



Macharia & another v Katua & 4 others (Environment & Land Case E205 of 2023) [2024] KEELC 4808 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4808 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E205 OF 2023**

**JA MOGENI, J
JUNE 13, 2024**

BETWEEN

PAUL KIUNDU MACHARIA 1ST PLAINTIFF

FRANCIS GACHERU NJENGA 2ND PLAINTIFF

AND

JOHN OSCAR KATUA 1ST DEFENDANT

**GILBERT MAKAU KATUA (SUING IN THEIR CAPACITY AS
ADMINISTRATORS OF THE ESTATE OF MARGARET KATUA
(DECEASED) 2ND DEFENDANT**

JACQUELINE MUENI KIOKO 3RD DEFENDANT

THE CHIEF LAND REGISTRAR 4TH DEFENDANT

ERIC KINGONDU MUTISYA 5TH DEFENDANT

RULING

1. This Ruling is in respect of the 1st and 2nd Defendants' Notice of Preliminary Objection dated 23/02/2024 seeking to strike out the Amended Plaint dated 25/01/2024 with costs on the following grounds:
 1. This Court lacks jurisdiction to hear and determine this matter.
 2. The suit by the Plaintiffs is time-barred by dint of section 7 of the Limitations of Actions Act as it is brought after the lapse of 12 years.
 3. That the 1st and 2nd Defendants having completed administration of the estate of the deceased does not have the legal capacity to be sued.



4. The suit has been overtaken by events and has suffered laches and therefore the Plaintiff is untenable.
5. The Plaintiff application is incompetent, bad law and an abuse of the court process.
2. The objection is not opposed. The Court on 30/04/2024 gave directions that the notice of preliminary objection be canvassed by way of written submissions and a Ruling date was scheduled. By the time of writing this Ruling, it is only the 1st, 2nd, 4th and 5th Defendants who had duly submitted and I have considered them. The 1st and 2nd Defendants filed written submissions dated 29/02/2024. The 4th and 5th Defendants filed written submissions dated 23/04/2024.
3. Having considered the preliminary objection, the only issue arising for determination before this court is whether the notice of preliminary objection on the plaintiffs' suit being time barred has merit.
4. The first two grounds upon which the preliminary objection is premised on is that the suit herein is time barred by the provisions of Section 7 of the Limitations of Actions Act.
5. It is trite law that any preliminary objection should be filtered, weighed and balanced on the measurements of the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696:

“...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. ...”
6. Sir Charles Newbold, P at Page 701 proceeded as follows;

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...”
7. The test to be applied in determining whether the preliminary objection met the threshold is as in the Mukisa case (Supra) which are whether the preliminary objection raises a pure point of law, that there is a demonstration that all the facts pleaded by the other side are correct and that there is no fact that needs to be ascertained.
8. In this case, the preliminary objection raised by the 1st and 2nd Defendants was based on grounds that the Court lacks jurisdiction to hear and determine this matter as the suit by the Plaintiffs is time-barred by dint of section 7 of the Limitations of Actions Act as it is brought after the lapse of 12 years.
9. Bearing the principles on sustaining a preliminary objection set out by Sir. Charles Newbold P in mind, it is my finding that issue of want of jurisdiction in the Court to entertain a claim for the said cause of action for the reason of noncompliance with the provisions of the *Limitation of Actions Act* as raised in the 1st and 2nd Defendants' preliminary objection was an issue of a pure point of law. I therefore find that the 1st and 2nd Defendants' preliminary objection satisfied the ingredients for sustaining a preliminary objection.
10. A suit being statute barred goes to the issue of jurisdiction. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. It will not matter whether the facts of the Plaintiff's case as outlined are true not because without Jurisdiction this court will not have any powers to determine the case. This is because in any litigation, jurisdiction



is central. A court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools. Having found that the preliminary objection herein raises pure points of law and it can be determined without ascertainment of facts from elsewhere, the Court is now left to determine whether the same is merited as provided by the Limitations of Actions Act.

11. Section 7 of the *Limitation 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.”

12. It is indeed trite that a claim founded on recovery of land should be filed within a period of 12 years’ failure to which it is time barred.

13. The 1st and 2nd Defendants have averred that the suit is time barred on grounds of Section 7 of the *Limitation of Actions Act*. Section 7 of the *Limitation of Actions Act* provides that an action for recovery of land may not be brought after the lapse of 12 years from the date the right of action accrued to the Plaintiff. Therefore, in regard to the agreement of 24/04/2008, the limitation period lapsed on 25/04/2020. Essentially therefore, the Plaintiffs’ suit having been filed on 9/06/2023, was filed out of time.

