



**Mbae (Suing as the legal representative administrator of the Estate of Silas Judah Mbae (Deceased) & 2 others v Mwamba & 5 others; M'Arimi & another (Interested Parties) (Environment & Land Case 42 of 2018) [2023] KEELC 19966 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19966 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MERU**  
**ENVIRONMENT & LAND CASE 42 OF 2018**  
**CK NZILI, J**  
**SEPTEMBER 20, 2023**

**BETWEEN**

**KENNON MWITI MBAE (SUING AS THE LEGAL REPRESENTATIVE ADMINISTRATOR OF THE ESTATE OF SILAS JUDAH MBAE (DECEASED) ..... 1<sup>ST</sup> PLAINTIFF**  
**KENYA DEPOSITORY INSURANCE CORPORATION ..... 2<sup>ND</sup> PLAINTIFF**  
**KENYA FINANCE BANK LTD (IN LIQUIDATION) ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**ZAVERIO KIAMBI MWAMBA ..... 1<sup>ST</sup> DEFENDANT**  
**THE LAND REGISTRAR, IMENTI NORTH DISTRICT ..... 2<sup>ND</sup> DEFENDANT**  
**THE LAND SURVEYOR, IMENTI NORTH DISTRICT ..... 3<sup>RD</sup> DEFENDANT**  
**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**  
**CONSOLATA KANUNGO MWAMBA ..... 5<sup>TH</sup> DEFENDANT**  
**GREGORY KIMATHI MAMBA ..... 6<sup>TH</sup> DEFENDANT**

**AND**

**Z NYAMU M'ARIMI ..... INTERESTED PARTY**  
**FESTUS RIUNGU RIMBERE ..... INTERESTED PARTY**

**RULING**

1. When this suit came up for hearing on 23.5.2023, learned counsel Mr. Mwarania, advocate on record for the 1<sup>st</sup>, 5<sup>th</sup>, and 6<sup>th</sup> defendants, rose to argue a preliminary objection as appearing on paragraph 5 of



the 5<sup>th</sup> and 6<sup>th</sup> defendants' defense and counterclaim dated 14.11.2022 and a stand-alone preliminary objection dated 22.2.2023 seeking for the court to find the primary suit statutorily barred by dint of Sections 4 (4), 7, 16 and 19 of the [Limitation of Actions Act](#) (Cap 22).

2. Learned counsel argued that from the pleadings, the 1<sup>st</sup> plaintiff became the registered proprietor of the suit land on 2.12.1986 and that a loan was taken on 27.1.1987 as per the green card. Counsel submitted that all the while, the 2<sup>nd</sup> and 5<sup>th</sup> defendants have been in occupation of the suit premises to date. Counsel submitted that since the death of the late Silas Mbae, no action was taken to have him relinquish the land to him. Counsel submitted that the time limitation to seek eviction orders under Section 7 of the Limitations of Actions Act lapsed in 1998, and therefore, the 1<sup>st</sup> plaintiff was precluded from filing the suit for the recovery of the suit land.
3. Counsel submitted that the passing on of the deceased did not stop time from running under Section 16 of the said Act, and there was no time interruption. Counsel submitted that the 1<sup>st</sup> plaintiff seeking to recover both possession and ownership of land in 2018 was late by 20 years.
4. Regarding the 2<sup>nd</sup> plaintiff's claim, counsel submitted that the advancement of the money against the title was in January 1987, as per paragraph 9 of the further amended plaint dated 11.8.2020, since the charge was registered on 28.1.1987.
5. The 5<sup>th</sup> & and 6<sup>th</sup> defendants submitted that under Sections 18 and 19 of the [Limitation of Actions Act](#), an action to recover money secured out of a charge cannot be lodged after 12 years when it became due. Counsel submitted that the default occurred after the money owed was disbursed since the loanee never intended to repay the loan. Further, counsel submitted that efforts to recover the loan since 1988 have been in vain, as pleaded in the counterclaim in paragraph 13 of Meru HCC No. 275d of 1994, which was determined in March 1995 in favor of the 2<sup>nd</sup> plaintiff. Counsel submitted that the 2<sup>nd</sup> plaintiff never took any action to execute the judgment, and therefore, under Section 4 (4) of the [Limitation of Actions Act](#), both the original debt and the execution of the decree became time-barred after 12 years.
6. Counsel submitted that the effect of prosecuting this suit is to try to evade the law by introducing the matter as a new claim. Therefore, the 5<sup>th</sup> and 6<sup>th</sup> defendants urged the court to find the claim statutorily barred and proceed to strike it out with costs.
7. Leaned litigation counsel, Miss Mbaikyatta, appearing for the 2<sup>nd</sup> – 4<sup>th</sup> defendants, rose to support the preliminary objection and associated her submissions with those of the 5<sup>th</sup> and 6<sup>th</sup> defendants. Learned counsel Mr. Kiara Kimathi, advocate for the 1<sup>st</sup> and 2<sup>nd</sup> interested parties, similarly supported the preliminary objection and associated his submissions with Mr. Mwarania's advocate.
8. Rising to oppose the preliminary objection, Mr. Thangicia learned counsel appearing for the 1<sup>st</sup> plaintiff submitted that their preliminary objection was not a pure point of law as facts in the matter must be subjected and tested by the court through viva voce evidence. Learned counsel submitted that the 5<sup>th</sup> and 6<sup>th</sup> defendants' counsel was also on record for the 1<sup>st</sup> defendant since 8.11.2018, and has never filed a defence.
9. Learned counsel for the 1<sup>st</sup> plaintiff submitted that the suit was about a fraudulent and unlawful subdivision and transfer in 2018 out of collusion of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants and the 1<sup>st</sup> interested party. Further, counsel submitted that it was not lost that the 1<sup>st</sup> defendant was the registered owner of the suit land while the movers of the preliminary objection were a brother and son of the 1<sup>st</sup> defendant.
10. Counsel submitted that the issue of occupation on the land since the 1990s was neither here nor there. Counsel submitted that the mover of the preliminary objection had filed an adverse claim in suit No. 21



