



Malel & another (Suing as Administrators of the Estate of the Late Kimalel Arap Sigei) v Malel (Sued as the Administrator of the Estate of The Late Martha Chepkoech Berenge) & 4 others (Environment & Land Case E016 of 2023) [2025] KEELC 3715 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3715 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE E016 OF 2023**

LA OMOLLO, J

MAY 8, 2025

BETWEEN

JAMES KIPLANGAT MALEL 1ST PLAINTIFF

RONALD LANGA 2ND PLAINTIFF

**SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE KIMALEL
ARAP SIGEI**

AND

**ANDREW ARAP MALEL (SUED AS THE ADMINISTRATOR OF THE ESTATE
OF THE LATE MARTHA CHEPKOECH BERENGE) 1ST DEFENDANT**

SAMWEL MALAKWEN BETT 2ND DEFENDANT

TIMOTHY KIPTANUI KORIR 3RD DEFENDANT

RICHARD KIPSANG KOECH 4TH DEFENDANT

DICKSON BOR 5TH DEFENDANT

RULING

Introduction.

1. This ruling is in respect of the 2nd Defendant's Notice of Preliminary Objection dated 13th November, 2024 which is on the following grounds;
 - a. That this suit is time barred having been brought outside the statutory limitation of 12 years in view of Section 7 of the *Limitation of Actions Act* Cap 22.



- b. That as a result this Court lacks jurisdiction to entertain the suit as the same is brought outside the statutory limitation of 12 years.
- c. That this suit is an abuse of the Court process.
- d. That in the circumstances, the suit is procedurally and substantively bad in law, hence suitable to be dismissed and/or struck out with costs to the 2nd Defendant.

Factual Background.

2. The Plaintiffs commenced the present proceedings vide the Plaint dated 8th December, 2023 wherein they seek the following prayers:
 - a. A declaration that the estate of the (sic) Kimalel Arap Sigei is the sole legal and beneficial owner of the land comprised in Kericho/Keбенeti/938 measuring approximate area 4.4 hectares and the 1st, 2nd, 3rd, 4th and 5th Defendant (sic) have no interest whatsoever therein and/or any portion thereof at all.
 - b. A declaration that the closure of register of the estate property comprised in Kericho/Keбенeti/938 and subsequent registration of alleged resultant title and parcels known as Kericho/Keбенeti/2145, 2146, 2147 & 2148 arising therefrom in the names of the 1st, 2nd and is (sic) irregular, un procedural, unlawful, null and void ab initio.
 - c. Upon grant of prayer (b) above, title deeds issued in the names of the 1st, 2nd & 3rd Defendants in respect of the resultant land parcels Kericho/Keбенeti/2145, 2146, 2147 & 2148 be cancelled and the register for land parcel Kericho/Keбенeti/938 be reinstated in the name Kimalel Arap Sigei as the 1st registered proprietor thereof.
 - d. A declaration that the 2nd 3rd 4th and 5th Defendants by themselves and/or their servants, agents and/or employees are trespassers on the estate property comprised in Kericho/Keбенeti/938.
 - e. This Honourable Court be pleased to issue orders directing the 2nd 3rd and 4th Defendants jointly and/or severally to vacate the estate property herein Kericho/Keбенeti/938 forthwith and/or in the alternative be evicted therefrom with the assistance of OCS Sondu Police Station at their own cost.
 - f. An order of permanent injunction restraining the 2nd 3rd and 4th Defendant by themselves and/or their servants, agents and employees from entering upon, remaining thereon, occupying, cultivating, using, leasing, erecting structures thereon, interfering and/or in any manner whatsoever dealing with the estate property comprised in land parcel Kericho/Keбенeti/938.
 - g. Special damages as prayed in paragraph 17 hereinabove.
 - h. Damages for trespass.
 - i. Cost of the suit.
3. The 2nd Defendant has entered appearance but has not filed any statement of Defence as at the time of writing of this ruling.
4. The 3rd Defendant filed his Statement of Defence dated 19th January, 2024 and urges the Court to dismiss the Plaintiffs suit with costs.
5. The 4th Defendant filed his Statement of Defence dated 19th January, 2024. He also urges the Court to dismiss the Plaintiffs suit with costs.



