



**Okwera v County Government of Busia & 5 others (Environment & Land
Case E004 of 2023) [2025] KEELC 3178 (KLR) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3178 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E004 OF 2023**

**BN OLAO, J
APRIL 8, 2025**

BETWEEN

PHANICE ADHIAMBO OKWERA PLAINTIFF

AND

COUNTY GOVERNMENT OF BUSIA 1ST DEFENDANT

BUSIA COUNTY SECRETARY 2ND DEFENDANT

**BUSIA COUNTY EXECUTIVE COMMITTEE MEMBER FOR
THE DEPARTMENT OF LANDS, HOUSING AND URBAN
DEVELOPMENT' 3RD DEFENDANT**

**BUSIA COUNTY CHIEF OFFICER FOR THE DEPARTMENT OF LANDS,
HOUSING AND URBAN DEVELOPMENT' 4TH DEFENDANT**

**BUSIA COUNTY EXECUTIVE COMMITTEE MEMBER FOR THE
DEPARTMENT OF PUBLIC, WORKS, ROADS, TRANSPORT AND
ENERGY 5TH DEFENDANT**

BUSIA COUNTY ATTORNEY 6TH DEFENDANT

RULING

1. The Plaintiff approached this Court vide her plaint dated 17th July 2023 and filed on 11th August 2023 though later amended on 18th March 2024. She sought judgment against the Defendants jointly and severally with regard to the land parcel No South Teso/Chakol/1158 (the suit property) in the following terms:
 - i. A Declaration that the Defendant's joint and several acts of forceful invasion, trespass and encroachment upon the land parcel No South Teso/Chakol/1158 amounted to an



infringement and violation of the Plaintiff's right to own property under Article 40 (1) of *the Constitution*.

1. (a) Order for compensation.
 - ii. General damages and special damages in compensation
 - iii. Costs of these proceedings
 - iv. Interest accruing on items (2) and (3) and (4) at Court rates.
 - v. Such other and/or further reliefs as this Honourable Court may deem fit and just to grant in the circumstances.

The basis of the Plaintiff's claim is that she is the registered proprietor of the suit property since 1st July 1996. However, in or about the month of August 2020, the Defendants their officers, agents and employees jointly and severally without any notice, justification or lawful excuse and despite the Plaintiff's loud protestations –

- a. Forcefully invaded, trespassed and encroached into the Plaintiff's land parcel No South Teso/Chakol/1158.
- b. Damaged, destroyed and partially demolished a perimeter fence that the Plaintiff had erected around the land parcel No South Teso/Chakol/1158.
- c. Proceeded to expand the adjacent road by constructing a new tarmac road that now occupies and covers a portion of the Plaintiff's land parcel No South Teso/Chakol/1158.

2. The Plaintiff pleaded that the Defendant's destructive act of trespass and encroachment into her land were illegal and unjustifiable.
3. Particulars of the Defendants' acts of unconstitutionality, illegality and unjustifiability were pleaded in paragraph 23(a) to (g) of the plaint. Particulars of loss and damage suffered by the Plaintiff were pleaded in paragraph 24(a) and (e) while the particulars of the expenses incurred by the Plaintiff in an attempt to repair the demolished dwelling house were pleaded in paragraph 28(a) to (d) and estimated at Kshs.1,300,000.00 (one million three hundred thousand).
4. Despite deemed having been made and notice of intention to sue having been given, the Defendants have jointly and severally refused to accede to the Plaintiff's demand thus rendering this suit necessary.
5. The Defendants filed a defence dated 30th September 2024 in which they denied the allegation of illegality as well as the particulars of loss and damage. They added that Kenya Rural Roads Authority (KERRA) And Kenya Urban Roads Authority (KURA) are, by statute, mandated to construct and maintain a category of roads different from County roads which are statutorily vested in the 1st Defendant and the Plaintiff shall be put to strict proof. They pleaded further that the Plaintiff's claim is malicious, mischievous, an abuse of the Court process, false, unsubstantiated and lacking any legal basis and that the Plaintiff is not entitled to the declaration and compensation sought.
6. By a Notice of Preliminary Objection dated 5th January 2023, the Defendants raised the following grounds:
 1. That the proceedings herein are time barred by dint of Section 3(1) of the Public Authorities Limitations Act Cap 39 of the Laws of Kenya.
 2. That this Honourable Court lacks jurisdiction to entertain the Plaintiff's suit.