of 2019, which was dismissed by this court in 2021; hence, they had no basis to prove such occupation, which occupation, in any event, has to be tested by way of evidence after a full trial.

11. On the 2<sup>nd</sup> issue of occupation, learned counsel for the 1<sup>st</sup> plaintiff submitted that after the 1<sup>st</sup> plaintiff raised the issue to vacate the land as they had agreed in 2017 established while implementing the grant in 2018, that there were some unlawful transfers.
12. Similarly, counsel submitted that restraining orders of injunction against the 5<sup>th</sup> and 6<sup>th</sup> defendants issued in 2018 were yet to be challenged. Counsel, therefore, took the view that the preliminary objection was a calculated move to subvert the cause justice and the expeditious disposal of the suit, which has been customary of the 5<sup>th</sup> and 6<sup>th</sup> defendants every time the matter was listed, they have a way to raise an issue to derail the hearing.
13. Counsel urged the court to infer the motive since no preliminary objection was raised at the case conference. No wonder counsel submitted that the 1<sup>st</sup> & 2<sup>nd</sup> interested parties and the defendants supported the preliminary objection since they colluded in the illegal transfers and moreso, especially the 1<sup>st</sup> defendant and 1<sup>st</sup> interested party who face a criminal case over the fraudulent transfers. Counsel urged the court to find the preliminary objection as an afterthought.
14. Leah Cheptumo, learned counsel for the 2<sup>nd</sup> plaintiff, opposed the preliminary objection because the suit was not based on the recovery of the debt but was challenging the illegal transfer and an appropriation of the claimed land by the 1<sup>st</sup> defendant. Counsel relied on Kathiaka vs. Muraguri Civil Appeal No. 7B of 2019, on the proposition that a preliminary objection should not be based on facts but on a pure point of law.
15. Counsel urged the court to find that there would be factual difficulties in determining the preliminary objection because of issues relating to the judgment in Meru H.C. No.275 of 1994, where the decision was yet to be executed as per pages 33 & 34 of the 2<sup>nd</sup> plaintiff's paginated bundle of documents, indicating that the execution of the decree was on course.
16. Counsel submitted that the debt stood as long as there was a legal charge a cause of action subsisted. Reliance was placed on Rajnikantkhetshi Shah vs. Habib Bank A.G Zurich (2016) eKLR.
17. The 2<sup>nd</sup> plaintiff submitted that this suit seeks to challenge the illegal transfer of the subject land, whose effects meant the merge was void.
18. In a rejoinder, Mr. Mwarania learned counsel for the 5<sup>th</sup> & 6<sup>th</sup> defendants while acknowledging that the 1<sup>st</sup> defendant had filed no defence and submitted that it was out of legal advice for his clients that the 1<sup>st</sup> defendant was not disputing the contents of the further amended plaint since he had acted against the interests of the family.
19. Learned counsel submitted that the issues before the court were not intertwined and that prayers No's (a), (c), (d) (e), and (f) of the amended plaint were offensive to Section 38 (a) of the Limitations of Actions Act, for they would go behind the doctrine of trusteeship. Regarding the 2<sup>nd</sup> plaintiff, counsel submitted that the prayers sought were trying to renew the status of the charge and its legality by way of a new course of action.
20. Counsel also submitted that the fact that he acted for the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants did not mean that their defenses were the same. On whether the originating summons was dismissed, counsel submitted that the adverse possession defense could simultaneously be used as a sword and shield. That notwithstanding, counsel submitted that the dismissal of the originating summons did not preclude the court from determining the issue of limitation.



