



REPUBLIC OF KENYA



**Karauni & another v Thiongo (Environmental and Land Originating Summons
1BB of 2024) [2025] KEELC 1434 (KLR) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1434 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 1BB OF 2024**

JM ONYANGO, J

MARCH 20, 2025

BETWEEN

ROBINSON KABUCHO KARAUNI 1ST PLAINTIFF

JENNIFER JOYCE WANJIRU GATHARIA 2ND PLAINTIFF

AND

JOHN MUGO THIONGO DEFENDANT

RULING

1. The Plaintiffs initiated this suit through originating summons dated 8th January 2024. Their case was that the 1st Plaintiff is a bonafide purchaser for value of land parcel number Dagoretti/Uthiru/T.290 (hereinafter referred to as “the suit property”) having purchased it from the Defendant pursuant to the agreement for sale of land dated 5th July 2005.
2. The suit property was registered in the name of Yusuf Thiongo Kanyi (deceased) and the Defendant is one of the administrators of his estate. The Plaintiffs contend that the sale was further consented to by Damaris Wanjiku Ngugi the co-administrator of the estate of Yusuf Thiongo Kanyi (deceased). The Plaintiff claims that despite obtaining a certificate of confirmation of grant in which he was confirmed as the sole and absolute beneficiary of the suit property, the Defendant has failed to transfer the title to the suit property to the 1st Plaintiff prompting him to file this suit.
3. This ruling is in respect of the Defendant’s Preliminary Objection dated 16th May 2024 in which he raises the following grounds:
 - i. That the suit herein (OS) offends the mandatory provisions of section 4 of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya.
 - ii. That the suit herein is bad in law as it contravenes the provisions of Succession Act Cap 160, Laws of Kenya.



- iii. That the agreement for sale of land is null ab initio for lack of capacity on the part of the vendor.
 - iv. That the orders sought have the effect of intermeddling with the estate of the deceased.
 - v. That the orders sought are not available to the applicant on account of clause 9 (d) of the agreement.
4. Upon being served with the Notice of Preliminary Objection, the Plaintiffs filed a Supporting Affidavit sworn by their advocate Clinton Kabuthia Kamau in which he deponed that this suit came about as a result of Nairobi High Court Succession Cause No. 2708 of 2005 in which the 1st Plaintiff was the Protestor.
 5. Counsel stated that parties in the succession matter recorded a consent requiring the 1st Plaintiff to pay the final purchase price for the suit property within 7 days and in turn he be registered as a beneficial owner of the property. The 1st Plaintiff complied with the order by paying Kshs 320,000 to Ms. Gatumuta & Company Advocates who were on record for the Defendant who was the Petitioner in the succession suit. Counsel added that the consent was adopted as an order of the court and has never been challenged. Counsel added that the court file went missing for a period of three years making it impossible to execute the consent order.
 6. Counsel contended that when the 1st Plaintiff went to register a restriction on the suit property at the Kiambu Land Registry, he was informed that the Green Card to the suit property was missing. Counsel further contended that the Defendant was issued with a Certificate of Confirmation of Grant on 26th June 2023 confirming him as the sole and absolute beneficiary of the suit property.
 7. It was counsel's contention that the Defendant filed the P.O in a bid to subvert justice.
 8. The Preliminary objection was canvassed by way of written submissions and both parties filed their submissions.

Defendant's Submissions

9. Counsel for the Defendant identified the following two issues for determination: (i) whether what has been raised amounts to a preliminary objection; and (ii) whether the suit should be struck out.
10. On whether what has been raised amounts to a preliminary objection, counsel relied on the decision in the case of *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others* [2015] eKLR to submit that a PO raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.
11. Counsel further submitted that the Defendant has raised the issue that the matter is statute barred which is an issue that is not dependent on facts. Counsel relied on the case of *John Omollo Nyakongo t/a H.R Ganijee & Sons v Kenya Power & Lighting Co. Ltd* [2022] eKLR. Counsel added that the issue of Limitation of Actions as well as meddling with the assets of the deceased are pure points of law. Counsel argued that what had been raised by the Defendant amounted to a preliminary objection.
12. On whether the suit should be struck out, counsel submitted that the suit contravenes Section 4 of the *Limitation of Actions Act* given that it was filed after the expiry of the statutory period stipulated for filing actions founded on contract.
13. Counsel further submitted that the suit contravenes the *Law of Succession Act*, Cap 160 Laws of Kenya. Counsel submitted that the Plaintiffs lacked the legal capacity to deal with the deceased's property. Counsel urged the court to dismiss the suit given that it did not meet the legal requirements for a valid succession claim.



14. Counsel contended that the agreement for sale of land was null ab initio because the vendor lacked capacity to enter into the agreement. Counsel relied on the nemo dat quod non habet principle to submit that the Defendant did not have the legal capacity to sell the suit property given that Yusuf Thiongo Kanyi (deceased) was the registered owner of the same.
15. Counsel further contended that the reliefs sought by the Plaintiffs if granted would have the effect of intermeddling with the property of the deceased. Counsel argued that the suit seeks to interfere with matters that are subject to the jurisdiction of the succession court.
16. Lastly, counsel asserted that the reliefs sought by the Plaintiffs are untenable because they are barred by Clause 9 (d) of the agreement for sale of land. The said clause stipulates that if either party fails to finalize the transaction or withdraws from it, then the defaulting party is obligated to pay 5% of the purchase price to the other party.
17. Counsel further asserted that clause 9(d) unequivocally limits the reliefs available to the applicant given that it neither provides for the remedy of specific performance nor the remedies the Plaintiff sought in the originating summons.

