



Haji v Mutemi & 2 others; Sorrow (Interested Party) (Environment & Land Case E254 of 2024) [2025] KEELC 3133 (KLR) (26 March 2025) (Ruling)

Neutral citation: [2025] KEELC 3133 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E254 OF 2024
TW MURIGI, J
MARCH 26, 2025**

BETWEEN

ABDULLAHI ABDISALAM HAJI PLAINTIFF

AND

KIEMA MUSILI MUTEMI 1ST DEFENDANT

NATIONAL SOCIAL SECURITY FUND 2ND DEFENDANT

ERICK TOO 3RD DEFENDANT

AND

FAUZIA ALI SORROW INTERESTED PARTY

RULING

1. The Plaintiff instituted this suit against the Defendants vide a Plaint dated 9th June 2024 seeking the following orders:-
 - a. An injunction restraining the Defendants whether by themselves or their servants or agents and/or otherwise from remaining on or continuing in occupation of the suit property.
 - b. Vacant possession of the suit property.
 - c. An eviction order be granted forthwith against the 1st Defendant herein, his agents and/or servants to evict him and his agents or servants from the Plaintiff's parcel land known as L.R. NO. 21190/Q/238- Tassia Estate Embakasi situated in the City of Nairobi.
 - d. Order for demolition of a permanent structure erected upon the said parcel of the land.
 - e. Costs and expenses occasioned by and incidental to the Plaintiff's entry, demolition and repossession of the suit property.



- f. General damages.
 - g. Costs of this suit.
 - h. Any such other or further relief as this Honourable court may deem appropriate.
2. Alongside with the Plaint, the Plaintiff filed a Notice of Motion application dated 9th June 2024 seeking the following orders:-
 - a. That a conservatory order in the nature of injunction be and is hereby granted restraining the 1st Respondent/Defendant whether by himself, his agents, servants, servants, employees or any other person acting under the Respondent's mandate or authority or direction from constructing or erecting and/or developing or in any way however from interfering with the Applicant's ownership, use and possession of all that parcel of land known as L.R NO. T/21190/Q/238 Tassia Estate Embakasi situated at Nairobi City County pending the hearing and determination of the suit.
 - b. That the costs of the application be in the cause.
 3. In response, the 1st Defendant filed a Notice of Preliminary Objection dated 27th January 2025 on the grounds that the Plaintiff's suit is statute barred by dint of Section 7 of the Limitations of Actions Act. The 1st Defendant urged the court to strike out the suit with costs.
 4. The Preliminary Objection was canvassed by way of written submissions. THE 1ST DEFENDANT'S SUBMISSIONS
 5. The 1st Defendant filed his submissions dated 30th January 2025.
 6. On his behalf, Counsel outlined the following issues for the court's determination:-
 - i. Whether the objection is based on a pure point of law not requiring the court to ascertain any factual matters;
 - ii. Whether the institution of the suit is time barred and therefore liable to be struck out.
 7. On the first issue, Counsel submitted that the issue of limitation of time raises a pure point of law.
 8. On the second issue, Counsel submitted that even if all facts presented by the Plaintiff are accepted as correct, the contract upon which his claim is based was entered into on 9th September 2009 while this suit was instituted 15 years later, contrary to the provisions of Section 7 of the *Limitation of Actions Act*.
 9. To buttress his submissions, Counsel relied on the following authorities:-a) South Nyanza Sugar company Limited v Charles M Nyantahe [2022] eKLR,
 - b. David Karobia Kiiru v Charles Nderitu Gitoi & Another [2018]eKLR, c)Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [2014] eKLR
 - d. Mukisa Biscuit Manufacturing Company Limited v West End Distributors Ltd (1969)EA 696.

The 2nd And 3rd Defendants Submissions

10. The 2nd and 3rd Defendants filed their submissions dated 6th February 2025. On their behalf, Counsel submitted that the main issue for determination is whether the preliminary objection is merited. Counsel further submitted that the Plaintiff's suit is statute barred by dint of Section 4(1) of the *Limitation of Actions Act* as it was filed 6 years after the contract it is based on had lapsed. Based on the foregoing, Counsel contended that the court lacks jurisdiction to hear and determine this matter.