21. On possession, counsel submitted that the 5<sup>th</sup> and 6<sup>th</sup> defendants did not require the originating summons to know whether there was possession since prayer (d) of the further amended plaint sought eviction orders. Regarding the case law in *Kithaka vs. Muraguri* (supra), counsel submitted that the 2<sup>nd</sup> plaintiff had admitted that a decree existed over the issue, and therefore, the question was, why come up with a new suit, yet there was an existing decree?
22. Counsel submitted that the 2<sup>nd</sup> plaintiff was trying to recover the debt twice from two different estates of Silas Mbai and Stephen M'Mwamba. Further counsel submitted that the 2<sup>nd</sup> plaintiff was attempting to renew and reinstate the charge, yet the decree awarded 100% of the debt, which was now stale.
23. On whether the charge was on and a new cause of action available, counsel submitted that the measure of running of time was from when the cause of action arose, and therefore, the failure to recover the loan within 12 years meant that it was no longer lawful to institute the suit, otherwise to do so would make the provisions of Sections 16 & 19 of the [Limitation of Actions act](#) superfluous.
24. In *Mukhisa Biscuit Manufacturing Co. Ltd vs West End distributors* (1969) E.A 696, the court held that a preliminary objection was like a demurrer raised as a pure point of law, which was argued on the assumption that all facts pleaded by the other side were correct. The court observed that it could not be raised if a fact had to be ascertained or if what was sought was the exercise of judicial discretion.
25. In *G4S Security Services (K) Ltd vs. Joseph Kamau & 468 others* (2018) eKLR, it was observed that the test to be applied in determining whether the preliminary objection met the threshold as in *Mukhisa* (supra) was whether the preliminary objection raised a pure point of law; that there was a demonstration that all the facts pleaded by the other side were correct and that there was no fact that needed to be ascertained.
26. In *G4S security* (supra), the basis of the preliminary objection was that the claims were time-barred since they had been filed three years after the causes of action had arisen. The court found the preliminary objection merited and overturned the dismissal by the trial court. In *Wavinya Ndeti vs. IEBC & others* (2014) eKLR, the court observed that law, like equity, serves the vigilant, not those who sleep.
27. Regarding the limitation on recovery of debt or loans, the court in *Rajnikantkhetshi* (supra) a suit for redemption of mortgaged property, was before the court. The court found the claim was not time-barred since the charger's equity of redemption had not been extinguished under the law. In *Nicholas Muhihu Murithi vs. Barclays Bank of Kenya Ltd* (2018), eKLR, at issue was the recovery of a debt secured by a mortgage and when the time for limitation could start running. The court observed that as per Section 19 (1) of the [limitation of Actions Act](#) the date of accrual of the debt was when the respondent sought to recover the amount through sale by public auction as 16.3.1999 and that the 12 years would start running from the said date. Regarding Section 23 (3) of the Act, on the extension of time, which has expired, the court observed that it could only be invoked if necessary. The court cited with approval *Afrofreight Forwarders Ltd vs. African Liner Agencies Civil Appeal No. 23 of 2007* that the suit was not time-barred based on the date of the acknowledgment of indebtedness by the debtor, which was within six years. Further, the court was guided by *Shire vs. Thabiti Finance Co Limited CA (Nrb) No. 761 (2000)* where it was held that every acknowledgment or part payment not only extends the limitation period but also revives an otherwise statute-barred action.
28. As to the execution of decrees in *Willis Onditi Odhiambo vs. Gateway Insurance* (2014) eKLR, the court observed that under Sections 4 (4), of the [Limitation of Actions Act](#), a judgment must be executed within 12 years. See *Danson Murithi Ayub vs. Evanson Mithamo Muroko* (2015) eKLR.



