



REPUBLIC OF KENYA



**Likama v Bakari (Environment and Land Appeal E023 of 2021)
[2024] KEELC 6199 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6199 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E023 OF 2021
MN GICHERU, J
SEPTEMBER 25, 2024**

BETWEEN

JOHNISCON KAURRAI LIKAMA APPELLANT

AND

JOSEPHINE NZEMBI BAKARI RESPONDENT

(Being an appeal from the whole of the Ruling and decree of the Chief Magistrates Court at Kajiado, Hon. S. Shitubi, CM, dated and delivered on 5th day of August 2021 in ELC NO. EO15 of 2021 (O.S.))

RULING

1. This ruling relates to the memorandum of appeal dated 19/8/2021 in which the appellant seeks to set aside the ruling dated 5/8/2021. In the impugned ruling, the learned trial Magistrate dismissed the appellant's suit on the ground that it was premature and unprocedural to bring a claim before establishing the legal representatives of the deceased. The second reason for dismissing the suit was that it was time barred for having been brought after six years yet it was based on contract. This offended Section 4 of the *Limitation of Actions Act*.
2. Aggrieved by the decision of the learned trial Magistrate the appellant, through counsel on record filed this appeal on the following grounds.
 1. By striking out the appellant's suit, the learned Chief Magistrate demonstratively misinterpreted the provisions of the *Limitation of Actions Act* thereby acting on the wrong principles of law in arriving at her decision.
 2. In failing to carefully evaluate, capture and decipher the salient foundational facts forming the basis of the appellant's cause of action, the learned trial Magistrate misapprehended the appellant's suit thus arriving at erroneous findings which were the basis of her decision.



3. In misapprehending the foundational basis of the appellant's cause of action, the learned trial Magistrate misapplied the law on the appellant's cause of action thus arriving at an erroneous decision.
 4. The learned trial Chief Magistrate erred in law when she failed to consider and take into account the appellant's submissions and authorities placed before her touching on pertinent and substantial points of law thus arriving at an erroneous conclusion.
 5. The learned trial Chief Magistrate erred in law when in her findings tried to ferret out evidence to support the appellant's grounds of opposition to the preliminary objection thus arriving at an erroneous decision.
3. In addition to setting aside the ruling of the learned trial Magistrate the appellant seeks these other orders.
 - b. The appellant's notice of motion dated 30/3/2021 be allowed.
 - c. The respondent be ordered to pay the costs of this appeal.
 - d. The court may grant any other order that it deems just and fair for the ends of justice to be met.
 4. The appellant's case is that on 12th April 2006, he entered into a sale agreement with Bakari Abdallah Abu who was the 1st respondent's husband and father to the 2nd – 4th respondents. The agreement was for sale of 70 acres of land which was to be excised from L.R. Kajjado/Elangata-Wuas/608. He took possession of the suit land upon payment of a substantial amount of the purchase price. Unfortunately, the seller died before the land could be subdivided and transferred to the appellant. The respondents have now threatened to evict the appellant from the suit land. This is why he filed ELC Case No. E015/2021 in the Lower Court.
 5. On the other hand the respondents do not agree with the appellant. According to them, they are not the registered owners of the suit land and they are not therefore liable for any claim arising out of it. Secondly, the suit offends the provisions of the Limitations of Actions Act especially Sections 7, 13, 15, 16, 17 and 38 (1). Thirdly, it also offends Section 66 of the *Law of Succession Act*, Rule 22 of the Probate and Administration Rules. Fourthly, the deceased was defrauded by the appellant into signing the sale agreement and he was not paid any consideration. Fifthly, there is a related case being Kajjado SPMCC No. 301 of 2003, David Letela Ololouya –versus- Bakari Mapi and another over the same land which is still pending in court. Sixthly, contrary to the averment by the appellant that he is in occupation of the suit land, he has never occupied the suit land and his claim for adverse possession has no basis.
 6. Counsel for the parties filed written submissions dated 29/2/2024 and 29/4/2024 respectively. The appellant's counsel identified two issues for determination as follows.
 - a. Whether the suit was time barred to warrant the striking out.
 - b. Whether the joinder of the 2nd, 3rd and 4th defendants in the suit would have warranted striking out of the suit.
 On the other hand, the respondent's counsel identified the following issues.
 - i. Whether the suit offended the provisions of Sections 7, 13, 15, 17 and 38 of the *Limitation of Actions Act*.
 - ii. Whether the suit offended Section 66 of Cap 160 and Rule 22 of the Probate and Administration Rules.



