



REPUBLIC OF KENYA



KENYA LAW
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**Kimeli v Ruto (Environment and Land Appeal E006 of 2025)
[2025] KEELC 18464 (KLR) (15 December 2025) (Judgment)**

Neutral citation: [2025] KEELC 18464 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL E006 OF 2025
L WAITHAKA, J
DECEMBER 15, 2025**

BETWEEN

LUCAS KIMELI APPELLANT

AND

KIPLAGAT RUTO RESPONDENT

*(Being an appeal from the Ruling and order of Hon. Gladys Adhiambo
SPM delivered on 16th June, 2024 in Iten MCELC No. 014 of 2025)*

JUDGMENT

Introduction

1. By a ruling delivered on 17th June, 2025 in Iten MCELC Case No. E014 of 2025, the trial court struck out the appellant's suit hereto with cost to the respondent on the ground that the suit is statutorily time barred by virtue of the provisions of Section 7 of the *Limitation of Actions Act*.
2. The circumstances leading to the striking out of the suit are that the respondent had filed a response, replying affidavit, to the appellant's notice of motion dated 20th March, 2025 in which the appellant sought an order of inhibition against parcel No. Cherangany/Koitugum/489 (the suit property) until determination of the suit. The respondent also sought an order directing the County Surveyor Elgeyo Marakwet County to visit the suit property and Cherangany/Koitugum/490 and furnish the court with comprehensive report detailing the actual boundaries and acreage on the ground.
3. The application was premised on the grounds that in 1979, the appellant entered into a land purchase agreement with the respondent for the acquisition of eighteen (18) acres of land; that the 18 acres were to be carved out of land parcel number Cherangany/Koitugum/ 118; that Cherangany/Koitugum/118 was subdivided into Cherangany/Koitugum /489 and Cherangany/Koitugum/ 490 measuring 9.54 Ha (23.5 acres) and 7.28 Ha (18 acres) for the respondent and the appellant respectively; that the appellant took possession of his parcel (Cherangany/ Koitugum/490) and had



been in use and possession of his parcel until sometime in 2009 or thereabout when a dispute concerning ownership of the parcel arose between the appellant and one Colletta Kibii; that the dispute between the appellant and Colletta Kibii was resolved in favour of Colletta Kibii by the Land Disputes Tribunal in that the Land Disputes Tribunal determined that the respondent had erroneously and fraudulently directed the appellant to occupy a portion of the land that rightly belonged to Colletta Kibii and that the decision/award of the Tribunal was adopted as an order of the court leading to loss of 10 acres of land by the appellant. Further, that when the appellant's parcel was surveyed with a view of excising the 10 acres awarded to Colletta Kibii, it was discovered that the portion sold to the appellant was 15 acres and not 18 acres.

4. That owing to the decision of the Tribunal and the discovery that the portion of land sold to the appellant was less by 3 acres, the appellant lost 13 acres of land; that the error that resulted in the appellant's loss of land was acknowledged by the respondent and that the respondent promised to transfer 13 acres out of Cherangany/ Koitugum/489 to the appellant.
5. The appellant lamented that despite repeated demands, the respondent had failed, refused and/ or neglected to transfer the promised 13 acres to him thereby breaching the agreement and causing him significant loss and distress.
6. Apprehensive that unless restrained by way of the orders sought in the application, the respondent may deal with the parcel of land known as Cherangany/Koitugum/489 in a manner prejudicial to his interest therein, the appellant instituted the suit hereto and the accompanying application for interlocutory reliefs.
7. In his response to the application, the respondent inter alia contended that, if at all the appellant had any claim over acreage of the portion of land he sold to him, then that claim was statute barred hence void ab initio and that the appellant's suit is unsustainable for running afoul the express provisions of Section 7 of *Limitation of Actions Act*, Cap 22 Laws of Kenya. The respondent further contended that the appellant was guilty of laches and that both the application and the suit are illusory and not deserving of the court's attention. The respondent urged the court to dismiss the application and the suit with costs to him.
8. By a ruling delivered on 16th June 2025, the learned trial magistrate determined that the appellant's suit was time barred and struck it out with costs to the respondent. In striking out the suit, the learned trial magistrate inter alia stated/held:-