6. As at the time of writing this ruling, the 1st and 5th Defendants have neither entered appearance nor filed their statements of defence.
7. The preliminary objection came up for hearing on 28th January, 2025 when the Court issued directions that it be heard by way of written submissions.
8. On 20th February, 2025, parties confirmed having filed submissions and the preliminary objection was reserved for ruling.

The Plaintiffs Response.

9. In response to the 2nd Defendant's preliminary objection, the Plaintiffs filed grounds of opposition dated 21st January, 2025. The grounds are as follows;
 - a. That the Court exercises of (sic) discretionary power under Order 4 Rule 1G of the Civil Procedure Act does not constitute a legal ground to merit determination and/or consideration as a pure point of law.
 - b. That the 1st and 2nd Plaintiffs are joint administrators of the estate of the late Kimalael Arap Sigei who is the deceased Plaintiff.
 - c. That contrary to the 2nd Defendant's averments in paragraph 13 of the Statement of Defence, the claim herein is
by and/or behalf of the estate of Kimalael Arap Sigei who is the Plaintiff and not its administrators Ronald Langat and James Kiplangat Malel.
 - d. That the deceased Plaintiff is the only one (1) and not two (2) as alleged by the 2nd Defendant.
 - e. That the notice of Preliminary Objection dated 13th November, 2024 is an abuse of the Court process we urge the Court not to find and to accordingly dismissed with cost. (sic)

Issues for Determination.

10. The 2nd Defendant filed his submissions on 13th February, 2024 while the Plaintiffs filed their submissions on 21st January, 2024.
11. The 2nd Defendant submits on the following issues;
 - a. Whether the 2nd Defendant has met the threshold for a preliminary objection. (sic)
 - b. Whether the preliminary objection is merited.
 - c. Who should bear costs of this application. (sic)
12. With regard to the first issue, the 2nd Defendant relies on the judicial decisions of *Mukisa Biscuit Manufacturing Limited v West End Distributors* [1969] EA 696, *Avtar Singh Bhamra & anor v Oriental Commercial Bank HCC No. 53 of 2004* and submits that for a preliminary objection to be maintained, pure points of law must be raised.
13. The 2nd Defendant also submits that the question of limitation of time touches on the jurisdiction of the Court. The 2nd Defendant further submits that if a matter is statute barred, the Court lacks jurisdiction to entertain the suit and it should therefore down its tools. The 2nd Defendant relies on the judicial decision of *Bosire Ongero v Royal Media Services* [2015] eKLR in support of this point.



14. The 2nd Defendant relies on Section 7 of the *Limitation of Actions Act* and submits that the present suit was filed twelve years after the course of action accrued.
15. On the second issue, the 2nd Defendant submits that the Plaintiffs acknowledge at paragraphs 9 and 10 of their Plaint that the register of land parcel No. Kericho/Kebeneti/938 was closed on 26th November, 1991 upon subdivision.
16. The 2nd Defendant also submits that he was issued with a title deed on the same date the register was closed and therefore the Plaintiffs ought to have filed their suit on or before the 26th Day of November, 2003.
17. The 2nd Defendant further submits that the Plaintiffs slept on their rights and filed the suit thirty-two years after the course of action arose and it is therefore statute barred.
18. The 2nd Defendant relies on the judicial decisions of Dickson Ngige Ngugi vs Consolidated Bank Ltd (Formerly Jimba Credit Corporation Limited) & another [2020] eKLR, Edward Moonge Lengusuranga v James Lanaiyara & another [2019] eKLR, Mehta v Shah [1965] EA 321 in support of his submissions.
19. It is the 2nd Defendant's submissions that the provisions of Section 26 of the *Limitation of Actions Act* cannot come to the rescue of the Plaintiffs as they did not plead fraud.
20. The 2nd Defendant concludes his submissions by urging the Court to allow his preliminary objection and strike out the suit with costs.
21. The Plaintiffs submit on whether or not the preliminary objection is proper and rely on the judicial decisions of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Limited (1969) E.A 696 to submit that grounds 1 and 2 on the preliminary objection raise pure points of law while grounds 3 and 4 do not merit consideration.
22. The Plaintiffs submit that the 2nd Defendant in his Statement of Defence did not plead grounds 3 and 4 of his preliminary objection and therefore, the Court should not consider them.
23. The Plaintiffs rely on the judicial decisions of Stephen Onyango Achola & another v Edward Hongo Sule & another [2004] eKLR, D T Dobie & Company (Kenya) Ltd v Muchina (1982-88) 1 KAR 1 in support of their submissions.
24. The Plaintiffs rely on Order 4 of the Civil Procedure rules, the judicial decisions of Luke Cheruiyot and 37 others v National Oil Corporation NRB CA Civil Appeal No. 91 of 2019 [2015] eKLR, Kiraku v Eastleigh Route Sacco Limited (Civil Appeal E057 of 2021) [2022] KEHC 11809 (KLR) (Commercial and Tax) (22 July 2022) (Judgement) and submit that the 2nd Defendant's preliminary objection lacks merit and it should be dismissed.