- iii. Whether the respondents lacked capacity to sue as none of them had obtained letters of administration.
7. I have carefully considered the appeal in its entirety including the record, the grounds in the memorandum, the pleadings by the parties, the written submissions and the law cited therein. I find that the issues as identified by learned counsel are appropriate and that they are correctly identified. I wish to add an extra issue.
 - i. Whether a suit such as this should have been commenced by way of originating summons.

I make the following findings on the above issues.

8. On the first of the appellant's issues, I find that it was premature to strike out the suit on the ground of time bar. The pleadings were not yet closed. There was time to amend and file all the necessary evidence. There were facts that were in dispute especially whether the appellant was in occupation of the suit land or not. While the appellant contended that he was in possession, the respondents contended that he was not. Possession was critical to the issue of adverse possession and the trial Magistrate should have waited for the issue to be proved by evidence. This is especially important because a party in possession may enjoy constructive trust. Under Section 28 (b) of the [Land Registration Act](#), trusts including customary trusts are overriding interests which supersede a title even if they are not noted in the register.
9. On the second of the appellant's issue, I do not have sufficient material to decide on this issue. While the first respondent deposed that she had no capacity to be sued, the appellant in his supplementary affidavit at paragraph 4 thereof deposes that there were such letters dated 9/6/2021. Unfortunately, I do not see those annexures to the affidavit. If it is true that there were such letters of administration, then it was premature to strike out the appellant's suit. The trial Magistrate should have waited for the parties to prove or fail to prove their averments.
10. Coming to the 1st of the respondent's issues, I have already decided on the time bar in deciding on the appellant's first issue. What remains is whether a Magistrate's Court has jurisdiction to entertain a claim for adverse possession. Section 38 (1) of the [Limitation of Actions Act](#) provides as follows.

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, or land ...he may apply to the High Court for an order that he be registered ...”

This provision clearly ousts the jurisdiction of the Magistrate's Courts from entertaining cases of adverse possession. There is no provision in the [Magistrates' Courts Act](#) that confers jurisdiction in the Lower Court to deal with claims of adverse possession. Section 9 (9) of the Magistrate's Court Act does not expressly confer such jurisdiction. If it were the intention of parliament to confer such jurisdiction, then it would have been expressly stated in the Act. In the Limitation Act, the Magistrates' Court's jurisdiction is clearly ousted.

11. On the second of the respondents' issues, I will make no finding because this court's jurisdiction does not extend to Probate and Administration matters. Under Article 162 (2) (b) of [the Constitution](#), the jurisdiction of this court is limited to disputes relating to,(b) The environment and the use and occupation of, and title to land.
12. As for the third of the respondent's issues, I find that I have already decided on it while deciding on the appellant's second issue.
13. Finally, on the issue whether this suit should have been commenced by way of originating summons, I find that it should not have been so commenced. An action is commenced by an Originating summons



which is required by a statute or where the dispute concerns matters of law and where there is unlikely to be any substantial dispute of fact. In the case of *Kenya Commercial Bank Limited –versus- Osebe, Civil Appeal No. 60 of 1982* it was held, inter alia

“The procedure of originating summons is intended for simple matters and enables the court to settle them without the expense of bringing an action. The procedure is not intended for determination of matters that involve serious questions. The procedure should not be used for purposes of determining disputed questions of fact. The procedure of originating summons is designed for summary or ad hoc determination of points of law, construction or certain specific facts for obtaining of specific directions of the court such as trustees, administrators or the courts’ execution officers”.

The dispute herein involves many disputed facts such as whether the appellant is in occupation or not, whether the respondents have capacity to be sued or not, whether there was a sale of the suit land or not, whether there is a pending suit related to the suit land or not among many other disputed facts. Under Order 37 rule 19 *Civil Procedure Rules*, the court has jurisdiction to direct that a suit commenced by way of originating summons should continue as if it had been began by filing a plaint. Had this suit been filed as per the dictates of the law, the trial court would have given such directions because of the complexity of this dispute.

14. In conclusion, I find no merit in the appeal because as I have found in paragraph (10) above the Magistrate’s court has no jurisdiction to entertain a claim for adverse possession by dint of Section 38 (1) of the *Limitation of Actions Act*. The appellant’s appeal is dismissed with costs to the respondents.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 25TH DAY OF SEPTEMBER 2024.

M.N. GICHERU

JUDGE