29. In *Richard Cheptige & another vs. KCB Ltd* (2017) eKLR, the court was faced with a situation where a charge had been registered in November 1989 against a loan of Kshs.70,000/=. Kshs.779,362/= had been repaid, but the bank was demanding Kshs.1.3 million. A suit was filed in 1994, and judgment was obtained at the Chief Magistrate Court in Nairobi. The judgment as delivered on 25.4.1994 had not been executed.
30. The applicants had filed a suit claiming that the defendants could not execute a judgment 18 years after the decree was issued which they termed as an immoral, unconscionable, and illegal loan. In response, the defendant had alleged that the account with the plaintiffs was an ongoing concern. On the question of execution of the decree after 12 years, the court observed that due to the delay to execute of 23 years, the judgment and the interest had suffered death by operation of the law.
31. Further, in *Pius Kimaiyo Langat vs Cooperative Bank of (Kenya) Ltd* (2017) eKLR, the issue was whether the claim was statute barred based on contract. The court cited with approval *Gathoni vs. KCC Ltd Civil Appeal No. 122 of 1981*, that the law on limitations was intended to protect defendants against unreasonable delay in bringing suit against them for the statute expects the intending litigant to exercise reasonable diligence and take appropriate steps in his interest. The court guided by *Divecon vs Samani* (1995 – 1998) E. A 48 observed that the limitation period could not be extended after the cause of action had accrued under Sections 4 (4) of the *Limitation of Actions Act*. As to what a cause of action is, the court said it was the factual situation that entitles one person to obtain a remedy against another person from the court. Further, the court cited with approval *Deposit Protection Fund Board in the liquidation of Euro Bank vs Rosaline Njeri Macharia & another* (2016) eKLR, on the factual and legal basis on when a cause of action accrues under Section 4 (4) of the Act.
32. Having set the law applicable, what then are the facts in this suit? The primary pleadings are the 1<sup>st</sup> plaintiff's amended plaint dated 1.4.2019; the 2<sup>nd</sup> plaintiff's further amended plaint dated 11.8.2020; the 2<sup>nd</sup> – 4<sup>th</sup> defendants' defence, the 5<sup>th</sup> and 6<sup>th</sup> defence and defence to counterclaim dated 15.3.2019, 2<sup>nd</sup> interested party defense and counterclaim dated 5.12.2019, the 1<sup>st</sup> plaintiff reply to defence and defence to counterclaim by the 1<sup>st</sup> plaintiff dated 16.1.2023.
33. In the amended plaint dated 1.4.2019, the 1<sup>st</sup> plaintiff, as the legal representative of the estate of Silas Judah Mbae, averred that he was the registered owner of L.R. No. Kirua/Naari/54 illegally subdivided into L.R. No's. Kiirua/Naari/5257, 5258, 5259, 5260, 5261, 5262, and 5263 yet the deceased died on 7.11.1996.
34. It was averred that on or about 7.3.2018, the defendants and the 1<sup>st</sup> interested party fraudulently and illegally caused the transfer of L.R. No. Kiirua/Naari/54 to the 1<sup>st</sup> defendant without the consent or knowledge of the 1<sup>st</sup> plaintiff and his family to deprive the said family of their land.
35. The 1<sup>st</sup> plaintiff sought invalidation of the 1<sup>st</sup> defendant's dealings with the suitland, cancellation of the title deed issued in the names of the 1<sup>st</sup> defendant and the resultant subdivisions so that the titles can revert to their original owner for purposes of estate administration, permanent injunction restraining the defendants from trespassing, entering into, subdividing, selling, leasing or in any way interfering with plaintiffs developments, possession or occupation and eviction of the defendants, their agents or servants or any person claiming under the 1<sup>st</sup> defendant.
36. The 2<sup>nd</sup> plaintiff, by a further amended plaint dated 11.8.2020, a financial institution under liquidation, averred that on 28.1.1987, the deceased acquired a loan facility of Kshs.90,000/= currently standing at Kshs.5,400,274.55/= as of 15.7.2020 with interest accruing at 15% per annum, monies advanced upon perfection of security instructions over L.R. No. Kiirua/Naari/54, used as collateral.



