



**Mutwiwa v Komarock Ranching Society (Environment & Land Case  
488 of 2018) [2022] KEELC 2811 (KLR) (7 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2811 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 488 OF 2018**

**JA MOGENI, J**

**JUNE 7, 2022**

**BETWEEN**

**PAUL MUTWIWA ..... APPLICANT**

**AND**

**KOMAROCK RANCHING SOCIETY ..... RESPONDENT**

**RULING**

**A. Background**

1. Before me for determination is the Notice of Preliminary Objection dated 17/01/2019 by the Defendant/Respondent which seeks to strike out the plaintiff's Application dated 26/10/2018 on the grounds that suit is statute barred by the provisions of Section 4 of the [Limitation of Actions Act](#), Cap 22 Laws of Kenya. The prayers sought in the preliminary objection are as follows:
  1. That, the Application dated 26/10/2018 violates Section 4 (4) of the [Limitation of Actions Act](#).
  2. That, the alleged Defendant herein is not known in law
  3. That, we are not the officials of the alleged Defendant herein.
  4. That, the application dated 26/10/2018 is res judicata as a similar application had already been heard and determined.
  5. That the Court lacks jurisdiction to extend time under the [Limitation of Actions Act](#).
  6. That, the Plaintiff/Applicant have never appealed the Ruling of the Court delivered on the 19/12/2017 hence the Court is functus officio.



2. The Applicant filed the Notice of Motion under Certificate of Urgency dated 26/10/2018 pursuant to Article 159 of the Constitution of Kenya 2010, Section 5 & 28 of the *Civil Procedure Act*, Section 23, 24 & 25 of the *Limitations of Actions Act*, Order 22 Rule 6 of *Civil Procedure Rules* 2010 and all enabling provisions of law. The Applicant is seeking for the following Orders:
  1. Spent.
  2. That this Honourable court be pleased to grant leave to the Applicant to proceed with execution out of time.
  3. That this Honourable court be pleased to extend the decree of Nairobi High Court Civil Suit No. 2861 of 1991 delivered on 10<sup>th</sup> July 1995.
  4. That this Honourable court be pleased to order the Respondent herein to transfer the suit piece of land as ordered by the court in the judgment.
  5. That the officials of the Respondent be detained in Prison for six months for disobeying the orders of this Honourable Court issued on 10.07.1995.
  6. That costs be provided for.
3. The Application is premised on the grounds cited at the foot of the Application and it is further grounded on the Supporting Affidavit of Paul Mutwiwa, the Applicant herein, sworn on 26/10/2018.
4. The Court on 9/3/2022 gave directions that the Notice of Preliminary Objection be canvassed by way of written submissions. The Defendant Respondent filed his written submissions on 4/03/2022 and the Plaintiff/Applicant on 25/4/2022. A Ruling date was scheduled.

#### **Issues for determination**

5. Having considered the pleadings, Preliminary Objection together with the rival submissions and the authorities cited to me, the following arise as the issues for determination before this court.
  - a. Whether the preliminary objection raises pure points of law.
  - b. Whether the Court has jurisdiction to hear and determine this suit.

#### **B. Analysis and Determination**

##### **a. Whether the Preliminary Objection raises pure points of law.**

6. The starting point is to define what a preliminary objection is. The case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 has been the watershed as to what constitutes preliminary objections. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also pellucidly captured the legal principle when it stated as follows:

“...A Preliminary Objection raises a pure point of law, which is argued 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...”



7. This statement of the law has been echoed time and again by the courts: see for example, *Oraro -v- Mbaja* [2007] KLR 141. In *Hassan Ali Jobo & another -v- Suleiman Said Shabal & 2 Others* SCK Petition No. 10 of 2013 [2014] eKLR the Supreme Court stated that:

“.... 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”. [emphasis added]

8. In the instant suit the defendant/respondent has based his Preliminary Objection on the ground that this court lacks jurisdiction to hear and determine the Plaintiff’s suit. 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 or 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. The Supreme Court *in the Matter of Interim Independent Electoral Commission* [2011] eKLR held as follows:

Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

[30] The *Lillian ‘S’* case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.