Plaintiff's Submissions

18. On the other hand, learned counsel for the Plaintiffs identified the following two issues for determination: (i) whether what has been raised by the Defendant amounts to a preliminary objection; and (ii) whether the suit should be maintained.
19. On whether what was raised by the Defendant amounted to a preliminary objection, counsel submitted that a preliminary objection can only be premised on undisputed facts and must raise a pure point of law which arise from the pleadings. Counsel relied on the decision in the case of Avtar Singh Bhamra & Another v Oriental Commercial Bank Kisumu HCCC No. 53 of 2004, in support of his submission.
20. Counsel contended that the Defendant's objection is grounded on the argument that the suit is time-barred. Counsel further contended that the issue of when the cause of action arose is a factual issue that can only be ascertained from the facts. Counsel added that the completion of the subject sale agreement was to happen in the future upon the Defendant petitioning the court for Grant for Letters of Administration Intestate and eventually upon the confirmation of the Grant of Letters of Administration. It was counsel's assertion that the cause of action therefore arose in 2023, when the Defendant failed to transfer title to the 1st Plaintiff even after getting the legal authority to transfer the suit property on 26th June 2023. Counsel added that the issue of when the cause of action arose was in contention and it could only be determined during trial. Counsel relied on the decision in the cases of Lemitei Ole koros & Another v Attorney General & 3 Others [2016]eKLR and Quick Enterprises Ltd v Kenya Railways Corporation HCCC No.22 of 1999 in support of his submission.
21. Counsel added that the final payment of the purchase price of Kshs 320,000 was paid in court in Succession Cause No. 2708 of 2005 and as a result a consent was recorded and adopted as an order of the court.
22. On whether the suit should be maintained, counsel reiterated that the suit is not time barred and does not offend the provisions of Section 4 of the *Limitation of Actions Act*, given that the cause of action arose on 26th June 2023. It was counsel's assertion that the Plaintiffs are not indolent and that the 1st Plaintiff appeared in Succession Cause No. 2708 of 2005 in the year 2008 and was an active protester in the matter until its conclusion in the year 2023.



23. Counsel contended that the Plaintiffs have never taken possession or handled the suit property in any way for it to be argued that they have intermeddled with the estate of Yusuf Thiongo Kanyi (deceased). Counsel further contended that the issue of intermeddling was never raised in Succession Cause No. 2708 of 2005. Counsel asserted that on 3rd June 2008 the Defendant was ordered by the court in Succession Cause No. 2708 of 2005 to include the name of the 1st Plaintiff as beneficial owner of Land Parcel Number Dagoretti/Uthiru/T.290. However, the court file in that suit mysteriously went missing immediately thereafter for a period of 3 years. Counsel urged the court to agree with the Plaintiffs that the Law of Succession Act was not violated and that any such argument can be raised during the hearing.
24. On the issue of validity of the sale agreement and the Defendant's capacity to contract, counsel submitted that the subject sale agreement was an executory contract also known as a future consideration contract. Counsel added that the 1st Plaintiff having fulfilled his end of the bargain, then the Defendant is obligated to fulfill his promise after the attainment of the future condition that was to be met.
25. Counsel argued that the Defendant is responsible for the duration it has taken him to settle the succession matter and eventually transfer title of the suit property therefore the court should not allow him to benefit from his delaying tactics in settling the dispute.
26. In conclusion, counsel urged the court to determine the matter on merit so that the court can issue specific performance orders directing the Defendant to transfer the title to the suit properties to the Plaintiffs.

Issues for determination

27. Having considered the Preliminary Objection, supporting affidavit and rival submissions the issue for determination is:

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.

Analysis and Determination

28. Before delving into the merits of the Preliminary Objection it is important to examine whether the P.O meets the definition of a P.O as set out in the case of *Mukisa Biscuit Company Ltd v West End Distributors Limited* [1969] E.A 696. In the said case the court 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.”



29. In the instant case the Defendant has raised the question of the suit being time-barred and it offending the mandatory provisions of Section 4 of the *Limitation of Actions Act*, which is a pure point of law. The Defendant added that this suit is bad in law given that it contravenes the provisions of the Succession Act Cap 160, Laws of Kenya; the agreement for sale of land is null ab initio for lack of capacity on the part of the vendor; the orders sought have the effect of intermeddling with the estate of the deceased; and that the orders sought are not available to the applicant on account of clause 9(d) of the agreement. All the latter objections are matters of fact which need to be determined after a hearing has been conducted and evidence produced.
30. With regard to the first objection, 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.”
31. It is clear from the pleadings that the Plaintiffs claim in the suit is based on breach of a contract, however, parties are not in agreement on when the cause of action arose.
32. The Defendant contends that the cause of action arose in 2005 when the contract was breached, hence the suit is now time-barred.
33. The Plaintiffs on the other hand contend that the contract was subject to the Defendant obtaining the Grant for Letters of Administration for the Estate of Yusuf Thiongo Kanyi (deceased) hence the cause of action arose on 26th June 2023.
34. Clause 9 (c) of the Agreement for Sale dated 5th July 2005 reads as follows:
- “The vendor shall obtain Letters of Administration of the Estate of Yusuf Thiongo Kanyi and shall cause the sold property to be transferred to the purchaser upon confirmation of Grant of Letters of Administration.”
35. It is clear that the contract was subject to a future act which occurred on 26th June 2023. Therefore, the cause of action arose on the said date. This suit was filed in 2024 barely a year later, hence it is not time-barred.
36. In view of the foregoing, the Preliminary Objection lacks merit and it is hereby dismissed. The Defendant shall bear the costs of the Preliminary Objection.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 20TH DAY OF MARCH 2025



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J. M. ONYANGO

JUDGE

In the presence of:

Mr Aluoch for the Plaintiffs

Mr Otieno for the Defendant

Court Assistant: Hinga

