



**Joseph (Suing as the Personal Representative of the Late Kuuro Arap Tapkeron - Deceased)
v Oldoinyo Orok Vocational Training Centre & 10 others (Environment and Land
Case Civil Suit E013 of 2022) [2023] KEELC 16977 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16977 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND CASE CIVIL SUIT E013 OF 2022
EM WASHE, J
APRIL 25, 2023**

BETWEEN

**RONO JOSEPH (SUING AS THE PERSONAL REPRESENTATIVE OF THE
LATE KUURO ARAP TAPKERON - DECEASED) PLAINTIFF**

AND

**OLDOINYO OROK VOCATIONAL TRAINING CENTRE 1ST DEFENDANT
COUNTY GOVERNMENT OF NAROK 2ND DEFENDANT
CHAIRMAN, WORLD FOOD PROGRAMME 3RD DEFENDANT
DAVID TERER 4TH DEFENDANT
ALICE OSORO 5TH DEFENDANT
JOSEPH KIMETO 6TH DEFENDANT
SAMWEL KIVILE KIRUI 7TH DEFENDANT
BENARD KIRUI 8TH DEFENDANT
PAUL RUTO 9TH DEFENDANT
ROP WESLEY 10TH DEFENDANT
LAND REGISTRAR- NAROK COUNTY 11TH DEFENDANT**

RULING

1. The 1st to 10th Defendants (hereinafter referred to as “the Applicants”) filed a Preliminary Objection dated January 30, 2023 (hereinafter referred to as “the present PO”) against the Plaintiff’s (hereinafter



referred to as “the Respondent”) seeking for the Plaint dated October 18, 2022 (hereinafter referred to as “the present suit”) to be struck out for the following grounds; -

- i. This Court lacks jurisdiction to hear and determine this suit by virtue of the cause of action being time barred having been filed after the lapse of the statutory period as set out in Section 4 and 7 of the *Limitation of Actions Act*.
 - ii. The suit is incompetent, bad in law and that the same should be struck out with costs to the Defendants/Applicants.
 - iii. The suit as drawn and filed is incompetent and fatally defective and therefore it should be struck out.
 - iv. That the suit against the Defendant should be dismissed with costs to the Defendants.
2. The present PO was served on the Respondent and the Court directed that it should be canvassed by way of written submissions.
 3. The Applicants duly filed their submissions but the Respondent failed to fill any submissions despite service of the Applicants submissions.
 4. The issues for determination in the present PO can be summarised as follows; -
Issue No 1- Is the applicants preliminary objection dated January 30, 2023 merited?
Issue No 2 - Who bears the costs of this application?
 5. The Honourable Court having identified the said issues for determination, it shall now proceed to look at the facts thereof and make its conclusions thereof.

Issue No 1- Is the cause of action in the present suit time barred?

6. The Respondent in the present PO filed this present suit against the Applicants herein on the basis of fraud in the sub-division of the property known as LR No Transmara/Barigo/224 belonging to the Kuuro Arap Tapkeron who has since passed away.
7. The Respondent has pleaded that the late Kuuro Arap Tapkeron was the beneficial owner of the property known as LR No Transmara/Barigo/224 from way back in 1972 and the descendants thereof are still in occupation of the said property.
8. However, on or about November 22, 2022, the Respondent herein discovered through the Records held by the 11th Applicant that the 2nd Applicant caused the property known as LR No Transmara/Barigo/224 to be registered in its name and thereafter sub-divided it into the properties known as LR No Transmara/Barigo/253 and LR No Transmara/Barigo/254.
9. The new properties known as LR No Transmara/Barigo/253 and LR No Transmara/Barigo/254 have now been occupied and/or are in use by the other Applicants herein.
10. There is no Defence filed by the Defendants/Applicants herein so far save for the Grounds of Opposition dated January 30, 2023.
11. In the case of *David Nyekorach Matsanga & another v philip Waki & 3 others* (2017) eKLR, the Court reaffirmed the definition of a Preliminary Objection as follows; -

“We quickly turn to the question whether we have before us a Preliminary Objection proper. Traditionally, the case of Mukisa Biscuit Manufacturing Co Ltd v. West End Distributors



Ltd [1969] EA 696 has been the watershed as to what constitutes Preliminary Objections. The Court of Appeal in *Nitin Properties Ltd v. Singh Kalsi & another* [1995]eKLR also captured the legal principle when it stated as follows:

“A Preliminary Objection 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.”

