



Ngari & another v Muia & another (Environment and Land Case E004 of 2024) [2025] KEELC 5713 (KLR) (30 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5713 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE E004 OF 2024**

NA MATHEKA, J

JULY 30, 2025

BETWEEN

DAVID KARIUKI NGARI DEFENDANT

AND

GAKUYO REAL ESTATE LIMITED PLAINTIFF

AND

JOSEPH MUTUKU MUIA 1ST DEFENDANT

CHRISTOPHER MUTUKU MUIA 2ND DEFENDANT

RULING

1. The 1st Defendants has raised a preliminary objection dated 16th September 2024 on the grounds that;

That the suit is substantially defective for failure to comply with mandatory provisions of Article 165(3a) of *the Constitution* of Kenya 2010 and Section 4 of the *Limitation of Actions Act* which provide as follows respectively:

A. *The Constitution* of Kenya 2010

Subject of Clause (5), the High Court shall have -

a. Unlimited original jurisdiction in criminal and civil matters;

b. ...

B. The *Limitation of Actions Act*

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 the which the cause of action accrued-
 - (a) actions founded on contract;
 - (b) ...
2. The claim should be dismissed with costs.
3. The Plaintiffs raised grounds of opposition that the Preliminary Objection is incompetent and fatally defective. The issue of limitation of actions is a mixed question of law and fact, requiring evidentiary proof, and cannot be properly raised as a Preliminary Objection. That the question of whether the suit is time-barred is a factual matter. The determination of whether the cause of action accrued outside the prescribed statutory period requires an inquiry into the facts, which can only be determined upon evidence being adduced.
4. That a Preliminary Objection must raise pure points of law. As held in *Mukisa Biscuit Manufacturing Co. Limited vs West End Distributors Ltd (1969) EA 696*, a Preliminary Objection must consist of a pure point of law, and where facts are disputed, the matter cannot be determined at the preliminary stage. That the Defendant/Applicant has improperly invoked the Preliminary Objection procedure. The issue of limitation should be raised by way of a formal application supported by evidence and not as a preliminary objection. That the Preliminary Objection offends the principles of fair hearing and access to justice. The Defendant/Applicant seeks to improperly terminate the suit without allowing the Plaintiff/Respondent to present its case, contrary to Article 50 and Article 159 of *the Constitution* of Kenya, 2010. That the suit discloses triable issues. Even assuming limitation is a valid concern, the Plaintiff/Respondent is entitled to be heard on any exceptional circumstances that may justify extension of time, which requires factual proof. That the Preliminary Objection is an abuse of court process. It is intended to delay and frustrate the fair determination of the matter on its merits. That hence, the Plaintiffs/Respondents prays that the Preliminary Objection be dismissed with costs.
5. This court has considered the Preliminary Objection and submissions therein. 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....."
6. The above legal proposition has been made in the case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd. (1969) E.A. 696* where the court held that;

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer 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 in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"
7. In the case of *Attorney General & Another vs Andrew Mwaura Githinji & another (2016) eKLR* the court outlined the scope and nature of preliminarily objection as;



- (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.
8. It is trite law 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 a case, in order to pave way for the smooth management and determination of the main dispute in a matter. The 1st Defendant has raised the issue of jurisdiction and limitation. I find that the filed preliminary objection by the 1st Defendant herein was properly brought before the court. The point of law the 1st Defendant argues is that this court does not have jurisdiction and they quoted Article 165(3a) of *the Constitution* of Kenya 2010 and the suit is time barred Section 4 of the *Limitation of Actions Act*.
9. In the case of Owners of the Motor Vessel M.V Lillian S. vs Caltex Oil (K) Limited (1989) KLR 1 the court held that without jurisdiction it has to down its tools. The jurisdiction of the ELC court flows from Article 162 (2)(b) of *the Constitution* of Kenya 2010. Section 13 (2) of the ELC Act vests this court with wide powers over any dispute relating to land it provides that;

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
10. The jurisdiction of this court to hear and determine this suit flows from *the Constitution* and the law. The jurisdiction of court is not conferred upon it by parties nor can the court confer upon itself jurisdiction. The Supreme Court in Samuel Kamau Macharia and Another vs Kenya Commercial Bank Limited & 2 others (2012) eKLR held that;

"A court's jurisdiction flows from either *the constitution* of 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."



12. I have perused the court record and find that by a plaint filed in court on the 23rd January 2024 the 1st Plaintiff avers that he entered into a sale agreement dated 9th September 2016 with the Defendants for the purchase of property known as MAVOKO TOWN BLOCK 3/2032. That despite paying a deposit the Defendants breached the contract and they now demand inter alia a refund of the same. The 1st Defendant submitted that this is a matter relating to contracts and that it ought to have been brought to court within six years. I find that this matter relates to a contract touching on the purchase of the suit land and hence this court has jurisdiction as per section 13 of the ELC Act referred to above.
13. The Appellant submitted that the suit is founded on contract and in accordance with section 4(1) of the *Limitation of Actions Act*, it ought to have been instituted within a period of six years from the date when the cause of action accrued. The said section provides as follows:
- Section 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
14. The purpose of the Law of Limitation was stated in the case of *Mehta vs Shah (1965) E.A 321*, 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 has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case."
15. In the case of *Gathoni vs Kenya Co-operative Creameries Ltd (1982) KLR 104*, the Court of Appeal held as follows;
- "...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."
16. A suit barred by limitation is a claim barred by law, hence by operation of law, the Court cannot grant the relief sought. In the case of *Iga vs Makerere University (1972) EA*, the Court had this to say on the Law of Limitation;
- "A Plaint which is barred by limitation is a Plaint barred by law. Reading these Provisions together it 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 sought."
17. Section 4 of the *Limitation of Actions Act* provides that an action based on contract may not be brought after the lapse of 6 years from the date the right of action accrued to the Plaintiffs/Respondents.
18. In my view, this suit requires a trial to ascertain as to when the Plaintiff discovered the contract or the fact that he would not get any ownership. The Plaintiff avers in his plaint the payments were made



towards the purchase as late as on the 27th January 2018 and alleges fraud. I rely on the authority of *Justus Tureti Obara vs Peter Koipetai Nengiso (2014) e KLR* where Okongo J. Stated that;

".....The proviso to section 26 (a) of the *Limitation of Actions Act*, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the defendant is a matter to be ascertained at the trial."

19. I therefore find that this suit is not time barred. I therefore find that the preliminary objection is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF JULY 2025.

N.A. MATHEKA

JUDGE

