



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ITEN**

**ELCA NO. E012 OF 2024**

**ISAAC KIPROTICH**

**KIPTOO.....APPELLANT/APPLICANT**

**VERSUS**

**ROSE JEPNGETICH MICAH T/A KEIYO**

**INVESTMENT.....RESPONDENT**

**JUDGMENT**

***(Being an appeal from the ruling of C. A Kutwa SPM delivered on 24<sup>th</sup> July 2024 in MCELC 004 of 2024)***

**Introduction**

1. By a ruling delivered on 24<sup>th</sup> July 2024 in Elgeyo Marakwet CMC ELC Case No. E004 of 2024, the trial magistrate Hon. C. A. Kutwa, dismissed the 3<sup>rd</sup> defendant's preliminary objection dated 27<sup>th</sup> March

---

2024 and allowed the plaintiff's notice of motion application dated 2<sup>nd</sup> April 2024.

2. Through the preliminary objection, the 1<sup>st</sup> defendant sought to dismiss the suit instituted in the lower court on the grounds that it was time barred under **Section 4(4)** of Limitation of Actions Act Cap 22 Laws of Kenya (LAA) and that the plaintiff lacked capacity to institute and prosecute the suit. In particular, the 1<sup>st</sup> defendant contended that the sale agreement and/or contracts relied on by the plaintiff in support of her case were entered into on 20<sup>th</sup> April 2007 and 11<sup>th</sup> January 2018 while the suit hereto was filed on 7<sup>th</sup> April 2024, more than 6 years from the time when the agreements or contracts were entered into, hence the suit offended **Section 4(4)** of LAA.

3. In dismissing the preliminary objection and allowing the plaintiff's application for interlocutory reliefs, the learned trial magistrate stated/held: -

**“...the contested Section 4(4) of Limitation of Actions Act, Cap 22 Laws of Kenya provides:**

4(4) an action may not be brought upon judgment after the end of 12 years from the date on which the judgment was delivered or (where the judgment or subsequent order directs any payment of money or delivery of any property to be made at a certain date or at recurring periods) the date of default in making the payment or delivery in question, in respect of judgment debt may be recovered after expiration of six years from the date on which the interest became due.

From the reading of above provision, it is apparent that Section (4)(4) of LAA refers to an action after judgment has been delivered. It does not apply to filing a fresh suit by the plaintiff. In the case of Willis Onditi Odhiambo vs Gateway Insurance Co. Ltd (2014) e KLR judges were clear that Section 4(4) of the LAA covers execution of judgments.....

...

---

**The plaintiff's claim is an action in land. The limitation period in matters relating to land is 12 years. The suit by the plaintiff does not offend the provisions of Limitation of Actions act. The issue as to whether the plaintiff has locus or not is not a pure point of law. In the premises I dismiss the objection by the defendants with costs to the plaintiff..."**

4. Regarding the plaintiff's notice of motion application for interlocutory reliefs dated 2<sup>nd</sup> April 2024, the learned trial magistrate stated/held: -

**"Without considering the merits of the parties rival submissions, there is no doubt from the parties affidavits that the suit property is in danger of being alienated or wasted by the respondents. Indeed the 3<sup>rd</sup> Respondent's replying affidavit sworn by him confirms the Respondents had set in motion the process of alienating the suit property herein, on the basis that the 1<sup>st</sup> defendant is the owner of the suit parcel notwithstanding**

---

**the applicant's allegation that she bought the property.**

**The Plaintiff/Applicant's position is that she is the owner of the suit property. The plaintiff has shown that she is the one who is in possession and the suit property was sold to her by the 1<sup>st</sup> defendant. The onus of proof to rebut this *prima facie* position shifts to the 1<sup>st</sup> respondent to show through documents that he did not sell the property and or he has refunded the purchase price.**

**I have perused the Respondents documents on record, and I am satisfied that the Respondents have failed to discharge the evidential burden of proof. The 1<sup>st</sup> Respondent has not shown he refunded the plaintiff's money. In view of the above, I am satisfied that the Applicant has raised serious issues for trial; and has demonstrated that this application is not intended to buy time nor is it frivolous nor vexatious. I am further satisfied that on the**

---

**strength of the documents produced in this application by Plaintiff/Applicant she has established a *prima facie* case with probability of success.**

**In the premises I do allow the Plaintiff's application dated 2<sup>nd</sup> April, 2024 with costs".**

5. Dissatisfied with the decision of the trial court, the 3<sup>rd</sup> defendant appealed to this court on the grounds that the learned trial magistrate erred by: -
- i) Allowing the plaintiff's application/motion dated 2/4/2024;**
  - ii) Finding that the respondent had proved *prima facie* case against the appellants to warrant grant of interlocutory judgement;**
  - iii) Failing to put into consideration the fact that whereas the parcel of land that was under litigation was Elgeyo Marakwet Koimur/98 while the parcel in which the application was hinged and or premised on was land parcel No. E/Marakwet Koimur/894 which are distinct parcels of land;**

