



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCLC NO. E098 OF 2025

IMMACULATE NAMUNYAK SUNKULI.....

.....PLAINTIFF

=VERSUS=

SAMSON OMWANZA OMBATI.....1ST

DEFENDANT

CHIEF LAND REGISTRAR.....2ND

DEFENDANT

HON ATTORNEY GENERAL.....3RD

DEFENDANT

RULING

1. By a Notice of Motion dated 11th March 2025 brought under Articles 159(2)(d) & 162(2)(b) of the Constitution of Kenya, Sections 3, 13, 18 and 19 of the Environment and Land Court

Act, and Order 40 and 51 of the Civil Procedure Rules, the Applicant seeks the following orders:-

a) Spent.

b) THAT the Honourable Court be pleased to issue an order compelling the 1st Defendant, either by himself, his agents, servants, and or anyone claiming on his behalf, to vacate the property known as apartment number C5 Peers Park Apartment Kikambala Road.

c) Spent.

d) THAT pending the hearing and determination of this suit this Honourable court be pleased to issue a temporary injunction restraining the 1st Defendant/Respondent by himself, his agents, servants, or anyone acting on his behalf from leasing out, offering for lease, utilizing, selling, advertising for sale or in any other manner interfering with property known as apartment number C5 Peers Park Apartments Kikambala road.

e) THAT in alternative to prayer (4) above the Honourable court be pleased to issue a temporary injunction restraining the 1st Defendant either by himself, his agents, servants and or anyone acting or on his behalf from leasing, offering for lease, utilizing, selling, advertising for sale or in any other manner interfering with as apartment number C5 Peers Park Kikambala road pending the hearing and determination of this suit.

f) THAT the 2nd Defendant be ordered to file in court and furnish the Plaintiff with a report giving the history of the root title of the suit

property, being apartment number C5 Peers Park, Kikambala Road.

g) ***THAT this Honourable Court be pleased to issue any other orders in the interest of justice.***

h) ***THAT the costs of this application be provided for.***

2. The application is based on the grounds appearing on its face together with the supporting affidavit of Immaculate Namunyak Sunkuli sworn on even date.

THE APPLICANT'S CASE

3. The Applicant averred that she is the bona fide owner of apartment No. C5 Peers Park, located on L.R. No. 209/3139, having purchased it from Ms. Ruth Chepkemai Mitei vide a sale agreement dated 22nd April 2013. She further averred that the 1st Respondent is an advocate who represented both parties in the property transaction.
4. She explained that upon payment of the purchase price, the 1st Respondent instructed the parties to furnish him with the completion documents and registered himself as the owner of the suit properties.
5. She stated that she was evicted from the suit property on 20th December, 2024, by a group of eight people who claimed to

be acting on the instructions of the 1st Defendant, leaving her and her son homeless.

6. She explained that she was not indebted to the 1st Defendant. She argued that the 1st Respondent fraudulently registered the meter bill in his name and used his position as the LSK representative to the JSC to frustrate her. She further stated that Ruth Mitei confirmed to her that she had not transferred the property to anyone else except herself.

THE 1ST DEFENDANT'S CASE

7. The 1st Defendant filed a replying affidavit dated 27th March 2024 in opposition to the application.
8. He stated that in February 2013, Andrew Leteipa Sunkuli, the Plaintiff's father, informed him about an offer letter for the sale of apartment No. C5 Peers Park Apartments with a purchase price of Kshs 15,700,000/= . He claimed that Andrew Leteipa amended the offer letter in the Plaintiff's name, and he accepted it by signing it himself.
9. He explained that he was not involved with the Plaintiff because Mr. Sunkuli presented her with the sale agreement,

had her sign it, and personally delivered the duly executed sale agreement by the Plaintiff to him.

10.He stated that upon payment of the purchase price, the vendor, Ruth Cheptkemoi Mitei, transferred the property to him as the beneficial owner, and this transfer has never been terminated.

