



Mbaruk & another (Suing Through His Brother and Next Friend Khamis Bin Mbaruk) v Omar (Sued in Her Capacity and as the Legal Representative of the Estate of Ali Ahmed Amir - Deceased) (Environment & Land Case 82 of 2019) [2025] KEELC 454 (KLR) (12 February 2025) (Ruling)

Neutral citation: [2025] KEELC 454 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 82 OF 2019**

SM KIBUNJA, J

FEBRUARY 12, 2025

BETWEEN

KHAMIS BIN MBARUK 1ST PLAINTIFF

NASSOR BIN MBARUK 2ND PLAINTIFF

SUING THROUGH HIS BROTHER AND NEXT FRIEND KHAMIS BIN MBARUK

AND

NURU NORIDHI OMAR DEFENDANT

SUED IN HER CAPACITY AND AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ALI AHMED AMIR - DECEASED

RULING

QUOTE

[NOTICE OF PRELIMINARY OBJECTION DATED 20TH JUNE 2019]

1. The defendant filed a notice of preliminary objection dated 20th June 2019, raising the ground that, “..... the suit offends the mandatory provisions of Sections 4 (1) of the Limitation of Action Act for having being brought more than 6 years after the cause of action purportedly arose.”
2. The court issued directions on filing and exchanging submissions on the 25th July 2024. The learned counsel for the defendant filed their submissions dated the 30th September 2024 and supplementary submissions dated 28th November 2024, while that for plaintiffs filed theirs dated the 15th November 2024, which the court has considered.
3. The issues for the court’s for determination are as follows:



- i. Whether the plaintiffs' suit is statutory time barred.
 - ii. Who pays the costs?
4. The court has carefully considered the ground raised in the preliminary objection, submissions by the learned counsel, superior courts decisions cited thereon, the pleadings filed and come to the following conclusions:

- i. In dealing with the question of whether or not the plaintiffs' suit is time barred, it is important to lay out the applicable legal position. It is trite that a preliminary objection must be correctly raised and qualify the principles set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd* (1969) EA 696, where Law J A stated that;

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the 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.”

Sir Charles Newbold P. further held;

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

In the case of *Oraro versus Mbaja* (2005) 1 KLR 141, the court held that:

“I think the principle is abundantly clear. A preliminary objection correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with 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, and 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 court should allow to proceed. I am in agreement with learned counsel, Mr Ougo, that ‘where a court needs to investigate facts, a matter cannot be raised as a preliminary objection’. This legal principle is beyond dispute, as there are divers weighty authorities carrying the message.”

- ii. Section 4 (1) (a) of the *Limitation of Actions Act* chapter 22 of Laws of Kenya states that:
 - “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.”



The court in the case of John Omollo Nyakongo t/a H.R. Ganijee & Sons versus Kenya Power & Lighting Co.Ltd [2022] eKLR held that;

“It has also been submitted that the suit is statute barred. It is not in doubt that the issue of limitation goes to the jurisdiction of the Court and the same does not require ascertainment of facts. The Court is only required to determine what the law says and whether indeed the suit is barred by Limitation of Action will not require the probing of evidence. All that the Court is expected to do is determine what the law says and this means that the same raises a pure point of law.

As per the description of Preliminary Objection in the Mukisa Biscuits case (supra), the Court finds that the said ground raised by the Defendant meets the test of what amounts to a Preliminary Objection. It raises pure points of law and it can be determined without ascertainment of facts from elsewhere. The Court is now left to determine whether the same is merited as provided for by the *Limitation of Actions Act*.”

- iii. Turning to the pleadings, I notice the suit was commenced through the plaint dated and filed on 10th May 2019. It is apparent the plaintiffs claims to be the lawful proprietors of Subdivision No. 464 (Original No. 138/3 Section IV Mainland North) Title No. CR 9772/5, delineated on Land Survey Plan No. 145907, measuring 43.32ha, that was a creation of the subdivision of Land Parcel No. 138/IV/MN on 10th February 1988 into two portions, Subdivision 464/I Section IV/Mainland North 43.30ha and Subdivision 464/II Section IV/Mainland North 95.82ha. The plaintiffs further averred that Subdivision 464/I Section IV/ Mainland North was later subdivided on 19th November 1990 into two portions Subdivision No. 485/IV/MN and Subdivision No. 486/IV/MN and certificates of title issued on 16th August 1997. The plaintiffs claimed that they entered into an agreement of sale with Ali Ahmed Amir (deceased) on 12th July 1991 for the purchase of Subdivision No. 485/IV/MN, at a consideration of Kshs 900,000, out of which only Kshs.429,350 was paid. That it was agreed the balance would be paid upon the handover of the completion documents. The plaintiff contended that they handed over the completion documents, including the transfer executed on 7th August 1997, to the defendants through their advocates, but the defendants have never paid the balance, though they effected transfer of the suit property in their names and are in the process of subdividing it. The plaintiffs prayed for judgment against the defendant for:

- a. A declaration do issue to the effect that by her acts and/or omissions, the deceased and/or the defendant constructively frustrated the completion of the contract created pursuant to the agreement of sale dated 12/07/1991.
- b. A declaration do issue to the effect that consequently the said contract is eligible for avoidance by the plaintiffs.
- c. A declaration do issue to the effect that consequently the plaintiffs’ avoidance of the part of the contract uncompleted by the deceased and or the defendant is lawful.
- d. A declaration do issue to the effect that consequently the plaintiffs are entitled to 21.13 hectares on subdivision No. 485/IV/MN.