11. To buttress his submissions, Counsel relied on the following authorities:-
 - a) John Omollo Nyakongo t/a H.R Ganijee & Sons v Kenya Power & Lighting Co. Ltd [2022] eKLR,
 - b. Equity Bank Limited v Bruce Mutie Mutuku T/A Diani Tour & Travel [2016] eKLR,
 - c. Provincial construction Co. Ltd v Attorney General on Behalf of the Ministry of Health [2017] KEHC 10045(KLR)
 - d. Phoenix of E.A Assurance Company Limited v S.M Thiga t/a Newspaper Service [2019] eKLR.

The Plaintiff's Submissions

12. The Plaintiff filed his submissions dated 13th February 2025.
13. On his behalf, Counsel identified the following issues for the court's determination:-
 - i. Whether the threshold to raise a preliminary objection has been met?
 - ii. Whether the Plaintiff's suit is time barred by dint of Section 7 of the *Limitation of Actions Act*.
14. Counsel submitted that the Preliminary Objection is derived from the Plaintiff's averment that he entered into a sale agreement with the Interested Party for the purchase of the suit property in the year 2009 which is merely a seriatim description of the events giving rise to the present suit. Counsel argued that the description of the events does not in any way imply that the cause of action arose in the year 2009.
15. Counsel further submitted that the question of limitation does not arise because he has not sued the Interested Party for an order of specific performance. Counsel contended that the 1st Defendant averred in his defence that he had paid for and was allocated the suit property by the 2nd Defendant in February 2024. From the foregoing, Counsel argued that the cause of action arose in February 2024 when the 1st Defendant trespassed on the suit property.
16. Counsel submitted that the issue of when the cause of action arose is based on facts which must be ascertained by way of evidence. Concluding his submissions, Counsel urged the court to determine the dispute on merit so as to ascertain the issue of ownership. Finally, Counsel urged the court to dismiss the preliminary objection with costs to the Plaintiff.

Analysis And Determination

17. Having considered the Preliminary Objection and the rival submissions, the only issue that arises for determination is whether the preliminary objection is merited.
18. The law on preliminary objection is well settled. A preliminary objection must be on a pure point of law. In *Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd* (1969) EA 696, Law JA stated;

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



19. In *Oraro Vs Mbaja* 2005 eKLR Ojwang J (as he then was) described it as follows: -

“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. An assertion which claims to be a Preliminary Objection and yet it hears 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 the Court should allow to proceed.”

20. The 1st Defendant’s Preliminary Objection is based on the grounds that the Plaintiff’s suit is statute barred.

21. The question of whether or not the Plaintiff’s suit is statute barred on account of limitation goes to the jurisdiction of this court to entertain this suit. If the suit is statute barred on account of limitation then the Court lacks jurisdiction to entertain the same.

22. The Preliminary Objection is on a point of law and the Court is satisfied that it has been properly and validly taken.

23. The 1st Defendant contended that the Plaintiff’s suit offends the provisions of Section 7 of the *Civil Procedure Act*.

24. Section 7 of the *Civil Procedure Act* provides that;

“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.”

25. The object of the law of limitation was stated in the case of *Gathoni v Kenya Co-operative Creameries Ltd* (1982) KLR 104 where the Court of Appeal held that :-

“...The law on limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest”

26. Similarly in the case of *Rawal v Rawal* (1990) KLR 2 the Court held that:-

“The object of any limitation is to prevent a plaintiff from prosecuting stale claims on the one hand and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time.”

27. Further in the case of *Iga v Makerere University* (1972) EA the court held that:-

“A plaint which is barred by limitation is a plaint barred by law. Reading these Provisions together it 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 when a suit is time barred the court cannot grant the remedy or relief sought.”

