



**Maiyo v Chomangei (Sued on his Behalf and as a Representative of Estate of the Late Philip Kiptoo Yego) & 2 others (Environment & Land Case E066 of 2024) [2025] KEELC 2931 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 2931 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE E066 OF 2024  
EM WASHE, J  
MARCH 27, 2025**

**BETWEEN**

**SAMUEL KIPTANUI MAIYO ..... PLAINTIFF**

**AND**

**SAMMY CHOMANGEI (SUED ON HIS BEHALF AND AS A REPRESENTATIVE OF ESTATE OF THE LATE PHILIP KIPTOO YEGO) ..... 1<sup>ST</sup> DEFENDANT**

**EMILY MURGOR (SUED AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE JOSEPH MISOI) ..... 2<sup>ND</sup> DEFENDANT**

**STEPHEN MISOI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants (hereinafter referred to as “the Applicants”) filed a Notice of Motion Application dated 03.12.2024 (hereinafter referred to as “the present Application”) against the Plaintiff (hereinafter referred to as “the Respondent”) seeking the following Orders; -
  - a. That the suit herein is time barred by dint of Section 4 (1) of the *Limitation of Actions Act* as the same is predicated on contracts purportedly done on 15.02.2007, 06.05.2008, 27.02.2009 and 29.04.2010.
  - b. That the suit is time barred by dint of Section 7 of the *Limitation of Actions Act* having been instituted more than 12 years from the date the cause of action is alleged to have arisen.
  - c. That the suit before Honourable Court is sub judice in that there are Two (2) suits pending for hearing and determination before the Chief Magistrates Court at Eldoret between the same parties.



- d. That the instant suit is incompetent, vexatious, malicious and abuse of the due process of this Honourable Court.
  - e. That the costs of this application be provided for.
2. The grounds in support of the prayers above are contained in the body of the present Application as well as the Supporting Affidavit sworn by the 1<sup>st</sup> Respondent on the 03.12.2024 and are summarised as follows; -
- a. The Applicants pleaded that the Respondent's Claim had been filed after the expiry of 12 years from the date of when the cause of action arose.
  - b. Consequently, the Respondent's Claim against the Applicants was time barred by virtue of Sections 4 (1) and 7 of the Limitation of Actions Act and should be struck out forthwith.
  - c. The Applicants further pleaded that the Claim filed by the Respondent was Res Judicata to two previous proceedings namely Eldoret Chief Magistrates Court ELC Case No. 311 OF 2019 and Eldoret Chief Magistrates Court Cae No. 311 of 2013.6
  - d. According to the Applicants, the Respondent's Claim is similar in nature in terms of the parties and the subject issues therein and the two proceedings having been determined by a competent Court, then the present Claim is Res-Judicata.
3. The present Application was duly served on the Respondent who filed a Replying Affidavit sworn on the 13.12.2024 and adduced the following grounds in opposition of the same; -
- a. The Respondent stated that the Claim of Action against the Applicants does not arise from the Agreements For Sale executed on the on the 15.02.2007,06.05.2008,27.01.2009 and 29.04.2010.
  - b. According to the Respondent, all the portions of land that were purchased through these Agreements For Sale mentioned hereinabove were handed over to him after completion of the purchase price and he has been in occupation of the same.
  - c. The Respondent pleaded that the Cause of Claim in the present suit arose after the conclusion of the Succession proceedings regarding the suit property known as LR.NO.776/9 on the 11.10.2024.
  - d. Consequently, the cause of action in the present suit is not time barred in terms of Section 4 (1) and Section 7 of the Limitation of Actions Act and this Court has the relevant jurisdiction to hear and determine the same.
  - e. In addition to the above, the Respondent was of the view that in instances where a party has pleaded Fraud as the Cause of Action, then time begins running from the date of discovery of such an act based on the provisions of Section 26 of the Limitation of Actions Act.
  - f. The Respondent lastly stated that the Applicants Preliminary Objection herein was based on disputed facts and as such, the said Preliminary Objection was pre-mature, bad in law and frivolous hence should be forthwith dismissed.
4. The Replying Affidavit by the Respondent was duly served on the Applicants who filed a Further Affidavit sworn on the 15.12.2024 to which they stated as follows; -
- a. The Applicants reiterated that the Respondent's Claim herein contravened the provisions of Section 6 of the Civil Procedure Act, Cap 21.



