been canvassed by way of written submissions. These have been filed by Mr Okwaro instructed by the firm of Tim Okwaro Associates Advocates for the Appellant and by Mr Wambura, County Legal Counsel Busia for the 1<sup>st</sup> Respondent.
10. I have considered the appeal, the record herein and the submissions by counsel.
11. The ruling subject of this appeal, as I have already stated above, was precipitated by a Preliminary Objection raised by the 1<sup>st</sup> Respondent. The issues raised therein were:
1. That the Appellants' suit is time barred under Section 7 of the *Limitation of Actions Act*.
  2. That the Appellants did not obtain leave to institute this suit as required under Sections 27 and 28 of the *Limitation of Actions Act*.
  3. That the Appellants did not serve a notice of intention to institute proceedings against the 1<sup>st</sup> Respondent as required under Section 13A of the *Government Proceedings Act*.

Those are issues of law and therefore meet the standard set out in the case of Mukisa Biscuit Manufacturing Company LTD -v- West End Distributors LTD 1969 E.A. 696. Therein, Law JA described a Preliminary Objection as consisting 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.”

In the same case, Sir Charles Newbold P defined it thus:

“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.”

Guided by the above, I discern the twin issues of law that I need to consider in this appeal as being:

1. Whether the Appellants' claim was barred by the statute of Limitation.



2. Whether failure to serve a notice of intention to institute proceedings was fatal to the Appellants' suit against the 1<sup>st</sup> Respondent.

I shall consider those issues in this appeal in that sequence. And even as I do so, I must revisit the very brief ruling delivered by the trial Magistrate on 30<sup>th</sup> August 2022 and which I have already cited in extenso. It is clear that the trial Magistrate did not give any reasons as to why she up-held the Preliminary Objections. That notwithstanding, this Court exercising its jurisdiction as a first appellate Court has the powers set out in Section 78 (1) and (2) of the *Civil Procedure Act*. That provision reads:

78

- (1): "Subject to such conditions and limitations as may be prescribed, an appellate Court shall have power -
- (a) to determine a case finally;
  - (b) to remand a case;
  - (c) to frame issues and refer them for trial;
  - (d) to take additional evidence or to require the evidence to be taken;
  - (e) to order a new trial.
- (2) Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on Courts of original jurisdiction in respect of suits instituted therein."

Therefore, in spite of the brevity of the impugned ruling, this Court must re-evaluate the pleadings which were before the trial Court, apply the law to those facts and decide whether the ruling of the trial Magistrate should be up-held or set aside. I shall now consider the issues which I have identified above.

### **Whether the Appellants Suit Was Time Barred**

12. Section 7 of the *Limitation of Actions Act* provides that:

7: "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."

Section 7 of the *Limitation of Actions Act* therefore prohibits the institution of a suit to recover land after twelve (12) years from the date when the cause of action arose.

13. The importance of the statute of limitation was set out 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 distributed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case."



Similarly, in the case of *Gathoni -v- Kenya Co-operative Creameries Ltd* 1982 KLR 104, Potter JA set out the rationale of the law on limitation thus:

“The law of limitation of actions is intended to protect Defendants against unreasonable delay in bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable steps in his own interest.”

In determining whether the Appellants’ suit was time barred, this Court will consider grounds 1, 2, 5 and 7 of the amended memorandum of appeal together. Those grounds fault the trial Magistrate for failing to make a finding that the cause of action arose on 11<sup>th</sup> August 2021 when the Respondents placed beacons on the suit land and which therefore means, that the twelve (12) years statutory period had not elapsed by the time the Appellants filed this suit in the subordinate Court on 5<sup>th</sup> January 2022.

14. The answer as to when the cause of action arose is to be found in the Appellants’ own pleadings. In paragraph eight (8) of their plaint dated 22<sup>nd</sup> December 2021, they pleaded as follows:

8: “On or about the 23<sup>rd</sup> May 1979 the Defendants jointly and severally caused parts of the parcels to be hived off (160’ x 140’) from parcel 214 and one acre from parcel 215 purportedly with a view to forcing (sic) part of a public market.

And on the 11<sup>th</sup> August of 2021, the 2<sup>nd</sup> Defendant caused beacons to be installed on the parcels, purportedly actualizing the aforesaid annexation.

The 1<sup>st</sup> Defendant participated in the beacons – planting process through the members of County Assembly for Namboboto/Nambuku Ward Mr. Vincent Olumbe, the Ag Ward Administration Ms Regina Nabwire and the Samia sub-County Administrator Ms Carolyne Anne Odwori.” Emphasis mine.

