



REPUBLIC OF KENYA



KENYA LAW
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**Ngari v Njagi & 5 others (Environment and Land Case
E007 of 2023) [2025] KEELC 5754 (KLR) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5754 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND CASE E007 OF 2023**

**A KANIARU, J
JULY 30, 2025**

BETWEEN

LABAN NJAGI NGARI PLAINTIFF

AND

MARY MUTHONI NJAGI 1ST DEFENDANT

CHARLES MACHARIA NJERU 2ND DEFENDANT

JOHN NJAGI NJERU 3RD DEFENDANT

ERIC KIMANTHI GATAVI 4TH DEFENDANT

KENNEDY NDWIGA NJAGI 5TH DEFENDANT

JACKSON MURIITHI DAVID 6TH DEFENDANT

RULING

1. This ruling relates to a preliminary objection brought here by the defendants vide a notice to raise it dated 28/11/2023 which was filed in court on even date. It is a five [5] – point objection seeking to dismiss the suit. The points on which it is premised are as follows:
 1. The suit is fatally defective.
 2. The suit is *res judicata* as the issue before this court has already been determined in Miscellaneous Case No. 114 of 2006 in the High Court at Embu.
 3. That the suit is time-barred having been brought outside the statutory limitation period of 12 years in view of Section 7 of the *Limitation of Actions Act*.
 4. That the suit offends the provisions of Section 4 [4] of the *Limitation of Actions Act*.



5. That the entire suit is brought in bad faith, is frivolous, vexatious and an abuse of the court process hence a good reason for striking it out with costs.
2. The target of the objection is the suit itself. It is therefore necessary to have a quick and brief look at the suit. The plaintiff – Laban Njagi Ngari – impleaded the six [6] defendants – Mary Muthoni Njagi, Charles Macharia Njeru, John Njagi Njeru, Erick Kimanathi Gatavi, Kennedy Ndwiga Njagi, And Jackson Muriithi David -before this court vide a plaint dated 14/9/2023 filed in court on the same day. Mary Muthoni Njagi is introduced as the plaintiff's wife and is said to have instituted Land Disputes Tribunals proceedings in the style and manner of case No. 38 of 2003. The proceedings related to land parcels No's Ngandori/manyatta/t6, Ngandori/manyatta/t.83, Ngandori/matanyatta/t.246, Ngandori/matanyatta/t.139, Ngandori/matanyatta/t.1422, and Gaturi/nembure/4273. These parcels of land were said to have been initially registered in the names of the plaintiff. The 1st defendant was claiming them as her own and the Land Tribunal awarded them to her. The plaintiff appealed to the then Eastern Provincial Land Appeals Committee but was not successful.
3. He then challenged the outcome in Judicial Review proceedings filed as Embu HC. Judicial Review Case No. 114 of 2006. He was successful and the tribunal's decision was quashed. But the 1st defendant, his wife, proceeded to act on the tribunal's decision and got herself registered as owner of the parcels of land. When she became such owner, she transferred the parcels of to 2nd, 3rd, 4th, 5th and 6th defendants. The 1st defendant then went to court later to have the same parcels of land declared as matrimonial properties. She did so vide Embu HCCC No. 3 of 2019. She was successful. The plaintiff is contesting the ownership of the parcels of land by the defendants.
4. Contemporaneously with the suit was also filed an application seeking, *inter alia*, some restraining orders. The defendants did not file a defence to the suit. They did not also respond to the application. Instead, they entered appearance on 28/11/2023 and concurrently filed the objection now under consideration.
5. On the very date that the objection was filed, this matter came up in open court for mention and the court directed that the objection be canvassed by way of written submissions. The defendants' submissions are dated 8/5/2024. On *res judicata*, it was submitted that the plaintiff should have implemented the orders that he got in his Judicial Review proceedings in the High Court in order to achieve what he is seeking here. He didn't do so and his attempt to do so now is said to be caught up by the doctrine of *res judicata*.
6. On the issue of the matter being time-barred, the defendants cited Section 7 of the Limitations of Actions Act which bars a party from seeking to recover land after expiry of twelve [12] years. It was then subsequently submitted that the plaintiff's cause of action accrued when the court delivered its decision in the Judicial Review matter. That was way back in the year 2006 [the plaint actually puts the date of delivery as 25/6/2007]. Another possible date when the plaintiff's cause of action could have arisen, was said to be 17/1/2007 when the suit properties were transferred. Either way, this suit filed in the year 2023 was said to run afoul of the provisions of Section 7 of the [Limitations of Actions Act](#).
7. Then there was the issue of enforcement of judgement after 12 years, which is something prohibited by Section 4 [4] of the [Limitation of Actions Act](#). In this suit, the plaintiff is said to be trying to enforce the outcome of his judicial review matter that the High Court decided long ago. He is trying to do so long after 12 years, which is the period within which a court judgement should be enforced. The plaintiff's claim is said to be extinguished.
8. The plaintiff's submissions are dated 25.5.2024. It was submitted that the suit is not *res judicata* as the proceedings before the Land Disputes Tribunal and the Provincial Appeals Committee were



conducted by entities that did not have jurisdiction. It was pointed out that for *res judicata* to apply, the proceedings needed to be conducted by fora that had the requisite competence to do so. Further, the 2nd to 6th defendants were said not to have been parties in the earlier proceedings. The plaintiff's claim against them cannot therefore be said to be *res judicata*.