- b. According to the Applicants, the proceeding known as CHIEF MAGISTRATES ELC CASE NO. 131 OF 2019 was still on going and not determination had been made although the parties and/or issues contained therein are similar to the present Claim herein.
  - c. The Applicants view therefore was that the Respondent was simply forum shopping and therefore this suit should be struck out forthwith.
5. Upon filing of the Further Affidavit by the Applicants herein, the Court directed parties to file written submissions which directions were duly complied by the Applicants filing their submissions dated 27.01.2025 while the Respondents filed their submissions dated 15.02.2025.
6. The Court has duly perused the present Application, the Replying Affidavit as well as the Further Affidavit therein and the submissions by the parties and identify the following issues for determination.
- Issue No. 1- Is The Respondent’s Claim Time-barred In View Of Section 7 Of The *Limitation Of Actions Act*?
- Issue No. 2- Is The Respondent’s Claim Either Res-judicata And/or Sub-judice To The Proceedings Known As Eldoret Chief Magistrates Court Elc Case.no.131 Of 2019 & Eldoret Chief Magistrates Court Cae No. 311 Of 2013?
- Issue No. 3- Are The Applicants Entitled To The Prayers Sought In The Present Application?
- Issue No. 4- Who Bears The Costs Of The Present Application?
7. The Court having identified the above issues for determination, the same will now be discussed as follows; -

**Issue No. 1- Is The Respondent’s Claim Time-barred In View Of Section 7 Of The *Limitation Of Actions Act*?**

8. The first issue for determination is whether the Respondent’s Claim against the Applicants is time barred or not.
9. The Applicants in the present Application sought to rely upon the provisions of Section 4 (1) and 7 of the *Limitation of Actions Act*.
10. Section 4(1) of the Limitation of Action Act provides as follows; -
- 4. Actions of contract and tort and certain other actions
    - (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
11. On the other hand, the provisions of Section 7 of the *Limitation of Actions Act* provide as follows; -
- “7. Actions to recover land; -
 

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
11. The two provisions of the *Limitation of Actions Act* give two different timelines within which an aggrieved party can file proceedings against another either under the Law of Contract, Tort Law or an action to recover land.



12. Based on this scenario, each Court when faced with an application that a Claim is time barred must evaluate and establish the true nature of the Claim so that it can apply the correct period which is applicable either under Section 4(1) or Section 7 of the *Limitation of Actions Act*.
13. In the present Application, the Applicants pleaded that the cause of action filed by the Respondent was one that is founded on the Law of Contract.
14. Consequently, the applicable provision of the *Limitation of Actions Act* is Section 4 (1) of the *Limitation of Actions Act*.
15. Further to the above, the Applicants pleaded and submitted that in the alternative, even if the Respondent's Claim was for recovery of land, then Section 7 of the *Limitation of Actions Act* would still be applicable.
16. In essence, either way, the Respondent's Claim is time barred by dint of Section 4 (1) and Section 7 of the *Limitation of Actions Act*.
17. The Respondent on the other hand opposed the Applicants pleadings and submissions by stating that there was no dispute as to the Contracts For Sale.
18. The Respondent's position was that the terms of the Agreements For Sale were duly complied with and he took position of the portions of land he had purchased.
19. However, after the death of the Vendor, the Estate of the Vendor failed to recognise his ownership rights by facilitating the issuance of ownership documents to his name.
20. It was this omission and/or commission by the Estate of the Vendor that he filed the Objection proceedings which were dismissed leaving him with no option but to file the present suit.
21. In essence therefore, the time within which the Respondent's Claim should be filed starts to run from the date of the decision dismissing his Objection Application and not before.
22. The Respondent further pleaded that the Claim against the Applicants is one that is founded on fraud and therefore, time within which limitation should be calculated is provided under Section 26 of the *Limitation of Actions Act*.
23. It is important before proceeding to make any finding that the Court looked at the actual cause of action pleaded by the Respondent in the Plaint dated 14.11.2024 and confirm whether it's one which falls within Section 4 (1) or Section 7 or Section 26 of the *Limitation of Actions Act*.
24. According to the Respondent's Plaint dated 14.11.2024, Paragraphs 4,5,6, and 7 indicates that the Respondent had purchased a portion measuring total of 11.1 Acres based on various Agreements For Sale on the portion of land known as LR.NO.772/6.
25. The Respondent pleaded in Paragraph 9 of the Plaint dated 14.11.2024 that he took possession of the portion of land measuring 11.1 Acres but on or about December 2009, the Applicants herein forcefully re-entered into the Respondent's portion of land and occupied a portion of 3.7 acres thereof.
26. Consequently, the reliefs contained in the Plaint dated 14.11.2024 are seeking for a declaration of ownership for a portion measuring 11.1 Acres, an Order of Transfer of the said portion measuring 11.1 Acres and a permanent injunction thereof.
27. The finding of the Court as regards the facts and reliefs pleaded in the Plaint dated 14.11.2024 is that the Cause of Action therein is not about the Agreements For Sale executed in years between 2007



