



**Ndemo v Ondoro & 4 others (Environment and Land Case
E004 of 2022) [2025] KEELC 6754 (KLR) (8 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6754 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND CASE E004 OF 2022
DO OHUNGO, J
OCTOBER 8, 2025**

BETWEEN

MICHAEL MOTURI NDEMO PLAINTIFF

AND

RHODA MONGINA ONDORO 1ST DEFENDANT

JOHNSTONE NYANYUKI MENGE 2ND DEFENDANT

JAMES ONGERA KEMONI 3RD DEFENDANT

HELLEN ACHINGA MAKORI 4TH DEFENDANT

YUNES BOERA NYAMWANGE 5TH DEFENDANT

RULING

1. This ruling is in respect of the Second Defendant’s Notice of Preliminary Objection dated 15th April 2024 and the First Defendant’s Notice of Preliminary Objection dated 11th November 2024.
2. Notice of Preliminary Objection dated 15th April 2024 is pleaded as follows:

Take notice that Counsel for the 2nd Defendant herein shall at the first Hearing of the Main suit raise and/or canvass Preliminary Objections on point(s) of law as hereunder;

1. The instant suit by and/or at the instance of the Plaintiff is barred by the dint of the Provisions Sections 4 and 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
2. At any rate, the suit herein is Pre-mature, Misconceived and Bad in Law.
3. Besides, the Plaintiff herein is Non-Suited.



4. In any event, the instant suit herein does not Disclose any Reasonable cause of action against the 2nd Defendant, whatsoever and/or howsoever.
 5. In the premises, the instant suit constitutes and/or amounts to an abuse of the Due process of the Court.
3. On the other hand, Notice of Preliminary Objection dated 11th November 2024, which is verbose, is pleaded as follows:

The 1st Defendant hereby wish to raise Preliminary points of law to be decided upon for disposal of the suit and the same need not be fixed for hearing.

1. The suit is res judicata on the following grounds: -
 - a. The Plaintiffs late father Joseph Zachary Onduko had before his death filed a similar suit on 17/11/2006 at Kisii High Court against the 1st Defendnat (sic) and 3 others and it was KISII H.C. Civil Case No.155 of 2006. He died on 10/11/2010 (the Plaint and Defence are attached herein for perusal).
 - b. That the said suit, Kisii H.C. Civil Case No.155 of 2006, was dismissed for want of prosecution on 21/7/2010 by Hon. D. Musinga (J) and the dismissal order is dated 23/7/2010 (attached herein is the said dismissal order).
 - c. That judgment includes dismissal order, and the same was to expire on 21/7/2022 which is 12 years from time of dismissal order.
 - d. That while the said judgment was still standing the Plaintiff filed this suit on 12/5/2022.
 - e. That the Plaintiff has sued in this case as personal representative of his said late father Joseph Zachary Onduko (attached is Plaintiff's letters of administration.
 - f. That the 1st Defendant's parcels of land in dispute in KISII H.C. Civil Case No.155 of 2006 are:
 - i. Gesima Settlement Scheme/337
 - ii. Gesima Settlement Scheme/343
2. That the 1st Defendant's above mentioned parcels of land were also subject in the Environment and Land Court Case NO.1130 of 2016 (O.S) at Kisii which case was filed by the 2nd Defendant herein (Johnstone Nanyuki Menge) against the 1st Defendant herein (Rodha Mongina Ondoro) and after the case was fully heard on merit judgment was delivered on 9/10/2019 by Hon. J. M. Mutungi (J). (the judgment is attached herein).

The court has to avoid giving conflicting judgments affecting same subject matter.



3. That the same Plaintiff's parcels of land namely Gesima Settlement Scheme/337 and 343 were further also in issue in the Environment and land Court at Nyamira in E.L.C CASE NO.60 OF 2004 (Yunes Boera Nyamwange - vs - Rodha Mong'ina Ondoro (1st Defendant) and others, in which this court delivered its judgment on 9/5/2024 (copy of judgment is attached).

That the 1st Defendant Rodha Mongina Ondoro cannot be harassed/punished over and over again in the same subject matter.

