REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KERUGOYA

ELCA NO. E006 OF 2024

HARRISON NJAU NJURAI ..... APPELLANT

VERSUS

SIMON NYAMU MWANGI ..... RESPONDENT

(Being an appeal against the ruling of Hon. Martha Opanga, PM, delivered on 23rd January 2024 in Wang'uru MELC Case No. E080

of 2023)

JUDGMENT

1. This appeal arises from the ruling of **Hon. Martha Opanga, PM,** delivered on **23rd January 2024** in **Wang'uru MELC Case No. E080 of 2023**, in which the learned trial magistrate dismissed the appellant's preliminary objection and allowed the respondent's application dated 1st September 2023 pending the hearing and determination of the main suit.

2. Aggrieved by that decision, the appellant lodged the present appeal vide a Memorandum of Appeal dated 15th

February 2024, contending inter alia that the learned trial magistrate erred both in law and in fact in dismissing the preliminary objection and in allowing the respondent's application by failing to properly consider the submissions and authorities placed before it to the effect that the respondent's suit was statute barred, the claim being founded on a sale agreement executed on 4th September 2003; that the trial court misdirected itself on when the cause of action accrued, failed to appreciate the purpose and effect of the **Limitation of Actions Act**, particularly **Section 4(1),** and wrongly concluded that the statutory period had not lapsed, notwithstanding the execution of the sale agreement on 4th September 2003, and a memorandum of understanding dated 10th July 2014; that the learned trial magistrate erred in holding that succession proceedings had been undertaken in which the respondent was awarded 4.8 hectares out of **Land Parcel Mutithi/Chumbiri/174,** despite the respondent allegedly failing to tender documentary evidence in support of that assertion; that the court erred in ruling that the appellant was issued with a title deed on 23rd February 2022 without an evidential basis; that the learned trial magistrate effectively amended or imposed new terms to the contract so as to suit the respondent's case on when the cause of action accrued, thereby misdirecting herself in the assessment of limitation; that the court failed to properly consider the evidence tendered and the submissions made in support of the preliminary objection,

treated the same superficially, and arrived at a conclusion inconsistent with established principles and already decided cases of a similar nature.

3. On the basis of those complaints, the appellant prays that the appeal be allowed; that the ruling and orders of the lower court be set aside; that the preliminary objection be upheld; and the respondent's suit be struck out with costs, together with the costs of this appeal; and such further relief as this Court may deem fit.

4. Before the trial court, the respondent moved the court by a Notice of Motion under certificate of urgency dated 1st September 2023, seeking for orders compelling the Land Registrar to register an inhibition against **Land Larcel Mutithi/Chumbiri/174** pending the hearing and determination of the suit.

   He further sought temporary injunctive orders restraining the appellant from selling, transferring, gifting, cultivating, blocking access to, or otherwise dealing with the said parcel pending both the hearing of the application and the determination of the main suit. He also sought orders restraining the appellant from refunding the purchase price and prayed for costs and any other appropriate relief.

5. The application was premised on the grounds set out therein and supported by the respondent's affidavit. The respondent deponed inter alia that on 4th September 2003, he entered into a sale agreement with the appellant for the purchase of two (2) acres out of **Land Parcel Mutithi/Chumbiri/174**, then measuring approximately eight (8) acres. At the time, the land was registered in the name of the appellant's father, **Njurai Gitetu (deceased**), and succession proceedings were pending **in Embu Succession Cause No. 195 of 1983**.

   According to the respondent, the appellant was selling a portion of his anticipated share and it was agreed that transfer would be effected upon conclusion of the succession proceedings. That the succession proceedings were eventually concluded, and the appellant became registered as proprietor of the suit land. He stated that he made various payments towards the purchase price and that, following the execution of a memorandum of understanding dated **10th July 2014**, he made what he described as the final payment of **Kshs.28,250/=**, which he contended cleared the balance of the purchase price for the two acres.

   He maintained that acknowledgements were executed for the payments made, but despite full payment of the purchase price, the appellant failed and/or refused to transfer the two acres to him. He alleged that the

appellant at some point proposed that he elect between taking one acre out of the two acres or receiving a refund of **Kshs. 120,000/=,** which he declined.

6. With regard to the memorandum of understanding dated 10th July 2014, the respondent contended that it was executed in circumstances he described as oppressive and that it purported to cancel the original sale agreement while simultaneously addressing refund of consideration. He maintained that the memorandum became ineffective and unenforceable on account of alleged misrepresentation and frustration, and that the original agreement remained binding.

