



**Chege & another v Minis & 10 others (Environment & Land Case 10 of 2021) [2023] KEELC 18160 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18160 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENT & LAND CASE 10 OF 2021**

**EM WASHE, J**

**JUNE 15, 2023**

**BETWEEN**

**IGNATIUS MWANGI CHEGE ..... 1<sup>ST</sup> PLAINTIFF**

**SAMSON MPATIANI RINKA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ADASON OLE MINIS ..... 1<sup>ST</sup> DEFENDANT**

**OLE NANYOIKE LEMAYIAN ONYOKIE ..... 2<sup>ND</sup> DEFENDANT**

**SHIROI KIMOKOTHO OLE NASHA ..... 3<sup>RD</sup> DEFENDANT**

**MPOKE MATASI ..... 4<sup>TH</sup> DEFENDANT**

**SAMSON MPATIAN RINKA ..... 5<sup>TH</sup> DEFENDANT**

**AHAMED SALIM ..... 6<sup>TH</sup> DEFENDANT**

**COUNTY GOVERNMENT OF NAROK ..... 7<sup>TH</sup> DEFENDANT**

**IGNATIUS CHEGE MWANGI ..... 8<sup>TH</sup> DEFENDANT**

**TRANSMARA WEST ..... 9<sup>TH</sup> DEFENDANT**

**TRANSMARA WEST ..... 10<sup>TH</sup> DEFENDANT**

**MARY MERENE SIPARO ..... 11<sup>TH</sup> DEFENDANT**

**RULING**

1. The 4<sup>th</sup> Defendant in the Counter- Claim known as Mary Merene Siparo (hereinafter referred to as “the applicant”) has raised a preliminary objection dated February 2, 2023 (hereinafter referred to as



“the present P.O”) seeking for the Counter-claim by Samson Mpatiani Rinka (hereinafter referred to as “the Respondent”) to be dismissed for the following grounds; -

- i. This court lacks jurisdiction to hear and determine this Counter-Claim 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 Counter-Claim is incompetent, bad in law and that the same should be struck out with costs to the defendant/applicant.
  - iii. The Counter-Claim as drawn and filed is incompetent and fatally defective and therefore it should be struck.
  - iv. The Counter-Claim is tantamount to trifling with the court and is an abuse of the process of this honourable court.
  - v. That the Counter-Claim against the defendant should be dismissed with costs to the 4<sup>th</sup> defendant.
2. The present P.O was served upon the respondent herein and the honourable court directed that it be canvassed by way of written submissions.
  3. The applicant filed her submissions on the February 17, 2023 and the respondent filed his submissions on the 28<sup>th</sup> of February 2023.
  4. The 1<sup>st</sup> defendant in the Counter-Claim also participated in the present P.O by filing a replying affidavit dated February 8, 2023 and his submission dated March 9, 2023.
  5. The honourable court has perused the present P.O and the submissions by the parties herein and identify the issues for determination as follows; -  
Issue No.1- Is The Counter-claim time barred by the provisions of section 4 and 7 of the [Limitation of Actions Act](#)?  
Issue No. 2- Is the present P.O Merited?  
Issue No. 3- Who bears the cost of the present P.O?
  6. This court having identified the issues for determination in the present P.O, the same will now be discussed and determined as below.

**Issue No.1- Is the Counter-claim time barred by the provisions of section 4 and 7 of the [Limitation of Actions Act](#)?**

7. The applicant in the Present P.O is seeking to have the respondent’s suit contained in the Counter-Claim filed on the 18<sup>th</sup> of February 2023 be declared time barred by virtue of section 3 and 7 of the [Limitation of Actions act](#).
8. The applicant’s submission is that the cause of action filed by the respondent arose more than 12 years from the time of filing the said Counter-Claim.
9. A perusal of the pleadings in the court’s file confirms that the respondent actually filed a Counter-Claim against several defendants with the applicant being one of them.
10. Upon service of the Counter-Claim filed by the respondent herein, the Applicant filed the present P.O.



