

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT IN HOMABAY
ENVIRONMENT AND LAND COURT LAND CASE NO. E013 OF
2025

THOMAS ODHIAMBO OGOLA.....

PLAINTIFF

VERSUS

ANASITASIA ACHIENG ONDENG

DEFENDANT

RULING

1. The Plaintiff filed a Plaint dated 30th May 2025. He pleaded that pursuant to an agreement between his mother and the late Joshua Ephraim Arum Onduto, the latter leased a portion of the suit land to work on, from the Plaintiff's mother. Further, the family members had since held the land parcel number Kabondo/Kodoch West/396 on customary interest, specifically on the concept of trust. After the death of Ogola Ogonyo Dede, the plaintiff's father and his family realized that the Executive Officer, through an order from the Oyugis Court, had conducted a subdivision process on the parcel of land without his knowledge. They said Ogola Dede died in 2014 without any knowledge regarding the illegal subdivisions.

2. The suit parcel of land was a fallow grazing land until 2002 when the Defendant served the plaintiff with a Court Order meant to access the same with a view to establishing boundaries. The plaintiff pleaded further on 28th November 2002 adopted the decision of t. that the Senior Resident Magistrates Court at Oyugis in Miscellaneous P& E No. 1 of 2002 adopted the Land Disputes Tribunal decision by the District Officer Kabondo on 17th June 2002. He pleaded further that the Order was vague and ambiguous to the extent that it recommended a share of the suit land to the Defendant's deceased husband. The order was illegal to the extent of that it adopted a Tribunal decision which cancelled the original title of the suit land, powers which the Tribunal did not have.
3. The plaintiff averred further that the adoption of the award by the Oyugis Court by the said Joshua Ephraim Arum Onduto was not served on the Plaintiff's late father for the subdivision of the suit land hence the whole process was done with illegalities. He added that pursuant to the illegal order, the Executive Office of the Court conducted a subdivision process, giving rise to two portions of the land now registered in new

numbers, being, parcel number Kabondo/Kodhoch West/918 and 919. He pleaded that the Plaintiff's family to run the risk of being permanently deprived by the Defendant of their rights over their suit land which they have been grazing on and which is now registered in the name of the defendant. He gave particulars of fraud numbering 8. He prayed for the following reliefs:

1. An order declaring the ruling by the Kabondo Land Disputes Tribunal dated 5th August 2002 null and void.
2. An order declaring the proceedings by the Senior Resident Magistrates Court in Oyugis in Miscellaneous P& E No. 1 of 2002 leading to the adoption of the award of the Kabondo Land Dispute Tribunal, irregular and without jurisdiction.
3. An order directing the Land Registrar, Homa Bay County, to cancel the subdivision. of Kabondo/ Kodhoch West/918 and 919 and restore it back to Kabondo/Kodoch West/396 in the names of the original owner Ogola Ogonyo Dede alias Ogola Ogonyo alias James Ogola Ogonyo.

4. An order permanently barring the Defendant from entering into and/ or dealing in any manner with land parcel number Kabondo/ Kodhoch West/396.

5. Cost of the suit.

6. Any other or further relief this honourable court deems just to grant.

3. Immediately upon service of the summons to enter appearance on the defendant, he entered Appearance and filed Defence. He Denied the contents of paragraph 3, 4 and 6 of the Plaint and pleaded that title number Kabondo/Kodhoch West/396 was closed after subdivision of the said parcel to parcel numbers 918 and 919. He added that there was never between the parties and that the defendant never paid any rent like he would be legally obligated in a lease agreement. Further, he pleaded that the plaintiff's mother did not have any capacity to enter into a sale or lease agreement with anyone since the land was not under her name. He also denied the contents of paragraph 7 of the plaint and stated that they late Ogola Ogonyo was fully aware that the Order from Oyugis Court emanated from the Land Dispute Tribunal in which he was a

party and fully participated in the process. The panel was headed by the Chairman one Musumba and delivered a Judgment and Order, both dated 5th August 2002.

4. He added that the contents of paragraph 8 of the plaint were malevolent fabrications which the plaintiff had misrepresented facts since the late Ogolla Ogonyo died in 2014, which was way after the subdivision exercise was done and the new titles deeds issued in 2003. Thus, he died with knowledge of the subdivision. He maintained that the late Ogola Ogonyo was the one who had legal standing to transact on the parcel of land. He was privy to the sale agreement. Crucially, the said deceased person was aware of the subdivision and never challenged it.

