



REPUBLIC OF KENYA



**KENYA LAW**  
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**Omar v Abdi (Environment & Land Case 235 of 2022)  
[2022] KEELC 15344 (KLR) (5 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15344 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 235 OF 2022  
JO MBOYA, J  
DECEMBER 5, 2022**

**BETWEEN**

**MUHUBO SHEIKH OMAR ..... PLAINTIFF**

**AND**

**MARIAM NOOR ABDI ..... DEFENDANT**

**RULING**

**Introduction and Background**

1. The Ruling herein relates to and is in respect of the notice of motion application dated the October 26, 2022 and the preliminary objection dated the August 18, 2022.
2. For coherence, the notice of motion application dated the October 26, 2022 seeks the following Reliefs;
  - i. That honourable court be pleased to certify this application as one of utmost urgency and dispense with service of the same on the Defendant in the first instance;
  - ii. That this honourable court be pleased to grant the plaintiff/applicant Leave to commence and continue with the instant suit out of time.
  - iii. That upon the grant of prayer 2 above, this honourable court be pleased to deem the plaint filed herein as properly filed.
  - iv. That costs of this Application be in the cause.
3. The subject Application is premised on the various grounds which have been enumerated at the foot thereof and same is further supported by the affidavit of Muhubo Sheikh Omar, sworn on the October 26, 2022.
4. Upon being served with the instant Application, the defendant/respondent filed Grounds of opposition dated the November 2, 2022 and in respect of which the defendant/respondent has



contended, inter-alia, that the honourable court is devoid and divested of the requisite Jurisdiction to entertain the subject suit and to extend time in the manner sought.

5. On the other hand and vide the notice of preliminary objection, dated the August 18, 2022, the defendant herein has raised and highlighted the following Grounds;
  - a. This suit is statute time barred under section 4(2) of the *Limitation Actions Act*, cap 22 of the Laws of Kenya.
  - b. The suit is for damages for unlawful ejection which is a tort.
  - c. A suit making any claim under tort must be filed within Three (3) years of the occurrence of the action leading to the cause of action.
  - d. The alleged unlawful eviction took place or occurred on October 29, 2018 whereas this suit was filed on June 13, 2022.
  - e. The limitation to file suit lapsed on October 30, 2021.
  - f. The plaintiff prays that this suit be struck out with costs.
6. The subject matter came up for mention and directions pertaining to the manner of disposal of both the preliminary objection and the notice of motion application on the October 26, 2022.
7. Suffice it to point out that when the matter came up for directions, the Advocates for the respective parties agreed that both the application and the preliminary objection be disposed of/ canvassed at the same time and by way of written submissions.
8. Pursuant to and in line with the agreement of the parties, details in terms of the preceding paragraph, the honourable court proceeded and gave directions for the filing and exchange of written submissions.

### **Submissions by the Parties:**

#### **a. Plaintiff's/Applicant's Submissions**

9. The plaintiff/applicant herein duly filed written submissions pertaining to both the application and the preliminary objection. First and foremost, counsel for the plaintiff/applicant submitted that the plaintiff herein had hitherto filed and lodged a previous suit, namely, ELC 126 of 2019, together with other parties and in respect of which same sought similar reliefs against the current defendant.
10. Nevertheless, counsel added that the previous suit which filed by and on behalf of the plaintiff/applicant was found to be defective for inter-alia, for failure to file a compliant verifying affidavit as prescribed vide the provisions of Order 4 Rule 1(2) as read together with Order 1 Rule 13(2) of the *Civil Procedure Rules*, 2010.
11. Owing to the foregoing, counsel for the plaintiff/applicant has therefore submitted that it behooved the plaintiff/applicant to return to court and to file the instant suit afresh.
12. Secondly, counsel for the plaintiff/applicant has submitted that the cause of action touches on and concerns an illegal and arbitrary eviction of the plaintiff from the premises known as L.R No. 32/11/17, situated within Eastleigh, within the City of Nairobi.
13. Based on the fact that the cause of action touches on Eviction, counsel for the plaintiff has therefore conceded that the instant suit relates to the law of tort and hence same ought to have been filed/ mounted within three (3) years from the accrual of the cause of action.



14. Be that as it may, counsel for the applicant has contended that the subject suit was however filed out of time and hence the need to extend time and by extension, validate the suit.
15. Additionally, counsel for the plaintiff/applicant has submitted that this honourable court is conferred and vested with the requisite Jurisdiction to extend time for purposes of filing a suit out of time and even to deem a suit that has already been filed as validly filed.
16. Finally, counsel for the plaintiff has submitted that a failure to grant the relief sought at the foot of the application would be tantamount to driving the plaintiff from the seat of Justice and condemning same unheard.
17. In a nutshell, counsel for the plaintiff/applicant implored the Honourable court to find and hold that the impugned application is meritorious and ought to be granted.
18. On the other hand, counsel submitted that once the application is found to be meritorious, the preliminary objection filed by the defendant/ respondent, would be rendered moot and redundant.