4. The Plaintiff's claim for land is statutory barred under the *Limitation of Actions Act* (Cap 22 Laws of Kenya) on the following reasons: -
 - a. The Plaintiff alleges that his late father Joseph Zachary Onduko had bought land namely Plot No.11 in 1982. Recovery of land has to be done within 12 years from the time cause of action arose.
 - b. The Plaintiff's said late father did file the suit (stated in paragraph 1(a)above) to recover the said land but the same was dismissed on 21/7/2010 and the Plaintiff herein being his son did not bother to resurrect the dismissed suit and continue with it. He instead unlawfully filed this suit.
5. That the amended Plaintiff filed on 30/6/2023 is fatally defective as there is no Veffying (sic) Affidavit accompanying it and the same should be struck out with costs.
6. That the court of Appeal sitting at Kisumu in Civil Appeal (Application) No.302 of 2019 (Johnstone Nyanyuki Menge, Applicant - vs - Rhoda Mongina Ondoro & other Respondents) had expressly refused stay of execution in respect of the 1st Defendants parcels of land namely: -
 - a. Gesima Settlement Scheme/337
 - b. Gesima Settlement Scheme/343

The Plaintiff cannot seek stay of execution in respect of the same parcel of land as this may contradict the express orders of the court of appeal. (Ruling of Court of Appeal delivered by Hon. Asike Makhandia, Hon. S. Gatamba Kairu (FCI Arb), S. ole Kantai (JJA) on 4/12 2020 is attached.

4. The objections were heard together, partly through oral submissions and partly through written submissions.
5. The First Defendant filed submissions dated 26th February 2025 through which she submitted that the suit is res judicata, time barred, defective and an abuse of the court process. She adopted and relied on her Notice of Preliminary Objection "together with attached documents" and submitted that the suit is a non-starter which ought to be dismissed with costs.
6. Counsel for the Second Defendant argued in his oral submissions that the Plaintiff particularised fraud at paragraph 10 of the Amended Plaintiff and added that despite the Plaintiff discovering the fraud in the year 2015, this case was not filed until the year 2022. He contended that the delay is beyond the period permitted under Section 4 of the *Limitation of Actions Act*. He went on to submit that pursuant to paragraph 6 of the Amended Plaintiff the Plaintiff is seeking to enforce a contract executed in 1982



- and to challenge subdivisions done in 1995. That the Second Defendant had been in occupation since 1995 and that the claim is outside the 12 years permitted by Section 7 of the *Limitation of Actions Act*. Additionally, the Second Defendant filed submissions dated 16th June 2025 which I have considered.
7. Counsel for the Third Defendant associated herself with the submissions of the Counsel for the Second Defendant and contended that the Plaintiff never took possession of the suit property. She added that the Plaintiff was well aware that the seller passed away in 2004 and that a succession cause was filed. Arguing that the Third Defendant had been in possession since 2010, she urged the Court to uphold the objections.
 8. Despite evidence of service being availed, the Fourth and Fifth Defendants neither attended court during the hearing of the objections nor filed submissions.
 9. The Plaintiff filed submissions dated 17th February 2025. Relying on the case of *Nyanyuki v Openda & another* [2023] KEELC 20469 (KLR), he argued that *res judicata* cannot be raised through a preliminary objection since its proof requires evidence of existence of a previous suit, the parties to the suit as well as determination of the suit. He therefore urged the court to find that the plea of *res judicata* raised herein is misconceived and does not constitute a pure point of law.
 10. Regarding the aspect of limitation of actions, the Plaintiff submitted that whereas it is not disputed that the portion of land that is the subject of these proceedings was purchased in the 1980s, he had pleaded misrepresentation, fraud, breach of trust and wilful on the part of the original vendor. That since it is not indicated in the pleadings when the fraud and misrepresentation were discovered so as to determine when time started running, the issue can only be determined after receiving evidence at the hearing and does not therefore constitute a valid preliminary objection. He relied on the cases of *Justus Tureti Obara v Peter Koipeitai Nengisoi* [2014] eKLR and *Matundura (Suing as the legal representative and administrator of the Estate of Kerebi Matundura) v Matundura & 3 others* [2023] KEELC 15963 (KLR) as well as Section 26 of the *Limitation of Actions Act* and urged the court to find that the plea of limitation of actions is without basis.
 11. I have considered the two preliminary objections and the submissions. The issues that arise for determination are whether the objections raise pure points of law, and if so, whether the objections have merit.
 12. The essentials of what constitute a valid preliminary objection were summed up in *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696 by Law JA as follows:

