



Giuliana & another (Administrators for the Estate of Pieracci Giulio – Deceased) v Moro (Civil Appeal E011 of 2023) [2024] KEELC 4539 (KLR) (6 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4539 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL APPEAL E011 OF 2023**

EK MAKORI, J

JUNE 6, 2024

BETWEEN

PIERACCI SILVESTRA 1ST APPELLANT

PIERACCI GIULIANA 2ND APPELLANT

ADMINISTRATORS FOR THE ESTATE OF PIERACCI GIULIO – DECEASED

AND

SILVANA MORO RESPONDENT

(Being an Appeal against the Ruling delivered on 18th January 2023 by Hon. E. K Usui (CM) and orders issued in the Chief Magistrates Court at Malindi in ELC No. E230 of 2022)

RULING

1. The Appellants, [Pieracci Giuliana] and [Pieracci Silvestra], filed a Memorandum of Appeal dated 27th March 2023. The crux of their appeal is as follows:
 - a. That the Appeal be allowed.
 - b. That the Ruling delivered by Hon. E. K. Usui (CM) in the Chief Magistrate Court at Malindi in ELC Case No. E230 of 2022 and all other consequential orders be set aside.
 - c. Upon granting prayers 1 & 2 above, the Court will be pleased to make an Order that the entire suit filed in ELC Case No. E230 of 2022 at the Chief Magistrate Court at Malindi be dismissed with costs to the Appellants, [Pieracci Giuliana] and [Pieracci Silvestra].
 - d. The costs of this Appeal should be awarded to the Appellants.
 - e. This Court is respectfully requested to make any other and further orders it deems fit and just to grant in the circumstances of the matter, ensuring a fair and just resolution.



2. The Memorandum of Appeal and the Record of Appeal were served upon the Respondent through her Advocate on record, Ms. Minyanzi, on 11th July 2023. Despite acknowledging receipt, the Respondent failed to participate in these proceedings despite having full knowledge of the pendency of the Appeal.
3. The Respondent, [Silvana Moro], filed an Application under Certificate of Urgency dated 29th August 2022 claiming ownership and interest in Plot No. 10849 (Original No. 1800/5) and Plot No. 10847 (Original No. 1800/3). The dispute centres around the validity of an Agreement for Sale dated the 8th day of June 2011.
4. The 1st Appellant, having been duly authorized by the 2nd Appellant in the suit in Lower Court, swore a Replying Affidavit expressly affirming that they are the registered proprietors of the properties known as Plot No. 10847 (Original No. 1800/3) and Plot No. 10849 (Original No. 1800/5) (the “suit properties”).
5. The Respondent alleged that the instant claim was based on an Agreement for Sale dated the 8th day of June 2011 duly executed between Pieracci Giulio (deceased) and herself in the presence of an Advocate High Court of the Republic of Kenya.
6. The 1st Appellant, in her Replying Affidavit, unequivocally stated that the said Pieracci Giulio (deceased), who is their biological father, was never present nor was he residing in the Country at the time of the alleged execution of the Agreement for Sale dated 8th June 2011. The Appellants assert with utmost seriousness that the Respondent's claim is an attempt to commit fraud, as they firmly believe the alleged Agreement for Sale is invalid.
7. Further, the Appellants filed a Notice of Preliminary Objection dated 9th September 2022 alleging the instant Suit and Application filed by the Respondent contravened the mandatory provisions of Section 4 (1) (a) and Section 28 (2) (a) of the *Limitations of Actions Act*, Cap 22 Laws of Kenya. The Appellants, after that, sought for the entire Suit and Application to be struck out with costs.
8. Upon inter partes hearing, the Court directed that the Appellant Notice of Preliminary Objection dated 9th September 2022 and the Respondent Application dated 29th August 2022 be canvassed through written Submissions; both parties duly complied.
9. The Court rendered its decision vide a Ruling dated 18th day of January 2023 whereby it issued orders that the Appellants herein be restricted from trespassing, alienating, and or interfering with the whole suit property being Plot No. 10849 (Original No. 1800/5) registered at Mombasa Lands Registry in Volume LT 38 Folio 166/A/1 File 8626. The Ruling also issued a prohibitory Order to the Land Registrar to restrict the two suit properties from further interference or action until the pending suit was heard and determined.
10. The Appellants submit that they are the registered proprietors of a ¼ share of Plot No. 10847 (Original No. 1800/3) located at Malindi Sub-County in Kilifi County registered at Mombasa Lands Registry in Volume LT 38 Folio 165/A/1 File 8526 and a 1/5 share of Plot No. 10849 (Original No. 1800/5) registered at Mombasa Lands Registry in Volume LT 38 Folio 166/A/1 File 8527. However, the Respondent claims ownership of the suit properties by the Agreement for Sale dated 8th June 2011, which she alleges to have been duly executed by all parties and upon receipt of the initial deposit of USD 188 235 /-equivalent then to Kshs. 16 000 000/- by Pieracci Giulio (deceased) as the Vendor.
11. The Appellants firmly assert that the deceased was never present or residing in the country at the time of the alleged execution of the Agreement for Sale and that the allegations by the Respondent are an attempt to commit fraud. The Appellants maintain that they raised these issues before the Trial Court