In paragraph 4 of it’s defence, the 1<sup>st</sup> Respondent has responded to the above assertion by pleading that:

4: “The 1<sup>st</sup> Defendant denies in toto the contents of paragraph 8 of the plaint in it’s entirety and contends that, the parcels of land allegedly hived of from the suit lands constitute land duly reserved for a public market and public access road and is held in trust by the 1<sup>st</sup> Defendant for public utility and the Plaintiffs shall be put to strict proof thereof.” Emphasis mine.

Essentially therefore, while the Appellants’ case was that part of their land was first hived off on 23<sup>rd</sup> May 1979, the 1<sup>st</sup> Respondent’s case is that the portions of land hived off were infact public land utilized as a market and road of access. The fact that portions of land were hived off from the suit land on 23<sup>rd</sup> May 1979 is not really in dispute. What is in dispute is that whereas the Appellants claim that the suit land was part of the Estate of Khanani Namalia, the 1<sup>st</sup> Respondent’s case is that infact the land was public land. The ward to “hive something off” is defined in the Concise Oxford Dictionary 12<sup>th</sup> Edition as to:

“Separate something from a larger group or organization.”

Although the trial Magistrate in her ruling did not address the issue as to when exactly the cause of action arose, there can be no doubt from the parties’ pleadings that portions of land were first hived off from the suit land on 23<sup>rd</sup> May 1979 and with the knowledge of the Appellants. The Appellants in their submissions would like the Court to believe that the process commenced on 11<sup>th</sup> August 2021 and not on 23<sup>rd</sup> May 1979. This is what their counsel has submitted in paragraph 5 of his submissions:



- 5: “The Appellants responded to the 1<sup>st</sup> Respondent’s Preliminary Objection on the 24<sup>th</sup> May 2022 (dated the 23<sup>rd</sup> May 2022) page 60 of the record of appeal.
- a. That the creation of a plot or price (sic) out of another parcel is a process (not a one on act). The process has three stages:
    - i. Beaconing.
    - ii. Mutation.
    - iii. Numbering or registration.

The Appellants contend that the Respondents did the Beaconing on the 11<sup>th</sup> August 2021 which the Appellants contended was the date of the cause of action.

The Respondents did not deny that they had gone to the land on the 11<sup>th</sup> August 2021 to do the Beaconing. This at paragraph 8 of the Plaintiff (page 95 Record of Appeal).

The Appellants’ suit was filed on the 5<sup>th</sup> January 2022 about five months after the cause of action arose.

Therefore the Appellants were within the 12 years limitation period provided for in the *Limitation of Actions Act* and did not need to seek Court’s leave to sue.”

What the Appellants wanted the trial Court and this Court to believe is that although portions of land were hived off from the suit land on 23<sup>rd</sup> May 1979, this cause of action only commenced on 11<sup>th</sup> August 2021 when beacons were placed on the suit land. That cannot be the correct position. It is of course true that the creation of a portion of land from the bigger parcel eventually culminating in the registration of that portion with a separate title is a process which takes time and goes through several stages as submitted above. However, for purposes of when a cause of action begins in a claim to land, it can only be when the offending party first enters the land in dispute and lays a claim over it or a portion thereof. It cannot possibly begin when the trespasser is at the tail end of the process of illegal acquisition of the land. The term “cause of action” is defined in Black’s Law Dictionary 10<sup>th</sup> Edition as:

“A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in Court from another person.”

The factual situation in this case, as pleaded by the Appellants themselves, is that the Respondents jointly and severally caused parts of land measuring 160 x 140 feet and one acre to be hived off from the suit land on or about 23<sup>rd</sup> May 1979. The Appellants were entitled to approach the Court at that time and seek appropriate remedies including an order of injunction. That was the time when the cause of action arose. They did not have to wait until 11<sup>th</sup> August 2021 when the 2<sup>nd</sup> Respondent was placing beacons on the portions of land to file this suit. That was rather too late in the day and by the time this suit was being filed on 5<sup>th</sup> January 2022, the Respondents had taken over the portions of the suit land and asserted ownership thereof for a period of 43 years.

15. It is clear, therefore, that by the time the Appellants moved to the subordinate Court seeking the various remedies against the Respondents, their claim was statute barred and was for striking out. Although the trial Magistrate gave very scarce consideration to the elaborate submissions raised by counsel on the issue of limitation, it is obvious that she nonetheless arrived at the correct decision in up-holding the Preliminary Objection raised by the 1<sup>st</sup> Respondent with respect to that issue. Having considered the un-dispute facts and the law, this Court affirms that finding.
16. Grounds NO 1, 2 and 5 are therefore for dismissal.



