



REPUBLIC OF KENYA



KENYA LAW
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**Wanjohi & 2 others v Gichuhi (Environment & Land Case
E265 of 2024) [2025] KEELC 1181 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1181 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E265 OF 2024**

**TW MURIGI, J
MARCH 6, 2025**

BETWEEN

ISAAC GATHUNGU WANJOHI 1ST PLAINTIFF

ISABELLA NYAGUTHII WANJOHI 2ND PLAINTIFF

WAHFAM LIMITED 3RD PLAINTIFF

AND

GEORGE MURIUKI GICHUHI DEFENDANT

RULING

1. This ruling is in respect of the Defendant’s Notice of Preliminary Objection dated 1st October 2024 raising the following grounds:-
 - i. That this suit is time barred having been brought outside Section 7 of the *Limitation of Actions Act* as it allegedly seeks to enforce the terms of a sale agreement dated 24th December 2002 almost 22 years later.
 - ii. That the Honourable Court lacks jurisdiction to hear and determine the suit.
 - iii. That the suit is frivolous, vexatious, time barred and should be dismissed with costs to the Defendant.
2. The Preliminary Objection was canvassed by way of written submissions.

The Defendant’s Submissions

3. The Defendant filed his submissions dated 20th January 2025. The Defendant’ submissions are erroneously titled “Plaintiff’s Written Submissions”
4. On his behalf, Counsel outlined the following issues for the court’s determination: -



- i. Whether the preliminary objection raised is sustainable.
 - ii. Whether the Complaint dated 28th June 2024 is time barred and thus be struck out.
5. Counsel relied on the case of *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 others* (2015) eKLR and on the case of *Mukisa Biscuits Manufactures Co. Ltd vs West End Distributors Limited E.A* (1969) to submit that a preliminary objection must be based on a pure point of law.
 6. Counsel relied on Section 7 of the *Limitation of Actions Act* to submit that an action for recovery of land cannot be brought outside the limitation period of twelve years. Further reliance was placed on the case of *Bosire Ongero v Rooyal Media Services* (2015) eKLR where it was held that: -

“...the question of limitation touches on the jurisdiction of the court which means that if a matter is statute barred, the court would lack jurisdiction to entertain it....”
 7. Further reliance was placed in the case of *Dickson Ngige Ngugi vs Consolidated Bank Ltd (Formerly Jimba Credit Corporation Limited & Another)* (2020) eKLR where it was held that:-

“The question whether or not the Plaintiff’s suit is barred by statute on account of limitation goes to the jurisdiction of the court to entertain the suit. If the suit is statute barred on account of limitation then the court lacks jurisdiction to entertain the same...”
 8. Counsel submitted that the question of limitation is a pure point of law as it touches on the jurisdiction of the court.
 9. Counsel submitted that the Plaintiffs are seeking to enforce a sale agreement and a transfer instrument both dated 24th December 2002 approximately 23 years after the cause of action arose. Counsel contended that the period of 23 years goes beyond the statutory period for an action to recover land. It was further submitted the preliminary objection has met the legal threshold of a preliminary objection.
 10. With regards to the second issue, Counsel relied on Section 7 of the *Limitation of Actions Act* which stipulates that an action for recovery of land must be brought within 12 years. Counsel submitted that a suit filed outside the limitation period is statute barred and ought to be struck out. To buttress this point, Counsel relied on the case of *Koros (suing as personal representative of the Estate of Anthony Kipkoros Toweet) vs County Government of Kericho* (2022) eKLR. Counsel further relied on the case of *Mehta v Shah, Joseph Mungai Wanene vs Housing Finance Company of Kenya Limited* (2017) eKLR and on the case of *Mukuru Munge vs Florence Shingi Mwanana & 2 others* (2016) eKLR to submit on the purpose of limitation of actions.
 11. Counsel submitted that from the pleadings before the court, the Plaintiff is seeking to enforce an alleged sale agreement and transfer instrument both dated 24th December, 2002 approximately 23 years after the cause of action. Counsel further submitted that the Plaintiffs pleadings show that the transaction relates to the Defendant’s late sister Margaret Wanjiru Gichuhi who passed away on 12th January 2009 and his late brother Johnson Home Gichuhi. It was submitted that majority of the parties and witnesses to the alleged transaction over the suit property have passed away or are incapacitated due to their old age.
 12. Counsel contended that the Defendant will be greatly prejudiced if a trial is to be conducted as his right to a fair trial under Article 50 of *the Constitution* will be violated. Counsel further contended that the Plaintiffs suit contravenes the provisions of Section 7 of the *Limitation of Actions Act*.



