



REPUBLIC OF KENYA



KENYA LAW
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**Sawe v Waithaka & 3 others (Environment and Land Case
E051 of 2024) [2025] KEELC 6777 (KLR) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6777 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND CASE E051 OF 2024**

CK YANO, J

OCTOBER 9, 2025

BETWEEN

JOAN JEBICHI SAWE PLAINTIFF

AND

DANCAN KURIA WAITHAKA 1ST DEFENDANT

GEORGE KIBET SAWE 2ND DEFENDANT

JANE C. SAWE 3RD DEFENDANT

LAND REGISTRAR, UASIN GISHU COUNTY 4TH DEFENDANT

RULING

1. The 1st Defendant herein raised a Notice of Preliminary Objection dated 29th April, 2025, challenging the jurisdiction of this court to entertain the suit as filed. The Notice of Preliminary Objection was raised on the following grounds: -
 1. The suit herein being based on contract offends the provisions of Section 4 of the *Limitation of Actions Act* Cap 22 Laws of Kenya.
 2. The suit herein being recovery of land offends the provisions of section 7 of the *Limitation of Actions Act* Cap 22 Laws of Kenya.
 3. This Honourable Court has no jurisdiction to entertain the suit and the same be struck out and/or dismissed with costs.
2. The Preliminary Objection was canvassed by way of written submissions. The 1st Defendant filed his submissions dated 9th May, 2025 together with authorities while the Plaintiff filed her submissions dated 19th May, 2025 together with authorities which I have read, considered and summarized as hereunder.



1st Defendant's Submissions;

3. Counsel for the 1st defendant submitted on two issues, to wit; whether the plaintiff's claim based on an agreement dated 27.07.1996 is time barred by dint of section 4[1] of the *Limitation of Actions Act* and whether the plaintiff can recover land purchased on 27.07.1996 through a suit filed on 19.08.2024.
4. On the first issue, counsel outlined the provisions of section 4[1] of the Act and stated that the law was very clear that claims based on contracts cannot be filed after the expiry of 6 years.
5. It was submitted that the agreement relied on by the plaintiff is dated 27.07.1996 and at clause 4 of the said agreement, it is provided that, "the purchaser shall take possession on signing this agreement". It was therefore his contention that the said clause was breached when the 1st defendant's deceased father failed to put the plaintiff and her deceased husband in possession.
6. Counsel thus maintained that the breach having occurred on 27.07.1996, six years from the time lapsed on 27.07.2002. To support this position, counsel relied on the case of South Nyanza Sugar Company Limited v Charles M. Nyantare [Migori High Court Civil Appeal No. 75 of 2019].
7. In concluding the first issue, it was submitted that the plaintiff's suit had been filed hopelessly out of time and the same was therefore statute barred and ought to be struck out with costs.
8. On the second issue, counsel for the 1st defendant outlined the provisions of section 7 of the said Act and further submitted that the action to recover land accrued on the 27.07.1996 when the plaintiff and her deceased husband were not handed vacant possession of the suit land and 12 years from that period lapsed on 27.07.2008.
9. It was counsel's submission that the defendants have remained on the suit parcel since 27.07.1996 to date. It was his argument that even if the contract period is excluded, 12 years from 27.07.2002 would run to 27.07.2014, which period the defendants would have acquired rights under adverse possession in respect to the suit land.
10. To support the above position, counsel relied on the decisions in Sohanlaldurgadass Rajput & Another v Division Integrated Development Programmes Co. Ltd [2021] eKLR and Benson Oketch Okello v Benson Nyandiga Onguru [2019] eKLR.
11. Counsel went on to submit that the situation would have been different if the plaintiff was in occupation and/or possession of the suit land, in which case they would have been entitled to a claim of constructive trust against the defendants. To buttress this point, he cited the case of Grace Wanjiru Gachari v Stephen Maina Muchiri ELC Case No. E010 of 2023.
12. It was his contention that a claim of specific performance and constructive trust, which are both equitable remedies cannot be invoked in a claim or suit which is barred by statute of limitation. In this regard, he quoted the case of Bosire Ongera v Royal Media Services [2015] eKLR.
13. He further submitted that the defendants have remained and had possession of the suit land adversely for a period of 27 years, from 27.07.1996 to 19.08.2024 when the suit herein was filed. He maintained that the plaintiff has never had possession or occupation of the suit land.
14. In conclusion, it was his submission that there being no leave sought and granted to file the suit out of time in the instant matter, he urged the court to find that the preliminary objection is merited and proceed to strike out the suit with costs.