and 2009 but the ownership, transfer and possession of the 11.1 Acres within the property known as LR.NO.772/6.

28. The Applicable Section of the Limitation of Actions Act in dealing with the Respondent's cause of action is Section 7.
29. As already outlined herein, any cause of action for Recovery of Land should be filed within a period of 12 years from the date of the cause of action otherwise such a claim should be deemed time barred.
30. According to Paragraph 9 of the Plaint dated 14.11.2024, the Applicants herein trespassed into the Respondents portion of land measuring 3.7 acres and took possession of the same on or about December 2009.
31. Further to the above, Paragraph 11 states that the Applicants upon taking possession of the Respondent's 3.7 acres proceeded to sell the same to a third party thereby giving raise to the Particulars of Fraud contained in Paragraph 12 of the Plaint dated 14.11.2024.
32. The Respondent is further fearful that the Estate of the 1<sup>st</sup> Applicant will evict him from the remaining portion of land by virtue of the fact that he was allocated a portion of 21 acres through the proceedings known as ELDORET SUCCESSION CAUSE NO. 188 OF 2004.
33. According to the above scenario, there is the claim of 3.7 Acres which is being referred to under Paragraphs 9 up to 11 and the remaining 7.4 Acres which are in possession of the Respondent.
34. As to the 3.7 Acres which is alleged to have been invaded by the Applicants and sold off to third parties, it is clearly pleaded by the Respondent that the cause of action happened in the year 2009.
35. The Respondent through his own pleadings gives a clear date of when the Cause of Action against the Applicants commenced which is 2009.
36. As such, the twelve years' period for recovery of the 3.7 acres commenced from 2009 and lapse twelve years later which was 2021.
37. In essence, the Respondent's cause of action against the Applicants in relation to the 3.7 acres taken over by the Applicants either jointly or otherwise is time barred.
38. As regards to the remaining 7.4 Acres, the said portion of land is within the Respondent's possession and/or use and his claim for a declaration, processing of the ownership documents as well as a permanent injunction is not time barred because there is no interference and/or interruption by the Applicants to allow time to start running under the provisions of Section 7 of the Limitation of Actions Act.

**Issue No. 2- Is The Respondent's Claim Either Res-judicata And/or Sub-judice The Proceedings Known As Eldoret Chief Magistrates Court Elc Case.no.131 Of 2019 & Eldoret Chief Magistrates Court Cae No. 311 of 2013?**

39. The second issue is whether or not the present suit is Res Judicata and/or Sub-Judice the proceedings known as Eldoret Chief Magistrates Court ELC Case No. 311 of 2019 and/or Eldoret Chief Magistrates Court Cae No. 311 OF2013.
40. As regards the proceedings known as Eldoret Chief Magistrates Court Case No. 311 of 2013, the Applicants pleaded in the grounds in support of the present Application and the Supporting Affidavit thereof that this matter was either Sub-Judicata and/or Sub-Judice.