9. As to whether the suit is time-barred, it was submitted that time as against the 2nd to 6th defendants could only start running from the time they were registered as owners of the parcels of land transferred to them. All of them were registered sometimes in 2020. The 1st defendant was said to have filed a matrimonial cause. That matrimonial cause was decided on 26/7/2023. It is the plaintiff's position that time was not running during the pendency of the matrimonial cause.
10. Concerning the issue of limitation of time in relation to enforcement of judgement, the plaintiff submitted that she is seeking to enforce the judgement arising from her concluded matrimonial cause. The judgement was delivered in the year 2023. The twelve [12] year period beyond which a judgement cannot be enforced is said not to have expired yet. Ultimately, the court was urged to dismiss the preliminary objection.
11. I have considered the preliminary objection and the rival submissions. I think the task before me is to find out whether or not a good case has been made via the objection to warrant dismissal of the plaintiff's case. In *Oraro v Mbaja* [2005], KLR 141, Ojwang J [as he then was] stated the meaning and essence of a preliminary objection as follows:

“A preliminary objection correctly understood is now well defined as, and declared to be, a point of law which must not be blurred by factual details liable to be contested, and in any event to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seek to adduce evidence for its authentication is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”

12. In the much older case of *Mukisa Biscuit Co. Ltd. v West End Distributors Ltd.* [1969] EA 696 the true nature of a proper preliminary objection was delineated as follows:

Per Law JA,

“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 point may dispose of the suit.

Examples are an objection to the jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the suit to arbitration.”

Per Sir Charles Newbold P:

“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.”

13. As pointed out earlier the preliminary objection herein is based on five points. I feel constrained to observe that some of the points – like the suit being a non-starter and/or that the suit is brought in bad faith, is frivolous, vexatious and an abuse of the court process – are not pure points of law as their



- proof or otherwise is a matter of factual evidence to be made available and probed during trial. The defendants have also not based these points on any known statutory provisions. I therefore reject these points as proper issues for canvassing as preliminary objection.
14. The other three points – the one on *res judicata*, and the two others based on the statute of limitations – are prima facie proper points of law as they are based on clear statutory provisions. But these points fail to pass muster when subjected to the other requirement of a proper preliminary objection namely: that they should be based on correct or incontestable facts. The fact of the matter is that the plaintiff has seriously contested the facts on which these points are based. For instance, while the defendants’ averment is that the plaintiff is trying to enforce a stale judgement delivered over twelve [12] years ago, the plaintiff is saying that the suit is based on a high court judgement delivered in the year 2023. At this point in time, it is difficult to tell who is telling the truth. The court has to wait until all evidence is in. Obviously, when the situation is as it is, it would be wrong to say that there is a proper preliminary objection before the court.
 15. But there is also another reason why the objection before the court now can be said to be improperly raised. Ordinarily, when a suit is filed, the other side is expected, if served, to enter appearance and file a defence. In the defence, everything necessary to defend the suit is included. If the defendants are minded to end the suit preliminarily, all points necessary for that endeavour are put in the defence and an intention or intimation is then expressed that a notice of preliminary objection would be raised later. When such notice of preliminary objection is raised later, it does not come as a surprise to court and its context is also clear. Usually, the preliminary objection raised is expected to be the same or substantially similar to the one expressed or stated in the defence. In other words, the text of the objection and its context should align. When this is not done, the objection raised often seems out of context and the facts on which its hinged are often lost to the court.
 16. In the matter at hand, the defendants entered appearance but did not file defence. They filed a notice of preliminary objection instead. One would have expected that the defence would first be filed and such defence would be expected to be accompanied by material containing for instance the decisions that make the defendant say that the suit is *res judicata* or copy of the judgement they allege to have been delivered long ago and which the plaintiff allegedly wants to enforce after a period of twelve [12] years. This would have made the defendants’ narrative more complete and/or comprehensive. The point here is that the approach taken by the defendants in responding to the plaintiff’s suit is wanting. The law does not support it. If it was a response to an application, it would be a sound one in law for the law itself expressly allows that an application can be responded to by way of a preliminary objection. But as a response to the suit, the approach taken is wanting. A decided case illustrating this position is useful.
 17. In *Achola & Another v Hongo & Another* [2004] 1 KLR 462, the appellants filed a case alleging, *inter alia*, the tort of fraudulent misrepresentation. The second respondent in the matter, the Municipal Council of Kisumu, which was 2nd defendant in the High Court, raised a preliminary objection that the suit against it was time-barred since the alleged tort was said to have been committed in 1994 and the original plaint was only filed in 1997. A defence which was previously filed by the 2nd respondent had neither pleaded the defence of limitation nor specifically pleaded that the claim was time-barred under the *Public Authorities Limitation Act*. The High Court nevertheless allowed the issue of limitation, upheld the preliminary objection thereby terminating the appellant’s claim. On appeal, it was held, *inter alia*, that the 2nd respondent having failed to plead limitation in its defence, it was not entitled to rely on that issue and base a preliminary objection on it and it was not entitled to rely on that defence during the trial of the suit unless it amended its defence. The High Court was faulted for allowing the issue of limitation to be raised and upholding it.



18. In the matter at hand, the defendants have raised a preliminary objection without even filing a defence. The true nature and parameters of the defendants' defence remain unknown and the objection raised lacks a proper context. The defendants did not deem it necessary to make available to the court the materials that can substantiate or give credence to the assertions they made in support of their objection. Overall therefore, there is no proper preliminary objection before court to warrant detailed consideration of the issue of *res judicata* or the issue of limitation of time.
19. Ultimately, the defendants' objection is one that must fail. Its merits are not demonstrated and I hereby dismiss it with costs to the plaintiff.

RULING DATED, SIGNED AND DELIVERED ONLINE AT KITUI THIS 30TH DAY OF JULY, 2025.

A. KANIARU

JUDGE- ENVIRONMENT & LAND COURT, KITUI

In the presence of;

Kimanzi for Defendants

Rose Njeru for Plaintiffs - absent

