



REPUBLIC OF KENYA



**KENYA LAW**

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**Opondo & another v Ogutu (Environment & Land Case  
E011 of 2022) [2023] KEELC 16135 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16135 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE E011 OF 2022**

**AY KOROSS, J**

**MARCH 16, 2023**

**BETWEEN**

**LAWRENCE OTIENO OPONDO ..... 1<sup>ST</sup> PLAINTIFF**

**VINCENT ODONGO OKUMU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOHN OPONDO OGUTU ..... DEFENDANT**

**RULING**

**Introduction**

1. This is a ruling in respect of a notice of motion by the plaintiffs dated 7/12/2022 in which they sought temporary injunctive orders and an order for accounts to be undertaken and a notice of preliminary objection by the defendant dated December 1, 2023. The preliminary objection condemned the motion and suit for being statutory barred.
2. As directed by the court, parties' counsels disposed of the motion and preliminary objection by way of written submissions. Mr. Maube, counsel for the plaintiff filed two written submissions. One in support of the motion dated December 19, 2022. Counsel's other submissions dated January 24, 2022 were in response to the preliminary objection. Mr. Okello, the defendant's counsel filed his written submissions dated January 19, 2023.

**Preliminary Objection**

3. The preliminary objection contended this court lacked jurisdiction to entertain the entire suit and motion. The 7 grounds of objection were encapsulated in the provisions of the [Limitation of Actions Act](#).
4. In brief, they were *inter alia*, by Section 4(1)(a), the plaintiffs' claim on breach of contract which accrued from 1988 lapsed in 1994 - a 6 year period; by Sections 4(2) and 26, the plaintiffs' claim on



fraud which accrued from 2004 lapsed in 2007 – a 3 year period; by Section 4(3), the plaintiffs’ claim on accounts which accrued from 1988 lapsed in 1994 - a 6 year period; by Section 7, the plaintiffs’ claim for recovery of land which accrued from 1988 lapsed in 2000 - a 12 year period; by Section 8, the plaintiffs’ claim for distress for rent, arrears and damages thereof accrued from 1988 lapsed in 1994 – a 6 year period.

5. Counsel contended the plaintiffs had not sought leave to file these causes of action within the statutory period and the plaintiffs’ pleadings should be struck out.

### **Notice of motion and replying affidavit**

6. The motion was moved pursuant to the provisions of Sections 1A, 1B and 63 (c) and (e) of the Civil Procedure Act and Order 40 Rules 1(a) of the Civil Procedure Rules. The plaintiffs sought the following reliefs: -

- a. That an order of temporary injunction do issue against the defendant whether by himself, or his officers, servants and or agents or otherwise to forthwith, immediately be restrained from entering, alienating, transferring, charging, pledging, leasing, building upon, collecting rent, wasting or in any manner whether or howsoever dealing or interfering with the plaintiffs’ peaceful and quiet possession of all or any part of all that parcel of land known as L.R. No. 12045/61 (Siaya Municipality Block 1/252) [‘suit property’] pending the hearing of this suit.
- b. An order do issue authorizing the plaintiffs to retain a land/estate valuer to take truthful, just and honest accounts of the suit property and tabulate the sums of rental income that the suit property has yielded and or has been received by the defendant from the year 1988 but not remitted to the estate.

7. The application is premised on the grounds enumerated on the face of the motion and the annexed supporting affidavit of the 1<sup>st</sup> plaintiff Lawrence Otieno Opondo.
8. In summary, he deponed the plaintiffs were respectively son and grandson of Erasto Opondo Otieno (deceased and hereinafter ‘Erasto’). He was an administrator of Erasto’s estate. Erasto was the registered owner of the suit property. After an agreement with some of Erasto’s relatives, the defendant had been collecting rent from the suit property from 1988 to their detriment. He had denied them access and illegally held himself as the owner. The defendant had made fraudulent attempts to succeed Erasto’s estate and transfer the suit property to his name.
9. In addition to the preliminary objection, the defendant filed a replying affidavit dated January 12, 2023 in which he made several depositions where he mostly denied the assertions made in the 1<sup>st</sup> plaintiff’s affidavit. He contended he and the plaintiffs were distant relatives. Some of the assertions made in the supporting affidavit were untruthful and/or strange to him. He had entered into an agreement for purchase of the suit property from some of Erasto’s relatives and he had constructed upon it. He had been in peaceful occupation and possession of the suit property from 1984 to 2004 and his claim of adverse possession had accrued.