28. The 1st Defendant contended that the cause of action herein arose on 9th September 2009 when the Plaintiff purchased the suit property from the Interested Party.



29. In the case of Edward Moonge Lengusuranga vs James Laniyara & Another (2019) eKLR the Court held that:-

“ A cause of action is a set of facts sufficient to justify a right to sue to obtain money, property or the enforcement of a right against another party. The term also refers to the legal theory upon which a plaintiff brings a suit.”

30. The 1st Defendant relied on paragraph 9 of the Plaint to submit that the Plaintiffs suit is statute barred by dint of Section 7 of the [Limitation of Actions Act](#). As rightly submitted by the Plaintiff, the Plaintiff is not seeking orders for specific performance of the contract. The orders sought in the Plaint will require ascertainment of facts by the parties herein.

31. From the foregoing, I find that the issue of whether the instant suit is statute barred will require ascertainment of facts which in my view falls outside the purview of a preliminary objection.

32. The upshot of the foregoing is that the Preliminary Objection dated 27th January 2025 is devoid of merit and the same is hereby dismissed with costs to the Plaintiff.

33. Having found that the Preliminary Objection is not merited, this court is called upon to exercise its inherent jurisdiction under Sections 1A, 3 and 3A of the Civil Procedure Rules to consider the Plaintiff's Notice of Motion application dated 9th June 2024.

34. The application is premised on the grounds appearing on its face together with the supporting affidavit of Abdisalam Haji sworn on even date.

The Applicant's Case

35. The Applicant averred that he is the beneficial owner of the suit property having purchased the same from the Interested Party on 15th September 2009. He further averred that the suit property was allocated to the Interested Party by the 2nd Respondent.

36. He deposed that in February 2024, the 1st Respondent forcefully removed his gate and took possession of the suit property where he unlawfully started constructing a permanent structure.

37. That he later learnt that the suit property was allocated to the 1st Respondent by the 2nd and 3rd Respondents in total disregard of the law and procedure. The Applicant contended that by the time the 1st Respondent forcefully took possession of the suit property, he had already paid the balance of the purchase price to the Interested Party herein.

38. The Applicant is apprehensive that he will suffer irreparable damage which cannot be compensated if the eviction orders are not granted against the Defendants. In conclusion, the Applicant urged the court to allow the application as prayed.

The 1st Respondent's Case

39. The 1st Respondent opposed the application vide his replying affidavit sworn on 20th January 2025. He averred that on 20th January 2024, the 2nd Defendant ran a public Notice on national dailies notifying its customers and the general public of the status of issuance of Titles for Tassia 1 & 11 Embakasi. He averred that the notice stated that any parcels not paid for at the conclusion of the said Notice would be disposed of.



40. He further averred that he inquired about the availability of the plots that would be disposed of by the 2nd Defendant. That the suit property was amongst the plots that were available. That he offered and purchased the suit property from the 2nd Defendant for Kshs. 529, 946/=.
41. That after fulfilling the requirements set forth by the 2nd Respondent, he was issued with a letter dated 27th February 2024 confirming his ownership of the suit property. He further averred that he was issued with a certificate of verification of the suit by the 2nd Defendant as well as a beacon certificate. He maintained that he is in possession of the suit property and has put up a residential house which is at the verge of completion. The 1st Respondent contended that he will suffer irreparable damages if the orders sought are granted.

