



**Mwangi v Kibathi (Environment and Land Appeal E049 of 2020)
[2024] KEELC 3895 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3895 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E049 OF 2020**

**AA OMOLLO, J
APRIL 18, 2024**

BETWEEN

JAMES KAHUGI MWANGI APPELLANT

AND

DANIEL KIARIE KIBATHI RESPONDENT

*((Being an Appeal from the ruling of the Senior Resident Magistrate Hon.Peter Muholi (Mr.)
dated 9th November,2020 in Milimani Chief Magistrate's Court Civil Suit No.8694- of 2019))*

JUDGMENT

1. The Appellants filed a memorandum of appeal dated 17th November 2020 seeking for the following orders;
 - a. That the Appeal be allowed
 - b. That the ruling of the lower court (Honourable Peter Muholi, Senior Resident Magistrate) dated 9th November,2020 be set aside and this Court do substitute therefore an order dismissing the Defendant's/Respondent's Preliminary Objection and reinstating the suit for full hearing.
 - c. That costs of this appeal be awarded to the Appellant.
 - d. That such further relief as may appear just to the Honourable Court.
2. The Appeal was based on five (5) grounds as follows;
 1. That the Learned Trial Magistrate erred in law and fact by finding that the Defendant's Preliminary Objection was merited and striking out the Plaintiff's suit when the same had not been justified.



2. That the Learned Trial Magistrate erred in law and fact in failing to hold that the limitation period started running from the date the cause of action accrued.
3. That the Learned Trial Magistrate erred in law and fact in holding that the Plaintiff's claims were time barred when no justification was offered for the time used to calculate the limitation period.
4. That the Learned Trial Magistrate erred in law and fact and misdirected himself in failing to consider the submissions by the Appellant together with the authorities relied on by the Appellant.
5. That the Learned Trial Magistrate erred in law and fact in coming to the conclusions and ruling he came to contrary to the evidence, the Law and submissions urged before him.

Submissions.

3. The Appellant and the Respondent filed their submissions dated 22nd November 2023 and 7th February 2024 respectively.
4. The Appellant outlined the background of the Appeal stating that the same emanated from a ruling by the subordinate court which found merit in the Respondent's Preliminary Objection. He added that the background of the matter is that the Respondent was a beneficiary entitled to 0.365 Ha from parcel of land L.R Number Dagoretti/Mutuini/309 and by a sale agreement dated 17th May 2009, the Appellant purchased ¼ Acre of the same which was to be exercised from the main parcel and subsequently purchased yet another ¼ Acre from the Respondent's portion in the parcel.
5. That the parties had agreed that after payment of the purchase price and the successful finalization of succession proceedings in the High Court as regards the Estate of Milka Wangui Wambura-deceased, the Respondent was obligated to cause subdivision of the land and transfer half (1/2) an acre to the Appellant. However, he failed or refused to do so despite payment of the purchase price and the finalization of succession proceedings in the High Court.
6. The Applicant submitted that the trial court erred in law and fact in holding that his claims were time barred when no justification was offered for the time line used to calculate the limitation period. He contended that trial Court erroneously stated that the agreement for purchase was executed in 2012 rather than 17th May 2009.
7. That from the date of 17th May, 2009 when the Parties signed an agreement to 18th November, 2019 when the Appellant filed his case in the trial Court, is a period of 10 years and not 12 years as per Section 7 of the Limitation of action Act. The Appellant contended that the trial court relied on Section 4 which stipulates on actions founded on contract leaving out the Section 7 that stipulates specifically the action to Court to recover land. He relied on the case of Elc Appeal No. 5 Of 2017, in the Matter Of John Muthusi Mweke Vs Mosoi P.Parkut where Justice Christine Ochieng noted that Section 7 of the Limitations of Actions Act require a suit to claim land to be instituted within twelve years. Thus, the subject of a contract that involves land, time will only begin to run once the vendor obtains a certificate of title. That the provisions of the Limitations of Actions Act cannot be read in isolation submitting that the trial Court read Section 4 and isolated Section 7 of the Limitations of actions Act.
8. The Appellant further submitted that the Respondent received the purchase price from him with an understanding that once the succession proceedings were successfully completed he could apportion him his share. Instead, since obtaining the title deed namely Dagoretti/Mutuini /1597 which was



registered on 29th January, 2019 held by the PLC Court Case No. E180 of 2020 Moses Kibathi and James Muchugia Kibathi Versus Daniel Kibathi Kiarie and Others, the Respondent has challenged the claim by the Appellant that it is time barred amongst other grounds of opposition.