- e. An order do issue directing the defendant within sixty days of making this order to;
 - i. Either transfer 21.13ha on sub-division No. 485/IV/MN to the plaintiff jointly,
 - ii. Alternatively, make payment to the plaintiffs of the equivalent fair market value of 21.13ha, with such value being agreed upon by the parties or in default of such agreement, the value be determined by a professional valuer to be appointed by the honourable court.
 - f. Costs of this suit.
 - g. Any other/further relief the honourable court may deem fit and just to award in the circumstances.”
- iv. The defendant opposed the plaintiffs’ claim through his statement defence dated and filed on the 18th June 2019, inter alia averring that;
- a. In paragraph 3 affirming the history of the suit property set out in the plaint up to the time of transfer;
 - b. In paragraph 8 claiming that the contractual obligations to the plaintiffs were fully discharged, and
 - c. In paragraph 15 that the defendant shall at the earliest opportunity raise a preliminary objection.

It is clear from the pleadings that the transaction subject matter of this suit emanated from the agreement of sale dated 12th July 1991, that was between Khamis Mbaruk & Nassor as the vendors, and Ali Ahmed Amir, now deceased, as the purchaser of Plot No. MN/IV/485 for Kshs 900,000/=. The plaintiffs’ main issue is that the purchaser/defendant did not pay the full purchase price, as Kshs 470,650/= is outstanding. The plaintiffs have argued in their submissions that their claim is premised on the frustration of the agreement of sale by the defendant's actions and omissions, that were as recent as 18th December 2018, and hence their claim is not statute time-barred. They further maintained that it would be impossible for the court to determine the preliminary objection on whether or not their suit is time barred without delving into the facts and evidence of the suit. That the defendant was inviting the court to delve into matters of facts and evidence pleaded by one party and not admitted by the other, which makes the preliminary objection unmerited. Section 4 (1) of the Limitation of Actions Act provides that no action shall be brought after 6 years from the date the cause of action accrued.

- v. There is no dispute from the facts pleaded by both the plaintiffs and defendant that the cause of action herein is founded on the agreement of sale dated 12th July 1991, irrespective of whether the purchase price was paid in full or not, which is the issue being disputed by the parties. That being the case, it is apparent the period from the date of the sale agreement, 12th July 1991, to the date the suit was filed 10th May 2019, is about twenty-eight (28) years. It is therefore undisputable that the cause of action having accrued in 1991, the six years within which a claim could have been filed lapsed



on or about 12th July 1997, and as this suit was filed on 10th May 2019, then it is statute barred.

- vi. Limitation of actions goes to the jurisdiction of the court, and does not require ascertainment of facts or evidence as argued by the plaintiffs, for a determination to be made. In the case of *Bosire Ogero versus Royal Media Services* [2015] KEHC 4728 (KLR) the court held that;

“The law of limitation of actions is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in the bringing of suits against them. The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a Matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over. See the case of *Pauline Wanjiru Thuo vs David Mutegi Njuru* [CA 2778 of 1998](#). It is for that reason that the issue of jurisdiction must be raised at the earliest opportunity. As has been severally held, jurisdiction is everything, without which, a court of law downs its tools in respect of a matter before it the moment it holds the opinion that it is without it.”

Contrary to what has been submitted by the plaintiffs, there are no facts that have been pleaded by one party and disputed by the other on what constituted the cause of action in this suit. The plaintiffs claim that the agreement of sale dated 12th July 1991 was frustrated by the non-payment of purchase price by the defendant. That may be so, but the period over which the payment may have been frustrated if at all, is a non-issue in determining the date the cause of action arose or commenced. What is key is that the date of the agreement of sale, on which the said frustration is founded, that was undoubtedly executed on 12th July 1991, which places the plaintiffs’ claim outside the 6-year statutory time limitation provided in Section 4 (1) of the [Limitation of Actions Act](#). The Court of Appeal in the case of *Alba Petroleum Limited versus Total Marketing Kenya Limited* [2019] KECA 846 (KLR) relied *Iga versus. Makerere University* [1972] EA where it was held that:

“A plaint which is barred by limitation is a plaint barred by law. A reading of the provisions of Section 3 and 4 of the Limitations Act Cap 70 together with Order 7 Rule 6 of the Civil Procedure Rule of Uganda which has same provisions with Limitations Act of Kenya seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief.”

The court is of the view that after the expiry of six years from 1991, that is 1997, the plaintiffs’ claim based on the sale agreement became time-barred by operation of Section 4 (1) (a) of the Limitations of Actions Act. The plaintiffs could not therefore maintain a claim based on the sale agreement of 12th July 1991, as they appear to do through this suit, without first seeking and obtaining the leave of court in accordance



with Section 26 of the Limitation of Actions Act, which provides for an extension of the of time, which they did not do.

vii. That in terms of section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, that provides for costs to follow the events unless where for good cause otherwise ordered, I find the defendant is entitled to costs.

5. The upshot of the foregoing is that the court finds the defendant's notice of preliminary objection dated 20th June 2019 has merit, and orders as follows:

i. That the preliminary objection is upheld and the plaintiffs' suit commenced through the plaint dated and filed on 10th May 2019, is hereby struck out.

ii. The court awards costs to the defendant.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 12TH DAY OF FEBRUARY 2025.

S. M. Kibunja, J.

ELC MOMBASA.

In the presence of:

Plaintiffs : M/s Mwaniki for Ngonze

Defendant : Mr. Abaja for Mogaka

Shitemi – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

