Guyo v Catholic Church Moyale & another (Environment and Land Appeal E015 of 2023) [2025] KEELC 2964 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEELC 2964 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL E015 OF 2023

JO MBOYA, J

MARCH 28, 2025

BETWEEN

ABDI TACHO GUYO ..... APPELLANT

AND

CATHOLIC CHURCH MOYALE ..... 1ST RESPONDENT

JOSEPH SODE ..... 2ND RESPONDENT

(Being an appeal from the judgment of Willy K. Cheruiyot (Senior Principal Magistrate dated 13th November 2023 at the Moyale Senior Principal Magistrate's Court)

JUDGMENT

1. The Appellant herein [who was the Plaintiff in the subordinate court] filed a Plaint dated 22nd July 2021 and in respect of which the Appellant sought the following reliefs:
    a. An order of eviction of the Defendants or any of their agents from plot No. 1160 situated at Manyatta.
    b. An order that the Defendants do pay mesne profit assessed on average monthly 1978 to date.
    c. Costs of the suit.
2. The Defendants duly entered appearance and filed a Statement of Defence dated 24th November 2021 and wherein the Defendants denied the claims by the Appellant. Furthermore, the Defendants contended that the Appellant herein was one of the many orphans who were accommodated and thereafter educated by the Catholic Church during the years 1973 to 1975, respectively.
3. The Statement of Defence by the Defendants was subsequently amended, culminating into the Amended Statement of Defence and Counterclaim dated 22nd June 2022. The Counterclaim has sought for the following reliefs:

a. A declaration that all that land being the unregistered suit property in the possession of the 1st defendant, rightfully belongs to the 1st defendant.

b. A declaration that the 1st defendant holds a good title.

c. Costs of the suit.

4. The suit by the Appellant herein was heard and disposed off vide judgment rendered on 22nd November 2023 whereupon the learned trial magistrate found and held that the Appellant did not establish and or prove his claim to the suit property. To this end, the trial court proceeded to and dismissed the Appellant's suit with costs to the Defendants.

5. Aggrieved and dissatisfied with the judgment of the trial court, the Appellant has since approached this court vide (sic) Amended Memorandum of Appeal dated 29th May 2024 and where in the Appellant has highlighted the following grounds;

i. The learned principal magistrate Willy K. Cheruiyot erred in law and fact in dismissing the plaintiff's suit without good reason, ignoring the plaintiff's suit, exhibits and proof of ownership of Plot No. 1160 Manyatta within Moyale sub-county and subsequently granting an order of dismissal of the plaintiff's suit as against the Defendants.

ii. The learned trial magistrate erred in law and fact by ignoring the plaintiff's entire evidence on who he applied to Moyale sub-county and was registered as the owner of Plot No. 1160, Manyatta.

iii. The learned trial magistrate, Willy K Cheruiyot, erred in law and fact when he did not find that the Catholic Church, Moyale, subjected itself to these proceedings by filing a defence and a counterclaim to the plaintiff's suit without an objection on a point of law.

iv. The learned trial magistrate will k. Cheruiyot erred in law and in fact by ignoring the 1st issue after determination on who owns the suit land No. 1160, Manyatta which was properly registered in the name of the plaintiff by the sub-county government of Moyale.

v. The learned trial magistrates erred in law and fact by ignoring the fact that the Defendants were and are in illegal occupation of plot NO. 1160 Manyatta registered recently in the names of the plaintiff

vi. The learned trial magistrate will k. Cheruiyot erred in law and fact by acting as an advocate for the 1st defendant by raising issues of preliminary objection not raised in the defence.

vii. The learned trial magistrate Willy K. Cheruiyot was biased when he delayed the hearing of this suit by ordering several adjournments in favor of the 1st defendant without good reason.

viii. The learned trial magistrate will. K. Cheruiyot erred in law and fact by ignoring the fact that the Defendants are not registered as owners of plot No. 1160 at Manyatta even as he addressed issues to be considered in his judgment.

