



REPUBLIC OF KENYA



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**Tapem v Ariworeng & 5 others (Environment & Land Case  
100 of 2015) [2023] KEELC 234 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 234 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 100 OF 2015  
FO NYAGAKA, J  
JANUARY 24, 2023**

**BETWEEN**

**MUSA TAPEM ..... PLAINTIFF**

**AND**

**SAMSON ARIWORENG ..... 1<sup>ST</sup> DEFENDANT**

**CHEPOSIRKOI ARIWORENG ..... 2<sup>ND</sup> DEFENDANT**

**REUBEN ARIWORENG ..... 3<sup>RD</sup> DEFENDANT**

**MUSA ARIWORENG ..... 4<sup>TH</sup> DEFENDANT**

**CHEPOGHE ARIWORENG ..... 5<sup>TH</sup> DEFENDANT**

**CHARLES ARIWORENG ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff brought this suit against the Defendants who are alleged to be brothers. The Plaintiff amended his Complaint on 06/12/2021. It was filed on even date. In it he sought the following reliefs:
  - a. An eviction order against the Defendants, their agents and/or servants from the said parcel of land known as L.R. No. West Pokot/Chepareria/461.
  - b. A permanent injunction restraining the Defendants, their agents and/or servants from trespassing upon and/or committing any acts upon the said parcel of land known as L.R. No. West Pokot/Chepareria/461 measuring 10.15 hectares.
    - bb. Cancellation of the title deed West Pokot/Chepareria/461 issued to the 1<sup>st</sup> Defendant herein and the title deed to revert to the late Danger Tabim (deceased).
  - c. Costs of this suit together with interest.



- d. Any other or further relief that this Honorable Court may deem fit and just to grant.
2. The suit was defended strenuously. Although they failed to file an amended Statement of Defence, the Defendants entered appearance and subsequently filed their joint statement of Defence. It was dated 30/03/2017 and filed on 31/03/2017. They denied the claim, urging that contrary to the Plaintiff's allegations the suit land belonged to the 1<sup>st</sup> Defendant who was duly registered as such and the Defendants had been in possession of the suit land. They prayed that the suit be dismissed with costs.
3. In response to the Defence, the Plaintiff filed his Reply to Defence. It was dated 18/04/2017. After directions were taken, the suit proceeded to hearing.

### **The Plaintiff's Case**

4. The Plaintiff stated that he was the eldest son and the Legal Administrator of the estate of the late Danger Tabimwho died on 10/07/2013 at Senetwo in West Pokot County. He produced the letters of Administration Intestate (Form P & A 41) granted by the High Court in Kitale in HC. Succession Cause No. 68 of 2014 marked as P. Exhibit 1 and the Gazette Notice produced and marked as P. Exhibit 2 inviting objectors to its confirmation that occurred on 29/09/2016. The Certificate of Confirmation of Grant was produced in evidence and marked as P. Exhibit 7.
5. The deceased person was the sole registered proprietor of all that parcel of land namely L.R. No. West Pokot/Chepareria/461 measuring 10.15 hectares on 01/07/1998. In support, he produced and marked as P. Exhibit 3, the Certificate of Official Search dated 13/01/2014.
6. It was PW1's testimony that before his death, his deceased father and the late Ariworeng Ruatanyang, the Defendants' father, had a dispute over the ownership of the suit land. The said dispute was presided over by the Land Dispute Committee of Chepareria Adjudication Section on 03/08/1982. Parties made substantive representations on their positions that culminated in the Committee's findings. In its decision, the Committee ruled that the land belonged to the Plaintiff's deceased father. The proceedings and findings were produced and marked as P. Exhibit 4.
7. He testified further that the Defendant's father then appealed against that decision at the Arbitration Board which overturned the decision of the Committee. Dissatisfied with that outcome, the Plaintiff filed Objection Number 502 before the Land Adjudication Officer who heard the objection. By a decision dated 28/09/1992, it was affirmed that the suit land be registered in favor of the Plaintiff's deceased father. Furthermore, the Defendant in the proceedings was granted a sixty (60) day window right of Appeal. The objection proceedings were produced in evidence and marked as P. Exhibit 5.
8. Following the decision by the Adjudication Officer, the Defendants' late father vacated the suit land. However, in spite of the above position, the descendants of the late Ariworeng Ruatanyang, the Defendants herein, entered onto and have continually trespassed on the Plaintiff's parcel of land by permanently settling therein, constructing structures, cultivating the land and grazing thereon without his consent. He produced a demand letter dated 31/03/2015 marked in evidence as P. Exhibit 6, asking the Defendants to vacate the suit premises.
9. The Plaintiff cited the 1<sup>st</sup> Defendant for illegally and unprocedurally registering the suit property in his name on 18/02/2016. He produced a certified true copy of the register demonstrating this. It was marked as P. Exhibit 9.
10. Following the conclusion of the succession proceedings, the Plaintiff informed the Land Registrar West Pokot County, PW2, Edwin Wafula, the County Land Registrar, wrote P. Exhibit 8 to the 1<sup>st</sup> Defendant on 27/09/2017 summoning him to surrender the title to their office to register the