41. However, the Applicants did not either place the Court file and/or the proceedings known as Eldoret Chief Magistrates Court Cae No. 311 OF 2013 before this Court to enable it verify the parties therein, the subject matter, the issues and/or the determination by a Competent Court of law with proper jurisdiction.
42. The Applicants similarly did not demonstrate to this Court the similarity of the proceedings known as Eldoret Chief Magistrates Court Cae No. 311 OF 2013 and the present suit in terms of the parties, the subject matter, the issues for determination and the outcome by a Competent Court of law.
43. As such, the Applicants allegations that the present suit is either Res-Judicata and/or Sub-Judice remains just an allegation and there is no basis upon which this Court can issue any adverse orders against the Respondent.
44. In any event, the proceedings known as Eldoret Chief Magistrates Court Case No. 311 OF 2013 was duly dismissed for having been filed in a Court without jurisdiction and there was no substantive determination of the issues therein by a Court of competent jurisdiction.
45. As regards the proceedings known as Eldoret Chief Magistrates Court ELC Case No. 311 OF 2019, the Applicants also sought for an order that this suit should be struck out for the reasons that its either Res -Judicata and/or is Sub-Judice.
46. The Applicant proceeded to place before this Court the Plaint and Verifying Affidavit of the proceedings known as Eldoret Chief Magistrates Court ELC Case No. 311 OF 2019 through the Further Affidavit sworn on the 18.12.2024.
47. However, a perusal of the Plaint dated 29.07.2019 in the proceedings known as Eldoret Chief Magistrates Court ELC Case No. 311 OF 2019 and in particular the reliefs sought therein, it is clear that the dispute therein is about the 3.7 acres which was taken up by the Applicants in the year 2009.
48. The proceedings known as Eldoret Chief Magistrates Court ELC Case No. 311 OF 2019 do not deal with the remaining portion of 7.4 Acres which the Respondent is seeking for a declaration, ownership documents and/or permanent injunction in the present suit.
49. In essence, this Court is of the considered view and finding that the subject matter in the proceedings known as Eldoret Chief Magistrates Court ELC Case No.131 of 2019 was the portion of land measuring 3.7 acres which had been occupied and/or sold by the Applicants while the present suit is about the 7.4 Acres which are in occupation and use by the Respondents.
50. As such, the present suit is neither Res-Judicata nor Sub-Judice to the proceedings known as Eldoret Chief Magistrates Court ELC Case No. 311 of 2019.

### **Issue No. 3- Are The Applicants entitled to the prayers sought in the Present Application?**

51. Based on the findings in Issue No.1 and 2 above, this Court is of the view that the present Application is partially merited on the grounds the Respondent's Cause of Action is time barred in terms of the 3.7 Acres which were taken up and/or occupied by the Applicants way back in 2009.
52. For the remaining 7.4 Acres, the Respondent suit is not time barred and the Court has jurisdiction to hear and determine the same.
53. As to the prayer that this suit is either Res-Judicata and/or Sub-Judice to the proceedings known as Eldoret Chief Magistrates Court Cae No. 311 of 2013 and Eldoret Chief Magistrates Court ELC Case No. 311 of 2019 and should therefore be struck out, this Court makes a finding that the same is not merited and therefore fails.



#### **Issue No. 4- Who Bears The Costs Of The Present Application?**

54. Costs usually follow the event.
55. However, in the present Application, the Applicants partially succeeded and the Respondent partially succeeded.
56. It is therefore only fair that the costs of this Application abide the outcome of the main suit.

#### **Conclusion**

57. In conclusion, this Court hereby makes the following Orders as regards the Notice of Motion Application dated 03.12.2024; -
  - a. The Plaintiff's/respondent's Claim For The Portion Of 3.7 Acres Occupied By The Defendants/applicants In The Year 2009 Is Time Barred.
  - b. This Court Has The Jurisdiction To Entertain And Determine The Cause Of Action Relating To The 7.3 Acres Pleaded In The Plaint Dated 14.11.2024.
  - c. The Present Suit Is Not Either Res-judicata And/or Sub-judice To The Proceedings Known As Eldoret Chief Magistrates Court Case No 311 Of 2013 And/or Eldoret Chief Magistrates Court ELC Case No. 311 Of 2019.
  - d. The Costs Of The Present Application Shall Abide The Outcome Of The Main Suit.

**DATED, SIGNED & DELIVERED VIRTUALLY AT ELDORET ELC THIS 27<sup>TH</sup> DAY OF MARCH 2025.**

**EMMANUEL.M. WASHE**

**JUDGE**

In The Presence Of:

Court Assistant: Brian

Advocates For The Applicant: Ms. Sielei

Advocates For The Respondent: Mr. Kirui – no appearance