13. It was submitted that the Plaintiff did not plead the exemptions that would necessitate extension of the limitation period espoused under Section 26 of the *Limitation of Actions Act*.
14. Counsel further submitted that the previous actions and claims relating to the suit property were instituted by the Estate of the Late Margaret Wanjiru Gichuhi and not by the Plaintiffs who chose to sleep on their rights if any and await such a time when the Estate would be unable to defend itself. It was submitted that the Plaintiffs never filed a counter claim to espouse any rights over the suit property, which claim would have survived the abatement of the previous suits.
15. Concluding his submissions, Counsel submitted that the suit herein is statute barred hence this court lacks jurisdiction to hear and determine the same. Finally, Counsel urged the court to dismiss the Plaintiff's suit with costs.

The Plaintiffs Submissions

16. The Plaintiffs filed their submissions dated 21st January 2025. On their behalf, Counsel submitted that the Preliminary Objection is misconceived as it is partly based on disputed facts contrary to the rule set out in Mukisa Biscuits case(supra). It was submitted that ascertainment of facts is not within the province of a preliminary objection.
17. Counsel submitted that the Plaintiffs are within the time frame to bring an action for recovery of land against the Defendant. Counsel further submitted that L.R No. 209/1461 (the suit property herein) was transferred to the Plaintiffs by the late Margaret Wanjiru Gichuhi after purchasing the same on 24th December 2002 for a consideration of Kshs 6,000,000/=. Counsel further submitted that the Plaintiffs have not realized any return from the investment since the suit property was transferred to them for over 21 years due to the frustration caused by the Defendant and his brother, Johnson Home Gichuhi.
18. It was submitted that since the year 2003, there have been numerous suits between the parties herein touching on the suit property including in the Rent Restriction Tribunal Case No.2 of 2003 where the Tribunal ordered the tenants to deposit rent in it but the Defendant and his late brother advised the Tribunal that the tenants had left the premises.
19. Counsel submitted that in the year 2007, the Defendant and his late brother Johnson Home Gichuhi instituted HCCC No.114 of 2007 Johnson Gichuhi & Ano –v- Isaac Gathungu Wanjohi and 5 Others (now Nairobi ELC No. 1006 of 2023) in order to frustrate the Plaintiffs from taking possession of the suit property.
20. That after the death of the vendor (Margaret Wanjiru Gichuhi), the Defendant and his late brother filed an application seeking to revive the suit and to substitute the deceased with the name of Johnson Home Gichuhi (now deceased). That the said application was dismissed on 14th July 2007 and Nairobi Civil Appeal No.335 of 2017 challenging the dismissal was also heard and dismissed on 18th March 2022 by the Court of Appeal.
21. That the Defendant and his late brother filed another application seeking stay of execution of the notice of eviction issued on 27/04/2022 amongst other orders which was heard and dismissed on 23/09/2022.
22. It was submitted that the Defendant and his brother Johnson Home Gichuhi (deceased) challenged the sale of the suit property in Milimani HCCNO.114 of 2007(now known as Milimani ELC No. 1006 of 2016 in which the Plaintiffs herein filed a defence and counterclaim.



23. Counsel submitted that the Plaintiffs filed Misc. Application No. E115 of 2023 seeking for eviction orders against the Defendant herein. That on 14/12/2023, the application was struck out on the ground that the Plaintiffs ought to have instituted the suit by way of a plaint.
24. Counsel argued that even if one was to assume that a cause of action ought to be brought within 12 years, the Plaintiffs are within the time frame to bring a claim against the Defendant from the time when his suit was dismissed by the court on 14/07/2007.
25. Counsel further argued that the documents filed by the Plaintiff confirm that the Defendant and his brother Johnson Gichuhi Home have from the year 2007 sought to challenge the sale agreement without any success.
26. Concluding his submissions, Counsel submitted that the court has jurisdiction to hear and determine this suit and urged the court to dismiss the preliminary objection with costs.