finalization of Succession Cause No. 68 of 2014. However, the 1<sup>st</sup> Defendant failed to surrender the same back to the County Land Registrar to register the outcome of the succession proceedings as per the confirmed grant.

11. When cross examined, the Plaintiff revealed that the Defendants' father appealed against that decision of the Land Committee before the Minister in Appeal Case No. 164 of 1995 where parties were on 24/06/2015 summoned (D. Exhibit 5) to appear and testify. The proceedings were produced and marked D. Exhibit 6. It emerged that as per the proceedings produced in evidence as D. Exhibit 6, the Plaintiff's siblings became unruly and threatened violence and demonstration. He observed that the appeal was unprocedurally filed after the stipulated sixty (60) day period.
12. The decision of the Minister was captured by the Director of Land and Adjudication and Settlement in his letter dated 14/08/2015 (D. Exhibit 7). It affirmed the Land Registrar to remove the restriction registered by the Plaintiff on 12/08/2015 and that the suit land be registered in the name of the 1<sup>st</sup> Defendant. Subsequently, the Chief Land Registrar on 10/02/2016 wrote to the District Land registrar, as shown on D. Exhibit 9, rehashing the decision of the Minister. This was captured in P. Exhibit 9.
13. It is this decision that prompted the Plaintiff to apply in Judicial Review No. 7 of 2019. The Application relied on by the Defendants as evidence of the Plaintiff's challenge of the Minister's decision was produced and marked as D. Exhibit 12. Noting his demeanor, this Court observed that the Plaintiff was evasive when cross-examined as to whether the Appeal to the Minister was ever challenged, apart from the Judicial Review proceedings.
14. From the evidence in further cross-examination, it turned out that on 23/09/2015 the Plaintiff's deceased father was notified by the Registrar that a caution, marked as D. Exhibit 8, would be removed upon the lapse of thirty (30) days unless he had a written objection to the contrary. The deceased's sons were also informed by letter dated 26/08/2013 marked as D. Exhibit 10 that an appeal had been lodged before the Land Control Board in respect to the property and were thus warned against any interferences until determination of the case.
15. Further evidence was that in 2015, the Plaintiff evicted the Defendants' father from the suit land by way of a court order. His claim against the Defendants is for eviction and trespass hence the suit.

### **The Defendants' Case**

16. The 1<sup>st</sup> Defendant testified on the Defendants' behalf. His authority to plead was produced and marked as D. Exhibit 1. He testified that he remains the registered proprietor of the suit land namely L.R. No. West Pokot/Chepareria/461. He produced a copy of the title and the Certificate of Official Search dated 23/02/2017 and marked them as D. Exhibit 2 and D. Exhibit 3 respectively.
17. He claimed that the suit land belonged to his late father before issuance of titles. He confirmed that their father and the Plaintiffs were entangled in a land dispute over the suit land from 1982. He produced the proceedings thereon from the Chepareria Land Dispute Adjudication Committee of 1992 and marked them as D. Exhibit 4.
18. His further evidence was that, dissatisfied with those findings, the 1<sup>st</sup> Defendant appealed against that Decision before the Minister in 2015. Parties were summoned to appear before the Minister for hearing on 08/07/2015 in respect to Appeal Case No. 164 of 1995. He produced in evidence and marked as D. Exhibit 5 the summons dated 24/06/2015 issued to the Plaintiff.