11.He insisted that the Plaintiff neither retained his services for the transaction nor paid any fees for legal services. Additionally, he stated that the Plaintiff did not give him funds to purchase the suit property or to cover the stamp duty.

12.He argued that the Plaintiff has not taken any steps to pay the stamp duty or file a suit for specific performance in 11 years since the transaction was completed.

13.He also argued that the suit is statute-barred because more than six years have passed since the sale agreement was executed.

14.He explained that the Plaintiff had changed her lineage to deceive him in order to acquire property. He argued that once he paid the purchase price, a resulting trust was created in his favour. He maintained that the Plaintiff is not in possession of

the suit property and that she occupied the property under a gentleman's agreement. He asserted that, as the registered owner of the suit property, he is entitled to the rights of a proprietor.

15. The 1st Defendant filed a Notice of Preliminary Objection dated 1st April 2025, raising the following grounds:-

a) Section 4(1)(a) of the Limitation of Actions Act (Cap 22 Laws of Kenya) debars any action founded on the law of contract from being brought 6 years after the date of the contract.

b) The Plaintiff's cause of action based on the sale agreement dated 22nd April 2013 is time-barred.

c) Without prejudice to (1) & (2) above, the court that would have had the requisite pecuniary jurisdiction is the Chief Magistrate's court.

THE RESPONSE

16. In a further affidavit dated 11th April 2025, the Applicant reiterated the contents of her supporting affidavit. She asserted that the preliminary objection lacks merit because there is no contractual relationship between her and the 1st

Defendant. She maintained that the suit is not statute-barred as the cause of action arose on 20th December 2024 when she was unlawfully evicted from the suit property.

17.She argued that the sum of Kshs 3,140,000/=, which represents 20% of the deposit for the purchase price, was paid from the 1st Defendant's client account, rather than his personal account. She stated that the agreement does not specify that the remaining balance of the purchase price was to be paid to her father. She further stated that any money sent to her father was the result of business dealings he had with the 1st Defendant. She denied the contents of the replying affidavit.

18.The application and preliminary objection were canvassed by way of written submissions.

THE PLAINTIFF'S SUBMISSIONS

19.The Plaintiff filed her submissions dated 17th April 2025.

20.On behalf of the Plaintiff, Counsel submitted that the cause of action arose on 20th December 2024 when the 1st Defendant unlawfully evicted the Plaintiff from the suit property.

21. Counsel submitted that the cause of action is related to the illegal eviction and the alleged transfer of the suit property, which the 1st Defendant does not deny.

22. It was argued that this court has jurisdiction despite the suit property being worth less than Kshs 20 million. It was also contended that the value of the suit property is a factual matter that cannot be challenged through a preliminary objection.

23. Regarding the application, Counsel outlined the following issues for the court's determination:-

a) *Whether the 1st Defendant was a party to the sale agreement dated 22nd April 2022?*

b) *Whether the 1st Defendant paid the purchase price for the suit property?*

c) *Whether the 1st Defendant followed the law in evicting the Plaintiff from the suit property?*

d) *Whether the application is merited?*

e) *What orders should the court make?*

24. Counsel relied on the contents of the supporting affidavit to support his submissions.

THE DEFENDANT'S SUBMISSIONS

25.The 1st Defendant filed his submissions dated 8th May 2025.

26.On behalf of the 1st Defendant, Counsel outlined the following issues for the court's determination:-

a) Whether the Applicant has made out a case for the grant of an injunction?

b) Whether there is prima facie evidence of a resulting Trust in favour of the 1st Defendant?

c) Whether the suit is incompetent on account of the Limitation of Actions?

27.Counsel submitted that the Applicant has not met the conditions for the grant of an injunction outlined in the case of **Giella v Cassman Brown & Company (1973) EA 358.**

28.Regarding the first condition, Counsel argued that the Applicant has not established a prima facie case because she has not provided evidence of payment for the property or the stamp duty.

