



**Maiyo & another v Sang (Environment & Land Case
E001 of 2023) [2024] KEELC 3651 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3651 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E001 OF 2023**

MN MWANYALE, J

MAY 2, 2024

BETWEEN

HENRY KIPLAGAT MAIYO 1ST PLAINTIFF

JOHN KIRWA 2ND PLAINTIFF

AND

REMMY KIPKOECH ARAP SANG DEFENDANT

RULING

1. This Ruling relates to the Notice of Motion application dated 26th January 2024 seeking orders that;
 - a. The suit time barred having been brought outside the statutory limitation of 12 years in view of Section 7 of the Limitations of Actions Act Cap 22.
 - b. The plaint and the entire suit be struck out for want of reasonable cause of action and being bad in law with costs of the Defendant.
 - c. Costs of the suit.
2. The grounds in support of the application are interalia that the Plaintiff/Respondent is seeking enforcement of a contract pursuant to an alleged oral agreement for purchase of land in the year 1974, the title was issued in 1978 and suit having been filed on 5/7/2023 is outside the statutory limitation period of 12 years since the registration and issuance of the title deed.
3. That there exists no contract executed between the Plaintiffs/Respondents and the Defendant/Applicant hence there is no reasonable cause of action between the parties, as the Plaintiff/Respondents have not been in occupation and have never been in use and occupation of the suit land hence the suit is an attempt at unjustly enrichment by the Plaintiff and the same does not disclose a reasonable cause of action and suit ought to be dismissed.



4. The application is supported by the supporting affidavit of the Defendant/Applicant who has reiterated the grounds in support of the application and annexed a copy of the title deed.
5. In opposition to the application the 2nd Plaintiff/Respondent, John Kirwa, filed a replying affidavit, deponing that the application is a waste of the Courts time, and that the Defendant had charged the suit properly and due to the numerous cases, which involved the suit property the Defendant has not been able to subdivide and transfer the same to the beneficiaries.
6. The Respondent has annexed a copy of the Register for NANDI/NDUBENETI/476 and a copy of Decree in LDT No. 46/2001.
7. The Court directed parties to orally argue the application Miss Tanui Learned Counsel held brief for Mrs. Koech – Lelei for the Defendant/Applicant and submitted while Mr. Tallam Learned Counsel opposed the application on behalf of the 2nd Plaintiff/Respondent.
8. It was the Applicants submissions that this suit was filed 45 years after issuance of the title to the Defendant and that under the provision of Section 7 of the Limitation of Action Act, the suit was time barred.
9. In support of this submissions the Applicants placed reliance in the cases of Dickson Ngigi Ngugi vs Consolidated Bank and Shah 1965 E. A and Bosire Ongero vs Royal Media Services 2015 (eKLR).
10. The Applicant urged the Court to dismiss the suit as order 2 Rule 15 provides for striking out suits without any reasonable cause of action.
11. The Applicant submits that the Plaintiff has not produced any evidence in support of his claim and that pleadings must be clear on the date when cause of action arose as was held in Julier Africa Adent Limited & another vs Christopher Michael Lokily (2017) eKLR.
12. Mr. Tallam submitted that the application and issues raised therein were an afterthought the same not having been initially raised in the statement of Defence.
13. It was Mr. Tallam’s further submissions that when the Plaintiff and Defendant purchased the suit property, the same was registered in the name of the Defendant who took a loan and charged the same till 2009.
14. That the Defendant had not been in peaceful occupation owing to previous suits; and the title had never been free to be transferred and that the suit was filed after the title became free to transfer after being discharged in 2021.
15. The Respondent further submitted that his cause of action was similar to the one by the 1st Plaintiff whom the Defendant had settled hence there was a reasonable cause of action and he urged the Court to dismiss the application.
16. In a brief rejoinder, Ms. Tanui Learned Counsel submitted that the decree annexed by the Respondent had no nexus to the suit as the Respondent was not a party and cannot rely on the decree of another person. Despite the property being charged the Defendant had had quiet possession.
17. The Court directed the Advocates to file the authorities they relied on in their submissions and reserved its ruling. None of the Advocates filed the authorities.