19. Meanwhile on 23/09/2015, the Land Registrar notified the Plaintiff, vide a letter which DW1 produced as D. Exhibit 8, of the decision to remove the caution within thirty (30) days unless objected by way of written instructions.
20. The outcome of the Appeal to the Minister was that the suit land be registered in the name of the 1<sup>st</sup> Defendant. The proceedings were produced in evidence and marked as D. Exhibit 6. Thus, to him the decision remained upheld. The latter decision was communicated to the Chief Land Registrar by the Director of Land and Adjudication and Settlement on 14/08/2015 which was produced as D. Exhibit 7. The Chief Land Registrar in turn notified the District Land Registrar on 10/02/2016, produced as D. Exhibit 9, to implement the Minister's decision to wit to remove the restriction and register the 1<sup>st</sup> Defendant as the owner of the suit land.
21. The title was subsequently registered in favor of the 1<sup>st</sup> Defendant on 18/02/2016 with the restriction being removed. He accused the Plaintiff and his siblings of chasing his family and destroying their houses. He annexed photographs of the alleged destruction and marked as D. Exhibit 11. He cited further violence as shown in the letter dated 26/08/2013 which he produced as D. Exhibit 10.
22. The 1<sup>st</sup> Defendant recounted that the Plaintiff filed an appeal against the decision of the Minister via judicial review proceedings which were dismissed. He prayed that the suit be dismissed with costs. This marked the close of the parties' cases.

### Submissions

23. Thereafter, the parties were directed to file and exchange written submissions. The Plaintiff's submissions dated 18/10/2022 were filed on the same day. He submitted that he had proved his case on a preponderance of the evidence adduced and prayed that the same be allowed. The Defendants on the other hand had failed to file their submissions as at the time of writing this judgment. Whichever the case in regard to the filing of the submissions, the Court must analyze the pleadings, the evidence on record and law in order to arrive at a determination on whether the Plaintiff had proved his case to the required standard or not. Submissions do not amount to evidence hence their presence or absence notwithstanding the Court has to analyze the issues as by law required. As such, whether they are filed or made orally or not will not and does not prejudice the cases of the parties. This Court has on occasion in *Patrick Simiyu Khaemba v Kenya Electricity Transmission & another* [2021] eKLR stated as follows:

“Evidence of parties comes into a matter in one of many ways, namely, by way of oral testimony, filed written witness statements that have been adopted as evidence of the parties in accordance with the rules of procedure and evidence, and affidavits of whatever nature as long as they have formed part of the Court record. Further, in relation to Applications or issues that come up before Courts for determination on such, submissions do not and cannot be equated to and be seen to be an Affidavit, Replying Affidavit, Supplementary Affidavit, Further Affidavit, Grounds of Opposition or Preliminary Objection.”

24. The position of submissions in the legal process is only to give the views of the parties about the case and leave it to the court to make appropriate findings: they only market the parties' cases. Reference is made to the case of *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR. That being the case, I now proceed to determine the merits or otherwise of this matter.

### Analysis and Disposition

25. I have carefully analyzed the pleadings, the oral testimony, that given in form of adopted written witness statements and the documents relied on. I have also considered the submissions and



authorities relied on. Both parties lay credence to ownership of the suit land namely L.R. No. West Pokot/Chepareria/461. Looking at the evidence in totality, I find that the following issues fall for determination:

- i. Whether the suit is competent;
- ii. If the answer to (i) is in the affirmative, whether the Plaintiff proved his case on a balance of probabilities?
- iii. Who bears costs of the suit?

26. I shall now proceed to determine the issues as postulated above sequentially.

#### **i. Whether the suit is competent**

27. The competency of the suit shall be determined in two (2) ways; whether the Plaintiff had locus standi hence the capacity to institute this suit as at 03/08/2015 when the suit was filed and whether the Plaintiff was barred by the doctrine of finality.

#### **a. Locus standi**

28. On the Plaintiff's capacity, I observe that notwithstanding the fact that the Plaintiff sued in his own name, he averred under paragraph three (3) the Plaintiff that he was suing in his capacity as the Legal Administrator of the estate of the late Danger Tabim. He relied on P. Exhibit 1 and P. Exhibit 2 to show that he had taken steps to become Administrator of the estate of his deceased father in the High Court vide High Court Succession Cause No. 68 of 2014.

29. The authority to sue on behalf of the estate of a deceased person is governed by the provisions set out in Order 3, Rule 7 of the Civil Procedure Rules which provides as follows:

“No claim by or against an executor or administrator, as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in of which the plaintiff or Defendant sues or is sued as executor or administrator, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.”

30. The above provision necessitates that in order to lodge a suit or have the same defended, the party so lodging or defending on behalf of the estate of a deceased person must have the authority or capacity to do so as an Administrator. In other words, the party must possess locus standi. The Court of Appeal in the case of *Alfred Njau vs. City Council of Nairobi* [1983] KLR 625 defined locus standi as:

“...a place of standing and refers to the right to appear or be heard in Court or other proceedings and to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding”.

