



REPUBLIC OF KENYA



**Mohammed v Ocean View Limited & 2 others (Environment & Land  
Case 57 of 2022) [2025] KEELC 3463 (KLR) (25 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3463 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 57 OF 2022**

**LL NAIKUNI, J  
APRIL 25, 2025**

**BETWEEN**

**MOHAMMED YUSUF MOHAMMED ..... PLAINTIFF**

**AND**

**OCEAN VIEW LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**NYALI VIEW LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**NATIONAL BANK OF KENYA LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. Before this Honourable Court for its determination is the Preliminary objection raised by the National Bank of Kenya Limited, the 3<sup>rd</sup> Defendant herein dated 12<sup>th</sup> November, 2024 challenging the Plaintiff's suit.
2. As a matter of precedence, the Honourable Court directed that the objection be dealt with as a matter of priority.

**II. The Preliminary objection by the 3<sup>rd</sup> Defendant**

3. The 3<sup>rd</sup> Defendant brought an objection on the Plaintiff's suit on the following grounds:-
  - a. That the suit has been instituted before a Court that lacks the requisite jurisdiction to hear and determine the matter;
  - b. That the Cause (s) of action raised by the Plaintiff is barred by the Statute of Limitation.



### III. Submissions

4. On 7<sup>th</sup> February, 2025 while the Parties were present in Court, they were directed to have the Preliminary Objection dated 12<sup>th</sup> November, 2024 be disposed of by way of written submissions. By the time of penning down the Ruling, the Honourable Court was only able to access the written Submissions by the Plaintiff. Pursuant to that a ruling date was reserved and further deferred to 25<sup>th</sup> April, 2025 by Court accordingly.

#### A. The Written Submissions by the Plaintiff

5. The Plaintiff through the Law firm of Messrs. Oluga & Company Advocates filed their written submissions dated 6<sup>th</sup> December, 2024. Mr. Oluga Advocate submitted that the 3<sup>rd</sup> Defendant has raised a preliminary objection dated 12<sup>th</sup> November, 2024 on two grounds as follows:-

- a. The Court lacked jurisdiction.
- b. The suit is statute barred by limitation.

6. On whether the court lacked jurisdiction. The Learned Counsel submitted that before 2010, the High Court dealt with all land matters. However, when Kenyans promulgated *the Constitution* of Kenya in 2010, they resolutely and resoundingly resolved under the provision of Article 162 (2) (b) that all cases relating to use, occupation of and title to land be heard and determined by the Environment and Land Court (ELC). This case related to use, occupation of and title to land, namely, properties known as L.R NO. 2263 (original No.1674/1) and L.R NO.2264 (Original NO.1674/2). To support that fact, they referred the court to the averments contained in the following Paragraphs of the Plaintiff:

“5. On or about 29<sup>th</sup> September 2011, the Plaintiff and the 1<sup>st</sup> Defendant entered into a Joint Venture Agreement under which the 1<sup>st</sup> Defendant agreed to develop forty (40) housing units on the Plaintiff’s properties known as L.R NO. 2263 (Original No.1674/1) and L.R NO.2264 (Original NO.1674/2) (hereinafter jointly referred to as “the suit property”).

6. ....

7. ....

8. ....

9. Pending completion and handing over of the apartments due to the Plaintiff, it was agreed that the Plaintiff would retain 15% share of the suit property while 85% share thereof was to be transferred and registered in the name of the 2<sup>nd</sup> Defendant as commitment and security for the performance of the Joint Venture Agreement. Accordingly, on or about 16<sup>th</sup> March 2012, the Plaintiff transferred his 85% share of the suit property to the 2<sup>nd</sup> Defendant and retained 15% share thereof.

10. ..

11. Although the 1<sup>st</sup> and 2<sup>nd</sup> Defendants commenced construction of the housing units in partial fulfillment of their obligations under the Joint Venture Agreement, they deliberately failed, refused, declined and neglected to complete the construction within the agreed period of 24 months or at all.



