



**Kiarie v Kiratu (Environment and Land Appeal 77 of 2019)
[2023] KEELC 18081 (KLR) (5 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18081 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 77 OF 2019**

JA MOGENI, J

JUNE 5, 2023

BETWEEN

KANGETHE KIARIE APPELLANT

AND

WILSON NGUMI KIRATU RESPONDENT

(Being an Appeal from the Ruling and Order of Hon. D.W. Mburu, Senior Principal Magistrate, delivered on 4/10/2019 in Nairobi CMCC Suit No. 6823 of 2018)

JUDGMENT

Introduction

1. The Appellant herein Kangethe Kiarie, was the Plaintiff in CMCC Suit No. 6823 of 2018. The Respondent herein, Wilson Ngumi Kiratu was the Defendant in the above stated suit. The Plaintiff (the appellant herein) had via a Plaint dated 16/10/2015 sought for the following orders against the Defendant (respondent herein):-
 - a) A declaration that the Plaintiff is the rightful purchaser of plot known as Plot B measuring 0.27 acres out of Plot No. Dagoretti/Kangemi/198.
 - b) That the Deputy Registrar does execute all the requisite documents of Plot B measuring 0.27 acres out of Plot No. Dagoretti/Kangemi/198.
 - c) Costs of this suit.
2. The Defendant raised a preliminary objection dated 30/11/2015 on four grounds against the Plaintiff's suit in that the trial court lacked jurisdiction to hear and determine the suit as the Plaintiff's suit is statute barred by Section 4(2) of the Law of *Limitation of Actions Act* as the Plaintiff seeks to enforce the terms and conditions arising from a written contract entered into on 21/08/2000 which action arising



out of a contract and are only enforceable within a period of 6 years. The trial court considered the preliminary objection and held that the issue of limitation is not a mere technicality but a jurisdictional one and on that ground alone, the trial court found that the suit is unsustainable and upheld the preliminary objection thereby dismissing the suit with costs to the defendant.

3. The Appellant was aggrieved by the aforementioned decision and by a Memorandum of Appeal dated 9/10/2019, the Appellant herein brought this Appeal and sought for orders that: -

- a) That the ruling and order of the lower court dated 4th October, 2019 be set aside.
- b) That the Respondent's Notice of Preliminary Objection dated 30th November, 2015 be dismissed with costs to the Appellant.
- c) That the Appellant's suit be deemed to have been filed within time hereof.
- d) That the Appellant's suit be heard and determined on merits.
- e) That the Honourable Court be pleased to give appropriate directions relating to hearing and determination of the suit hereof.
- f) That the costs of this appeal and of the Court below be awarded to the appellant hereof.

4. The Appeal is based on the grounds that: -

1. The learned Magistrate of the Lower Court erred in law and fact in its ruling of 4th October, 2019 by finding that the Appellant was time barred and not entitled to pursue his claim in court.
2. The learned Magistrate of the Lower Court erred in law in its ruling of 4th October, 2019 by failing to hold that a cause of action arose at the time of breach of the suit agreement and not at the date of entering the said agreement hereof.
3. The learned Magistrate of the Lower Court erred in law and fact in allowing the Respondent's Notice of Preliminary Objection dated 30th November, 2015 which was based purely on matters of facts and not law.
4. The Appellant contends Preliminary Objection offends the provisions of Section 20 on *Limitation of Actions Act* concerning trust property and which provides;
 - (1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action-(a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or
 - b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.
5. The learned Magistrate of the Lower Court erred in law and fact in basing its ruling of 4th October, 2019 on speculation and mere conjecture.



6. The learned Magistrate of the Lower Court erred in law and fact in failing to adequately consider facts herein and the appellant's submissions thus leading to a wrong ruling thus occasioning a miscarriage of justice against the Appellant.
5. The Appeal is not opposed. The Appeal was admitted for hearing on 31/10/2022 wherein directions were taken to the effect that it shall be disposed by way of written submissions to which the Appellant thereafter filed his submissions dated 7/12/2022 on 8/12/2022.