11. A further perusal of the court record confirms that the applicant in the present P.O has not filed any Defence to the Counter-Claim by the respondent.
12. In essence therefore, the respondent's cause of action and the facts surrounding it have not so far been disputed and/or affirmed by the applicant.
13. The 1<sup>st</sup> defendant in the Counter-Claim has also not filed any defence but tried to file a replying affidavit to the present P.O alleging various facts relating to the manner in which time computation should be undertaken by the honourable court.
14. The filing of replying affidavit against a preliminary objection is not a lawful practice as the facts giving rise to the preliminary objection ought to have been raised through the defence and/or reply to the substantive cause of an action.
15. In essence therefore, for this honourable court to be able to analyse and make a determination whether the cause of action in the Counter-Claim is time barred or not, it will require to analyse the facts presented by the Applicant and those presented by the Respondent to confirm that indeed, the time when the cause of action is presumed to have occurred is ascertained and thereafter calculate the stipulated period of 12 years as provided under the [Limitation of Actions Act](#).
16. In this present P.O, the applicant has not filed any defence in reply to the counter-claim and therefore the honourable court is not able to ascertain by way of facts when time should begin to run.
17. In the celebrated case of *Mukbisa Biscuits Manufacturing Limited v West End Distributors Ltd* (1969) EA 696, the Court observed as follows; -

“A preliminary Objection Is in the nature of what used to be called a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other sides are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

18. In the present P.O, the absence of a Defence makes it not possible for the Honourable Court to assume that all the facts pleaded by the other side to the Counter-Claim are correct and will now require the Honourable Court to exercise its judicial discretion to ascertain the facts surrounding the time period within which the cause of action arose.
19. Such an exercise in the Honourable Court's view is contrary to the intent and purpose of a Preliminary Objection and can only be deemed to be pre-mature.
20. In the case of [Unilever Tea Kenya Limited v Andrew Cheruiyot Rotich & 3 others](#) (2020) eKLR, the Court had an opportunity to discuss the issue of filing a Preliminary Objection before filing a Defence in the following manner; -

“I have considered the objection, rival submissions, and the pleadings already on record. From a procedural perspective, I think the 1<sup>st</sup> – 4<sup>th</sup> 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.”

21. In another authority known as *George Waweru Njuguna-versus- Pauline Chesang Gitau Kamuyu* (2017) eKLR, the Court was of a similar view and further observed as follows; -

“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”

22. This Court indeed agrees with the findings of the two cited authorities fully.

### **Issue No. 2- Is the Present P.O Merited?**

23. Based on the finding of this Honourable Court that indeed the present P.O is premature, then the prayer seeking to have the respondent’s cause of action declared time barred by way of a preliminary objection can not be granted and is pre-mature.

### **Issue No. 3- Who Bears The Cost Of The Present P.O?**

24. The rule of the thumb is that costs follow the event.
25. In the present P.O, the applicant has not been successful and will now bear the costs thereof.
26. In conclusion therefore, the honourable court hereby makes the following orders as appertaining the Preliminary Objection dated February 2, 2023; -

**A. The Preliminary Objection dated 2<sup>Nd</sup> February 2023 Be and is hereby Dismissed with costs to the respondent.**

**DATED, SIGNED & DELIVERED** Virtually in **KILGORIS ELC** Court on day of **15<sup>TH</sup> JUNE 2023.**

**EMMANUEL.M.WASHE**

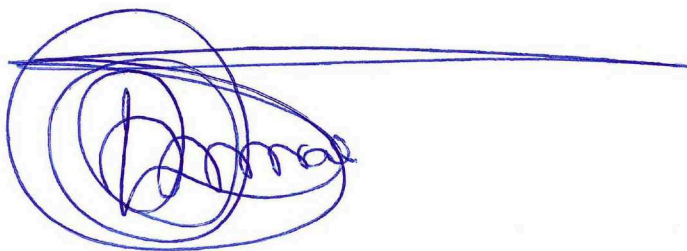
**JUDGE**

**IN THE PRESENCE OF:**

COURT ASSISTANT: NGENO/MEMPE

ADVOCATES FOR THE 4<sup>TH</sup> DEFENDANT/APPLICANT: MR. KIPROTICH

ADVOCATES FOR THE PLAINTIFF IN COUNTER-CLAIM/RESPONDENT: MS. PION



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