



**Ogola & another v Ombija & 2 others (Environment & Land Case E024 of 2022) [2024] KEELC 13744 (KLR) (9 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13744 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE E024 OF 2022  
SO OKONG'O, J  
DECEMBER 9, 2024**

**BETWEEN**

**JOSEPHINE AWUOR OGOLA & ANOTHER ..... PLAINTIFF**

**AND**

**NICHOLAS RANDA OWANO OMBIJA ..... 1<sup>ST</sup> DEFENDANT**

**THE COUNTY LAND REGISTRAR, KISUMU ..... 2<sup>ND</sup> DEFENDANT**

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

**RULING**

1. The Plaintiffs brought this suit against the Defendants on 29<sup>th</sup> July 2022. In their plaint, the Plaintiffs averred that they were the administrators of the estate of Alexsus Nyasio Abonyo alias Nyasio Abonyo, deceased (hereinafter referred to as “the deceased”) who died on 20<sup>th</sup> October 1984. The Plaintiffs averred that at all material times, the deceased was registered as the proprietor of all that parcel of land known as Kisumu/Dago/363 (hereinafter referred to as “the suit property”). The Plaintiffs averred that on 17<sup>th</sup> May 2022, they applied for and obtained a copy of the register for the suit property and were surprised to discover that the suit property which had their ancestral home and which they had been cultivating had been registered in the name of the 1<sup>st</sup> Defendant on 23<sup>rd</sup> January 1992. The Plaintiffs averred that the deceased who was the first registered owner of the suit property died without selling or transferring the property to anyone. The Plaintiffs averred that the transfer of the suit property to the name of the 1<sup>st</sup> Defendant was illegal and fraudulent. The Plaintiffs pleaded several particulars of fraud against the Defendants.
2. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants entered appearance and filed a statement of defence on 25<sup>th</sup> August 2022 denying the Plaintiffs’ claim in its entirety. The 1<sup>st</sup> Defendant also entered an appearance and filed a statement of defence on 15<sup>th</sup> September 2022. The 1<sup>st</sup> Defendant denied all the allegations made against him in the plaint. The 1<sup>st</sup> Defendant averred that in or around December 1991, one Lynette Achieng



- Okech offered to sell to the 1<sup>st</sup> Defendant the suit property and the 1<sup>st</sup> Defendant agreed to purchase the same at a consideration of Kshs. 100,000/-. The 1<sup>st</sup> Defendant averred that he carried out a search that confirmed that the suit property was owned by the said Lynette Achieng Okech. The 1<sup>st</sup> Defendant averred that he entered into a written agreement with the said Lynette Achieng Okech and paid to her the agreed purchase price in full after which the suit property was transferred and registered in his name on 23<sup>rd</sup> January 1992 after consent of the Land Control Board was sought and obtained by the parties.
3. The 1<sup>st</sup> Defendant averred that he did not acquire the suit property from the deceased, Alexsus Nyasio Abonyo alias Nyasio Abonyo. The 1<sup>st</sup> Defendant averred that he was a stranger to the deceased who was neither the registered owner nor the beneficial owner of the suit property at the time the 1<sup>st</sup> Defendant acquired the same. The 1<sup>st</sup> Defendant averred that the Plaintiffs' suit was time barred pursuant to the provisions of Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. The 1<sup>st</sup> Defendant averred further that the Plaintiffs' suit was incompetent and bad in law the same having been brought on the strength of a limited Grant of Letters of Administration whose validity was limited to 90 days from 2<sup>nd</sup> June 2022. The 1<sup>st</sup> Defendant averred that the validity or tenor of the said Grant of Letters of Administration having expired on 1<sup>st</sup> September 2022, the Plaintiffs ceased to have locus standi to maintain and continue with the suit which should be struck out. The 1<sup>st</sup> Defendant averred further that the said Grant of Letters of Administration could only have been valid if the same expressly authorised the Plaintiffs to bring a suit for the recovery of the suit property which it did not. The 1<sup>st</sup> Defendant averred that the said Grant of Letters of Administration was to that extent void while it existed.
  4. The Plaintiffs filed a reply to the 1<sup>st</sup> Defendant's statement of defence on 12<sup>th</sup> October 2022. The Plaintiffs denied that the suit was statute-barred. The Plaintiffs also denied that the Grant of Letters of administration on the strength of which the suit was filed had expired and that the same was void for the period it existed.
  5. After the close of pleadings, the 1<sup>st</sup> Defendant filed a Notice of Preliminary Objection to the suit dated 8<sup>th</sup> April 2024. In the Notice of Preliminary Objection, the 1<sup>st</sup> Defendant contended that the Plaintiffs' suit was time barred and incompetent and should be struck out. The 1<sup>st</sup> Defendant contended that the 1<sup>st</sup> Defendant was registered as the owner of the suit property on 23<sup>rd</sup> January 1992 and as such the Plaintiffs should have brought the suit against him for the recovery of the suit property by 22<sup>nd</sup> January 2004. The 1<sup>st</sup> Defendant averred that this suit that was brought on 29<sup>th</sup> July 2022 was statute-barred pursuant to Section 7 of the *Limitation of Actions Act*. The 1<sup>st</sup> Defendant contended further that the suit was incompetent and bad in law in that the limited Grant of Letters of Administration on the strength of which it was brought had a duration of 90 days which expired on 1<sup>st</sup> September 2022. The 1<sup>st</sup> Defendant averred that upon the expiry of the said 90 days, the suit became incompetent. The 1<sup>st</sup> Defendant contended further that the said Grant of Letters of Administration did not expressly give the Plaintiffs power to sue for the recovery of the suit property and as such the same was void while it existed.
  6. When the suit came up for hearing on 23<sup>rd</sup> September 2024, the 1<sup>st</sup> Defendant requested that the preliminary objection be disposed of first before the hearing of the suit. The court directed that the preliminary objection be heard by way of written submissions. The 1<sup>st</sup> Defendant filed submissions dated 27<sup>th</sup> September 2024 while the Plaintiffs filed submissions dated 2<sup>nd</sup> October 2024.

