

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ELCLA NO. E028 OF 2024

HARIKRUSHNA HARMANBHAI PATEL ----- APPELLANT

VERSUS

ASMAN MOHAMMED (suing as the legal and personal representative of the late MOHAMED MWANZA WANGA).....1ST RESPONDENT

JONATHAN NAMULALA NYONGESA..... 2ND RESPONDENT
JOSEPHINE M. CHIBOLE (being sued as the widow of WINFRED CHIBOLE NAMALE)3RD RESPONDENT

BENARD WAFULA.....4TH RESPONDENT

THE LANDS REGISTRAR, BUNGOMA5TH RESPONDENT

THE HON. ATTORNEY GENERAL..... 6TH RESPONDENT

(being an appeal from the Ruling by Hon. C. MAUNDU Chief Magistrate in Bungoma CM-ELC NO. E013 of 2023 delivered on 28/05/2024

JUDGMENT

Introduction.

1. Vide a memorandum of appeal dated 03/06/2024, **HARIKRUSHNA HARMANBHAI PATEL** who is the Appellant herein was the 4th Defendant before the trial court (Hon. C. Maundu Chief Magistrate) in Bungoma MC Case no. 13 of 2023 (herein referred to as the former suit) appeals to this Court challenging the ruling delivered on 28/05/2024.

2. By way of background, the Respondents herein sued the Appellant vide a plaint dated 04/02/2023 seeking orders directing the reversion of title deeds comprised in LR No. E.Bukusus/S.Kanduyi/10161 and 10162, rectification of an entry in the land register for LR No. E.Bukusus/S.Kanduyi/10161 and 10162 to revert back to LR No. E.Bukusu/S.Kanduyi/4117, a permanent injunction against the Appellant and the 2nd 3rd and 4th Respondents, eviction and demolition orders, general damages for loss of user, costs and interests of the suit.

3. The Appellant herein filed a statement of defence dated 28/03/2023 accompanied by a Notice of preliminary objection on grounds that the trial court lacked jurisdiction to determine the dispute in view of the provisions of Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya.

4. The 2nd Respondent also filed a notice of preliminary objection dated 28/03/2023 on the same grounds the Appellant herein had raised. The 4th Respondent equally filed a statement of defence dated 20/04/2023. The 1st Appellant entered into a consent with the 4th Respondent dated 27/04/2023 to compromise the suit against him while the suit against the 3rd Respondent was withdrawn vide a notice of withdrawal dated 20/04/2023.

5. Pursuant to directions issued on a priority basis, the preliminary objection raised by the Appellant was agreed to be

canvassed through written submissions. Upon consideration, the trial court dismissed the said preliminary objection and ordered costs to be in the cause. It is the above ruling which prompted the Appellant to file the present appeal seeking to have it set aside and costs thereof be awarded to him.

The Appeal.

6. The following four (4) grounds of appeal have been preferred:

- a) The learned trial magistrate erred in law and in fact in holding that it is not clear from the pleadings when the plaintiff discovered the fraud.**
- b) The learned trial magistrate erred in law and in fact in dismissing the Preliminary Objection dated 28th March 2023.**
- c) The learned trial magistrate erred in law and in fact in failing to hold that the plaintiff's suit is barred by Limitations of Actions Act Cap 22 Laws of Kenya.**
- d) The learned trial judge erred in law and in fact in failing to consider the Appellant's case and submissions in respect to Notice of Preliminary Objection dated 28th March 2023.**

7. The appeal was agreed to be canvassed by way of written submissions with the Appellant filing his missions dated 15/05/2025 where he argued that the import of paragraphs 11 and 20 of the Plaint is that the deceased became aware of the

alleged fraudulent transfer of the suit land by the 2nd Respondent before he died i.e. before 22/04/2010. He submitted that the suit was filed on 10/08/2023 which is more than 13 years 4 months after the cause of action arose. From the 1st Respondent's own pleadings, the suit was filed outside the timeframe of 12 years. It was submitted that section 7 of the Limitation of Actions Act applies to actions aimed at recovering land as well as claims for possession or title to land. That once the 12-year period lapses, the right to recover the land is barred, and the defendant is entitled to rely on the limitation period as a defense.

8. Reliance was placed inter-alia in the cases of **Avtar Singh Bhamra & Ano. v Oriental Commercial Bank HCC No 53 of 2004**, **Bosire Ongero v Royal Media services [2015] eKLR**, **Mehta v Shah [1965] EA 321**. It was further submitted that Section 26 of the Limitation of Actions Act provides for the extension of limitation periods in cases where the right of action is concealed by fraud, based on a mistake, or where damages require knowledge of specific facts could not aid the 1st Respondent since the actions complained of were discovered over 13 years ago. He cited the case of **Justus Tureti Obara v Peter Koipeitai [2014] eKLR**, **Environment and Land Case 54 of 2015 (Kenya Law, 2021)** and **Gachuma Gacheru v Maina Kabuchwa [2015] eKLR**.

