



Mburu v Kwale County Government & 2 others (Enviromental and Land Originating Summons E007 of 2023) [2025] KEELC 3295 (KLR) (8 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3295 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E007 OF 2023**

LL NAIKUNI, J

APRIL 8, 2025

BETWEEN

SAMUEL MWANGI MBURU PLAINTIFF

AND

KWALE COUNTY GOVERNMENT 1ST DEFENDANT

MINISTRY OF TOURISM & WILDLIFE 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

RULING

I. Introduction

1. Before the Honourable Court for its determination are the Grounds of Opposition and a Notice of Preliminary objection both dated 25th October 2024 and filed by the Ministry of Tourism & Wildlife and the Honourable Attorney General, the 2nd and 3rd Defendants herein.
2. Conventionally, the Honourable Court will as a matter of precedence first and foremost, deal with the Preliminary objection before embarking on any other substantive issue from the instituted suit.
3. Nonetheless, for good order and ease of flow, it is significant that the Court provides a brief background of the matter. From the filed pleadings, the Plaintiff/Applicant instituted this civil suit vide an Originating Summons which was further amended on 21st November, 2023. It was brought before court pursuant to the provisions of Sections 17, 18, 37 & 38 of the *Limitation of Actions Act* Cap. 22 laws of Kenya and Order 37 Rule 30 of the Civil Procedure Rules, 2010. The Applicant sought for a declaration that he was the legal owner of all that parcel of land known as land Reference numbers Kwale/Diani Complex/33 by way of Land adverse possession.
4. Upon service being effected, the 2nd & 3rd Defendants/Respondents entered appearance by filing a Memorandum of Appearance for the Hon. Attorney General dated 30th January, 2023. Apart from



filing a Notice of Appointment before court on 23rd January, 2024, the 1st Defendant/Respondent is yet to fully comply.

II. The Plaintiff/Applicant's Case

5. In the main suit, the Plaintiff/Applicant herein prayed for the following orders:-
 - a. That the Plaintiff/Applicant be declared to have become the legal owner of all that parcel of the whole title Kwale/Diani Complex/33 measuring 20x15 feet each [two plots] entitled by adverse possession of over 12 years since the plaintiff has stayed on the suit property for over 36 [thirty-six years]
 - b. That the parcel of land claimed by the Plaintiff/Applicant comprises of two plots with an area 20x15ft and 20 x 15ft [plot no 145 and 146] white house part of plot no Kwale/Diani Beach Complex/33.
 - c. That the Plaintiff/Applicant be registered as the proprietor of the said parcels of land namely [plot no 145 and 146] within plot no Kwale/Diani Complex 33 place of the above named Defendant/Respondent in whose favour the land is currently registered
 - d. That the two plots [20 x 15 ft each] mentioned above be hived from title no Kwale/Diani Complex/33 and further subdivision be done and individual titles given to the Plaintiff herein.
6. The summons was supported by the annexed affidavit of SAMUEL MWANGI MBURU. The deponent averred as follows that:-
 - a. He had been the occupant and/or directly in possession of two plots measuring 20 x 15ft each of land parcel Kwale/Diani Complex/33 where having operated two market stalls from year 1987 to date.
 - b. He had enjoyed quiet possession of the said parcel of land uninterruptedly for over twelve years which require him to earn ownership of the land.
 - c. The 2nd Defendant/Respondent had given him a Letter of Offer authorising him to build the said market stalls which he had been paying for it.
 - d. The Plaintiff/Applicant sought that he be declared the owner of the parcels in question and that the Registrar Kwale to issue him with a title deed in respect of the said parcels.

III. 1st Defendant/Respondent's Case

7. The 1st Defendant/Respondents through the office of the County Attorney Kwale filed a Notice of Appointment before court on 23rd January, 2024. However, they were yet to file any pleadings in response to the originating summons but orally submitted to court that they were not opposed to the Preliminary Objection herein.

IV. The objection by the 2nd and 3rd Defendants/Respondents.

8. In opposing the further Amended Originating Summons, the 2nd and 3rd Defendants/Respondents filed Grounds of Opposition and a Notice of Preliminary Objection dated 25th October, 2024 set forth as here below that:-
 - a. The Plaintiff/Applicant originating summons was misconceived and highlights the following objections.