### **Analysis and determination**

7. I have considered the pleadings by both parties, the 1<sup>st</sup> Defendant's Notice of Preliminary Objection and the submissions by the advocates for the parties together with the various authorities cited in



support thereof. In *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 others* (2014) eKLR, the Supreme Court stated as follows on preliminary objections:

“To restate the relevant principle from the precedent setting case, *Mukisa Biscuit Manufacturing Co. Ltd. Vs West End Distributors* (1969) EA 696.

8. ‘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 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 has to be ascertained or if what is sought is exercise of judicial discretion.”

In *Oraro v. Mbaja*[2005]1KLR141, the court stated that:

“A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”

9. It is on the foregoing principles that the 1<sup>st</sup> Defendant’s Notice of Preliminary Objection falls for consideration. I agree with the Plaintiffs that the 1<sup>st</sup> Defendant’s preliminary objection to the suit before the court has no merit. It is not disputed that the suit property was registered in the name of the deceased, Nyasio Abonyo as the first registered owner on 23<sup>rd</sup> October 1973. The suit property was transferred to the 4<sup>th</sup> Defendant Lynette Achieng Okech on 5<sup>th</sup> September 1991 and subsequently to the 1<sup>st</sup> Defendant on 23<sup>rd</sup> January 1992. The Plaintiffs have pleaded that as of the time of his death on 20<sup>th</sup> October 1984, the deceased had neither sold nor transferred the suit property to a third party. The Plaintiffs pleaded that on 17<sup>th</sup> May 2022, they applied for and were issued with a copy of the extract of the register (Green Card) for the suit property. The Plaintiffs pleaded that it was upon perusal of the said register that they learnt that the suit property had been transferred to the 1<sup>st</sup> and 4<sup>th</sup> Defendants on the dates mentioned above. The Plaintiffs pleaded that since the said transfers were effected after the death of the deceased and without the involvement of the administrators of his estate, the transfers were carried out illegally and fraudulently. The Plaintiffs have sought the cancellation of the said transfers and the restoration of the suit property to the name of the deceased.
10. I agree with the 1<sup>st</sup> Defendant that the suit is for the recovery of land and as such should have been brought within 12 years from the date of the cause of action. However, Section 26 of the *Limitation of Actions Act* provides that where the claim is based on fraud or mistake the limitation period does not run until the fraud or mistake is discovered. The Plaintiffs have claimed that the transfers of the suit property to the 1<sup>st</sup> and 4<sup>th</sup> Defendants were fraudulently effected. The Plaintiffs have pleaded that they discovered the fraud on 17<sup>th</sup> May 2022 and filed the present suit on 29<sup>th</sup> July 2022. The Plaintiffs have placed before the court through their list and bundle of documents; a copy of their advocates’ letter dated 6<sup>th</sup> April 2022 to the land registrar requesting for a copy of the register for the suit property and a copy of the receipt of the same date for the payment made to the department of lands for the same. The Plaintiffs also placed before the court a copy of the extract of the register for the suit property issued to their advocates by the land registrar on 17<sup>th</sup> May 2022. I am of the view that the issue of whether the Plaintiffs could have discovered the alleged fraud earlier is a matter of fact that requires evidence. The same cannot be determined on a preliminary objection. There is prima facie evidence before me



