



**Odido v Kennedy Odera Obar Maria Kerubo Migiro t/a Odera Obar & Co. Advocates
(Civil Case 213 of 2016) [2025] KEHC 184 (KLR) (Civ) (20 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 184 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
CIVIL CASE 213 OF 2016
AA VISRAM, J
JANUARY 20, 2025**

BETWEEN

HELLEN ODIDO PLAINTIFF

AND

**KENNEDY ODERA OBAR MARIA KERUBO MIGIRO T/A ODERA OBAR &
CO. ADVOCATES DEFENDANT**

JUDGMENT

1. The Plaintiff instituted this suit through a Complaint dated 8th August, 2016, seeking judgment against the Defendant for general damages for negligence, costs of the suit, and interest on both.
2. The background to the suit is that around October 2008, the Plaintiff instructed the Defendant to represent her in the purchase of L. R. NO. 5842/2/7 Karen from Anne Mumbi Mutiso (“the Vendor”) a beneficiary of the estate of the late John Theuri Gitahi, the registered proprietor.
3. The Plaintiff paid Kshs. 660,000/- being 20% of the purchase price after signing the agreement for sale dated 17th October, 2008 (“the Sale Agreement”) on the Defendant’s advice.
4. The Vendor subsequently failed to avail the grant of letters of administration and certificate of confirmation of grant as part of the completion documents in time for completion. The said documents were eventually issued by the court long after the agreed completion period of 90 days, being on 12th January, 2010 and 6th June, 2011, respectively. The Vendor failed to provide the same to the Plaintiff even after the same were issued despite the Plaintiff’s willingness to proceed with the sale.
5. As a result of the failure on the part of the Vendor, as stated above, the Plaintiff, on advice from the Defendant, commenced arbitration proceedings against the Vendor seeking specific performance of the Sale Agreement.



6. During the course of the arbitral proceedings, it emerged that the late John Theuri Gitahi was not, in fact, the registered proprietor of the subject land at the time of his death. The administrators of the estate accordingly sought its deletion from the list of his assets in the confirmed grant.
7. In the final award dated 3rd June, 2015, the Arbitrator ordered the seller to refund the Plaintiff the paid purchase price of Kshs. 660,000/= together with simple interest at a rate of 12% p.a. and costs of the arbitral proceedings. The Arbitrator however declined to order specific performance of the Sale Agreement because, inter alia, the Vendor's beneficial interest had been defeated.
8. The Plaintiff's claim is that the Defendant handled the transaction in a negligent manner. In particular, by failing to conduct appropriate due diligence, failing to obtain an official search before the Sale Agreement was signed, and wrongly advising the Plaintiff that the transaction could be completed when in fact, the Vendor lacked capacity to sell because the land was subject to succession.

Defence

9. The Defendant filed a statement of defence dated 15th September, 2016. In his defence, in sum, the Defendant denied the allegations stated above, asserting that the Plaintiff's claim is time-barred under section 4(2) of the *Limitation of Actions Act*; that he discharged his duty with the degree of ordinary, reasonable care, and ability as ordinarily expected, and stated that there is no causal connection between the Defendant's conduct, and the alleged damage suffered by the Plaintiff.

Evidence

10. The hearing commenced on 15th March, 2023. The Plaintiff testified in support of her claim, as PW1. She adopted her witness statement dated 18th April, 2018, as her evidence in chief. She also produced her bundle of documents dated 8th August, 2018, marked as Exhibits 1 consisting of pages numbered 1 to 74.
11. During cross-examination, the Plaintiff confirmed that she was the claimant in the arbitral claim while her brother and advocate, Mr. James Oudia, who swore the verifying affidavit, managed the case on her behalf. She also explained that she had appointed her brother as her attorney through a power of attorney.
12. The Plaintiff clarified that the present matter was different from the arbitral proceedings because in those proceedings she had stated that the Vendor represented to her that the suit property was registered in favour of the Vendor's late father and that the Vendor was a beneficiary. She admitted that while she faulted the seller for failure to execute a valid contract, she was of the opinion that the Defendant failed to conduct proper due diligence as well.
13. The Plaintiff admitted that the Sale Agreement was subject to various completion documents, which included the provision of the grant of letters of administration. She admitted that the completion period was 90 days and that this had not been complied with.
14. The Plaintiff further acknowledged that during the course of the transaction, the Defendant had advised/ proposed several amendments to the draft Sale Agreement, including an indication that the seller was a beneficiary, the specification of the interest that was for sale, the acreage of the land and the holding of the deposit by the seller's advocates on stakeholder basis.
15. The Plaintiff admitted that, two years after the execution of the Sale Agreement, the Defendant followed up on the stamping of the Sale Agreement, and the issuance of outstanding completion documents through various letters copied to her. She received various letters from the Vendor's lawyers



explaining that the delay was due to ongoing succession proceedings. She was aware that after the grant of letters of administration intestate was eventually issued, the Vendor applied for a certificate of confirmation of the grant.

