

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ELC LAND CASE NO. E013 OF 2024

WILLY KIPKORIR KOTEY
PLAINTIFF

VERSUS

ERICK KIPTOO CHEMARICH 1ST
DEFENDANT

WILLY CHEPKOLE 2ND
DEFENDANT

RULING:

1. The Defendants herein raised a Notice of Preliminary Objection dated 26th June, 2025, seeking to have the plaintiff's suit struck out and/or dismissed in limine, on the following grounds: -
 - a. **That the suit is statutory barred pursuant to section 4(1) (a) and 7 of the Limitation of Actions Act Cap 22 Laws of Kenya.**
 - b. **That the present suit does not disclose any cause of action against the defendants.**
 - c. **That in the circumstances, the whole suit is misconceived, incompetent, frivolous and vexatious, the orders sought therefrom are untenable in law, unlawful/irregular and amounts to gross abuse of the court process.**

2. This court issued directions on the 30.09.2025 that the Preliminary Objection be canvassed by way of written

submissions. The Defendants filed their submissions dated 16.10.2025 while the Plaintiff filed his submissions dated 10.11.2025 which I have read, considered and summarized as hereunder.

Defendants' Submissions;

3. Counsel for the defendants submitted on the 3 grounds of the preliminary objection separately.
4. On the first ground of the Preliminary, counsel submitted that the current Preliminary Objection is premised on Limitation of Actions, which constitutes a pure point of law and maintained that the issue of limitation goes to the jurisdiction of the court.
5. It was counsel's submission that it is clear that a valid contract exists between the parties. That the plaintiff attached the sale agreement dated 20th March,2012 in his bundle of documents. That the agreement identifies the suit property, sets out the consideration for the sale and was duly executed by the parties in the presence of witnesses. That the agreement satisfies the conditions set out in Section 3(3) of the Law of Contract Act.
6. It is therefore their submission that the suit is time-barred pursuant to Section 4(1) of the Limitation of Actions Act as it is founded on a contract for the sale of land which the plaintiff alleges was breached and seeks to repudiate. They further submitted that the present cause of action was premised on an alleged failure to clear the purchase

consideration of the suit property and thus the suit ought to have been filed in the year 2018, which is six (6) years from 2012, when the contract for disposal of the suit property was entered into and executed. They relied on the decision of the Court in **Alba Petroleum Limited Vs Total Marketing Kenya Limited [2019] eKLR**.

7. It was further their submission that according to Section 7 of the Limitation of Actions Act, an action for recovery of land cannot be brought after the lapse of twelve (12) years from the date the right of action accrued. That the agreement for disposal of the suit land is dated 20th March, 2012 and the limitation period thereof lapsed in 2024. They relied on the decision in the case of **Benson Oketch Okello v Benson Nyandiga Onguru (2019) eKLR** in further support of this point.
8. On the second ground of the PO, counsel relied on the definition of a cause of action as stated in the case of **Edward Moonge Lenguuranga vs James Lanaiyara & Another (2019) eKLR** and on the Court of Appeal decision in the case of **Attorney General & another vs Andrew Maina & another [2016] eKLR** where cause of action was defined as an act on the part of the defendant, which gives the plaintiff his cause of complaint.
9. He also cited the Court of Appeal decision in the case of **DT Dobie & Co (K) Ltd V Muchina, [1982] KLR** where the

court defined the term “reasonable cause of action” to mean;

“an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer.”

10. It was further their submission that they have scrutinized the entire plaint dated 13.03.2024 and they have not come across any averment by the plaintiff that discloses any cause of action against the defendants. Counsel added that no complaint is specifically made against the 2nd defendant in the plaint and thus submitted that the plaint does not disclose any reasonable cause of action against the 2nd defendant. That no allegations have been levelled against him with respect to the suit land whereas orders have been sought against him. It was therefore his claim that the 2nd defendant cannot therefore possibly defend himself against claims which are not specified.
11. In conclusion, counsel submitted that it is the duty of the party instituting a suit to disclose a cause of action against the parties he is suing. He maintained that the plaintiff has failed to demonstrate how the defendant's action has caused him to complain and or necessitated the filing of this suit.

12. On the final ground in the PO, the defendants' counsel submitted that the plaintiff's suit is an abuse of the process where it is frivolous or vexatious or both.
13. He submitted that a matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court's time; or (v) when it is not capable of reasoned argument. They relied on the decision in the case of **Dawkins vs. Prince Edward of Save Weimber (1976) 1 QBD 499; Chaffers vs Golds Mid (1894) 1 QBD 186.**
14. He further submitted that a matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance, or (iv) it is brought so that the party's pleading should have some fanciful advantage; or (v), where it can really lead to no possible good and relied on the decision in the case of **Willis Vs. Earl Beauchamp (1886) 11 PD 59.**
15. He thus maintained that from the above set of facts, the entire suit aforesaid is misconceived, incompetent, scandalous, frivolous, and vexatious; that the suit, the orders sought therefrom are untenable in law, unlawful/irregular, and amounts to gross abuse of court process and the same should struck for being brought out of time and the suit is not disclosing any cause of action against the defendants.