9. 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. In the present matter the Defendant/Respondent has hinged its preliminary objection on the fact that the Plaintiff/Application cause of action was time barred and that the suit was brought after the expiry or lapse of the period of limitation. I am of the considered view that the Defendant/Respondent is within the law to raise Preliminary Objection challenging the jurisdiction of this court. It is my finding that the Preliminary Objection raised by the Defendant/Respondent is one on pure point of law that that this court needs to determine.
10. If the suit is statute barred on account of limitation, then the court lacks the jurisdiction to entertain the same. If the court were to proceed to hear and adjudicate the suit when it lacked the jurisdiction, its decision would be null and would be void.



**b. Whether this Court lacks jurisdiction to hear and determine this suit.**

11. Having determined that the Preliminary Objection by the Defendant/Respondent is based on pure points of law, it will be important to determine whether this court lacks jurisdiction to hear and determine this suit.
12. Section 4 of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya prescribes the limitation period for the institution of suits in regard to various causes of action. In regard to actions founded on contract the limitation period is six years whereas in regard to actions founded on tort the limitation period is three years. Section 4 (4) of the *Limitation of Actions Act* further provides as follows:-
  - “(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”
13. It is not in dispute that the cause of action herein was founded on a contract. From the record, the Plaintiff herein had instituted a suit in the High Court against the Defendant and Judgment was delivered on 10/7/1995 wherein the Court held that the Plaintiff was entitled to the suit property. It is the Plaintiff’s case that the Defendant applied for a Review in 1996 and a Ruling was delivered on 5/7/1996 upholding the Judgment for 10/7/1995. The Plaintiff contended that he proceeded to execute the Judgment against the Defendant, but the office of the Commissioner of Cooperative Development commenced arbitration proceedings and an Order was subsequently issued on 23/3/1999 upholding the said Judgment.
14. The execution of the judgment was forestalled by the subsequent court and arbitration proceedings. Therefore, I believe time started running from 23/3/1999.
15. The Plaintiff submitted that by virtue of Section 39 of the *Limitation of Actions Act*, the Defendant is stopped from invoking Section 4(4) of the *Limitation of Actions Act*. He also relied on the case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 in stating that the Preliminary Objection is not a Preliminary Objection within the definition of the celebrated case of *Mukhisa Biscuit*.
16. On the other hand, the Defendant/Respondent submitted that the provisions of Section 4 (4) of the *Limitation of Actions Act* are self-explanatory. They averred that the Plaintiff/Applicant seeks to enforce that which dates back to the year 1995, over 20 years ago. The Defendant/Respondent contends that the judgment ought to have been executed on or before the year 2007. They relied on the case of *James Maina Kinya vs Gerald Kwendaka* [2018] eKLR and *Koinange Investments and Development Company Ltd vs Ian Kabiu Ngethe & 3 others* (2015) eKLR.
17. Section 39 of the *Limitations of Actions Act* provides that:
  - “(1) A period of limitation does not run if—
    - (a) there is a contract not to plead limitation; or
    - (b) that the person attempting to plead limitation is estopped from so doing.



