



REPUBLIC OF KENYA



KENYA LAW
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**Vaz v Oyatsi & 2 others (Civil Appeal E035 of 2022)
[2025] KECA 251 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 251 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E035 OF 2022
AK MURGOR, GWN MACHARIA & KI LAIBUTA, JJA
FEBRUARY 21, 2025**

BETWEEN

FARIDA VAZ APPELLANT

AND

DESTERIO ANDADI OYATSI 1ST RESPONDENT

KENNETH HAMISH WOOLER KEITH 2ND RESPONDENT

**ELISABETH KLEM (SUING AS EXECUTOR OF THE LLATE KIPYATOR
NICHOLAS KIPRONO BIWOTT (DECEASED) 3RD RESPONDENT**

(Being an appeal against the Ruling and Orders of the Environment and Land Court of Kenya at Mombasa (M. Odeny, J.) dated 2nd September 2022 in E.L.C Case No. 22 of 2021)

JUDGMENT

1. By a plaint dated 24th March 2021, the 1st and 2nd respondents together with the 3rd respondent suing in their capacity as personal representatives of the estate of Kipiyator Nicholas Kiprono Biwott (the deceased), sued the appellant jointly with three other persons not party to the instant appeal, claiming that the property known as Kilifi/Jimba/362 (the suit property) was allocated to the deceased by way of adjudication, and a title issued to him as the absolute proprietor thereof on 18th June 1979.
2. The respondents' case was that, on 29th July 2008, the Land Registrar Kilifi (the Registrar), purported to fraudulently issue a second title in respect of the suit property to the appellant and the late Peter Ignatius Vaz; and that the two had been occupying the suit property through proxies on the strength of the fraudulent title issued by the Registrar. They prayed for a declaration that the deceased was the legal proprietor of the suit property; a declaration that the title issued to the appellant and Peter Vaz was unlawful, null and void; an order directing the Registrar to revoke the title issued to the appellant and Peter Vaz; an order for the eviction of the appellant and Peter Vaz; an order of injunction restraining the appellant and Peter Vaz from occupying, trespassing on and carrying out any activities on the suit



- property; general damages for trespass; and mesne profits for the period between 29th July 2008 up to the date of judgment.
3. Contemporaneously with the plaint, the respondents filed a Notice of Motion of even date praying, inter alia, for: temporary injunction restraining the appellant and Peter Vaz from transferring, delineating or carrying out any further developments on the suit property pending hearing and determination of the suit; an order that the OCS, Kilifi Police Station do ensure compliance therewith; and for costs of the application.
 4. The respondents' Motion was supported by the annexed affidavit of Elisabeth Klem (the 3rd respondent), but whose jurat is not part of the record as put to us. Suffice it to mention that, in it, Klem deposed to the precis of their suit and the grounds on which the application was made, which we need not replicate here, save to take note of their main contention, namely that, despite being in possession of the title documents issued to the deceased, the respondents have not been able to access the suit property with a view to fencing and developing it due to the hostile conduct of the persons in occupation thereof.
 5. On his own behalf and on behalf of the Registrar, the Attorney General filed Grounds of opposition dated 10th May 2021 together with a notice of preliminary objection of even date on the ground that the respondents had shown indolence in establishing their alleged claim to the suit property and were guilty of laches. Citing section 7 of the Limitation of Actions Act (Cap. 22), the Attorney General urged the trial court to strike out the respondents' suit.
 6. In opposition to the respondents' application, the appellant filed a replying affidavit sworn on 29th November 2021 primarily contesting the respondents' claim, and stating that the Motion was "full of falsehoods"; that the respondents had not met the threshold for grant of orders of injunction as sought; that they (the appellant and Vaz) were the lawful and rightfully registered owners of the suit property; that they had built thereon a servants' house where their servants had continuously and openly lived together with their families since 2008; that the respondents had no right of claim over the suit property; and that, if the orders sought are granted, the appellant shall suffer great prejudice, irreparable loss and damage not capable of compensation by an award of damages. She prayed that the respondents' Motion be dismissed with costs.
 7. In response, the 3rd respondent filed a supplementary affidavit sworn on 23rd February 2022 generally deposing to the merits of their suit and reiterating the contents of her supporting affidavit aforesaid.
 8. This prompted the appellant's further affidavit sworn on 21st March 2022 essentially reiterating the contents of her replying affidavit.
 9. When the respondents' Motion and the Attorney General's preliminary objection came for directions on 16th November 2021, counsel agreed to have the Motion and the preliminary objection canvassed together by way of written submissions.
 10. In compliance with the court's directions, the Attorney General filed written submissions dated 29th October 2021 in support of the preliminary objection and in opposition to the respondents' Motion.
 11. On their part, learned counsel for the appellant, M/s. Machuka & Company, also filed written submissions dated 21st March 2022 in support of the preliminary objection and in opposition to the respondents' Motion.
 12. In reply, learned counsel for the respondents, M/s. Kipkenda & Company, filed their written submissions and list of authorities dated 23rd February 2022 in support of the Motion and in opposition to the preliminary objection.