   According to the respondent, although the appellant had transferred other portions of the land to third parties following confirmation of grant, he had persistently declined to transfer the two acres to him. It was his position that unless restrained, the appellant would dispose of the land in a manner prejudicial to his claimed proprietary interest. On that basis, he sought preservation orders pending the determination of the suit.

7. In opposition to the application, the appellant filed Grounds of Opposition dated 11th September 2023. In those grounds, he contended that the application was misconceived, frivolous, vexatious, and an abuse of the court process, and that it lacked merit.

He further asserted that the respondent lacked locus standi to institute the application. In addition, the appellant filed a Notice of Preliminary Objection dated 12th September 2023, contending that the respondent's claim offended **Section 4 of the Limitation of Actions Act, Chapter 22 of Laws of Kenya**, and that the suit was statute time barred.

8. The Court directed that the appeal be canvassed by way of written submissions, and the learned counsel for the appellant and respondent filed their submissions dated the 27th January 2025 and 26th May 2025 respectively, that the court has considered.

9. In his written submissions, the learned counsel for the appellant identified three issues for determination, namely: whether the appeal is merited; whether the respondent's suit in the lower court offended **Section 4 of the Limitation of Actions Act, Chapter 22 of Laws of Kenya;** and what orders ought to be made as to costs.

   On whether the appeal is merited, counsel submitted that the respondent's application and the suit in the lower court were incompetent for having been filed outside the statutory limitation period and without leave of court. Counsel argued that the suit was founded on a sale agreement executed in the year 2003, more than twenty

years before the institution of the proceedings, and was therefore, hopelessly time-barred.

It was further submitted that the trial court misdirected itself by failing to appreciate that the issue before it was one of limitation and that the respondent's cause of action was barred under **Section 4 of the Limitation of Actions Act.** Counsel contended that the learned trial magistrate failed to properly apply the law on limitation to the undisputed fact that the agreement was entered into in 2003.

On costs, counsel submitted that costs follow the event and urged the Court to award the appellant the costs of the appeal and of the proceedings in the lower court.

10. In their submissions, the learned counsel for the respondent identified three issues for determination, namely: whether the preliminary objection was valid in law; whether the appeal ought to be allowed; and who should bear the costs.

On the validity of the preliminary objection, counsel submitted that the objection did not meet the threshold of a pure point of law and that the trial court properly dismissed it.

On whether the appeal ought to be allowed, counsel submitted that the respondent had demonstrated that the cause of action sought to be enforced accrued within the statutory period. It was contended that from the inception of the transaction, the appellant informed the respondent that he was selling the land in his capacity as a beneficiary of his deceased father's estate and that the transfer would be effected upon issuance of a grant of letters of administration. Counsel submitted that the respondent took possession and occupation of the suit land in anticipation of transfer and had been in occupation for over two decades.

It was further submitted that the cause of action accrued when the appellant became registered as proprietor and was issued with a title deed in his favour, and not in 2003 when the sale agreement was executed. Counsel argued that the respondent had consistently pursued transfer of the land, but that the appellant had declined to effect the same.

It was therefore submitted that the suit was not statute time barred, and that the trial court properly exercised its discretion in granting preservatory orders. On costs, counsel urged that the appeal be dismissed with costs to the respondent.

The respondent further submitted on issues of adverse possession, which was, however, neither pleaded nor

canvassed before the trial court, and this Court will therefore refrain from considering it, as parties are bound by their pleadings and a new cause of action cannot be introduced at the appellate stage.

11. This appeal in substance turns on a single question, that is, whether the learned trial magistrate erred in dismissing the appellant's preliminary objection founded on **Section 4(1) of the Limitation of Actions Act.**

12. I have carefully considered the grounds on the memorandum of appeal, record of appeal, submissions by the learned counsel, superior court decisions cited thereon, and come to the following findings:

a. As this is a first appeal, the duty of this Court is to re-evaluate the evidence afresh and draw its own conclusions, while bearing in mind that it did not see or hear the witnesses. This principle was stated in ***Selle & Another versus Associated Motor Boat Co. Ltd & Others [1968] EA 123***, where the **Court of Appeal** held:

> ***"This Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court is by way of retrial… this Court must reconsider the***

evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

b. The law on preliminary objections is pretty well settled. In the case of ***Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd [1969] EA 696***, the Court stated that a preliminary objection consists of a pure point of law which is argued on the assumption that the facts pleaded by the opposite party are correct and which, if upheld, is capable of disposing of the suit. A preliminary objection, therefore, must raise a pure question of law; must not require ascertainment of contested facts; and must be capable, if successful, of bringing the proceedings to an end.