ix. The learned trial magistrate will k. Cheruiyot erred in law and fact by not making a finding that the 2nd defendant, Joseph Sode, was in illegal occupation of the property in plot No. 1160 registered in the names of the plaintiff/Appellant and that the registration was threatened to be revoked but was not revoked after the plaintiff supplied further documents to the registering authority in Moyale sub-county administrators.

x. The learned trial magistrate considered issues affecting the 1st defendant only in the judgment ignored the party's occupation who was the 2nd defendant, Joseph Sode.

xi. The learned trial magistrates erred in law and fact by ignoring the fact that the property (Plot No. 1160 Moyale) is not in the list of the inventory of the properties of the church and as such the 1st respondent was in illegal occupation.

xii. The learned trial magistrate erred in law and fact by failing to consider the fact that the 1st defendant did not prosecute its counterclaim.

6. The appeal beforehand came up for directions on 10th June 2024, whereupon the advocate for the parties covenanted to file and exchange written submissions. In this regard, the court proceeded to and circumscribed the timelines for the filing of the written submissions.

7. The Appellant duly complied with the orders of the court and proceeded to file and serve written submissions dated 24th June 2024. However, the Respondents herein did not file their written submissions within the set timelines or at all.

8. On 30th September 2024, the learned judge (differently constituted) granted to and in favour of the Respondents a further 30 days within which to file and serve their written submissions. For good measure, the court ordered that the matter shall be mentioned on 28th January 2025 to confirm whether the Respondents have filed and served their written submissions.

9. Nevertheless, it is instructive to state that the Respondents herein did not file their written submissions. At any rate, the Respondents' counsel appeared before the court and sought to be granted further latitude. To this end, the court reluctantly granted the Respondents a further 14 days to file and serve written submissions. However, it was ordered and directed that in the event of default by the Respondents to file and serve written submissions within the set timelines, the Respondents' right to file submissions was to lapse and or stand forfeited.

10. Suffice to state that the Respondents herein neither filed their written submissions within the set timelines or at all. Notably, no written submissions have been filed by and on behalf of the Respondents.

11. Back to the submissions filed by the Appellant. The Appellant filed written submissions dated 24th June 2024 and wherein the Appellant has raised and canvassed four salient issues for consideration by the court. The issues raised and canvassed by the Appellant are namely: that the Learned Trial Magistrate failed to properly appraise and evaluate the evidence tendered and thus arrived at an erroneous conclusion; the Learned Trial Magistrate dismissed the Appellant's case without due regard to the law; that the Learned Trial Magistrate raised and canvassed issues which had not been addressed by the Respondents and finally that the Learned Trial Magistrate did not make any precipitate findings in respect of the Counterclaim.

12. Regarding the first issue, namely; whether the Learned Trial Magistrate considered and appraised the evidence tendered, it was submitted that the Appellant herein tendered and produced before the court various documents including the letter of allotment issued by the County Government of Moyale confirming that the Appellant was the lawful owner and/or proprietor of the suit property.

13. It was the further submission by learned counsel for the Appellant that the Learned Trial Magistrate also failed to take into account the evidence that the suit property was allocated/given to the Appellant way back in 1975 by the chief, albeit at the request of the Appellant's sponsor.

14. Secondly, learned counsel for the Appellant has submitted that the Learned Trial Magistrate took and deployed a slanted approach in evaluating the evidence and thus failed to appreciate that the documents tendered by the Appellant were valid, lawful and authentic.

15. Thirdly, learned counsel for the Appellant has also submitted that the Learned Trial Magistrate took it upon himself raised the questions pertaining to the competence of the Appellant's suit as against the 1st Respondent. In this regard, it has been submitted that the Learned Trial Magistrate, suo motto, raised and addressed the issue that the 1st Respondent is not a legal entity [body corporate] capable of being sued in its own name or otherwise.

16. Finally, the learned counsel for the Appellants has submitted that the judgment rendered by the Learned Trial Magistrate is contrary to the weight of evidence on record and thus same [judgment] has occasioned injustice to the Appellant.