ISSUES FOR DETERMINATION: -

18. Having perused the plaint, the defence, the application and the opposing affidavits, the Court frames the following as issues for determination; -



- i. What is the cause of action by the Plaintiff?
- ii. Is the suit time barred?
- iii. Is the application merited?
- iv. What reliefs ought to issue?
- v. Who bears the costs of the suit?

ANALYSIS AND DETERMINATION: -

19. From the plaint, it is clear that the suit herein is a suit for recovery of land in NANDI/NDUBENETI/476; and that cause of action thus crystallized 12 years after the registration of the title deed in favour of the Defendant hence the same was time barred in about 1990, the title having been registered in 1978 and would be cleared time barred by provision of Section 7 of the Limitation of Action Act.
20. At paragraphs 3, 4 and 5 of the plaint, the following has been pleaded;
 - “ 3 that between the years 1970 – 1975, the Plaintiffs and the Defendant herein jointly entered in an engagement and agreed to buy a parcel of land registration number NANDI/NDUBENETI/476 measuring approximately 10.10 Ha.
 4. The Plaintiffs aver that; the Defendant was the one who was conducting and was in conduct of the purchase of the said land parcel and theirs was just to contribute the purchase price.
 5. the Plaintiffs states that upon completion of the purchase, the land was thereafter in the year 1978 transferred and registered in the Defendant’s name.”
21. A keen analysis of the above varies the pleaded cause of action from being a suit to recovery land to becoming a suit for recovery of trust land by a beneficiary as the Plaintiffs and Defendant jointly purchased the suit land but the same was registered in the name of the Defendant.
22. In arriving at the above, I am guided by the Court of Appeal decision in the case of Twalib Hatayan & another vs Said Saggur Ahmed Al heidy and others where the Court discussed the concept of Resulting Trust. The definition was also adopted in the case of Mark Kiprotich Sirma vs Sosten Kiplagat Singoei 2022 (KELA) 708 KLR. In the Twalib case the Court observed “.....while a Resulting Trust is defined as a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee.... The general rule is that a resulting trust will automatically arise in favour of the person who advances the purchase money...”
23. In the case of Peter Ndungu Njenga vs Sophia Watiri Ndungu (2000) eKLR, it was held that the Court could presume a Trust.
24. In view of the pleadings the plaint particularly paragraphs 3 -5, the Court presumes a Resulting Trust in favour of the Plaintiff who has pleaded the advancement of purchase money so the suit is therefore a claim by a beneficiary to recover trust property.
25. Thus, in answer to issue number 1 the Court finds the cause of action to be a suit for recovery of trust property by a beneficiary.



26. On issue number 2, is the suit time barred? Having found that the issue of Resulting Trust exists, it follows that the suit is on a prima facie basis excepted under Section 20 (i) (b) of the Limitation of Actions Act as it is suit for recovery of land by a beneficiary under a Resulting Trust.
27. For the above reasons, Section 7 of the Limitation of Action Act does not apply to this suit.
28. On the issue number 3, whether the application is merited, the Applicant submits that there is no cause of action since the Agreement the basis of the Plaintiff's claim has not been produced since the matter has not give to trail, it would be premature to conclude, that the Agreement the basis of the Plaintiff's claim has not been produced. It follows that having found that the suit is excepted under Section 20 (i) (b) of the Limitation of Action Act, and further that a reasonable cause of action exists subject to prove at trial by evidence to be produced by the Respondent and/or his witnesses.
29. It follows therefrom that the application before Court lacks merit and the same is dismissed.
30. The costs of the application shall abide by the outcome of the suit.
31. The application dated 21/01/2024 is hereby dismissed.
32. Costs in the cause.

RULING, DELIVERED AND DATED AT KAPSABET THIS 2ND DAY OF MAY 2024.

HON. M. N. MWANYALE

JUDGE.

In the presence of;

Mr. Tallam for the 2nd Plaintiff/Respondent

Ms. Olando holding brief for Ms. Lelei for the Defendant

KAPSABET ELC LC E001 OF 2023 RULING
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2