Plaintiff's Submissions;

15. Counsel for the plaintiff submitted on 6 issues. On the first issue of whether the cause of action is anchored on contract and recovery of land and whether it offends sections 4 and 7 of the law of limitation, counsel admitted that there was an agreement for sale of the suit land dated 27.07.1996 and further acknowledged that owing to the provisions of sections 4 and 7 of the *Limitation of Actions Act*, an action based on contract and recovery of land ought to be filed within 6 and 12 years respectively upon accrual of the cause of action.
16. Counsel for the plaintiff, however, maintained that the plaintiff's claim is not purely based on contract and/or recovery of land by dint of sections 4 and 7 of the *Limitation of Actions Act* but rather, her claim is based on constructive trust and which she urged the court to imply from the totality of the circumstances of her case.
17. The second issue was on constructive trust and whether the same could be implied in the present circumstance of the case and its effect. On this issue, counsel reiterated the terms of the agreement of sale dated 27.07.1996 and maintained that the full purchase price was paid and that the vendor [the 1st defendant's deceased father] executed the necessary transfer documents and even delivered the original title deed.
18. It was his submission that upon receiving all the necessary completion documents, the plaintiff's late husband placed the suit parcel under the custody of the 2nd and 3rd defendants to take care of the suit parcel and further gave them copies of the transaction documents.
19. He thus maintained that the 1st defendant's late father having received the full payment of the purchase price and executed all completion documents, it abhors equity and fairness for his estate to unjustly benefit from what does not belong to them hence the claim on constructive trust. In this regard, he cited the Supreme Court decision in *Shar & 7 Others v Mombasa Bricks & Tiles Ltd & 5 Others* [petition 18] [E020 of 2022] KESC 106 [KCR] 28 December 2023 [Judgment] wherein the doctrine of constructive trust was defined.
20. It was therefore submitted that if one acquires a property in a manner that is unconscionable, he is converted into a trustee. That the estate of the late Hiram Waithaka Kuria is obligated to transfer the suit land to the plaintiff, who is the rightful owner.
21. He further submitted that constructive trust claims are generally not barred by the *Limitation of Actions Act* even though it largely depends on the circumstances and uniqueness of each case. To support this position, counsel relied on the case of *Chombo v Msagha & Another* [civil appeal No. E023 of 2020] [2023] KECA 88 [KLR] [3February 2023] [Judgment].
22. On the issue whether orders of specific performance can be granted in a situation where the suit is time barred but the court has imposed constructive trust, counsel for the plaintiff submitted that orders of specific performance is designed to actualize the intention of the parties and with the plaintiff having established that the defendant hold the suit land in constructive trust for her, then it is only just and equitable that the defendants are compelled to actualize the clearly manifested intention, though the intention of parties in constructive trust is not important consideration. Counsel cited the case of *Chombo v- Msagha & Another* [Supra]; *Isaac M'Inange Kiebie v Isaaya Theuri M'Kintari & Another* [2028] eKLR; *Elijah Sadala Msagha v Benedict Mwakio Mchombo & another* [2020] eKLR and *Willy Kimutai Kitilit V Michael Kibet* [2018] eKLR.



23. On whether the Preliminary objection is merited, counsel submitted that the same lacks merit and urged the court to allow the matter to proceed to its logical conclusion. Consequently, counsel for the plaintiff urged the court to dismiss the preliminary objection with costs.

Analysis and Determination:

24. It is my considered opinion that the issues arising for determination are:-
- i. Whether the Notice of Preliminary Objection dated 29.04.2025 meets the threshold of what amounts to a Preliminary Objection.
 - ii. Whether the Preliminary Objection is merited.
 - iii. Costs

i. Whether the Notice of Preliminary Objection dated 29th April, 2025 meets the threshold of what amounts to a Preliminary Objection;

25. The preliminary objection has been raised on account of sections 4 and 7 of the [Limitation of Actions Act](#) which bars the filing of suits founded on contract and recovery of land after the lapse of a statutory period of 6 and 12 years respectively.

26. The law on what constitutes a preliminary objection was outlined in the case of Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd 1969 E.A. 696 where the Court defined Preliminary Objection as follows;

“...is in the nature of what used to be a demurrer. It 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.”

27. Further, in the case of Oraro v Mbaja [2005] 1KLR 141, the court held as follows: -

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

28. Guided by the above case laws, it is well settled that a preliminary objection can only be raised on a pure point of law argued on the assumption that there is no contest on the facts which stand to be tested by rules of evidence or one that would require the exercise of judicial discretion.

29. Sections 4 and 7 of the [Limitation of Actions Act](#) provides as follows: -

4[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.

7. Actions to recover land.

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.



30. It must be noted that limitation of actions is a matter that touches on the jurisdiction of a court to adjudicate over a given suit as filed. It is therefore evident that the preliminary objection herein was raised on pure points of law and meets the threshold set out in the Mukhisa Biscuit case above.

ii. Whether the Preliminary Objection is merited;

31. As stated hereinabove, the preliminary objection is premised on the provisions of sections 4 and 7 of the Limitation of Actions Act on actions founded on contract and actions for the recovery of land respectively.

