



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mbori & another v Oria (Being the Legal representative of the  
Estate of the late Chrysanthus Onyuka) (Environment & Land Case  
35 of 2021) [2022] KEELC 14747 (KLR) (14 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14747 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY**  
**ENVIRONMENT & LAND CASE 35 OF 2021**  
**GMA ONGONDO, J**  
**NOVEMBER 14, 2022**  
**(FORMERLY MIGORI ELC O.S NO. 76 OF 2019)**

**BETWEEN**

**JOSIAH OUMA MBORI ..... 1<sup>ST</sup> PLAINTIFF**

**SAMUEL OUKO MBORI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**EDWARD ODHIAMBO ORIA (BEING THE LEGAL REPRESENTATIVE OF  
THE ESTATE OF THE LATE CHRYSANTHUS ONYUKA) ..... DEFENDANT**

**RULING**

1. This ruling is in respect of the respondent's Notice of Preliminary Objection dated 15<sup>th</sup> June 2022 and filed in court on 6<sup>th</sup> July 2022 (The Preliminary Objection herein).
2. The respondent is represented by Ojienda & Company Advocates.
3. The gist of the preliminary objection is that the plaintiffs' suit for enforcement of a sale agreement purportedly executed on 17<sup>th</sup> March 1985 is statute-barred by dint of the provisions of Section 4 (1) (a) of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. That therefore, the same should be struck out with costs.
4. On 6<sup>th</sup> October 2021, this matter was transferred from Migori Environment and Land Court, where it had initially been filed to this court for hearing and determination.
5. On 3<sup>rd</sup> October, 2022, this court ordered and directed that the Preliminary Objection be heard by way of written submissions in the spirit of Article 159 (2) (b) of *the Constitution* of Kenya, 2010; see also *Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 others* (2013) eKLR.



6. Accordingly, the plaintiffs' counsel filed submissions dated 26<sup>th</sup> October 2022 on 9<sup>th</sup> November 2022. Counsel submitted that the sale agreement in contention forms part of the evidence that the plaintiffs intend to use to demonstrate how they came into possession of the suit land. That further, the plaintiffs are not seeking orders for specific performance and enforcement of the said sale agreement dated 17<sup>th</sup> March 1985 but have asked the court to determine, among others, whether the plaintiffs have an interest in the suit land enforceable by way of constructive trust and/or whether the plaintiffs have become the owners of the suit land by way of adverse possession. Thus, counsel urged the court to dismiss the Notice of Preliminary Objection with costs.
7. On the part of the defendant, his counsel filed submissions dated 14<sup>th</sup> October 2022 on 14<sup>th</sup> November 2022. Counsel submitted, inter alia, that the suit is an afterthought, brought not in good faith and filed out of time as stipulated by Section 4(1) (supra). That therefore, this court is devoid of jurisdiction over this suit which should be struck out with costs to the defendant. Counsel relied on *Mukisa Biscuits case (infra)*, *Rawal –vs- Rawal* (1990) KLR 275 and *Owners of Motor Vessel “Lillian S” –vs- Caltex (K) Ltd.* (1989) eKLR, in support of the submissions.
8. It is noteworthy that, by way of originating summons dated 8<sup>th</sup> October, 2019 and filed herein on 15<sup>th</sup> October 2019, the plaintiffs, through M/s Gordon Ogola, Kipkoech & Company Advocates, are seeking the following reliefs:
  - a. A declaration be and is hereby issued that the Estate of the late Chrysanthus Onyuka holds a portion measuring 120ft by 120ft in all that property known as West Kasipul/Kasimba/474 (the suit land herein) in trust for the plaintiffs.
  - b. In the alternative, the plaintiffs have become entitled by adverse possession to the suit land.
  - c. The Deputy Registrar of the honourable court does execute all necessary documents to facilitate registration of the plaintiffs as the proprietors of the suit land.
  - d. An order directing the Migori District Land Registrar to rectify the title by cancelling the registration of Chrysanthus Onyuka as the proprietor of the plaintiffs and substituting Chrysanthus Onyuka with the plaintiffs.
  - e. Costs of the suit be awarded to the plaintiffs.
9. The plaintiffs' contention is that they acquired the suit land from the late Chrysanthus Onyuka on 17<sup>th</sup> March 1985. That the said vendor died before transferring the suit land to the plaintiffs. That the defendant has since taken out letters of administration in respect of the estate of the deceased and has sought eviction orders against the plaintiffs. That in any event, the plaintiffs have been in open, exclusive and uninterrupted use of the suit land for a period exceeding twelve years.
10. The suit was opposed by the defendant, through Ojienda and Company Advocates, who filed a Notice of Preliminary Objection dated 22<sup>nd</sup> October 2019. The same was dismissed for want of merit by a ruling delivered by this court on 27<sup>th</sup> February 2020. The defendant's counsel then lodged the instant Notice of Preliminary Objection.
11. Further, the defendant filed a Replying Affidavit and witness statement both dated 28<sup>th</sup> January, 2022 on 14<sup>th</sup> February, 2022. The defendant averred that the portion of land measuring 120ft by 120ft in L.R No. West Kasipul/Kasimba/474 belongs to the Estate of Chrysanthus Onyuka (deceased) and not to the plaintiffs. That in any event, the plaintiffs' claim is time-barred pursuant to Section 4(1) of the *Limitation of Actions Act* (supra).



