



**Mutai (Suing as the legal representative of the Estate of James Kimutat Cheriro (Deceased) v
Soi (Being sued as the legal representative of the Estate of Samuel A Soi (Deceased) & 3 others
(Environment & Land Case 26 of 2020) [2023] KEELC 16104 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 16104 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 26 OF 2020
MC OUNDO, J
FEBRUARY 23, 2023**

BETWEEN

**ERICK KIPKEMOI MUTAI (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF JAMES KIMUTAT CHERIRO (DECEASED) PLAINTIFF**

AND

**ESTHER CHEPKOECH SOI (BEING SUED AS THE LEGAL REPRESENTATIVE
OF THE ESTATE OF SAMUEL A SOI (DECEASED) 1ST DEFENDANT**

**BORNES CHELANGAT SOI (BEING SUED AS THE LEGAL REPRESENTATIVE
OF THE ESTATE OF SAMUEL A SOI (DECEASED) 2ND DEFENDANT**

REGISTRAR OF TITLES 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. Pursuant to the filing of an undated Complaint on 4th August 2020, the Plaintiff herein sought for the following orders;
 - i. A declaration that the parcels of land known as I.R No. 2138 and I.R No. 2140/1 belongs to the twenty members of Paraiwot & Partners Company only.
 - ii. A declaration that Plaintiff is entitled to shares in parcels of land known as IR No. 2138 and I.R No. 2140/1 as the legal representative of the estate of James Kimutai Cheriro (Deceased) .
 - iii. A permanent injunction do issue restraining the Defendant and all the illegal occupants by themselves, their servants, agents and/or employees or whoever is acting on their behalf from, selling, disposing off and/or in any other manner interfering with the Plaintiff's share in parcels of land known as I.R No. 2138 and I.R No. 2140/1.



- iv. An order directing the Registrar of Title to cancel Entry no. 8 in the register relating to land parcel I.R No. 2138 and I.R No. 2140/1.
 - v. An order that the land surveyor do go to the ground to determine the acreage, that each of the twenty members of the partnership are entitled to in parcels of land known as I.R No. 2138 and I.R No. 2140/1 for purposes of determining the boundaries.
 - vi. Cost of the suit together with interest at court rates
2. The 1st Defendant, in her defence dated the 11th November 2020 denied the contents contained in the Plaint wherein at paragraph 20 she averred that the Plaintiff's case lacked merit for being time barred, the cause of action having arisen in 1983 which was more than 36 years ago.
 3. Subsequently the 1st and 2nd Defendants filed their Notice of Preliminary Objection dated 2nd June 2022 on 10th June 2022 pursuant to the provisions of Section 7 of the *Limitation of Actions Act* wherein they sought that the Plaintiff's suit be struck out with costs as it offended the provisions of Section 7 of the *Limitation of Actions Act*, the suit having been filed on 4th August 2020 whereas the cause of action admittedly arose in the year 1978. That the court therefore lacked jurisdiction to determine the matter as it was statute barred.
 4. The Plaintiff in his manmade Grounds of Opposition to the Preliminary Objection dated the 28th November 2022, and which had been supported by his affidavit sworn on an equal date, and also in response to the 1st and 2nd Respondents Notice of Preliminary Objection stated that the matter did not offend the statutory period set out under Section 7 of the *Limitation of Actions Act* because it became known to him in the year 2001 after the death of his father James Kimutat Cheriho. That he had been following the matter through various channels wherein in 2010 he had been informed by the Kimulot Land Disputes Tribunal to file his claim in court where the matter would be handled and resolved.
 5. The Application on the Notice of Preliminary Objection was disposed of in the first instance by way of written submissions.

1st and 2nd Defendants' submissions.