16. In the end, he urged the court to uphold the preliminary objection with costs to the defendants.

Plaintiff's Submissions;

17. Counsel for the plaintiff in opposing the grounds in the notice of Preliminary Objection relied on the provisions of sections 18(c) and 19 of the Environment and Land Court Act which provides that any proceedings to which the Act applies shall be done without undue regard to technicalities of procedure as further provided under Article 159 of the Constitution.
18. Counsel submitted that the law on Limitation of Actions may be suspended if the right of action is based on fraud or concealment that the claimant could not discover with reasonable diligence.
19. It was his contention that the plaintiff has pleaded in paragraph 6 of the plaint that he only came to learn of the said fraud in the month of January 2024 when the 2nd defendant entered into a portion of the suit land and which led to the filing of the instant suit.
20. He further submitted that the plaintiff's claim is that the 1st defendant proceeded to sell a portion of the suit land known as L.R. No. Moi's Bridge/Ziwa Block 10 (Lemoru) 163 to the 2nd defendant before clearing the initial purchase price owed to the plaintiff vide the sale agreement between the plaintiff and the 1st defendant.

21. He thus maintained that the actions of the 1st defendant constituted a breach of contract and amounts to fraud. That the agreement between the plaintiff and the 1st defendant though signed was not finalized and therefore the 1st defendant only acquired equitable interests which could not grant him powers to transfer any portion thereof to the 2nd defendant.
22. In conclusion, counsel for the plaintiff urged the court to be guided by the provisions of section 19 of the Environment and Land Act 2011 and on the fact that fraud was involved in transferring the land to the 2nd defendant. Consequently, he prayed that the preliminary objection be dismissed with costs to the plaintiff.

Analysis and Determination:

23. From the foregoing, it is my considered opinion that the following issues arise for determination: -
 - i. *Whether the Notice of Preliminary Objection dated 26.06.2025 meets the threshold of what amounts to a Preliminary Objection.*
 - ii. *Whether the Preliminary Objection is merited.*
 - iii. *Who shall bear the costs of the Preliminary Objection.*

Whether the Notice of Preliminary Objection dated 26th June, 2025 meets the threshold of what amounts to a Preliminary Objection;

24. The instant preliminary objection has been raised on account of sections 4 and 7 of the Limitation of Actions Act which bars the filing of suits founded on contract and recovery of land after the lapse of a statutory period of 6 and 12 years respectively.
25. The P.O. has also been raised on the ground that the suit does not disclose any reasonable cause of action against the defendants and finally that the plaintiff's suit is misconceived, incompetent, frivolous, vexatious and that the orders sought are untenable, irregular/unlawful and thus amounts to gross abuse of the court process.
26. The law on what constitutes a preliminary objection was outlined in the case of **Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd 1969 E.A. 696**; where the Court defined Preliminary Objection as follows;
- "...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 has to be ascertained or if what is sought is the exercise of judicial discretion."***

27. Further, in the case of **Oraro -vs- Mbaja (2005) 1KLR 141**, the court held as follows: -

“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. It is now well settled that a preliminary objection can only be raised on a pure point of law, argued on the assumption that there are no disputed facts which stand to be tested by rules of evidence and/or contest on facts that would require the exercise of judicial discretion.

29. Sections 4(1) (a) of the Limitation of Actions Act provides as follows: -

4(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

(b)

30. Section 7 on the other hand provides as follows:-

7. Actions to recover land.

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.

31. It is important to note that a question on limitation of actions is a question that goes to the jurisdiction of a court to entertain a suit as filed. In the case of **Sohanladurgadass Rajput & another vs Divisions Integrated Development Programmes Co Ltd (2021) eKLR**, it was held that: -

"The question of limitation is a question that goes to the jurisdiction of this Court. It is a clear point of law, which if argued as Preliminary Objection point may dispose of the suit."

32. It is therefore evident that ground (1) of the preliminary objection is premised on pure points of law and meets the threshold set out in the Mukhisa Biscuit case above.

33. However, grounds (2) and (3), in my considered view do not constitute pure points of law. The same would in the opinion of this court require the exercise of discretion of the court as they derive their foundation from factual information which stands to be tested by rules of evidence. Consequently, the two grounds do not meet the threshold set in the Mukhisa Biscuit case.

Whether the Preliminary Objection is merited;

34. As stated hereinabove, the preliminary objection is premised on the provisions of sections 4 and 7 of the Limitation of Actions Act on actions founded on contract and actions for the recovery of land respectively.