12. Further, the units partially constructed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants failed to meet and/or conform to the agreed standards in terms of size (built up area), finishes, workmanship and general quality. The total built up area per unit in respect of the apartments due to the Plaintiff as partially constructed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is 2,337.34 square feet instead of 2,500 square feet which is what was agreed upon.
13. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants breached the terms of the Joint Venture Agreement and deliberately failed to discharge their obligations as agreed.

Particulars of breach of the joint venture agreement

- i. Failing, declining, neglecting and adamantly refusing to complete the construction of the project within 24 months as agreed and failing to complete the construction at all.
- ii. Failing, declining, neglecting and adamantly refusing to give and hand over to the Plaintiff the apartment units due to the Plaintiff as agreed.
- iii. Failing, declining, neglecting and adamantly refusing to pay to the Plaintiff the agreed amount of Kshs. 60,000.00 per month to cater for the Plaintiff's costs of alternative accommodation.
- iv. Failing to construct apartment units that meet and/or conform with the agreed standards in terms of size (built up area), finishes, workmanship and general quality.

...

22. Further, the Plaintiff avers that since the Joint Venture Agreement collapsed as a consequence of the Defendants' actions as pleaded herein, the Plaintiff is entitled to a reversal and retransfer of the 85% share of the suit property held by the 2<sup>nd</sup> Defendant back to the Plaintiff."

7. From the paragraphs of the Plaintiff highlighted above, it was clear that the Plaintiff's case related to use, occupation of and title to the suit properties in the following sense:
  - i. The case was about a Joint Venture Agreement to develop forty (40) housing units on the Plaintiff's properties (use of the suit property by developing apartments thereon). See paragraph 6 of the Plaintiff as highlighted above.
  - ii. The Plaintiff retained 15% share of the suit property while 85% share thereof was transferred and registered in the name of the 2<sup>nd</sup> Defendant pursuant to the Joint Venture Agreement (title to the suit property exchanged hands where the Plaintiff surrendered 85% ownership to the 2<sup>nd</sup> Defendant). See paragraph 9 of the Plaintiff as highlighted above.
  - iii. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants deliberately failed, refused, declined and neglected to complete the construction forty (40) housing units within the agreed period of 24 months or at all (the agreed use of the suit property was not undertaken as intended). See paragraph 11 of the Plaintiff as highlighted above.
  - iv. The units partially constructed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants failed to meet and/or conform to the agreed standards in terms of size (built up area), finishes, workmanship and general quality



(the intended use of the suit property was not undertaken as agreed). See Paragraph 12 of the Plaintiff as highlighted above.

