



REPUBLIC OF KENYA



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**Nzioka v Muasya & another (Environment and Land Appeal
E050 of 2021) [2024] KEELC 6594 (KLR) (8 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6594 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E050 OF 2021
CA OCHIENG, J
OCTOBER 8, 2024**

BETWEEN

ESTHER NZULA NZIOKA APPELLANT

AND

MICHAEL MUSYIMI MUASYA 1ST RESPONDENT

SAMUEL THEURI KIVONDO 2ND RESPONDENT

*(Being an Appeal from the Judgment of Machakos Chief Magistrate's
Court in ELC Case No. 26 of 2020 (formerly HCC ELC No. 134 of
2018) delivered on 30th January, 2021 by Hon. M.A. Otindo (PM))*

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated the December 8, 2021 the Appellant appealed against the Judgment delivered by Hon. Mary Otindo (PM). The genesis of this Appeal is the Judgment in the Chief Magistrate's Court at Machakos in Civil Suit No. 26 of 2020 by the Hon. Mary Otindo PM, delivered on January 30, 2021 where the trial court proceeded to strike out the Appellant (Plaintiff's) suit.
2. The Appellant being dissatisfied with the whole of the said Judgment filed a Memorandum of Appeal dated the December 8, 2021 which contains the following grounds: -
 1. That the Learned Magistrate misdirected herself and failed to hold that the time of cause of action starts running at the time of breach of terms of agreement and not the time of making the agreement.
 2. That the Learned Magistrate erred in Law and fact in considering the allegation in the defence which were not substantiated or proved at the Trial.



3. That the Learned Magistrate erred by considering and creating her own issues which were not before the Honourable Court.
4. That the Learned Magistrate misapprehended the Law seriously and exercised her discretion prejudicially by draconially striking out the Appellant suit.
5. That the Learned Magistrate erred by finding that the suit was filed on 2020 and not in 2018.
6. That the Learned Magistrate erred misapplied the Law and failed to consider the Appellant's case but instead considered the Respondents case which was not supported by evidence.
7. That the Learned Magistrate erred when he framed her own issues, addressed them without Appellant be given opportunity to respond to them.
8. That the Learned Magistrate erred by taking sides and argued or aided the case of Respondent at the disadvantage of the Appellant.

Reasons wherefore, the Appellant prays that the Lower Court Judgement made on November 30, 2021 be set aside forthwith with costs to the Appellant and Judgement be entered in favour of Appellant as prayed in the Plaint.

3. The Appeal was canvassed by way of written submissions.

Submissions

Appellant's Submissions

4. The Appellant in her submissions contended that the Learned Magistrate relied on an unproven Defence of the Defendants' dated the July 28, 2019 and July 17, 2019 respectively and struck off her suit on the ground that it was statute barred as it was filed nine (9) years after the Agreement which was entered on February 9, 2011. She argued that the Learned Magistrate erred when she started analyzing and relying on Defences and yet the Defendants never turned up to testify. To buttress her averments, she relied on the following decisions: *Bhogals Garage Ltd V Shukwinder Singh Jutley* purporting to trade as Sukako Transporters Ltd and or Sukako Ltd & 20 Others (2017) eKLR; *Mokama Tea Factory Co. Ltd v Joshua Nyakovi* (2015) eKLR; *Thomas Kibe & 14 Others v KPA* (2011) eKLR; *Edward Munga (through) Stanley Muriga D Schulter* Civil Appeal No. 33 of 1997 and *CMC Aviation Ltd v Crusalr Ltd* (No.1) (1987) eKLR 103.

