



**Ntoikah v Mwingirwa (Environment & Land Case E020 of 2023)
[2024] KEELC 13232 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13232 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E020 OF 2023
LC KOMINGOI, J
NOVEMBER 14, 2024**

BETWEEN

STEPHEN RITEI NTOIKAH PLAINTIFF

AND

HENRY MWINGIRWA DEFENDANT

RULING

1. The Preliminary Objection dated 15th February 2024, raised by the Defendant is on the following grounds;
 1. This Honourable Court has no jurisdiction to entertain a suit which is statute barred. It must down its tools.
 2. This suit does not lie, is incompetent, superfluous, fatally defective, misconceived, lacks merits and tantamount to abuse of the court process.
 3. The suit is statute barred. The entire suit offends the provisions of Limitation of Actions Act, Section 4 (1) of the Act provides that;

“.....The following actions may not be brought after the end of 6 years from the date on which the cause of action accrued”

 - a. Actions founded on contracts
 - b. Actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture.”
2. On the 9th April 2024, the court with the consent of the parties directed that the Preliminary Objection be canvassed by way of written submissions.



The Defendant's Submissions.

3. They are dated 8th April 2024. They raise three issues for determination;
 - i. What constitutes a Preliminary Objection?
 - ii. Issue of Statute barred.
 - iii. Jurisdiction of the court.
4. Counsel submitted that the entire suit offends Section 3(3) of the Law of Contract Act and must be struck out. Further that the alleged cause of action is over six (6) years old hence the entire suit is incompetent.
5. Reliance is placed on the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distribution* (1969) EA 696; *IEBC v Jane Cheperenger* (2015) eKLR .
6. It is also submitted the suit is statute barred in law in terms of Section 4 (1) of the Limitation of Actions Act. He has put forward the cases of *E. Torgbor v Ladislaus Odongo Ojuok* (2015) eKLR; *Maersk Kenya Limited v Murabu Chaka Tsuma* (2017) eKLR; *South Nyanza Sugar Company Ltd v Dickson Aoro Owuor* (2019) eKLR ; *John Omollo Nyakongo T/a H.R. Ganijee & Sons v Kenya Power & Lighting Co. Ltd* (2022) eKLR.
7. Counsel submitted that the Plaintiff has confirmed that the matter arose on 2012 which is over 12 years ago which offends Section 4(1) of the Limitation of Actions Act.
8. Counsel also submitted that this Honourable Court has no jurisdiction to hear and determine this suit as was held in the locus Classicus case of *Owners of Motor Vessel "Lillian"s" v Caltex Oil (Kenya) Ltd* (1989) eKLR where the late Nyarangi J of the Court of Appeal held as follows;

“I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
9. Reliance is also placed on the cases of *Sir Ali Salim v Shariff Mobammed Sharray* (1938) KLR; *Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 others* (2012) eKLR ; *Family Bank Limited v Shemsa Nassdro Hamdu* (2021) eKLR ; *Phoenix of E.A. Assurance Company Limited v S.M. Thiga T/A Newspaper Service* (2019) eKLR.
10. He prays that the application and the entire suit be out with costs to the Defendant.

The Plaintiff's Submissions.

11. They are dated 1st October 2024. Counsel submitted that the oral agreement coupled with part performance by the Defendant is enforceable under Kenyan law.

That the Defendant made part payment of Kshs 18,000,000/= having a balance of Kshs 36,000,000. She has put forward the case of *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* (2014) Eklr.



12. It is further submitted that the Defendant took possession of the land and made significant developments, thus part performance has occurred making the oral agreement enforceable.
13. Counsel also submitted that oral contracts, especially where evidenced by the conduct of the parties are valid under Kenyan law. She has put forward the cases of *Erick Ogero Nyakagwa v Thomas Ochieng Owalla & Another* (2020) eKLR.
14. It is also submitted that the Defendant issued cheques in 2013, which kept the contract alive. She has put forward the case of *Gathoni v Kenya Co-operative Creameries Ltd* (1982) eKLR.

That this extends the time to 2025 hence the suit is not time barred.

15. It is also submitted that the Defendant's actions are not only illegal but also constitute trespass on the property beyond what was intended for sale. The Defendant's development and subdivision of the land without proper legal backing should not confer any rights of ownership.
16. It is submitted that the Defendant has been in occupation for less than 12 years and is insufficient for a claim of adverse possession. She has put forward the case of *Wambugu v Njuguna* (1983) eKLR.
17. Counsel also submitted that the typographical error in the amounts stated in the pleadings does not affect the substantive claim. She has put forward the case of *Agakhan Foundation v AG & Another* (2013) eKLR.