### **Plaintiffs’ submissions**

10. In support of the motion, the plaintiffs identified three issues for determination;
  - (a) whether the plaintiffs had established a *prima facie* case with probability of success



- (b) whether irreparable harm could be compensated by an award of damages and,
- (c) where did the balance of convenience tilt?
11. On the 1<sup>st</sup> issue, counsel submitted the plaintiffs were the heirs and beneficiaries of the estate of Erasto and held a certificate of confirmation of grant and the defendant did not have a colour of right or title over the suit property. Counsel placed reliance on the Court of Appeal decision of *Mrao Ltd v First American Bank of Kenya and 2 others* that held -
- ‘A *prima facie* case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.’
12. On the 2<sup>nd</sup> issue, counsel submitted the estate of Erasto and the plaintiffs would suffer harm which could not be compensated by an award of damages because the defendant would continue unjustly enriching himself without accounting to the estate. On the last issue, counsel submitted the balance of convenience tilted in the plaintiffs’ favour. On this last issue, counsel placed reliance on the case of *Pius Kipchirchir Kogo v Franklin Kimeli Tenai* [2018] eKLR where the court stated: -
- ‘Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them is greater than that which may be caused to the Defendants. If the inconvenience is equal, it is the Plaintiff who suffers.’
13. In the supplementary submissions, counsel waded into the merits of the main suit. In his submissions, counsel submitted the suit was not statutory barred.

#### **Defendant’s submissions**

14. Counsel submitted the grounds raised in the preliminary objection fell within the confines of pure points of law and were based on undisputed facts. Counsel placed reliance on the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* 1969 E.A. 696. Counsel argued this court did not have jurisdiction to handle the suit. To buttress his position, counsel placed reliance on the decision of *Dickson Ngige Ngugi v Consolidated Bank Ltd (Formerly Jimba Credit Corporation Limited & another)* [2020] eKLR which stated: -
- ‘Gathoni –vs- Kenya co-operative Cremires (sic) Ltd (1982) KLR 104 Potter, JA stated the rationale of the Law of Limitation as follows: -
- “The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”
15. Counsel also relied on the case of *Kariuki v Mbataru* [2004] eKLR where a party had sought accounts from a partnership that had ceased to exist and in arriving at its decision, the court stated: -
- ‘The partnership issues involved are issues in contract, and for the relevant cause of action, the limitation period is six years. All the evidence shows that if at all a partnership did exist, then even the plaintiff has acknowledged that it came to an end in 1995, in which case that



is the latest date during which the cause of action would have arisen; and six years from then takes us to the year 2001. The suit was filed on 20th June, 2003 – rather too late.’

16. On the motion, counsel placed reliance on the principles established by *Giella v Cassman Brown & another* [1973] EA 358 which settled the principles as thus: -

‘Firstly, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.’

17. On *prima facie* case, counsel contended the defendant was a purchaser for value and an adverse possessor. It was counsel’s submissions the plaintiffs had not established irreparable harm that could not be adequately compensated by an award of damages. Counsel submitted the balance of convenience tilted in the defendant’s favour since he had been in occupation for a period spanning 3 decades.