to determine whether the suspected Agreement for Sale was valid and was executed by both parties if the deceased was in the country at the material time and if he was a party to such contract.

12. It is the Appellants' submission that even though the Respondent instituted an Application claiming to have purportedly executed an Agreement for Sale with the deceased, the same is barred by the [Limitation of Actions Act](#), Cap 22. ‘
13. Whether the Respondent's Application dated 29th August 2022 barred by the [Limitation of Actions Act](#), Cap 22? The Appellants reiterate that the Application filed by the Respondent in the Lower Court failed to meet the requirements of Section 4 (1) (a) and 28 (2) (a) of the [Limitation of Action Act](#), which the Trial Court failed to consider and thereby rendered a Ruling adversely affecting the constitutional rights of the Appellants. The alleged Agreement for Sale was made on the 8th day of June 2011, and the Respondent further admitted that the same should have been completed on or before 15th February 2012. By the alleged Agreement for Sale, the cause of action accrued the moment the contract was breached by one party, which in this case was soon after 15th February 2012. According to [Black's Law Dictionary](#) (10th Edition), the word “accrue” means “to come into existence as an enforceable claim or right”.
14. The Appellants propose in their submissions that on determining when the cause of action in this suit accrued, the Court ought to take into consideration that the right to sue could only arise when the Appellants or the Respondent had failed to complete the Agreement for Sale on time as expressly provided in the Agreement. The Respondent knew the alleged Agreement for Sale was in breach. Yet, she did not take steps to prosecute the same for over ten (10) years. She gave no reasonable or justifiable grounds for the inordinate delay in instituting her suit. It should be noted that the provisions of Section 4 (2) (a) of the [Limitation of Actions Act](#) which states as follows:

“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.”
15. The Appellants believe that the Respondent, for the preceding reasons, failed to meet the legal threshold of instituting a claim of breach of contract within the stipulated time as required by law, and, therefore, the orders sought ought not to be granted. Despite the Respondent's suit failure to meet the necessary statutory timeline for instituting the claim, no leave was sought from this Court to extend the time for filing the suit. The Respondent failed and or ignored to seek leave from the Court to file the suit out of time. The Respondent also failed to give any reasons for the excessive delays occasioned in filing the suit.
16. Section 27 of the [Limitation of Actions Act](#) provides for extending the limitation period in case of ignorance of material facts in actions for negligence. It reads as follows:

“Section 4(2) does not afford a defence to an action founded on tort where

 - (a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by a contract or of a written law or independently of a contract or written law); and
 - (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person.”



17. The Appellants believe that the Respondent knew the material facts about the alleged Agreement for Sale and its breach. Still, she failed to seek any redress for her grievances at the material time. Further, the Respondent has not proved that the material facts about the cause of action were outside her knowledge. That the power of the Court to extend time is discretionary, and it can only do so where there is reasonable cause for the delay and that the Respondent ought to have sufficient and reasonable grounds for any delays on its part
18. The Appellants aver that in the case of *Mary Ofundwa v Nzoia Sugar Company Limited* [2002] eKLR, the Court of Appeal held as follows:

“Section 27 of the *Limitations of Actions Act* clearly lays down the circumstances under which the court would have jurisdiction to extend time, that the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The court also held that the Section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort.”
19. The Appellants reiterate that the ten (10) year delay has not been explained at all. That extension of time is not a right to a party but an equitable remedy only available to a deserving party at the discretion of the Court, and the same does not apply to cases of breach of contract. In the premises, the suit filed by the Respondent in the Lower Court is a nullity and therefore barred in law. In this regard, it is imperative to take cognizance of the decision in the case of *Hilton v. Sultan S. Team Laundry* (1946) 1 KB 61, 81, where Lord Greene MR held as follows:

“But the statute of limitation is not concerned with merits, once the axe falls, it falls and a defendant who is fortunate enough to have acquired the benefits of the statute of limitation is entitled to insist on his strict rights.”
20. The Appellants submit that the Orders sought by the Respondent in the Lower Court should not be granted as the Suit and the instant Application are time-barred by the Statute of Limitations Act.
21. The Appellants contend that upon filing the instant Memorandum of Appeal with the Record of Appeal, the same was served upon the Respondent through her Advocate on record. Still, they failed to respond or participate in the proceedings since the Appeal was lodged. It is in that respect that it is stated that the instant Appeal is uncontested and uncontroverted by the failure of the Respondent to participate in these proceedings. The Appellants rely on several decisions to press the view that in the absence of rebuttal evidence by the Respondent, the Appellants' case must automatically be taken as proved. The Appellants cite the decisions in *Linus Nganga Kiongo v Town Council of Kikuyu*, HC No. 79 of 2011, *Karuru Munyoro v Joseph Ndumia Murage & Another* Nyeri HC No. 95 of 1988, and *Drappery Empire v The Attorney General* Nairobi HC No. 2666 of 1996 all speaking to the consequences of failure by a Defendant to adduce evidence in rebuttal to assertions provided by a Plaintiff at a hearing as inviting the Court to rule in favour of the Plaintiff as against the Defendant.
22. This Court's mandate is to re-evaluate, re-assess, and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned Trial Magistrate should stand and give reasons either way. See *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR, *Kiruga v Kiruga & Another* [1988] KLR 348 and *Peters vs. Sunday Post Ltd* [1958] EA 424.
23. From the materials and submissions, I frame the following issues for the determination of this Court:



- i. Was the Respondent's Application dated 29th August 2022 and the entire suit barred by the Limitation of Actions Act, Cap 22?
 - ii. Should the orders sought in the Memorandum of Appeal dated 27th March 2023 be granted?
24. The Trial Magistrate correctly cited the leading decision in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 on what to consider when determining what a Preliminary Objection entails – that it must raise uncontested facts and purely points of law. Put it this way – Preliminary Objection rests on the proposition that when raised, its fundamental achievement will have a bearing on disposing of a matter because it raises pure points of law. It also underscores the need for prudent time management as a Court resource by summarily flagging frail and hopeless suits that, if admitted to full trial, will be a waste of judicial time and will not serve the interest of justice. One will not be required to look elsewhere to find an answer as to whether a Preliminary Objection is sustainable or not but look at the pleadings and discover that the suit is a none starter - see Ogola J. in DJC v BKL (Civil Suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling):

“The Supreme Court in *Hassan Ali Jobo & Another v Suleiman Said Shabbal & 2 Others* cited the leading decision on Preliminary Objections, *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 like 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”.

8. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. 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.”

25. In dismissing the Preliminary Objection based on the Statute of Limitation, the Magistrate stated:

“It is clear from the above excerpts that Preliminary Objection may only be raised on a pure question of law. In order to discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed. From the pleadings filed before the Court, several facts are disputed. Defendant alleges that the agreement produced



by Plaintiff is a forgery that, at the time alleged of the making of the same, the deceased was not in the right state of mind and was outside the jurisdiction of the Court and Country. It is further stated that the Applicant was well aware of the death of the deceased, but the same is disputed. These are facts that will be established at the hearing of the suit and not issues of law. Clearly, issues of fact are in dispute herein, and the Preliminary Objection automatically fails.”

26. The Appellant extensively submitted that the claim before the Magistrates Court was time-barred and offends Section 4 (1) (a) and 28 (2) (a) of the Limitation of Action Act that the agreement relied on was explicitly repudiated by the Respondent, who failed to pay the purchase price ten years down the line and that this claim based on Contract ought to have been brought six years after the Respondent failed to discharge his party by paying the remaining balance USD 23,529/- equivalent then to Kshs. 2,000,000/- to the vendor on the appointed date, on or before 15th February 2012 (the completion date).
27. A look at the averments of the Respondent in the Magistrates Court will reveal that he started to look for the vendor (deceased) on 1st February 2012 to clear the balance. He could not be found. He was later to discover from the Italian embassy that the vendor had died. He came to learn that his heirs had filed a Succession Cause in Malindi and obtained a grant in 2016. When he proceeded to the Land Registry, he discovered that they had transferred the suit property to themselves by Deeds of Assent using the same grant in the same year.
28. When he discovered the vendor's demise in 2012, he engaged the Appellants in purchasing suit properties and the monies he had paid to the deceased. They did not cooperate. They had not taken letters of administration to be capable of being sued.
29. Conversely, the Appellant alleges the agreement was a total forgery. Evidence was adduced that the deceased was not in Kenya, and his passport had expired, so he could not have signed the agreement.
30. The Magistrate opined that all the issues raised by the parties were contested and required a full hearing. I agree with her. These issues must be examined at the trial; the magic of cross-examination will work it out for the parties. It will be noted that the Respondent could not complete his part of the bargain on the appointed date. The death of the vendor was a frustrating event. The heirs were seized of capacity to be sued in 2016. Whether the claim is purely on Contract, which calls for six years within which to bring suit, or recovery of land, which calls for twelve years within which to bring suit, will be a matter to be determined at a hearing. I conclude that, on this point, the Magistrate did not err.
31. On the orders sought in this appeal, Ms. Miyanzi for the Respondents did not participate in the proceedings. It is not explained why. The Respondent was never served and could be possibly unaware of these proceedings. The authorities cited discuss the net effect of Defendant, who failed to turn up at a hearing to dispute the issues raised by Plaintiff. In most cases, an unfavourable verdict will likely be reached against such a Defendant. The contrast is that we are dealing with an Appeal based on the record reflected in the Memorandum and Record of Appeal. The Court is bound to consider that record and draw its conclusion. A nil return or no-show by the Respondent in these proceedings cannot be a basis for striking out or drawing an unfavourable outcome against the Respondent. The Court has a duty imposed on it to reevaluate the Record of Appeal and draw its conclusion, as I have done here.
32. The upshot is that I find no merit in the appeal, so it is dismissed with costs.
33. The file is returned to Chief Magistrate Malindi for an expeditious trial to resolve the issues raised in the pending suit.



DATED, SIGNED, AND DELIVERED VIRTUALLY ON THIS 6TH DAY OF JUNE 2024.

E.K. MAKORI

JUDGE

In the Presence of:

Mr. Kandia for the Appellant

Court Assistant: Happy

In the absence of:

Ms. Miyanzi for the Respondent

