



Republic v Chief Magistrate Homabay Law Courts & 3 others; Omugah (Ex parte Applicant); Achieng (Interested Party) (Environment and Land Judicial Review Case E011 of 2024) [2025] KEELC 8568 (KLR) (3 December 2025) (Ruling)

Neutral citation: [2025] KEELC 8568 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E011 OF 2024

FO NYAGAKA, J

DECEMBER 3, 2025

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

FOR ORDER OF PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF THE LAW REFORMS ACT SECTION 8 & 9

AND

IN THE MATTER OF ALL ENABLING PROVISIONS UNDER THE

JUDUCATURE ACT, THE MAGISTRATE’S COURT ACT. LAND

ADJUDICATION ACT, LAND ACT, LAND REGISTRATION ACT

AND ALL OTHER RELEVANT PROVISIONS OF THE

CONSTITUTION OF THE REPUBLIC OF KENYA (2010)

BETWEEN

REPUBLIC APPLICANT

AND

THE CHIEF MAGISTRATE HOMABAY LAW COURTS 1ST RESPONDENT

THE LAND SURVEYOR 2ND RESPONDENT

THE LAND REGISTRAR HOMABAY 3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 4TH RESPONDENT

AND

JACOB ONGORO OMUGAH EX PARTE APPLICANT

AND



RULING

The Application

1. The 4th Respondent filed a Notice of Preliminary Objection dated 17th April 2025, which objection is premised on the Grounds That:
 - a. This honorable court lacks jurisdiction to entertain the suit (sic);
 - b. The application is fatally defective for seeking to enforce an award issued more than six (6) years ago contrary to Section 4(1) of the Limitation of Actions Act;
 - c. The application is fatally defective for seeking to enforce a judgement/decree issued more than twelve (12) years ago contrary to section 4(4) of the Limitation of Actions Act; and
 - d. The application as presented before this court is a non-starter and an abuse of the court process.
2. With regard to the 4th limb of the Objection, this court is of the view, as will be seen in the definition of given in the Mukisa Biscuits case (infra), that it is not a Preliminary point of law because for one to establish that there is abuse of the process of the court he has to present evidence about certain existing facts which demonstrate abuse of the process of the court. Thus, this court is left to analyze the three limbs which urge points of law.
3. The Preliminary Objection was premised on the Ex Parte Applicant's Application whose facts as pleaded in the Statutory Statement of the Notice of Motion were:
 - a. That the Ex Parte Applicant had lodged an Appeal before the Minister in Adjudication Land Appeal no.117 of 2004 over parcel Nos. Homabay /Kodhidha 2407 and Homabay/Kodhidha/3727. The Minister gave a decision on 28th August 2004.
 - b. Further, that on 18th January 2023 the 1st Respondent issued an order requiring the 2nd and 3rd Respondent to visit the suit parcels of land and establish their boundary. Further, that on 23rd August 2023 the two Respondents visited the parcels of land and established boundaries contrary to those the Minister fixed in 2004. Then he prayed for orders of mandamus to compel the 2nd Respondent to implement (sic) the Minister's decision by adjusting the survey map to reflect the Minister's decision and further calculate the new acreage that conforms with the existing Minister's decision with regard to the size of land parcel no. Homabay/Kodhidha/3727.

Submissions

4. The Preliminary Objection was canvassed by way of written submissions. The respondents filed their submissions dated 17th April 2024. They raised one issue for determination by this court, being, whether the Preliminary Objection is meritorious. They answered this question in the affirmative and based their argument on Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited [1969] EA 696 as well as Oraro v Mbanja [2006] 1 KLR 141 which provide that a Preliminary Objection should only raise pure points of law and not deal with facts that need to be proved. They argued that the Preliminary Objection had met this test as paragraph (b) of the motion prays that an order of mandamus does issue directing the 2nd respondent to implement a decision that was delivered



in 2004, that is, over twenty (20) years ago. The respondents relied on sections 4 (1) (c) and 4(4) of the Limitations of Actions Act to argue that the application is time barred.