## 2. Whether Failure to Serve a Notice of Intention To Sue Was Fatal to the Suit Against The 1<sup>st</sup> Respondent

17. Section 13(A) of the [Government Proceedings Act](#) cap 40 Laws of Kenya provides that:

13A: “Notice of Intention to institute proceedings

No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings.”

It is common ground that no such notice was served upon the Respondents as stipulated above. Counsel for the Appellants has submitted that since this was a claim seeking declarations of rights, such notice was not necessary. This is how counsel has submitted in paragraph 5 (b) of his submissions:

“Regarding the 1<sup>st</sup> Respondent contention that the Plaintiffs had not given notice to sue as required under Section 13A of [Government Proceedings Act](#) Cap 40 provides that where the Appellants has prayed for a declaration of rights of the parties (prayer (a)) in the plaint (page 95 Record of Appeal) or where the Court can on its own motion make a declaration of the parties rights, then notice of intention to institute proceedings is not requisite.”

On the other hand, counsel for the 1<sup>st</sup> Respondent made the following submission on that issue after citing the said provision at paragraph 16:

“We submit that the Appellants failed to comply with this particular express provision of the law thereby effectively rendering the Appellants’ entire suit a nullity.”

In the case of *Kenya Bus Services Ltd & Another -v- Minister Of Transport & 2 Others* 2012 eKLR Majanja J had an opportunity to consider the import of the provisions of Section 13A of the [Government Proceedings Act](#) vis-à-vis access to justice rights under Article 48 of [the Constitution](#) and took the view that the mandatory requirement to comply with Section 13A of the [Government Proceedings Act](#) violates [the Constitution](#) and diminishes the ability of citizens to seek relief against the Government. That decision was affirmed by the Court of Appeal in the case of *Joseph Nyamamba & Others -v- Kenya Railways Corporation C.A. Civil Appeal No 235 of 2009* (2015 eKLR).

18. Guided by the above, it is clear that failure by the Appellants to serve the Notice of Intention to sue against the 1<sup>st</sup> Respondent was not fatal to their case.
19. Grounds NO 3 and 6 of the memorandum of appeal which raised the issue of non-compliance with Section 13A of the [Government Proceedings Act](#) therefore succeeds. The trial Magistrate erred in law and in fact by up-holding that limb of the Preliminary Objection. Those grounds of appeal must therefore be allowed.
20. In ground NO 4, the trial Magistrate is faulted for failing to analyse the facts, issues and the law pertinent to the case before delivering the impugned ruling.
21. There is merit in that ground. At the commencement of this ruling, I referred to the brief ruling delivered on 30<sup>th</sup> August 2022 in which the trial Magistrate up-held the Preliminary Objection. No reference was made to the relevant case law or the facts upon which the Preliminary Objection was founded. A ruling, just like a judgment, especially one determining such weighty issues as limitation must of necessity contain the reasons upon which it was arrived at. As is clear from the ruling above, it was clearly bare on the grounds upon which the decision was arrived at. However, this Court has



already cited the provisions of Section 78 (2) of the Civil Procedure Act which donates to this Court the power to perform that which the trial Court was required to perform. Further, this being a first Appellant Court, my duty as set out in the case of *Selle & Another -v- Associated Motor Boat Company Ltd* 1968 E.A 123, is to re-consider the evidence which was before the trial Court, evaluate it and draw my own conclusions as to whether the decision arrived at can be up-held or not. That is precisely what I have done above.

22. Having considered this appeal and the record, I am persuaded that notwithstanding the fact that the trial Magistrate did not give her reasons for up-holding the Preliminary Objection in her ruling, she nonetheless arrived at the correct decision in up-holding it specifically on the ground that the Appellant's suit was caught up by the provisions of Section 7 of the Limitation of Actions Act. The Appellant's claim was clearly statute barred having been filed some 43 years after the cause of action occurred. On that ground, this appeal must be dismissed.
23. On the issue of costs, Section 27 of the Civil Procedure Act, provides that they follow the event unless the Court, for "good reason", orders otherwise. I see no reasons to deny the 1<sup>st</sup> Respondent the costs of this appeal.
24. Ultimately therefore, this Court makes the following disposal orders with regard to the appeal:
  1. The appeal is dismissed.
  2. The Appellant shall meet the costs of the appeal and in the Court below.

**BOAZ N. OLAO**

**JUDGE**

**12<sup>TH</sup> NOVEMBER 2024**

**JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS  
12<sup>TH</sup> DAY OF NOVEMBER 2024.**

**BOAZ N. OLAO**

**JUDGE**

**12<sup>TH</sup> NOVEMBER 2024**

