



**Mwachituko v Mwachituko & 3 others (Land Case E066 of 2024)
[2025] KEELC 5815 (KLR) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5815 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
LAND CASE E066 OF 2024
LL NAIKUNI, J
JULY 30, 2025**

BETWEEN

OMAR BAKARI MWACHITUKO PLAINTIFF

AND

SHEE BAKARI MWACHITUKO 1ST DEFENDANT

ALI BAKARI MKANGALA 2ND DEFENDANT

HAMISI OMARI MWACHAMKONO 3RD DEFENDANT

BAKARI OMARI MWACHAMKONO 4TH DEFENDANT

RULING

I. Introduction

1. Before this Honourable Court for its determination is the Notice of Preliminary objection dated 17th December, 2024. It was raised by Shee Bakari Mwachituko, Ali Bakari Mkangala, Hamisi Omar Mwachamkono and Bakari Omar Mwachamkono challenging the entire suit instituted by Omar Bakari Mwachituko, the Plaintiff herein vide a Plaint dated 15th October, 2024 thereof.

II. The Notice of Preliminary objection by the Defendants

2. The Defendants brought an objection on the jurisdiction of the Honourable Court to hear the Plaintiff's Plaint seeking to have the matter herein struck out, with costs for reason that the same is barred by dint of Section 4 (1)(c) of the *Limitation of Actions Act*, Cap. 22 Laws of Kenya.

III. Submissions

3. On 25th February, 2025 while the Parties were present in Court, they were directed to have the Notice of Preliminary Objection dated 17th December, 2024 be disposed of by way of written submissions.



Pursuant to that all the parties obliged. On 2nd April, 2025 the Honourable Court reserved a ruling date on 30th June, 2025 by Court accordingly.

A. The Written Submissions by the Defendants

4. The Defendants through the Law firm of Messrs. Musa Nyariko & Co. Advocates filed their written submissions dated 20th February, 2025. Mr. Nyariki Advocate commenced their submissions by stating that their Notice of Preliminary Objection dated the 17th December, 2024 seeking to have the matter herein struck out, with costs, for reason that the same is barred by dint of Section 4 (1)(c) of the [Limitation of Actions Act](#), Cap. 22 Laws of Kenya.
5. The Learned Counsel provided the Honourable Court with a brief background of the matter. He stated that the Plaintiff moved the Honourable Court vide a Plaint and a Notice of Motion Application dated 15th October, 2024 claiming ownership of the Land Parcel number;- KWALE/ MABOKONI/ 617, which suit intended to enforce an award granted in civil case of “Mombasa SRM land award no. 4 of 1990” and the order issued in “the Civil Case Mombasa appeal MC APP no. 286 of 2002. The Plaintiff alleged that he was the rightful owner of the suit property KWALE/MABOKONI/617 and that an order be issued to direct the Kwale Land Registrar to Rectify the register entered in favor of the Defendants herein.
6. The Defendants objected the Plaintiff’s application and subsequent suit citing that the same was time barred by dint of Section 4 (1)(c) of the [Limitation of Actions Act](#). Cap. 22 Laws of Kenya.
7. On the issues of law, the Learned Counsel submitted that the provision of Section 4 (1) (c) of the [Limitation of Actions Act](#). Cap. 22 Laws of Kenya provides:
 4. Actions of contract and tort and certain other actions
 - (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued-
 - (c) Actions to enforce an award;
8. While relying on the above provision of the Law, the Counsel submitted that the Plaintiff’s case was time barred. This was because, the Plaintiff based his case onto an order of the court in Mombasa SRM land award no.4 of 1990 and an appeal in Mombasa MC APP no. 286 of 2002, wherein the Plaintiff sought to enforce the award given therein in relation to the suit property. To him, the suit was filed out of time. The Counsel argued that as at 15th October, 2024 when the Plaintiff’s Application and suit were filed before this Honourable Court, the 6 years stipulated under the provision of Section 4(1) of the Limitation of Actions, Act, Cap. 22 had already lapsed. Hence, the matter herein was time barred by dint of the said Section.
9. To buttress on this point, the Learned Counsel relied on the case of “Gathoni – Versus – Kenya Co – operative Creameries Ltd (1982) KLR 104”, Potter, JA stated that the rationale of the law of limitation as follows: -

“The law of limitation of actions is intended to protect Defendants against unreasonable delay in bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”



10. Further, the Learned Counsel relied on the case of “Rawal – Versus – Rawal (1990) KLR 275”, the Court held as follows:-

“The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand and on the other hand protect a Defendant after he had lost evidence for his defence from being disturbed after a long lapse of time.”