#### **b. Defendant's Submissions**

19. Learned counsel for the defendant filed written submissions in respect for both notice of motion application and the preliminary objection dated the August 18, 2022. For clarity, counsel raised and highlighted two salient issues for consideration.
20. First and foremost, learned counsel for the defendant submitted that the cause of action herein touches on and relates to unlawful Eviction. In this regard, counsel added that the cause of action is one of tort.
21. Premised on the fact that the cause of action is one of tort, counsel contended that the subject suit ought and should have been filed within three (3) years from the occurrence of the activities that is complained of.
22. Nevertheless, counsel has added that despite the fact that the cause of action arose on the October 29, 2018, the instant suit was only filed on the June 13, 2022. In this regard, counsel has thus pointed out that the suit was filed out of time without Leave of the honourable court.
23. Secondly, counsel for the defendant herein has submitted that to the extent that the cause of action touches on Eviction, such a claim does not lend itself to extension of time, either in the manner sought or at all.
24. To this end, learned counsel for the defendant has invited the honourable court to take cognizance of the provisions of section 4(2) as read together with section 27 of *Limitation of Actions Act*, chapter 22 Laws of Kenya.
25. Owing to the fact that a cause of action relating to Eviction is not captured or envisaged under the provisions of section 27 of the *Limitation of Actions Act*, counsel for the defendant has therefore submitted that the instant application is tantamount to inviting the honourable court to commit an illegality.
26. Other than the foregoing, counsel for the defendant has added that the filing of the current application by the Plaintiff, was a deliberate albeit subtle attempt to defeat the Preliminary objection which had been duly filed and served.
27. In view of the foregoing, counsel for the defendant has submitted that the application filed by the plaintiff//applicant is therefore premature, misconceived or otherwise constitutes an abuse of the due process of the court.



### Issues for Determination:

28. Having reviewed the Application dated the October 26, 2022 and the notice of preliminary objection dated the August 18, 2022; and having similarly considered the submissions filed on behalf of the parties, the following issues do arise and thus merits determination;
- i. Whether Cause of action in respect of the subject suit touches on Eviction and if so, whether Eviction constitutes a cause of action in tort.
  - ii. Whether the Honourable court is seized and possessed of the requisite Jurisdiction to extend time for filing a suit for Eviction or to deem such a suit filed out of time as lawfully filed.

### Analysis and Determination

#### Issue Number 1 Whether Cause of action in respect of the subject suit touches on Eviction and if so, whether Eviction constitutes a cause of action in tort.

29. It is common ground that the plaintiff herein was hitherto a tenant of the defendant in the premises known and described as L.R No. 32/11.17, situate within Eastleigh Area of the City of Nairobi.
30. Be that as it may, it has been contended that on the October 29, 2018, the defendant herein illegally and unlawfully and in flagrant disregard of lawful court orders proceeded to and evicted the plaintiff from the suit property.
31. As a result of the illegal and unlawful eviction, the plaintiff has claimed that same suffered various losses and damages. in this regard, the plaintiff has thus mounted the suit seeking compensation premised on the damage to personal properties, chattels, as well as loss of Income.
32. Premised on the foregoing, the critical question for determination herein is the nature of the cause of action, that is, whether eviction constitutes tort or otherwise and thereafter, the honourable court will then move to determine the duration, within which a suit for Eviction ought to be filed.
33. Be that as it may, before proceeding to consider whether Eviction constitutes a cause of action in tort or otherwise, it would be imperative to appreciate what is the legal meaning and tenor of or better still, what constitutes a cause of action.
34. In this regard, it is imperative to take cognizance of the holding and observation of the Court of Appeal in the case of *Kigwor Company Limited v Samedy Trading Company Limited* [2021] eKLR, where the court stated and observed as hereunder;
36. In the Court of Appeal case of *Attorney General & another v Andrew Maina Githinji & another* [2016] eKLR Justice Waki held that:-

“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”

That definition was given by Pearson J in the case of *Drummond Jackson v Britain Medical Association* (1970) 2 WLR 688 at pg 616. In an earlier case, *Read v Brown* (1889), 22 QBD 128, Lord Esher, M R had defined it as:-

“Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court.”



Lord Diplock, for his part in *Letang v Cooper* [1964] 2 All ER 929 at 934 rendered the following definition:-

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

When did the cause of action in this case arise? Put another way, when did the respondents become entitled to complain or obtain a remedy ...”