Issues for determination

6. This Court has considered the Record of Appeal in totality, the ruling by the trial magistrate and the Appellant's written submissions together with the court record generally and identify the following as the issues that emerge for determination:
 - a. Whether the Learned Magistrate of the Lower Court erred in law and fact in its ruling of 4th October, 2019 by finding that the Appellant was time barred and not entitled to pursue his claim in court.
 - b. Whether the learned Magistrate of the Lower Court erred in law in its ruling of 4th October, 2019 by failing to hold that a cause of action arose at the time of breach of the suit agreement and not at the date of entering the said agreement hereof.
 - c. Whether the Learned magistrate of the Lower Court erred in law and fact in allowing the Respondent's Notice of Preliminary Objection dated 30th November, 2015 which was based purely on matters of facts and not law.
 - d. Whether the Preliminary Objection offends the provisions of Section 20 on Limitation of Actions Act concerning trust property.
 - e. Whether the learned Magistrate of the Lower Court erred in law and fact in basing its ruling of 4th October, 2019 on speculation and mere conjecture.
 - f. Whether the learned Magistrate of the Lower Court erred in law and fact in failing to adequately consider facts herein and the appellant's submissions thus leading to a wrong ruling thus occasioning a miscarriage of justice against the Appellant.

Analysis and Determination

7. This being a first appeal, this court is under a duty to reconsider the evidence adduced and analyze it so as to be able to reach its own independent conclusions and thus determine whether the conclusions reached by the trial court are consistent with the evidence and the applicable law. In Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR the Court held that:

“this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it



itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

8. As the Court embarks on determination of the instant Appeal, it will take into account that the impugned Ruling that was delivered by the learned Magistrate on 4/10/2019, involved exercise of Judicial discretion. The Court will further take into account that it will not interfere with the discretion of the lower court unless it is satisfied that the lower Court did misdirect itself both in law and facts. See the case of *Mbogo & Another v Shab* [1968] EA 93, where the Court held that:-

“..... this court will not interfere with the exercise of discretion by an inferior Court, unless it is satisfied that its discretion is clearly wrong because it has misdirected itself or because it has acted on matter which it should not have acted on because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

9. The court will only interfere with the discretion of the learned Magistrate’s judicial discretion if it is satisfied that he did not exercise the said discretion judiciously.
10. This is an appeal against a ruling on grounds that the Appellant’s suit is statute barred hence the evidence on record for this court to reconsider and analyze is the evidence in respect of the Respondent’s preliminary objection raised on grounds that the Appellant’s suit is statute barred. It includes the Plaint dated 16/10/2015, the Preliminary Objection dated 30/11/2015 and the submissions by the parties on the preliminary objection.
11. The Appellant has set out 8 grounds of appeal in the memorandum of appeal dated 9/10/2019. In his subsequent written submissions before this Court, the appellant’s main submission was on trespass. Counsel submitted that trespass has no time limitation. He relied on Civil Appeal No. 43 of 2017 (Nyeri) wherein the Court held that Section 4(2) of the *Limitation of Actions Act* does not apply on continuing trespass within the meaning of the *Trespass Act* Cap 403. That the Appeal Court agreed with the Superior Court that the term ‘trespass’ by the eminent learned authors, it is clear that any unauthorized entry whether present or continuous is trespass.
12. Taking into account the 8 grounds of appeal set out in the memorandum of appeal, I am of the view that I need to address grounds 1 – 4 in order to determine this appeal.

Whether the Learned Magistrate of the Lower Court erred in law and fact in its ruling of 4th October, 2019 by finding that the Appellant was time barred and not entitled to pursue his claim in court.