17. I have already stated that the Respondents did not file any written submissions. Nevertheless, it is common ground that an appeal is determined on the basis of the evidence on the record and the applicable law. To this end, the absence of the written submissions by the Respondents notwithstanding, this court is still obligated to undertake its appellate responsibility in accordance with the provisions of the law.

18. Having reviewed the record of appeal, the pleadings and the submissions that were filed before the court and taking into account the totality of the evidence that was adduced before the trial court, I come to the conclusion that the determination of the instant appeal turns on four key issues, namely; whether the appeal against the 2nd Respondent is legally tenable and/or competent; whether the suit against the 1st Respondent and by extension the appeal herein discloses a reasonable cause of action; whether the suit by and on behalf of the Appellant was statute barred; and whether the Learned Trial Magistrate correctly evaluated and appraised the evidence on record or otherwise.

19. Before venturing forward to address the issues which have been highlighted in the preceding paragraph, it is important to underscore that by virtue of being the first appellate court, this court is seized of the statutory jurisdiction to undertake exhaustive scrutiny, evaluation, appraisal and analysis of the evidence that was tendered before the trial court and thereafter to arrive at an independent conclusion.

20. Furthermore, it is imperative to observe that this court is not necessarily bound by the conclusions of facts, which were arrived at and/or reached by the trial court. Nevertheless, it is worthy to state and reiterate that whereas this court is at liberty to depart from and or arrive at a different conclusion from the one arrived at by the trial court, the court is called upon to exercise caution and circumspection taking into account that the court did not see or hear the witnesses testify. Simply put, the court is called upon to defer to the trial court on matters pertaining to factual findings, unless a compelling reason arises.

21. The scope of the jurisdiction and/or mandate of this court while entertaining an appeal from the court of first instance is circumscribed by the provisions of Section 78 of the *Civil Procedure Act* Cap 21 Laws of Kenya.

> 78.(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
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> (a) to determine a case finally;
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> (b) to remand a case;
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> (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.

22. Furthermore, the jurisdictional remit of this court whilst entertaining a first appeal has been elaborated upon and underscored in various decisions. In the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, the Court of Appeal for Eastern Africa elaborated on the applicable principle and stated thus;

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

23. Likewise, the extent and scope of the jurisdiction of the first appellate court was also elaborated upon in the case of Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, where the Court of Appeal held thus;

> We also wish to be guided by the reasoning of this court in the case of Mwana Sokoni versus Kenya Business Limited (1985) KLR 931 page 934,934 thus:-
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> " Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the House of Lords in Sottos Shipping versus Sauviet Sohold, the Times, March 16,1983.
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> > " It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said"
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> Again, in Peters versus Sunday Post Limited (1958) EA424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O' Conner, P said at page 429:
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> > " It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses."

24. Without endeavouring to exhaust the case law that elaborate on the scope and extent of jurisdiction of the first appellate court, it is apposite to take cognizance of the holding of the Court of Appeal in

the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, where the court held as hereunder;

> As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in Peters –vs- Sunday Post Ltd [1958] EA 424. In its own words:
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> > " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ..."

25. Duly guided by the established position [ratio] which underlines the scope and extent of the jurisdiction of the first appellate court, I am now disposed to revert to the subject matter and to discern whether the Learned Trial Magistrate correctly appraised, analysed and evaluated the evidence tendered by the parties and in particular, the Appellant [who was the Plaintiff before the trial court] and thereafter correctly applied the law in the course of determining the dispute between the parties.

26. Additionally, I am also well positioned to review and re-evaluate the factual matrix [evidence] presented before the trial court and thereafter endeavour to ascertain whether the factual findings arrived at by the trial magistrate accord with the evidence on record or better still, whether the conclusions arrived at, were perverse to the evidence on record.

27. With the foregoing principles in mind, it is now appropriate to revert and address the various issues that were highlighted elsewhere in the body of this judgment. Regarding the first issue, namely whether the appeal has against the 2nd Respondent is legally tenable, it is imperative to underscore that before the judgment was delivered, it was indicated that the 2nd Respondent had passed on. For good measure, it was indicated that the 2nd Respondent passed on 20th September 2023.