- b. The present suit as taken out, drawn and filed was incompetent, fatally defective and unsustainable in law or at all.
 - c. The Honourable Court lacked jurisdiction to hear this matter as envisaged under the provision of *the Constitution* of Kenya, 2010 under Article 62 [1] as read together with Section 41 of the *Limitation of Actions Act*, Cap 22. The alleged cause of action in the suit was land lawfully held by the Ministry of Tourism as evidenced by the Certificate of official Search filed by the Plaintiff/Applicant himself.
 - d. It was a well - known and respected maxim of equity that equity follows the law. Equity seeks to supplement the law rather than overturn it
 - e. In the circumstances the Plaintiff/Applicant's suit should be struck off for contravening both law and equity.
 - f. In the whole the Plaintiff/Applicant herein was a vexatious and frivolous litigant and the proceedings herein an abuse of the Court process.
9. The 2nd and 3rd Defendants/Respondents stated that in the circumstances the suit herein ought to be struck out with costs.

V. Grounds of opposition by the 2nd & 3rd Defendants/Respondents

10. The Grounds of Opposition was dated 25th October, 2024. It was premised upon the following grounds:-
- a. That the Plaintiff/Applicant had filed an application to be declared the legal owner of all that parcel of land known as Kwale/Diani Complex/33 measuring 20 x 15 ft each by virtue of an alleged long occupation.
 - b. That the subject land was lawfully held by the Ministry of Tourism on leasehold dating from 16th July 1999 and for a term of 33 years
 - c. That the suit land was land held for public interest. It was not subject to a claim of adverse possession. The Plaintiff/Applicant's application was against the provision of *the Constitution* of Kenya, 2010, under the provision of Article 62 [1] as read together with Section 41 of the *Limitation of Actions Act*, Cap. 22.
 - d. That the Plaintiff/Applicant had not demonstrated dispossession of the proprietor in this case the Ministry of Tourism that defeated its titles or acts which were inconsistent with the Ministry's enjoyment of the subject land.
 - e. That it was trite law that Land adverse possession could not accrue against land that was held by the government or land vested under the County Council as per the provision of Section 41 of the *Limitation of Actions Act*, cap. 22.
 - f. That a license could not give rise to adverse possession. The law defined a license as permission given by the commission in respect of public land or proprietor in respect of private or community land or a lease which allowed the licensee to do some act concerning the land or land comprised in the lease which would otherwise be trespass but never included an easement or profit.
 - g. That the Plaintiff/Applicant had not indicated the size of the land claimed, the exact location and an estimated of the suit property.



- h. That this suit had not complied with the requirements of Order 37 Rule 7 [2] on the provision of the certified extract of the current title.
- i. That in a suit of adverse possession, the Claimant had to present a Survey report from a Licensed Surveyor and Licensed Valuer which inter alia indicated the exact identity of the land which the Claimant alleged to be in possession of. The Plaintiff/Applicant had not complied with this requirement.
- j. That the application was made in bad faith and never disclosed all material facts relevant to the case hence disentitled the Plaintiff/Applicant to the reliefs sought.
- k. That the Plaintiff/Applicant was neither candid nor honest in their reason for the present application dated 21st December, 2023
- l. That the instant application was misconceived and formed a classical description of an abuse of the court process and should be dismissed with costs.

VI. Submissions

- 11. On 21st January, 2025, in the presence of all the parties, the Honourable Court as a matter of first precedence, directed that the Preliminary Objection be dispensed off by way of written submissions.
- 12. Pursuant to that, by time of penning down this Ruling only the 2nd and 3rd Defendants/Respondents and the Plaintiff/Applicant had complied. Subsequently, the Honourable Court proceeded on to reserved deliver its Ruling on its merit on 8th April, 2025 accordingly.