12. The facts relied by any party who raises a Preliminary Objection must not be contested and/or seek the court’s evaluation and/or determination of issues therein.

13. In another case of *Avtar Signh Bhamra & another v Oriental Commercial Bank*, KSM HCCC No 53 of 2004, the Court made the following observation; -

“ A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

14. In the present PO, the Court observes that the Applicants have not filed any Defence thereof to the Plaint dated October 18, 2022.

15. The Applicants actions of filing the present PO even before filing their defence on the facts and issues raised in the Plaint dated October 18, 2022 is in the Honourable Court’s view pre-mature.

16. The reason is that a Defence usually directly responds to the facts and/or cause of action contained in the Plaint and gives a clear picture of what facts are admitted and/or contested.

17. The absence of a Defence or a substantive Response to a cause of action creates a situation where the Court is now required to determine a Preliminary Objection on facts pleaded by one party.

18. This Honourable Court cannot on its own motion assume that the facts the Respondent pleaded in the Plaint dated October 18, 2022 are admitted and/or not contested in the absence of a Defence on record.

19. In the case of *George Waweru Njuguna v Pauline Chesang Gitau Kamuyu* (2017) eKLR, the Court made the following Observation while dismissing a Preliminary Objection; -

“I am in agreement with the plaintiff that the issues raised by the defendant have been wrongly brought before the court by way of a preliminary objection. First, as I have stated earlier in this ruling, the defendant is yet to file a statement of defence to the plaintiff’s claim herein. It is clear from the cases cited above that a preliminary objection must arise expressly or by implication from the pleadings. I am of the view that in the absence of a defence on record by the defendant, the defendant’s preliminary objection has no basis”

20. In another case of *Kitao Rupande Partinarov Letesh Parkinaro & 4 others* (2021) eKLR, the Court also reiterated the above position as regards a Preliminary Objection being raised before the filing of a Defence; -

“Based on the facts as presented while associating myself with the decisions cited above, I find that the Defendants’ preliminary objection does not raise any points of law. Further, there are no pleadings filed to provide a basis for the same but requires the court to ascertain facts before it can be determined. At this juncture I find the Preliminary Objection premature.”



21. Lastly, in the case of *Unilever Tea Kenya Limited v Andrew Cheruiyot Rotich & 3 others* (2020) eKLR, the Court again held the following opinion; -

“I have considered the objection, rival submissions, and the pleadings already on record. From a procedural perspective, I think the 1st – 4th defendants made a tactical blunder in the manner they raised the objection. They have not filed a defence to the suit yet. The usual procedure when one is raising a point of law that may conclude a suit before trial is to file a defence first. In that defence, the point that forms the basis of the intended preliminary objection is raised. The intimation of intention to raise the point as a preliminary objection is expressed in the same defence. When the notice to raise the objection comes in later stage, it is not a surprise. The approach is good because it removes the element of surprise. It also serves to contextualize the objection within the defence.”

22. Based on the above authorities that this Honourable Court fully concurs with, it is the Honourable Court’s considered view that the present PO was raised pre-maturely before the close of pleadings herein and should not be granted as this stage.

Issue No 2 - Who bears the costs of this application?

23. The secondary issue in this present PO is the issue of costs.
24. Costs usually abide the outcome of the application and/or the suit.
25. Unfortunately, in the Present PO, the Plaintiff/Respondent did not file any submissions to oppose the same.
26. Consequently therefore, there will be no order as to costs for the present PO.

Conclusion

27. In conclusion therefore, the court hereby makes the following order as appertains the preliminary objection dated January 30, 2023; -
- A. The preliminary objection dated January 30, 2023 be and is hereby dismissed with on orders as to costs.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 25TH APRIL, 2023.

EMMANUEL M WASHE

JUDGE

In The Presence Of:

Court Assistant: Ngeno/mempe

Advocate For The Plaintiff: Mr. Gichana (n/a)

Advocate For The Defendant: Mr. Kiprotich For 1st & 10th Defendant/applicants