So far as I'm 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.
 13. It follows therefore that for a preliminary objection to be valid, it must raise a pure point of law which is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. If it is upheld, a valid preliminary objection should result in summarily terminating the suit or application against which it is raised. As Sir Charles Newbold (P) cautioned in *Mukisa Biscuit Manufacturing Co. Ltd* (supra), a preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Not every objection amounts to a valid preliminary objection. If what is raised is not a pure point of law, the issue is better addressed through a substantive application or in the ordinary course of defending a given matter.



14. The Court of Appeal recently restated the law relating to preliminary objections in *Ndumba v Returning Officer Kimilili Constituency & another* [2025] KECA 636 (KLR) where it held:
26. A P.O serves to challenge the legal sufficiency of a case, proceeding on the assumption that all factual claims presented are accurate. It is reserved solely for addressing legal points, strictly avoiding engagement with any disputed factual matters. The court's assessment hinges on whether the objection originates exclusively from the pleadings and is rooted firmly in established legal principles.
27. Should the determination necessitate an inquiry into extraneous factual matters, or the exercise of judicial discretion, a P.O would be deemed procedurally inappropriate. See the case of *Oraro Vs Mbaja* [2005] 1KLR 141, where the Court 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".
28. A P.O cannot be raised if any fact has to be ascertained from elsewhere, or if the court is called upon to exercise judicial discretion. The court will also take into account that the P.O must stem from the pleadings and raise pure point/s of law. It should not deal with disputed facts, nor should it derive its foundation from factual information.
15. The two objections gravitate around two broad points: whether the suit is *res judicata* and whether the suit is barred by the *Limitation of Actions Act*. *Res judicata* is a common law doctrine grounded on equitable principles. It has found statutory expression at Section 7 of the *Civil Procedure Act* which provides as follows:
- No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
16. The prerequisites of a successful plea of *res judicata* are that there must be a previous suit in which the matter was in issue; the parties in both matters were the same or litigating under the same title; the previous matter was heard and determined by a competent court and the issue is raised once again in the new suit. See *Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another* [2016] eKLR.
17. To investigate and ascertain whether *res judicata* should be upheld, the court will need to receive evidence on whether the cases that the First Defendant has referred to existed, the parties thereto and the outcomes. In an attempt to prop up her preliminary objection, the First Defendant even annexed copies of pleadings and judicial determinations to her Notice of Preliminary Objection. That is unacceptable. The mover of a preliminary objection must rely solely on the facts pleaded by the party against whom it is raised. As was held in *Nyanyuki v Openda & another* (*supra*), *res judicata* should be raised through a formal application since it is not a pure point of law.
18. The First and Second Defendants have also contended that the suit is barred by various provisions of the *Limitation of Actions Act*. Specifically, they have cited Sections 4 and 7 of the *Limitation of Actions Act*. Suffice it to state that the issue of the date when a cause of action arose is an intensely factual question. The Court of Appeal held as much in *South Nyanza Sugar Company Limited v Mboga* [2025] KECA 546 (KLR). There will be need to receive evidence to determine dates, including the date of discovery of fraud. The evidence will have to be received and weighed at the trial.



19. In view of the foregoing, I find that the Second Defendant's Notice of Preliminary Objection dated 15th April 2024, and the First Defendant's Notice of Preliminary Objection dated 11th November 2024 do not raise pure points of law. I find no merit in the objections, and I therefore dismiss them with costs to the Plaintiff.

DATED, SIGNED, AND DELIVERED AT NYAMIRA, THIS 8TH DAY OF OCTOBER 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Mr Marita for the Plaintiff

No appearance by the First Defendant

Mr Mulisa for the Second Defendant

Ms Mosomi for the Third Defendant

No appearance by the Fourth and Fifth Defendants

Court Assistant: B Kerubo

