



REPUBLIC OF KENYA



**Ajore v Owidi (Environment & Land Case 10 of 2021)  
[2024] KEELC 7337 (KLR) (5 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7337 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND CASE 10 OF 2021  
GMA ONGONDO, J  
NOVEMBER 5, 2024**

**BETWEEN**

**JARED OBUDO AJORE ..... PLAINTIFF**

**AND**

**PENINA AOKO OWIDI ..... DEFENDANT**

**RULING**

1. The instant ruling is in respect of a preliminary objection dated 5<sup>th</sup> July 2024 by O.H Bunde and Company Advocates learned counsel for the defendant premised upon the following grounds;
  - a. That the instant suit offends the provision of section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya hence nullity ab initio.
  - b. That the Honourable court is therefore divested of the jurisdiction to entertain the suit.
  - c. The suit does not disclose any reasonable cause of action.
  - d. The suit is an abuse of the process of the court.
2. The preliminary objection was heard by way of written submissions pursuant to the directions of this court given on 8<sup>th</sup> July 2024.
3. By the submissions dated 22<sup>nd</sup> July 2024, learned counsel for the defendant made reference to the grounds of the preliminary objection, the cases of Mukisa Biscuit Manufacturing Ltd-vs-West End Distributors Ltd (1969) EA 696 and Peter Mungai-vs-Joseph Kuria and another, Leah Njeri Ndichu (Interested party) (2022) eKLR that a preliminary objection must only raise issues of law pleaded or raised by clear implication out pleadings and which argued as a preliminary objection, may dispose of the suit. Counsel submitted that section 7 of the Limitation of Actions Act (The LAA) provides for claim to recover land and that the alleged agreement was made in the year 2001 and 2003 while the alleged breach was committed 23 years after the contract.



4. To that extent, counsel submitted that the suit is statute barred and that section 27 of the LAA does not give jurisdiction to this court to extend time for filing of suit in cases of contract or any other cause of action other than in tort. By relying on the case of Mary Osundwa-vs-Sugar Company Ltd (2002) eKLR on jurisdiction to extend time, it was submitted that there is no reasonable cause of action in the suit which is a nullity ab initio and an abuse of the process of the court as it offends section 7 of the LAA. That therefore, the preliminary objection be allowed and dispose of the suit in entirety.
5. The plaintiff through Bana and Company Advocates for Nchoe Jaoko and Company Advocates filed submissions dated 23<sup>rd</sup> September 2024 setting out the grounds of the preliminary objection and that in the plaint dated 11<sup>th</sup> December 2020, he is seeking transfer of the suit land reference Kabondo/Kodhoch East/1437, specific performance, permanent injunction and costs. Counsel submitted that upon purchase of a portion of the suit land, the defendant put him in possession of the same immediately. That thus, constructive trust was created thereon as the plaintiff paid full purchase thereof.
6. So, counsel submitted that the plaintiff has an equitable claim over the portion of the suit land in light of section 20 of the LAA on the application of trust and sections 4 and 7 of the LAA cannot apply in the circumstances. Counsel referred to the case of Ndiwa Chesebe-vs-John Chesebe Sikuku (2022) eKLR that trust is not statute barred claim. That as such, the preliminary objection is grossly misconceived and lacks merit hence, the same be dismissed with costs to the plaintiff.
7. In the plaint dated 26<sup>th</sup> November 2020, the plaintiff sued the defendant seeking the transfer of the portion bought by him into his name, to be curved out of the suit land. Also, he has sought specific performance against the defendant, compelling the defendant to cause the title to be transferred into the names of the plaintiff in respect of the portion as well as permanent injunction to restrain the defendant by herself, the successors in title assigns or however from interfering with quiet possession and enjoyment of the plaintiff and/or alienating selling, transferring or dealing with the suit property in any manner, in respect of the same portion.
8. By the statement of defence dated 20<sup>th</sup> April 2024, the defendant denied the plaintiff claim and prayed that the same be dismissed. That the claim is subject to proof as it is based on sinking sand and jurisdiction of this court is admitted.
9. Having considered the preliminary objection, the parties' respective pleadings and rival submissions, is the preliminary objection sustainable?
10. It is trite law that a preliminary objection must be based on points of law and may dispose of a suit; see Mukisa Biscuit case (supra).
11. No doubt, the defendant raised points of law in the preliminary objection, to the effect that the suit is statute barred and that jurisdiction of this court lacks herein; see also Mukisa Biscuits case (supra)
12. In the circumstances, this court has to handle the preliminary objection with promptitude being guided by the Court of Appeal decision in the case of Kakuta Maimai Hamisi-vs-Peris Pesi Tobiko and 2 others (2013) eKLR.
13. The defendant laments in the preliminary objection that this suit offends section 7 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya which provides;

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 first accrued to some person through whom he claims, to that person.



14. In the submissions, Mr. Otieno Bana learned counsel for the plaintiff referred to section 4 concerning actions of contract, tort and certain other actions. In Osundwa case (supra), the Court of Appeal remarked that;

..... the section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other cause of action than those in tort.....’

15. Article 10 (2) (b) of *the Constitution* of Kenya 2010 anchors the principles of equity. Indeed, constructive trust, being a principle of equity, is raised by the plaintiff in his submissions as regards the preliminary objection.

16. Section 20 of the LAA provides for actions concerning trust property. So, section 27 of the LAA on extension of limitation period does not apply to trust raised in the plaintiff’s submissions herein; see also Chesebe case (supra).

17. It is therefore, my considered view that there is a cause of action discerned in the suit which is neither an abuse of the court process nor a nullity ab initio.

18. In the result, it is the finding of this court that the preliminary objection is misplaced and devoid of merit. The same is hereby disallowed.

19. Costs of the preliminary objection be in the cause.

20. It is so ordered.

CONCLUSIONMS

**DATED AND DELIVERED AT HOMA BAY THIS 5<sup>TH</sup> DAY OF NOVEMBER 2024**

**G.M.A ONG’ONDO**

**JUDGE**

**PRESENT.**

1. Mr. Omuthe learned counsel for the defendant

2. Ms. Mutiva and Mr. Obunga, court assistants.

