



Rotich & 2 others (Suing as the legal representatives of the Estate of the Late Ruth Cheronu Chumo) v Chumo & 2 others (Environment & Land Case E007 of 2022) [2023] KEELC 931 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEELC 931 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE E007 OF 2022
MC OUNDO, J
FEBRUARY 16, 2023**

BETWEEN

**TENGECHA ROTICH 1ST PLAINTIFF
CAROLINE CHEBET CHUMOH 2ND PLAINTIFF
KIPNGETICH CHUMO 3RD PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
RUTH CHERONO CHUMO**

AND

**PASCALIA C CHUMO 1ST DEFENDANT
LAND REGISTRAR 2ND DEFENDANT
ATTORNEY GENERAL 3RD DEFENDANT**

RULING

1. The Plaintiffs herein filed a suit against the Defendants via their Plaint dated June 10, 2022 wherein they had sought for judgment against the Defendants as well as for the following orders;
 - i. An order to issue against the 2nd Respondent directing them to cancel title deeds issued irregularly in Kericho/Silibwet/4016, Kericho/Silibwet/4017, Kericho/Silibwet/4018, Kericho/Silibwet/4018, Kericho/Silibwet/4020, Kericho/Silibwet/4021, Kericho/Silibwet/4022 and Kericho/Silibwet/4023 so that the land could revert back to its parent title Kericho/Silibwet/881 in the name of the deceased Ruth Cheronu Chumo ;
 - ii. A declaration that the estate of the late Ruth Cheronu Chumo is the legal and indefeasible owner of the land parcel



Kericho/Silibwet/881.

- iii. A permanent injunction restraining the 1st Defendant by herself, her agents, servants and employees from entering, remaining or developing or in any way interfering with the land parcel Kericho/Silibwet/881.
 - iv. Cost of the suit and any further or other relief this court may deem just to grant
2. The 1st Defendant herein in response to the Plaintiff, filed her Defence and Counter claim dated the July 4, 2022 seeking the following orders;
- i. A declaration that Ruth Cherono Chumo's title to land parcel No Kericho/Silibwet/881 was illegally and fraudulently obtained and therefore null and void
 - ii. An order directing the rectification of the registrar of land parcel No Kericho/Silibwet/881 so as to remove the entries in favour of Ruth Cherono Chumo and all the resultant parcels of land and the titles revert back to the proprietorship of Francis K Chumo.
 - iii. The 1st Defendant also sought for costs of the suit and counterclaim as well as any other relief the court may deem fit and just to grant.
3. In response thereto, the Plaintiff/Applicant filed their Notice of Preliminary Objection dated the August 22, 2022 to have the defense and counter-claim struck off on the following grounds;
- i. That the 1st Defendant's defense and Counter-claim against the Plaintiffs dated July 4, 2022 is time-barred as it contravened provisions of Section 7 of the Limitations of Action Act Cap 22;
 - ii. That the 1st Defendant herein lacks the requisite the locus standi to institute this suit/claim against the Plaintiffs on behalf of the estate of the late Francis K Chumo (Deceased) as per her defense and Counter-claim claim
 - iii. That this counter-claim has been brought to this Court in clear disregard the due process of court and no leave of court was sought by the 1st Defendant before filing the counter-claim against the Plaintiffs
4. On November 2, 2022 the court had commended Plaintiffs for taking the initiative of seeking to dispose of the preliminary objection in the first instance by filing and serving their written submissions to the same wherein it had adopted the initiative as the order of the court and thereafter directed the Defendants to file and the effect service of their respective written submissions within the cause of the day. The 1st Defendant filed their submissions on the February 10, 2023, almost 2 months late and without leave of the Court.

Plaintiff's submissions.

5. In arguing their Preliminary Objection, the Plaintiffs framed issues for determination as follows:
- i. Whether the 1st Defendant's claim is time barred?
 - ii. Whether the 1st Defendant lacks the requisite locus standi to institute the claim?
 - iii. Who bears the costs of the suit?
6. On the first issue for determination, the Plaintiffs relied on the guidelines applicable to such objections as set down in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969] {sic} to submit that the 1st Defendant's claim was time barred for the reasons that in her defense and



counterclaim she had claimed that the deceased Ruth Cheronno Chumo acquired the property illegally and fraudulently on or around the year 1982 when the property was registered to her name. That under paragraph 17 of her defense and counterclaim, the 1st Defendant had even stated that the Public Trustee moved to file a restriction stopping any dealings with the parcel file on or about the year 1995, that it was therefore clear that the 1st Defendant sought to litigate on a land transferred through a court process of succession way back in 1982. That it was evident that upon getting knowledge of the transfer on or about 1995, instead of challenging the same in a court of law, she, in collusion with the Public Trustee had placed a restriction on the land. That the Plaintiff's claim was thus time-barred pursuant to the provisions of Section 7 of the Limitations of Actions Act, as she sought to bring an action to recover land about 40 years after the right of action had accrued. To buttress their submission, the Plaintiff further relied on the decision in Machakos ELC No 50 of 2020, [Sobanlaldurgadass Rajput & Another v Divisional Integrated Development Programs Co Ltd.](#)