29.Regarding the second condition, Counsel submitted that the Applicant, having failed to establish a prima facie case, cannot claim she will suffer irreparable harm. To support this

argument, reliance was placed on the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others (2104) KECA 606(KLR).**

30. Counsel further submitted that the balance of convenience favours the 1st Defendant because he is the registered proprietor of the suit property.

31. Regarding the second issue, it was submitted that a resulting trust was created in favour of the 1st Defendant because he paid the entire purchase price from his funds. To support this argument, reliance was placed on the case of **Twalib Hatayan & another v Said Saga Ahmed Al Heidy & 5 others (2105) KECA 713 (KLR)** and **Juletabi African Adventure Ltd & Another v Christopher Michael Lockley Civil Appeal (Msa) No 75 of 2016.**

32. Counsel further submitted that the Plaintiff's suit is statute-barred because it stems from a contract dated 22nd April 2013. To buttress this argument, reliance was placed on Section 4(1) (a) of the Limitation of Actions Act, which provides that an action based on a contract must be filed within six years.

ANALYSIS AND DETERMINATION

33. Having considered the application, the affidavits, the preliminary objection, and the rival submissions, the following issues fall for determination:

a) Whether the preliminary objection is merited?

b) Whether the Applicant has met the threshold for the grant of an injunction?

34. The law on preliminary objections is well settled. A preliminary objection must be on a pure point of law.

In **Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd (1969) EA 696**, Law JA stated as follows:-

“So far as I’m aware, 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

35.Further on, **Sir Charles Newbold JA** stated;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

36.In **Oraro Vs Mbaja (2005) eKLR** Ojwang J (as he then was) described it as follows;

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point

of law which must not be blurred with factual details liable to be contested and, in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

- 37.** For a preliminary objection to be valid, it must be on a point of law and must be founded on facts that are not in dispute. It should not be proved through facts or evidence, nor deal with disputed facts.
- 38.** The 1st Defendant's preliminary objection is based on the grounds that the suit is statute-barred.
- 39.** The issue of limitation and jurisdiction is a pure point of law that can determine the matter without having to consider the merits of the case. This Court is therefore satisfied that the 1st Defendant's Preliminary Objection is based on a pure point of law.

40.Section 4 of the **Limitation of Actions Act, Cap 22, 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.

41. The object of the law of limitation was stated in the case of **Gathoni Vs Kenya Co-operative Creameries Ltd (1982) KLR 104** where the Court of Appeal held that:-

“...The law on limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them.”

42. Similarly, in the case of **Rawal Vs Rawal (1990) KLR 2**, the Court held that:-

“The object of any limitation is to prevent a plaintiff from prosecuting stale claims on the one hand and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is to extinguish claims.”

43. Further, in the case of Iga vs Makerere University (1972) EA 65, the Court held that:-

44. ***“A plaint which is barred by limitation is a plaint barred by law. Reading these Provisions together it 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 when a suit is time barred the court cannot grant the remedy or relief sought.***

45. The 1st Defendant contends that the Plaintiff’s claim is statute-barred as the cause of action is based on a sale agreement executed in 2013. The Plaintiff contended that the cause of action arose on 20th December 2024 when she was unlawfully evicted from the suit property.

46. This court is called upon to determine when the cause of action arose in this suit.

47. In the case of **Edward Moonge Lengusuranga Vs James Laniyara & Another (2019) eKLR**, the Court defined a cause of action as follows:-

“A cause of action is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a plaintiff brings a suit.”

48. From the Plaint, it is clear that the Plaintiff’s main cause of action revolves around the registration and eviction from the suit property. The 1st Defendant argued that the Plaintiff’s cause of action is based on the sale agreement dated 22nd April 2013. The sale agreement was between the Plaintiff and Ruth Chepkemoi Mitei and not the 1st Defendant. This court finds that there is no contractual relationship between the Plaintiff and the 1st Defendant. Based on the foregoing, I find that this suit is not statute-barred.

49. The 1st Defendant argued that the Chief Magistrate Court has pecuniary jurisdiction to determine this matter

since the value of the suit property is less than Kshs 20 million.