Respondents' Submissions

5. The 2nd Respondent in his submissions contended that the Appellant (Plaintiff) did not state when the cause of action arose. He argued that the contract giving rise to the suit in the lower court was entered into on February 9, 2011 and did not give timelines as to when the obligations created by the said contract were to be performed by either party. Further, that the implication of this, was that the obligations created by the contract were to be performed upon execution of the agreement. He insisted that it was therefore only logical that the only interpretation that could be given to the said contract by the trial court is that the cause of action arose on February 9, 2011 when the contract was drawn. He submitted that parties are bound by their pleadings and a cause of action can only be inferred from the said pleadings. He reiterated that the cause of action in the pleadings before the trial court arose on February 9, 2011 when the contract was drawn and expired on February 9, 2017. Further, that the suit was filed on July 5, 2018, more than one year after it became time barred. He further submitted that the Appellant has however not brought forth any evidence as to when the alleged breach of the contract occurred. He also submitted that the Respondents (Defendants) having entered appearance,



filed Defences and statements; those pleadings formed part of the court record and the court could not entirely ignore them and more so, if issues of law had been raised. Further, that in making her Judgment the Learned Magistrate did peruse the Defence filed by the Respondents (Defendants) and because the 1st Respondent (Defendant) had raised issues of law (limitation of time), the Learned Magistrate was alive to that fact and that she was bound to make a determination on that point of law. He reaffirmed that the Learned Magistrate was within her legal mandate to consider any issues of law arising from the pleadings before her and cannot be said to have created her own issues in rendering her well-reasoned Judgment. He further insisted that he is a *bona fide* purchaser for value of the property, subject to Share No. NROO63 within Ngelani Ranching Unity. To buttress his averments, he relied on the following decisions: *Gathoni v Kenya Cooperative Creameries Ltd* (1982) KLR 104; *Iga vs. Makerere University* [1972] EA as was quoted in *Dennis Nyandu v Francis Aburi Oyaro* [2021] eKLR; *Mark Otanga Otiende v Dennis Oduor Aduol* [2021] eKLR; *Michael Benhardt Otieno v National Cereals & Produce Board* (2017) eKLR; *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another* [2015] eKLR; *Lawrence Mukiri v Attorney General & 4 Others* [2013] eKLR and *Weston Gitonga & 10 others Vs Peter Rugu Gikanga & another* [2017] eKLR.

Analysis and Determination

6. Upon consideration of the Memorandum of Appeal, Record of Appeal and rivalling submissions, the following are the issues for determination:-
 - a. Whether the Appellant's claim in the Lower Court was statute barred.
 - b. Whether the Appeal is merited.As to whether the Appellant's Claim in the Lower Court was statute barred.
7. The Appellant who was the Plaintiff filed her Complaint dated the July 5, 2018 where she sought the following Orders:-
 - a. That the Honourable Court do Order the 1st Defendant to transfer 19 acres together with a commercial plot comprised in Share Certificate No. NR0063 situated at Ngelani Ranching Unity to the Plaintiff. In default the Executive Officer of this Honourable Court do sign all relevant documents to facilitate transfer of the said interest to the Plaintiff.
 - b. That the Honourable Court do Order and direct the 2nd Defendant to pay the Plaintiff Kshs. 9,380,000/= plus interest being balance of purchase price of 17 acres of land that he bought from the Plaintiff.
 - c. Costs of this suit.
8. The trial Magistrate after considering the Appellant's claim, struck it out on the grounds that it was filed without leave as the limitation period for filing a suit on contract had lapsed. This is what forms the crux of the Appeal.
9. The key issue this court needs to decipher is whether the fulcrum of the dispute herein revolved around a contract or a claim for land. On perusal of the pleadings and proceedings in the lower court, I note the Appellant at paragraph 6 of the Complaint, stated that they jointly owned Share No. NR 0063 Ngelani Ranching Unity, with the 1st Defendant which Share was registered in the name of the 1st Defendant. Further, she claimed seventeen (17) acres of land comprised in the said Share including all interest contained therein. At paragraph 8 of the Complaint, the Appellant stated that the parties therein had reached an agreement on how to distribute proceeds from the said Share, whereby the Plaintiff (Appellant)'s share of 17 acres was to be sold and she was to be paid a proportional amount, which was



- reduced to an agreement dated the February 9, 2011. Further, that the remainder was to be transferred to her after the title deed had been issued. She contended that the 1st Respondent (1st Defendant) failed to transfer her portion to her and also give her part of the purchase price.
10. The Respondents (Defendants) in their Defences opposed the suit by insisting that the 2nd Respondent legally acquired a portion of the suit land from the 1st Respondent. They disputed that the Plaintiff (Appellant) and 1st Defendant (Respondent) jointly owned the aforementioned share. Further, that the 1st Respondent in his Defence contended that the suit was statute barred.
 11. The suit proceeded for hearing but it is only the Appellant who presented her case after which the trial Magistrate proceeded to strike it out on the ground that it was statute barred.
 12. On a claim on contract or tort, Section 4(1) of the [Limitation of Actions Act](#) stipulates thus:-
 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....”
 13. On a claim for land, Section 19(1) of the [Limitation of Actions Act](#) provides that:-