32. It is the 1st defendant's contention that the plaintiff's claim is premised on an agreement for sale dated 27.07.1996 and he thus avers that by dint of section 4 of the Act, the suit is time barred for being filed after the lapse of the 6 years' statutory period.

33. The 1st defendant further contends that the plaintiff's suit is also statutory barred on account of section 7 of the Act for the reason that the suit as filed is for the recovery of land and has been filed after the 12-year statutory period.

34. The plaintiff on the other hand maintained that her claim is purely based on constructive trust and thus does not offend the provisions of section 4 or 7 of the Act. She therefore urged the court to imply constructive trust from the circumstances of her case.

35. The question that therefore follows is whether the plaintiff's suit/claim is founded on contract, or recovery of land or on constructive trust and consequently, whether the suit is time barred pursuant to the provisions of section 4 and 7 of the Limitation of Actions Act.

36. To answer/determine this, this court is called upon to carefully and critically look at the plaintiff's claim as contained in the plaint dated 19.08.2024.

37. It is common ground that the genesis of the plaintiff's claim is the sale between her late husband and the 1st defendant's late father, Hiram Waithaka Kuria vide the agreement for sale dated 27.07.1996. This fact is contained at paragraph 6 of the plaint, wherein the plaintiff outlined the details of the alleged sale and the processes thereafter.

38. However, I do note that from paragraphs 17 – 19 of the plaint, the plaintiff has brought out the doctrine of trust and explained how the same arises on the part of the 1st defendant, as the administrator of the estate of the vendor, and on the part of the 2nd and 3rd defendants, who are her in-laws and who she contends were tasked with taking care of the suit land and the cattle project thereon.

39. From a totality of the foregoing, it is my considered opinion that even though the genesis of the plaintiff's claim was the agreement for sale dated 27.07.1996, her claim against the 1st to 3rd defendants also rests on the doctrine of constructive trust.

40. On the issue of constructive trust, it is the 1st defendant's contention that constructive trust is an equitable remedy which cannot be invoked where the suit is barred by statute of limitation. The plaintiff on the other hand maintained that constructive trust claims are generally not barred by the Limitation of Actions Act.

41. Consequently, the question that this court seeks to answer is whether a claim founded on constructive trust can be barred by the Limitation of Actions Act.



42. The Court of Appeal in the case of Twalib Hatayan and Another v Said Saggar Ahmed Al Heidy and 5 Others [2015] [eKLR] defined the constructive Trust as follows: -

“A constructive Trust is an equitable remedy imposed by the court against ne who has acquired property by wrong doing. It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a Trustee, the law will impose a trust. A constructive Trust will automatically arise where a person who is already a trustee takes advantage of his position for his own benefit....”

43. Before delving into the merits of this issue, it is imperative to point out that constructive trust is a fact that is implied from the circumstances of the case and which essentially would entail the exercise of judicial discretion. This in my opinion does not fall within the threshold of what amounts to a proper preliminary objection.

44. In the case of Musekenya v Kortom [Environment and Land Appeal E006 of 2023] [2025] KEELC 3709 [KLR] [8 May 2025] [Judgment] while dealing with the issue of whether a claim of constructive trust is barred under the Limitation of Actions Act the court held as follows: -

“25. Having found that the pleadings and evidence in the matter pointed on a prima facie basis to the creation of constructive Trust, it follows that the cause of action by the Plaintiff, is an action by a beneficiary under a Trust[herein a constructive trust] to recover Trust property from a trustee and the same is excepted under Section 20[1] [b] of the Limitation of Actions Act.

26. It follows therefrom that the suit was not time barred under Section 7 of the Limitation of Actions Act as it was excepted under Section 20 [1] [b] of the said Act, and the Learned Magistrate fell in error to strike out the same...”

45. In view of the foregoing and guided by the above decision, it follows that a claim founded on constructive trust falls under the exception found at section 20[1] [b] of the Limitation of Action Act and the same cannot therefore be said to be time barred on account of section 7 of the Act.

46. In conclusion, it is the finding of this court that the plaintiff’s claim which is based on constructive trust cannot be said to be time barred and consequently, I find that the notice of preliminary objection as filed is not merited.

Costs:

47. It is a well settled principle that costs follow the event unless the court deems otherwise.

48. In this case, even though I have held that the notice of Preliminary Objection is not merited, I find that the plaintiff is not entitled to the costs.

49. In the premises, I find that the Notice of Preliminary Objection dated 29th April, 2025 is not merited and is hereby struck out. Each party to bear their own costs.

50. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF OCTOBER, 2025.

HON. C. K. YANO

ELC, JUDGE



Ruling delivered in the presence of: -

Ms. Chepkwony holding brief for Mr. Nyamweya for 1st Defendant.

Mr. Kalwa for plaintiff.

Court Assistant – Laban