that the Plaintiffs did not discover the alleged fraud until 17<sup>th</sup> May 2022 and if that is the case, the time for the purposes of the 12-year limitation period started running on 17<sup>th</sup> May 2022. The Plaintiffs' suit which was filed on 29<sup>th</sup> July 2022 is therefore not time-barred. I overrule the 1<sup>st</sup> Defendant's limb of the objection based on this ground.

11. The second limb of the objection was on the competency of the suit. This objection was based on the validity of the Limited Grant of Letters of Administration Ad Litem (the Grant) dated 2<sup>nd</sup> June 2022 on the strength of which this suit was brought by the Plaintiffs. The Grant provided as follows on the material part:

“Be it known that Letters of Administration Ad Litem of all the Estate of the above named ALEXSUS NYASIO ABONYO alias NYASIO ABONYO who died Domiciled in Kenya on the 20<sup>TH</sup> OCTOBER, 1984 which devolves to and vest in his Personal Representatives but limited to the purposes only for filing Suit Limited to 90 days and until further representation were granted by this Court to JOSEPHINE AWUOR OGOLA and ROSE ADHIAMBO NYASIO, they having undertaken to administer such estate according to law(limited as aforesaid for a period of 90 days) and will render a true and just account thereof whenever required by law to do so.

THIS 2<sup>ND</sup> day of JUNE 2022

SIGN

HON. G.C.SEREM

RESIDENT MAGISTRATE”

12. The 1<sup>st</sup> Defendant has not disputed that the court has the power to issue a limited Grant of Letters of Administration Ad Litem for the purposes of filing a suit. The 1<sup>st</sup> Defendant contends that the Grant having been issued to last for 90 days, the same expired on 2<sup>nd</sup> September 2022 thereby bringing to an end the power that had been granted to the Plaintiffs to file and prosecute the suit. From my reading of the Grant, what was limited was the period within which the Plaintiffs were to file the suit. It could not have been the intention of the court that issued the Grant to prescribe the period within which the suit once filed had to be heard and concluded. I agree with the Plaintiffs that they filed the suit within the 90 days that was given in the Grant. I wish to add that even if it were to be taken that the court which issued the Grant herein intended that the Grant expires within 90 days whether a suit was filed or not which is not the case in my view, that could not render a suit that was filed within the 90 days incompetent calling for its striking out. It would only mean that the Plaintiffs go back for an extension of the Grant or pursue the full Grant. This will completely defeat the purpose for which the limited Grant was issued. This court cannot interpret the Grant before it in a manner that would achieve such an outcome. This suit is therefore not incompetent as alleged by the 1<sup>st</sup> Defendant.
13. On the 1<sup>st</sup> Defendant's argument that the Grant should have expressly stated that it was for the purposes of filing a suit for the recovery of the suit property, I agree with the Plaintiffs that the argument lacks basis. It is neither based on statute nor case law. I am of the view that it was sufficient for the Grant to provide that it was for the filing of a suit. It was not necessary to add that the suit was for the recovery of the suit property herein.
14. The upshot of the foregoing is that I find no merit in the 1<sup>st</sup> Defendant's preliminary objection. The preliminary objection is dismissed with costs to the Plaintiffs.

**DELIVERED AND DATED AT KISUMU ON THIS 9<sup>TH</sup> DAY OF DECEMBER 2024**



**S. OKONG'O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. P.D.Onyango for the Plaintiffs

Mr. Wasuna for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

N/A for the 4<sup>th</sup> Defendant

Ms. J.Omondi-Court Assistant