35. Having duly appreciated and understood the meaning and tenor of a cause of action, it is now appropriate to venture and discern what then is the cause of action in respect of the complaints alluded to and contained in the plaint filed by and on behalf of the plaintiff herein.
36. Suffice it to point out, that the plaintiff herein has contended that the defendant unlawfully, illegally and without due regard to the obtaining orders of the court, proceeded to and evicted same from the suit property. Consequently, it becomes evident that the crux of the plaintiff's case, touches on and concerns eviction.
37. The next issue for consideration therefore relates to whether eviction constitutes a cause of action in tort or otherwise. In this regard, I am of the considered view that Eviction is ipso facto, a tort and not otherwise.
38. In any event, it is appropriate to state and underscore that both the Parties herein are in agreement that Eviction is indeed a tortious act and therefore, there is no gainsaying that the claim beforehand, is one founded and grounded on tort.
39. Despite the foregoing and for the sake of clarity, it is still appropriate to take cognizance of the holding of the Court of Appeal in the case of *Jelioth Wambui Theuri v Stanley Omondi & another* (2019)eKLR, where the Court of appeal stated and observed as hereunder;
  12. Upon my perusal of the plaint annexed to the Motion, I have established that the cause of action is founded on trespass and unlawful forceful eviction arising out of a tenancy relationship and the orders being sought in the plaint are of an injunctive and declaratory nature.
  13. Both trespass and forceful/wrongful eviction are known to constitute torts which means that this court is clothed with jurisdiction to entertain both the application and the intended appeal.
40. Having discerned and established that the cause of action is one of tort, the next critical issue therefore relates to the duration/timeline for filing a cause of action founded on tort.
41. In this regard, it is appropriate to take cognizance of the provisions of section 4(2) of the *Limitation of Actions Act*, chapter 22 laws of Kenya.
42. For convenience, the said provisions of section 4(2) (*supra*) are reproduced as hereunder;
  4. Actions of contract and tort and certain other actions
    - (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.
- (2) 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.

43. My reading and understanding of the foregoing provisions confirms that a claim/cause of action founded on tort ought to be filed/commenced within three (3) years from the date of accrual of the cause of action.
44. Consequently and in the premises, it is imperative to state and underscore that the Complaints raised and ventilated by the Plaintiff herein are essentially complaints that touch on and concern a cause of action based on tort and not otherwise.

**Issue Number 2 Whether the Honourable court is seized and possessed of the requisite Jurisdiction to extend time for filing a suit for Eviction or to deem such a suit filed out of time as lawfully filed.**

45. Having found and observed that the plaintiff's cause of action is founded on the tort of Eviction, it is now essential to determine whether a claim/ cause of action founded on the tort of Eviction is amenable to extension of time.
46. Essentially, what the plaintiff/applicant has sought from the court is exercise of a discretion with a view to extending time for the plaintiff to commence a suit premised on Eviction or better still, to deem/validate the instant suit, which was admittedly filed out of time.
47. Before venturing to resolve the critical question pertaining to whether the honourable court can extend time in respect of such a situation, it is imperative to take cognizance of the provisions of section 27 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
48. Given the significance and importance of the provisions of section 27(1) (supra), it is appropriate to reproduce same.
49. For convenience, the said provisions are reproduced as hereunder;
27. Extension of limitation period in case of ignorance of material facts in actions for negligence, etc.
- (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.

50. From the provisions of section 27(1) of the [Limitation of Actions Act](#), it is evident and apparent that the Jurisdiction to extend time is limited to a cluster or cadre of tort and in particular, the tort pertaining to a claim of Damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of written law independently of a contract or written law).

51. On the other hand, the foregoing provisions also underscore that such a claim for negligence, nuisance or breach of duty must be of such a nature that relates to a claim for Damages in respect of Personal injuries of a person and not otherwise.

52. Consequently, where the cause of action that has been pleaded does not touch on or concern an action for Damages for negligence, nuisance or breach of duty, culminating into Personal injuries of any person, then the Honourable court is devoid of the requisite Jurisdiction to entertain and adjudicate upon an application for extension of time.

53. To buttress and vindicate the foregoing statement of the Law, it is appropriate and imperative to take cognizance of the holding of the Court of Appeal in the case of [Mary Osundwa v Nzoia Sugar Company Ltd](#) (2002)eKLR, where the court stated as hereunder;

“This section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort”.