35. The first question which this court seeks to determine is whether the plaintiff's suit as filed offends the provisions of section 4(1) of the Limitation of Actions Act, which states that actions founded on contract may not be filed after the end of 6 years from the date on which the cause of action accrued.
36. It is the defendants' contention that the plaintiff's claim is founded on an agreement for sale dated 20.03.2012 and is therefore time-barred pursuant to the provisions of section 4 of the Limitation of Actions Act, which provides that actions founded on a contract for the sale of land must be filed within a period of 6 years. It is their contention that the suit should have been filed by the year 2018, which is 6 years from the year 2012. They thus aver that by dint of section 4 of the Act, the suit is time barred having been filed after the 6 years' statutory period.
37. The plaintiff on the other hand averred that the law on limitation may be suspended if the cause of action is based on fraud or concealment of facts that the claimant could not discover with reasonable diligence. He maintained that he only learnt of the fraud sometimes in January, 2024 when the 2nd defendant entered the suit land.
38. I have carefully and critically look at the plaintiff's claim as contained in the plaint dated 13th March, 2024 and particularly paragraphs 4 and 5 of the plaint.

39. From the plaint, it is the plaintiff's contention that vide an agreement dated 20.03.2012, he sold the suit property to the 1st defendant with an undertaking that the 1st defendant was to clear the balance on or before 31.12.2012. However, the 1st defendant in breach of the express terms of the contract failed to clear the said consideration price as stipulated in the agreement. He thereafter outlined the particulars of breach of contract in paragraph 6.
40. Looking at the plaint in totality, the plaintiff's claim rests or is founded on the agreement for sale dated 20.03.2012 between the plaintiff and the 1st defendant and the failure by the 1st defendant to clear the purchase price within the specified timelines thereto, that is, on or before 31.12.2012.
41. It is on account of that failure to finalize the payment of the consideration and/or breach of the contract that he contends the 1st defendant's subsequent sale to the 2nd defendant was/is vitiated by fraud and that the 1st defendant did not acquire any interest capable of being transferred to the 2nd defendant.
42. In view of the foregoing, it is evident that the plaintiff's suit has been filed after the 6 years' statutory period. The contract was entered into on 20.03.2012. One of the conditions in the contract was the full and final payment of the consideration price on or before 31.12.2012. The 1st defendant's failure to complete the payment of the purchase price by the said date therefore meant that the cause of

action accrued on 31.12.2012. Consequently, the suit ought to have been filed within 6 years from the said date. Further, the plaintiff did not seek leave of the court before the filing the instant suit.

43. In the absence of any leave sought and granted to file the suit out of time, it is the finding of this court that the plaintiff's suit is time-barred pursuant to the provisions of section 4 (1) (a) of the Limitation of Actions Act.
44. Additionally, the defendants also claimed that the plaintiff's suit is also statutory barred on account of section 7 of the Act for the reason that the suit was seeking the recovery of land and had been filed after the 12-year statutory period.
45. As stated hereinabove, the plaintiff's argued that the law on limitation ought to be suspended. He further urged the court to be guided by the provisions of section 18(c) and 19 of the Environment and Land Court Act as read with Article 159 of the Constitution that proceedings should be undertaken without undue regard to procedural technicalities.
46. Before delving into the merits, I wish to reiterate that questions of limitation are questions that go to the root of a court's jurisdiction to hear and determine a claim before it and cannot be regarded as mere procedural technicalities as the plaintiff avers. The importance of jurisdiction cannot be overstated. Jurisdiction gives the court the authority and power to entertain a matter before it. It is settled law that without jurisdiction, a court of law must down its tools.

47. In determining whether the suit offends the provisions of section 7 of the Limitation of Actions Act, it is important to consider when the cause of action to recover the land accrued.
48. As stated hereinabove, the cause of action herein arose on 31.12.2012, when the 1st defendant failed to complete the payment of the consideration price as stipulated in the agreement for sale of land dated 20.03.2012.
49. Section 7 of the Act provides that actions for the recovery of land cannot be filed after 12 years from the date the right of action accrued. In the instant case, the right of action accrued on 31.12.2012. 12 years from the said date is 31.12.2024 whereas the suit herein was filed on 13.03.2024.
50. From the above it is clear that the suit was filed before the expiry of the 12-year period and does not therefore contravene the provisions of section 7 of the Limitation of Actions Act as alleged.
51. Be that as it may, having held that the suit offends the provisions of section 4 (1) (a) of the Limitation of Actions Act and is thus time barred, it is the finding of this court that the preliminary objection is merited.

Costs:

52. It is a well settled principle that costs follow the event unless the court directs otherwise.

53. In this case, having held that the notice of Preliminary Objection is merited, I find that the defendants are entitled to the costs.

Conclusion:

54. In view of the foregoing, it is the finding of this court that the Notice of Preliminary Objection dated 26th June, 2025 is **merited** and the same is upheld.

55. Consequently, the plaintiff's suit dated 13th March, 2024 and the subsequent application are hereby **struck out** with costs to the Defendants.

56. It is so ordered.

DATED, SIGNED and virtually **DELIVERED** at **ELDORET** this **11th** day of **DECEMBER, 2025.**

HON. C.K. YANO
JUDGE

Ruling delivered in the virtual presence of: -

Ms. Kinyua for Defendants.

Mr. Misoy for the Plaintiff.

Court Assistant - Edwin