13. In her ruling dated 14th December 2021, the learned Judge (Dr. M. Odeny, J.) dismissed the Attorney General’s preliminary objection with costs to the respondents and allowed their Motion on the terms that “... the status quo prevailing at the time of filing this suit be maintained.”
14. Dissatisfied by the learned Judge’s decision, the appellant moved to this Court on appeal on 9 grounds set out in her memorandum of appeal dated 24th October 2022 faulting the learned Judge for, inter alia: dismissing the preliminary objection; holding that the period of limitation of actions ran from the year 2019 instead of the year 1979; disregarding vital provisions of Article 40 of *the Constitution* and the Registration of *Land Act*, 2012; failing to find that, as at the time when the National Land Commission held public hearing, the respondents’ claim over the suit property had already been extinguished through successive change of title; pegging the limitation of actions on the date of issue of the title to the property; disregarding the effect of the respondents’ laxity, indolence and inaction; and for disregarding the evidence that the respondents had not dealt with nor interacted with the suit property since 1979.
15. In support of the appeal, counsel for the appellant filed written submissions dated 4th April 2023 and a list of authorities dated 13th April 2023 citing seven (7) judicial authorities on the law on adverse possession, which is not in issue in the instant appeal. Finally, counsel cited the case of *Gathoni v Kenya Co- Operative Creameries Ltd* [1982] KLR 104, submitting that the law on limitation of actions is intended to protect defendants against unreasonable delay in bringing suits against them.
16. On their part, learned counsel for the respondents filed written submissions, list of authorities and case digest dated 24th October 2024. Counsel cited 4 judicial decisions relevant to the instant appeal, namely: *Diana Katumbi Kioo v Reuben Musyoki Muli* [2018] eKLR, submitting on the definition of the term “cause of Action”; *Kenya Ports Authority v Timberland (K) Limited* [2017] eKLR; and *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, submitting that a prescribed period of limitation for a cause of action does not begin to run where the right of action is concealed by the defendant’s fraudulent act until the plaintiff has discovered the fraud; and *IEBC v Jane Cheperenger & 2 Others* [2015] eKLR, highlighting the two purposes of a preliminary objection, namely that it serves as a shield of the originator of the objection; and that it serves the public course of sparing scarce judicial time.
17. Having considered the record as put to us, the impugned ruling and orders, the grounds on which the appeal is anchored, the rival submissions, the cited authorities and the law, we form the view that the instant appeal stands or falls on our finding on a single ground, namely: whether the learned Judge erred in law in dismissing the Attorney General’s preliminary objection on the ground that the respondents’ suit was statute barred.
18. In support of the appeal, learned counsel for the appellant submitted that “[under] section 7 - *Limitation of Actions Act*, [time] started to run from 1979 which is when the plaintiffs [Respondents] claim to have acquired the title, ... thus the Appellant who bought, occupied and developed the suit land from 2008 had a good title.”
19. On their part, counsel for the respondents submitted that “14.

... the review process before the National Land Commission commenced in the year 2014 and a determination was made on 15th February 2019. The Respondents could not institute any proceedings between the year 2014 and 2019.... The alleged fraud thus came to the knowledge of the Respondents in the year 2014. Time thus started running on 15th February 2019”



20. We need to point out right at the outset that preliminary objections must be purely on points of law and are not intended to invite the trial court to determine the merits of a case before it on contested facts. Addressing itself to the nature and intent of preliminary objections, the Supreme Court in the case of *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* [2013] eKLR cited the leading decision on Preliminary Objections, *Namely Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696 where the Court held as follows:

“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 a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure 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 has to be ascertained or if what is sought is the exercise of judicial discretion.” [Emphasis ours]

21. In the same vein, the Supreme Court in *IEBC v Jane Cheperenger & 2 Others* [2015] eKLR made the following observation as relates to Preliminary Objections:

“... It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

22. It is instructive that the respondents’ suit against the appellant and three others was founded on trespass and fraud on account of which they sought, inter alia, eviction orders, injunctive relief, general damages and mesne profits. In view of their occupation of the suit property for a long period of time during which their title obtained in 2008 was not challenged, the appellant contended that the respondents’ suit was statute barred. Hence the preliminary objection lodged by the Attorney General, the dismissal of which prompted the instant appeal in which the learned Judge is faulted for failing to find that the respondents’ suit was time barred. We need not overemphasise the fact that the respondents’ and the appellant’s competing claims are destined to be resolved judicially, and on the merits on which we cannot pronounce ourselves beyond our determination of the propriety of the Attorney General’s two-pronged preliminary objection.

