



REPUBLIC OF KENYA



KENYA LAW
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**Kimani v Agropack Ltd & 3 others (Environment & Land Case
1 of 2023) [2025] KEELC 2961 (KLR) (24 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 2961 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 1 OF 2023**

**JM ONYANGO, J
MARCH 24, 2025**

BETWEEN

WILLIAM NJIHIA KIMANI PLAINTIFF

AND

AGROPACK LTD 1ST DEFENDANT

ONESMUS KIMANI NGUNJURI 2ND DEFENDANT

RUTH MUTHONI NGUNJIRI 3RD DEFENDANT

NGANGA MBUGUA 4TH DEFENDANT

RULING

1. The Plaintiff initiated this suit through a Complaint dated 23rd May 2023 and amended on 1st November 2023. However, the Amended Complaint retained the same date of 23rd May 2023 and it was not accompanied by a Verifying Affidavit. His case is that through an agreement dated 15th August 2016, the 1st, 2nd, and 3rd Defendants agreed to pay him Kshs 2,000,000 and carve out a half-acre portion of land from property Land Reference No. 25009 (hereinafter referred to as “the suit land”) situated in South East of Kiambu Municipality, and transfer the same to him as a condition for rescinding an earlier agreement between him and the 1st, 2nd, and 3rd Defendants regarding sale of the suit land.
2. Being apprehensive that the 1st, 2nd, and 3rd Defendants intended to sell the entire suit land in disregard to his interests and to the agreement dated 15th August 2016, the Plaintiff filed this suit.
3. The Plaintiff subsequently filed a Notice of Motion application dated 5th June 2023 and amended on 18th October 2023 seeking that a prohibitory order be issued and served upon the Chief Land Registrar and registered against Land Reference Number 25006 until the final determination of the suit against the 1st, 2nd and 3rd Defendants. The 4th Defendant was sued as a guarantor for the due performance of the agreement dated 15th August 2016, by the 1st, 2nd, and 3rd Defendants.



4. The 1st, 2nd and 3rd Defendants filed their Statement of Defence dated 8th October 2024. The 4th Defendant entered appearance and filed a Statement of Defence dated 29th September 2023.
5. This ruling is in respect of the 1st, 2nd and 3rd Defendants' Preliminary Objection dated 8th October 2024 in which they raise the following grounds:
 - i. That this court does not have jurisdiction to hear and determine the suit and the application as the Plaintiff's cause of action that is founded on the purported contract dated 15th August 2016 is time-barred by dint of section 4(1) (a) of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya.
 - ii. The Amended Plaintiff dated 23rd May 2024 offends Order 4 Rules 1(1) (f) and 2 of the *Civil Procedure Rules* as it is not accompanied by verifying affidavits.
 - iii. The suit is bad in law, incurably defective and should be struck out with costs to the Plaintiff.
6. The Preliminary objection was canvassed by way of written submissions. The 1st, 2nd and 3rd Defendants filed written submissions dated 24th January 2025 while the Plaintiff filed written submissions dated 28th January 2025.

1st, 2nd and 3rd Defendants' Submissions

7. Counsel for the 1st, 2nd, and 3rd Defendants relied on Section 4 (1) (a) of the *Limitation of Actions Act*, Cap 22, Laws of Kenya to submit that the Plaintiff initiated the suit through a Plaintiff dated 23rd May 2016 which is more than 6 years since the cause of action for breach of contract arose. Counsel further submitted that this court neither has jurisdiction to determine the Plaintiff's suit since it is time-barred, nor does it have jurisdiction to entertain an application for extension of time. Counsel relied on the Court of Appeal decision in the cases of *Divecon vs Samani*: Civil Appeal No. 142 of 1997, *Beatrice Kabai Adagala vs Postal Corporation of Kenya* [2015] eKLR and *Rift Valley Railways (Kenya) Ltd vs Hawkins Wagunza Musonye & Desidery Tyson Otieno* [2016] eKLR in support of his submission.
8. Counsel urged the court to strike out the Plaintiff's suit with costs because it is statutorily time-barred, hence bad in law and incurably defective.
9. On whether the Amended Plaintiff should be struck out for want of a verifying affidavit, counsel relied on the decision in the case of *Priska Onyango Ojuang' & Another vs Henry Ojuang Nyabende* [2018] eKLR where the court stated that:

“Where a claim is commenced through a plaintiff or counterclaim filed without an accompanying verifying affidavit in accordance with Order 4 Rule 1 (2) of Civil Procedure Rules, then such a claim is improperly before the court and is liable to be struck out on the court's own motion, or on being moved by a party to the proceedings.”
10. Counsel urged the court to be guided by the above decision and strike out the Amended Plaintiff for want of a verifying affidavit.
11. In conclusion, counsel submitted that the P.O is merited hence it should be upheld.

