



**Otieno v Ndirangu (Environment and Land Appeal E036 of 2023)
[2025] KEELC 4112 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4112 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E036 OF 2023**

**A OMBWAYO, J
MAY 23, 2025**

BETWEEN

KEFA OMUYOMA OTIENO APPELLANT

AND

FRANCIS GATHAMBO NDIRANGU RESPONDENT

JUDGMENT

1. The appellant instituted this case vide an undated Complaint filed on 13/5/2020 seeking the orders of Specific performance of the agreement dated 3/5/2012, costs of the suit and any other or further relief as may be seen fit by the Honourable Court to grant. The appellant's case was that on 3/5/2012, he entered into a sale agreement with the respondent to purchase the respondent's beneficial interest in a piece of land measuring 1.25 acres in land known as LR 40836/43 situated in Kangawa area. He paid the full purchase price. The respondent however failed to honour the agreement by failing to formally transfer the property and rendering vacant possession of the same to the appellant.
2. The suit in the lower court was defended vide the amended statement of Defence dated 3/12/2021. The respondent averred that the agreement between him and the appellant is overtaken by events and is time barred, thus cannot be enforced. Further, that a claim for refund is time barred as well. The respondent further denied being the owner of the alleged land.
3. On 24/1/2022, the appellant filed an amended Complaint wherein he averred that he took possession of part of the suit property immediately after execution of the sale agreement. The respondent however failed to grant vacant possession of the remaining part of the suit property and thus the respondent was a trespasser. In the amended Complaint, the appellant sought judgment against the respondent for specific performance of the sale agreement dated 3/5/2012. Moreover, he sought a declaration that the respondent was a trespasser to LR 40836/43 in Kangawa area. The appellant further sought an order directing the respondent to hand over vacant possession of all that property known as LR 40836/43 in Kangawa area failure to which the appellant to forcefully evict the respondent under the supervision



of Officer Commanding Molo Police Station (OCS) who was to ensure there was law and order. The appellant also sought the costs of the suit and any other relief as may seem fit to the Honourable Court to grant.

4. The appellant testified at the hearing of the case that on 3/5/2012, he entered into an agreement for purchase of a parcel of land measuring 1.25 acres hived off from land parcel number LR 40836/43 belonging to the respondent. The entire parcel of land was forty acres. The respondent did not show
5. him a copy of the Title Deed but he paid the full purchase price of Kshs. 300,000/=. He then took possession of part of the land and started farming thereon. However, the respondent did not vacate his house situated on the property promising to move out once he completed another house in Mau Summit. To the date of hearing, the respondent had not rendered vacant possession of the entire parcel of land and was yet to transfer the same to the appellant. He stated that the parcel he was claiming is plot number 81 measuring 1.25 acres and situated within plot number LR 40836/43. PW2 was Fredrick Joseph, a businessman from Molo Town who testified that on 3/5/2012, he witnessed the agreement for sale of land between the appellant and the respondent.
6. The respondent on his part gave evidence admitting that he entered into an agreement for sale of land to the appellant on 3/5/2012. The appellant paid the full purchase price of Kshs. 300,000/=. The parcel of land that he sold to the appellant was measuring 1.25 acres hived off a 40 acre parcel of land belonging to Kangawa Junior Company Limited. The respondent testified that he has not been able to procure the Title Deed to the land due to an appeal case in the High Court Case number 338/2013. He stated that he has no interest in the land capable of being transferred to the appellant. He also stated that his wife had not consented to the sale of the land. However in cross-examination, he stated that his wife was present when the agreement was executed.
7. Both parties filed written submissions which the lower court considered and found that from the Plaintiff, there was no dispute that the appellant's suit was based on a sale agreement dated 3/5/2012 between the Plaintiff and the Defendant. The suit was therefore founded on contract.
8. The learned Magistrate referred to Section 4(1) of the *Limitation of Actions Act*, Cap 22 Law of Kenya, which provides that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. He referred to the case of Michael Benhardt Otieno v National Cereals & Produce Board (2017) eKLR, the court observed as follows:- "As regards the applicability of section 4(1) it is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done, namely an action that is brought in contract six years after the cause of action. In light of these clear provisions it should be unacceptable to imply
9. as the learned judge of the superior court did that the wording of section 4(1) of the *Limitation of Actions Act* suggests a discretion can be invoked"
10. Further the learned Magistrate referred to the verdict in Iga vs. Makerere University [1972] EA, it was held that:-