### **Analysis and Determination**

18. Having carefully considered the preliminary objection, motion, affidavits rival submissions together with provisions of law and judicial precedents cited, the issues falling for determination are: -
- a. Whether the preliminary objection has met the legal threshold and is merited.
  - b. Whether the plaintiffs have met the threshold to warrant grant of an order of temporary injunction.

### **Whether the preliminary objection has met the legal threshold and is merited**

19. The case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors* (supra) has long settled the principle of preliminary objections. A preliminary objection must be on a point of law and it is premised on the assumption that all the facts pleaded by the other side are correct. At page 700 paragraphs D-F Law JA had this to say:

‘...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. The defendant’s counsel asserted the plaintiffs causes of action on breach of contract, fraud, accounts, recovery for land and rent were statutory barred. To assert his position, counsel pointed out to several paragraphs in the plaintiffs’ pleadings which according to him evidenced this court could not exercise jurisdiction over these particular causes of action.
21. The *Limitation of Actions Act* has imposed limits on authorities of courts if a cause of action has been filed outside stipulated timelines without leave of the court. In other words, the question of limitation is a question that goes to the root of the jurisdiction of a court and it raises a pure point of law. The facts of the plaintiffs’ case as highlighted by the defence counsel are undisputed and it is my finding the defence has raised pure points of law which if argued, may dispose of the suit.



22. 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. It is trite law that reliefs sought in a claim must flow from pleadings. Although, the plaintiffs in their plaint put forward several causes of action including breach of contract, fraud, accounts, recovery of land, rent and presumably trespass, they sought reliefs on only two causes of action; accounts and presumably trespass. Be that as it may, I will proceed to address if the causes of action alluded to in the preliminary objection are statutory barred. The question as to when the causes of action arose can be answered from the pleadings.
23. On breach of contract, arrears for rent and accounts, the defendant's counsel asserted by virtue of Sections 4(1)(a), 4(3) and (8) of the Limitation of Actions Act, the plaintiffs' claims were statutory barred. Section 4(1)(a) and 4(3) states thus:
- (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
    - (a) actions founded on contract;
    - (b) .....
    - (c) .....
    - (d) .....
    - (e) .....
  - (2) .....
  - (3) An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action.'

While Section 8 provides as follows: -

'An action may not be brought, and distress may not be made, to recover arrears of rent, or damages in respect thereof, after the end of six years from the date on which the arrears became due.'

24. Paragraphs 6,7, 8, 9, 10, 15, 20, and 24 of the plaint contended in part 'In the month of January 1984, the defendant...entered into a verbal agreement with one of the widows and sons...wherein the defendant was to complete construction...and thereafter act as an agent to collect rent therefrom and share the proceeds of the said rent in the ration of 70:30...then it was further agreed between the said widow and son of the deceased that the defendant would refund himself the money he had spent in the construction from his share of the rent proceeds...Despite completion of the construction works of the uncompleted shops by the defendant late in the year 1987 and...yielding regular income from the year 1988 ...on 18/12/1999 I went to the suit property to demand that the defendant pays the sum due to the deceased's estate...the defendant has leased the property to 3<sup>rd</sup> parties and has been receiving income from the year 1988...tabulate rental income...from 1988.'
25. My understanding of these paragraphs is that the defendant having partially fulfilled the contract by constructing on the suit property, was to commence remittance of 30% of the rental sum to Erasto's family from the year 1988. The 1<sup>st</sup> plaintiff must have been aware of default because he allegedly made a demand from the defendant on 18/12/1999. I agree with the defendant that time started to run from 31/12/1988 and ended on 31/12/1994. See Kariuki v Mbataru (supra), Dickson Ngige Ngugi v Consolidated Bank Ltd (Formerly Jimba Credit Corporation Limited & another (supra) and