“Actions to recover mortgage money or proceeds of sale of land (1) An action may not be brought to recover a principal sum of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land, after the end of twelve years from the date when the right to receive the money accrued.”
 14. While Section 7 of the [Limitation of Actions 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.”
 15. I note there was an Agreement dated the February 9, 2011 between the Appellant and the 1st Respondent which was produced as an exhibit. At Clause 1 to 3 of the said Agreement, the parties agreed as follows:-
 1. The 1st Party is the registered shareholder vide certificate Number NR 0063 of and in undertaking known as Ngelani Ranching Unity. (2) The interest in the said shareholding comprises:- a) Sixty six and one quarter (66¼) (b) One (1) Commercial Plot. (c) Six (6) acres on the river frontage. (3) Both parties have agreed to reach into a settlement of their respective shares.”
 16. From this excerpt, it is clear the dispute in the lower court revolved around Share of NR 0063 Ngelani Ranching Unity. Further, the Ownership Certificate where the suit land emanated from is dated the 4th February, 2009. From the court record, I note the suit in the lower court was filed on 5th July, 2018.
 17. In the case of [Justus Tureti Obara vs Peter Koipeitai](#) [2014] eKLR Okong’o J held that:-

“I am in agreement with the Plaintiff’s submission that the Plaintiff’s claim is for the recovery of the suit property from the Defendant and as such the limitation period for such a claim is 12 years as provided for in section 7 of the [Limitation of Actions Act](#), Cap. 22, Laws of Kenya. I would wish to point out further that the Plaintiff’s case although for recovery of land is based on fraud. The proviso to section 26 (a) of the [Limitation of Actions Act](#), Cap.



22, Laws of Kenya provides that where an action is based on the fraud of the Defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the Defendant is a matter to be ascertained at the trial.”

18. Based on my analysis above while relying on the legal provisions I have quoted including the decision cited, I find that the claim in the lower court was both for land and monies received. I beg to disagree with the 2nd Respondent that the trial Magistrate was correct in holding that the suit was statute barred since the claim was based on contract. Further, that the trial Magistrate was correct in relying on their Defence. It is my considered view that there is glaring evidence that twelve (12) years had not lapsed, since the cause of action arose. In this instance, I opine that the Learned Magistrate erred in striking out the suit in the Lower Court as the claim therein was for land including monies. It is trite that pleadings alone do not suffice, but a party has to prove their claim through viva voce evidence. I note the Defendants despite filing their Statement of Defence failed to attend court to tender evidence to prove the averments therein. Section 107 of the Evidence Act provides that:-

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

19. See the decision of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002, where Lesiit, J. (as she then was), while favourably citing the case of Avtar Singh Bambra and Another vs. Raju Govindji, HCCC No. 548 of 1998.

20. I opine that since the Respondents (Defendants) failed to controvert the Appellant (Plaintiff)’s averments through *viva voce* evidence, the said Claim remained unchallenged. It was hence improper for the Learned Magistrate to rely on their Statements of Defences.

21. In the foregoing, I find that the Learned Magistrate misdirected herself and failed to hold that the time the cause of action arose, was when there was a breach of terms of agreement and not the time of making the impugned agreement.

22. In the circumstances, I find the Appeal merited and will allow it. I will proceed to set aside the Judgment delivered by Hon. Mary Otindo (PM) Chief Magistrate’s Court at Machakos in Civil Suit No. 26 of 2020 on January 30, 2021.

23. I direct that the Machakos Chief Magistrate’s Court Civil Suit No. 26 of 2020 be set down for hearing on merit before a different Magistrate.

24. The Appellant will have the costs of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 8TH DAY OF OCTOBER, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Tamata for Appellant

Ms. Gichuki for Respondent

Court Assistant – Simon/Ashley

