



**Warrakah (Suing as the Administrator and Legal Representative of the Estate of Gakweli Mohamed Warrakah - Deceased) v Mwatsami (Civil Appeal E015 of 2020) [2024] KECA 579 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KECA 579 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E015 OF 2020  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
MAY 24, 2024**

**BETWEEN**

**MILDRED AKOTH WARRAKAH ..... APPELLANT  
SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE  
ESTATE OF GAKWELI MOHAMED WARRAKAH - DECEASED**

**AND**

**MWAFUMBIRI HAMISI MWATSAMI ..... RESPONDENT**

*(An appeal from the Ruling of the Environment and Land Court of Kenya at Mombasa (Yano, J.) delivered on 15th July 2020 in Mombasa ELC No. 6 of 2018)*

**JUDGMENT**

1. The appellant, Mildred Akoth Warrakah (suing as the Administrator and Legal representative of the Estate of Gakweli Mohamed Warrakah (the deceased), filed suit against the respondent, Mwafumbiri Hamisi Mwatsami, by way of a Plaint seeking: (i) a declaration that the respondent is a trespasser on the suit premises, namely all that piece of land situated in Kwale County being Plot No. Kwale/ Shimba North/Kandutsi "B" /1062 (the suit premises) measuring 16.0 Hectares or thereabout; (ii) a mandatory injunction to the respondent to pull down and or remove the structures situated on the appellant's land; and (iii) an order directing the Kwale County Commissioner and or administration assistant together with the officer commanding Kwale Police station to undertake the supervision and provision of security during eviction.
2. According to the appellant, the suit premises was purchased by the deceased in 1988 through an auction and subsequently registered in his favour in 1994. She claimed that the respondent is a trespasser on the parcel of land and has severally been informed to vacate the land and not to develop it.



3. In response, the respondent filed a Defence and counter claim where he denied being a trespasser, and stated that he is a son of Abdallah Mwamtsame Ali Chuvi, who was the legal owner of the suit premises and, hence, he is not a trespasser, but rightly in possession, occupation and use of the land. He contended that the auction referred to by the appellant was fraudulent, and that he lives on the suit premises together with his mother, siblings and their children. In his counter-claim, he prayed for an order to have the suit premises revert to his father and an order of permanent injunction against the appellant.
4. In response to the Counterclaim, the appellant filed a Notice of Preliminary objection dated 5<sup>th</sup> March 2019 challenging the counterclaim on the basis that it was statute barred by section 7 of the [Limitation of Actions Act](#); that the counter-claim seeking recovery of land was time barred as the land was, and is, registered in the name of her late husband pursuant to the Certificate of Title issued on 1<sup>st</sup> March 1994, and that 25 years have elapsed since registration. She asserted that she has always been in occupation of the land together with all beneficiaries of the deceased and that, if the respondent was aggrieved or had knowledge of fraud or any wrong doing in the registration of the suit premises in the name of the deceased, he ought to have brought an action within 12 years; that, since he had failed to do so, it followed that the action for recovery of the land by the respondent was time barred and that, therefore, the counter-claim ought to be dismissed.
5. Similarly, the respondent filed a Preliminary objection dated 20<sup>th</sup> March 2019 on the grounds that the entire suit was statutorily time barred under the [Limitation of Actions Act](#), and that the suit was therefore unsustainable.
6. Upon considering both Preliminary objections, and by a ruling dated 15<sup>th</sup> July 2020, the trial Judge held that:
  - “9. The issue of limitation has been raised by both parties on the basis that the other’s claim is statute barred by the provisions of Section 7 of the [Limitation of Actions Act](#) Cap 22 Laws of Kenya. It is quite clear that the parties are not in agreement as to when the causes of action in this matter arose....
  12. ...it is clear that the cause of action in this matter arose in 1994 when the suit land was registered in the name of the late Captain Gakweli Warrakah pursuant to the auction carried out in 1988. Under the provisions of Section 7 of the [Limitation of Actions Act](#), both the plaintiff and the counter-claim would be statutorily barred from bringing their respective actions. Both the suit and the counter-claim are time barred and cannot be sustained”.
7. And with that, the suit and the respondent’s counter-claim were struck out in their entirety.
8. The appellant was aggrieved by the ruling of the trial Judge and has filed an appeal on grounds that the learned Judge erred in the findings on issues of fact concerning the suit premises and overlooked that the appellant was a beneficiary by transmission, and that her status in the subject matter can only be canvassed adequately and comprehensively upon the hearing of evidence, viva voce; in finding that the cause of action arose in 1994, and yet the deceased owner had no issue with the respondent, who by then had no proprietary interests in the subject matter because his father was alive at that time, a fact which could have been confirmed during the hearing; in holding that the appellant’s suit was time barred, yet the prayers in the Plaint were not for recovery of land, but eviction of the respondent by virtue of the appellant’s ownership and/or proprietary interests by transmission; in observing that the cause of action arose in 1994 whereas the appellant only came into the contest between the appellant’s late husband and the respondent’s father, Abdalla Mwamtsame Ali Chuvi, also deceased, after the



grant was confirmed on 11<sup>th</sup> April 2011; in dismissing the suit and leaving the appellant in a quandary, notwithstanding her right of ownership by virtue of transmission; and in denying the appellant the privilege of enjoying her proprietary right as envisaged by Article 40 of the Constitution.