- v. The particulars of breach were clearly itemized at Paragraph 13 of the Plaintiff. They include failure to complete the construction of the project (use of the land); failure to hand over to the Plaintiff the apartment units due to the Plaintiff as agreed (use and occupation of the apartment units as well as ownership (title) of the same); and failure to construct apartment units that meet and/or conform with the agreed standards (failure to use the land as agreed).
8. The Learned Counsel submitted that in addition to what was pleaded in the body of the Plaintiff, the prayers sought in the plaintiff clearly show that what is before court relates to use, occupation of and title to the suit properties. Just to highlight some of the prayers:
  7. Prayer 1 as follows:
    - “1. A declaration be and is hereby issued that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are in breach of the Joint Venture Agreement dated 29<sup>th</sup> September 2011 executed between the Plaintiff and the 1<sup>st</sup> Defendant and subsequently transferred to and taken over by the 2<sup>nd</sup> Defendant.”
  9. The breaches being complained about include the failure to use the suit properties by developing the same as agreed which was strictly a matter of use of the land. Prayer 8 as follows:
    - “8. An order of permanent injunction be and is hereby issued to restrain the Defendants jointly and severally from selling, further charging, transferring, occupying, developing, using or in any other manner dealing with the suit properties known as LR NO. 2263 (Original No.1674/1) and LR NO.2264 (Original No.1674/2) situated in Nyali, Mombasa County and the developments erected thereon.”
  10. In the above prayer 8, the Plaintiff is asking the court to restrain the Defendants from transferring (changing title/ownership), occupying (using), developing (using), using (use is expressly pleaded) or in any other manner dealing with the suit properties. That prayer directly relates to use of land and falls squarely within the jurisdiction of this court. The prayer could not be granted by the High Court.
  11. Prayer 9 as follows:-
    - “9. An order of mandatory injunction be and is hereby issued compelling the 2<sup>nd</sup> Defendant to retransfer to the Plaintiff 85% share of the properties known as LR NO. 2263 (Original No.1674/1) and LR NO.2264(Original No.1674/2) within 14 days of the date of this order in default of which the Deputy Registrar of this Honourable Court to execute and sign the transfer and all the necessary documents to facilitate the transfer of the 2<sup>nd</sup> Defendant's 85% share of the said properties to the Plaintiff and the Land Registrar Mombasa to rely on and use the transfer and documents so executed by the Deputy Registrar to effect registration and transfer of the said properties in favour of the Plaintiff.”
  12. In the above prayer 9, according to the Learned Counsel, the Plaintiff was asking the court to compel the 2<sup>nd</sup> Defendant to transfer back to the Plaintiff 85% shares of the suit property so that the Plaintiff could own the same at 100% as it was originally. That prayer directly touches on title of land and falls squarely within the jurisdiction of this court. The High Court had no jurisdiction to grant the same.



13. According to the Learned Counsel, the 3<sup>rd</sup> Defendant wanted this court to look at the case with a narrow lenses confined to breach of Joint Venture Agreement. The court must contextualize the context within which the breaches were pleaded which is use, development, occupation and title of the suit property. The Joint Venture Agreement was not just a commercial agreement. It gave right to the parties to exchange ownership (title). develop and occupy (use) the suit properties. The agreed use was development of apartments. The agreed title being the transfer by the Plaintiff to the 2<sup>nd</sup> Defendant of 85% ownership/shares. The Plaintiff was expressly asking the court to reverse the transfer in prayer 9 of the Plaint. In effect, the Plaintiff was asking the court to make a determination on whether the development of apartments (use) of the suit property as undertaken by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants conforms to what the parties agreed upon. Further, the Plaintiff was asking the court to make a determination on whom between the Plaintiff and the 2<sup>nd</sup> Defendant should hold the 85% shares of the suit properties. It was a question of use and ownership/title of the suit properties which the High Court cannot determine but ELC.
14. The Learned Counsel submitted that they had said enough to show that this suit relates to use, occupation of and title to the suit properties in the context of the Joint Venture Agreement and the relationship and dealings of the parties as clearly pleaded in the Plaint. The suit therefore falls squarely within the jurisdiction of this court under the provision of Article 162 (2) (b) of *the Constitution* of Kenya, 2010. Anybody who was suggesting otherwise was either deliberately misleading the court or had not read, understood and internalized the averments in the Plaint.
15. Further and in addition to the above, it was wrong for any person to suggest that commercial charge was not use of land. It was the intention of Kenyans when they gave unto themselves *the Constitution* of Kenya, 2010 was that all disputes relating to use of land should be handled by the ELC. Such use include charges and commercial leases. Anybody who suggested otherwise is going against the wish of Kenyans. The decision of the Court of Appeal in the case of “Co - operative Bank of Kenya Limited – Versus - Patrick Kangethe Njuguna & 5 Others [2017] eKLR” was made per in curium and the same goes against the wishes of Kenyans. It was a bad decision which should not be relied upon by any court of law. A per in curium decision could not bind this court. Thus, although this case clearly related to use, occupation and title of land and not purely commercial charge, even assuming that the case was purely about a charge, the right court with jurisdiction would still be the ELC. A charge was about use of land to obtain a loan. The charge may lead to change of ownership (title) of the land should the borrower default and the bank decides to sell the land to a third party. Therefore, a charge was all about use and ownership of land and it is very wrong to suggest that the ELC lacks jurisdiction to deal with disputes over charges.
16. The Learned Counsel urged this court to jealously guard its jurisdiction as donated by the provision of Article 162 (2) (b) of *the Constitution* of Kenya, 2010 and not to cede the same in the name of “commercial transactions.” Commercial transactions, if they relate to land, must be dealt with by ELC.
17. On whether the suit is statute barred by limitation. The Learned Counsel submitted that this was another hot air blown by the 3<sup>rd</sup> Defendant on the face of the court. The allegations by the 3<sup>rd</sup> Defendant that the cause of action arose on 30<sup>th</sup> September 2023 and that the Plaintiff ought to have filed this suit within six (6) years from that date clearly shows that the 3<sup>rd</sup> Defendant had not internalized what this case is all about. As they had shown, the Plaintiff was seeking to recover his land from the 3<sup>rd</sup> Defendant. That is why there is an express prayer that the 2<sup>nd</sup> Defendants to retransfer to the Plaintiff 85% shares in the suit properties (prayer 9). The suit also sought orders of injunction to restrain the Defendants from using, developing and occupying the suit properties (prayer 8). The