7. That Section 26 of the [Limitations of Actions Act](#) provided for extension of time in cases of fraud and mistake and the Supreme Court in the case of [Kenya Ports Authority v Timberland \(k\) Ltd](#) (sic) had upheld the view that where an action was based on fraud, the period of limitation prescribed did not begin to run until the Plaintiff discovered the fraud. That factoring in the 1st Defendant's fraud allegations, that the fraud was discovered in the year 1995 and a restriction placed by the Public Trustee, the same would still be time barred by the 12 year limitation period from the time she had discovered the fraud. That the 1st Defendant's claim could not succeed in the circumstance.
8. On the second issue for determination, the Plaintiff submitted that the 1st Defendant lacked the locus standi to institute the claim on behalf of the deceased Francis C Chumo. That the present claim related to a land transferred from the late Francis C Chumo to the late Ruth Cheronno Chumo. That the 1st Defendant allegedly wished to defend the interests of the estate of the late Francis C Chumo, without having obtained any letters of administration conferring her the authority to sue with respect to the said estate. That the Plaintiff's pleadings showed that she was suing in her own capacity and not any other capacity which would entitle them to institute the suit on behalf of another person. That it was trite law that the estate of a deceased person could only be represented in any legal proceedings by a person duly authorized to do so on behalf of the estate. Reliance was placed on the provisions of Section 82(1) (a) of the [Law of Succession Act](#).
9. The Plaintiff submitted that this kind of anomaly could not be cured by a party subsequently obtaining the Letters of Administration as was held in the Kisii Land and Environment Court in ELC No 167 of 2016, [Isaya Masira Mmanyi v Daniel Omwoyo & Another.](#)
10. That courts had proceeded to strike out suits for lack of locus standi. That there being a glaring defect in the 1st Defendant's suit which could not be cured by subsequently obtaining the Letters of Administration, the suit was a lame duck which could not stand.
11. On the third issue for determination on who should bear the costs of the objection, it was the Plaintiffs' submission that it was trite, that costs follow the event. That the 1st Defendant's suit could not succeed and she should be slapped with costs of the suit.

Determination.

12. Before I analyze my finding, I wish to point out that pursuant to the service of the Notice of Preliminary Objection upon the Plaintiffs, they chose not to file a response to the same but instead filed their



submissions challenging the Preliminary Objection. The Supreme Court of Kenya in *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 Others* [2018] eKLR held as follows:

A Replying Affidavit is the principal document wherein a Respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence of this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent on August 17, 2018 are of no effect."

13. Since the Defendants/Respondents did not comply with the court's directives to file their written submissions and further that the 1st Defendant's undated written submissions filed on 10th February 2023 are of no effect without a Replying Affidavit, I shall proceed to determine the un-opposed Preliminary Objection on its merits.
14. 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."
15. 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 v 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."
16. In the case of *Avtar Singh Bhamra & Another v 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."
17. The Plaintiff/Applicant's Preliminary objection, inter alia is based on two limbs, firstly that the 1st Defendant's defence and counter claim were fatally defective for reasons that the 1st Defendant's claim in her counter claim was time barred by virtue of the provisions of Section 7 of the Limitations of Action Act. The second limb is that the 1st Defendant had no locus standi to institute this suit/claim against the Plaintiffs on behalf of the estate of the late Francis K Chumo (Deceased).
18. The Matters for determination are;
 - i. Whether the Preliminary Objection raised is sustainable.
 - ii. Whether the said Preliminary Objection has merit and should be upheld.
19. The impugned 1st Defendants Defence and counterclaim is hinged on a cause of action founded on fraud which is a tort herein and which ought to have been brought within 3 years from the date when



the cause of action arose. I further note that the counterclaim is also for the recovery of land parcel No Kericho/Silibwet/881, so as to revert the resultant titles to Francis K Chumo (deceased)

20. In the case of *Justus Tureti Obara v Peter Koipeitai* [2014] eKLR wherein J Okong'o held that;

I am in agreement with the Plaintiff's submission that the Plaintiff's claim is for the recovery of the suit property from the Defendant and as such the limitation period for such a claim is 12 years as provided for in section 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya. I would wish to point out further that the Plaintiff's case although for recovery of land is based on fraud. The proviso to section 26 (a) of the Limitation of Actions Act, Cap 22, Laws of Kenya provides that where an action is based on the fraud of the Defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the Defendant is a matter to be ascertained at the trial."

21. To contextualize the Plaintiff/Applicant's point of Preliminary Objection, on this point, it is necessary to set out the relevant provisions of the Limitation of Actions Act which he relies on and I set the same out hereunder:-

22. Section 4 (2) of the *Limitation of Actions Act* reads:

"An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:"

23. I have considered the submissions herein, and I note from the Plaintiffs' submission, that they had sought that the 1st Defendant's defence and counterclaim were time barred for the reasons that in her defense and counterclaim, the 1st Defendant had claimed that the deceased Ruth Cherono Chumo had acquired the property illegally and fraudulently on or around the year 1982 when the property was registered to her name.