That Preliminary Objection is the subject of this ruling. Directions were taken that the same be canvassed by way of written submissions. The same have been filed by Mr Wamburathe Busia County Legal Counsel for the Defendants and by Mr Manwari instructed by the firm of Manwari And Company Advocates for the Plaintiff.

7. I have considered the Preliminary Objection and the submissions by counsel.
8. The Preliminary Objection raises the issues of limitation and the jurisdiction of this Court to determine the dispute herein. There is no doubt that those are pure issues of law and therefore fall within what is considered as a proper Preliminary Objection as defined in the case of *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd* 1969 E.A 696. That is the locus classicus in matters Preliminary Objections where Sir Charles Newbold P defined it as follows:

“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 facts have 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 nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

In the same case LAW JA described it as follows:

“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 objection to the jurisdiction of the Court or a plea of limitation that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.” Emphasis mine.

As regards the issue of jurisdiction, it has to be raised at the earliest opportunity so that the Court in which it is raised can address it as a first port of call. As Nyarangi JA stated in the case of *Owners Of The Motor Vessel “Lilian S” v Caltex Oil (kenya) Limited* C.a. Civil Appeal No50 of 1989 eKLR:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. 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.”

I will therefore consider the Preliminary Objection in light of the above precedents and others.

1. That these Proceedings are time barred by dint of Section 3(1) of The Public Authorities Limitation Act.

9. Section 3(1) of the Public Authorities Limitations Act provides that:

“No proceedings founded by tort shall be brought against the Government or Local authorities after the end of twelve months from the date on which the cause of action accrued.”



In the submissions by the Defendants' counsel in support of the Preliminary Objection, he has cited paragraph 21(a) of the amended plaint where the Plaintiff has pleaded that the Defendants, their officers, agents and employers jointly and severally without any notice, justification or lawful excuse and despite the Plaintiff's loud protestations;

- a. Forcefully invaded, trespassed and encroached into the Plaintiff's land title No South Teso/Chakol/1158".

Counsel then goes on to add that:

"Consequent to the aforesaid, we submit that, the orders sought by the Plaintiff are manifestly in contravention of the statutory provisions of the law governing limitations of actions and the suit is statute barred.

One of the Plaintiff's cardinal ground is that the cause of action herein arose at the very latest from August 2020. The action herein was filed on 11th August 2023, that is to say 3 years after the cause of action arose, it was statute barred.

The action herein is inter alia for recovery of land and compensation. We submit that the Plaintiff's interest in the land had long been extinguished by the time they filed suit in 2023."

On his part, counsel for the Plaintiff has submitted in opposition to the Preliminary Objection at page 5 as follows:

"First and foremost, the Defendant's unlawful invasion of – and encroachment into – the Plaintiff's parcel of land (the suit property) obviously amounts to the tort of trespass (under English Common Law). However, the invasion/encroachment aforesaid also amounts to an infringement and violation of the Plaintiff's constitutional right to own property, which right is enshrined, guaranteed and protected under Article 40(1) of *the Constitution*.

In her amended plaint (as amended on the 18th day of March 2024), the Plaintiff has clearly pleaded that the Defendants' acts and omissions were unconstitutional in the circumstances. She has clearly accused the Defendants of arbitrarily infringing upon – and violating – her constitutional right to own property."

Counsel then goes on to cite the pleadings in paragraph 23 of the Plaintiff's amended plaint and adds at page 6 thus:

"The prayers in the amended plaint are abundantly clear that the Plaintiff is seeking legal remedies that are available to her under Article 23 (3) of *the Constitution* of Kenya. The 1st limb of the Defendant's Preliminary Objection conveniently ignores these glaring facts."

Counsel then cites the cases of *Wachira Webeire v A.g.* 2010 Eklr And Also *Absa Bank Kenya Plc (absa) v Kenya Deposit Insurance Corporation* NbiH.C.C. NoE411 of 2023 in which the threads that run through them is that where a party is claiming a violation under *the Constitution*, there can be no period of limitation. And *the Constitution* being the supreme law, the provisions of the *Public Authorities Limitation Act* limiting the period for initiating actions against public authorities is inconsistent with *the Constitution* to the extent that it limits a party's rights to seek redress for contravention of fundamental rights. Counsel also cites D.A.S Majanga J in the case of *Kenya Bus Services Ltd & Another*



v Minister For Transport & Others 2012 KEHC 2402 KLR and also PJO Otieno J In Ngobi v K.P.A. 2017 KEHC 627 KLR and finally makes the following submission on that issue:

“The Plaintiff submit, therefore, that it is disdainful and callous for the Defendants to try to take cover and hide behind Section 3(1) of the *Public Authorities Limitation Act* (cap 39) after constructing a public road on part of the Plaintiff’s private land without compensating her therefor. In the circumstances, the Plaintiff humbly submit, your Lordship, that the Defendant’s Preliminary Objection ought to be dismissed.”