“...The plaintiff is not disputing that he entered into agreement of sale of land with the defendant in the year 1979 and that pursuant to the terms of the agreement the defendant/ respondent transferred to him land parcel No. Cherangany/ Koitugum/490 and he (the plaintiff) assumed possession and ownership. The agreement of sale of land took place 46 years ago. The plaintiff's averment is that subsequently a dispute arose concerning the ownership of the plaintiff's portion of land as one Colletta Kibii a third party claimed ownership of approximately 10 acres of the land that the defendant sold to the plaintiff, that is parcel No. Cherangany /Koitugum /490. The plaintiff's averment is that vide the decree dated 2/9/2009 the court adopted the findings of the boundaries of the land leading to the plaintiff to occupy a portion that rightly belonged to Colletta Kibii. In a bid to prove this the plaintiff applicant annexed the following documents to his affidavit: the certificate of official search for land parcel No. Cherangany/Koitugum/489, the certificate of official search for land parcel No. Cherangany/Koitugum/490; a copy of the proceedings of the tribunal and the tribunal award and the decree of the court that is the decree dated 2/9/2009 as annexure LK2A, LK 2B, LK 4 and LK 5. Having perused the aforesaid documents, I find that the



cause of action arose in 2009 when the plaintiff got to know about the award of the tribunal and particularly when the surveyor was deployed to the land registered in the name of the plaintiff to hive off the 10 acres awarded to Colletta Kibii. The cause of action arose in 2009 as such the plaintiff ought to have instituted this suit before the end of the year 2021. The plaintiff did however file this suit in March 2025. The suit was therefore time barred...

The plaintiff did not seek leave to file the suit out of time neither did he aver that he noticed the alleged fraud on the part of the defendant after expiry of 12 years from the time the cause of action arose....

I find that this suit is time barred and it is for that reason that I hereby strike out the plaintiff's suit with costs to the defendant."

9. Dissatisfied with the decision of the trial magistrate, the appellant appealed to this court on 11 grounds which are summarized as follows; The learned trial magistrate erred by:-
 - i. Striking out the suit on the ground that it was time barred
 - ii. Failing to consider his supplementary submissions;
 - iii. Failing to take into account that the appellant and the respondent had a further verbal agreement after 2009;
 - iv. Failing to take into account that he had brought out the issue of fraud as exception to the issue of limitation of time;
 - v. Failing to exercise discretion judiciously so as to avoid hardship or injustice to him;
 - vi. Failing to consider and apply the law appropriately;
 - vii. The findings of the learned trial magistrate are insupportable in law or on the basis of the evidence adduced.
10. The appellant prays that the appeal be allowed, the ruling striking out his suit be set aside, the suit be remitted back to the magistrate's court for hearing de novo and that he be awarded the costs of the appeal.
11. Pursuant to directions given on 29th September, 2025 the appeal was disposed of by way of written submissions.

SUBMISSIONS

Appellant's submissions

12. In his submissions filed on 23rd October 2025, the appellant makes reference to the provisions of Order 2 Rule 4 of the Civil Procedure Rules and to the decisions in Mohamed Abdikadir Mohamed v Sammy Kagiri & Another (2016) KEHC 6502 (KLR) and Ng'ethe & 2 Others v Nyandarua Progressive Agencies Company Limited & 5 Others (2023) KEELC 16692 KLR and because no defence was filed in this suit raising the issue of limitation of time, submits that in the absence of a defence, the issue of limitation of time was not properly before the trial court.



13. The appellant further submits that the provisions of Order 2 Rule 4 of the Civil Procedure Rules are couched in mandatory terms;
- “that a party shall in any pleading subsequent to a plaint plead specifically any matter, for example any relevant statute of limitation or any facts showing illegality:-
- a. Which he alleges makes any claim or defence of the opposite party not maintainable;
 - b. Which, if not specifically pleaded, might take the opposite party by surprise.
 - c. ,,
14. Based on the decision in the case of Mohamed Abdikar (supra), the appellant submits that the rational of the provisions of Order 2 Rule 4 of the Civil Procedure Rules requiring that the defence of limitation should be pleaded specifically is firstly, to avoid ambush upon or taking the plaintiff by surprise on such a fundamental issue as limitation of action; secondly, the plaintiff is notified of the defence of limitation and thirdly, the plaintiff gets the opportunity to plead such facts as are necessary to bring his claim within the exception of Section 27 of the Limitation of Actions Act.
15. The appellant complains that in the instant case, he was not notified of the defence of limitation of time so as to get an opportunity to plead such facts as are necessary to bring his claim within the exception of Section 27 of the Limitation of Actions Act.
16. The appellant urges this court to hold that the learned trial magistrate erred by striking out his suit on the basis that it was time barred when no defence had been filed without giving opportunity to him to plead all the necessary facts to bring his claim within the exceptions of Section 27 of the Limitation of Actions Act.

Respondent’s submissions

17. The respondent filed submissions dated 31st October 2025, in which he identifies the issue for the court’s determination to be whether the trial court erred in holding that the appellant’s claim to recover land was statute barred under Section 7 of the Limitation of Actions Act hence incompetent for want of jurisdiction.
18. Concerning that issue, the respondent makes reference to the provisions of Section 7 and 26 of the Limitation of Actions Act and to the cases of Okado v Abudo & 3 others (2025) KEELC 3317 (KLR); Gathoni v Kenya Cooperative Creameries Ltd (1982) KLR 104, Divecon Ltd v Samani (1995-1998) 1 EA 48; Bosire Ongero v Royal Media Services (2015) e KLR and Iga v Makerere University (1972) EA 65 and submits that the learned trial magistrate did not err when she determined that the appellant’s cause of action arose in 2009 and that by dint of the provisions of Section 7 of the Limitation of Actions Act, he was supposed to file his suit on or before 2021. The respondent further submits that the learned trial magistrate correctly observed that there was no demonstration of any continuing fraud, mistake and/or explanation for the delay in filing the suit.

Analysis and determination

19. 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.

20. Having read and considered the circumstances leading to filing of the instant suit, the grounds taken up in opposition to the suit and the application accompanying it and the reasons given by the learned trial magistrate for striking out the suit preliminarily and having read and considered the grounds taken up in support of the appeal and the submissions by the parties, I have concluded that the sole issue for determination is whether the learned trial magistrate erred in determining that the appellant's suit was time barred.
21. Concerning that issue, upon re-evaluation of the case urged before the lower court, I find as a fact that it is not in dispute that the appellant's claim to entitlement of land comprised in land parcel No. Cherangany/Koitugum/489 arises from a sale agreement allegedly entered into between the appellant and the respondent in 1970s. Pursuant to that agreement /transaction, the appellant was registered as the proprietor of land parcel No. Cherangany/Koitugum 490.
22. In 2009 or thereabout, a dispute arose between the appellant and a third party, Colletta Kibii, concerning ownership of land parcel No. Cherangany/Koitugum 490. The dispute between the appellant and the third party, Colletta Kibii, led to loss of 10 acres of the land the appellant bought from the respondent.
23. Arising from the dispute between the appellant and the third party, the appellant also discovered that the size of his land, on the ground was also less by 3 acres. The loss of land by the appellant arising from the dispute and the discovery happened in 2009 or thereabout. In the plaint and the notice of motion, the appellant claimed or alleged that the respondent promised to make good the loss after it was discovered but failed to fulfil his promise.
24. In his replying affidavit, the respondent denied having made any promise to make good the short fall and contended that he only sold to the appellant 7 acres and that the appellant's claim was by dint of the provision of Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, statute barred.
25. Even though the appellant had the opportunity to respond to the respondent's claim/allegation that he never promised to make good the appellant's loss, by filing a supplementary or further affidavit introducing evidence of the promise, he never filed a response to the respondent's denial.
26. In the circumstances of this case, where the issue of limitation of action was raised as a ground of attack to the appellant's suit and the accompanying application for interlocutory relief, it is my considered opinion that the requirement of Order 2 Rule 4 of the Civil Procedure Rules was met.
27. I have seen the documents attached to the plaintiff's list of documents dated 20th day of March, 2025. None relates to the promise allegedly made by the respondent or the repeated demands allegedly made following the alleged promise to make good the loss suffered by the appellant.
28. Absence of any documentary evidence of the alleged promise, means if there was any promise made by the respondent to remedy the shortfall, it must have been oral.
29. Cognizance of the provisions of Section 3(3) of the *Law of Contract Act*, which requires transactions/ dealings in land to be in writing and witnessed, it is my considered view that, even if the alleged promise exists, it cannot found any cause of action in favour of the appellant as the respondent has denied existence of such promise/arrangement.
30. In the absence of any evidence that the respondent had indeed promised to make good the loss the appellant suffered, which evidence the appellant had opportunity to present before the trial court but



failed to do so, the decision by the trial court that the appellant's suit was time barred cannot reasonably be faulted, in the circumstances of this case.

31. The upshot of the foregoing is that the appeal has no merit. Consequently, I dismiss it with costs to the respondent.

32. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KABARNET THIS 15TH DAY OF DECEMBER, 2025.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

Ms. Chepngetich holding brief for Mr. Wanga for the Appellant

Mr. Nechesa Maina for the Respondent

Court Assistant; Christine