6. The 1st and 2nd Defendants, in support of their Preliminary Objection framed the issues for determination as follows;
 - i. Whether the Plaintiff's suit offends the express provisions of Section 7 of the *Limitation of Actions Act* CAP 22 Laws of Kenya.
 - ii. Whether this honorable court has jurisdiction to hear and determine this matter.
7. On the first issue for determination the 1st and 2nd Defendants submitted that as per paragraphs 5 & 8 of the Plaint, it was evident that the cause of action herein arose between the years 1973 and 1978 when the suit parcels of land were pleaded to have been acquired and sub-divided amongst members of Paraiywot & Partners Company. The Defendants thus relied on the holding in *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Company Limited*, (1969) E.A. 696 cited with approval in *Rebecca Chumo vs. Christina Cheptoo Chumo* [2021] eKLR, to submit that their preliminary objection was premised on a pure point of law that is, limitation of time, which arose by a clear implication of the Plaintiff's pleadings set out under paragraphs 5-12 of the Plaint.
8. That in view of the fact that the Plaintiff's pleadings clearly expressed that the cause of action herein arose between the years 1973 and 1978, the 1st and 2nd Defendants contended that the suit offended



the express provisions of Section 7 of the *Limitations of Actions Act*, the matter having been filed on 4th August, 2020, long after the limitation period had lapsed.

9. On the second issue for determination as to whether the court had jurisdiction to entertain this matter, it was the 1st and 2nd Defendants' submissions that in view of the fact that the Plaintiffs suit was clearly time barred, it therefore followed that the court lacked jurisdiction to entertain it as was held in *Bosire Ongero vs Royal Media Services* [2015] eKLR cited with approval by this court in *Koros (Suing as Personal Representative of The Estate of Anthony Kipkoros Towett) vs. County Government of Kericho* (Environment & Land Case 50 of 2016) [2022] and in the notorious case of *Owners of the Motor Vessel "Lillian S"* (supra) (sic)
10. The 1st and 2nd Defendants sought that the Preliminary Objection dated 16th April, 2019(sic) be allowed with costs.

Plaintiff's Submissions

11. The Plaintiff's submission in opposition was to the effect that he was the son of the deceased James Kimutai Cheriro who died on 27th November 1989. That the deceased was among the first members of Paraiwot & Partners Company, a company which had acquired land in 1973 and 1974 to be used for the benefit of the group. That pursuant to joining the group, the late Samwel A. Soi was appointed to be among the collectors for purposes of licenses collection in Kaptien location on behalf of Paratwot & Partners Company wherein he had subdivided LR No. 2138 and LR No. 2140/1 which were named Koitalel and Busoreto farms, to other members to the exclusion of the original members.
12. That he (Plaintiff) only became aware of this injustice which had been done to his late father in 2001 wherein he had approached the area chief of Kaptien location to summon the late Samwel Soi (when he was still alive) to resolve this land dispute. That the dispute has been ongoing to date hence he had come to court to seek justice for his late father.
13. That the suit was properly filed and within the set timelines under Section 7 of the *Limitations (sic) Act*. The Plaintiff thus relied on *the Constitution*, Law of Limitations (sic) Act, and the decided cases (which he did not cite) in support of his claim wherein he sought for exclusive right of possession and registration as proprietor of the said parcels of land as well as mense profit from the year of trespass, to date of conclusion of the suit.
14. That the time when the cause of action arose was not known. That it had only been after the death of James Kimutai Cheriro when his family started collecting his assets for his estate, that they had realized that the deceased had not been allocated any shares from Paraiwot & Partners Company where he was a member. The deceased's family followed up with Paraiwot & Partners Company where they were led to the late Samwel A. Soi. That inquiries from the said Samwel A. Soi did not yield any fruits as he was always evasive of this discussions.
15. The Plaintiff relied on the provisions of Section 26 of the *Limitation of Actions Act* to submit that the matter had been filed within the prescribed time as required by law as the same became known to him in the year 2001.
16. The Plaintiff further relied on the provisions of Section 3(1) of the *Land Disputes Tribunal Act* CAP 303 A(repealed) to submit that time should have started to run from the year 2010 after the final verdict by the Kimulot Land Dispute Tribunal who had advised him to file the matter in court. That having filed this suit in 2020, the 12 year time limitation had not lapsed. Reliance was placed on the decided case in *Mukisa Biscuits* (supra) and *Mrao Limited vs. First American Bank of Kenya Limited & 2 Others* [2003] KLR 125.