"A plaint which is barred by limitation is a plaint barred by law. A reading of the provisions of Section 3 and 4 of the Limitations Act Cap 70 together with Order 7 Rule 6 of the Civil Procedure Rules of Uganda which has same provisions with the Limitation of Actions of Kenya seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar



the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief.”

11. On the aspect of trespass by the respondent as claimed by the appellant, the learned Magistrate correctly observed that trespass is a tort and under Section 4(2) of the *Limitation of Actions Act*, 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. However, when there is a continued trespass, every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.
12. On the question as to whether the appellant had proved that the respondent had continually trespassed on his parcel of land for the cause of action of trespass to be sustained the learned magistrate observed that for trespass to be proved, ownership ought to be established. The evidence tendered showed that an agreement for sale of land was executed between the appellant as the Purchaser and the respondent as the vendor. It was stated in the agreement that the vendor was the registered owner of 25 acres of land comprised in all that piece of land known as L.R 40836/41 vide C.T.I.R 83589 measuring 40 acres. However, no document of ownership of the said land by the respondent was shown to the appellant. The respondent admitted that he had no documents of ownership due to an ongoing dispute in the High Court. The learned Magistrate found that:-

“It is therefore clear that the Defendant while executing the agreement had no good interest in the land capable of being passed to the Plaintiff. The Plaintiff was aware of lack of Title Deed and admits not seeing any documents of ownership on the date of the purchase. Apart from the agreement exhibited, there is no document of ownership that passed from the Defendant to the Plaintiff after execution of the agreement in order to confer ownership. No transfer documents were signed. The agreement executed by the parties on its own cannot confer any ownership upon the Plaintiff in the absence of any other documents in proof of the existence of the land sold and its ownership. The Plaintiff having failed to establish that he is the registered owner or beneficial owner of the subject parcel of land cannot therefore raise a claim of trespass.”

13. The learned magistrate further found that the appellant in his pleadings claimed the whole parcel of land described as 40836/41 and yet what is described in the agreement for sale is only part of the entire land. The prayers as couched could no therefore be granted.
14. In conclusion, the court observed that having failed to prove a cause of action based on a continued trespass which would not have been barred by limitation period, it remained that the appellant’s case is solely based on the agreement dated 3/5/2012. According to the court, an agreement is a contract and a cause of action based on contract ought to be filed before the expiry of six years from the date of the contract. In the case before the court, the suit was filed in the year 2020, eight years after the cause of action arose. The suit was thus statute barred.
15. The Honorable magistrate cited the case of *Bosire Ogero v Royal Media Services [2015] eKLR*, where it was held that:

“...The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over.”



