



REPUBLIC OF KENYA



**Mary v Olegeem & 2 others (Land Case E024 of 2024)  
[2025] KEELC 5630 (KLR) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5630 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
LAND CASE E024 OF 2024  
MN MWANYALE, J  
JULY 30, 2025**

**BETWEEN**

**GESARE MARORO ONDERI MARY ..... PLAINTIFF**

**AND**

**LEKISHOM OLEGEEM ..... 1<sup>ST</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR, TRANSMARA ..... 2<sup>ND</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This Ruling relates to the Notice of Preliminary Objections dated 31/03/2025 filed by the 1<sup>st</sup> Respondents in respect of this P/O is premised on two grounds to wit, that:
  - i) the Plaintiff has no locus to institute this case.
  - ii) the 1<sup>st</sup> Defendant has been in continuous occupation for over 15 years the suit is time barred by section 7 of the *Limitation of Actions Act*.
2. The hearing of the P/O was directed to be by way of oral submissions. At the hearing of the submissions Ms. Mwendwa learned counsel appeared for the 1<sup>st</sup> Defendant while Mr. Masore Nyangau learned counsel appeared for the Plaintiff.
3. In her submissions Ms. Mwendwa Learned counsel for the 1<sup>st</sup> Respondent submitted that a Preliminary objection should arise from the pleadings and on the basis that facts are agreed by both parties. On this point she placed reliance on the decision in the case of John Musakali vs Speaker County Assembly of Bungoma. with regard to the first ground of the P/O she submitted that the Plaintiff had previously filed a suit against the first defendant over the same subject matter in her capacity as the legal Attorney of her late brother Mariko Mangerere Mabeya, that the trial court entered judgment in favour of the Plaintiff and that the 1<sup>st</sup> Defendant preferred an appeal which appeal set aside



the judgment and decree thereof as pleaded at paragraph 12 of the plaint. the suit herein is based on the judgment that was set aside hence the plaintiff has no capacity to bring the suit reliance was placed on the decision in the case of MaxVictor Enterprise Limited vs Gulf African Bank and Another. Ms. Mwendwa learned counsel thus submits that the Plaintiff has no interest in the suit property only the late Mariko Mangerere or his Estate can sue as the decree upon which the plaintiff lays claim to the suit property was nullified.

4. It was her submissions on the second ground of her Preliminary Objection that the defendant took possession of the suit property in 2000 and the first suit had been filed in 2016 more than 15 years after the 1<sup>st</sup> defendant had taken possession of the suit property. Reliance on this limb of ground and submissions was placed on the decision in the case of Peter Kamau vs Emmanuel Charo Tinga on the proposition that the jurisdiction of the court was ousted by Virtue of the suit being statute barred by the *Limitations of Actions Act*.
5. On his part Mr. Masore Learned counsel for the Plaintiff submitted that there was no preliminary objection before the court as the issues raised therein ought to be brought by way of a formal application because as filed the P/O raised factual issues. He further submitted that where P/O raised mixed issues of law and facts it is not a proper P/O. In support of this Limb of submissions counsels relied on the decisions in the cases of Mayende t/a Engo Garage vs Bumula Sub County Hospital and others: Bungoma HCJR case no. 33 of 2023 and *Karata Ernest and others vs Attorney General Darsaleem Civil Revision no 10 of 2020*
6. It was Mr. Masore's further submission that for purposes of the suit time started running in 2015 as pleaded at paragraph 8 of the Plaint, hence 12 years have not lapsed for a successful plea of limitation of Action to be brought and the issue of continuous occupation being disputed needs to be examined by the court. The validity of the title needs to be established by way of evidence in view of the death of Mariko Mangerere as pleaded and the court will need to establish whether the previous suit was struck out. Hence as filed the P/O is not well founded and ought to be struck out.
7. In brief rejoinder submissions, Ms Mwendwa submitted that the P.O was well taken and justice ought to be administered without regard to technicalities. she conceded though that the issue of limitations was factual, buy submitted that the Plaintiff lacks capacity to institute the suit hence the suit is mute. She urged the court to uphold the P/O.

### **Issues For Determination**

8. Having analyzed the Notice of preliminary objection as well as the rival submissions by the parties, the court frames the sole issue for determination as follows,  
  
Whether the Preliminary objection before court meets the threshold of a Preliminary Objection capable of determining the suit in limine?

### **Analysis And Determination**

9. The Court shall now consider whether the Preliminary objection as filed in this Matter meets the threshold of Preliminary Objections as was observed in the decision in the case of *In Mukisa Biscuit Manufacturer Limited vs Westend Distributors Limited*; the Court held in respect of a preliminary objection, that “so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implications out of pleadings, and which if argued as 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 acts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion....”



10. Similarly in the decision in the case of *Omondi vs National Bank of Kenya Limited and 2 others*; as quoted in the decision of *J. N. and 5 others vs Board of Management St. G. School Nairobi and Another* where it was 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.....where a 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.”
11. From the above excerpts a Preliminary Objection must no deal with issues of ascertainment of the facts and evidence. The issue of the Capacity of the Plaintiff to institute the suit in view of the previously determined Appeal by this court is a factual issue which requires examination of facts and evidence to be availed before court through the ordinary course of evidence by way of either viva voce evidence or affidavit evidence. Whereas it emerges from the pleadings, having been pleaded by in the Plaint, the same has been denied in the Defence hence it is not agreed by all parties so as to fall within the criteria defined in the John Musakali decision cited by both parties herein. It follows therefrom as drawn ground one of the preliminary objections fails to meet the threshold of a preliminary objection.
12. The plea that the suit is Statute barred by virtue of section 7 of the *Limitation of Actions Act* is undoubtedly a point of law which has the potential of determining a matter summarily. The Plaintiff submits that the cause of action arose in 2016 while the 1<sup>st</sup> Defendant pleads that the cause of action arose in 2000 hence rendering this suit statute barred. a resolution of the above rival positions by the parties can only be reached by ascertainment of evidence. This ground too does not meet the threshold of a Preliminary Objection.
13. It follows therefrom that both grounds the basis of this P/O involve ascertainment of facts through the rules of evidence hence removing the same from being pegged on pure points of law and thus falling outside the scope of a Preliminary objection as stated in the decision in Mukisa Biscuit Manufacturing Limited.
14. The upshot is that the preliminary objection dated 31.3.2025 is hereby struck out with costs in the cause, The issues raised in the preliminary objections shall be considered as part of the 1<sup>st</sup> Defendants Defence.

**DATED AND DELIVERED AT KILGORIS THIS 30<sup>TH</sup> DAY OF JULY 2025.**

**HON. M.N. MWANYALE**

**JUDGE**

In the presence of

C/A Emmnuel/ Sylvia/ Sandra

Mr. Nyangau for the Plaintiff/Respondent

Mr. Nderitu h/b for Mr. Ranah for the 2<sup>nd</sup> and 3<sup>RD</sup> Defendants.

Ms Mwendwa h/b for Mr. Marete for the 1<sup>st</sup> Defendant.