It is clear that as provided under Section 3(1) of the *Public Authorities Limitation Act*, this suit which is against the County Government of Busia and its officers ought to have been filed within 12 months of the time when the cause of action arose. The cause of action in this case, as per paragraph 21 of the plaint, arose in or about the month of August 2020 when the Defendants invaded the suit land. So the Plaintiff ought to have approached this Court within 12 months from August 2021. This case was filed 24 months later on 11th August 2023 well beyond the statutory period set out in the law.

10. I note that the Plaintiff has approached this Court by way of a plaint but not a Petition. Nonetheless, she has pleaded of violation of her constitutional right to property in particular Article 40 of *the Constitution*. The right to property is among the rights protected under chapter Four of *the Constitution* which relates to Fundamental Rights. In the case of James Kanyitta v A.G. Petition No 180 of 2011, the Court held that there is no limitation period for filing proceedings to enforce fundamental rights and freedoms. However, any inordinate delay must be explained. I have not heard the Defendants contend that the delay herein has been inordinate or that they will be prejudiced by the delay herein. I also take the view that although the Plaintiff did not approach this Court by way of a Petition alleging violation of her constitutional right, she has nonetheless invoked that violation in paragraph 23 of her plaint. In view of the provisions of Article 159(2)(d) of *the Constitution*, I am persuaded that she is still entitled to pursue her claim in the manner in which she has approached this Court and that the jurisprudence set out in previous cases cited above and which were dealing with Constitutional Petitions still also apply in this case. The Plaintiff having invoked a violation of constitutional rights to the suit property, the Preliminary Objection founded on Section 3(1) of the Public Authorities Limitation does not defeat her case.
11. Most importantly, however, the Plaintiff’s case is anchored on trespass to the suit property. She has pleaded in paragraph 21(a) of her plaint that the Defendants’
 - a. “Forcefully invaded, trespassed and encroached into the Plaintiff’s land title No South Teso/Chakol/1158.”

The Plaintiff goes on to add in the following paragraphs that the Defendants damaged, destroyed and demolished the perimeter wall and houses on the suit land - paragraph (b) and (c) - and constructed a new tarmac road on a portion of the suit land. It must be obvious from the above that the Plaintiff’s claim is on trespass to land. Indeed in her plaint, the main remedy sought is:

1. “A declaration that the Defendants joint and several acts of forceful invasion, trespass and encroachment upon land title No South Teso/Chakol/1158 amounted to an infringement and a violation of the Plaintiff’s right to own property under Article 40(1) of *the Constitution* of Kenya.”

She then seeks for an order of compensation as well as General and special damages for that violation. This being a claim for compensation for trespass to land, there can be no limitation to such a claim – Isaack Ben Mulwa v Jonathan Mutunga Mweke 2016



eKLR. Such a tort is a continuing one. See also the case of *Nguruman Ltd v Shompole Group Ranch & 3 Others C.a. Civil Appeal No 73 Of 2004* [2007 eKLR], where the Court cited with approval the text on Clerk And Lindsell On Torts 16th Edition paragraph 23-01 which states:

“Every continuance of a trespass is a fresh trespass in respect of which a new cause of action arises from day to day as long as the trespass continues.”

The Court then went on to add that:

“Every action of trespass constitutes a fresh and distinct cause of action. It is inconceivable that a claim based on an action for trespass committed in 2015 would be res judicata simply because the same parties or their parents litigated over the same matter in 1985. It is a well settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts.”

The Court then proceeded to cite Winfred And Jolowincz On Tort 11th Edition at page 32 that:

“Trespass, whether by way of personal entry or by placing things on the Plaintiff’s land may be continuing and give rise to actions de die in diem so long as it lasts. Nor does a transfer of land by the injured party prevent the transferee from suing the Defendant for continuing trespass.”