28. For ease of appreciation, the proceedings before the trial court on the 27th September 2023 highlight the issue pertaining to the death of the 2nd Respondent. Notably, learned counsel for the Defendants [now Respondents] intimated to the court the death of the 2nd Defendant. Counsel is on record stating thus; "the 2nd Defendant passed on yesterday. The matter came for judgment today. We wish to have the judgment differed as we pray to substitute the 2nd Defendant with his legal representative. I request for a mention date".

29. On the 22nd November 2023, the matter again came up before the trial court and learned counsel for the Respondents intimated to the court thus: "The matter is coming up for judgment. We have filed an application to arrest the judgment. The reason is the 2nd Defendant is already deceased as of 20th September 2023. I had sought for time. The court directed we file an application. The application is under the civil procedure rules. Order 24 of the Civil Procedure Rules are relevant. An order of the court cannot issue against a party who does not have a legal persona before a court of law. Unless the court addresses itself to that application, the order of the court issued in the suit will be an order in futility".

30. Despite the intimation by the learned counsel for the Defendants that the 2nd Defendant was deceased, the Honorable Court [trial court] proceeded and delivered the judgment on the 22nd November 2023.

31. Arising from the judgment, the Appellant herein proceeded to and filed the appeal beforehand. However, there is no gainsaying that by the time the appeal was being filed, the 2nd Respondent was long deceased. In this regard, the question that does arise is whether an appeal [which by itself is a suit] can be filed against a deceased person.

32. Suffice it to underscore that court proceedings, including an appeal, can only be filed, commenced and or maintained against legal entities, whether same be animate or inanimate. As pertains to human beings, it is not lost on this court that a suit can only be filed against adult persons of sound minds and dispositions. Moreover, no suit can be filed against a minor, albeit without a next friend. [See Order 32 of the Civil Procedure Rules].

33. Other than the foregoing, it is trite and established that no suit can be filed, commenced and or maintained against a dead person. Instructively, suits against deceased persons can only be commenced and or maintained against legal administrators, representatives or executors, duly authorized under the law. [See Section 82 of the *Law of Succession Act* Cap 160, Laws of Kenya].

34. In the premises, it is common ground that a suit, whether appeal or otherwise, filed against a dead person, is a nullity ab initio. Such a suit is void for all intents and purposes and thus incapable of redemption.

35. In the case of Geeta Bharat Shah & 4 Others vs Omar Said Mwatayari & Another, Court of Appeal at Mombasa, Civil Appeal No. 46 of 2008, (2009) eKLR the Court of Appeal held and stated as hereunder:

> In the result, as Bharatkumar Nathalal Shah was already dead by the time the suit was filed, we hold the view that the suit was a nullity and Mr. Oddiaga, is with respect right in conceding the appeal in respect of him on that score. We see no merit in directing that he be allowed to file defence as he is not there to do so and the administrators to his estate cannot in law take over the matter as it was filed after he was already dead.

36. Justice Mbogholi Msagha J (as he then was) in the case of Viktar Maina Ngunjiri & 4 Others vs Attorney General & 6 Others, High Court at Nairobi, Civil Suit No. 21 of 2016 (2018) eKLR extensively dealt with and addressed the legal consequences attendant to a suit/proceedings commenced a deceased person. For coherence, the judge stated thus;

> In the Indian case of C. Muttu vs. Bharath Match Works AIR 1964 Kant 293 the court observed,
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> > "If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person."

In yet another Indian Case of Pratap Chand Mehta vs Chrisna Devi Meuta AIR 1988 Delhi 267 the court citing another decision, observed as follows,

> " ...if a suit is filed against a dead person, then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment."

37. To the extent that a suit filed against a dead person is void, such a suit does not exist in the eyes of the law. In any event, what is void is incapable of being remedied by any amendment or otherwise.

38. Without belabouring the import and tenor of what is void, it suffices to reference the dictum in the case of Mcfoy vs United Africa (1961) ALL ER 1159, where Lord Denning, while delivering the opinion of the Privy Council, stated thus;

> " If an act is void, then it is in law a nullity. It is not only bad, but also incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding, which is founded on it, is also bad and incurably bad."