limitation for a case seeking to recover and protect land from interference is 12 years from the date of the alleged breach. It was not 6 years as the 3<sup>rd</sup> Defendant alleged.

18. Thus, even assuming that the cause of action arose on 30<sup>th</sup> September 2023, which it did not, this suit was filed on 25<sup>th</sup> May 2020 which was 9 years and therefore within 12 years. But the cause of action did not arise on 30<sup>th</sup> September 2023 as the 3<sup>rd</sup> Defendant misguidedly suggests. The 2<sup>nd</sup> Defendant was still holding 85% shares of the Plaintiff's properties. That specific cause of action was still continuing and on-going to date. A continuing injury cannot be statute-barred. It could not have a cut-off time of 30<sup>th</sup> September 2023.
19. Further, as can be seen at paragraph 10 of the Plaintiff, it was a term of the Joint Venture Agreement that the Plaintiff would be paid Kenya Shillings Sixty Thousand (Kshs. 60,000.00) per month for vacating the subject property which payment was to take care of the Plaintiff's costs of alternative accommodation. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants failed to pay to the Plaintiff the said amount. As at the date of filing the suit, the payment had accumulated to a sum of Kenya Shillings One Million Nine Twenty One Thousand Four and Nine Hundred and six cents (Kshs. 1,921,409.06/). The Plaintiff expressly pleaded that the payment "continues to accrue." That also another continuous injury. It could not be barred by limitation of statute.
20. According to the Learned Counsel, the 3<sup>rd</sup> Defendant wanted the court to only concentrate on the cause of action founded on the Joint Venture Agreement with a commercial contractual angle, without bearing in mind that the Joint Venture Agreement created rights of use, occupation and title over the suit land which is what the Plaintiff is agitating in this suit. Further the 3<sup>rd</sup> Defendant had deliberately overlooked the fact that the Plaintiff's suit is not based on the Joint Venture Agreement only. The Plaintiff had expressly pleaded that the Defendants illegally and fraudulently created a charge over the suit property without the Plaintiff's consent. That limb of the cause of action was based on fraud the particulars of which had been expressly pleaded.
21. The Learned Counsel argued that it was well settled that for a cause of action founded on fraud, time starts running from the time the fraud is discovered. This is pursuant to the proviso in the provision of Section 26 of the Limitation of Action Act, Cap. 22 which provides as follows:-

"Where, in the case of an action for which a period of limitation is prescribed, either-

- a. the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- b. the right of action is concealed by the fraud of any such person as aforesaid; or
- c. the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it

22. The date when the Plaintiff discovered the fraud was a matter of trial. It could not be determined in the preliminary objection. They sought refuge in the case of "Justus Tureti Obara – Versus - Peter Koipeitai Nengisoi [2014] eKLR" where Justice S. Okongo held as follows: -

"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. The Defendant's objection based on time bar also fails.”