A. The Written Submissions by the 2nd and 3rd Defendants/Respondents

- 13. The 2nd and 3rd Defendants/Respondents through the Office of the State Law/Honourable Attorney General, Mombasa offices filed their written submissions dated 11th February, 2025. M/s. Saru Advocate commenced the submissions by recounting on the background of the suit. That the Plaintiff/Applicant instituted the suit through an Originating Summons dated 8th November, 2023. It was later on amended on 14th November, 2023. The Plaintiff/Applicant sought for the above stated reliefs.
- 14. The Learned Counsel averred that the said objection raised the following four (4) issues for its determination:-
 - a. Whether the suit property was public land or private land under the law.
 - b. Whether there is any statutory or constitutional provision that allows the claim of adverse possession against the government.
 - c. Whether issuance of license to land give rise to adverse possession.
 - d. Who bears the costs of the suit?
- 15. On whether the suit property is public land or private land under the law. The Learned Counsel submitted that *the Constitution* of Kenya 2010 made three (3) classification land in Kenya – Private, Public and Community land. Of significance to the instant case were the Private & Public land categories. According to the provision of Article 64 provided for private land. It included a). land registered held by any person under any freehold tenure; b). land held by any person under leasehold tenure; c). any other land declared private land by any Act of Parliament; and Article 62 of *the Constitution* defines Public land as follows: (a) land which at the effective date was alienated government land as defined by an Act of Parliament in force at the effective date;(b)land lawfully held,



used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease; (c) land transferred to the State by way of sale, reversion or surrender; (d) land in respect of which no individual or community ownership can be established by any legal process; (e) land in respect of which no heir can be identified by any legal process; (f) all minerals and mineral oils as defined by law.

16. Thus, according to the Learned Counsel, the suit property in question is public land lawfully held by the Ministry of Tourism as evidenced by the certificate of search filed by the Plaintiff himself.
17. The Learned Counsel argued that having laid out the three (3) Constitutional classification of land in Kenya, the main issue of contention was whether the Plaintiff was or not the proprietor of the suit land resides. Further, whether the suit land was public land or not. It was clear from the evidence above that the land in question was a public land lawfully owned by the Ministry of Tourism evidenced by the Certificate of official Search filed by the Plaintiff/Applicant himself. It was not in dispute that the suit property otherwise known as LR. No 209/11543 and LR. No. 209/11546 is Government land.
18. On whether there was any statutory or constitutional provision that prevented the claim of adverse possession against the Government. The Learned Counsel contended that the provision of Section 41 of the Limitation of Action Act, Cap. 22 made an exclusion of public land. It provided that, the Act never:-
 - (a) enabled a person to acquire any title to, or any easement over:-
 - (i) Government land or land otherwise enjoyed by the Government;
 - (ii) mines or minerals as defined in the *Mining Act*, Cap. 306;
 - (iii) mineral oil as defined in the Mineral Oil Act, Cap. 307;
 - (iv) water vested in the Government by the *Water Act* (Cap. 372);
 - (v) land vested in the county council (other than land vested in by the provision of Section 120 (8) of the Registration of *Land Act*, Cap. 300 (Now Repealed); or
 - (vi) land vested in the trustees of the National Parks of Kenya.
19. To buttress on that point, the Learned Counsel cited the case of: “Chevron (K) Limited – Versus - Harrison Charo (2016) eKLR” the Court of Appeal held that time does not run against land held by government and time could only start running upon registration of a proprietor as owner of land. Additionally, the Counsel submitted that it was a well settled principle that a claim for adverse possession could only be maintained against a registered owner; nor could one claim adverse possession against public land. On this point the Counsel referred Court to the case of “Faraj Maharus – Versus - J.B. Martin Glass Industries and 3 Others [2005] eKLR”, whereby the Court of Appeal stated that:-

“There can be no adverse possession on public or government land however long one may have been squatting thereon without let or hindrance from the Government. Therefore, the Appellant cannot benefit from the long period of his occupation of the disputed property.”
20. Similarly, in the case of “Sammy Mwangangi and 10 Others – Versus - Commissioner of Lands and 3 Others [2018] eKLR” the Court of Appeal stated that:

“It is trite law that one cannot claim adverse possession against Government land by virtual of Section 41 of the *Limitation of Actions Act*.”