31. Upon filing the suit, the Plaintiff presented P. Exhibit 1 which was subsequently Gazetted as demonstrated in P. Exhibit 2. Ultimately, the Grant was confirmed on 29/09/2016. This Court holds and finds that it was only at this juncture, that is on 29/09/2016 and not earlier, that the Plaintiff was then qualified to deal with the estate by for instance pursuing the present proceedings. His other alternative otherwise lay in obtaining Limited Grant of Letters of Administration ad litem.

32. As at 03/08/2015, when the suit was brought, the Plaintiff had not obtained a Grant of Letters of Administration. P. Exhibit 1 was simply a notification to interested parties to be made aware that a



Grant of Letters of Administration was being pursued so that objectors and persons with equal ranking as his are given an opportunity to either confirm or challenge the same. It is for this reason that in trite practice, once a petition has been filed for obtaining a Grant of Letters of Administration, a Gazette notice is issued inviting members of the public to make presentations if any, for or against the issuance. Once a Grant is confirmed, the party applying then becomes the Legal Administrator of the estate to conduct himself/herself in the manner provided under Section 82 of the Law of Succession Act. Otherwise, the petitioner seeking to become the Legal Administrator is not authorized to deal in any manner with the affairs of the estate as long as there is no Confirmation of Grant or issuance of a Limited Grant. Needless to say, that, in fact, such actions amount to intermeddling with the estate as ascribed in Section 45 of the Law of Succession Act imposing criminal sanctions.

33. It is clear that the Plaintiff had not obtained a Grant of Letters of Administration authorizing him to file the present suit as at the time of its filing. While I find from the evidence before me that the Grant of Letters of Administration was confirmed on 29/09/2016 when the Plaintiff then became an Administrator, the law does not operate retrospectively. A suit purportedly filed on behalf of the estate of a deceased person without the authority to do so as prescribed under the law is nullity ab initio. No life can be breathed into it through subsequent acquisition of a Grant of Letters of Administration. The consequential effect of filing the suit without obtaining the necessary letters invalidated the suit entirely and such invalidity remained incurable. The Court has held as much in a previous matter: that is in the case of *Bolton vs. Salim Khanot* (1958) EA 360.
34. Also, in *Julian Adoyo Ongunga vs. Francis Kiberenge Abano* Migori Civil Appeal No.119 of 2015, Justice A. Mrima had this to say on the issue of a party filing a suit without having obtained a Limited Grant and which position I wholly adopt:

“Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

#### **(b) Whether the Plaintiff was barred by the doctrine of finality**

35. The legal defect above aside, what is clear from the proceedings herein is that the late fathers of the parties herein had a litigious relationship that was passed down to the generation of the parties herein. Both parties assumed ownership of the suit land. This gave rise to a dispute that was adjudicated upon by the Land Dispute Committee Chepareria Adjudication Section on 03/08/1982. In its decision, the Committee ruled that the land belonged to the Plaintiff's deceased father.
36. The Defendant's father then appealed against that decision at the Arbitration Board which overturned the decision of the Committee. Dissatisfied with that outcome, the Plaintiff filed Objection Number 502 before the Land Adjudication Officer who heard the objection. By judgment dated 28/09/1992, it was affirmed that the suit land be registered in favor of the Plaintiff's deceased father. Furthermore, the Defendant in the proceedings was granted a sixty (60) day window right of Appeal.
37. The 1<sup>st</sup> Defendant appealed against that decision before the Minister in Appeal Case No. 164 of 1995. Albeit filed more than sixty (60) days after the period from which the same was to be done, the parties were, on 24/06/2015, summoned to appear and testify before the Minister. There was no challenge



against late filing, if any, before the Minister. From the proceedings produced as D. Exhibit 6, there was no indication either that extension of time was not sought for the filing of the Appeal before the Minister. That should have been taken up at that point. As things stand, if the argument by the Plaintiff in his evidence that filing of the Appeal was not done in time is anything to go by, this was a matter to be taken by way of Judicial Review before an appropriate Court.