Analysis and determination.

25. I have considered the preliminary objection, the grounds of opposition and the rival submissions filed by the parties herein.
26. In my view, the only issue that arises for determination is whether the Plaintiffs suit is statute barred for having been filed more than twelve years after the course of action arose and whether on account of this, it offends the provisions of Section 7 of the *Limitation of Actions Act*.



27. In *Oraro vs Mbaja* 2005 1 KLR 141 the Court held as follows;

“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. Any assertion which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof, or seek 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.” (Emphasis mine)

28. 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. However, it cannot be raised if any facts have to be ascertained. In other words, a preliminary objection should not deal with disputed facts nor should it derive its foundation from factual information.

29. The 2nd Defendant submits that the course of action arose on 26th November, 1991 when he was registered as the owner of land parcel No. Kericho/Kebeneti/2147.

30. The 2nd Defendant also submits that the Plaintiffs ought to have filed their suit on or before 26th November, 2003 but instead they filed their suit thirty-two years after the course of action arose.

31. The 2nd Defendant therefore contends that the Plaintiffs’ suit is statute barred as it was filed after the statutory period of twelve years had lapsed.

32. In response, the Plaintiffs contend that Grounds 3 and 4 of the preliminary objection are not pleaded in the 2nd Defendant’s Statement of Defence and they should therefore not be considered by the Court.

33. Though the Plaintiffs refer to the 2nd Defendant’s Statement of Defence, no such defence is on the Court record.

34. Section 7 of the *Limitation of Actions Act* provides as follows;

“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 *Sichuan Huashi Enterprises Corp. Limited v Micheal Misiko Muhindi* [2019] eKLR the Court held as follows;

“13. The law as I understand it is that the defence of limitation of time is a matter for determination at the trial; it cannot be dealt with in a summary manner or at preliminary stage or as a preliminary objection. The Court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial. (Emphasis mine)

On this see the case of *Oruta & Another vs. Nyamato* [1998] KLR 590, where the Court held that limitation of action:-

“...could only be queried at the trial

but not by...a preliminary objection...The appellant could raise the objection at the trial and the trial judge would have to deal with the matter on the evidence to be adduced at the trial” (Emphasis mine)



14. See also the case of Divecon Ltd vs Shirinkhanu S. Samani Civil Appeal No. 142 of 1997, where the Court quoted with approval the words of Gachuhi, J.A., the leading judge in the Oruta case (ibid) that:

“It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the *Limitation of Actions Act*...” (Emphasis mine)

Disposition.

36. A defence of limitation of time requires interrogation of evidence and can therefore only be determined at a trial and not as a preliminary objection.
37. Consequently, I find that the 2nd Defendant’s Preliminary Objection dated 13th November, 2024 lacks merit and it is hereby dismissed with costs.
38. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 8TH DAY OF MAY, 2025.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Kiletyen for Kemboi for 2nd defendant

No appearance for the Plaintiff

1st and 3rd in person. Absent.

Court Assistant; Mr. Joseph Makori.