The Plaintiff’s claim is that in or about August 2020, the Defendants and their officer without any justification or lawful excuse “invaded, trespassed and encroached” onto the suit land and proceeded to construct “a tarmac road that now occupies and covers a portion of the Plaintiff’s land” as pleaded in paragraph 26 of the amended plaint. There is nothing to suggest that the said road has ever been removed. Therefore for as long as the said road remains on a portion of the suit property and for which no compensation has ever been made to the Plaintiff, the plea of limitation cannot shield the Defendants in this case. Of course whether or not the Plaintiff will, at the trial, prove her case, is a matter to be determined by the trial Court on the evidence to be adduced during the hearing.

12. In view of all the above, I am not persuaded that the objection on limitation is well taken. I dismiss it.

.That This Court Lacks The Jurisdiction To Determine This Dispute:

13. It is not very clear to me why this Court’s jurisdiction has been brought to question. The remedies sought by the Plaintiff have been clearly set out in paragraph 35 of the amended plaint and I need not repeat them as I have already set them out at the commencement of this ruling. The jurisdiction of this Court is set out in Section 13(2) of the *Environment and Land Court Act* as follows:

13(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.”

Further, under Section 13(5) of the same Act, this Court can grant prerogative orders, interim and permanent injunctions, damages, compensation, specific performance, restitution declaration or cost. It is also clear that under Article 23(3) of *the Constitution*, among the remedies which this Court can grant include declarations. The remedies which the Plaintiff seek are therefore well within the realm of this Court’s jurisdiction.

14. In support of the Defendants’ Preliminary Objection with regard to jurisdiction, counsel has pleaded as follows:

“The action herein is inter alia for recovery of land and compensation. We submit that the Plaintiff’s interest in the land had long been extinguished by the time they filed suit on 2023.”

The Plaintiff is not, *stricto sensu*, seeking that the Defendant’s return the suit property back to her. She is probably well aware that with the construction of the tarmac road on a portion of it, that would be a tall order. That is why she has crafted her reliefs in the manner in which she has. And even if she intended to seek the return of the suit land back to her, it is clear from paragraph 21 of her amended plaint that the Defendants invaded the suit property in or about the month of August 2020. This suit was filed on 11th August 2023 some three (3) years later. Section 7 of the *Limitation of Actions Act* provides that:

7: “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

Therefore, even if the Plaintiff was seeking to recover the suit property, which she is not, it cannot be correct to submit that her interest therein “had long been extinguished by the time they filed suit in 2023.” Nothing can be further from the truth. The Defendants in paragraph 7 of their defence denied “in toto”, the contents of paragraph 21 of the Plaintiff’s plaint. That can only mean that either the Defendants did not trespass and/or encroach on the suit property in 2020 and proceed to destroy her fence, houses and thereafter expand a tarmac road thereon, or if the Defendants did indeed construct a road thereon, then the process was not un-constitutional, illegal or unjustifiable in which case, the Defendants should have said when the road was constructed and that there was justification in doing so. In the absence of that, this Court can only rely on the Plaintiff’s pleadings that the events complained of occurred in 2020 since that is the only year pleaded. That being the position, it cannot be correct to say that the Plaintiff’s interest in the suit property “had long been extinguished” by 2023 when this suit was filed. The Plaintiff’s interest in the suit property in fact had another nine (9) years before being extinguished by operation of the law. Counsel for the Defendants cited the case of *Bosire Ongero V Royal Media Services* 2015 eKLR and submitted that:

“The Court held that the issue of limitation goes to the jurisdiction of the Court to entertain claims and therefore if a matter is statute barred the Court has no jurisdiction to entertain the same.”

In the preceding paragraphs of this ruling, I have already found that the Plaintiff’s suit is essentially one of trespass to land and which cannot be defeated by the statute of limitation. Therefore, if counsel’s submission on want of jurisdiction by this Court is anchored on the claim that the Plaintiff’s suit is



statute barred, it must be clear to the Defendants by now that the objection of limitation will not aid them. It must be dismissed.

15. The up-shot of all the above is that having considered the Defendant's Preliminary Objection dated 5th January 2023, I issue the following disposal orders:

1. The Preliminary Objection is devoid of any merit and is hereby dismissed.
2. The Defendant's shall bear the Plaintiff's costs of the objection.

BOAZ N. OLAO

JUDGE

8TH APRIL 2025

Ruling dated, signed and delivered on this 8th day of April 2025 by way of electronic mail.

BOAZ N. OLAO

JUDGE

8TH APRIL 2025