16. He also relied on the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989) as follows:

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

17. Having found that the suit was statute barred, the learned Magistrate held that the court had no jurisdiction to determine the same. The suit was struck out with costs to the respondent.
18. The appellant is aggrieved by the whole decision of the court and appeal to this court on grounds that the learned magistrate erred in law and fact in failing to find and enforce the sale agreement between the parties and that the learned trial magistrate erred in law and fact in failing to find and to hold that the limitation period for actions for contract for land matters is 12 years, as is outlined in section 7 of the *Limitation of Actions Act*, rather than 6 years which is applicable for general contracts.
19. Further that the learned trial magistrate erred in law and fact, in failing to find that the Plaintiff was the bona fide purchaser of the property known as L.R 40836/43 in Kangawa area measuring 1.25 acres and in failing to uphold the Plaintiff’s constitutional right to acquire and own property freely and without interruption as given under article 40(1) of *the constitution* 2010. Last but not least that the learned trial magistrate erred in law and fact in denying the plaintiff enjoyment of his property, by upholding that there was no trespass to his property by the defendant. The Appellant prays that the appeal be allowed and that the decision by Honourable A. Mukenga delivered on 8th November 2023 in MOLO ELC 23 OF 2020 be set aside with costs.
20. I have read the submissions of both parties and do find that the first issue for determination is whether the learned magistrate failed to find and enforce a sale agreement. This issue covers grounds 1,2,3 and 4 of the Memorandum of appeal. There is no dispute of the existence of an agreement between the appellant and the respondent. The dispute revolves on the enforceability of the agreement. The agreement was made on 3rd May 2012 and yet the suit was filed on 13th May 2020 seeking orders of specific performance of the agreement dated 3rd May 2012. The plaint was amended on 24th January 2022 wherein the appellant further sought a declaration that the respondent was a trespasser to LR 40836/43 in Kangawa area. The appellant further sought an order that the respondent hands over part of the suit property and that is why the respondent sought vacant possession. The appellant has not comprehended the decision of the learned magistrate which was based on the fact that the sale agreement could not be enforced because the same was stale at the time of filing the suit.
21. I do agree with the learned magistrate that the applicable Law on limitation was section 4 of the *limitation of Actions Act* Cap 22 Laws of Kenya. Section 4(1) of the *Limitation of Actions Act* Cap 22 Laws of Kenya provides that an action founded on contract may not be brought after the end of six years from the date when the cause of action accrued whereas section 4(2) of the *Limitation of Actions Act* Cap 22 Laws of Kenya provides that an action founded on tort may not be brought after the end of 3 years from the date when the cause of action accrued. I do find that the main prayers in the plant were Specific performance of the said agreement, a declaration that the respondent was a trespasser and eviction of the respondent. I am in agreement with the finding of the learned magistrate that the appellant’s claim was contract based. An action founded on contract is barred by limitation from being



filed after a period of six years. The agreement that appellant invokes is dated 3rd May 2012. This suit was filed on 13th May 2020 and was therefore filed outside the time allowed by the statute.

22. The appellant relies on Section 7 of the *Limitation of Actions Act* to argue that the suit was not time barred. This section provides inter alia:-

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it is first accrued to some person through whom he claims, to that person".

23. Section 13 is in these terms:

(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession. "

24. Section 17 further provides that upon the expiry of the period (12 years) prescribed by the Act for a person to bring an action to recover land, the title of that person to the land stands extinguished.

Finally Section 38 states:-

38.

(1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land."

25. As was stated by this Court in the case of Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996:

"The combined effect of the relevant provisions of sections 7, 13 and 17 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land."

26. The onus is on the person or persons claiming adverse possession:-

".. to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; see Wanyoike Gathure v/s Berverly (1965) EA 514, 519, per Miles J. and Kneller J (as he then was) in Kimani Ruchine v/s Swift, Rutherford & Co. Ltd (1980) KLR 10. Sections 7, 8, 13 and 38 of the *Limitation of Actions Act* are not relevant as they deal with recovery of land by a registered owner. The appellant was not recovering land because he was not a registered owner but was enforcing an agreement of sale of land. Moreover, the appellant was not seeking to be declared in adverse possession.

27. On the issue as to whether the respondent was a trespasser, I do find that the learned magistrate did properly find that for the cause of action of trespass to be sustained ownership ought to be established. The evidence tendered showed that an agreement for sale of land was executed between the appellant



as the Purchaser and the respondent as the vendor. It was stated in the agreement that the vendor was the registered owner of 25 acres of land comprised in all that piece of land known as L.R 40836/41 vide C.T.I.R 83589 measuring 40 acres. However, no document of ownership of the said land by the respondent was shown to the appellant. The respondent admitted that he had no documents of ownership due to an ongoing dispute in the High Court. The appellant therefore could not sustain a claim based on trespass. The upshot of the above is that the learned magistrate properly applied the law on the facts before him in striking out the suit as being statute barred. The appeal is dismissed with costs.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

**THE JUDICIARY OF KENYA. NAKURU ENVIRONMENT AND LAND COURT
ENVIRONMENT AND LAND COURT**

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