

REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA  
ELCLC NO. E086 OF 2024

KACHE LIZZY & 31 OTHERS .....  
APPLICANTS

VERSUS

HASHAM ABDULLA SULEIMAN DAMJI ..... 1<sup>ST</sup>  
RESPONDENT

THE BOARD OF DIRECTORS JOMVU

CONSTITUENCY DEVELOPMENT FUND ..... 2<sup>ND</sup>  
RESPONDENT

RULING

*[NOTICE OF PRELIMINARY OBJECTION DATED 22<sup>ND</sup> SEPTEMBER  
2025]*

1. The 2<sup>nd</sup> respondent filed the notice of preliminary objection dated the 22<sup>nd</sup> September 2025, raising one ground that the suit contravenes section 41(a)(i) of the Limitation of Actions Act, and should be struck out and or dismissed with costs.
2. On the 25<sup>th</sup> September 2025, the court directed the parties to file and exchange submissions on the preliminary objections within the timelines given. The learned counsel for the 2<sup>nd</sup> respondent and the applicants filed their submissions dated

the 27<sup>th</sup> October 2025 and 28<sup>th</sup> October 2025 respectively, which the court has considered.

3. The issues for the court's determinations in the preliminary objections are as follows:

*a. Whether the applicants' suit contravenes section 41(a)(i) of the Limitation of Actions Act, and if so, what order to issue.*

*b. Who pays the costs?*

4. The court has carefully considered the ground on the preliminary objection, submissions by the learned counsel, the pleadings, and come to the following conclusions:

a. The suit herein was commenced through the originating summons dated the 4<sup>th</sup> October 2024 in which the applicants seeks to be declared as proprietors of land parcel MN/V1/737, through adverse possession. the applicants attached a certificate of postal search showing as on 24<sup>th</sup> September 2024, the said land was registered in the name of Hasham Abdulla Suleiman Damji, the 1<sup>st</sup> respondent, under freehold tenure.

b. The 2<sup>nd</sup> respondent preliminary objection to the suit is on the basis that it contravenes *section 41(a)(i)* of the Limitation of Actions Act, that provides that:

*“This Act does not enable a person to acquire any title any title to or any easement over Government Land or land otherwise enjoyed by the Government.”*

The learned counsel has submitted that land parcel MN/V1/737, suit property, claimed by the applicants overlaps MN/V1/702, that is registered with Government of Kenya. That as adverse possession does not lie over government land, their preliminary objection should be upheld, and the applicants' suit against 2<sup>nd</sup> respondent be dismissed. the learned counsel relied on the following superior court decisions; Mwenda Kalama Masha versus Commissioner of Lands & 3 Others [2014]KEELC 82 (KLR), Sammy Mwangangi & 10 Others versus Commissioner of Lands & 3 Others [2018] KECA 800 (KLR), Faraj Maharus versus Martin Glass Industries & 3 Others [2005] eKLR, and Presbyterian Foundation versus General of the Salvation Army [2018] KEELC 495 (KLR).

- c. The learned counsel for the applicants submitted that the preliminary objection is without merit, as the land parcel MN/V1/737, that they claim under adverse possession is private land owned by the 1<sup>st</sup> respondent, and is not Government land. That *section 41(a)(i)* of the Limitation of Actions Act is concerned with government land and as the suit property is private land the 2<sup>nd</sup> respondent's preliminary objection should be dismissed.
- d. A notice of preliminary objection has been discussed ad nauseum and the locus classicus would be Mukisa Biscuit Manufacturers Ltd vs Westend Distributors Limited [1969] E.A 696, where Law, JA stated 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 implication out of pleadings, and which if argued as a preliminary objection 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."*

In the same case, Newbold, JA set out the remit upon which preliminary objections would be founded 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 has to be ascertained or if what is sought is the exercise of judicial discretion”.*

It is therefore clear that a preliminary objection should be raised on a pure point of law, and only upheld where the court is satisfied that there is no dispute on the facts between the parties. Such a preliminary objection is then determined without consideration of evidence. Where there is a contestation on the facts, the mode of raising an objection is through an application to enable the parties present their evidence. The court then hears the application by considering the factual materials presented and the legal arguments by the parties.

- e. The above being the applicable legal position on what constitutes a pure point of law, that qualifies to be raised

as a preliminary objection, it is then crystal clear that the ground raised by the 2<sup>nd</sup> respondent herein in their preliminary objection dated the 22<sup>nd</sup> September 2025, does not qualify as such. This is because the facts on the ownership of the suit property and its tenure are disputed as between the applicants and the 2<sup>nd</sup> respondent, and evidence would need to be considered before it can be determined.

f. Also, the claim by the 2<sup>nd</sup> respondent through their submissions that the suit property overlaps parcel MN/V1/702, that is government land, is not a fact pleaded by the applicants in the originating summons, and it would require evidence to be considered before determination one way or the other. The foregoing shows the 2<sup>nd</sup> respondent's preliminary objection is without merit and is rejected.

g. Under *section 27* of the Civil Procedure Act chapter 21 of Laws of Kenya, costs follow the events unless where directed differently by the court on good grounds. I find no reasons to deviate from that edict and the applicants are entitled to costs on the preliminary objection.

5. Flowing from the above determinations on the 2<sup>nd</sup> respondent's preliminary objection dated the 22<sup>nd</sup> September 2025, the court finds and orders as follows:

*a. That as the preliminary objection raised does not amount to a pure point in law, it is rejected.*

*b. That the 2<sup>nd</sup> respondent will pay the applicants' costs on the preliminary objection.*

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 10TH DAY OF DECEMBER 2025.

S. M. Kibunja, J.  
ELC MOMBASA.

IN THE PRESENCE OF:

APPLICANTS : Mr Okanga

RESPONDENTS : M/s Ambetsa for 2<sup>nd</sup> Respondent

KALEKYE-COURT ASSISTANT.

S. M. Kibunja, J.  
ELC MOMBASA.