13. I have considered the fact that the present Appeal has been filed after the trial magistrate upheld the Defendant’s preliminary objection dated 30/11/2015 to the effect that the Plaintiff’s suit was time barred by virtue of the provisions of Section 4 (1) of the *Limitation of Actions Act*.
14. Section 4 (1) of the *Limitation of Actions Act* provides that:

- “(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)
 - (c)



(d)

(e)

15. It is not dispute that the Appellant purchased the suit property through a sale agreement dated 21/08/200. The Appellant contends that the defendant breached the sale agreement by failing to transfer the portion in favour of the plaintiff despite receiving the full purchase price. The Appellant was aggrieved by the trial court ruling delivered on 4/10/2019 and stated that the trial magistrate erred in law and fact by finding that the Appellant was time barred and not entitled to pursue his claim in court.
16. In his submissions in the present appeal, counsel for the Appellant submitted that trespass has no time limitation. He relied on Civil Appeal No. 43 of 2017 (Nyeri) wherein the Court held that Section 4(2) of the Limitation of Actions Act does not apply on continuing trespass within the meaning of the Trespass Act Cap 403. That the Appeal Court agreed with the Superior Court that the term ‘trespass’ by the eminent learned authors, it is clear that any unauthorized entry whether present or continuous is trespass.
17. The central theme in the appellant’s case is contestation that the trial magistrate erred in holding that the Appellant’s claim was barred under Section 4 of the Limitation of Actions Act.
18. The issue as to whether the suit filed in the trial court was statute barred must be determined by examining whether the material placed before the trial court was sufficient to warrant the decision it arrived at. This court, being an appellate court, has the duty to re-evaluate the evidence placed before the trial court and establish whether the conclusions made on the evidence before the court below and the findings arrived at by that court were justified.
19. The question as to whether the suit filed in the trial court was statute barred can only be answered after determining when the parties entered into an agreement, when the plaint was filed and what the cause of action was.
20. A perusal of the Court record shows that the contract for sale of the suit property was entered into on 21/8/2000 and the Plaint was filed in the lower court on 21/10/2015, which was fifteen (15) years after the cause of action arose and this indeed offended Section 4 of the Limitation of Actions Act. The Section provides that an action founded on contract should be brought within six (6) years.
21. Additionally, it was a term of the contract, under clause 4, that the balance of the purchase price Kshs. 114,000.00 was to be paid to the vendor after the vendor has executed all the necessary transfer and consent documents to the purchaser. The plaintiff has admitted that he paid the entire purchase price and took possession. The dispute therefore was that the defendant failed to transfer the suit property to the plaintiff. As the plaint dated 16/10/2015 shows, the Plaintiff’s claim is for a declaration that he is the rightful purchaser and that the Deputy Registrar does execute the requisite documents. This demonstrates that the cause of action arose from the contract dated 21/08/2000 which was duly executed by both parties.
22. In Gathoni v Kenya Co-Operative Creameries Ltd. [1982] KLR 104, Potter, JA at page 107 expressed himself thus:

“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.”



23. In *Iga v Makerere University* [1972] EA it was held:

“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 Rule of Uganda which has same provisions with Limitations Act 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.”

24. Guided by the above findings, I do not share the Appellant’s view that the claim is one of trespass. I disagree with it. The ruling giving rise to this Appeal was subject to the Respondent’s preliminary objection dated 30/11/2015 raised on grounds that the suit was statute barred.

25. I agree with the findings of the trial court and my finding on this ground is that the trial court did not err in finding that the Appellant’s suit was time barred and not entitled to pursue his claim in court. In any event, the question before the trial court was whether the Appellant/Plaintiff’s suit was time barred and the court rightly rendered itself on the issue.

Whether the learned Magistrate of the Lower Court erred in law in its ruling of 4th October, 2019 by failing to hold that a cause of action arose at the time of breach of the suit agreement and not at the date of entering the said agreement hereof.

