



**Mburu v Chege & 2 others (Environment & Land Case 1 of 2024)
[2024] KEELC 7143 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7143 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 1 OF 2024
MAO ODENY, J
OCTOBER 31, 2024**

BETWEEN

SAMUEL WAINAINA MBURU PLAINTIFF

AND

SIMON CHEGE 1ST DEFENDANT

DAVID MWANGI WAMUGUNDA 2ND DEFENDANT

JAMES NDUGO 3RD DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 4th June, 2024 by the Defendants/Applicants seeking the following orders:
 - a. Spent
 - b. That the Plaintiff's Complaint dated 9th January, 2024 and filed in this Honourable Court on 11th January, 2024 be struck out.
 - c. That the costs of the application be borne by the Plaintiff/Respondent.
2. The application was supported by the annexed affidavit of David Mwangi Wamugunda, the 2nd Defendant/Applicant herein who deponed that the Plaintiff/Respondent moved the Chief Magistrate's Court at Nakuru vide a Miscellaneous Application dated 17th August, 2022 for orders for leave to file a complaint out of time.
3. He deponed that the Defendants/Respondents herein opposed the application and it was allowed nonetheless on 13th February, 2024. Further that the Plaintiff/Respondent filed a complaint dated 9th January, 2024 and filed in court on 11th January 2024 seeking judgment against the Defendants which was premature as the miscellaneous application had not been determined.



4. The Plaintiff/Respondent filed grounds of opposition dated 17th July, 2024 and stated that the contention that this suit was filed prematurely on 11th January, 2024 or that it was filed out of time, is vexatious and gives undue regard to technicalities as the subordinate court gave leave for a suit to be filed. The plaintiff also relied on the Replying Affidavit giving the reasons of what transpired.

Defendant/applicants' Submissions

5. Counsel for the Defendant/Applicants filed submissions dated 1st August, 2024 and identified the following issues for determination:
 - a. Whether the Defendants are entitled to an order for striking out of the Plaintiff's plaint dated 9th January, 2024?
 - b. Who should bear the costs of this Application?
6. On the first issue, counsel submitted that the instant suit is founded on breach of contract and by the Plaintiff's own admission; more than six years had lapsed since the cause of action in his intended suit had accrued as of 16th August, 2022. Counsel relied on Section 4 (1) (a) of the [Limitation of Actions Act](#) and the cases of Gathoni vs Kenya Co-operative Creameries Ltd [1982] KLR 104, Bosire Ogero v Royal Media Services [2015] eKLR and Michael Benhardt Otieno v National Cereals & Produce Board [2017] eKLR. On the second issue, Counsel relied on Section 27 of the [Civil Procedure Act](#) and prayed for costs.

Plaintiff/respondent's Submissions

7. Counsel for the Plaintiff/Respondent filed submissions dated 15th August, 2024 and submitted that the Plaintiff's suit is based on fraud, trespass and also sought declaratory orders. Counsel relied on Section 26 of the [Limitation of Actions Act](#) Cap 22 of the Laws of Kenya and submitted that the Plaintiff discovered fraud and mistake at the place and time he filed this suit and that is when time for the cause of action began to run.
8. Counsel submitted that while it is true that the Plaintiff/Respondent realized the mistake and fraud, subsequently before the ruling of the court on 13th February, 2024 which was done in the absence of the parties and without notice to them. Counsel submitted that the application and the resultant positive orders are not fatal to this suit.
9. It was counsel's submission that the suit herein is based on mistake and fraud and relied on the case of Meritus Oluoch Odero & Another vs Peter Matheka Ndivo & Another Nairobi Civil Case No E105 of 2021.
10. Mr. Mwangi also relied on Articles 48, 50 and 159 of [the Constitution](#) of Kenya and submitted that it would be a drastic step to dismiss the suit at this stage. Counsel relied on the case of Delilah Ondari vs Francis Ondiela Atandi ELC NO 4 OF 2021 and submitted that the proceedings have not closed and the amendment can be done and as such this application is premature and incompetent.

Analysis And Determination

11. The issue for determination is whether the Plaintiff's Plaint dated 9th January, 2024 and filed in this Honourable Court on 11th January, 2024 should be struck out.
12. It is the Applicants' case that the Plaintiff's case is based on contract, which had lapsed by virtue of the provisions of the [Limitation of Actions Act](#). The Applicants also admit that the lower court heard and determined an application that allowed the Plaintiff to file a plaint out of time.



13. The application as crafted is like an appeal challenging the court's ruling allowing the application to file the plaint out of time. The Plaintiff deponed that the claim is based on mistake and fraud. The Defendant/Applicants want the suit struck out as it was filed before the ruling was delivered allowing the extension of time.

14. In the case of *Simon Kirima Muraguri & another v Equity Bank (Kenya) Limited & another* [2021] eKLR cited with approval the case of *The Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa* (Civil Appeal No. 54 of 1999) where the Court of Appeal held as follows:

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court.”

15. The application wants the court to deal with technicalities to strike out a suit. The Plaintiff got the necessary nod to file the plaint, therefore the issue of limitation does not arise at this stage. The Plaintiff has also explained that the suit is based on mistake and fraud, which he discovered late, and that time only started running upon discovery.

16. Section 26 of the Limitations of Actions Act states as follows:

“Where, in the case of an action for which a period of limitation is prescribed, either-

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which-

- (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

17. In the case of *Nzoia Sugar Co. Ltd v Kenya Ports Authority* [1990] eKLR the court observed that:

“Although Sections 22 and 26 of the *Limitation of Actions Act* refer to extension of the limitation period in case of disability or fraud or mistake respectively, it seems to me that these sections do not envisage an application for leave to extend the limitation period and



an application based on those sections would be incompetent. Rather these provisions empower a party to file a suit despite the expiry of the limitation period prescribed for the action and give the court jurisdiction to disregard the limitation period prescribed for the action if the suit falls within the scope of Sections 22 and 26 of the *Limitation of Actions Act*. If it was intended that applications under Sections 22 and 26 of the Limitation of Actions be made in court, then enabling rules similar to order XXXVI Rule 3C providing for application for extension of limitation period under section 27 of *Limitation of Actions Act* could have been made”.

18. It should be noted that even if the lower court did not extend the time within which the suit could be filed, the Plaintiff would still be allowed to file the Plaint and plead when he discovered the mistake or fraud by the defendant.
19. Consequently, I find that the application lacks merit and is therefore dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 31ST DAY OF OCTOBER 2024.

M. A. ODENY

JUDGE