50. It is trite law that jurisdiction is everything, and without it, the court cannot take one more step in the case. The locus classicus on jurisdiction is the celebrated case of **Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Limited (1989) eKLR**, where the Court held that:-

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings..."

51. Similarly, the Supreme Court in the case of **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR** pronounced itself thus;

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Where

the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”

- 52.**A court derives its jurisdiction from the Constitution, legislation, or both. The jurisdiction of this court is derived from Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act.
- 53.** The 1st Defendant is challenging the jurisdiction of this court on the grounds that the dispute herein falls under the chief magistrate court.
- 54.** The orders sought related to the title, use and occupation of land. I therefore find that this court has jurisdiction to hear and determine this suit.
- 55.** The Applicant seeks an injunction pending the hearing and determination of this suit. The principles applicable in an application for an injunction were laid down in the celebrated case of **Giella vs Cassman Brown & Co Ltd 1973 EA 358** as follows.

a) First, the applicant must show a prima facie case with a probability of success.

b) Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.

c) Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.

- 56.** The first issue for determination is whether the Applicant has established a *prima facie* case with a probability of success. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR** as follows;

“a prima facie case in a civil application includes but is not confined to a genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

- 57.** It is not in dispute that both parties are claiming ownership of the suit property. The Applicant asserts that she is the bona fide owner of the suit property, having purchased it

from Ruth Chepkemai Mitei. In this regard, she produced a sale agreement and a share certificate for the suit property.

58. The 1st Defendant, on the other hand, insisted that he is the registered owner of the suit property. He asserted that he paid the full purchase price and was subsequently issued a title for the suit property. To this end, he argued that a resulting favour was created in his favour.

59. In the case of **Mbuthia Vs Jimba Credit Corporation Ltd** **988 KLR 1**, the court held that;

“In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law, and the court should only weigh the relative strength of the parties' cases.”

60. Similarly, in the case of **Edwin Kamau Muniu Vs Barclays Bank of Kenya Ltd**, the court held that;

“In an interlocutory application to determine the very issues which will be canvassed at the trial with finality, all the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”

61. At the interlocutory stage, the court is not required to make final findings on the contested matters. In the matter at hand, the issues of ownership, fraud, and sale can only be determined in a full trial where the parties will have an opportunity to call evidence and have the same challenged by way of cross-examination.

62. Based on the material that is on record, I find that the Applicant has not established a prima facie case with a probability of success.
63. In an application for interlocutory injunction, the Applicant has to satisfy the three conditions before an injunction is granted.
64. In the case of **Nguruman Limited Vs Jan Bonde Nielsen & 2 Others [2014] eKLR**, the Court of Appeal stated as follows: -

“...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may

appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.

65. Having found that the Applicant has failed to establish a *prima facie* case with a probability of success, it will be immaterial to delve into the other limbs that are to be considered on grant of a temporary injunction. In so finding, I am persuaded by the holding in the case of **Commercial Finance Co. Ltd vs Afraha Education Society & Others C A Civil Appeal No. 142 of 1999** where the court held that:-

“.....the judge should address himself sequentially on the conditions for granting an injunction instead of proceeding straight away to address himself on the third condition because where the Applicant has no registered interest in the land comprised in the title dispute and thereof has not demonstrated that it has a prima facie case with a probability of success, no interlocutory injunction would be available.”

66. The upshot of the foregoing is that the application dated 11th March 2025 is devoid of merit and the same is hereby dismissed with costs. To preserve the suit property, I hereby

direct that the 1st Defendant shall not sell or charge the suit property pending the hearing and determination of this suit.

**RULING DATED, SIGNED, AND DELIVERED VIA
MICROSOFT TEAMS THIS 21ST DAY OF NOVEMBER
2025.**

.....
**T. MURIGI
JUDGE**

IN THE PRESENCE OF:

Kamwaro for the Plaintiff/Applicant

Onderi for the 1st Respondent

ORIGINAL