54. Additionally, the circumstances under which a court of law can extend time for the filing of a suit out of time was also considered and reiterated by the Court of Appeal in the case of [Willis Onditi Odhiambo v Gateway Insurance Company Ltd](#) (2014)eKLR, where the court stated as hereunder;

“*Mary Osundwa v Nzoia Sugar Company Limited* [2002] eKLR, Osiemo, J., had, with the consent of the parties, granted extension of time to file suit retrospectively. Notwithstanding that the parties had consented, on appeal this court said of section 27 (1) of the [Limitation of Actions Act](#):

“This Section clearly lays down the circumstances in which the court would have jurisdiction to extend time. That action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The Section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort. Accordingly Osiemo, J. had no jurisdiction to extend time as he purported to do on 28th May, 1991. That the order was by consent can be neither here nor there; the parties could not confer jurisdiction on the judge by their consent.”

55. For emphasis only, the circumstances under which extension of time can be entertained and granted were also reviewed, considered and affirmed in the recent decision in the case of [YH Wholesalers Ltd v Kenya Revenue Authority](#) (2021)eKLR, where the court held as hereunder;



27. In *Oadi Odhiambo v Gateway Insurance Co Ltd* [23] the Court of Appeal faced with the same set of circumstances as in this case observed:
- “Under section 27 (1) of the Limitations Act, time to file a suit can only be extended where the action is founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages accorded should be in respect of personal injury to the plaintiff as a result of the tort.”
28. The applicants supporting affidavit tried to depict how the Respondent is to blame. What is required at this stage is not a merit evaluation of the case, but the applicant must bring himself within the grounds in section 27 and to also, an explanation for the delay. Lord Green MR said it all in *Hilton v Sultan S Team Laundry*[24]
- “But the statute of limitation is not concerned with merits, once the axe falls, it falls and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled to insist on his strict rights.”
29. Flowing from the above grounds addressed above, I find and hold that the applicant’s Originating Summons is manifestly un merited. There is no basis at all upon which this court can grant the leave sought. Accordingly, the originating summons dated February 19, 2021 is hereby dismissed with costs to the Respondent.
56. Nourished and duly guided by the elaborate holdings in the decisions that have been cited in the preceding paragraphs, I have no hesitation in finding and holding that this honourable court has no Jurisdiction to extent time for filing a suit premised or anchored on Eviction, even though same is a claim in tort.
57. In view of the foregoing, it must have become evident and apparent that the reliefs sought at the foot of the subject application cannot be therefore be entertained and or be granted by the Honourable court.
58. Suffice it to point out that if the Honourable court were to grant the reliefs sought and essentially to deem the suit as duly filed, the honourable court would be committing an illegality and the resultant act/decision shall be a nullity and void.
59. In a nutshell and despite my sympathy to the Plaintiff, the provisions of section 27(1) of the *Limitation of Actions Act*, Chapter 21 Laws of Kenya, do not countenance and envisage the extension of time in the manner sought.
60. On the other hand, it is also imperative to state and underscore that where a suit is filed outside the duration stipulated and provided for under the law, the suit would be invalid and void. For clarity, the cause of action is deemed to be stale, extinguished and redundant.
61. To this end and to be able to understand the implication/ consequences of the law of limitation, it is appropriate and apt to take cognizance of the observation by the Court of Appeal in the case of *Gathoni v Kenya Co-operative Creameries Ltd*[1982] eKLR, where the court stated and observed as hereunder;
- “The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not



help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done”.

62. Consequently, where a suit is filed outside the stipulated duration, the honourable court would thus be obliged to terminate same, irrespective of the merits or otherwise of the claims attendant thereto.

**Final Disposition:**

63. Having reviewed the two issues that were isolated and highlighted in the body of the Ruling, it must have become apparent and evident that the application by and on behalf of the plaintiff is misconceived and legally untenable.
64. To the contrary, the notice of preliminary objection dated the August 18, 2022, is ex-facie meritorious. Clearly, the instant suit was filed out of time and therefore same is a nullity ab initio.
65. In the premises, I am obliged to and Do hereby make the following orders;
- i. The Application dated the October 26, 2022 be and is hereby Dismissed.
  - ii. The Preliminary Objection dated the August 18, 2022, be and is hereby allowed.
  - iii. The plaintiff's suit be and is hereby struck out.
  - iv. The plaintiff shall bear the costs of the suit as well as the application and same to be taxed and certified by the taxing officer of the Honourable court.
66. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF DECEMBER 2022.**

**OGUTTU MBOYA**

**JUDGE**

In the Presence of;

Benson - Court Assistant.

Ms. Khadija Saaid h/b for Mr. Cohen Amany for the Plaintiff/Applicant.

Ms. Murigu h/b for Mr. Wandago for the Defendant/Respondent.