11. Additionally, in support of the Notice of Preliminary Objection, the Learned Counsel referred Court to the case of: “Environment and Land Court at Narok Judicial Review No. 10 of 2019 Republic – Versus – Attorney General & 5 Others; Olkendenyi Ole Koikai (Interested Party) Ex - Parte Ndalama Ole Masikonde”; Justice Mohamed Kullow J. opined that: -

“The Application that as indicated earlier relates to enforcement of an award that was made in 1980 by the land Dispute Tribunals. The Applicant has not shown what he has been doing all this time and what prevented him from enforcement of his award.”

“It is the Applicant’s contention that the Preliminary Objection does not meet the threshold that consists a preliminary objection. I find that the Applicant cannot escape the reality of the day and I also find the same is time barred and thus I struck out the judicial review with costs.”

12. In conclusion, the Learned Counsel emphasized that the present suit filed before this Honourable Court was barred by Section 4(1)(c) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya and the same ought to be struck out with costs to the Defendants.

B. The Written Submissions by the Plaintiff

13. The Plaintiff through the Law firm of Messrs. OG MaKowade Advocates, filed their written submissions dated 26th March, 2025. Mr. Kowade Advocate held that the submissions were in opposition the Defendants’ preliminary dated 17th December 2024, which was now before this Honorable court.

14. On the issues for determination, the Learned Counsel submitted that the following were the issues for determination in this suit: -

- a. Whether section 4(1)(c) of the *Limitation of Actions Act* is applicable in the matter before this honorable court.
- b. Whether the preliminary objection is merited.

15. The Learned Counsel on the analysis of issues for determination submitted that the provision of Section 4(1)(c) of the *Limitation of Actions Act*, Cap. 22 provides for enforcing a contractual award within the six-year time frame. However, the Learned Counsel pleaded as follows: -

- i. The Plaintiff’s ownership history begun in the year 1990 or thereabout, when the land tribunal as was then, awarded the suit property to the plaintiff.
- ii. As per the rules then, the tribunal forwarded their finding to the court in Mombasa, where Hon. Oseko, who was presiding Magistrate, adopted the award as an order of the court.
- iii. The Defendants having not satisfied with the court’s decision, appealed the decision at the High Court in Mombasa where Judge David Maraga, as he was then, upheld the decision and thus made the Plaintiff the legitimate owner of the suit property.



- iv. It was worth noting that the Defendants in this suit today were the Dependants of the initial Defendants in the land suit before Hon. Oseko and the appeal that went before Justice Maraga.
16. The Learned Counsel submitted that the provision of Section 4(1)(c) of the *Limitation of Actions Act*, Cap. 22 was misplaced in this matter as it did not point to which point of law it alludes to. Further, the Learned Counsel argued that this suit did not arise from any claims of award but wrongful entry into the registrar of the Defendants while the Plaintiff had already been entered into the register. The Learned Counsel urged the Court to dismiss the Preliminary objection with costs.

IV. Analysis and Determination

17. I have considered the Notice of Preliminary Objection by the Defendant and the submissions herein and three (3) issues fall for determination in the Notice of Preliminary Objection: -
 - a. Whether the Preliminary objection raised by the Defendants herein raises pure points of law?
 - b. Whether the Notice of Preliminary objection is merited?
 - c. Who bears the Costs of the Notice of Preliminary objection dated 14th November, 2024.

ISSUE No. A). Whether the Preliminary objection raised by the Defendants herein raises pure points of law?