26. The question before the trial magistrate was when the appellant’s cause of action accrued for purposes of Section 4(1) (a) of the *Limitation of Actions Act*. Section 4(1) (a) of the *Limitation of Actions Act* prohibits actions based on contract from being commenced after the expiry of six (6) years from the date of the transaction.

27. The Court in *South Nyanza Sugar Company Limited v Diskson Aoro Owuor* MGR HCCA No. 85 of 2015 [2017] eKLR held that;

“(17) There is no doubt in this matter that the parties entered into a contract and which contract was allegedly breached. What is for determination is when exactly the cause of action accrued since from that time the limitation period of 6 years starts running. I do not find that issue difficult to decide on. I say so because when a party enters into a contract for a specific period of time, it does so in the understanding and belief that each of the parties to the contract will observe its part thereof until full execution of the contract. It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period.”

28. The agreement between the appellant and the respondent was executed on 21/08/2000. It was a term of the contract that the balance of the purchase price Kshs. 114,000.00 was to be paid to the vendor after the vendor has executed all the necessary transfer and consent documents to the purchaser. No evidence was produced before the trial court to demonstrate when the Appellant paid the balance of the purchase price in the amount Kshs. 114,000.00 or when he paid the balance of the purchase price. The said evidence would have been key to calculate when the alleged breach of contract arose. Even if



we relied on the Law Society Conditions of Sale and added the 90 days completion date, the date in which the alleged breach occurred can still not be determined.

29. My interpretation of clause 4 of the sale agreement dated 21/08/2000 is that the Appellant was to pay the balance of the purchase price after the vendor has executed all the necessary transfer and consent documents to the purchaser. The plaintiff has admitted that he paid the entire purchase price and took possession. The trial court was not privy to any evidence that demonstrated that the Appellant paid the balance apart from his allegation made in his Plaint dated 16/10/2015. Breach of contract would have occurred if the terms of the contract had not been met and the trial court did not have the opportunity to delve into the merit of the Plaintiff's suit and I shall also steer clear of the same but from the evidence before the court, there is nothing to show when the alleged breach may have taken place.
30. I adopt the position taken in *South Nyanza Sugar Company Limited v Diskson Aoro Owuor* (Supra) in determining when the cause of action accrues. According to Black's Law Dictionary (10th Edition) the word "accrue" means "to come into existence as an enforceable claim or right." In the present suit and for the reasons given, I opine that the right to sue could only arise when the parties entered into an agreement for the sale of the suit plot. This is when the cause of action accrued and when, in terms of section 4(1) (a) of the *Limitation of Actions Act*, the time begins to run.
31. From the foregoing, I agree with the findings of the trial court and it is my finding that the learned Magistrate of the Lower Court did not err in law in its ruling of 4/10/2019 by failing to hold that a cause of action arose at the time of breach of the suit agreement and not at the date of entering the said agreement hereof.

Whether the Learned magistrate of the Lower Court erred in law and fact in allowing the Respondent's Notice of Preliminary Objection dated 30th November, 2015 which was based purely on matters of facts and not law.

32. As stated in the renowned case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 :

"...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 the contract giving rise to the suit to refer the dispute to arbitration..." Sir Charles Newbold, P at Page 701

proceeded as follows;

"a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."

33. The test to be applied in determining whether the preliminary objection met the threshold is as in the *Mukisa* case (Supra) which are whether the preliminary objection raises a pure point of law, that there is a demonstration that all the facts pleaded by the other side are correct and that there is no fact that needs to be ascertained.



