

- (i) *The suit is time-barred under Section 4(2) of the Limitation of Actions Act and Section 3(1) of the Public Authorities Limitation Act;*
- (ii) *The Plaintiff lacks locus standi;*
- (iii) *The Court lacks jurisdiction as the orders sought are in the nature of judicial review;*
- (iv) *The suit discloses no reasonable cause of action;*
- (v) *The Plaintiff's work permit does not authorize ownership of shares;*
- (vi) *No injury has been suffered;*
- (vii) *The interested parties were joined without leave;*
and
- (viii) *The suit amounts to an abuse of the court process.*

2. The objectors submitted that the cause of action arose on 24th May 2018 when the Plaintiff's shares were allegedly transferred to the 1st Interested Party. Consequently, the suit filed on 16th June 2021 was said to be filed outside the limitation period for tortious claims, and thus time-barred. They further argued that the Plaintiff lacked authority to sue on behalf of the Interested Parties, and that his work permit did not entitle him, as a foreign national, to own shares in a Kenyan company.

3. The Plaintiff opposed the objection, arguing that the purported Amended Preliminary Objection is itself procedurally defective and an abuse of court process, having been filed merely as a fallback in case an earlier motion

failed. He maintained that the claims against the Defendants are not time-barred, that he sues in his personal capacity as beneficial owner of 9,800 shares, and that the issues of fraud, breach of fiduciary duty, and conspiracy require evidence and therefore cannot be determined through a preliminary objection.

4. The Plaintiff also contends that foreigners are constitutionally entitled to own movable property, including company shares, under Article 40 of the Constitution, and that no provision of the Kenya Citizenship and Immigration Act limits that right. He further asserts that the leave to amend the Plaint granted by Mwita J. on 17th April 2023 was proper under Order 8 Rule 3 and Order 1 Rules 6 and 7 of the Civil Procedure Rules.

Analysis and determination

5. From the pleadings and submissions, the only issue for determination is whether the Preliminary Objection is merited.
6. The principles governing preliminary objections were set out in the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**, where Law JA held that:

“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. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

7. The Plaintiff has argued that the Amended Preliminary Objection is an abuse of process. It is trite that a preliminary objection must raise a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct.
8. The Court must therefore first determine whether the matters raised are pure points of law. In the present case, the objection touches on whether the Plaintiff is the beneficial owner of shares, whether he suffered loss, whether his work permit allowed shareholding, and the circumstances of amendment of the pleadings. These are contested factual matters that can only be determined upon evaluation of evidence. To that extent, the purported objection departs from the principles in the **Mukisa Biscuit** case and is misconceived.
9. On limitation, Section 4(2) of the Limitation of Actions Act limits actions founded on tort to three years. The Objectors contend that the cause of action arose in May 2018, hence the suit filed in June 2021 was out of time.
10. However, the Plaintiff's claim includes allegations of fraud and breach of fiduciary duty, both of which are exceptions to strict limitation under **Section 26** of the **Limitation of Actions** Act, which provides that:

“Where, in the case of an action for which a period of limitation is prescribed, the action is based upon the fraud of the defendant...the period of limitation shall not begin to run until the plaintiff has discovered the fraud...”

11. The question of when fraud was discovered is a matter of evidence and cannot be determined at the preliminary stage. This position was emphasized in **Gathoni v Kenya Co-operative Creameries Ltd [1982] KLR 104** and **Divecon Ltd v Samani [1995-1998] 1 EA 48**. Accordingly, whether the suit is time-barred cannot be determined on a preliminary objection.
12. On *locus standi*, the Plaintiff pleads that he sues as the beneficial owner of shares and controlling mind of the 2nd Interested Party. Article 260 of the Constitution defines “person” to include natural and juristic persons, while Article 40(1) expressly guarantees every person, including non-citizens, the right to acquire and own property of any description, subject to limitations in land ownership under Article 65. Shares in a company constitute movable property, as recognized in **Victor Mabachi & Another v Nurtun Bates Ltd [2013] eKLR**.
13. There is no provision in the Kenya Citizenship and Immigration Act or the Companies Act, 2015 that bars foreigners lawfully in Kenya from owning shares. Consequently, the Plaintiff’s locus cannot be denied merely

on the basis of nationality. Whether he indeed holds the 9,800 shares is again a question of fact.

14. On the question of jurisdiction and the argument that the reliefs sought are in the nature of judicial review, the Court notes that judicial review under Section 8 and 9 of the Law Reform Act and Article 47 of the Constitution deals with decisions of public bodies and administrative action. The Plaintiff's claim is for declarations and rectification of a company's share register on grounds of fraud and breach of trust matters, which are commercial disputes and properly within the civil jurisdiction of this Court under Article 165(3) (a) of the Constitution.
15. Jurisdiction, as stated in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**, is everything. However, the nature of the pleadings here shows that the Court is properly seized of the matter.
16. On the question of amendment, the leave granted by Mwita J. on 17th April 2023 permitted the Plaintiff to amend his plaint. Order 8 Rule 3(1) of the Civil Procedure Rules gives the Court discretion to allow such amendments. The record shows that the amendments were properly made, and the joinder of parties falls within Order 1 Rules 6 and 7.
17. Finally, on the propriety of the Amended Preliminary Objection itself, a preliminary objection is not a pleading and therefore cannot be amended without leave of the Court. In **Kenya Ports Authority v Modern Holdings [EA] Ltd [2017] eKLR**, the Court emphasized that procedural steps must be taken within the rules. No leave was sought or

granted, hence the amended objection is irregularly on record.

18. In the result, the Court finds that the Amended Preliminary Objection dated 18th May 2023 and amended on 23rd August 2024 is without merit and is hereby dismissed with costs to the Plaintiff.

RULING delivered virtually, dated and signed at **NAIROBI**

This **30th** day of **October** 2025.

P.M. MULWA
JUDGE

In the presence of:

Ms. Ongeso h/b Mr. Karega for Plaintiff

Mr. Makau for 1st & 4th Defendants and 2nd Interested Party

Mr. Owiti h/b for Mr. Ndungu for 1st Interested Party

Court Assistant: *Carlos*