37. The 2<sup>nd</sup> plaintiff averred that the deceased defaulted in repaying the loan, and demands were issued, but no response was received after whose lapse the 2<sup>nd</sup> plaintiff exercised its statutory power of sale, until up to 2016 when it learned that the debtor had passed on way back on 1.11.1996.
38. The 2<sup>nd</sup> plaintiff averred that on 7.3.2018, the defendants and interested parties, in a conspiracy, fraudulently, unlawfully, illegally, and secretly caused the transfer of L.R. No. Kiirua/Naari/54 from the 1<sup>st</sup> defendant without the consent of the 1<sup>st</sup> plaintiff, yet a search yielded on 22.7.2016 showed that the deceased was the registered owner of the land charged to it, but a search for 28.5.2018 indicated that the entries of the charge to its favor had been unlawfully removed, following which a report was made to the Director of Criminal Investigations (CID).
39. The 2<sup>nd</sup> plaintiff termed the defendants' actions as aimed at depriving it and the 1<sup>st</sup> plaintiff's family off their legal interest in the suit land.
40. The 2<sup>nd</sup> plaintiff sought a declaration that the suit land belongs to the estate of the deceased, invalidation of any dealings, cancellation of the title deed issued to the 1<sup>st</sup> defendant and the resultant subdivisions, and the same to revert to the estate, permanent injunction and eviction of the defendants, agents or their agents, a declaration that the suit property was encumbered and lawfully charged to the 2<sup>nd</sup> plaintiff in the certificate of title of L.R. No. Kiirua/Naari/54.
41. In the statement of defense and counterclaim dated 2.11.2022, the 5<sup>th</sup> and 6<sup>th</sup> defendants claimed to be administrator's ad litem of the estate of the late Stephen Mwamba M'Ngare, the 1<sup>st</sup> registered owner of L.R. No. Kiirua/54. They denied the contents of the further amended plaint dated 18.1.2020 and termed the claim time-barred. Similarly, they alleged the existence of another suit namely Meru ELC No. 21 of 2019 (O.S.).
42. By way of counterclaim against the plaintiffs in the main suit and the 1<sup>st</sup> defendant, alleged that the deceased and his family, including themselves, had worked on the claimed land since 1965, which land the deceased used trickery, registered himself as the owner of the land, charged it with the 2<sup>nd</sup> defendant to the counterclaim, but refused to repay the loan, which in 1988, the 2<sup>nd</sup> defendant in the counterclaim attempted to realize the security but has been unable to do so date.
43. The plaintiff to the counterclaim averred that under provisions of Sections 19 (1) & (4) of the Limitation of Actions Act, both the principal sum and the interest were statutorily time-barred and that the charge against that parent suit land was unjustifiable. Further, the plaintiffs to the counterclaim averred that in August 1994, the 2<sup>nd</sup> defendant to the counterclaim sued the deceased for the recovery of both the principal sum and the interest and obtained a judgment in March 1995, which it failed to execute until the judgment debtor passed on on 7.11.1996. After that, the 2<sup>nd</sup> defendant to the counterclaim never sought to pursue the debt against the estate of the deceased, which decree had become stale by operation of the law.
44. Additionally, the 5<sup>th</sup> and 6<sup>th</sup> defendants averred that the 2<sup>nd</sup> plaintiff had no legally protectable right under the charge or late borrower's covenant to repay the loan by operations of law, which title should be discharged forthwith.
45. The 5<sup>th</sup> and 6<sup>th</sup> defendants averred that the cause of action arose in the Kiirua area within the jurisdiction of this court. The 5<sup>th</sup> and 6<sup>th</sup> defendant's counterclaim for:
  - a. Cancellation of the subdivision and reinstatement of the original title.
  - b. Discharge of the charge to the original title deed.