16. The certificate of confirmation of grant forwarded to her advocate listed the suit property and the Vendor as a beneficiary. Thereafter, the Vendor engaged a surveyor to start the subdivision process, and an application was lodged to reconstruct the title because the same could not be traced.
17. The Plaintiff admitted that at that time, she had no issue with the breach of time frame on the part of the Vendor, nor did she take issue with the fact that the title was missing. Accordingly, the Defendant issued a completion notice to the Vendor dated 3rd June, 2023, also copied to the Plaintiff.
18. During re-examination, the Plaintiff clarified that she had never been furnished with a copy of the title to the suit property; no search had been carried out by the Defendant; no title existed in the year 2010; and that if she had known this, she would not have engaged in the transaction.
19. The Plaintiff also clarified that because she was outside the country, she was not directly involved in the purchase; for this reason, a power of attorney was utilized. She had trusted the Defendant, her brother's friend, to represent her in the sale, and he had let her down.
20. She further testified that both she and her brother were buying 10 acres each, and her brother had lent her money to pay the balance on her portion.
21. The Defendant called one witness, Kennedy Odera Obar (Mr. Odera), as DW1. He adopted his witness statement dated 18th March, 2019, as his evidence in chief. He produced the Defendant's list and bundle of documents dated 16th September, 2016, marked as the Defendant's exhibit. The Defendant's supplementary list and bundle of documents dated 15th March, 2023, was excluded on the basis the Plaintiff objected to it and the court agreed with the objection that it was filed after the Plaintiff's testimony and close of her case.
22. In summary, Mr. Odera testified that he supervised the sale transaction which was handled directly by an advocate employed by his firm. He explained that the firm could not conduct an official search at the time because the title was missing. This fact was within the knowledge of both parties from the outset. He testified that there was a letter written by the Vendor's advocates to the effect that they were pursuing reconstruction of the title in 2010. It was the Vendor's responsibility to avail the title, not his.
23. He testified that he did everything in his power and diligence to ensure that the transaction went through. He averred that he was vindicated by the arbitral tribunal which, in its award, found that the agreement for sale was valid. The Vendor bound herself to avail the completion documents in accordance with the terms of the Sale Agreement, and he had no reason to think she would not.
24. Finally, and in sum, Mr. Odera testified that at all times, his advice was sufficient and proper.

Submissions

25. The Plaintiff filed written submissions dated 11th May, 2023, in support of her claim that the Defendant was negligent in advising and representing her.
26. The Plaintiff relied on the decision of the court in *Gabriel Mugai Njiri v Wanga Robert Hawi t/a as R. H. Wanga & Co Advocates* [2018] eKLR in support of the argument that an advocate is liable for an act of gross negligence or ignorance of elementary matters of law consistently arising in practice. She contended that the Defendant owed her a duty to advise her on all relevant aspects of the Agreement,