Plaintiff's Submissions

12. On the other hand, learned counsel for the Plaintiff identified only one issue for determination: (i) whether the Plaintiff's suit is time-barred by dint of Section 4 (1) (a) as read with Section 7, 9(3) and 19 (1) of the *Limitations of Actions Act* Chapter 22 of the Laws of Kenya.



13. Counsel relied on the decisions in the cases of *Interim Independent Electoral Commission* [2011] eKLR and *Owners of Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Limited* [1989] KLR 1 to submit that a court cannot validly take any step without jurisdiction.
14. Counsel relied on Sections 7, 19 (1), 9(3) of the *Limitation of Actions Act* and the decision in the case of *Geogory Mburu vs Thika District Hospital* [2018]eKLR to submit that the agreement between the parties dated 15th August 2016 was breached in 2016 while this suit was filed on 23rd May 2023 which is 7 years since the cause of action accrued. Counsel further submitted that the limitation period of 12 years contemplated by Sections 7, 9(3) and 19(1) of the *Limitation of Actions Act* has not yet crystallized given that the cause of action in this suit is for specific performance of an agreement on disposition of land as well as an action for recovery of proceeds of sale of land.

Issues for determination

15. Having considered the Preliminary Objection and rival submissions the issues for determination are:
 - i. Whether the suit offends suit offends the mandatory provisions of Section 4 of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya.
 - ii. Whether the Amended Plaintiff ought to be struck out for lack of a verifying affidavit.

Analysis and Determination

16. The court in the case of *Mukisa Biscuit Company Ltd v West End Distributors Limited* (1969) E.A 696. held as follows:

“...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, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of Preliminary objections does nothing but unnecessarily increase the costs and occasions confusion of the issues. This improper practice should stop.

17. In the instant case the Defendant has raised the question of the suit being time-barred and the same offending the mandatory provisions of Section 4 of the *Limitation of Actions Act*, which is a pure point of law. Section 4 of the *Limitation of Actions Act* provides that:

- “(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) actions to enforce a recognizance;
 - (c) actions to enforce an award;



- (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
- (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”

18. The parties are not in agreement on what the cause of action is. The 1st, 2nd and 3rd Defendants contend that the cause of action is breach of the agreement dated 15th August 2016 while the Plaintiff contends that the cause of action in this suit is specific performance of an agreement on disposition of land as well as an action for recovery of proceeds of sale of land. A perusal of the Plaintiff and Amended Plaintiff reveals that the Plaintiff seeks various reliefs as follows:
- a. The Plaintiff craves for leave of the court to extend time within which to file the case if need be;
 - b. The case be deemed as filed on time.
 - c. The prohibitory order be served upon the Chief Land Registrar Ardhi house and registered against title L.R Number 25009 until the final determination of this suit
 - d. The Defendants do curve out one acre as claimed and transfer the same to the Plaintiff herein forthwith or in the alternative, paragraph nine of the Plaintiff do apply
 - e. That in case of the Defendants failing to curve out the portion, the district surveyor Kiambu be ordered to curve out the same form L.R 25009 situate south east of Kiambu and the court do execute the transfer of the portion to the Plaintiff on behalf of the Defendants.
 - f. The Chief Land Registrar be ordered to register the transfer forthwith and release the title to the Plaintiff.
 - g. That the Kshs. 2,000,000 owed to the Plaintiff to carry interest from 15th August 2016 at the rate of 14% per annum until payment in full.
 - h. Any other relief that this Honourable court may deem fit and just.
19. It is not in dispute that the said reliefs flow from the sale agreement dated 16.8.2016 which was allegedly breached by the Defendants. Further, in apparent recognition of the fact that the suit is time-barred, the Plaintiff has sought extension of time.
20. The Plaintiff relied on Sections 7, 9 (3), and 19 (1) of the *Limitation of Actions Act*. Section 7 and 9 (3) is on actions for recovery of land while Section 19 (1) is on actions to recover mortgage money or proceeds of sale of land. None of the sections apply in the present suit given that the suit does not involve an action for recovery of land. For one to recover land, they must have been in possession of the same before they lost it in one way or the other.
21. Secondly, this is not an action to recover mortgage money or proceeds of sale of land. There is no mention of a mortgage in the suit and the suit land is yet to be sold for there to be an action to recover proceeds of sale of the same. The court finds that the cause of action in this suit is for breach of contract and since the Plaintiff admits that the same was breached in 2016, then the suit is time-barred and the court lacks jurisdiction to entertain the same.



22. In view of the foregoing, I see no need to venture into the second issue for determination. This court has no choice but to down its tools. The court therefore finds that the preliminary objection is merited. The suit is hereby struck out.

23. The Plaintiff shall bear the costs of the preliminary objection and the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 24TH DAY OF MARCH 2025.

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J. M ONYANGO

JUDGE

In the presence of :

Mr. Ndegwa for Mr. Rapando for the 1st, 2nd and 3rd Defendants

No appearance of the Plaintiff

Court Assistant: Hinga.