21. On Whether issuance of license to a land give rise to adverse possession. The Learned Counsel cited the case of: “Mate Gitabi – Versus - Jane Kabubu Muga Alias Jane Kaburu Muga & 3 Others [2017] eKLR”, the Court stated as follows:

“For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner.”
22. These elements were contained in the Latin maxim *nec vi, nec clam, nec precario*. Occupation of land by consent or license does not accrue any right of adverse possession on the claimant. In the case of: “Mwinyi *Hamis Ali – Versus - Attorney General & Philemon Mwaisaka Wanaka, Civil Appeal No. 125 of 1997*” it was held that:- “adverse possession does not apply where possession is by consent and in a court of law, sympathy takes a second stand as the Court is governed by statutes.”
23. In the case of “Wambugu – Versus - Njuguna, the Court held:

“Where the claimant is in exclusive possession of the land with leave and license of the Appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined”.
24. It was clear from those principles that the onus lies on the person claiming title by adverse possession to prove the essential elements before an order is granted in his or her favour.
25. On the issue of costs. The Counsel opined that it was trite law that costs always follow the event. Rule 26(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provides that the award of the costs is at the discretion of the Court. Sub Rule (2) provides that in exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.
26. In determining whether or not to award costs therefore, this Court must be mindful not to hinder the advancement of constitutional justice. The Court through its wisdom should be able to discern that this matter is moot and ought to be dismissed. Therefore, the Defendants/Respondents were entitled to costs for being involved in a needless suit.
27. In conclusion, the 2nd and 3rd Defendants/Respondents submitted that the claim by the Plaintiff/Applicant should be dismissed, government ownership rights should be affirmed over the disputed property, and the preservation of public assets for their intended purpose should be ensured.
28. Hence, the 2nd and 3rd Defendants/Respondents respectfully prayed that the Claim be dismissed with costs.

B. The Written Submissions by the Plaintiff/Applicant

29. While opposing the said Preliminary Objection dated 25th October, 2025 raised by the 2nd and 3rd Defendants/Respondents, the Plaintiff/Applicant through the Law firm of Messrs. Matoke D & Company Advocates filed their Written Submissions dated 24th February, 2024. M/s. Matoke Advocate commenced by stating that the 2nd and 3rd Defendants/Respondents sought to dismiss the instant suit for reasons that, the provision of Sections 4 and 41 of the *Limitation of Actions Act*, Cap. 22 never allowed the Plaintiff/Applicant to claim the suit property being Government land allegedly under the Ministry of Tourism.



30. It was the submissions by the Counsel that the Plaintiff/Applicant's claim herein as instituted, was properly before Court by virtue of Article 40 (1) of the Constitution of Kenya 2010. The said provision of law states that:

- “(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--
- (a) of any description; and
 - (b) in any part of Kenya”

31. The expression, “any description” here, extended even to public land. The provision of Section 41 of the Limitation of Action Act, Cap. 22 cited by the 2nd and 3rd Defendants/Respondents, the basis of which they want this case dismissed, never mentioned about adverse possession. Within the meaning of Section 37 of Limitation of Actions Act Cap. 22, the Plaintiff/Applicant was allowed by the said provision of law to claim the suit property herein. The said provision of law states that:-

“This act applies to land registered under the Government Lands Act Cap 280, the Registration of Titles Act Cap. 281, the Land Titles Act Cap. 282, or the Registered Land Act Cap 300, in the same manner and to the same extent as it applies to land not so registered, except that:-

- (a) Where if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest or any other person interested in the land whose estate or interest is not extinguished by this act.”

32. Thus, it was the contention by the Learned Counsel that the provision of Section 38 of the Limitation of Actions Act, permits the Plaintiff/Applicant to file claim for adverse possession before this Court. The section provides that:-

- “(1) where a person claims to have become entitled by adverse possession to land registered under any of the acts cited in Section 37 of this act, or land comprised in a lease registered under any of those acts, he may apply to the High Court for an order that he be registered as a proprietor of the land or lease in place of the person then registered as proprietor of the land.
- (2) An order made under Sub-section 1 of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this act”.