12. I have duly considered the Preliminary Objection, the respondent's response thereto and the parties' respective pleadings and submissions. So, is the Preliminary Objection sustainable?
13. It must be noted that the Preliminary Objection is on a point of law and may dispose of the suit; see Mukisa Biscuits case (*infra*).
14. The Preliminary Objection is grounded on Section 4(1) (*supra*) which provides 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. 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.
15. In the locus classicus case of Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696 the Court of Appeal pronounced itself on what constitutes a preliminary objection 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 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 a contract giving rise to the suit to refer the dispute to arbitration...”
16. On one hand, the defendant contends that the plaintiffs' suit is for enforcement of a sale agreement purportedly executed on 17<sup>th</sup> March 1985. That the same is statute-barred by dint of the provisions of Section 4 (1) (a) (*supra*).
17. On the other hand, plaintiffs' counsel submitted that the sale agreement in contention forms part of the evidence that the plaintiffs intend to rely on to demonstrate how they came into possession of the suit land. That further, the plaintiffs are not seeking orders for specific performance and enforcement of the said sale agreement but have asked the court to determine, among others, whether the plaintiffs have an interest in the suit land enforceable by way of trust and/or adverse possession.
18. Further, the plaintiffs are not relying on part performance doctrine which is not pleaded in the suit; see *Sumaria & another v Allied Industries Limited* [2007] 2KLR 1.
19. Basically, the plaintiffs rely on some overriding interests including trust and adverse possession as provided for under Section 28 of the [Land Registration Act, 2016](#) (2012).
20. Indeed, the orders sought by the plaintiffs in the originating summons dated 8<sup>th</sup> October, 2019 and filed herein on 15<sup>th</sup> October 2019 and as listed in paragraph 8 hereinabove, do not include an order for specific performance of the sale agreement dated 17<sup>th</sup> March 1985. Also, no part performance claim is laid thereon as noted in Sumaria case (*supra*).



21. In the circumstances, this court is persuaded by the plaintiffs' contention. It is my considered view that Section 4 (1) (a) of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya does not come into play in this suit.
22. In view of the foregoing, it is the finding of this court that the respondent's preliminary objection is unmeritorious. Therefore, the same fails.
23. The upshot is that I hereby order and direct that the Preliminary Objection dated 15<sup>th</sup> June 2022 and filed in court on 6<sup>th</sup> July 2022, be and is hereby dismissed with costs in the cause.
24. It is so ordered.

**VIRTUALLY DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 14TH DAY OF NOVEMBER 2022.**

**G.M.A ONG'ONDO**

**JUDGE**

Present

Mr. Ouma holding brief for Mr. Ogola, learned counsel for the plaintiffs

Mr. Ojienda, learned counsel for the defendant

Angela and Fiona- Court Assistants