- 2) For the purposes of subsection (1) of this section, “estopped” includes estopped by equitable or promissory estoppel.”
18. I have considered the materials placed before the court and find that they do not disclose any contract made by the plaintiff/applicant stating that it would not plead limitation, and there was no demonstration in any way how the plaintiff/applicant was estopped from pleading limitation. After the Defendant/Respondent stopped negotiations, nothing precluded the Plaintiff/Applicant from filing an application seeking to execute the judgment within the stipulated period. In my view, the Plaintiff/Applicant slept on his rights, and equity does not come to the aid of the indolent.
19. The common law delay rule involves a two-stage inquiry: first, whether the proceedings were instituted after a reasonable time has passed, and, second, if so, whether the court should exercise its judicial discretion to overlook the unreasonable delay taking the relevant circumstances into consideration. The litigation consists of three stages, initiation of litigation, adjudication of litigation, and implementation of litigation. The last stage of litigation, that is the implementation of litigation is known as an execution which enables the decree-holder to enjoy the benefits of the judgment. If not implemented at the right time then the decree-holder may be caught up with laches. Which is the case in this instant suit.
20. The doctrine of laches is an equitable defense that seeks to prevent a party from ambushing someone else. Laches (“latches”) refers to a lack of diligence and activity in making a legal claim, or moving forward with legal enforcement of a right, particularly in regard to equity; hence, it is an unreasonable delay that can be viewed as prejudicing the opposing [defending] party. In short, laches is asserting that a party “slept on its rights”. Laches is associated with the maxim of equity, “Equity aids the vigilant, not the sleeping ones [that is, those who sleep on their rights].” Put another way, failure to assert one’s rights in a timely manner can result in a claim being barred by laches. In this case, the claim for execution was not advanced in good time and was caught up by the provisions of the *Limitations of Actions Act*. See *Edward Akong’o Oyugi & 2 others v Attorney General* [2019] eKLR.
21. From the material on record, the relevant time that counts for purposes of the plaintiff’s claim to the land is the period between 1999 – 2018 when the Application dated 26/10/2018 was filed. The Plaintiff admitted that the Defendant stopped the negotiations in 2009. The Court finds that the Plaintiff should have come to Court then as it would have still been within the limitation period set out by law. For clarity, this Application was filed on 26<sup>th</sup> October 2018, which is 19 years from the time the judgment was entered.
22. Section 4(4) of the *Limitation of Action Act* applies to judgments and therefore a judgment must be executed within 12 years after which it will be statute barred. See *Koinange Investments and Development Company Ltd vs Ian Kabuu Ngethe & 3 others* (2015) eKLR.
23. In the case of *Gathoni v Kenya co-operative Cremires Ltd* [1982] KLR 104 Potter, JA stated the rationale of the Law of Limitation as follows:-
- “The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”
24. The Plaintiff filed the present application on 26/10/2018, 19 years after judgement in Nairobi High Court Civil Case number 2861 of 1991 was delivered. The Plaintiff has explained why execution of the same took all that time. However, no explanation was given on why he didn’t file the present application in 2009 when the Defendant stopped the negotiations. Let’s say time started running from



1999 when the Arbitration proceedings ended, twelve years would have lapsed in the year 2011 or thereabouts. The said judgement remained unexecuted for over 12 years and by 2011 it expired by dint of section 4(4) of Limitation of Actions Act. This application was filed on 26/10/2018. It is clear therefore that the application was filed outside the limitation period and is therefore statute barred and must fail. There is a reason why the Limitation of Actions Act was enacted.

25. The Court of Appeal Judges in the case of Willis Onditi Odhiambo v Gateway Insurance Co. Ltd [2014] eKLR were clear that Section 4(4) of the Limitation of Actions Act covers execution of Judgments. In the case they stated as follows:-

“In other words the appellant wanted to execute the said decree against the respondent out of time. Execution of judgments and/or decrees is governed by section 4(4) of the Limitation of Actions Act which is in the following terms-

“4(4) an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered”.

The judgment which the appellant sought to execute was passed on 26th August, 1996. The judgment should therefore have been executed on or before 27th August, 2008”.

26. In the case of ELC No. 5704 of 1992 (OS) Hudson Moffat Mbue -vs- Settlement Fund Trustees & 3 others (unreported) Mutungi J while considering the application of Section 4(4) of the Limitation of Actions Act where an application for execution of judgment had been brought before the expiry of the 12 years had lapsed but was determined until after the period had expired observed thus;

“What I understand the law to be is that once a judgment has been rendered, execution of that judgment must be commenced within the 12-year period otherwise you cannot obtain a judgment and fail to do anything about it and after 12 years have expired seek to execute the same. Section 4(4) of the Limitation of Actions Act will bar you from carrying on with such execution”.

27. In the case of Bosire Ongero v Royal Media Services [2015] eKLR the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.

28. In the final result, I find the preliminary objection to be well founded. It is upheld and it is my determination that this suit is not sustainable on account of being statute barred under the Limitation of Actions Act. I order the Application dated 26/10/2018 to be struck out and dismissed.

It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF JUNE, 2022.**

.....

**MOGENI J**

**JUDGE**

**In the presence of: -**

..... **for the Plaintiff/Applicant**

.....**for the Defendant/Respondent**

**Mr. V. Owuor- Court Assistant**