33. To support the argument, the Learned Counsel referred Court to the case of: “Manason Ogendo Afwande – Versus - Alice Awiti Orende & Another (2020) eKLR”, the Environment and Land Court, sitting at Kisumu, while citing the case of “Tabitha Waitherero Kimani – Versus - Joshua Ng'ang'a (2017) Eklr”, gave threshold for grant of claim for adverse possession as follows:-

- “(a) open and notorious use of the property
- (b) continuous use of the property



- (c) exclusive use of the property
- (d) actual possession of the property"

34. The Counsel submitted that the Plaintiff/Applicant had been staying in the suit property for an uninterrupted period of 36 years as pleaded in the Amended Originating Summons herein. He was entitled to claim adverse possession on the suit property.
35. All said and done, the Counsel was of the view that the issues in controversy in this claim were substantive in nature that could not be disturbed by the provisions of law cited by the 2nd and 3rd Defendants herein, and in any case the Plaintiffs claim herein was curable under provisions of Article 50(1) and 159 (2) (d) of *the Constitution* of Kenya 2010.
36. The Learned Counsel averred that granting of the prayers sought in the Preliminary Objection, would deny the Plaintiff/Applicant herein his right to a fair hearing as enshrined in Article 50(1) of *the Constitution* of Kenya 2010. Whether or not the Plaintiff was entitled to claim adverse possession herein was a matter to be canvassed at full hearing, where the Court would have an opportunity to interrogate the evidence tendered by parties herein during the full trial and make a determination on the basis of the said evidence. In the premises, the Preliminary Objection as filed herein by the 2nd and 3rd Defendants/ Respondents was prematurely before Court and the upshot ought to be that, the same be dismissed and directions of the hearing of this matter be given by this Honorable Court.

VII. Analysis & Determination.

37. This court has keenly considered the pleadings in form of the Originating Summons, the replies and the Preliminary Objection raised by the 2nd and 3rd Defendants/Applicants herein, the written submissions, the cited myriad of authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the Statutes.
38. In order to arrive at an informed, reasonable and just decision, I have framed the following three (3) salient issues for determination
- a. Whether the Preliminary Objection dated 25th October 2024 by the 2nd and 3rd Defendants/ Respondents meets the fundamental threshold of a preliminary objection based on Law and Precedents.
 - b. Whether the further amended originating summons herein is merited
 - c. Who will bear the costs of the preliminary objection?

Issue No. a). Whether the Preliminary Objection dated 25th October 2024 by the 2nd and 3rd Defendants/Respondents meets the fundamental threshold of a preliminary objection based on Law and Precedents

39. Under this sub – heading, the Honourable Court as a matter of precedence will critically deal on the issue of the Preliminary Objection raised by the 2nd and 3rd Defendants/Respondents herein. 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.....”



40. A Preliminary Objection was elaborately described in the case of:- “Mukisa Biscuits Manufacturing Co. Limited – Versus - West End Distributors Limited (1969) EA 696 to mean: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

41. Further Sir Charles Newbold, JA stated 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. The improper practice should stop”.

42. It is not in doubt that a Preliminary Objection is the one that raises pure point of law. Further, it is which is argued on the assumption that all facts pleaded by the other side are correct. However, a preliminary objection cannot be raised if any facts has to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion. That should not be a Preliminary objection at all.

43. Ideally, the Court will normally take into account that the Preliminary Objection must stem from the pleadings and raises pure point of law, and should not deal with disputed facts nor should it derive its foundation from factual information. This position was affirmed in the case of: “Oraro – Versus - baja (2005) 1KLR 141, where it was held that: -

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”

44. Similarly, the Supreme Court in the case of “Hassan Ali Joho & another v Suleiman Said Shabal & 2 others SCK Petition No 10 of 2013 [2014] eKLR held that:-

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

45. Primarily, the 2nd and 3rd Defendants/Respondents herein have raised two - fold broad issues from their filed objection. The first point of call, they argued that this court is devoid of the jurisdiction to determine this suit by virtue of the provisions of Section 41 of the *Limitation of Actions Act*, Cap. 22. Secondly, as a quick follow from the first issue, they have submitted that the suit land being a Government/public land was not available to be claimed by the Plaintiff under the doctrine of land adverse possession as provided for by Law accordingly.

46. Fundamentally, Jurisdiction is the authority that a court has in determining matters that have been placed before it. The same touches on the core mandate and/or business of the court as permitted by the law. The courts have held time and again that jurisdiction is everything and without jurisdiction a court of law must down it tools. I reiterate the observations of the supreme court in the case of “Samuel



Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, which were as hereunder;

“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”.

47. The issue of jurisdiction is thus not an issue to be established by facts but rather the law which vests the respective court with the power to carry out its mandate. The preliminary objection raised herein is thus qualified to be an objection. However, the Honourable Court holds its reservation as to whether this is a Government and/or Public land to be determined under an objection raised by the Defendants. Certainly, this is an issue to be dealt with at a later stage of this Ruling.