- c. Rectifying the register to the original title by canceling all entries to the proprietorship section to reinstate the deceased as the registered owner.
  - d. Lifting or removing all cautions, restrictions, inhibitions, prohibitions, charges, and any other encumbrance to the initial parcel and its resultant parcels of land.
  - e. Production of the original title deed.
46. The 5<sup>th</sup> and 6<sup>th</sup> defendant defense and counterclaim were accompanied by a list of documents dated 2.11.2022, among them a statement of Cecilia Nduku Nzioka on behalf of the 2<sup>nd</sup> plaintiff dated 30.11.2018 which mentioned that the late Stephen Mwamba M'Ngare had filed Civil Suit No. 162 of 1992, Criminal Case No. 647 of 1989, and later, in September 2004, acknowledged the indebtedness to the bank, leading to a possible proposal to settle the debt by letters dated 19.9.2016 and 22.8.2018. The said letters or negotiations were included or referred to in the 2<sup>nd</sup> plaintiff's supplementary list of documents dated 11.1.2023, especially the letter dated 16.8.2009 signed by Stephen Mwamba, Zaverio Kiambi, Cyprian Mwiti Sekundu and Gregory Kimathi.
47. In reply to the defense and defense to the counterclaim by the 2<sup>nd</sup> plaintiff dated 11.1.2023, in paragraphs 8,9 and 10, it stated that there was a negotiated settlement with the 1<sup>st</sup> plaintiff, which on the eve of clearing the agreed settlement sum, a discovery was made that the title to the land had fraudulently changed hands to the 1<sup>st</sup> defendant from the deceased. Further, the 2<sup>nd</sup> plaintiff averred that the charge and the debt subsisted; hence, the cause of action was not time-barred. Additionally, the 2<sup>nd</sup> plaintiff averred that the counterclaim was an admission of the existence of the charge of the land to it.
48. It is trite law that parties are bound by their pleadings, and through pleadings, parties set the agenda of trial before the court. Looking at the foregoing pleadings, several undisputed facts by the parties arise namely; that the initial suit land L.R. No. Kiirua/Naari/54 was initially owned by Silas Judah Mbae, deceased, who had charged it with the bank for a loan that remains uncleared to date. That the charge has been in existence with effect from 29.1.1987 in favor of the 2<sup>nd</sup> plaintiff; that the entry of the charge to the title document was removed under unexplained circumstances on 7.3.2018 under Succession Cause No. 192 of 2016, and the title deed changed into the name of the 1<sup>st</sup> defendant, who proceeded to subdivide and transfer the new parcels of land to third parties, among them the interested parties.
49. The 1<sup>st</sup> defendant has not disputed the contents of the two complaints by the 1<sup>st</sup> & 2<sup>nd</sup> plaintiffs, yet severe allegations of fraud and illegality have been made against him. He is also subject to Meru CMCC Cr. Case No's. 35/2019 and 624/19 going by the 1<sup>st</sup> plaintiffs list of documents dated 13.10.2019.
50. The 1<sup>st</sup> plaintiff has averred that the only grant issued for the deceased's estate was in Nairobi High Court Succession No. 825 of 2010 dated 16.11.2010 to the 1<sup>st</sup> plaintiff and not the 1<sup>st</sup> defendant as confirmed on 5.7.2011 and rectified on 12.4.2016.
51. The suit by the plaintiffs revolves around fraud, illegality, misrepresentation, and collusion. The main actors alleged to be architects and active participants are the 1<sup>st</sup> – 4<sup>th</sup> defendants and the interested parties now supporting the preliminary objection.
52. None of the supporters of the preliminary objection have denied that the cause of action arose on 7.3.2018, when the entry in the copy of records to the title register was removed and replaced based on Succession Cause No. 192 of 2016. The certificate of grant used has not been displayed by the 1<sup>st</sup> – 4<sup>th</sup> defendants and the 3<sup>rd</sup> interested party. No court order has been availed to show that an order was made to discharge or declare the charge invalid, void, and or ineffective in the succession grant.



53. The suit was filed on 23.10.2018 after discovering the alleged fraud, illegality, or collusion. The defendants and interested parties have not denied the illegality, fraud, or conspiracy. These are the undisputed facts in the suit. The issue of whether or not the charge, the debt, or the decree is statute-barred is secondary. A cause of action, as defined in the caselaw cited above, relates to a factual situation that gives a party a right to sue the other. The plaintiffs herein held the suit property based on a charge, whose rights are alleged to have been infringed by the defendants and the interested parties. This is what is before this court for determination. The preliminary objection does not amount to a pure point of law since the establishment of the facts and evidence can only be determined at the main hearing.
54. The upshot is that the preliminary objection dated 22.2.2023 lacks merits.
55. The same is dismissed with costs.
- Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON  
THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2023**

**HON. CK NZILI**

**ELC JUDGE**

In presence of

C.A Kananu/Mukami

Cheptumo for 2<sup>nd</sup> plaintiff

Kajuju for Thangicia for 1<sup>st</sup> plaintiff

Murira for Mwarania for 5<sup>th</sup> & 6<sup>th</sup> defendants

Maina for Mbaikyatta for 2<sup>nd</sup> & 3<sup>rd</sup> defendants