c. Where apparent or ascertainable on the face of the pleadings, the ground of limitation of actions may properly amount to a pure point of law. However, where the question of limitation depends on disputed factual matters, particularly as to when the cause of action accrued, then it may not be suitable for determination through a preliminary objection, as evidence will be needed to be presented and

considered before determination one way or the other.

d. The first task of this Court is therefore to determine whether the question of limitation in the suit before the trial court was capable of determination purely as a matter of law. **Section 4(1)(a) of the Limitation of Actions Act, Chapter 22 Laws of Kenya,** provides that:

> ***"4. Actions of contract, tort, and certain other actions***
> ***(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;"***

The provision is couched in mandatory terms and admits no discretion, unless extension is expressly provided for under the **Act**.

e. The **Court of Appeal** in the case of **Divecon versus Samani [1995-1998] 1 EA 48** held as follows;

> ***"No one shall have the right or power to bring after the end of six years from the***

date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done, namely, an action that is brought in contract six years after the cause of action arose, or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract."

That pronouncement underscores that once a claim founded on contract is statute time barred, the court lacks jurisdiction to entertain it. On the nature of limitation, the Court of Appeal in the case of ***Gathoni versus Kenya Co-operative Creameries Ltd [1982] KLR 104*** stated:

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

The central inquiry under **Section 4(1) of the said Act** is therefore, when the cause of action accrued.

f. On what constitutes accrual, the **Court of Appeal** in ***Halsbury's Laws of England*** has consistently been adopted to the effect that:

> ***"A cause of action arises when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed."***

In actions founded on contract, time begins to run from the date of breach, and not necessarily from the date the contract was executed. This principle was affirmed in the case of ***Attorney General & another versus Andrew Maina Githinji & Another [2016] eKLR***, where the Court stated that:

> ***"Time begins to run when there is a breach of contract, and not necessarily from the date of the contract itself."***

Accordingly, for purposes of ***Section 4(1)*** **of the Act**, the determinative question is: when did the breach of the contract occur? That is the date from which the six-year limitation period begins to run.

g. Where the date of breach is clear and uncontested from the pleadings, limitation may properly be

determined as a pure point of law at the preliminary stage. However, as stated in the case of ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696,*** a preliminary objection must raise:

> ***"A pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct."***

If the determination of limitation requires ascertainment of contested facts, particularly as to when the breach occurred, then the matter may fall outside the scope of a proper preliminary objection.

h. In this case, the agreement relied upon by the Respondent is dated 4th September 2003. It provides that the vendor was entitled to four (4) acres out of **Land Parcel Mutithi/Chumbiri/174** pursuant to a confirmed grant dated 6 February 1989, and that he agreed to sell two (2) acres to the Respondent. The balance of the purchase price was to be paid upon execution of the necessary transfer documents. It is common ground that, as at 20 May 2013, the land remained registered in the name of the deceased proprietor. It follows that as at 2003, when the agreement was made, and even as late as 2013, the vendor had not been registered as proprietor pursuant to transmission.

i. Under the **Law of Succession Act, chapter 160 of Laws of Kenya**, a beneficiary under a confirmed grant does not acquire legal title until transmission is effected and registration completed. Until such registration, the beneficiary holds no registrable interest capable of transfer. The immediate legal consequence is simply that as at 4th September 2003, when the agreement was made, the vendor/appellant, was not in a position to execute transfer documents of the property subject matter in the said sale agreement in favour of the purchaser/Respondent. The contract, therefore, contemplated performance upon the occurrence of a future event, namely, transmission and registration of the vendor/appellant as proprietor of the said property.

j. The legal and practical reality is that the appellant's obligation to effect transfer was contingent upon his acquisition of title. Until registration in his name, he lacked the capacity to transfer the land. The green card shows that the appellant became registered proprietor on 23rd February 2022. That date is not peripheral; it is foundational. Before that date, a claim for specific performance compelling transfer would have been premature because the vendor was

not legally capable of performing the very act sought to be compelled.

k. The appellant, however, argues that the breach occurred earlier. His position is that upon execution of the Memorandum of Understanding, which purported to cancel the 2003 agreement, required payment of the balance of Kshs. 28,250/=, which was paid, and contemplated rectification of the confirmed grant. That the respondent failed to comply with its terms, including surrender of 0.225 acres, and vacating the portion occupied. It is contended that refusal to comply with the MOU constituted a breach, and that time began to run from that point.