34. When upholding the Respondent’s preliminary objection, the learned magistrate stated as follows:
- “... Consequently, I do hereby make a similar finding that the issue of limitation is not a mere technicality but a jurisdictional one. On this ground alone, this suit is unsustainable...”
35. In this case, the preliminary objection raised by the Respondent was based on section 4(1) (a) of the *Limitation of Actions Act*. The objection was on grounds that the trial court lacked of jurisdiction to hear and determine the suit as the Plaintiff’s suit is statute barred by Section 4(1) of the Law of *Limitation of Actions Act* as the Appellant/Plaintiff seeks to enforce the terms and conditions arising from a written contract entered into on 21/08/2000 which action arising out of a contract and are only enforceable within a period of 6 years.
36. Section 4 (1) of the *Limitation of Actions Act* provides that:
- “(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;
37. It is not in dispute that the alleged cause of action arose in the years 1996 - 2000 when the Appellant entered into an agreement for the sale of land with the Respondent on 21/08/2000. Pursuant to the provisions of section 4(1) (a) of the *Limitation of Actions Act*, the Appellant’s claim became time barred in 2006, six (6) years after the cause of action arose.
38. I have revisited the record and appraised it on my own and it is evident that the trial court upheld the Respondent’s preliminary objection dated 30/11/2015 to the effect that the Plaintiff’s suit was time barred by virtue of the provisions of Section 4 (1) of the *Limitation of Actions Act*.
39. Bearing the principles on sustaining a preliminary objection set out by Sir. Charles Newbold P in mind, it is my finding that issue of want of jurisdiction in the Court to entertain a claim for the said cause of action for the reason of noncompliance with the provisions of the *limitation of Actions Act* as raised in the Respondent’s preliminary objection was an issue of a pure point of law. I therefore find that the Respondent’s preliminary objections satisfied the ingredients for sustaining a preliminary objection.
40. A suit being statute barred goes to the issue of jurisdiction. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. It will not matter whether the facts of the Plaintiff’s case as outlined are true not because without Jurisdiction this court will not have any powers to determine the case. This is because in any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools.
41. The issue of jurisdiction is key since without jurisdiction a court has no powers to proceed to entertain the matter and it has to down its tools. I am of the considered view that since the matter was yet to be heard, the Respondent was within the law to raise a Preliminary Objection challenging the jurisdiction of the trial court.



42. It is my finding that the Preliminary Objection raised by the Respondent is one on pure points of law that the trial court went ahead and determined and that the trial court did not err in upholding the same.

Whether the Preliminary Objection offends the provisions of Section 20 on Limitation of Actions Act concerning trust property.

43. The appellant contends that the Respondent’s Preliminary Objection offends the provisions of Section 20 of the Limitation of Actions Act.

44. I have gone through the record of appeal dated 2/02/2022 and the lower court file and I note that there is nowhere in the pleadings or proceedings of the lower court where the Appellant has pleaded or raised the issue of trust property. The ruling delivered on 4/10/2019 also did not touch on the issue of trust property. Counsel for the Appellant cannot therefore raise new issues in this appeal that were not canvassed by the parties during the disposal of the Respondent’s preliminary objection.

45. In so holding I am guided by the decision of the Court of Appeal in Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others ex-parte Tom Mbaluto [2018] eKLR (as cited in Frera Engineering Company Limited v Morris Mureithi Mutembei [2020] eKLR) where the court stated that -

“...It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also George Owen Nandy v. Ruth Watiri Kibe, CA No. 39 of 2015 and Openda v Ahn [1983] KLR 165). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court.... As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance.”

46. In the premises, I decline to consider ground 4 of the memorandum of appeal.

Disposal Orders

47. From my analysis of the material placed before the trial court and the impugned ruling, I find that the learned trial Magistrate neither failed to fully analyze and evaluate the evidence nor reached a wrong decision. I also find that there were no substantial issues raised regarding pleadings by the parties which the trial court failed to address and no miscarriage of justice was occasioned.

48. The upshot is that none of the grounds of appeal have been proved. I find and hold that there is no justification to interfere with the findings of the trial magistrate. In the premises, I do not find any merit in this appeal and the same is dismissed with costs to the Respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JUNE 2023.

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MOGENI J

JUDGE

In the Virtual presence of

Mr Karauka for Appellant

No appearance for the Respondents

Ms. C. Sagina: Court Assistant

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MOGENI J

JUDGE