9. During the hearing on a virtual platform, Mr. Birir, learned counsel for the appellant, informed us that he would rely on their written submissions where it was submitted that it was erroneous for the Judge to rule that the cause of action arose in the year 1994, and yet there was no dispute by then because the appellant's husband was the legal owner by virtue of having purchased it through an auction; that the respondent only came into the picture after the death of his father on 27<sup>th</sup> January 2007; that both the deceased and the respondent's father died about the same time leaving the subject matter in the hands of the appellant.
10. Counsel submitted that the subject matter was registered in the appellant's husband's name on 1<sup>st</sup> March 1994, and that through Succession Cause No. 2436 of 2007, the appellant together with her son, Dzochera Ali Warrakah, were appointed joint Administrators of the Estate; that she filed suit seeking the respondent's eviction from the suit premises and that, by striking out the suit, the learned Judge deprived the appellant of her rights under *the Constitution*.
11. The respondent, who appeared in person, also relied on his written submissions and contended that the trial Judge was alive to the preliminary objection and the manner in which the suit was instituted; and that the trial judge was right in holding that the appellant's suit is time barred. He submitted that Abdallah Mwamtsame Ali Chuvi was the legal owner of this suit premises, and that the trial judge cannot be faulted for finding that the cause of action arose in 1994 through a purported purchase of the suit premises in 1989, which rendered the suit to be time barred under the *Limitation of Actions Act*.
12. The mandate of this Court on a first appeal as set out in rule 31(1) (a) of the rules of this Court is to reappraise the evidence and draw our own conclusions. In *Peters vs. Sunday Post Limited* [1958] EA 424, the predecessor of this Court, the Court of Appeal for Eastern Africa, stated that:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.”
13. Having considered the record, the impugned ruling, the submissions of learned counsel for the appellant and for the respondent, the main issue for determination is whether the learned judge rightly upheld the respondent's preliminary objections and struck out the appellant's suit.
14. We begin by observing at the outset that this appeal is limited to addressing the grounds of appeal as they pertain to the appellant's complaint against the respondent's Preliminary objection dated 20<sup>th</sup> March 2019. As the appeal is not concerned with the appellant's Preliminary objection against the respondent's counterclaim, the decision of the trial court on the Preliminary objection dated 5<sup>th</sup> March 2019 striking out the respondent's counterclaim remains undisturbed.
15. A preliminary objection was succinctly defined in the case of *Mukisa Biscuit Company vs Westend Distributors Limited* [1969] EA 696 at page 701 as:

“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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and occasion confuse the issues. This improper practice should stop”.

16. Law, JA. in the same case went on to state that:

“A ‘Preliminary Objection’ correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

17. In the appeal before us, it is to be observed that, during the proceedings in the trial court, the parties could not agree on the exact period in time when the causes of action arose. This was acknowledged by the trial Judge when he expressed himself thus: “It is quite clear that the parties are not in agreement as to when the causes of action in this matter arose”.

18. In the case of Attorney General & another vs Andrew Maina Githinji & Another [2016] eKLR, Waki, J (as he then was) held that:

“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”

19. And in the case of \_\_\_\_ Letang vs. Cooper [1964] 2 All ER 929 pg 934 Lord Diplock, set out the definition thus:

“A cause of action is simply a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person.”

20. Since the date when the different causes of action arose was contested and remained elusive as between the parties, the only way the court could establish when the cause or causes of action arose was to hear the evidence of the parties. On the basis of the above definition of a preliminary objection, this would mean that the Preliminary objection raised by the respondent to the appellant’s suit would not be capable of determination on a pure point of law. On this basis alone, the learned judge ought to have found the respondent’s Preliminary objection to have been incompetent and accordingly dismiss it.

21. But that is not the only reason upon which the learned judge ought not to have dismissed the appellant’s case by upholding the respondent’s Preliminary objection. We say this because a consideration of the appellant’s pleadings shows that, at all times, she sought the following orders: (i) a declaration that the respondent is a trespasser on the suit premises; (ii) a mandatory injunction to the respondent to pull down and or remove the structures from and lastly, (iii) an order directing the Kwale County Commissioner and or administration assistant or the officer commanding Kwale Police station to supervise and provide security during eviction.

20. When the pleadings and prayers are considered, what becomes apparent is that, the dispute was concerned with an alleged trespass of the respondent on the appellant’s property. And as can be



discerned from the record, what the learned judge failed to appreciate was that, the crux of the dispute turned on allegations of trespass and not on proof of ownership of the suit premises. This error is apparent from the trial court's finding that, "...the cause of action in this matter arose in 1994 when the suit land was registered in the name of the late Captain Gakweli Warrakah pursuant to the auction carried out in 1988..."