That contention introduces a further question of what was the legal effect of the Memorandum of Understanding? Did it effectively rescind the 2003 agreement? Did it vary its terms? Was it partially performed and then abandoned? The record shows that the balance of the purchase price was paid after execution of the MOU, and that nothing further was implemented. Whether the MOU extinguished the original agreement or whether the parties reverted to the original contractual framework are matters that cannot be resolved purely as questions of law. They require evidential interrogation at trial.

l. More fundamentally, even if the MOU is taken at its highest in favour of the appellant, the question remains whether a cause of action for specific performance could accrue before the appellant became the registered proprietor of the land subject matter. A vendor cannot be in breach of an obligation to transfer registered land at a time when he is not legally capable of effecting that transfer. If performance was contingent upon rectification of the grant, and transmission of title, then the date of registration becomes central to determining accrual. Whether the delay in pursuing transmission itself amounted to a breach is again a matter requiring evidence to be considered after being presented and tested through cross examination.

m. The record further shows that the first formal demand for transfer was made on 16th August 2023, and expressly declined on 18th August 2023. If the breach is pegged to refusal after the appellant became the registered proprietor in February 2022, then this suit that was evidently filed in 2023, falls well within the six-year limitation period.

n. I have also noted that the agreement does not stipulate a specific date for completion. In such

circumstances, the law implies that performance must occur within a reasonable time. However, what constitutes a reasonable time depends on surrounding important indicators/circumstances, including inter alia, whether transmission was pursued; whether the vendor became capable of effecting transfer; whether there were demands made earlier than 2023; and whether the Respondent was in possession.

o. The record reveals a formal demand dated 16th August 2023 was made by the respondent to the appellant requiring the execution of transfer documents. The suit was filed on 1st September 2023. If the Respondent's case is that the breach occurred upon refusal following that demand, then accrual would arguably arose in 2023. However, courts have consistently held that a claimant cannot indefinitely postpone accrual by failing to demand performance. Where no time is fixed for performance, the cause of action accrues after lapse of a reasonable time, not at the claimant's election.

p. Determining what constituted a reasonable time in the present circumstances would require factual inquiry. That inquiry goes beyond the narrow

confines of a pure point of law, as it would require among others, establishment of when transmission occurred, if at all; whether the vendor/appellant ever became a registered proprietor; whether consent under the **Land Control Act** was required or obtained; whether the land was vested in **National Irrigaion Authority** (NIA); and when the breach actually crystallised, to determine the accrual date. That would definitely require or necessitate an evidential evaluation.

q. These are not matters that can be conclusively determined solely from the face of the plaint. Accordingly, while the lapse of 20 years between the date of agreement, 2003, and the filing of suit, 2023, is prima facie inordinate, the exact date of accrual of the cause of action is not self-evident from the pleadings alone. The limitation issue is, therefore, not a clean and self-executing point of law capable of disposal through a notice of preliminary objection, without consideration of evidence. It is intertwined with factual questions regarding capacity, statutory compliance, and breach. Accordingly, the limitation argument does not meet the strict threshold of a pure preliminary objection, as the matter requires evidential interrogation at trial. The appeal is for the reasons set out above without merit.

r. **Section 27(1) of the Civil Procedure Act chapter 21 of Laws of Kenya** provides, in mandatory terms that:

> ***"Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall not bar the court for ordering that the costs be paid. Provided that the costs of any action shall follow the event unless the court or judge shall for good reason otherwise order."***

The general rule is that costs follow the event, save where good reason exists to depart from the rule. I do not find any basis to depart from the above edict, and the appellant, having failed to

succeed in the appeal, will meet the respondent's costs.

13. Having come to the determinations above on the appeal, the court finds and orders as follows:

a. **That the appeal has no merit and is dismissed in its entirety.**

b. **The learned trial magistrate ruling delivered on 23rd January 2024 in Wang'uru MELC Case No. E080 of 2023, dismissing the appellant's preliminary objection and allowing the respondent's application dated 1st September 2023 is for the reasons given above, affirmed wholly.**

c. **The appellant will meet the respondent's costs in this appeal.**

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 4TH DAY OF MARCH 2026.

S. M. Kibunja

ELC

JUDGE

In the presence of:

Appellant – No appearance

Respondent – M/s Muthoni Njuguna

Kinyua - Court Assistant.

S. M.

Kibunja

ELC

JUDGE