The 2nd And 3rd Respondents Case

42. The 2nd and 3rd Respondents opposed the application through the replying affidavit of Enos Cheron, IC-TPS of the 2nd Defendant.
43. The deponent averred that following comprehensive consultations between the 2nd Defendant and the Government through the Minister for Labour, the Office of the President and local leaders, the Board of Trustees agreed to sell over 5,500 plots to squatters/grabbers on a cash basis.
44. He further averred that the Interested Party was one such purchaser who acquired a plot from the grabbers/group leader in the year 2001. That she applied for registration of the suit property and was initially registered in the year 2009 subject to paying cash upfront but to date, she has only paid Kshs. 240,000/=.
45. He went on to state that several notices to all grabbers /invaders were placed in the Daily Nation Newspaper on 25th August 2005 and on January 2006 requiring them to register with the 2nd Defendant and make full payments immediately. That additional notices were issued on 30th May 2013 giving a 30 days' notice and on 2nd November 2023 giving a 90 days' notice.
46. That despite having been issued with the said notices, the Interested party failed to comply and was subsequently issued with a repossession notice of 37 days on 3rd May 2013 and another notice for a further 90 days on 10th February 2021.
47. The deponent explained that the 2nd Respondent has embarked on processing titles for all the fully paid plots in order to exit the scheme by 2024 thus all plot owners were required to clear the purchase price in full, together with land rent/rates. He asserted that the 2nd Defendant was within its right to repossess the suit property on account of failure by the Interested Party to pay for the same.
48. He deposed that the 1st Defendant is in possession of the suit property and has been issued with a letter of completion together with a beacon certificate. He averred that the Plaintiff is a stranger to the 2nd Respondent since he does not appear in their records. He further averred that the Plaintiff has never applied to be registered on the suit property nor paid for the same.

Analysis And Determination

49. I have considered the application and the affidavits in support and in opposition to the application; the only issue that arises for determination is whether the Applicant has met the threshold for the grant of a conservatory order in the nature of an injunction. The principles applicable in an application for an injunction were laid down in the celebrated case of *Giella vs Cassman Brown & Co Ltd* 1973 EA 358 as follows.



- a. First the applicant must show a prima facie case with a probability of success.
 - b. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.
 - c. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
50. The first issue for determination is whether the Applicant has established a prima facie case with a probability of success.

A prima facie case was defined by the Court of Appeal in *Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others* (2003) eKLR as follows;

“a prima facie case in a civil application includes but is not confined to a genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

51. It is not in dispute that Plaintiff and the 1st Respondent are claiming ownership over the suit property. The Applicant’s claim is anchored on the sale agreement dated 15th September 2009 between him and the Interested Party, a bundle of receipts issued by the 2nd Defendants and a letter of confirmation of ownership issued by the same entity while the 1st Defendant claim is based on the sale agreement and certificate of verification issued by the 2nd Defendant.
52. In the case of *Mbuthia Vs Jimba credit Corporation Ltd* 988 KLR 1, the court held that;
- “In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases.”
53. Similarly, in the case of *Edwin Kamau Muniu Vs Barclays Bank of Kenya Ltd nairobi HCCC No. 1118 of 2002*, the court held that:-
- “In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”
54. At the interlocutory stage, the court is not required to make final findings on the contested matters. The issues of ownership and sale can only be determined in a full trial where the parties will have an opportunity to call evidence and have the same challenged by way of cross examination.
55. On the basis of the material that is on record, I find that the Applicant has not established a prima facie case with a probability of success.
56. In an application for interlocutory injunction, the Applicant has to satisfy the three conditions before an injunction is granted.
57. In the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal stated as follows: -

“...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages



are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.

58. Having found that the Applicant has failed to establish a prima facie case with a probability of success, it will be immaterial to delve into the other limbs that are to be considered on grant of a temporary injunction.

59. In so finding, I am persuaded by the holding in the case of Commercial Finance Co. Ltd vs Afraha Education Society & Others C A Civil Appeal No. 142 of 1999 where the court held that:-

“.....the judge should address himself sequentially on the conditions for granting an injunction instead of proceeding straight away to address himself on the third condition because where the Applicant has no registered interest in the land comprised in the title dispute and thereof has not demonstrated that it has a prima facie case with a probability of success no interlocutory injunction would be available.”

60. The upshot of the foregoing is that the application dated 9th June 2024 is devoid of merit and the same is hereby dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 26TH DAY OF MARCH, 2025.

.....

T. MURIGI

JUDGE

In The Presence Of:

Wesonga for the 1st Respondent.

Court assistant: Hilda