38. This suit is not a judicial review one. If anything, the judicial review by the Plaintiff was filed in Kitale Environment and Land Court as Judicial Review No. 7 of 2019 and the Applicant lost it. It is noteworthy here that in the interest of justice, the Court perused the Court file in respect of the Judicial Review and noted that in the matter the Applicant was Musa Tapem (suing as the Administrator of the Estate of the Late Danger Tabim). The Respondents were the Director of Land Adjudication & Settlement and Samson Kedikou Rwatanyang. It was filed on 12/07/2019 through the Firm of John Bororio & Co. Advocates. The Attorney-General opposed the same on behalf of the 1<sup>st</sup> Respondent and Ms. Teti & Co. Advocates came on record for the 2<sup>nd</sup> Respondent who too opposed the same.
39. The Applicant prayed for an order of certiorari to be issued to remove into this Court and quash the proceedings and directions of the Cabinet Secretary in case No. 164 of 1995 LR No. 328, Adj. Section Chepareria, Ariworeng Ruatanyang -vs- Danger Tabim. At the end of the proceedings, the Court delivered its Judgment on the matter on 21/01/2020. By it, the Court dismissed the Application with costs.
40. Thus, from the above summary, it is clear that the issue being raised in evidence by the Plaintiff herein that the decision of the Minister was made in a matter filed out of time hence the Court should overturn it was settled in the Judicial Review matter. If the Plaintiff felt aggrieved by that decision he ought to have appealed against it. What the Plaintiff is engaged in by raising this piece of evidence or argument herein is an indirect appeal against the procedure before and decision of the Minister. It is not permitted in law to do so and it must be rejected.
41. To be clear, I find that the decision of the Minister was captured by the Director of Land and Adjudication and Settlement in his letter dated 14/08/2015. It affirmed and directed that the Land Registrar does remove the restriction registered by the Plaintiff on 12/08/2015 and that the suit land be registered in the name of the 1<sup>st</sup> Defendant. Subsequently, the Chief Land Registrar on 10/02/2016 wrote to the District Land Registrar rehashing the decision of the Minister. It is this decision that prompted the Plaintiff to Appeal in Judicial Review No. 7 of 2019.
42. The suit essentially seeks to challenge the decision of the Minister as implemented subsequently in the suit land. It is an appeal against the Minister's decision though drafted as a facade seeking eviction orders, injunction and cancellation of title. I say so because the Plaintiff's prayer for cancellation of the title issued in favor of the 1<sup>st</sup> Defendant would in essence overturn the decision of the Minister issuing that title.
43. I find that the said proceedings were governed by the dictates of the *Land Adjudication Act* Cap 284 Laws of Kenya. In line with Section 29, the Minister determined the Defendants' Appeal and made orders thereto which orders, as couched in the mandatory terms of the provision, are final. The import of the provisions of the Act is that the decision by the Minister remains unappealable and can only be challenged on procedural defects by way of Judicial Review proceedings.
44. The drafter and the legislature which put forth the will of the people of Kenya through the said provision intended that once the decision of the Minister has been made, the contingent nature of protracted litigation would come to an end. It was intended that there would be as little of the court's interference as possible given the sui generis nature of the adjudication process.



45. Section 29 of the *Land Adjudication Act* epitomizes the doctrine of finality in that litigation must come to an end. Bosire, J.A in *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others* [2007] eKLR described the principle as follows:

“This is a doctrine which enables the courts to say litigation must end at a certain point regardless of what the parties think of the decision which has been handed down.”

46. Finally, I find from the totality of the evidence of the parties herein that the Plaintiff failed to adduce evidence to prove on a balance of probabilities that he is entitled to any of the orders sought. It therefore means that his suit fails miserably. Further, I find that the Plaintiff did not have capacity to institute this suit from the beginning. The Plaintiff was barred by statute from filing the present suit since it was an appeal against the decision of the Minister. Since his recourse lay in judicial review proceedings, the present suit was filed in violation of the provisions of statute. Be that as it may, it did emerge from the proceedings that the Plaintiff had filed judicial review proceedings in Judicial Review No. 7 of 2019. Again, I find that the decision of the Minister as to the true proprietor of the suit land was final and has never been overturned by any Court of law. It therefore means that the Defendant’s late father was properly registered as proprietor.

47. In sum, it appears thus that not only was the Plaintiff acting as a vexatious litigant but was also forum shopping. This court will not condone such conduct.

48. For the above reasons, I find that the Plaintiff’s claim is baseless and further that the suit is incurably incompetent and void ab initio. Consequently, the same is dismissed with costs to the Defendants.

49. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 24<sup>TH</sup> DAY OF JANUARY, 2023.**

**HON. DR.IUR FRED NYAGAKA**

**JUDGE, ELC KITALE**

