



REPUBLIC OF KENYA



Matundura (Suing as the legal representative and administrator of the Estate of Kerebi Matundura) v Matundura & 3 others (Environment & Land Case E009 of 2022) [2023] KEELC 15963 (KLR) (28 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15963 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE E009 OF 2022
JM KAMAU, J
FEBRUARY 28, 2023**

BETWEEN

JACKSON ONYWERI MATUNDURA (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF KEREBI MATUNDURA) PLAINTIFF

AND

**SAMWEL OMWERI MATUNDURA 1ST DEFENDANT
JANET BOSIBORI OMWANGE 2ND DEFENDANT
SAMUEL MOKAYA NYAMORAMBO 3RD DEFENDANT
LAND REGISTRAR, NYAMIRA COUNTY 4TH DEFENDANT**

RULING

1. Vide Plaintiff dated November 24, 2022 the Plaintiff has sought the intervention of this court for:
 - a. A declaration that the transfer of all that parcel of land known as Central Kitutu/bogetaorio/706 from the name of Kerebi Matundura (Deceased) to the 1st Defendant and one Joshua Mwangi Nyamorambo (now deceased) and the subsequent sub-divisions was fraudulent, unlawful, null and void.
 - b. A declaration that the closure of the title known as Central Kitutu/bogetaorio/706 and the creation of Title Numbers Central Kitutu/bogetaorio/2458 – 2464 was unprocedural, unlawful and therefore a nullity ab initio.
 - c. An order directing the Land Registrar, Kisii County to cancel all the entries arising out of the sub-division of all that parcel of land known as Central Kitutu/bogetaorio/706.



- d. General Damages for unlawful sub-division and/or conversion.
 - e. Interest on (d) above at court rates.
 - f. Costs of this suit be borne by the Defendant.
 - g. Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.
2. The Plaintiff anchors his prayers on his stated averments that he is the Legal Administrator of the Estate of the late Kerebi Matundura who died on July 1, 2000. Until his demise the Deceased was the registered owner of the parcel of land known as Central Kitutu/bogetaorio/706 measuring approximately 7.73 Acres. It was then registered in the name of the 1st Defendant who is also deceased having died on November 6, 2008 without probate. The Title was later closed on April 8, 2009 after sub-division giving rise to Central Kitutu/bogetaorio/2458 – 2464 (inclusive), which process the Plaintiff now terms as unlawful and fraudulent, mainly on account of lack of probate and without the surrender of the original Title Deed which is in the hands of the Plaintiff and also by virtue of the land having been transferred to other people who are not the rightful beneficiaries and Dependants of the Deceased owner. This consequently denied the Plaintiff his rightful share of the suit property. Upon filing the suit on November 25, 2022, the Plaintiff contemporaneously filed a Motion for the preservation of the suit properties - Central Kitutu/bogetaorio/2458, 2459, 2460, 2461, 2462, 2463 and 2464 respectively.
 3. On December 5, 2022, the first 3 Defendants filed Grounds of Opposition to the aforesaid Notice of Motion alongside a Preliminary Objection and on December 6, 2022, I directed that the parties be heard on the Preliminary Objection first for reason that the Defendants have raised the issue of limitation of action to the effect that the suit is time barred and that the same is untenable for it includes non-parties, and specifically parties who are Deceased. Written Submissions were filed in compliance with the Court’s directions save on the 4th Defendant’s behalf and the court has taken time to consider them.
 4. I will start by addressing the issue of limitation of action. Counsel for the 1st, 2nd and 3rd Defendants has brought to the attention of the court that from the averments in the Plaintiff’s own Plaint and statement of facts, the suit land was registered in the name of the 1st Defendant Joshua Omwange Nyamorambo On November 6, 2008. He relied on the Court of Appeal Case of *Gathoni Vrs Kenya Co-operatives Creameries Ltd (1982) e KLR* which I fully agree on in an ideal situation:

‘ The law of limitation of actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the Applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.’
 5. Counsel argues that the 12 years lapsed on November 7, 2020 and that the Plaintiff is not spared by the *Limitation of Actions Act*.
 6. This court wishes to refer to its own Judgment in the case of *Delilah Onderi vs Francis Ondieki Atandi Nyamira ELC Case No 4 of 2021* where I addressed this issue with exhaustion:

‘Turning now to the question as to whether the suit is time barred or not, the suit is anchored on breach of contract. Under Section 4 of the *Limitation of Actions Act*, an action



founded on contract cannot be brought after the end of six years from the date on which the cause of action arose. Though the plaintiff's claim is for the refund of money from a land transaction whose limitation period is 12 years as provided for under Section 7 of the Limitation of Actions Act, the provisions of Section 26 of the same Act provides that the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it.'

7. In the case of Koinange & 13 Others V Charles Karuga Koinange 1986 KLR at page 23 Justice Amin citing the case of Ratilal Patel Makanji (1957) EA 314 observed as follows:

' When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a balance of probabilities is required'

8. If any fraud was ever perpetrated by any of the Defendants, when was it discovered? We cannot tell this at this stage until evidence has been tendered in court and the same subjected to thorough scrutiny. And more so due to the fact that the Plaintiff is only a legal representative of an Estate against which, as he claims, the alleged fraud was perpetrated.

9. On the 2nd Ground of the 1st, 2nd and 3rd Defendants' Objection that since the Plaintiff avers that Land Parcel No Central Kitutu/bogetaorio/706 was registered in the name of the 1st Defendant and one Joshua Omwange Nyamorambo who is now Deceased without undertaking succession papers the Estate of the late Joshua Nyamorambo should have been joined in the suit because any orders issued would inevitably affect the Deceased's Estate. He says that on this ground alone, the suit ought to be dismissed at this stage.

10. It is indeed true that the Estate of One Joshua Nyamorambo would be affected by any Orders made in this suit. This would cause injustice since the beneficiaries of the Estate will either gain without any effort or be disadvantaged by being condemned unheard. But does that justify the dismissal of the suit? Certainly not. The panacea is to be found in Order 1 Rule 9 of the Civil Procedure Rules, 2010: -

' No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.:'

11. In this instant case the non-joinder of the Estate of Joshua Nyamorambo does not render the suit dismissible. However, the court would only deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The interests of Joshua Nyamorambo's Estate have a nexus with the interest of the 1st Defendant. We take great solace from the fact that Order 1 Rule 9 gives the court discretion by the use of the word 'May'. How does the court cure the anomaly of the case being heard without compromising the interests of Joshua? Order 1 Rule 10 (2) provides as follows: -

' The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.'

12. I wish to point out that the Estate of Joshua Omwange Nyamorambo is a necessary party in this suit and that in order to effectually and completely adjudicate the dispute herein and settle all questions involved



in this suit Joshua Omwange Nyamorambo's Estate is indispensable. Without much hesitation I do order that the Estate of the late Joshua Omwange Nyamorambo be accordingly joined as the 5th Defendant in this suit within the next 7 days from the date hereof. As to terms that may appear to the court to be just, I must point out that the Plaintiff, having had the benefit of being represented by an able learned counsel of no mean stature, repute and experience, he ought to have considered this and failure to do so must have been deliberate and with very inquisitive consequences. I therefore order that the 1st, 2nd and 3rd Defendants do have the costs of this Preliminary Objection in any event assessed by this court at Kshs 15,000/=. These are the orders of the Court.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 28TH DAY OF FEBRUARY 2023.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Applicant: Mr. Ochoki

Defendants: Mr. Nyang'acha for the 1st, 2nd & 3rd Defendants