39. In respect of the second issue, namely whether any suit could have been filed and/or commenced against the 1st Respondent, and by extension whether the appeal herein is lawful, it is important to recall that the 1st Respondent was described by the Appellant as the Catholic Church situated at Moyale.

40. For ease of appreciation, it is imperative to reproduce the description assigned to the 1st Respondent at the foot of the Plaint dated 22nd July 2021. The same is reproduced as hereunder:

> " Paragraph 2: The 1st defendant is a Catholic Church situated at Moyale parish within Moyale subcounty. Service upon which shall be effected through the plaintiff's advocates' offices".

41. Going by the description given by and on behalf of the Appellant, it is evident that the 1st Respondent is a church organization. For good measure, the 1st Respondent is merely a branch of the Catholic Church, falling within some diocese.

42. To the extent that the 1st Respondent is indeed a branch or a segment of the Catholic Church, which no doubt falls within some diocese, there is no gainsaying that the 1st Respondent herein is not a legal entity capable of being sued or otherwise. Instructively, if the Appellant was keen to sue the 1st Respondent, it behoved the Appellant to discern whether the 1st Respondent had registered officials or trustees in accordance with the law.

43. It is common ground that suits against societies, associations and/or such other organizations, which are established under the *Societies Act*, Cap 108, Laws of Kenya, can only be commenced against the registered officials or registered trustees. Simply put, a society, whether a church or otherwise, is not seized of the legal capacity to sue or be sued in its own name.

44. In the case of Trustees Kenya Redeemed Church & Anor vs Samuel M'Obiya & 5 others [2011] eKLR, the court stated and held thus:

> " It is trite law that a society under the *Societies Act* is not a legal person with the capacity to sue or be sued. A society can only sue or be sued through its duly authorized officers' orders. It has not been pleaded that the 2nd defendant has been sued in the capacity of an official of Kenya Redeemed Church nor has it been pleaded that he has been sued in his personal capacity."

45. Similarly, the court in the case of African Orthodox Church of Kenya vs Rev. Charles Omuroka & Anor [2014] eKLR, the court [Justice E. C. Mwita, Judge] addressed the situation and stated as hereunder:

> " The plaintiff has pleaded in paragraph 1 of its plaint that it is a duly registered church. At paragraph 3 of the plaint, the plaintiff has described the 2nd defendant as a duly registered church or organization. obviously, churches are societies under the *Societies Act*. Societies do not have capacity to sue or be sued in their own names."

46. To my mind, the suit that was commenced by and on behalf of the Appellant in the subordinate court was incompetent and void. For good measure, no suit could have been filed and or maintained against a body, which is not a legal entity.

47. By parity of reasoning, no appeal can arise and or be maintained against a body and/or organization which is not a legal entity in the eyes of the law. Nevertheless, I wish to add and clarify that the foregoing position of the law applies to civil suits and not constitutional petitions. [see Articles 22 & 258 of the *Constitution* 2010].

48. Arising from the foregoing, it is my finding and holding that the Learned Trial Magistrate did not fall in error in finding and holding that the suit against the 1st Respondent was incompetent and invalid for having been commenced against a body which is not a legal entity in the eyes of the law.

49. In the premises, I come to the conclusion that the suit in the subordinate court was void for all intents and purposes. Similarly, the appeal is equally incompetent and void.

50. Next is the third issue, namely whether the suit by the Appellant was statute-barred. To start with, the Appellant contended that the suit property was allocated/given to him in the year 1975. Furthermore, the Appellant has contended that the respondent herein has variously denied and deprived same [Appellant] of the right to occupy, possess and use the suit property. In any event, the Appellant has ventured forward and thereafter sought for various reliefs, including payment of mesne profits from the year 1975 to date.

51. My understanding of the Appellant's claim is to the effect that the Respondents and more particularly the 1st Respondent, has denied and deprived the Appellant of the right to use and possess the suit property from the year 1975. Moreover, the Appellant therefore approached the court in an endeavour to recover (sic) the suit property, which same contended belonged to him.