21. Since the pleadings are clear that trespass, and not the registered ownership of the suit premises of the deceased was at the heart of the appellant's case, then, it goes without saying that, the learned judge ought to have determined the respondent's Preliminary objection on the basis of the act or acts of trespass alleged by the appellant in the pleadings.

22. The act of unlawful trespass is recognized by section 3 of the [Trespass Act](#) which provides:

" 1) 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 shall be guilty of an offence..."

Black's Law Dictionary defines a 'trespass' as:

"One who has committed trespass; one who unlawfully intrudes upon another's land and forcibly takes another's persona; property"

23. The same dictionary goes further to discuss the nature of a 'continuing trespass' as:

"A trespass in the nature of a permanent invasion on another's rights".

24. The text book Clerk & Lindsell on Torts 16<sup>th</sup> Edition para. 23- 01 further addressed the continuing trespass thus:

"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".

25. Whilst the text book Salmond on Torts, 15th ed., at p. 791, elaborated on the cause of action in relation to a continuing tort in the following terms:

"When the act of the defendant is a continuing injury, its continuance after the date of the first action is a new cause of action for which a second action can be brought, and so from time to time until the injury is discontinued. An injury is said to be a continuing one so long as it is still in the course of being committed and is not wholly past. Thus the wrong of false imprisonment continues so long as the plaintiff is kept in confinement; a nuisance continues so long as the state of things causing the nuisance is suffered by the defendant to remain upon his land; and a trespass continues so long as the defendant remains present upon the plaintiff's land. In the case of such continuing injury an action may be brought during its continuance, but damages are recoverable only down to the time of their assessment in the action."

26. Therefore, it can be discerned that trespass to land occurs when a person directly enters upon land in possession of another without permission and remains there, places or projects any object upon the land, and that the tort of trespass is designed to enforce possessory rights rather than proprietary rights from unlawful interference. As long as the act of trespass persists, it is a continuing trespass.



27. To determine whether a trespass has occurred, a court would of necessity be required to: i) establish the nature of the trespass, ii) whether the plaintiff is in possession of the land and iii) the specific steps taken to deny third parties from accessing or interfering with the land. With the tort of trespass to land, courts generally view the unlawful possession as a continuing trespass for which an action lies for each day that passes and the trespass continues. See *Konskier vs Goodman Ltd* [1928] 1 KB 421.
28. In the case of *Muthiora vs Marion Muthama Kiara* (Suing on behalf of the Estate of Erastus Muthamia Kiara - Deceased) (Civil Appeal 43 of 2017) [2022] KECA 28 (KLR) it was held that:
- “...it is clear that any unauthorized entry whether present or continuous is trespass. In this case, it is indeed common ground that the appellant entered into and has remained in occupation of the suit property. The appellant’s continued occupation of the said property from the first date of entry in so far as it is unauthorized by the respondent amounts to trespass and remains as such to date. The respondent’s claim for trespass being a continued tort is, therefore, not time barred.”
- See also \_\_\_\_\_ *Challo vs City Chicken and Eggs Dealers Co-operative Society Limited & another* (Civil Appeal 117 of 2018) [2023] KECA 244 (KLR).
29. In the instant case, the appellant’s suit was concerned with a claim of alleged trespass by the respondent as trespasser onto the suit premises, which the appellant asserted belonged to her deceased husband as the registered owner.
30. Though he had denied being a trespasser, in response, the respondent asserted that he was rightly in possession, occupation and use of the same parcel of land. When this assertion is considered within the context of the appellant’s claim, there can be no doubt that an issue of a continuing trespass, which was the basis on which the question of limitation ought to have turned, comes into focus.
31. Having so discerned, we need say no more on the issue as, whether or not trespass will be established, remains a matter for the court that will hear and determine the dispute. All we will say is that, since it is plain from the above cited authorities that the cause of action complained of was in respect of the tort of continuous trespass, and was not a claim for recovery of land, the appellant’s suit based on trespass, and more so a continuing one, was not time barred, since section 7 of the *Limitation of Actions Act* was not applicable to the suit. With the result that, the learned judge ought to have dismissed the respondent’s Preliminary objection dated 20<sup>th</sup> March 2019.
32. In view of our conclusion, the appellant’s appeal is merited and succeeds, and we find it necessary to interfere, in part, with the trial court’s judgment dated 15<sup>th</sup> July 2020 and make the following orders:
1. The ruling of the Environment and Land Court dated 15<sup>th</sup> July 2020 is hereby set aside to the extent that it struck out the appellant’s suit by upholding the respondent’s Preliminary objection dated 20<sup>th</sup> March 2019;
  2. The appellant’s Complaint dated 16<sup>th</sup> January 2018 be and is hereby reinstated;
  3. The suit be heard and determined by a judge of the Environment and Land Court other than Yano, J; and
  4. Costs to the appellant.
- It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF MAY, 2024.**



**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA C.Arb, FCI Arb.**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

