



REPUBLIC OF KENYA



**Timau Agro Industries Limited v Bayshore Limited (Environment & Land
Case E76 of 2022) [2023] KEELC 17628 (KLR) (22 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17628 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE E76 OF 2022

LL NAIKUNI, J

MAY 22, 2023

BETWEEN

TIMAU AGRO INDUSTRIES LIMITED PLAINTIFF

AND

BAYSHORE LIMITED DEFENDANT

RULING

I. Introduction

1. The Defendant/Respondent – Bayshore Limited as the Objector raised a preliminary objection dated 24th October, 2022 against the Notice of Motion application and the originating summons suit dated 8th July, 2022 and filed on 12th July, 2022 both instituted by the Plaintiff/Applicants herein. The objection was based on the following grounds reproduced herein verbatim: -
 - a. That the Plaintiff / Applicant cause of action in the Application and originating summons dated 8th July 2022 and filed on 12th July 2022 is time barred under provisions of section 4 (1) (a) of the Limitation Act Cap 22 without seeking leave from this Honorable court on the way to approach.
 - b. That the Plaintiff/ Applicant cause of action and originating summons dated 8th July ,2022 and filed on 12th July 2022 offends the provisions of Order 37 Rule 6 of the Civil Procedure Act Cap 21, as the nature of the orders sought in the summons do not contain any substantive orders on which the Applicant seeks to extend the limitation period.
 - c. That the basis of the Plaintiff/Applicant’s rights in filing the Application and originating summons dated 8th July are not inherent within the meaning of Order 37 Rule 3 of the Civil Procedure Act Cap. 21 which denotes that the Applicant ought to seek substantive orders for leave and this Honorable Court holds such discretionary powers to entertain the same or make orders dismissing it.



2. The Defendant/Respondent being the objector herein prayed that the pending interlocutory Notice of Motion application and the entire suit in form of originating summons both dated 8th July 2022 and filed on 12th July 2022 by the Plaintiff/Applicant herein to be struck out with costs.

II. The background

3. The originating summons suit is premised upon the provision of Article 40 of *the Constitution* of Kenya, 2010, Sections 25, 26 and 27 of the *Land Registration Act* No. 3 of 2012, Order 37 Rules 3 & 8 of the Civil Procedure Rules 2010. From the filed pleadings, it is evident that the cause of action arose from a breach of contract in form of a Sale Agreement duly entered on 8th June, 2017 between the Plaintiff/Applicant and the Defendant/Respondent for the purchase of all that parcel of land known as Land Reference Number 3713/VI/MN (Miritini, Mombasa County) (Hereinafter referred to as “The Suit Land”) for a consideration of Kenya Shillings Two Thirty One Million Six Sixty Eight Thousand Six and Five Hundred (Kshs. 231,668,605/=). The Directors of both the Plaintiff and the Defendant executed the Agreement for Sale dated 8th June, 2017 terms and condition stipulated thereof. By the time of the execution of the sale agreement there were a number of squatters on the suit property and the vendor undertook to remove them within a given period. Unfortunately, on the given time the Defendant failed to comply with the terms of the contract hence the Plaintiff held that the vendor was in breach of the contract and necessitating the filing of this suit hereof. The Plaintiff/Applicant averred that the Defendant/Applicant was in breach of Clauses 3.4,4.3.4.4 and 6.2 of the Agreement for sale dated 8th June, 2017 that was executed as between the parties’ for the sale and purchase of Land Reference Number 3713/VI/MN (Miritini, Mombasa County)
4. From the filed suit, the Plaintiff/Applicant sought for the following declarations and orders reproduced herein verbatim -
 - a. That a declaration be and is hereby issued that the Defendant is in breach of Clauses 3.4,4.3.4.4 and 6.2 of the Agreement for sale dated 8th June, 2017 that was executed as between the Plaintiff and the Defendant herein for the sale and purchase of Land Reference Number 3713/VI/MN (Miritini, Mombasa County)
 - b. That a declaration be and is hereby issued that the Defendant has unlawfully transferred Land Reference Number 3713/VI/MN (Miritini, Mombasa County) to itself without paying the agreed consideration to the Plaintiff.
 - c. That this Honorable Court be pleased to compel the Defendant to pay to the Plaintiff the balance of the purchase price for Land Reference Number 3713/VI/MN (Miritini, Mombasa County) plus interest thereof to be computed from 90 days from the date of the Agreement for sale dated 8th June, 2017 less Kshs. 15,000,000 being the agreed costs for removing the squatters.
 - d. That this Honorable Court be pleased to award the Plaintiff general damages for breach of contract.
 - e. That in the alternative to order number 3 above, this Honorable Court be pleased to nullify both the Agreement for sale dated 8th June, 2017 for non-performance on the part of the Defendant and the subsequent transfer of Land Reference Number 3713/VI/MN (Miritini Mombasa County) to the Defendant with directions that the Plaintiff retains the sums paid to it by Defendants.
 - f. That the costs of the originating summons be borne by the Defendant.



III. Submissions

5. On 16th November 2022, when the Counsels to the parties appeared before the Honorable Court, they were directed to dispose off the objection by way of written submission. Pursuant to that they obliged and Court reserved a day to render its ruling accordingly.

A. The Written Submission by the Defendant/Respondent

6. On 9th December, 2022, the Learned Counsel for the Defendant/Respondent through the Law firm of Messrs. Ogendo Mwidau, LLP Advocates filed their written Submission. Dated 28th November, 2022. Mr. Ogendo Advocate provided the crux of the preliminary objection in brief. He defined two (2) issues as being the ones to be considered by Court while making a determination of the said objection. These were firstly, whether the cause of action by the Plaintiff through the filed suit was time barred within the provisions of Section 4 (1) (a) of the Limitation Actions Act. Cap. 22 without seeking the leave of this Honorable Court on the way to approach Court. The Learned Counsel submitted that the objection was justified taking that it was purely on matters of law. He held that the Plaintiff's cause of action was time barred with the year 2022 being the final year on which the contractual basis of the sale agreement could be challenged or in the alternative, an application be made by the Plaintiff to seek for leave of this Court to enlarge time as provided for by Law. To buttress this point the Learned Counsel cited several authorities which included the cases of: "Samwuel Waeru – Versus – Geoffrey Muhoro Mwangi (2014) eKLR; Mukisa Biscuit Manufacturing Company Limited – Versus West End Distributoers Limited (1969) EA 696; Independent Electoral & Boundaries Commission – Versus Jane Cheprenger & 2 Others (2015) eKLR; Charles Onchari Ogoti – Versus – Safaricom Limited & Another (2020) eKLR; whereby the Supreme Court held:-

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection – against profligate deployment of time and other resources. And secondly, it serves the public cause of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword for winning a case otherwise destined to be resolved judicially, and on the merits”

7. Secondly, the other issue for determination in according to the learned Counsel was the awarding of Costs to the Defendant/Respondent. Based on law and precedents being the cases of “Reid, Hewett & Co. – Versus – Joseph, AIR 1918 CAL, Myres – Versus – Defries (1880) 5 Ex D 180 and Morgan Air cargo Limited – Versus – Everest Enterprises Limited (2014) eKLR,” he recognized that the issue of costs was a discretion of the Court and that Costs fooled the event. However, in the instant case, the Defendant/Respondent had managed to positively demonstrate the preliminary objection on the basis of prima facie proceedings and hence the need to allow it accordingly by dismissing the Plaintiff's case with costs.

B. The written submissions by the Plaintiff/Respondent

8. On 24th November, 2022, the Learned Counsels for the Plaintiff/Respondent herein the law firm of Messrs. Grace Ndinda Regina Advocate filed their written submissions dated 23rd November, 2022 in response to the Defendants Notice of Preliminary objection dated 24th October, 2022. M/s. Ndinda Advocate submitted that the suit filed by the Plaintiff/Respondent was not time barred as alleged by



the Defendant under the provisions of Section 4 (1) (a) of the Limitation of Actions Act Cap 22 of Laws of Kenya.

9. According to her from the Provisions of Section 4 (1) (a) the Limitation period for action founded on contract was 6 years from the date on which the cause of action accrued. The Instant Suit was founded on the Agreement for Sale dated 8th June 2017 which was the contract that was executed by the Plaintiff/Respondent and the Defendant herein for the sale and purchase of Land Reference No 3113/VI/MN (Miritini, Mombasa County). In other words, the 6 years ought to have lapsed on 8th June, 2023.
10. Hence the Notice of Motion application and suit vide Originating Summons dated 8th July, 2022 and filed on 12th July, 2022 were filed within the time frame provided for under Section 4 (1) (a) of the Limitation of Action Act Cap 22 of Laws of Kenya with respect to claims founded on contract and as of right. According to the counsel the Plaintiff/Applicant never required leave of this Honorable Court to institute the instant suit since the same was filed in time.
11. Thus, taking that the suit was filed within the required statutory period an application for extension of the limitation period under Order 37 Rule 6 of the Civil Procedure 2010 was not necessary. She held that such an application would be made if a claim was being filed after the lapse of the six (6) years Limitation period. The instant suit was filed in time and as of right.
12. In conclusion the Preliminary was misconceived frivolous and vexatious as the Defendant was of the believe the suit was filed out of time and hence leave was required and hence it should be dismissed with costs.

IV. Analysis and Determination

13. I have had an opportunity to critically assess and consider the Preliminary objection 24th October 2022, the filed pleadings and submissions by both parties, the relevant provision of the Constitution of Kenya, 2010 and the statutes. For the Honorable Court to reach an informed, reasonable and just decision, it has set out three (3) issues for its determination. These are:-
 - a. Whether the Preliminary objection dated 24th October, 2022 raised by the Defendant/ Respondent as the Objector herein meets the threshold of an objection based on Law and precedents.
 - b. Whether the Defendant/Respondent as the Objector in this Preliminary Objection is entitled to the relief sought.
 - c. Who bears costs of the application?

Issue No. a). Whether the Preliminary objection dated 24th October, 2022 raised by the Defendant/ Respondent as the Objector herein meets the threshold of an objection based on Law and precedents.

14. Under this Sub heading, according to the Black Law Dictionary, a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal preposition has been made graphically clear in the now famous case of Mukisa Biscuits Manufacturing Co. Limited – Versus- West End Distributors Limited. [1969] E.A. 696. Where Lord



Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer 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 in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

15. I further wish to cite the case of “Attorney General & Another –Versus- Andrew Mwaura Githinji & another [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-
- i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
16. The objection raised by the Defendant/Respondent is on whether the cause of action by the Plaintiff through the filed suit was time barred within the provisions of Section 4 (1) (a) of the Limitation Actions Act. Cap. 22 without seeking the leave of this Honorable Court on the way to approach Court. The Learned Counsel for the Defendant/Respondent submitted that the objection was justified taking that it was purely on matters of law. He held that the Plaintiff’s cause of action was time barred with the year 2022 being the final year on which the contractual basis of the sale agreement could be challenged or in the alternative, an application be made by the Plaintiff to seek for leave of this Court to enlarge time as provided for by Law. Indeed, I find that the Preliminary objection herein raises points of law onto the rules and regulations a provided in the Civil Procedure Cap 22 and Limitations Act Cap 22 and thus need to be entertained.

Issue No. b). Whether the Defendant/Respondent as the Objector in this Preliminary Objection is entitled to the relief sought.

17. On perusal of the originating summons dated 8th July 2022 I make the observation that the application is premised under Order 37 Rule 3 and 8 of the Civil Procedure Act Cap 21 whereas the Preliminary objection herein is premised upon the non - compliance of the Plaintiff/ Respondent of order 37 Rule 3 and 6 of the Civil Procedure Act Cap 21 and Section 4(1)(a) of the Limitation Actions Act Cap 22.
18. The provision of Order 37 Rule 3 of the Civil Procedure Act Cap 21 provides thus: -

“Summons by vendor or purchaser of land [Order 37, Rule 3.] A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections,



or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).

19. From the reading of the provision of Order 37 Rule 3 of the Civil Procedure Rules, 2010 it gives a Vendor of land the leeway to move the Court vide an originating summons in case of non-compliance of the terms of the contract by the other party. The originating summons dated 8th July 2022 raises issues of non-compliance of purchase terms being removal of squatters in the suit property and questions of detectable amount to be subtracted from the purchase price following removal of said squatters by the other party. My understanding is that the said issues fall within the ambits of Order 37 Rule 3 as there are issues arising from the terms of the contract and not its validity.
20. The Defendant/Replicant averred that the originating summons dated 8th July 2022 is in noncompliance of Order 37 Rule 6 that provides thus:-
 1. An application under Section 27 of the *Limitation of Actions Act* made before filing a suit shall be made ex parte by originating summons supported by affidavit.
 2. Any such application made after the filing of a suit shall be made Ex - Parte in that suit.
21. The provision of Section 27 of the Limitations of Actions Act Cap 22 provides thus:-
 - 1) Section 4 (2) does not afford a defence to an action founded on tort where—
 - (a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
 - (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
 - (c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
 - (d) the requirements of subsection (2) are fulfilled in relation to the cause of action.
 - (2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the Plaintiff until a date which—
 - (a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and
 - (b) in either case, was a date not earlier than one year before the date on which the action was brought.
 - (3) This section does not exclude or otherwise affect—
 - (a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or
 - (b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

The provision of Section 28 of the Limitation of Action Act. Cap. 22 provides thus:-



1. An application for the leave of the court for the purposes of section 27 of this Act shall be made ex - parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.
 2. Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the Plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient-
 - (a) to establish that cause of action, apart from any defence under Section 4(2) of this Act; and
 - (b) to fulfill the requirements of Section 27(2) of this Act in relation to that cause of action.
 - (3) Where such an application is made after the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the Plaintiff, it appears to the court that, if the like evidence would in the absence of any evidence to the contrary, be sufficient—
 - (a) to establish that cause of action, apart from any defence under Section 4(2) of this Act; and
 - (b) to fulfill the requirements of Section 27 (2) of this Act in relation to that cause of action, and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the Plaintiff that the matters constituting that cause of action had occurred on such a date as (apart from Section 27 of this Act) to afford a Defence under Section 4(2) of this Act.
 - (4) In this section, “relevant action” in relation to an application for the leave of the court, means any action in connection with which the leave sought by the application is required.
 - (5) In this section and in Section 27 of this Act “Court”, in relation to an action, means the court in which the action has been or is intended to be brought.
22. The provision of Section 27 of the Act expressly refers to claims in tort where action is for damages from negligence, nuisance or breach of duty. This provision does not provide for claims arising from contractual relationships. The provision of Section 28 of the Act provides for the procedures for extension of time under the provision of Section 27 of Act. The two sections are therefore limited to extension of limitation period for claims under Section 4(2) of the *Limitation of Actions Act*, Cap. 22 which provides for actions founded on torts. The provision of Sections 27 and 28 of the Act are therefore not applicable to claims under the provision of Section 4(1) of the *Limitation of Actions Act*, Cap. 22 under which limitation period for contracts is provided for and hence for this reason the objection must fail.
23. The Defendant/Applicant also raises an objection to the effect that the originating summons is time barred in reference to Section 4(1)(a) of the Limitation of Action Act Cap. 22 which limits rights of parties to bring forth issues arising from a contract after six (6) years. From the facts and the filed pleadings, the parties entered into a Sale Agreement duly executed on 8th July 2017 whereas the originating summons is dated 8th July 2022 and was filed on 12th July 2022, which from quick arithmetics translates to 5 years and 4 days since onset of the contract. Clearly, the statutory limitation



of six years was still to lapse and therefore the suit was well within the stipulated time of six (6) years. For this reason, once more, the objection can not succeed.

Issue No. c). Who bears costs of the application?

24. It is now well established that the issue of costs it is discretion of the Court. Costs means the award that is granted to a party at the conclusion of any legal action, proceedings and process. The proviso of the Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow the event. By event it means the results of the said legal action, process and proceedings. This legal position was supported in the Court of Appeal case of “Republic – Versus - Rosemary Wairimu Munene, Ex-Parte Applicant – Versus - Ihururu Dairy Farmers Co-operative Society Limited Judicial Review application no 6 of 2014 and the Supreme Court case of “Jasbir Rai Singh – Versus – Tarchalan Singh” (2014) eKLR where the Court held as follows: -

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

25. In the instant case, the preliminary objection raised by the Defendant/Respondent application is unsuccessful. It follows that the Defendant/Applicant herein is not entitled to any reliefs sought. Hence, the Plaintiff/Applicant is entitled to costs of the objection to be in the cause.

VI. Conclusion & findings.

26. The upshot of the matter is after causing an elaborate analysis of the crystalized herein, the Honorable Court on preponderance of probability, finds that the objection raised by the Defendant/Respondent is unmerited. Specifically, oy orders as follows:-

- a. THAT Preliminary Objection dated 24th October, 2022 by the Defendant/Respondent as the Objector herein be and is found to be unmeritorious and hence it is dismissed.
- b. THAT for expeditious sake the two Notice of Motion applications dated 8th July, 2022 and 14th December, 2022 filed by the Plaintiff/Applicant and as per the orders of this Honorable Court made on 12th October, 2022 and 16th November, 2022 for both of them to be disposed off simultaneously by way of written submission as follows:-
 - i. The Defendant/Respondent herein granted 14 days leave to file and serve Replies and written Submission onto the two applications (upon being served with the Plaintiff/Applicant’s submissions).
 - ii. Upon services with the responses by the Defendant/Respondent, the Plaintiff/Applicant granted leave of 14 days to file and serve further affidavit responding onto any new issues, if need be and written submission.
 - iii. The matter be fixed for “inter parte” hearing on 27th June, 2023 and a ruling date reserved by this Court whereby the direction on disposing off the Originating Summons 8th July, 2022 under the provisions of Order 37 Rules, 16, 17 and 18 of the Civil Procedure Rules, 2010 will be provided thereof.
 - iv. In the meantime, this is matter should be heard within the next One Hundred and Eighty (180) days from the date of this Ruling.



c. THAT the Costs of the Preliminary Objection to be borne by the Defendant/Respondent.

It is so ordered accordingly

**RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND
DATED AT MOMBASA THIS 22ND DAY OF MAY 2023**

.....

HON. JUSTICE MR. L. L. NAIKUNI (JUDGE)

ENVIRONMENT & LAND COURT AT

MOMBASA

Ruling delivered in the presence of:-

- a. M/s. Yumnah, the Court Assistant.**
- b. M/s. Grace Ndinda Advocate for the Plaintiff/Applicant**
- c. Mr. Ogendo Advocate for the Defendant/Respondent**