9. He argued that the time lawfully started to run when the Respondent received the title deed in 2021 that the Appellant has another 11 years running through which time he can successfully prosecute his claim. He submitted that even if the general rule of 12 years' time limit for land contracts were to be strictly followed there is an exception as to when the time started accruing given that there existed collective trust between the parties that the title deed could only be transferred upon successful completion of the process of succession and ultimate registration of the title deed which happened on 29th January, 2019.
10. The Respondent submitted that the Appeal is misconceived as the record of the Appeal indicates that the Appeal arises from the ruling of the Senior Resident Magistrate at Milimani Nairobi, Hon. Peter Muholi (Mr.) dated 9th November, 2020 in Milimani Chief Magistrate Court Civil Suit No. 8694 of 2019 and the same appears in their submissions dated 22nd November, 2023. However, the Ruling contained in the Record of Appeal at pages 71-76/77 was delivered on 30th April, 2020 in Nairobi CMCC No. 9005 of 2019 Dennis Kariuki Waweru -vs- Daniel Kiarie Kibathi. The Respondent however clarified that from the proceedings in the trial court for 9th November, 2020 the matter was coming up for mention to adopt a Ruling in Nairobi Milimani CMCC No.9005 of 2019 because the matters were related and judgement had been delivered on 30th April, 2020.
11. The Respondent submitted that the parties through the Consent recorded on 9th November, 2020 adopted the Ruling in Nairobi Milimani CMCC No. 9005 of 2019-(Dennis Kariuki Waweru -vs- Daniel Kiarie Kibathi) as the Ruling in Nairobi Milimani CMCC No. 8694 of 2019- James Kahugi Mwangi vs- Daniel Kiarie Kibathi, thus there is no Appeal that can be filed /lodged against an order that has been adopted and recorded by consent of parties unless that consent order was obtained through fraud which has not been alleged by the Appellant.
12. The Respondent also clarified that the agreement referred to be executed on 18th April, 2012 by the parties in the ruling is that of the Nairobi Milimani CMCC 9005 of 2019 but the agreement in between James Kahugi Mwangi and Daniel Kiarie Kibathi herein is indicated to be executed on a 17th May, 2009 in the various documents.
13. The Respondent submitted that the Appellant's case was dismissed on ground of time barred under section 4 of the *Limitation of Actions Act* and the trial court was very clear that the agreement between Dennis Kariuki Waweru was executed on 18th April, 2012 and the suit filed in Court on 6th December, 2019 was filed outside six (6) years. Therefore, the Court found that preliminary point of law on time bar had merit and proceeded to dismiss that suit Nairobi Milimani CMCC No. 9005 of 2019 with costs.
14. He added that the ruling in 9005 of 2009 being adopted in Milimani CMCC No. 8694 of 2019 by consent, the date of the agreement between James Kahugi Mwangi & Daniel Kiarie Kibathi was 17th May, 2009 and the Lower Court suit was filed on 26th November, 2019 and this is the date that is applicable in computing the time under section 4 (1)(a) of the *Limitation of Actions Act*.

Analysis and Determination:

15. It is now an established principle that in the first appeal such as this one, the court has a role to re-evaluate, re-assess and reanalyse the extracts on the record before deciding whether the trial court



decision stands or not and give the reasons thereof. I am guided by the Court of appeal decision in the case of *Selle & Ano. Vs Associated Motor Boat Co. Ltd (1968) EA 123*

16. Consequently, I have looked at the Appellant's claim filed in the lower court vide *Plaint* dated 18th November 2019, and the Preliminary Objection by the Respondent dated 20th December 2019. At paragraph 9 of the *Plaint*, it is pleaded thus;