5. The Interested Party filed his submissions dated 8th October 2025 and echoed the arguments raised by the respondents. He identified two issues for determination, namely: whether the Preliminary Objection was on a point of law; and whether the application should be dismissed. On the first issue, the interested party relied on *Mugambi & 2 others v Mung'ara & 11 others* (Environment and Land Court Case E160 of 2024[2025] (KLR) to argue that Preliminary Objection should only raise points of law and not facts to be ascertained. He concluded that the Preliminary Objection raises points of law as there are no facts to be ascertained.
6. On the second issue, the interested party argued that the Preliminary Objection seeks to enforce orders and decree made by the Minister in Adjudication Land Appeal No. 117 of 2004, which prays offends Sections 4(1) and 4 (4) of the *Limitation of Actions Act*. On this account, he prayed that the application be dismissed.
7. The Ex-parte applicant filed his submissions dated 27th August 2024. He identified one issue for determination by this court, that is, whether the Preliminary Objection has merit. He argued that his application has nothing to do with any judgment, decree, or award. Rather, the application seeks to correct usurpation of power and mandate by the respondents. Besides, the ex-parte applicant argued that, in as much as the Preliminary Objection raised pure points of law, the same should not be allowed as all the facts pleaded in the Preliminary Objection are incorrect. He relied on *Hassan Nyanje Charo v Khatib Mwashetani & 3 others*, Civil Appeal no.23 of 2024 [2014] eKLR as well as *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others*, Application No.50 of 2014 [2014] eKLR to argue a Preliminary Objection should not raise an issue of contested facts.
8. Further to the above, the ex-parte applicant argued that the application had been heard and only judgment is pending before court. He maintained that the 4th respondent never made appearance at any stage of the proceedings even after being properly served and only emerged to serve the Preliminary Objection at the tail-end. He argued that equity aids the vigilant and not the indolent besides raising the maxim that whoever seeks equity must do equity.
9. The ex-parte applicant concluded his submissions by arguing that the 4th respondent improperly raised points of law for purposes of increasing costs and causing confusion around the issue at hand. He prayed that the Preliminary Objection be disallowed for the reason that it was not merited.

Issues, Analysis and Determination

10. This court has carefully analyzed the Preliminary Objection, the submissions filed by the parties as well as the law and has concluded that the issues determination are as follows:
 - a. Whether the Preliminary Objection was filed timeously;
 - b. Whether the Preliminary Objection is merited, and
 - c. Who should bear the cost of the Preliminary Objection, and if it succeeds who to bear costs of the Judicial Review.
11. This court sets out to determine the issues sequentially.

Whether the Preliminary Objection was filed timeously

12. The Ex-parte applicant argued that the 4th respondent filed the Preliminary Objection towards the tail end of the hearing of the judicial review application. He submitted that the same should be disregarded,



because the 4th respondent having been properly served but never responded to the application, only to file the instant Preliminary Objection when the only pending task with regard to the judicial application was judgment. He relied on two maxims of equity: equity aids the vigilant and not the indolent; and he who comes to equity must do equity to reinforce his argument.

13. Unfortunate as it may be to the ex-parte applicant, it should be noted that a Preliminary Objection can be raised at any point during the proceedings, only that parties should endeavor to raise the same as early as possible. In *Ngari & another v Muia & another* (Environment and Land Case E004 of 2024 [2025] KEELC 5713 (KLR) Matheka J stated as hereunder:

It is trite that a Preliminary Objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of the case in order to pave way for the smooth management and determination of the main dispute in a matter.

14. Equally, in *Nyagudi v Kenya Power and Lighting Company Limited* (Civil Case 1 of 2023) [2025] KEHC 3298 (KLR), the court noted that:

It is trite that a Preliminary Objection on grounds of jurisdiction can be raised at any stage of the proceedings. Even though the defendant has raised the said Preliminary Objection rather late in the day, it is still within its right to raise it for the courts' consideration. As the same had been raised, this court must determine it first before embarking on further proceeding because whenever an issue of jurisdiction is raised by parties to a suit, the same must be dealt with by the court as a matter of priority.

15. Having so established, it is my finding that the instant Preliminary Objection was brought within time. As such, this court will proceed and analyze the succeeding issues. It still has to be considered on the merits, even though it was brought late in the day because its timing does not oust the jurisdiction of the court regarding objections on points of law which can be taken up even on appeal.

Whether the Preliminary Objection is merited.