52. Simply put, the Appellant's suit in the subordinate court was seeking to recover land. In this regard, there is no gainsaying that the Appellant ought to have filed and/or commenced the suit, if at all, within 12 years from the occurrence of the cause of action. To this end, the provisions of section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya are instructive and relevant.

53. The provisions of Section 7 of the Limitations of Actions Act state as hereunder:

> Actions to recover land
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> 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.

54. From the foregoing provisions of law, what comes to the fore is that by the time the Appellant was filing the suit beforehand, the 12-year period provided for recovering land had long lapsed and thus no suit could have been filed and/or maintained by the Appellant or at all.

55. The law of limitation and the legal consequences attendant thereto was elaborated upon by the Court of Appeal for Eastern Africa E.A.C.A in the case of Iga vs Makerere University [1972] EA 65:

> " A Plaint which is barred by limitation is a Plaint "barred by law". Reading these provisions together it seems clear to me that unless the Appellant 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 Appellant was clearly out of time, and despite the opportunity afforded by the Judge he did not show what grounds of exemption he relied on, presumably because none existed. The limitation 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."
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> Law, Ag. V. P. in the same case inter alia stated thus:
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> > " ... The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the Plaint, the Plaintiff must be rejected."

56. In the case of Bosire Ogero v Royal Media Services [2015] eKLR, the court considered the implication of the law of limitations as pertains to suits and proceeded state as hereunder;

> The *Limitation of Actions Act* Chapter 22 Laws of Kenya is the primary substantive legislative enactment which statute expects the intending plaintiffs to exercise reasonable diligence and to take reasonable steps in their own interest, as not all causes of action once barred by statutory limitations are capable of being revived. See Gathoni v Kenya Co-operative Creameries Ltd [1982] eKLR where K.D. Porter JA held that:
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> > " The Act does not help persons who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done."
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> In the instant case, the defendant's contention is that the suit is time barred since the plaintiff in his plaint pleaded that the cause of action arose on 24/4/2012 and the suit herein was filed on 24/7/2013. According to the plaintiff the suit was filed after the mandatory statutory time limit for filling claims based on defamation, whether premised on slander or libel.

57. In my humble view, by the time the Appellant was filing and/or commencing the suit beforehand, his right to or interest over the suit property [if any stood extinguished by effluxion. In this regard, the Appellant could not be heard to raise and/or canvass any claim before the court as pertains to the suit property or at all.

58. Lastly, it is worth to recall that the Appellant contended that the suit property was allocated and/or given to him by the chief of the area. To this end, it is appropriate to capture the evidence of the Appellant while testifying in chief. same stated thus;

> "I obtained the property from Fr. Egeno who was my sponsor in 1973. I did not buy it. I went to the local chief who gave me the land. My sponsor was Fr. Egeno. I went to Dawe Osho and Dake Luko, who were the local chiefs. Dake Luko was senior chief. I went with my sponsor to the local chief who told me he wanted to adopt me and build me a home I did not have a family around. He said he wanted to give me land. I got the land from the chief upon request by my sponsor. This was in 1975. I was 14 years old then. I owned the property at 14 years of age. The land was not demarcated.

59. From the Appellant's own testimony, same was recorded to be confirming that the land in question was given to him by the sponsor namely Fr. Egeno. To this end, it was therefore incumbent upon the Appellant to tender and produce to the court evidence [documents] to demonstrate that Fr. Egeno ever owned the land in the first place. Suffice it to state that Fr. Egeno could not have given to the Appellant land, which same [Fr. Egeno] did not own in the first place. [see the doctrine of nemo dat quo non habet].

60. Notwithstanding the fact that the Appellant had indicated that same was given the land by Fr. Egeno, the same Appellant is on record as stating that the land in question was gotten from the chief, albeit upon the request by (sic) his [Appellant's] sponsor.

61. In the event that the Appellant got and/or was given the land by the chief, in the manner posited by the Appellant, again it was incumbent upon the Appellant to tender and place before the court evidence that the chief in question, was seized of the authority to allocate and/or alienate land in the first place. However, there is no gainsaying that the Appellant fails to tender any such authority or otherwise.