17. The Plaintiff's conclusion was that this matter fell within the provisions of filing land claims/suits under the Limitations (sic) Act and that Section 7 (sic) was not applicable herein. That the Preliminary Objection herein filed should be dismissed so that the matter could proceed to hearing by way of evidence. That the Preliminary Objection was unmerited and immature since the suit was filed after it was fully determined as a land dispute by Kimulot Land Dispute Tribunal which had advised that the matter be heard in court.

Determination.

18. I am at pains to find judicious words to answer some of the Applicant's peculiar arguments and therefore compelled, before determining this matter, to first quote a verse from the Holy Book to wit;

“My people perish for lack of Knowledge”.

19. A Preliminary Objection according to the decided case by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Co. Ltd-v- West End Distributors Limited* (1969) EA. 696 was stated to be thus:-

“So far as I am aware, 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 the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

20. It is evident that a Preliminary Objection consists of pure points of law and it is also capable of bringing the matter to an end preliminarily. See the case of *Quick Enterprises Ltd. vs. Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999, where the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

21. In the case of *Avtar Singh Bhamra & Another vs Oriental Commercial Bank*, Kisumu HCCC No.53 of 2004, the Court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

22. In its Preliminary objection, the 1st and 2nd Defendants case inter alia is that the suit before the Court was fatally defective for reasons that it was in contravention of the provisions of Section 7 of the [Limitation of Actions Act](#).

23. I therefore find the matter that arises for determination as being:

i. Whether the said Preliminary Objection has merit and should be upheld.

24. The Defendants contention was that since the suit was filed on 4th August 2020 wherein the cause of action arose in the year 1978, that the court lacked jurisdiction to determine the matter as it was statute barred.



25. A cause of action, is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a Plaintiff brings suit.
26. Section 7 of the *Limitation of Actions Act* provides:
- “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
27. Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued.
28. Quite clearly the Plaintiff’s claim is for the recovery of land, wherein he seeks for a declaration that the parcels of land known as I.R No. 2138 and I.R No. 2140/1 belongs to the twenty members of Paraiwot & Partners Company.
29. I have considered the certificate of titles to land parcel No. I.R No. 2138 and I note from entry No. 7 that the land measuring 91.11 hectares was transferred and registered to the individuals therein named who were trading as “Paraiwot & Partners Company,” as joint tenants wherein they had been issued with LR No. 6022/1 on the 28th December 1973.
30. In reference to land parcel No. I.R No. 2140/1, I note at entry No. 7 that 54.11 hectares had also been registered to the individuals therein named who were trading as “Paraiwot & Partners Company,” as joint tenants to LR No. 6026/1 vide certificate of title No. IR. 27616 on the 19th June 1975.
31. The present suit was filed on the 4th August 2020, indeed there is no doubt that the period of about forty seven (47) years and forty five (45) years respectively have lapsed since 1973 and 1975 respectively when the impugned cause of action; the individuals named in the titles and who were trading as “Paraiwot & Partners Company,” were registered as joint tenants to the suit lands herein.
32. The Court of Appeal in *Mukuru Munge vs. Florence Shingi Mwawana & 2 others* [2016] eKLR held that:
- The purpose of the law on limitation of actions is to avoid stale claims, based on the sensible and rationale appreciation that over time memories fade and evidence is lost. The law of limitation therefore seeks to compel claimants not to sleep on their rights and to bring their claims to court promptly. Secondly, the law on limitation of actions ensures that claims are instituted within reasonable time after the cause of action has arisen, so as to secure fair trial when all the evidence is available and to ensure that justice is not delayed. In our minds, those are important constitutional values and principles, which are underpinned by legislation on limitation of actions.”
33. The Plaintiff needed to commence his claim within the time prescribed under Section 7 of the *Limitation of Actions Act*. It follows therefore that by the time the Plaintiff filed this suit, the claim was already statute barred.
34. In the case of *Bosire Ongero vs Royal Media Services* [2015] eKLR the court had held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.



35. The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Justice Nyarangi of the Court of Appeal had held as follows

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

36. Clearly, this Court lacks jurisdiction and the matter is at its end. I will have to down my tools and take no further step. The preliminary objection on this point succeeds with the result that the Plaintiff's suit is herein struck out with costs to the 1st and 2nd Defendants.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 23RD DAY OF FEBRUARY 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