23. They urged the court to leave the issue of when the Plaintiff discovered the fraudulent charge to the trial. If in doubt, they referred the court to the following averments at paragraphs 15 and 16 of the Plaintiff's witness statement:

“ 15. Sometime in November 2017, the Defendants approached me and suggested that the suit property be charged to raise funds to complete the project. Acting in good faith and eager to see the project completed./signed a charge dated 27<sup>th</sup> November 2017 to secure the funding.

16. The Defendants misrepresented to me that the property was being charged for the first time without disclosing to me that there was an earlier charge which the Defendants had created in 2014 without involving me and as a result of which the 3<sup>rd</sup> Defendant disbursed to the 2<sup>nd</sup> Defendant Kshs. 245,000,000.00. The 2017 charge was only intended to hoodwink me and to cure the illegality that the Defendants had committed by charging the suit property in 2014 without my knowledge and approval. In actual sense and true picture, no funds were disbursed pursuant to the 2017 charge

24. The foregoing clearly shows that as at November 2017, when he executed the 2017 charge, the Plaintiff was not aware of the existence of the 2014 charge. That meant that the Plaintiff came to know of the fraudulent the year 2014 charge after November 2017. The date when he knew of it would come out at the hearing. Even if one were to use November 2017 as the date when the Plaintiff got to know of the fraudulent 2014 charge, six years would lapse in November 2023 by which time this suit had already been filed on 22<sup>nd</sup> May 2022. But as we have stated, the exact date when the Plaintiff discovered the fraud will come out at the hearing and cannot be dealt with now.

25. In conclusion, the Learned Counsel stated that the preliminary objection was hopeless. It showed that the 3<sup>rd</sup> Defendant was trying so hard to prevent the court from dealing with the issues on merit. The filing of the same over two years after the case was filed speaks volumes. They had said enough to show that the 3<sup>rd</sup> Defendant' Preliminary Objection must be dismissed with costs.

#### **IV. Analysis and Determination**

26. I have considered the Notice of Preliminary Objection raised by the 3<sup>rd</sup> Defendant and the submissions herein and three (3) issues fall for determination in the Notice of Preliminary Objection as follows:-

- a. Whether the Preliminary objection raised meets the required Pre - requisite standards laid down by Precedents and Law?
- b. Whether the Notice of Preliminary objection is merited?
- c. Who bears the Costs of the Notice of Preliminary objection dated 12<sup>th</sup> November, 2024.



**Issue No. a). Whether the Preliminary objection raised meets the required Pre - requisite standards laid down by Precedents and Law?**

27. Under this Sub – heading, the Honourable Court will decipher on the substratum of the matter is whether the objection raised pure points of law. In determining this instant Notice of Preliminary Objection, the Court will first consider what amounts to a Preliminary Objection and then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description.
28. According to the Black Law Dictionary a Preliminary Objection is defined as being:  
“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
29. The above legal preposition has been made graphically clear in the now famous case of “Mukisa Biscuits – Versus - Westend Distributor Limited [1969] EA 696”, the court observed that: -  
“ A Preliminary Objection is in the nature of what used to be a demurrer. It 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. ”
30. This statement of the law has been echoed time and again by the courts: see for example, “Oraro – Versus - Mbaja [2007] KLR 141”. The same position was held in the case of “Nitini Properties Limited – Versus - Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257” where the Court held that;  
“ A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion.”
31. Similarly in the case of “United Insurance Company Limited – Versus - Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005 (2005) LLR 7396”, the Court held that:-  
“ A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed .”
32. Therefore from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of “In the matter of Siaya Resident Magistrate Court Kisumu HCCMisc. App No. 247 of 2003” where the Court held that;  
“ A Preliminary Objection cannot be raised if any facts has to be ascertained.”
33. I have further relied on the decision of “Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR” as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-