18. Under this Sub – heading, the Honourable Court will decipher on the substratum of the matter is whether the objection raised pure points of law. In determining this instant Notice of Preliminary Objection, the Court will first consider what amounts to a Preliminary Objection and then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description.
19. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
20. Additionally, the said Black’s Law Dictionary 11th Edition, holds that a Preliminary Objection is an objection that if upheld would render further proceedings before the tribunal impossible or unnecessary. The Courts have variously defined Preliminary objection as one that consists of a point 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.
21. The above legal proposition has been made graphically clear in the now famous case of:- “Mukisa Biscuits – Versus - Westend Distributor Ltd [1969] EA 696”, the court observed that: -

“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. ”
22. This statement of the law has been echoed time and again by the courts: see for example,

“Oraro – Versus - Mbaja [2007] KLR 141”.



23. The same position was held in the case of “Nitin Properties Ltd – Versus - Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257” where the Court held that:-
- “ A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion.”
24. Similarly in the case of “United Insurance Company Limited – Versus - Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005(2005) LLR 7396”, the Court held that;
- “ A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed .”
25. Therefore from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of “In the matter of Siaya Resident Magistrate Court Kisumu HCCMisc. App No. 247 of 2003” where the Court held that;
- “ A Preliminary Objection cannot be raised if any facts has to be ascertained.”
26. I have further relied on the decision of “Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR” as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-
- (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
27. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, the Court now turns to the grounds raised by the Defendants herein which are the of the Honourable Court to hear the Plaintiff’s Complaint seeking to have the matter herein struck out, with costs for reason that the same is barred by dint of Section 4 (1)(c) of the [Limitation of Actions Act](#), Cap 22 Laws of Kenya. In this case, I am satisfied that the objection raises pure points of law in that the preliminary objection. Since an issue going to the jurisdiction of this Court has been raised that issue must be dealt with in limine.

ISSUE No. B). Whether the Notice of Preliminary objection is merited.

28. Under this Sub - title the Court shall examine whether the Notice of Preliminary objection is merited. An objection to the jurisdiction of the court has been cited as one of the preliminary objections that consists a point of law. Indeed the locus classicus case on the question of jurisdiction is the celebrated



case of “The Owners of Motor vessel Lillian ‘S’ -Versus - Caltex Kenya Limited. [1989] KLR 1” where the Court held:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

29. Jurisdiction means a courts power to decide case or issue a decree. In Kenya, the Environment and Land Court is a statutory creation by *the Constitution* of Kenya under the provision of Article 162 (2) (b). Here, the Courts are vested it with original and unlimited jurisdiction. From the preamble of the ELC Act, the jurisdiction of the court is defined as

“.....a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes.....”

30. The Supreme Court in the case of:- “Samuel Kamau Macharia – Versus - Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011”, observed that:-

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

31. Having determined that the Preliminary Objection by the Defendant is based on pure points of law, it therefore behooves this Court to consider and determine whether or not it has jurisdiction to entertain the instant proceedings by virtue of being statutorily barred or time barred.
32. The Defendants/ Objectors have averred that the Plaintiff moved the Honourable Court vide a Plaint and a Notice of Motion Application dated 15th October, 2024 claiming ownership of the Land Parcel number;- KWALE/ MABOKONI/ 617, which suit intends to enforce an award granted in Mombasa



SRM land award no. 4 of 1990 and the order issued in Mombasa appeal MC APP no. 286 of 2002. The Plaintiff alleged that he was the rightful owner of the suit property KWALE/MABOKONI/617 and that an order be issued to direct the Kwale lands registrar to Rectify the register entered in favor of the Defendants herein. The Defendants objected the Plaintiff's application and subsequent suit citing that the same is time barred by dint of Section 4 (1)(c) of the Limitation of Actions Act, Cap. 22 Laws of Kenya.

33. It is clear that limitation of action is a point of law which can dispose of a suit. See the case of "Iga – Versus - Makerere University [1972] EA" it was held: -

“ A Plaint which is barred by limitation is a plaint barred by law. A reading of the provisions of Sections 3 and 4 of the Limitations Act Cap. 70 together with Order 7 Rule 6 of the Civil Procedure Rule of Uganda which has same provisions with Limitations Act of Kenya seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief.”

