



**Goren & another v Ngetich (Environment & Land Case E001 of 2023)  
[2024] KEELC 1117 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1117 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT & LAND CASE E001 OF 2023**

**MN MWANYALE, J  
FEBRUARY 28, 2024**

**BETWEEN**

**JOHN KIPYEGON GOREN ..... 1<sup>ST</sup> PLAINTIFF**

**APTON GOREN ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ALEX KIPROTICH NGETICH ..... DEFENDANT**

**RULING**

1. Vide the Notice of Motion application dated 15<sup>th</sup> February 2024, the Defendant/Applicant premising his said application on Section 7 of the Limitation of Actions Act seeks orders that this suit be struck out and costs of both the application and suit.
2. The grounds in support of the application are that the reliefs sought in the plaint dated 19<sup>th</sup> October, 2023 are time barred as the cause of action arose at the signing of the agreement for sale on 24<sup>th</sup> March 1976 as pleaded at paragraphs 4 and 5 of the plaint and thus became time barred 12 years later from 1976 and 1978 respectively hence the suit is timed barred.
3. The above ground was reiterated in the supporting affidavit of the Applicant Alex Kiprotich Ngetich.
4. In response to the application, Mr. Apton Goren the 2<sup>nd</sup> Plaintiff/Respondent filed a replying affidavit and stated that the suit is not time barred as the cause of action arose in 2022 when the 1<sup>st</sup> Plaintiff reached out to family of John Kipkemboi Kemei seeking assistance to process a new certificate of title the initial title having been misplaced by their previous Advocate.
5. That they had been in occupation since 1976 in peaceful without a dispute.
6. That there is no denial of the existence of the agreement for sale dated 24/3/1976; hence the cause of action arose in the year 2022.



7. Parties filed their list of authorities and argued the application orally.
8. In support of the application, Mr. Mokuia Learned Counsel appearing together with Mr. Maranga the Learned Counsel argued the same, pointing that the suit being a claim for recovery of land was time barred as the cause of action arose 12 years after the initial agreement for sale. Mr. Mokuia Learned Counsel distinguished the authorities cited by the Plaintiff/Respondent in that the first authority, to wit *Delilah Ondari vs Francis Ondieki Atandi (2022) eKLR* the exception to the Limitation of Action therein was fraud, which had not been pleaded in this case; and that on the second authority, *Joseph Njuguna Karugu vs Margaret Nduta Ngugi & 2 others (2021) eKLR*, there was no Agreement for Sale while the present case there was an Agreement for Sale.
9. On the strength of the above submissions, the Applicant urges the Court to allow the application and has in support of his submissions have placed reliance on the decisions in the cases of *Sohantadirgadass Rajput & Another vs Divisional Integrated Development Programmes Company Limited (2021) eKLR*; and *Edward Moonge Lengusuranga vs James Lanaiyara & Another (2019) eKLR*.
10. While answering a question from the Court the Applicants Advocate conceded that the Plaintiff had taken possession of the suit property and that there was an Agreement for Sale which was not disputed but the Respondents had only made part payment.
11. In response to the application Ms. Oduor Learned Counsel for the Respondents submitted that the cause of action is not a recovery of the suit property as claimed by the Defendant but the cause arose after the Defendant as Administrator of the family of John Kipkemboi Kemei refused to assist them get a replacement title to facilitate to transfer themselves.
12. The Respondent's Advocate further stated that the agreement for sale and occupation by the Respondent was not disputed.
13. In support of her submissions, the Respondent Advocates placed reliance on the Authorities on the list of Authorities dated 20/2/2024, alluded to at paragraph 8 above.

**Issues For Determination: -**

14. From the application, the rival affidavits and submissions and authorities, the Court frames the following as issues for determination
  - i. What is the cause of action in the suit?
  - ii. Is the suit time barred?
  - iii. Whether the application is merited?
  - iv. Who bears costs of the suit?
15. The Court agrees with the Applicant Advocates that the suit as pleaded herein is for recovery of land and that the same crystallized 12 years after the agreement for sale thus in 1988 and in 1990 and the same is time barred from the pleadings and the submissions of the parties.
16. The Plaintiff did allude to the existence of an Agreement for Sale which the Applicant/Defendant does not deny and actually based his application on the same.
17. Both parties agree on the fact that the Plaintiff took possession of the suit property pursuant to the said agreement.



18. These sets of facts, of the existence of an Agreement for Sale, which was uncompleted as there was no transfer to the purchasers but the purchasers took possession of the suit property, varies the pleaded cause of action of the suit herein from being a suit for recovery of land to becoming suit for recovery of trust land by a beneficiary, as was the vendors were converted to constructive trustee due to the uncompleted contract as was held by the Court of Appeal in Civil Appeal No. 121/1982, Paul Muthuitha vs Wanaoe where the Court of Appeal quoted Underhills Laws of Trusts and Trustees 13<sup>th</sup> edition at page 61 “ it is apprehended that any other that is other than a trustee of settled land or land on trust of sale, trustee, including a constructive trustee (as for example under an uncompleted contract) is liable to be divested of the legal estate by possession of a person entitled in equity the same way as if the latter were a stranger.”
19. The Court is aware that the issue of trust has not been expressly pleaded by either party, but the same is apparent from the pleadings and the submissions made in the course of this application and under the principle set out in the decision in Odd Jobs vs Mubea (1970 E. A. 476 where the Court held “a Court may validly determine an unpleaded issue where the evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the Court to decide.”
20. From the pleadings and application before Court it would appear that the issue of whether a trust exists due to the uncompleted contract or not has been left for the Court to determine.
21. This suit would thus be excepted under Section 20 (1) (b) of the [Limitation of Actions Act](#), as it is a suit for recovery of land by a beneficiary under a Constructive Trust.
22. For the above reasons, Section 7 of the Limitation of Action Act does not apply to this suit, and the inevitable conclusion is that the application dated 15<sup>th</sup> February, 2024 is not merited and it is hereby dismissed.
23. Costs in the cause.

**RULING, DELIVERED AND DATED AT KAPSABET THIS 28<sup>TH</sup> DAY OF FEBRUARY 2024.**

**HON. M. N. MWANYALE,**

**JUDGE.**

**In the presence of;**

Mr. Maranga Counsel for the Defendant

Ms. Oduor Counsel for the Plaintiff