Further that the verifying affidavit was properly sworn and filed in accordance with the law. She has put forward the case of *Reuben Nyambati Ntabo v Samson Omwenga* (2011) eKLR.

18. It is also submitted that the withdrawal of ELC E058 of 2023, Kajjado does not bar the Plaintiff from filing a fresh suit.
19. Finally it was submitted that this Honourable Court has jurisdiction to hear and determine this matter as it pertains to land ownership and use.

She prays that the Preliminary Objection be found to be unmerited and be dismissed with costs to the Plaintiff.

Analysis and Determination

20. I have considered the grounds of the Preliminary Objection, the rival submissions and the authorities cited. The issues for determination are;
 1. Whether the Preliminary Objection herein is merited.
 2. Who should bear costs?
21. It is a well settled principle, that a Preliminary Objection should be on a pure point of law which can be discerned and determined on the face of the pleadings. This was pronounced in the case of *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited* (1969) EA 696.
22. Similarly the Supreme Court of Kenya in *Kenya National Commission on Human Rights v AG; IEBC & 16 Others* (Interested Parties) pronounced itself as follows;

“[78] ...“Thus a preliminary objection may only be raised on a ‘pure question of law’. 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, as they are prima facie presented in the pleadings on record.”



16. It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

I am satisfied the Preliminary Objection herein raises pure points of law.

23. In paragraph 4 of the Plaintiff it is stated; “the Plaintiff duly informed the Defendant that if he still wanted to purchase the suit property by way of a verbal agreement then he should pay the balance otherwise vacate the same so that he can restore and develop it, but the Defendant has refused and continues to unlawfully continue to effect some development therein.”

24. Similarly in paragraph 2 of the Supporting Affidavit dated 17th August 2023 the plaintiff states;

“That Henry Mwingirwa sometime back entered into a verbal gentleman to gentleman agreed that I sell him the suit property which he paid Kenya Shillings Eighteen Million (Kshs 18,000,000/=) as a commitment deposit. We agreed to enter into a written sale agreement later on but we never did for the purchase of all that property known as Title Number KJD/KISAJU/5670 (herein referred to as “the suit property.”

25. It is clear from the above averments that the agreement was oral and or verbal. Section 3(3) of the [Law of Contract Act](#), provides that;

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

- a. the contract upon which the suit is founded—
 - i. is in writing;
 - ii. is signed by all the parties thereto; and CAP. 23 [Law of Contract](#) [Rev. 2012] L11 - 6 (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party: Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the [Auctioneers Act](#) (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust. (4) Subsection (3) shall not apply to a contract made in the course of a public auction nor shall anything in that subsection affect the creation or operation of a resulting, implied or a constructive trust. “

The Section is worded in mandatory terms. It goes without saying that the agreement between the Plaintiff and the Defendant is not in writing and offends Section 3 (3) of the [Law of Contract Act](#).

26. Section 4(1) of the [Limitation of Actions Act](#) provides that;

1. (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. actions to enforce a recognizance;
 - c. actions to enforce an award;



- d. actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
- 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.“

27. The Plaintiff does not state the date of the agreement in his witness statement or the plaint.

This Court will therefore go by the Defendant’s documents which shows that the Defendant was issued with a title deed on 21st August 2012 and that by 1st March 1989, the suit property was registered in the name of United Insurance Company Limited.

28. This means the Plaintiff has not been a registered owner of the suit property for years. It is also means the Defendant has been the registered owner of the suit property for over eleven (11) years. I find that the Plaintiffs claim is statute barred and cannot stand. He ought to have brought his claim within six (6) years. I rely on the case of *South Nyanza Sugar Company Limited v Dickson Aoro Owuor* (2019) eKLR.

29. Having found that the claim herein is statute barred this court cannot proceed any further.

30. I find that this suit is misconceived and or abuse of the court process.

31. The upshot of the matter is that I find merit in the Preliminary Objection and the same is upheld. The Notice of Motion dated 7th December 2023 and the entire suit are hereby struck out with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 14TH DAY OF NOVEMBER 2024.

L. KOMINGOI

JUDGE.

In The Presence of:

Mrs. Omenta for the Plaintiff.

Mr. Kurauka for the Defendant.

Court Assistant – Mutisya.