- (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
  - (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
  - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
34. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, the Court now turns to the grounds raised by the 3<sup>rd</sup> Defendant herein. In summary, they are two fold. Firstly, on the jurisdiction of this Honourable Court to hear this suit as per the Plaint dated 24<sup>th</sup> May, 2022; and Secondly, the fact that the same cause of action raised by the Plaintiff is barred by the statute of limitation. In this case, from the two stated grounds herein, I am satisfied that the objection raises pure points of law. Since an issue going to the jurisdiction of this Court has been raised, it will be an issue which must be dealt with in limine.

**Issue No. b). Whether the Notice of Preliminary objection is merited.**

35. Under this Sub title the Court shall examine whether the Notice of Preliminary objection is merited. An objection to the jurisdiction of the court has been cited as one of the preliminary objections that consists a point of law. Indeed the locus classicus case on the question of jurisdiction is the celebrated case of “The Owners of Motor vessel Lillian ‘S’ -Versus - Caltex Kenya Limited. [1989] KLR 1” where the Court held:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

36. Jurisdiction means a courts power to decide case or issue a decree. In Kenya, the Environment and Land Court is a statutory creation by *the Constitution* of Kenya under the provision of Article 162 (b). Here, the Courts are vested it with original and unlimited jurisdiction. From the preamble of the ELC Act, the jurisdiction of the court is defined as “.....a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes.....”



37. The Supreme Court in the case of “Samuel Kamau Macharia – Versus - Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011”, observed that:-

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

38. Having determined that the Preliminary Objection by the Defendant is based on pure points of law, it therefore behooves this Court to consider and determine whether or not it has jurisdiction to entertain the instant proceedings. The nature of the preliminary objection herein goes to the jurisdiction of this court. It is trite law as held in “Owners of the Motor Vessel “Lillian S” (Supra)” that:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”

39. This court is a creation of Article 162 (b) of *the Constitution* which donates to parliament the power to establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of and title, to land.

40. The *Environment and Land Court Act*, No. 19 of 2011 at Section 13 defines the jurisdiction of the court thus:-

1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
2. In exercise of its jurisdiction under Article 162 (2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes?
  - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
  - b. relating to compulsory acquisition of land;
  - c. relating to land administration and management;
  - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
  - e. any other dispute relating to environment and land.



41. Forward moving, the Court holds that under the provision of Order 2 Rule 6 of the Civil Procedure Rules, 2010, parties are bound by their own pleadings. Looking at the filed Plaintiff from Paragraphs 14 to 17, the Plaintiff pleaded that there was a breach of a joint venture agreement vide a charge dated 19<sup>th</sup> August, 2014. In the current case the dispute as clearly stated by the applicant is on the rights and obligations of the parties arising from a joint venture agreement which is a contract. It could be argued that this contract arises from land use hence the Environment and Land Court could have jurisdiction.
42. However, this question was laid to rest in the case of “Co - operative Bank of Kenya Limited – Versus - Patrick Kangethe Njuguna (Supra)” as already elaborately relied on by the Learned Counsel for the Plaintiff, which determined that the ELC jurisdiction to deal with disputes connected to ‘use’ of land and do not include mortgages, charges, collection of dues and rents which are within the civil jurisdiction of the High Court.
43. From the foregoing, I am fully convinced and persuaded that the dispute between the parties in this case is clearly over the suit land; its use, planning, construction and related issues as the joint venture agreement was in respect to the suit properties known as L.R. NO. 2263 (Original No. 1674/1) and L.R. No. 2264 (Original No. 1674/2). In a nutshell, therefore, I discern that the Court has jurisdiction to entertain and finally determine this case.
44. The second issue was on the suit being statute barred. The Defendant has raised the question of time limitation based on the undisputed fact that the subject matter of the suit is the land sale agreement dated October 13, 2003. A question of limitation is a question of law as it addresses the court’s jurisdiction because where a claim is time barred, a court has no jurisdiction to determine it. In the case of “Bosire Ongero – Versus - Royal Media Services [2015] eKLR”, the court held that the question of limitation goes to the jurisdiction of the court hence if a matter is statute barred, the court has no jurisdiction to entertain it. Although the Preliminary Objection filed was based on Section 4 of the Limitation of Actions Act, Cap. 22 Laws of Kenya, the 3<sup>rd</sup> Defendant’s submissions were in regard to Section 7 thereof. I note that the provision of Section 4 provides for the period for filing claims based on contract, tort and other actions, while Section 7 provides for the limitation period for a claim for land. As the Plaintiff’s claim herein is a claim for land, the applicable law is Section 7 of the Limitation of Actions Act.
45. However, the limitation period is extended in several instances including where fraud or mistake is pleaded. Therefore, where a cause of action is based on fraud, the Limitation of Actions Act provides for extension of the limitation period. The provision of Section 26 of the Limitation of Actions Act provides as follows:

Extension of limitation period in case of fraud or mistake.

Where, in the case of an action for which a period of limitation is prescribed, either—

- a. The action is based upon the fraud of the Defendant or his agent, or of any person through whom he claims or his agent; or
- b. The right of action is concealed by the fraud of any such person as aforesaid; or
- c. The action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—



- i. In the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
  - ii. In the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.
46. At this juncture, I am fully 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 Defendants or their 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 Defendants is a matter to be ascertained at the trial.
47. I have considered the Plaintiff's claim and I note that the Plaintiff's claim is for a joint venture agreement for a suit property which I have already determined above is correctly in this court. The Plaintiff has pleaded fraud which they alleged they discovered in the year 2017. While the joint venture agreement the subject matter of the claim herein was, the twelve – year limitation period lapsing in the year 2029. However, the provision of Section 26 of the *Limitation of Actions Act*, Cap. 22 has the effect of extending time even where it has lapsed where the claim is based on fraud which was alleged to have been discovered later; so that the period of limitation starts running from the date of discovery of the fraud. As the Plaintiff herein pleaded that the alleged fraud was discovered in the year 2017 and this suit was filed in the year 2020 three years after the fraud was discovered. Thus, it is my finding that the Plaintiff's claim is not time barred.
48. In the premises, I find no merit in the 3<sup>rd</sup> Defendant's Preliminary Objection dated 12<sup>th</sup> November, 2024. Hence, the said objection must and is hereby dismissed.

**Issue No. c). Who bears the Costs of the Preliminary objection dated 12<sup>th</sup> November, 2024**

49. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR” and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR”, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR”, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
50. In the present case, the Plaintiff shall have the costs of the Notice of Preliminary objection dated 12<sup>th</sup> November, 2024.



**V. Conclusion and Disposition.**

51. Ultimately in view of the foregoing detailed analysis from the framed issues, the Honourable Court arrives at the following decision and make the following orders:-
- a. That the Preliminary objection dated 12<sup>th</sup> November, 2024 is found to lack merit and is hereby dismissed.
  - b. That there be a mention of the matter on 7<sup>th</sup> May, 2025 before Hon. Justice Olola for further direction on the disposal of the main suit.
  - c. That costs of the Preliminary Objection to be awarded to the Plaintiff.

It is so ordered accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 25<sup>TH</sup> DAY OF APRIL 2025.**

.....  
**HON. MR. JUSTICE L. L. NAIKUNI,**  
**ENVIRONMENT AND LAND COURT**  
**AT**  
**MOMBASA**

Ruling delivered in the presence of:

M/s. Kalekye, the Court Assistant;

Mr. Kilonzo Advocate holding brief for Mr. Oluga Advocate for the Plaintiff; and

M/s. Ogunyio Advocates holding brief for Mr. Mogere Advocate for the 3<sup>rd</sup> Defendant.

No appearance for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants.