- particularly as she was based outside the country. The Defendant could not wish away his obligations by stating that Sale Agreement had not been forced upon her.
27. She submitted that the Defendant was responsible for advising her on any foreseeable issues that could have impacted the transaction's completion and failed to do so. In particular, she faulted him for advising her that the transaction could be completed in 90 days despite the probable and foreseeable delays in completing the same due to the succession proceedings, subdivision, and transmission of the suit property to the Vendor.
 28. She submitted that the Defendant was at fault for failing to obtain a search and the original title before proceeding with the Sale Agreement. She highlighted that the Defendant never requested a copy of the title from the Vendor. She relied on the decision of the High Court in *Harilal Velji Shah & another v Matiri Mburu & Chepkemboi Advocates* [2017] eKLR which emphasized the importance of conducting an official search.
 29. She submitted that the Defendant was negligent in advising her to enter into a Sale Agreement involving land subject to succession, and cited section 45 of the *Law of Succession Act*. She contended that the Defendant ought to have advised her on the potential challenges that could arise in a sale transaction involving land subject to succession.
 30. She argued that she suffered loss equivalent to the value of the one-acre parcel because of the Defendant's negligence. She referred to the award where the Arbitrator noted that she could not buy a similar sized parcel in Karen due to rising costs over the years. She urged the court to adopt a value of Kshs. 70,000,000/- based on a market survey report by Hillside Homes Limited.
 31. She relied on the decision of the High Court in *National Bank of Kenya Limited v E. Muriu Kamau & Another* [2009] eKLR, where the court held that where the advocate is in breach of his contractual duty to his client, or where he fails to use proper care towards the fulfilment of instructions given, he is liable in damages in so far as the client suffers loss. She prayed for general damages for negligence in the sum of Kshs. 70,000,000/- together with costs and interest at court rates.
 32. The Defendant filed his submissions dated 29th May, 2023. He submitted that the suit is statute-barred under the *Limitation of Actions Act*. The cause of action arose on 17th October, 2008 when the Plaintiff acted on the allegedly negligent advice to enter into the flawed transaction. He relied on English decisions in *Bell v Peter Browne* [1990] 2 QB 495, *Knapp v Ecclesiastical Insurance Group plc* [1997] EWCA Civ 2616 and *Kelly Elliot v Hattens Solicitors (a firm)* [2021] EWCA Civ 720 to illustrate that a cause of action for professional negligence accrues when the Plaintiff suffers damage, which he contended rendered the Plaintiff in breach of the statutory period of limitation.
 33. He relied on the text outlined in the practitioner's guide: *Negligence by Charlesworth & Percy*, 7th Edition where the authors expressed that the court's punitive jurisdiction over negligence by solicitors ought to be exercised sparingly and compensatory jurisdiction could be exercised where the solicitor has been grossly negligent or in serious dereliction of duty.
 34. He further relied on the Court of Appeal decision in *Kinluc Holdings Ltd v Mint Holdings Ltd & Another (Civil Appeal 264 of 1997)* [1998] eKLR in support of the standard of duty of care and skill required of an advocate in transactions such as the present one, arguing that he had not fallen below the required standard of care.

Analysis and Determination

35. I have considered the pleadings, evidence, submissions, and relevant law. The first issue arising for determination is whether the Plaintiff's claim is time-barred, the further issue is whether the Plaintiff



has proved negligence on the part of the Defendant, and the final issue is whether the Plaintiff is entitled to the reliefs sought.

36. As regards the first issue, the applicable law is found at Section 4(2) of the *Limitation of Actions Act*. The same provides that:-

(2) 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: Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

37. The Plaintiff did not tender comprehensive submissions on this issue. However, it is not disputed that the Plaintiff has premised her claim on the tort of negligence. The general rule is that in respect of claims of negligence, time for purposes of limitation begins to run when the cause of action accrues.

38. In R. A. Percy in Charlesworth & Percy on Negligence, 8th ed., at part 3 – 136 cited with approval in the High Court decision in *Humphrey Kiriungi Njagi v Aga Khan Health Services Ltd (Civil Suit 1304 of 2001)* [2005] eKLR, the court observed as follows:-

“In negligence actions the period of limitation starts to run from the date on which the cause of action accrued. Today, however, there are two broad exceptions, viz: (i) those cases involving either personal injury or a fatal accident, where circumstances have arisen that may permit an alternative commencement date; and (ii) those cases involving neither personal injuries nor death but where facts, relevant to the cause of action, are not known to the complainant at the date of accrual which, also, may permit an alternative commencement date. Generally in negligence actions, the cause of action accrues at the time when the plaintiff actually suffers the damage, even though its consequences may not become apparent until later, and not at the date of the negligent act or omission... [Because] negligence does not become actionable without proof of damage, it is only after damage has been suffered that the cause of action becomes complete and time begins to run. Thus, where a person is injured by a chattel that has been manufactured negligently, he may sue the manufacturer within the prescribed limitation period, which only starts running against him as from the date of injury. This is so even though more than three years may have elapsed since the chattel in question had been produced, dispatched from the maker’s factory premises and supplied to another.”