“it was further agreed between the plaintiff and the Defendant that upon completion of the succession proceedings in the high court as regards the estate of the deceased, the Defendant would cause the subdivision of his portion and transfer ½ an acre thereon to the Plaintiff”

17. Whether the pleading in paragraph 9 recited above was the position reached between the parties could only be determined during the trial of the case but on the face of it, it appears that the completion period was set on the happening of an event. The Appellant pleaded in paragraph 10 of the *Plaint* that the succession proceedings was finalised on 26th November 2018 and the Defendant was given a share of 0.365 out of the land *Dagoretti/Mutuini/1597*. It is after the issuance of the grant when the Respondent became evasive and or refused to perform his obligation as set out in paragraphs 12 and 13 of the *Plaint*.
18. The preliminary objection raised what was pleaded in paragraph 5 of the statement of defence.
19. Vide the ruling delivered on 30th April 2020 in *Milimani Chief Magistrate's Civil Suit No.9005 of 2019* which by consent of the parties was adopted as the ruling in Appellant's motion of 9th November 2020 on account that the matters are related, the trial magistrate counted the time to run from the date of execution of the agreement. The trial court stated that the suit is founded on a contract of sale executed on the 18th April 2012 which in this case will be a sale agreement executed on 17th May 2009. That the Appellant is enforcing the said contract/agreement which fell out of the limitation on 17th May 2015. He concluded that the initial suit was filed after the expiry of six years and thus time barred by virtue of the provisions of section 4 of Cap 22.
20. The ruling adopted in this case was rendered in *Civil Suit No.9005 of 2019* which was reached on merits of the pleadings of the parties thereof. In this case, the Court merely adopted the ruling by consent of the parties to apply it *mutatis mutandis* and cannot be a bar to appeal the decision. The Appellant urged that the trial court erred in law by basing its decision on Section 4 of the *Limitation of Actions Act* and failing to consider Section 7 of the same Act since the suit is based on land. He relied on decision of Justice Christine Ochieng in *Elc Appeal No. 5 Of 2017 The Matter Of John Muthusi Mweke Vs Mosoi P.Parkut*.
21. Section 7 of the Limitations of Actions Act provides;
- “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
22. The question that begs answer in this appeal is when did the right of action accrue? Although the learned trial magistrate counted time to run from the date of execution of the agreement, my considered view is that when time began to run was a contested issue that ought to have proceeded for trial. At paragraph 3 of the Defence, the Respondent pleaded to denying the claim as set out in paragraphs 3 to 20 of the *Plaint*. The learned magistrate correctly cited the case of *Mukisa biscuits Manufacturing Ltd vs West End Distributors Ltd (1969) EA 696* for the proposition that a preliminary objection should not require to be proved by adducing evidence.



23. In the instant appeal, there was need to interrogate the sale agreement and the understanding reached between the parties inter alia that the Respondent undertook to transfer the sold portion after obtaining his share after being allocated as a beneficiary. The learned magistrate was not seized of these facts because the case had not proceeded to hearing and was wrong on ignoring the facts set out in the Plaint to conclude that time began to run from the date of execution of the sale agreement.
24. In the case of *Rufus Kangethe Kamau v Grace Njeri Kamau* [2022] eKLR, Justice Rachel Ngetich cited the decision of the Court of Appeal in *Kneller & Hancox Ag JJA in Mkube Vs Nyamuro* [1983] KLR, 403-415, at 403 which stated as follows:
- “A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”
25. Consequently, in this appeal, I hold that the learned trial magistrate misapprehended the pleadings and applied wrong principles on what constitutes a p.o thus reached a wrong conclusion that the period of when time began to run was clearly discernable. Flowing from the above analysis, I find that the Appeal has merit and it is allowed. I make the following orders;
- a. That the ruling of the lower court (Honourable Peter Muholi, Senior Resident Magistrate) dated 9th November, 2020 is set aside. It is substituted therefore with an order dismissing the Defendant's/Respondent's Preliminary Objection and the Plaintiff's suit is reinstated to be heard on merit.
 - b. That costs of this appeal is awarded to the Appellant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF APRIL, 2024

A. OMOLLO

JUDGE