- 
- iv) Restraining appellants from land parcel 894 yet the evidence tendered shows she had purchased parcel No. E/ Marakwet Koimur/98;**
  - v) Finding that the respondent was in possession of suit land No 98;**
  - vi) Finding that the property No. 894 is in danger of being alienated when the same had not been pleaded nor advanced in the application;**
  - vii) Failing to find that the respondent's suit hinged on agreement made on 20/4/2007 and 11/1/2018 was caught up by Limitation of Actions Act;**
  - viii) Failing to order for maintenance of *status quo* when it was clear who was in possession of suit land;**
  - ix) Failing to take into account all material facts and taking into account matters ought not to have been taken into account;**
  - x) Misapprehending the evidence, facts and law thereby arriving at a decision that is plainly wrong.**

- 
6. The appellant prays that the impugned ruling, delivered on 24<sup>th</sup> July 2024 be set aside in its entirety and be substituted with an order allowing the 1<sup>st</sup> defendant's preliminary objection.
  7. Pursuant to directions given on 11<sup>th</sup> June 2025, the appeal was disposed of by written submissions.
  8. In his submissions filed on 18<sup>th</sup> July 2025, the appellant gave an overview of the circumstances leading to filing of the appeal and framed the issues for the court determination as follows: -
    - i) Whether the suit ought to have been struck out for being caught up by limitation of actions?
    - ii) Whether the respondent had met conditions for grant of injunctive orders against the appellant.
  9. On whether the suit ought to have been struck out for being caught up by Limitation of Actions Act, the appellant submits that the learned trial magistrate erred by failing to find that the suit was time barred.

---

Pointing out that the defendants had in paragraph 11 of their statements of defence, pleaded that the plaintiff's suit was time barred by dint of Limitation of Actions Act (LAA), the appellant faults the trial magistrate for failing to take into account material facts, the pleadings and submissions thereby arriving at a wrong finding.

10. Contending that the respondents' suit is based on contract of sale of land which contract the respondent seeks to enforce through the suit, the appellant maintains that the suit is time barred having been filed six years after the contracts were entered into.
11. The appellant resiles from his pleadings, in particular his contention that the suit offends **Section 4(4)** of LAA and cites **Section 4(1)** of LAA as the basis of his contention that the suit is time barred. In that regard, the appellant cites **Section 4(1)** of LAA and the cases of **Michael Benhardt Otieno v. National Cereals & Produce Board (2017)e KLR**; **Gathoni v. Kenya Cooperative Creameries Ltd (1982) KLR 104**; **Iga vs. Makerere University (1972) EA** and **Bosire Ogero vs. Royal Media Services (2015) e KLR**.

- 
12. The appellant urges this court to be persuaded by the decision in **Kisii ELC Appeal No. 4 of 2021-Dennis Nyandu vs. Francis Aburi Oyaró** where the court is said to have struck out a suit that was filed out of time.
13. On whether the respondent had met the conditions for grant of injunctive orders against the appellants, the appellant submits that the learned trial magistrate erred by failing to take into account that the appellant is the registered owner of parcel number Elgeyo Marakwet Koimur/894 which is different from the suit property. The appellant also faults the learned trial magistrate for failing to take into account that he was already in possession of the suit property. The appellant submits that the order which commended itself in the circumstances was an order for maintenance of status quo.
14. The respondent did not file submissions and if she did, the submissions were not placed in the file.

### **Analysis and determination**

- 
15. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard, see **Selle & Another vs. Associated Motor Boat Co. Ltd (1968) E.A 123** and **Mwanasokoni vs. Kenya Bus Service Ltd (1982-88)1 KAR** and **Kiruga vs. Kiruga & Another (1988) KLR 348**.
16. As pointed out herein above, by a ruling delivered on 24<sup>th</sup> July 2024 in Elgeyo Marakwet CMC ELC Case No. E004 of 2024, the trial magistrate dismissed the 3<sup>rd</sup> defendant's preliminary objection dated 27<sup>th</sup> March 2024 and allowed the plaintiff's notice of motion application dated 2<sup>nd</sup> April 2024.

- 
17. The learned trial magistrate dismissed the preliminary objection on the grounds that **Section (4)(4)** of LAA refers to an action after judgment has been delivered and that the plaintiff's claim is an action on land; that the limitation period in matters relating to land is 12 years; that the suit by the plaintiff does not offend the provisions of Limitation of Actions act and that the issue as to whether the plaintiff has locus or not is not a pure point of law.
18. In his submissions, the appellant framed two issues for the court's determination which are whether the respondent had met the conditions for grant of injunctive orders against the appellants and whether the suit ought to have been struck out for being caught up by limitation of actions.
19. I will adopt the issues framed by the appellant as the issues for the court determination.
20. On whether the respondent had met conditions for grant of injunctive orders against the appellants, this court dealt with the issue in its ruling delivered on 14<sup>th</sup>

---

January, 2025 in respect of the appellant/applicant's notice of motion dated 29<sup>th</sup> July 2024 in which the appellant sought an order of maintenance of the *status quo* which obtained as at the time the suit at the lower court was filed pending the hearing and determination of the appeal.