23. On the first limb as to whether the respondent’s suit in the trial court was barred by statute on account of the appellant’s prolonged occupation of the suit property, this Court in *Isaack Ben Mulwa v Jonathan Mutunga Mweke* [2016] eKLR held that:

“Each action of trespass constitutes a fresh and distinct cause of action It is a well- settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts.”

24. As explained by Winfield and Jolowicz in *WINFIELD AND JOLOWICZ ON TORT*, 11th Edition, Sweet and Maxwell, London, 1979 at page 342:

“Trespass, whether by way of personal entry or by placing things on the plaintiff’s land may be continuing and give rise to actions de die in diem so long as it lasts. Nor does a transfer of the land by the injured party prevent the transferee from suing the defendant for continuing trespass.”



25. Likewise, the Court of Appeal in *Muthiora v Marion Muthama Kiara* (Suing on behalf of the Estate of Erastus Muthamia Kiara – Deceased) [2022] KECA 28 (KLR) also held that:
- “53. Trespass is described under the *Trespass Act* Cap 294 to mean “any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof”.
26. A continuing trespass is defined in *Jowitt’s Dictionary of English Law* 2nd Edition as follows:
- “A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbor’s land.”
27. For the avoidance of doubt, a continuing trespass is defined in *Black’s Law Dictionary* 8th Edition as:
- “A trespass in the nature of a permanent invasion on another’s rights, such as a sign that overhangs another’s property.”
28. We take to mind the immutable principle that every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues (see *Clerk & Lindsel on Torts* 16th Edition, paragraph 2301). From the foregoing definitions of the term “trespass” by the eminent learned authors, it is clear that any unauthorized entry whether present or continuous is trespass.
29. In this case, it is common ground that the appellant entered into and has remained in occupation of the suit property. However, her claim that she is the rightful owner thereof is contested by the respondents, who allege that she (the appellant) obtained another title to the property fraudulently. Their case is that the appellant’s continued occupation of the said property from the 1st date of entry amounts to trespass and remains as such to date in so far as it is unauthorized by the respondent. The respondent’s claim for trespass being a continued tort is, therefore, not time barred.
30. To our mind, the respondents’ claim that the appellants entered into, and remained on, the suit property without the respondents’ consent, whereafter she continued to trespass thereon, must be tested on evidence in the substantive suit. The fact that the injury complained of in the respondent’s suit was continuous and actionable in tort, we find nothing to fault the learned Judge for granting the injunctive relief and the orders dismissing the preliminary objection in issue to enable the parties ventilate their competing claims on the merits.
31. On the second limb of the ground of appeal raising the issue as to whether the learned Judge was at fault in dismissing the preliminary objection for the reason that the alleged fraud on the part of the appellant in allegedly obtaining a title document to the suit property in the face of the deceased’s title issued in 1979, we hasten to observe that, in a claim of fraud, the “time to run” generally begins when the victim discovers the fraud, or could have discovered it with reasonable diligence, meaning that the clock starts ticking once they have enough information to suspect fraud. This is often referred to as the “discovery rule” and is crucial to consider when filing a legal claim based on fraud (see *Odero & another v Ndivo & another* [2021] KEHC 289 (KLR)). Whether or not the appellant’s title was obtained fraudulent is not for us to judge.
32. The respondents’ case is that they discovered the alleged fraud at the conclusion of the inquiry by the National Land Commission in 2019. On her part, the appellant denies the alleged fraud and asserts ownership of the suit property on the strength of a title document allegedly issued to her and the late



Vaz on purchase thereof. Whether that is the case is for the trial court to determine on evidence. The fact that the respondents contend that they discovered the alleged fraud in 2019, we cannot fault the learned Judge for concluding that they satisfied the requirements of section 30 for the purposes of section 27 of the *Limitation of Actions Act* relating to limitation of actions in fraud (see *Gathoni v Kenya Co-operative Creameries Ltd* [1982] eKLR).

33. In view of the foregoing, the learned Judge cannot be faulted for expressing herself thus:

“It is evident therefore that NLC took over the matter in 2015 and delivered a verdict [on] 15th February 2019, in favour of the 1st [Appellant] and 2nd Defendants that necessitated the filing of the present suit. ... it is evident that time started running on 15th February 2019 which in effect makes the suit within the statutory provision hence the preliminary objection lacks merit.”

34. Having carefully considered the record as put to us, the preliminary objection, the impugned ruling, the grounds on which the appeal was anchored, the rival submissions of learned counsel, the cited authorities and the law, we reach the inescapable conclusion that the appeal fails and is hereby dismissed with costs to the respondents. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY 2025.

A. K. MURGOR

JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar

