



**Onyango v Mangala & another (Environment and Land Appeal
E006 of 2022) [2024] KEELC 5552 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5552 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL E006 OF 2022**

**BN OLAO, J
JULY 30, 2024**

BETWEEN

JOSEPHINE AKINYI ONYANGO APPELLANT

AND

GRACE MANGALA 1ST RESPONDENT

LINAH E. NAFULA 2ND RESPONDENT

***(Being an appeal from the ruling of HON. P. A. OLENGO SENIOR
PRINCIPAL MAGISTRATE delivered on 1st April 2022 in BUSIA
CHIEF MAGISTRATE'S COURT ELC CASE NO 101 of 2020)***

JUDGMENT

1. By a plaint dated 1st August 2020 and filed in Busia Chief Magistrates Court on 3rd August 2020, JOSEPHINE AKINYI ONYANGO (the Appellant herein) impleaded GRACE MANGALA and LINAH E. NAFULA (the 1st and 2nd Respondents respectively) seeking judgment against them as follows:
 - a. A permanent injunction restraining the Respondents whether by themselves, their agents, servants, employees, assigns and agents from disposing, selling, transferring, taking possession of or in any way dealing with formerly land reference NO BUKHAYO/BUGENGI/4735 and now BUKHAYO/BUGENGI/11348.
 - b. An order directing the Respondents to specifically perform the sale agreement dated 3rd August 2007 by procuring the transfer and registration of the land formerly known as NO BUKHAYO/BUGENGI/4735 and now BUKHAYO/BUGENGI/11348 in favour of the Appellant.
 - c. Alternatively and without prejudice to prayers (a) and (b) above;



- d. An order directing the Respondents to pay the Appellant Kshs.332,175 at the current value of the land as special damages for breach of contract.
 - e. Interest on (d) above at court rates from date of payment of the purchase price to the date of payment in full.
 - f. Costs of the suit.
 - g. Any other relief that the Honourable court deems just to grant.
2. The basis of the Appellant's claim was that the Respondents, as the Administrators to the Estate of PENINA O. MANGALA offered to sell the land parcel NO BUKHAYO/BUGENGI/4735 measuring one (1) acre and now known as land reference NO BUKHAYO/BUGENGI/11348 (the suit land). On learning of the offer, the Appellant agreed to purchase the suit land at a consideration of Kshs.300,000 and a sale agreement was executed on 3rd August 2007 and on the same date, the full purchase price was paid. The appellant further paid Kshs.32,175 being stamp duty and other disbursements necessary to procure the transfer of the suit land in her name. Having performed her part of the sale agreement, the Appellant expected the Respondents to procure the registration of the suit land in her names. The Respondents however breached the said agreement by failing to procure the registration of the suit land in her names and instead sold it to a third party. That prompted the Appellant to move to court seeking the orders enumerated above.
 3. The record shows that only the 1st Respondent filed a defence dated 21st September 2021. Therein, she denied having executed any sale agreement with the Appellant dated 3rd August 2007 or at all. She added, however, that if there was any such sale agreement, which she denied, it was the Appellant's obligation to cater for the legal costs, Stamp Duty and other disbursements to facilitate the registration of the suit land in her name which the Appellant did not fulfil. The 1st Respondent denied that it was her obligation to procure the transfer of the suit land in the Appellant's names or that she had failed to fulfil her part of the agreement and put the Appellant to strict proof thereof.
 4. The 1st Respondent further denied having engaged in any acts of fraud or illegality by transferring the suit land to a third party. She added that the Appellant's claim as drawn was incapable of enforcement and did not exist since the suit land no longer existed and had changed hands having been registered in the names of a third party who is not a party to the suit. Further, the 1st Respondent pleaded that the claim for refund of the purchase price was time barred as the sale agreement was executed on 3rd August 2007 a period of over 12 years and a Preliminary Objection would be raised that the suit was time barred by the provisions of Sections 41(a) and 7 of the *Limitation of Actions Act*.
 5. The Appellant filed a reply to the 1st Respondent's defence in which she reiterated the entire contents of her plaint and joined issue with each and every allegation contained in the defence. She added that from 3rd August 2007 onwards upto 10th September 2015, she had remained in peaceful and un-interrupted occupation of the suit land and there was no sign of breach of contract to warrant the institution of a suit. She pleaded further that on 10th September 2015 some people started harvesting nappier grass from the suit land and a report was made to Busia Police Station and a restriction was also placed on the suit land. That the 1st Respondent had informed her that a stranger by the name JOSEPH SAMUJU MUKASA had acquired part of the large parcel but had proceeded to fraudulently process a title for the whole parcel which anomaly the 1st Respondent had filed a suit to rectify. The Appellant denied having failed to pay for the registration of the suit land in her names or that the suit was time barred adding that it is only when a breach occurs that gives rise to the institution of a suit and in this case, the parties did not have a fixed completion date. The Appellant pleaded that if the suit land has been



transferred to a third party and specific performance is incapable of performance, then the court can order a refund of the purchase price at the current value as had also been pleaded in the plaint.

6. Simultaneously with her defence, the 1st Respondent filed a Notice of Preliminary Objection dated 21st September 2021 in which she raised the following grounds:
 - a. That the suit offends the provisions of Section 4(1)(a) and (c) of the *Limitation of Actions Act* cap 22 Laws of Kenya which provides that suits founded on a contract must be brought within 6 years from the date on which the action arose.
 - b. That the suit offends the provisions of Section 7 of the *Limitation of Actions Act* cap 22 Laws of Kenya which requires suits for recovery of land to be filed within 12 years from the date on which the cause of action occurred.
 - c. That the Appellant did not obtain leave for extension of time to file the suit outside the period stipulated under Section 4(1)(a) and Section 7 of the *Limitation of Actions Act* cap 22 Laws of Kenya.

The Preliminary Objection fell for determination before HON. P. OLENGO Senior Principal Magistrate. In a brief ruling delivered on 1st April 2022, the trial magistrate having summarized the grounds of Preliminary Objection and the remedies sought by the Appellant in her plaint, made the following disposal order:

“It is true the plaintiff is suing for the recovery of the land and breach of contract which should be done within 12 and 7 years respectively. The plaintiff did not seek leave to bring the above claims. I think the Preliminary Objection is merited and I hereby sustain the same. The suit is bad in law and the same is hereby dismissed for being time barred”.

It is the above ruling which prompted the Appellant to file this appeal seeking to have this court set it aside and costs thereof be awarded to her.

7. The following nine (9) grounds of appeal have been proffered:
 1. The learned Magistrate erred in law and in fact in failing to consider that the agreement for sale had no completion date thereby arriving at the wrong decision.
 2. The learned Magistrate erred in law and in fact to understand that parties are bound by their pleadings and that the Preliminary Objection was not proper in view of the pleadings filed and thereby arriving at a wrong decision.
 3. The learned Magistrate erred in law and in fact in failing to consider that the issues of the sale agreement had been disputed in the defence and could now only be canvassed in a full hearing thereby arriving at a wrong decision.
 4. The learned Magistrate erred in law and in fact in failing to consider that it is only when a breach of contract occurs that a cause of action arises and the breach occurred when the property was transferred to another party thereby arriving at a wrong decision.
 5. The learned Magistrate erred in law and in fact in failing to consider that the Appellant had been granted vacant possession of the land and proceeded to take occupation and planted nappier grass and thereafter the Respondents breached the agreement thereby arriving at a wrong decision.
 6. The learned Magistrate erred in law and in fact by failing to consider all of the circumstances of the case thereby arriving at the wrong decision.



7. The learned Magistrate erred in law and in fact by conferring undue weight to the arguments advanced by the Respondents.
 8. The learned Magistrate erred in law and in fact by placing the Respondents in an advantaged position despite the said Respondent having invoked a wrongful procedure under the law.
 9. The learned Magistrate erred in law and in fact by failing to consider judicial precedents and/or relevant law in determining the matter.
8. The appeal has been canvassed by way of written submissions as directed on 29th January 2024. Those submissions have been filed both by MR BENCH instructed by the firm of BENCH & COMPANY ADVOCATES for the Appellant and by MR OKEYO instructed by the firm of OKEYO OCHIEL & COMPANY ADVOCATES for the 1st Respondent.
 9. I have considered the record herein as well as the submissions by counsel.
 10. In my view, this appeal being against the ruling of the trial magistrate in upholding the Respondents' Preliminary Objection based on limitation can easily be disposed off by considering grounds NO 2, 3 and 9 of the memorandum of appeal. Therein, the trial Magistrate is assailed for erring in law and fact in failing to understand that the Preliminary Objection was not proper as it raised issues which could only be canvassed at a full hearing. Further, that the trial Magistrate failed to consider judicial precedents and the relevant law.
 11. A Preliminary Objection as defined by LAW JA in the locus classicus case of MUKISA BISCUIT MANUFACTURING COMPANY LTD -V- WEST END DISTRIBUTORS 1969 E.A. 696, and which is the path that courts in this Country have continued to follow;

“... 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.”

In the same case, Sir CHARLES NEWBOLD P added thus:

“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 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 mine.

OJWANG J (as he then was), discussed the same issue in the case of ORARO -V- MBAJA 2005 KLR 141 and said:

“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 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 ...”. Emphasis mine.

12. There is no doubt that an issue of limitation is a pure point of law which qualifies to be raised as a Preliminary Objection. Indeed it goes to the jurisdiction of the court to determine the dispute before it. However, what the trial Magistrate should have done was to go further and examine whether the Preliminary Objection, as raised by the 1st Respondent, was infact “blurred by factual details liable to be contested” and which needed “to be proved through the process of evidence.” The trial Magistrate also needed to be sure “that all the facts pleaded by the other side are correct.” The moment it became clear that issues of facts were contested, the trial Magistrate ought to have made a finding that the Preliminary Objection, though purported to be raising jurisdictional issues, had not been properly raised and dismissed it.
13. As is clear from the submissions by MR OKEYO the counsel for the 1st Respondent, issues raised in the Preliminary Objection were issues touching on facts. At page 2 of his submissions, counsel has submitted that:

“The main issue for determination before the learned trial Magistrate was whether or not the suit was time barred in terms of Section 4(1) and Section 7 of the *Limitation of Actions Act* cap 22 Laws of Kenya. This was supposed to be applied on the facts before the court so as to determine the cause of action and whether or not the provisions in question could be applied to the dispute before court. The plaintiff’s main prayer is for specific performance of the land sale agreement dated 3rd August 2007 as captured at paragraph 5 of the plaint and prayer (b) in the plaint. Section 4(1) of the *Limitation of Actions Act* cap 22 Laws of Kenya provides that ...”. Emphasis mine.

Counsel then proceeds to cite the relevant provisions of Sections 4 and 7 of the *Limitation of Actions Act* and adds as follows at page 3:

“The Appellant has raised issue with the fact that the contract forming the basis of the suit had no completion date and further, that it is only when a breach of contract occurs that a cause of action arises. It is our humble submission that in general, contracts where specifics have not been supplied such as the one forming the basis of the suit herein, then the provisions of law guiding the area of law come into play. In land matters, the relevant statute in this instance is the *Land Control Act* cap 302 Laws of Kenya which has prescribed under Section 6(1)(a) and Section 8(1) the period within which a land sale agreement is to be enforced which in effect is the period upon which the cause of action accrues.” Emphasis mine.

It is clear from counsel’s own submissions therefore, that the trial Magistrate would have had to determine, inter alia, when the cause of action arose, whether or not there was a completion date, whether there was a breach and by whom etc. Those were contested issues as is clear from the pleadings. In paragraphs 10 and 11 of her defence, the 1st Respondent pleaded that:

10: “The 1st defendant avers that the plaintiff’s claim as drawn and filed is incapable of enforcement as the alleged suit parcel does not exist as the same has since changed hands and is since registered in the names of a 3rd party who is not a party to this suit and further that the claim for refund of purchase price is time barred as the agreement is said to have been executed on 3rd August 2007 a period of more than 12 years as envisaged under Section 7 of the *Limitation of Actions Act* cap 22 Laws of Kenya.