14. In addition to the above, it is evident that the Plaintiff’s suit is hinged on a contract dated 24/04/2008. The 1st and 2nd Defendants have also submitted that the cause of action accrued in 2008. In the case of *Edward Moonge Lengusuranga vs James Lanaiyara & another* [2019] eKLR the Court held that:

“A cause of action, is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a plaintiff brings suit.”

15. Persuaded by the above case, it is clear that a cause of action is a set of facts to justify a right to sue. What then in this case are the sets of facts that the Plaintiff/Applicant used to justify its rights to sue?

16. The Plaintiff’s case is that on 24/04/2008, the Plaintiffs entered into an agreement for sale for the suit property with one Margaret Mary Katua (deceased). They contend that the suit property had been excised from LR No. 6832 and at the time of sale, only the deed plan was available and the vendor was to take appropriate steps towards obtaining the title. The Plaintiffs continued to liaise with the vendor in an effort to ensure that the title deed for the property was processed but the vendor passed away in July 2009 before the title was processed. The Plaintiffs also accuse the Defendants of continuously interfering with their possession by demolishing any structures erected on the suit property. They aver that the sustained efforts by the Defendants are meant to defeat the agreement. The Plaintiffs pray for judgment to be entered against the Defendants for a declaration that they are the rightful owners of the suit property and an order directing the defendants and/or administrators of the estate of Margaret Mary Katua to handover the completion documents in respect of the suit property among other orders. This demonstrates that the cause of action arose from the contract dated 24/04/2008 which was duly executed by both parties.

17. The Court has carefully perused the Amended Plaint herein and is satisfied that the suit is hinged on the action of Margaret Mary Katua (deceased) and subsequently her administrators for allegedly refusing



to issue the Plaintiffs with a title to the suit property. Section 4 (1) of the [Limitation of Actions Act](#) provides that:

- “(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
- (a) actions founded on contract;
 - (b)
 - (c)
 - (d)
 - (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”

18. The Court finds and holds that the cause of action having accrued in 2008, that is when time began to run. As per Section 4 of the [Limitations of Actions Act](#) the causes of action founded on Contract have time limitation of 6 years, time having begun to run in 2008 naturally it would mean that limitation ended in 2014.

19. In echoing the holdings in [Wycliffe A. Swanya v Toyota East Africa Limited and Another](#) [2009] eKLR, Rawal v Rawal (1990) KLR 275 and Dhanesvar v Mehta v Manilal M. Shah [1965] EA 321, Aburili J. restated the rationale behind the [Limitation of Actions Act](#), in Bosire Ogeto’s case as follows:

“The Law of Limitation of actions is intended to bar plaintiffs from instituting claims that are stale and (is) aimed at protecting defendants against unreasonable delay in bringing of suits against them. The issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same”.

20. A suit barred by limitation is a claim barred by law, hence by operation of law, the Court cannot grant the relief sought. In [Iga v Makerere University](#) [1972] EA it was held:

“A plaint which is barred by limitation is a plaint barred by law. A reading of the provisions of Section 3 and 4 of the Limitations Act Cap 70 together with Order 7 Rule 6 of the Civil Procedure Rules of Uganda which has same provisions with [Limitations Act](#) of Kenya seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief.”

21. The upshot of the foregoing is that the notice of preliminary objection was based on the undisputed fact that the cause of action herein accrued in 2008 when the parties entered into an agreement for sale of land hence the Plaintiffs’ suit ought to have been filed within 6 years. It is trite law that actions arising out of a contract are only enforceable within a period of 6 years. In my view, it is beyond argument that the Preliminary objection raised a pure point of law based on limitation, and there is no relevant matter of fact requiring determination by the court. Neither is the matter raised one that involves the exercise of court’s discretion.



22. In view of the foregoing, the Court is satisfied that the notice preliminary objection dated 23/02/2024 is well taken and upheld in terms of grounds 1 and 2. The Plaintiffs' suit is time barred and thus struck out entirely with costs.

23. Orders Accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13th DAY OF JUNE, 2024.

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MOGENI J

JUDGE

In the virtual presence of: -

Mr. Mutemi for 4th & 5th Defendants

Mr. Ikua for plaintiffs

Ms. Rono for 1st & 2nd Defendant

No appearance for 3rd Defendant

C. Sagina - Court Assistant

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MOGENI J

JUDGE