21. In that ruling this court stated/held;

**“I have carefully read and considered the circumstances leading to the filing of the application for stay of execution of the orders issued by the lower court particularly the contention/allegation that contrary to the determination of the trial court that it is the respondent who is in possession of the suit property, it is the appellant/applicant who is in possession of the suit property. I have also taken into account the apprehension by the appellant/applicant that the orders issued by the lower court may be used by the respondent to evict him from the suit property and/or to cite him for contempt of court thereby greatly prejudicing him.**

---

**In addressing the concerns raised by the appellant /applicant I have read the order issued by the trial court and established that no order of eviction against the appellant/applicant was issued. Be that as it may, the order restrained the defendants/respondents, who include the appellant/applicant, from developing by way of construction of buildings, tilling, cultivating, selling, leasing and/or in any other way interfering with the parcel of land known as Elgeyo/Marakwet/Koimur/894 measuring approximately 4.0 hectares pending the hearing and determination of the application and the suit.**

**The phrase from any other way interfering with the suit property may be construed to mean that the appellant/applicant was restrained from remaining in occupation of the suit property yet from the grounds on the face of the application for injunction, the plaintiff/applicant (now respondent)**

---

**acknowledged that at the time she filed the suit it was the appellant/applicant who was in possession of the suit property. In the plaintiff/respondent's own words, the appellant/applicant had unlawfully and without any justifiable cause trespassed into the suit property and was in the process of building a structure thereon.**

**In the circumstances, I am satisfied that the appellant/applicant's apprehension of the possibility of being cited for contempt of court arising out of the lower court's decision on the issue of who between him and the respondent is in possession of the suit property is not farfetched. Consequently, I agree with the appellant/applicant that the order for maintenance of the *status quo* which obtained at the time the suit in the lower court was filed should issue pending the hearing and determination of the appeal herein.**

---

**The upshot of the foregoing is that the application dated 29<sup>th</sup> July 2024 has merit and is allowed in terms of prayer (c). The cost of the application shall abide the outcome of the appeal.**

**For avoidance of doubt, the appellant/applicant being the registered owner and the one in possession and occupation of the suit property shall remain as the registered owner of the suit property and retain possession of the portion of the suit property he was in occupation of as at the time the suit in the lower court was filed pending the hearing and determination of the appeal but shall not effect any new developments on the suit property”**

22. There being no change of circumstances that can warrant departing from that decision, I agree with the appellant/applicant’s submissions that the learned trial magistrate erred by granting an order of injunction in the circumstances.

---

23. As to whether the suit ought to have been struck out for being caught up by limitation of actions, it is noteworthy that the preliminary objection was based on a specific provision of the Limitation of Actions Act, namely **Section 4(4)** of the Limitation of Action Act and not **Section 4(1)** of the Act or the Act generally. That being the case, the appellant cannot rely on his changed position that the suit offended **Section 4(1)** of the Limitation of Actions Act when the ground taken up in his preliminary objection was **Section 4(4)** which deals with judgments as opposed to fresh suits.

24. It is trite law that parties are bound by their pleadings. Issues for determination also arise from the pleadings filed by the parties. In that regard, see the case of **Joshua Mungai Mulango & another v. Jeremiah Kiarie Mukoma (2015)e KLR** where the Court of Appeal held:-

**“Parties are bound by their pleadings. The court is bound to determine a dispute on the basis of the pleadings filed by the parties and the evidence adduced on the basis of such pleadings.....”.**

- 
25. The appellants having based their preliminary objection on **Section 4(4)** of the Limitation of Actions Act which deals with enforcement of judgments as opposed to filing of suits, cannot be heard to claim or argue that they could sustain their preliminary objection based on a ground not taken up as a ground in support of their preliminary objection, that is to say **Section 4(1)** of the Limitation of Actions Act. In any event, the claim that the suit is statute barred because it seeks to enforce contracts filed more than six years before the suit was filed is a matter of both law and fact. As such, unless the issue is expressly admitted in the pleadings filed by the parties, the issue requires evidence to prove hence not a pure question of law on which the preliminary objection can hinge.
26. The upshot of the foregoing is that the appeal partially succeeds in that the decision of the trial court granting an injunction against the appellants is set aside and substituted with an order of maintenance of status quo which obtained at the time the suit at the lower court was filed.

---

27. As the appellant has partially succeeded in his appeal, I award him half costs of the appeal.

28. Orders accordingly.

**Dated, signed and delivered virtually at Iten this 1<sup>st</sup> day of October, 2025.**

**L. N. WAITHAKA  
JUDGE**

Judgment delivered virtually in the absence of the parties

Court Assistant: Christine