34. The issue of limitations goes to the jurisdiction of the court as was held in the case of "Sohanladurgadass Rajput and another – Versus - Divisions Integrated Development Programmes Co Ltd (2021) eKLR" where the Court held;

“ 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.”

35. In this respect, it is important to restate and to reiterate the legal implications and consequence of Limitation of Action Act, Chapter 22, Laws of Kenya. For good measure, the significance thereof was underscored by the Court of Appeal in the case of "Gathoni – Versus - Kenya Co - operative Creameries Limited [Supra]", where the court stated and observed as hereunder:-

“ The law of limitation of actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.”

36. The meaning of the wording of section 4 (1) is clear beyond any doubt. It means that no one shall have the right or power to bring any legal action founded on contract after the end of six years from the date on which a cause of action accrued. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action.

37. Similarly, the Environment and Land Court is established under Article 162 (2) (c) of the Constitution of Kenya, 2010 and Sections 4 and 13 of the Environment and Land Court Act, 2011, provides as follows:

Jurisdiction of the Court



1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 2. In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.
 2. Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.
 3. In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.”
38. I have perused the Application and the final award. In the process, I have noted that the subject matter giving rise to the award was the ownership of KWALE/ MABOKONI/ 617 which award was granted in Mombasa SRM land award no. 4 of 1990 and the order issued in Mombasa appeal MC APP no. 286 of 2002. Justice Maraga delivered the Appeal while he was a Judge in Mombasa between the years 2003 and 2007. The matter was instituted in the year 2024 which is 17 years after the delivery of the award. I note that the Plaintiff never filed an application to institute and proceed with the action out of time.
39. Consequently and in this regard, there is no gainsaying that the Plaintiff ought to have filed and mounted the suit beforehand within six years from the date of accrual/ commencement of the cause of action.
40. Striking out suits preliminarily is a draconian measure. It should be allowed only as a last resort. This is when the suit is so hopeless and cannot be salvaged, even by an amendment. Courts have held that where there is a semblance of cause of action, parties should be allowed their day in court. In the case of “D.T. Dobie & Company (Kenya) Ltd – Versus - Muchina [1982] KLR 1”, the Court held as follows: -
- “No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment of. If a suit shows a mere semblance of a cause of action provided it can be injected with real life by amendment it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”



41. Similarly, in the case of “Peter Ngugi Kibiri – Versus - Esther Wangari [2015] eKLR” the Court of Appeal stated as follows: -

“Practical and substantive justice dictate that it is prudent that the dispute between the parties be resolved and determined through full hearing on the merits”

42. Be that as it may, in this case, the Plaintiff has not followed the procedural rules in filing this suit. Thus, as it stands the Notice of Preliminary objection is upheld and the suit as filed is struck out for being time barred.

ISSUE No. C). Who bears the Costs of the Notice of Preliminary objection dated 17th December, 2024

43. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR” and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR”, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR”, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

44. In the present case, the Defendants shall have the costs of the Notice of Preliminary objection dated 17th December, 2024.

V. Conclusion and Disposition.

45. Ultimately in view of the foregoing detailed and expansive analysis to the objection, the Court arrives at the following decision and make below orders:-

- a. That the Notice of Preliminary objection by the Defendants dated 17th December, 2024 be and is hereby upheld.
- b. That the Plaintiff’s claim through the Plaint and Notice of Motion application dated 15th October, 2024 be and are hereby struck out.
- c. That the Defendants shall have the costs.

It Is So Ordered Accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS.....30THDAY OFJUNE.....2025.

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HON. MR. JUSTICE L. L. NAIKUNI,

Environment And Land Court

At

Kwale



Ruling delivered in the presence of:

- a. Mr. Daniel Disii, the Court Assistant;
- b. Mr. Kowade Advocate for the Plaintiff; and
- c. Mr. Nyariki Advocates for Defendants.

