



REPUBLIC OF KENYA



**Ogutu v Tambo & 4 others (Environment & Land Case E037 of 2021)
[2024] KEELC 1098 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1098 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E037 OF 2021**

E ASATI, J

FEBRUARY 29, 2024

BETWEEN

ROSE AWINDA OGUTU PLAINTIFF

AND

JANE ADHIAMBO TAMBO 1ST DEFENDANT

SHADRACK OWUOR OCHOLA 2ND DEFENDANT

WANRADING COMPANY LIMITED 3RD DEFENDANT

RAYMOND OJWANG OMOLLO 4TH DEFENDANT

COUNTY GOVERNMENT OF KISUMU 5TH DEFENDANT

RULING

1. This ruling is in respect of the preliminary objection raised on behalf of the 1st and 5th Defendants *vide* the Notice of preliminary objection dated 19th May 2023. The preliminary objection is expressed to be brought pursuant to the provisions of section 4 (2) of the *Limitation of Actions Act* Cap 22 Laws of Kenya. The ground upon which the preliminary objection is based is that the suit premised on the tort of trespass contravenes the provisions of section 4(2) of the *Limitation of Actions Act* hence the court has no jurisdiction to entertain the suit as presented.
2. In support of the preliminary objection, it was submitted on behalf of the 1st and 5th Defendants that the preliminary objection raises pure points of law as defined in the case of *Mukisa Biscuits vs West End Distributors Ltd* (1969) EA 696. That an issue of jurisdiction is a point of law which can determine the matter without having to consider the merits of the case. And that the issue of limitation of actions goes to the jurisdiction of the court and needs to be considered and determined. Counsel relied on the cases of *Peter Somoni Motoki vs Jeremiah Matoke Nyang'wara & 2 others* [2021]eKLR and *Bosire Ogero vs Royal Media Services* [2015]eKLR to support the submissions.



3. Counsel submitted further that the suit violates the provisions of section 4(2) of the [Limitation of Actions Act](#) because according to the amended plaintiff, the trespass onto the suit land parcel No. L. R 16601, IR 75951 took place in the years 2012 and 2013. That the plaintiff's suit is founded on the law of tort and more so the tort of trespass. That section 4(2) of the [Limitation of Actions Act](#) provides that any action founded on tort may not be brought after the end of three (3) years from the date the cause of action accrued. Counsel relied on the case of [Haron Onyancha vs National Police Service Commission & another](#) [2017]eKLR where it was held, *inter alia*, that a claim barred by limitation is a claim barred by law and that when a suit is time barred the court cannot grant the remedy or relief sought. That continuous trespass is not pleaded in the amended plaintiff. That on the basis of what is pleaded in the amended plaintiff, the action is time barred under section 4(2) of the [Limitation of Actions Act](#). Counsel urged the court to uphold the preliminary objection and strike out the suit with costs.
4. In opposition, it was submitted on behalf of the plaintiff vide the written submissions dated 10th January 2024 that the plaintiff's case is based on two causes of action namely; trespass to property which the plaintiff discovered on 17th November 2020 as per paragraphs 3, 4, 4(a), 4(b) and 5(i), (iv-vi) of the amended plaintiff dated 23rd March 2022. That the suit filed on 8th June 2021 before the lapse of the 3 years limitation survives and the action is not defeated by section 4(2) of the [Limitation of Actions Act](#) Cap 22 Laws of Kenya.
5. Counsel for the plaintiff submitted that the suit is an action to recover land which the plaintiff had been unlawfully dispossessed of by the Defendants. That such claim under section 7 of the [Limitation of Actions Act](#) has a limitation period of 12 years which has not elapsed.
6. Counsel submitted further *vide* the Supplementary Submissions that the plaintiff's case is based on continuous acts of trespass as can be seen from paragraph 9 of the amended plaintiff.
7. I have considered the preliminary objection, the submissions in support and the submissions in opposition thereof. Indeed, under the provisions of section 4(2) of the [Limitation of Actions Act](#), a claim premised on tort must be brought before the expiry of 3 years from the date the cause of action accrued. There is no dispute that the suit herein is based on the tort of trespass. However, from the pleadings and particularly the amended plaintiff it is clear that the tortious acts complained of are continuous. The plaintiff pleaded in paragraph 9 of the amended plaintiff that since they trespassed onto the suit land, the Defendants have persisted with their acts of encroachment on the suit parcel. Among the prayers sought in the amended plaintiff is an order for the eviction of the Defendants from the suit land.
8. Section 4(2) of the [Limitation of Actions Act](#) could apply in a case of a one-time trespass where the Defendants unlawfully entered the suit land and left. But that is not the position in the instant suit. The facts pleaded in the instant suit demonstrate a continuing trespass. Continuous trespass has been defined in [Black's Law Dictionary](#) 8th edition as

“a trespass in the nature of a permanent invasion on another's property such as a sign that overhangs another's property.”
9. In the case of [Muthiora vs Marion Muthama Kiara \(suing on behalf of the estate of Erastus Muthama Kiara-deceased\)](#) (Civil Appeal 43 of 2017) [2022] KECA 28 (KLR) (4 February) (Judgement) the court described continuing trespass thus “In a case of a continuing trespass, a trespass consists of a series of acts done on consecutive days that are of the same nature and that are renewed or continued from day to day so that the acts in the aggregate form one indivisible harm.”



The court held in the same case that

“the trial court having found that the tort of trespass was continuous, the appellant’s defence of limitation of time was rendered otiose as the three years limitation strictures set for claims based on trespass did not apply.”

10. In the circumstances, the preliminary objection herein based on limitation of actions under section 4(2) of the *Limitation of Actions Act* is not sustainable. The preliminary objection is hereby dismissed. Costs to the plaintiff.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 29TH DAY OF FEBRUARY, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Ombwayo for the Plaintiff.

C. Obiero for the 1st & 5th Defendants.

No appearance for the 2nd, 3rd and 4th Defendants.