11: “The 1st defendant will raise a Preliminary Objection on a point of law that this suit is time barred by the provisions of Section 4(1)(a) and (e) and Section 7 of the *Limitation of Actions Act* cap 22 Laws of Kenya as the contract forming the basis of the suit is said to have been entered into on 3rd August 2007 and the plaintiff is hereby put on notice.”

In response to those averments, the Appellant pleaded in paragraph 11 of her reply to the Respondent’s defence thus:

11: “In reply to paragraphs 10 and 11 of the statement of Defence, the Plaintiff denies the 1st Defendant allegations and avers that it is only when a breach of contract occurs that gives rise to institution of a suit and in this case a breach started occurring around 10th September 2015 as illustrated by the documents when now the plaintiff could sue and 6 years from the date of breach of contract lapsed on 10th September 2020 by which time this claim had already been filed on 3rd August 2020 and the 1st defendant is invited to strict proof to the contrary.”

As is now obvious from those divergent pleadings, the 1st Respondent’s case was that time for purposes of limitation started to run on 3rd August 2007 when the sale agreement was executed while the Appellant’s case is that time can only be computed from 10th September 2015 when the breach occurred. There is no concurrence as to when the breach occurred. Those are issues of fact which could only be determined on the evidence during trial. That placed the issues beyond the purview of a Preliminary Objection which, as is now clear, is concerned with “a pure point of law.”

14. On that basis alone, this appeal is for allowing.
15. The trial Magistrate has also been faulted for failing to consider judicial precedents or the relevant law. I have in paragraph 6 of this ruling captured verbatim the reasons which the trial Magistrate gave for up-holding the 1st Respondent’s Preliminary Objection. No reference was made to any judicial precedents in support of the findings by the trial Magistrate. If the trial Magistrate had perused the case of MUKISA BISCUIT MANUFACTURING COMPANY (supra) and the facts in this case, it would have become clear to him that the Preliminary Objection was so muddled with contested facts which needed to be determined through examination of evidence and was not “a pure point of law.”
16. That ground also succeeds.
17. Finally, in the impugned ruling, the trial Magistrate made the following pertinent observation. He said:

“ The plaintiff did not seek leave to bring the above claims.”

That was in reference to the breach of contract and the trial Magistrate no doubt had in mind the provisions of Section 27 (1) of the *Limitation of Actions Act* which allows a party to seek an extension of time to file a suit that would otherwise be barred by Section 4(2) of the same Act and which the 1st Respondent had invoked in her Preliminary Objection. However, such leave would not have been available nor aided the Appellant in this case where the issue being canvassed is a breach of contract. Section 27(1) of the *Limitation of Actions Act* was considered in the case of *MARY OSUNDWA -V- NZOLA SUGAR COMPANY LTD 2002 eKLR C.A. CIVIL APPLICATION NO 244 of 2000* where the court of Appeal said:

“ This Section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to the tort 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 Section does not give jurisdiction to extend time for filing suit in cases involving contract or any other cause of action than those in tort.”

This was therefore not a case where the Appellant should have sought leave to file the suit out of time and even if such leave had been obtained, it would not have been of any use.

18. I have said enough to demonstrate that the trial Magistrate erred in law and in fact in up-holding the 1st Respondent’s Preliminary Objection dated 21st September 2021. This appeal therefore succeeds and I make the following disposal orders:

1. The ruling delivered by HON. P. OLENGO SPM on 1st April 2022 is hereby set aside.
2. The suit is reinstated and shall be heard by another Magistrate other than HON. P. OLENGO.
3. The costs of the appeal are awarded to the Appellant

JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 30TH DAY OF JULY 2024.

BOAZ N. OLAO

JUDGE