Analysis And Determination

27. Having considered the preliminary objection and the rival submissions, the only issue that arises for determination is whether the Defendant's Preliminary Objection is merited.
28. The law on preliminary objections is well settled. A preliminary objection must be on a pure point of law. In *Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors Ltd (1969) EA 696*, Law JA stated as follows:-

“So far as I'm aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
29. Further on Sir Charles Newbold JA stated;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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 nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”
30. In *Oraro Vs Mbaja (2005) eKLR Ojwang J (as he then was)* described it as follows;

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”
31. For a preliminary objection to be valid, it must be on a point of law and must be founded on facts that are not in dispute. It should not be proved through facts or evidence or deal with disputed facts.



32. The Defendant's grounds in the preliminary objection can be condensed into one ground namely:- whether the Plaintiffs suit is statute barred.
33. The Defendant contended that the Plaintiffs suit is statute barred by dint of Section 7 of the Limitation of Actions Act. He further contended that this court lacks jurisdiction to hear and determine this suit as the Plaintiffs are seeking to enforce the terms of a sale agreement and transfer both dated 24th December 2002 approximately 23 years after the cause of action arose.
34. Section 7 of the Limitation of Actions Act on which the preliminary objection is grounded provides that:-
- “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.”
35. In the case of *Mehta v Shah* (1965) EA 321 the court stated the purpose of limitation as follows:-
- “The object of any limitation enactments is to prevent a plaintiff from processing stale claims on the one hand and on the other hand to protect a defendant after he has lost evidence for his defence after a long lapse of time....”
36. The Plaintiffs instituted this suit against the Defendant vide a Plaint dated 28th June 2024 seeking the following orders:-
- a. A declaration that the Plaintiffs are the legal and beneficial owners of the land known as L.R NO. 209/1461.
 - b. A declaration that the Plaintiffs are entitled to possession, enjoyment and exercise of all property ownership rights in the land Known as L.R. NO. 209/1461.
 - c. A declaration that the Defendant has committed the tort of trespass to land on the suit property by constructing on the same temporary houses and letting the same to purported tenants.
 - d. An order of eviction to remove the Defendant, jointly and severally his purported tenants and/ or any other persons whatsoever and howsoever on his behalf or claiming through him from the land known as L.R No. 209/1461.
 - e. An order of permanent injunction to jointly and severally stop, prevent and restrain the Defendant, his servants and or agents and or any other person as all on his behalf or claiming through him from entering or remaining upon the suit property or portion thereof.
 - f. Mesne profits from the date of filing this suit until vacation by and/or eviction of the Defendant.
 - g. General damages for trespass.
 - h. Costs of this suit.
 - i. Any other relief and/or further orders as this court shall deem fit.
37. The Defendant argued that the suit herein is statute barred and hence this court lacks jurisdiction to hear and determine the same. The Plaintiffs on the other hand contended that the suit has been brought



within the time frame stipulated as the cause of action arose on 14th July 2007 after the Defendants suit in ELC No. 114 of 2017 was struck out with costs.

38. The record shows that the Defendant is yet to file his statement of defence. The procedural approach of raising an objection that can lead to striking out of a suit is that a defence is first filed. The Defendant has not disputed the Plaintiffs claim as he is yet to file a defence. It is only from the pleadings that the court would be able to ascertain whether the suit is time barred.

39. In the case of Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others Civil Application No. 36 of 2014, the Supreme Court held that: -

A preliminary objection consists of a point of law which has to be pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.....it cannot be raised if any fact has to be ascertained of if what is sought is the exercise of judicial discretion. ‘

40. Similarly, in the case of Avtar Singh Bhamra & Another Vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004, the Court held that:-

“ A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

41. To my mind the Defendant’s Preliminary Objection ought to have been anchored on his defence. From the foregoing, I find that the Defendant’s preliminary objection is premature as it is not anchored on a defence.

42. The upshot of the foregoing is that the Defendant’s preliminary objection is hereby struck out with costs.

RULING DELIVERED DATED AND SIGNED VIA MICROSOFT TEAMS THIS 6TH DAY OF MARCH 2025

.....

T. MURIGI

JUDGE

In the presence of

Nduta holding brief for Karanja for the Plaintiffs

Hussein for the Defendant.

Ahmed – Court Assistant