24. I have perused the said defence and counterclaim and I don't seem to spot the said phrase/allegation, indeed at paragraph 13 in the counterclaim, the 1st Defendant confirmed that the Public Trustee obtained a Grant of letters of Administration on the August 1, 1982 which were confirmed on August 10, 1988.

25. At paragraph 18-19 on the particulars of fraud, the 1st Defendant had stated that in February 2012, the deceased Ruth Cherono Chumo had illegally caused the subdivision and transfer of the subject parcel of land. That on October 9, 2018, the beneficiaries of the estate of Francis K Chumo had confirmed to having received their respective title wherein they had intimated to the Public Trustee to mark the matter settled.

26. This narration clearly shows that the Fraud had been committed on the October 9, 2018. As to when the 1st Defendant herein discovered the fraud alleged against Ruth Cherono Chumo (deceased), the same has not been disclosed and it therefore means that these are facts that will have to be ascertained at the trial.

27. 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"



28. Again paragraph 18 of the 1st Defendant's counterclaim on the particulars of fraud is clear that "...on or about February 2012, Ruth Cheron Chumo illegally cased the sub-division and transfer....."
29. By this statement, it is clear that the suit land herein was transferred 10 years before the filing of the suit which respectively is within the time limitation period as stipulated by the provision of Section 7 of the Limitation of Actions Act. On this note therefore, the first limb of the Preliminary Objection is herein dismissed.
30. On the second limb as to whether the 1st Defendant lacks the requisite locus standi to institute the claim, it was the Plaintiff's submission that the 1st Defendant lacked the locus standi to institute the claim on behalf of the deceased Francis C Chumo. That the present claim related to a land transferred from the late Francis C Chumo to the late Ruth Cheron Chumo. That the 1st Defendant allegedly wished to defend the interests of the estate of the late Francis C Chumo, without having obtained any Letters of Administration conferring to her the authority to sue with respect to the said estate.
31. Again I have considered the 1st Defendant's defence and Counterclaim more so at paragraph 15, the same is clear to the effect that there had been a confirmation of Grant to the Estate of the late Francis C Chumo wherein his beneficiaries were supposed to share his assets according to the schedule therein provided.
32. The issue of locus standi was defined in the case of Alfred Njau & 5 Others v City Council of Nairobi [1983] eKLR to mean- "the right to appear in Court." Indeed the Court of Appeal in this case had held as follows:
- ".....to say he has no *locus standi* means he cannot be heard, even on whether or not he has a case worth listening to."
33. At the risk of delving into the arena of the Probate court, Rule 41(5) of the Probate and Administration Rules provides as follows:
- "Where the court in exercise of its power under section 71(2) (a) of the Act directs that a grant be confirmed it shall cause a certificate of such confirmation in Form 54 to be affixed to the grant together with the seal of the court and ..."
34. It is trite that an administrator of the deceased's Estate is required to file for Confirmation of the Grant of Letters of Administration when the statutory period of six months lapses at which point, the administrator(s) will file a sworn affidavit indicating how the estate should be shared between the heirs and liabilities is launched. Once the court is satisfied on the proposed mode of distribution, it shall issue a certificate of confirmation of Grant. The Administrator(s) will then have the authority to transfer the estate's assets to the beneficiaries as per the mode of distribution endorsed by the court.
35. In this case, the Letters of Administration to the estate of Francis K Chumo were issued to the Public Trustee of the Republic of Kenya and the certificate of Confirmation of Grant to the estate of Francis K Chumo, in regard to the suit land, was issued to the Public Trustee of the Republic of Kenya on August 10, 1988, for distribution, vide High Court Succession Cause No 233 of 1983.
36. Let us not forget that (s)he that comes to equity must come with clean hands and must also do equity. After considering the above captioned provisions of the law, the distribution scheduled therein attached. It is interesting to note that on the August 23, 1982, Ruth Cheron Chumo (now Deceased) managed to transfer to herself Kericho/Silibwet/881, land which was registered to the deceased Francis C Chumo, before the filing of a Succession Cause No 233 of 1983, and wherein Letters of



Administration had subsequently been issued to the Public Trustee. Now her administrators (Plaintiffs herein) have alleged that the 1st Defendants has no locus to bring the suit on behalf of the estate of Francis C Chumo. I believe that the issue of locus standi regarding both parties herein, in the instant matter cannot be determined just by looking at the pleadings and without ascertaining the facts during a trial, which then removes the issue of locus standi herein from the periphery of a Preliminary Objection.

37. In the end I find that the Preliminary Objection dated the August 22, 2022 lacks merit and is herein dismissed with costs at a lower scale since it was undefended. Parties to comply with pre-trial directions within the next 21 days.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 16TH DAY OF FEBRUARY 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