39. J. B. Ojwang J in *Humphrey Kiriungi Njagi v Aga Khan Health Services Ltd* [Supra] stated as follows:-

“The tenor and effect of counsel’s submission is that s.4(2) of the *Limitation of Actions Act* (Cap.22) does not in plain and absolute terms, ordain three years as the period from what may appear as the accrual of the cause of action, within which a tort claim must be made. The facts of each case are always to be taken into account. It is to be noted, moreover, that time does not begin to run for the purpose of lodging a tort claim, in certain circumstances. This is stated in Charlesworth & Percy on Negligence, 8th ed. (at part 3 – 138):

“Time does not begin to run unless: (i) the parties, who are capable of suing and being sued, are in existence; (ii) the person to whom a right of action accrues is not under a disability; and (iii) the person’s right of action has not been concealed from him by fraud.”

Learned counsel submitted that the question, on what date was the damage suffered?, for the purpose of determining the accrual of a cause of action in



negligence, was much more crucial than simply the ascertainment of the date on which a certain single act did take place.” (Emphasis mine)

40. From the foregoing, the key question in relation to that issue is, when did the cause of action accrue? Or, when did the Plaintiff suffer damage?
41. The Defendant was of the view that since the claim is based on his advice to the Plaintiff to enter into the sale transaction, the cause of action accrued on 17th October, 2008, when the Plaintiff acted upon the impugned advice and entered into the Sale Agreement to her detriment. He submitted that the advice was given in the year 2008, and the suit was filed eight entire years later, and is therefore grossly out of time. This was, a fact that has never been opposed by the Plaintiff.
42. On the other hand, the Plaintiff was of the view that time should run from the time the date that the arbitral award was published in 2015 because that is when the Plaintiff received alternative legal advice.
43. The question of when time starts to run is based on an evaluation of the facts, and on a case by case basis. In this regard, in the High Court decision in *Proland Realtors Limited v Letshego Kenya Limited* (Civil Appeal E096 of 2021) [2023] KEHC 27114 (KLR) (Civ) (22 December 2023) (Judgment), the late Hon. Majanja J. stated as follows:-
 - “ 14. ...The Respondent’s claim as pleaded is based on negligence and I agree with the Respondent that the cause of action accrues where the claimant suffers damage as damage is an integral element in a claim based on negligence (see *Eric Omuodho Ounga v Kenya Commercial Bank Limited* [2017] eKLR). In *Ami Development Services Limited and 6 others v David Kahuhua Gitau and 8 others* [2005] eKLR, the court cited with approval *Sharham –Souter and another v Town and Country Development (Essex) Ltd and another* [1976]QB 858 where it was held that,

“The cause of action for negligence accrues, not at the date of the negligent act or omission but at the date when the damage is first sustained by the Plaintiff” (Emphasis added)
44. Based on the facts in the present matter, in my view, the most obvious case of damage was sustained by the Plaintiff at the point the Vendor failed to complete the sale and provide the Plaintiff with the relevant completion documents within the 90 day period stated in the Sale Agreement.
45. At the point of breach by Vendor the Plaintiff was on notice, and ought to have realized that there were issues and challenges relating to the sale and purchase of the property that required further investigation, or perhaps even a second legal opinion.
46. She testified that she had misgivings about her advocate’s advice and that he misadvised her in relation to the impact of succession proceedings on the transaction; availability of title; and did not give her proper advice concerning a realistic timeline for completion. In my view, all those issues crystallized, when the Vendor failed to complete the transaction, and ought to have been raised at that point. They were not.
47. Therefore, the question of when time began to run, may be inferred from a reasonable point of view as either, at the earliest, when she retained the advocate, or when she suffered damage as stated above.
48. The fact that the Plaintiff pursued the transaction for a further period of two years beyond the completion date additionally shows that she was well aware that that the purchase had not gone as planned. Still, even at that time, she did not file a suit against her counsel for negligence



- 49. Based on the facts as stated above, I am inclined to find that the cause of action accrued either towards the end 2008, or in the early months of 2009, when the Sale Agreement was breached for the reasons stated above. Accordingly, the Plaintiff having filed this suit on 8th August, 2016, more than seven years after the cause of action accrued, in my view, the same is time-barred pursuant to section 4(2) of the Limitation of Actions Act. For the avoidance of doubt, the Plaintiff ought to have filed the suit by no later than 17th October, 2011, which was three years from the date of accrual of the cause of action.
- 50. Having found the above, the remaining issues are moot and this court may not consider the same.
- 51. Based on the reasons set out above, I find and hold that the Plaintiff's claim is statute-barred. The Plaintiff's suit is hereby struck out with costs to the Defendant.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 20TH DAY OF JANUARY, 2025

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

-Court Assistant
-For the Plaintiff
-For the Defendant