9. The 1st Respondent filed submissions dated 12/06/2025 where he submitted that this honorable court lacks jurisdiction to hear and determine this Appeal for failure by the Appellant to seek leave of the court before filing the same. He argued that this court's jurisdiction to hear any appeal is conferred by either the constitution or statute or both and that it is not automatic. He cited inter alia the cases of **Nyutu Agrovet Ltd v Airtel Networks Ltd [2015] eKLR, Peter Nyaga Muvake v Joseph Mutunga [2015] eKLR, Gitau VS Kamau (civil appeal E067 of 2021) (2025) KEHC 10337 (KLR) (14 March 2022).** Further reliance was placed in the provisions of section 75 of the civil procedure Act, Cap 22 Laws of Kenya and order 43 Rule 1 of the civil procedure Rules, 2010.

10. It was further submitted that failure by the Appellant to plead the issue of the suit being subject to the Limitation of Action Act rendered the preliminary objection incompetent. Reliance was placed in the provisions of Order 2 rule 4 of the Civil Procedure Rules, 2010 and the case of **Mohamed Abdikadir Mohammed v Sammy Kagiri & another [2016] eKLR Civil Appeal 102 of 2011** and **Argos Furnishers Limited v Comat Trading Company Limited [2021] eKLR.** It was further submitted that it is mandatory to include decrees in the record of appeal which equally applies to orders appealed from. He submitted that in this case, the Appellant did not extract and include the order appealed from in the record of appeal. He submitted that this is fatal to the appeal and that the

appeal is incompetent and it ought to be struck out. The 1st Respondent further submitted that the Appellant's line of arguments that the preliminary objection is not premised on the Respondents' plaint but is a matter of conjecture and/or drawing of conclusions from the documents filed and therefore the same was not based on a pure point of law.

Analysis and determination.

11. I have duly considered the record of appeal together with the rival submissions by the learned counsel. In my view, this appeal, which challenges the ruling of the trial magistrate dismissing the Appellant's preliminary objection on the ground of limitation, may conveniently be determined by addressing the singular issue of whether the trial court erred in dismissing the said objection.

12. This Court as a first appeal court is alive to its role as set out under Section 78 of the Civil Procedure Act which is to re-evaluate, re-assess and re-analyze the evidence as contained in the Record of Appeal. This was echoed by the Court in the case of **Peter M. Kariuki Vs Attorney General [2014] eKLR.** The Appellant's preliminary objection is based on section 7 of the Limitation of Actions Act which provides that a suit for the recovery of land must be instituted within 12 years from the date when the cause of action arose.

13. It is important to first point out what constitutes a Preliminary Objection. The case of **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** lends credence to this Court. The trial Court in that case defined Preliminary Objection 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 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”.

14. Further Sir Charles Newbold JA in the same case stated 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 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”.***

15. Also see the findings of the Supreme Court in the case of **Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others [2015] e KLR.**

16. From the above definition of a Preliminary Objection, it is evident that it ought to raise a pure point of law which is premised 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 from elsewhere or where the court is called upon to exercise judicial discretion. Further, in determining a Preliminary Objection, the Court will take into account that a Preliminary Objection must stem from the pleadings and that it raises a pure point of law. See the case of **Avtar Singh Bhamra & Another...Vs....Oriental Commercial Bank, Kisumu HCCC No.53 of 2004.**

17. The Court in the case of **ORARO -V- MBAJA 2005 KLR 141** stated that;

“A Preliminary Objection correctly understood, is now well defined as and declared to be a point of law which must not be blurred by 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 yet it bears 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. Where court needs to investigate facts, a matter cannot be raised as a Preliminary point. Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence ...". Emphasis mine.

18. From the foregoing, it is clear that an issue of limitation is a pure point of law which qualifies to be raised as a Preliminary Objection. Indeed, it goes to the jurisdiction of the court to determine the dispute before it. In determining the merits thereof, the Court must also be satisfied that the issue of Limitation of law raised is not obscured by factual controversies requiring proof through evidentiary process. From the pleadings on record, the Preliminary Objection as raised is muddled with contested facts which needed to be determined through examination of evidence and was not "a pure point of law." The trial Magistrate in my view rightly held that it was necessary to first ascertain the correctness of the pleaded facts and to evaluate the parties' evidence in order to establish when the cause of action arose. Such an inquiry inevitably goes beyond the confines of a preliminary objection and calls for evidentiary evaluation. The pleadings, including the plaint and the defences demonstrate that the issue of limitation was heavily contested thereby rendering the objection improperly taken

19. On that basis alone, this appeal lacks merit and the same is hereby dismissed. The Respondents shall have the costs of the appeal.

20. Orders accordingly.

DATED and **SIGNED** and **DELIVERED** at **BUNGOMA** this 02nd day of October, 2025.

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HON.E.C CHERONO
ELC JUDGE

In the presence of;

1. Mr. Were for the Respondent.
2. Mr. Maloba for the Appellant.
3. Bett C/A.