- Sobanlaldurgadass Rajput & another v Divisional Integrated Development Programmes Co Ltd* [2021] eKLR. It is my finding the plaintiffs' claims on breach of contract, arrears for rent and accounts were statutory barred.
26. At this point, I do not want to speculate on the nature of mesne profits the plaintiffs are seeking. See *Lilian Njeri Muranja & John Muranja Mahinda v Virginia Nyambura Ndiba & Kajiado County Government* [2014] eKLR
27. Fraud is a tortious action. 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:
- Provided that an action for libel or slander may not be brought after the end of twelve months from such date.’
28. By Section 26 of the *Limitation of Actions Act*, a claim of fraud does not begin to run until a claimant has discovered it. In paragraph 13 of the claim, the plaintiffs pleaded and particularized fraud. From the plaintiffs bundle of documents, the fraudulent activities took place at different intervals. This notwithstanding, the particulars of fraud and illegality were more or less pleaded by the 1<sup>st</sup> plaintiff in his defence dated 9/12/2008 in Siaya PM No.31 2008. Obviously, the plaintiffs must have been privy to fraud by on or before 9/12/2008. It is my finding the plaintiffs claim on fraud was therefore statutory barred as from 9/12/2011.
29. Within the provisions of Section 7 of the *Limitation of Actions Act*, a claim for recovery of land must be brought within a period of 12 years. This provision of law provides as follows: -
- ‘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.’
30. In paragraph 9 of the plaint, the plaintiffs have asserted the defendant refused to hand over the suit property to them and denied them access. In prayers 22 and 25 of the plaint, the plaintiffs sought among others permanent injunctive orders, general damages, mesne profits and eviction. All these prayers fall within the claim of trespass.
31. Trespass is a tortious action. Within the provisions of Section 4 of the *Limitation of Actions Act*, an action founded on a tort must be commenced within three years from when the cause of action arose. *Clerk and Lindsel on Torts* 16<sup>th</sup> Edition Paragraph 23-01 defined a continuing trespass as follows;
- ‘Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.’
32. As at this point, this court is uncertain if the plaintiffs claim is on trespass, continuous trespass or at all. This will have to abide the outcome of the main suit.

**b)Whether the plaintiffs have met the threshold to warrant grant of an order of temporary injunction.**

33. In applying *Giella v Cassman Brown* (supra), the plaintiffs had to demonstrate that they had established a *prima facie* case with probability of success. The 1<sup>st</sup> plaintiff is the administrator of the estate of Erasto. This court is uncertain if the property has changed hands to the names of the plaintiffs but what is certain is that as at March 22, 2010, the suit property was still registered in Erasto's name. At this



point this court is uncertain of the capacity of the plaintiffs to institute suit in their personal names. The plaintiffs have established a *prima facie* case. However, the plaintiffs needed to meet all the other principles of injunctions.

34. The plaintiffs equally had to demonstrate they would suffer irreparable harm that could otherwise not be compensated by an award of damages. From the plaintiffs' pleadings, it is evident Erasto's family has not been in occupation and possession of the suit property since 1980s. In my considered view, in the event the plaintiffs succeed in their claim, they can be compensated by an award of damages in the event the defendant continues utilizing the suit property.
35. Having analyzed the 1<sup>st</sup> and 2<sup>nd</sup> principles, it follows the inconvenience caused to the defendant would be greater than that which would be caused to the plaintiffs if an injunction was granted but the defendant ultimately succeeds in his counterclaim. See *Pius Kipchirchir Kogo v Franklin Kimeli Tenai* (supra).
36. For the reasons stated above, it my ultimate finding that the plaintiffs' claims for breach of contract, arrears for rent, accounts and fraud are statutory barred and I hereby strike out the offending paragraphs from the plaint. The motion dated December 7, 2022 is not merited and I hereby dismiss it. It is trite law that costs follow the event and I award costs to the defendant.

**DELIVERED AND DATED AT SIAYA THIS 16<sup>TH</sup> DAY OF MARCH 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**MARCH 16, 2023**

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

Mr. Okello for the defendant

N/A for plaintiffs

Court assistant: Ishmael Orwa