62. Other than the foregoing, it is also worthy to recall that the Respondents herein called several witnesses who testified that the suit property belonged to the Catholic Church and that the Catholic Church had constructed a house thereon whereon same [the Catholic Church] housed several orphans, including the Appellant herein during his formative years. Furthermore, evidence abounds that the Appellant herein, together with DW2 & DW3 were students at St. Mary's Primary School, which was a school run, managed and operated by the Catholic Church.

63. Quite clearly, the suit property and the house sitting thereon were under the occupation of the Catholic Church. In this regard, the Appellant herein could only have become (sic) the owner of the property, if at all same [Appellant] was gifted the land by the Catholic Church. Sadly, the Catholic Church maintains that the house on the suit property is occupied and used by its catechists.

64. Additionally, it is worth to recall that the Appellant herein purported to apply for registration of the suit property to the County Government of Moyale on or about 28th October 2019. To this end, the Appellant tendered and produced the application for registration dated 28th October 2019 and an affidavit sworn on even date. Moreover, the Appellant thereafter tendered and produced another letter dated 28th December 2019 and where in same was contending that the town administration, Moyale Subcounty, had allocated the land to him.

65. Two critical issues do arise and are worthy of a short discussion. Firstly, the Appellant herein did not tender and/or produce the minutes of the County Government of Moyale, if any, wherein the application by the Appellant was discussed and approved. In the absence of minutes by the County

Government of Moyale, there is no gainsaying that the Appellant herein could not have demonstrated allocation of the suit property.

66. Secondly, it is important to underscore that the land in question, if at all same is capable of being allocated by the County Government of Moyale, then same is public land. In this regard, it is imperative to underscore that such kind of land can only be allocated and/or alienated by the National Land Commission, albeit on behalf of the County Government. [See Article 67 (2) of the *Constitution* 2010. [see also the decision of the Court of Appeal in Cordison Investments Ltd vs the Chairman National Land Commission (2019) eKLR at paragraphs *30* & 31 thereof].

67. Finally, it is also not lost on this court that by the time the Appellant was purporting to apply for allotment and registration of the suit property in his name, the Appellant knew that the Catholic Church had been in occupation and possession of the suit property from as early as 1973. Furthermore, the Appellant knew that there was a house which had been erected on the suit property by the Catholic Church and wherein the Appellant and many other orphans were accommodated during their formative years.

68. Owing to the fact that the Catholic Church had been in occupation and possession of what now constitutes the suit property, there is no way that the Appellant herein could have purported to apply for allotment and registration over the suit property without the involvement of and notice to the Catholic Church or at all.

69. At any rate, on the basis of occupation and possession, the Catholic Church would have priority over the Appellant and or such other third party. Pertinently, the Catholic Church would be entitled to rely on and invoke the doctrine of seisin, which underpins the rights of the person in occupation and possession.

70. In the case of Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] KECA 457 (KLR), the Court of Appeal discussed the doctrine of seisin and stated thus;

> In its pleadings, the 1st, 2nd and 3rd Respondents aver that they have always been in possession of the suit land. It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd Respondents being in possession of the suit land have a better right to the same as against the Appellant. The maxim is that possession is nine-tenths of ownership. As was stated by the Privy Council in Ghana of Wuta-Ofei -v- Danquah [1961] All ER 596 at 600, the slightest amount of possession would be sufficient.

71. I must have said enough to demonstrate that the appeal beforehand is not only premature and misconceived, but same is also devoid of merit. In this regard, there is no gainsaying that the plea by the Appellant is not tenable.

Final Disposition

72. For the reasons which have been highlighted in the body of the judgment, I come to the conclusion that the appeal beforehand is devoid and bereft of merits. In this regard, the appeal be and is hereby dismissed with costs to the 1st Respondent.

73. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 28TH DAY OF MARCH 2025.

OGUTTU MBOYA

JUDGE.

In the presence of

Mutuma Court Assistant

Mr. Ogeto Ongori for the Appellant

Mr. Behilu for the 1st Respondent