16. The test that must be met in a Preliminary Objection was set out in *Mukisa Biscuit Manufacturing Co. Ltd. V West End Distributors Ltd.* [1969] EA 696, where the court 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."

In the judgment of Sir Charles Newbold in the same case stated 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 had to be ascertained or if what is sought is the exercise of judicial discretion (emphasis added)"

17. A Preliminary Objection must therefore address pure points of law and not disputed facts or even facts to be adduced outside of the pleadings of the parties. Herein the contention is that that the Ex Parte applicant seeks to enforce a decision or award which is barred by the law of limitation of actions.
18. Regarding the timelines when awards can be enforced, Section 4 (1) of the Limitations of Actions Act provides as follows:
 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—



- (a) actions founded on contract;
- (b) actions to enforce a recognizance;
- (c) actions to enforce an award;
- (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
- (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

19. It is clear that an award should be enforced within six years of the decision being given. Further Section 4 (4) of the said Act provides that:

(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

20. The 4th Respondent argued that the application made by the ex-parte applicant is time barred by dint of Section 4 (1) (c) as well as 4(4) of the Limitations of Actions Act to the extent that it seeks to enforce an award as well as the judgment of the Minister in Appeal no. 117 of 2004 over the suit property.

21. The ex-parte applicant argued that his application has nothing to do with an award, decree or judgment in the aforesaid appeal; rather, he is seeking to prevent usurpation of power by the respondents. He further maintains that the Preliminary Objection is not merited because it is based on incorrect facts, even though it raises pure points of law.

22. I have examined the applicant's Judicial Review application dated 15th October 2025. The prayers in the statutory statement are couched in the following terms:

- a. That this honourable court be pleased to grant orders of prohibition prohibiting the 1st respondent from further entertaining any proceedings in Homabay CMC ELC NO. E39 OF 2022 over boundary lines of land parcel numbers Homabay /Kodhidha 2407 and Homabay/ Kodhidha/3727 as the same proceedings contravene the minister's decision in Adjudication land appeal no.117 of 2004
- b. Further, the honourable court be pleased grant orders of mandamus to compel the 2nd respondent to implement the minister's decision by adjusting the survey map to reflect the minister's decision and further calculate the new acreage that conforms with the existing minister's decision with regard to the size of land parcel no. Homabay/Kodhidha/3727 so as to enable the 2nd respondent to implement the same by adjusting the records of the said parcel number accordingly.

23. Whereas the ex parte applicant argues that his application does not seek to implement an award, judgment or decree as submitted by the respondents, prayer (b) of the statutory statement of his Judicial Review application does not support his argument. As noted above, the said prayer seeks this court's intervention in compelling the 2nd respondent to implement the minister's decision by adjusting the survey map as to reflect the said decision. The ex-parte applicant in same prayer also seeks the aid of this court in the calculation of new acreage so as to conform with the existing minister's decision



with regard to Homabay/Kodhidha/3727 for purposes of enabling the 2nd respondent to implement the same by adjusting the records of this parcel number.

24. The award which the ex-parte applicant seeks to enforce was granted in the year 2004, which is way beyond the statutory period provided under section 4 (1) (c) of the *Limitation of Actions Act*. Indeed, the award sought to be enforced by the instant Judicial Review application was given by the Minister in 2004, specifically on August 28th. It is more than the six years provided for by the law. The period is over fourteen years beyond the six years provided for.
25. This Court having established that the enforcement of the award was time barred, it did not bother to analyze the application of Section 4(4) of the Limitation of Actions because the pleadings do not disclose whether or not the award was adopted as a judgment of the court, in order for the period of 12 years to be known when it would have begun running.
26. Accordingly, I find and hold that the 4th respondent's Preliminary Objection is merited and is hereby allowed. The costs of the application shall be borne by the Ex-parte applicant.
27. Orders accordingly

RULING DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA THE TEAMS PLATFORM THIS 3RD DAY OF DECEMBER 2025.

HON. DR. IUR NYAGAKA

JUDGE

From 08:17 AM in the presence of

Ms. Odera Advocate for the Ex Parte Applicant

Mr. Ngani Advocate for Adoyo Advocate for the Interested Party

No appearance for the Respondents