Issue No. b). Whether the Objection raised by the 2nd and 3rd Defendants/Respondents herein has any merit

48. Before moving a step further by delving into the second issue for determination, it is proper to point out that the court has had several musings on the preliminary objection meeting the set threshold of a proper preliminary objection especially because of the issue of whether or not the suit property is public or private land.
49. Specifically, the provision of Order 2 Rule 6 of the Civil Procedure Rules, 2010 provides that parties are bound by their own pleadings. Just in passing, I have managed to place a glimpse some of the documentary evidence filed by the parties herein. For instance, there is a copy of official search conducted on 8th November, 2023 relied upon by the Plaintiff/Applicant in proving ownership of the suit property. Under the proprietorship section the name of proprietor is indicated as Ministry of Tourism, the nature of the title is leasehold and it is for a term of 33 years from 9th July, 1999. Hence, for arguments sake, it means that the lease will lapse in the year 2032. The Ministry of tourism is a government department and thus follows that the suit property is government land.
50. Undoubtedly, all these are issues of fact and not Law to be deliberated through intense examination in chief, cross examination and re – examination as provided for in the provision of the *Evidence Act*, Cap. 80. During the trial, the Court will hear and make a determination whether a claim of adverse possession would suffice in respect of public land. The Plaintiff/Applicant is keen on being declared the lawful proprietor of the suit property having been in occupation and use of the same for over 30 years. Additionally, the Court will determine whether there was no rent payable and presumably the lease is public. On the other hand, the Court will consider the arguments by the 2nd and 3rd Defendants/ Respondents who seek to have the suit be dismissed based on the provisions of Section 41 of the *Limitation of Actions Act*, Cap. 22 among other pertinent submissions hereof.
51. Therefore, I discern that the proper forum to make all these deliberations would be during a full trial. Based on the principles of natural Justice, Equity and Conscience, all the parties need to be accorded access to justice, fair hearing and an opportunity to be heard as clearly spelt out under the provisions of Articles 25 (c), 48, 50 (1) & (2) and 159 (1) & (2) of *the Constitution* of Kenya, 2020, I strongly hold that the issues raised from the objection are mainly matters of facts to be ably deliberated during a full trial. Hence, by and large, the objection is not sustainable.



Issue No. c). Who will bear the costs of the objection.

52. It is now well established that the issue of costs is at the discretion of Court. Costs mean the award that a party is granted at the conclusion of a legal action or proceedings in any litigation. The proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 provides that costs should follow the event unless the court for some good reason orders otherwise. By the event it means the results or outcome of the legal action.
53. In the instant case, the 2nd and 3rd Defendants/Respondents have not succeeded in prosecuting the preliminary objection. Thus, it follows that the Plaintiff/Applicant is entitled to costs of the objection herein.

VI. Conclusion & Disposition

54. Consequently, having caused an indepth analysis of the framed issues herein, based on the Preponderance of Probabilities and the balance of convenience, the Honourable Court proceeds to make the following orders:-
- a. That the Preliminary objection dated 25th October 2024 be and is hereby dismissed.
 - b. That for expediency sake there be a mention on 12th June, 2025 for purposes of conducting a Pre – Trial conference under the provision of Order 11 and taking direction for the disposal of the Suit filed through the Originating Summons under Order 37 Rules 13, 16 and 18 of the Civil Procedure Rules, 2010 and hearing of the suit scheduled on 2nd July, 2025 by the consensus of the parties hereof.
 - c. That the costs of the Preliminary Objection to be awarded to the Plaintiff/Applicant and borne by the 2nd and 3rd Defendants/Respondents.

It is ordered accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 8TH DAY OF APRIL, 2025

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**HON. MR. JUSTICE L.L NAIKUNI,
ENVIRONMENT & LAND COURT AT KWALE.**

Ruling delivered in the presence of: -

- a. Mr. Daniel Disii, the Court Assistant.
- b. M/s. Matoke Advocate for the Plaintiff.
- c. M/s. Saru Advocate for the 2nd & 3rd Defendants.
- d. No appearance for the 1st Defendant.