5. Regarding paragraph 10 of the plaint, the defendant pleaded that he had been using the piece of land for plantation and was currently utilizing it as a grazing paddock and for planting. He further stated that he has been peacefully occupying and cultivating that piece of land for more than 12 years, hence the rightful owner based on the principle of adverse possession. Further, that sometime in 2023 during the boundary

demarcation was when the dispute started. Regarding paragraph 11, he averred that the decision adopted by the court was an order which was valid and clear. He added that the Tribunal had legal authority and powers to issue decisions which were adopted by a court of law.

6. Further, he averred that the deceased Ogola Ogonyo was aware of the whole process as he even appointed the law firm of Bana and Company Advocates to represent him. Additionally, he filed an application to 10th December 2002 proposing the adoption of the Tribunal award and withdrew it on 21st November 2002. He added that all this was evidenced plaintiff's documents. He agreed with the Plaintiff's statement made at paragraph 14 and added that the subdivision process was legally done.

7. In response to paragraph 15, he stated that the plaintiff did not have any interest in the piece of land in issue. Rather, it was the defendant who was the bona fide owner of the same who had interest in it. It was conveyed to him after paying the agreed consideration for the parcel. Lastly, he added in response to paragraph 15 that the plaintiff intended, by the

instant suit, to escape the consequences of failing to appeal the Tribunal's decision of 5th August 2002. He then gave notice that he would be moving the Court to strike out the suit for being frivolous, lacking in merit and being *res judicata*.

8. Then the Defendant raised a Preliminary objection dated 10th July 2025. It was based on three grounds, namely,

1. The matter is *res judicata* since it raises issues that were directly and substantially in issue in the case before the Land Tribunal and was decided and judgment issued later adopted as an Order of the Court vide Miscellaneous Application No. 1 of 2002, Joshua Arun vs Ogolla Ogonyo.

2. The plaintiff's suit contravenes Section 7 and 26 of the Limitation of Actions Act, Chapter 22 Laws of Kenya hence irretrievably time barred.

3. The honorable court lacks jurisdiction to hear and determine the suit.

9. The defendant filed written submissions dated 7th October 2025. He gave two issues for determination. These were, whether the plaintiff's suit contravened sections 7 and 26 of

the Limitation of Actions Act, and whether this court lacks jurisdiction.

10. Regarding the first issue, that the plaintiff's suit contravenes sections 7 and 26, he relied on the case of **Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Limited [1969] EA, 696** and the case of **David Karobia Kiiru versus Charles Nderitu Gitoi and another [2018] eKLR**. He submitted that the objection was based on the statute of limitation which is a pure point of law. Further, that the claim was legally unsustainable by virtue of it being time barred under the express provisions of Section 7 of the Act since the claim arose over two (2) decades ago, yet the suit was instituted in the year 2025. Crucially, that the plaintiff does not contend that the award was adopted in the year 2002. The dispute herein was narrowly confined to the procedural propriety leading to the adoption.

11. On whether the honourable court lacks jurisdiction, the applicant relied on the case of owners of **Motor Vessel Lillian 'S' vs Caltex Oil (Kenya) Ltd, [1989]**, and **Orange Democratic Movement v. Yusuf Ali Mohammed & 5**

others [2018] eKLR. He summed it by virtue of Section 7 of the Limitation of Actions Act, since the period within which to challenge the award was long gone, this court lacks jurisdiction.

12. The Plaintiff too submitted on the Preliminary Objection through submissions dated 29th October 2025. He submitted that the objection raised by the defendant did not constitute true preliminary objection as it would have to be proven through the production of evidence, hence defeating their purpose of preliminary objection. He added that one would have to go through the findings of the said Tribunal and the findings of the Senior Resident Magistrate Court in Oyugis Miscellaneous P & E 1 of 2002 to prove that the subject matter in question was dealt with. He too, relied on the **Mukhisa Biscuit case (supra).** He also relied on the case of **Oraro v. Mbaja [2005] eKLR.** Further, he stated that on whether the matter was res judicata it would require probing the evidence. Therefore, the Objection did not amount to a preliminary objection.

13. He added that the plaintiff had a right to challenge the proceedings in a new suit, being the instant one, since his rights and those of his family were affected. Therefore, he sought the redress he could get through the honorable court making a finding. He added further that the legality of the adoption by the Senior Resident Magistrate court had never been determined by any court of competent jurisdiction. Therefore, this Court had the requisite jurisdiction to hear and determine it. Lastly, he stated that Section 7 of the Limitation of Actions Act is not applicable because there is a provision for extension of time as provided for under Section 26 of the Act. He added that as to when the Plaintiff discovered the fraud or concealment of the right of action against the defendant is a matter to be ascertained at the trial. The land had been followed for grazing till 2022 when the defendant suddenly served an order meant for the Plaintiff to vacate the land. He relied on the case of **Justus Obara vs. Peter. Koipeitai [2014] eKLR.**

ISSUE, ANALYSIS AND DETERMINATION

14. This court is asked to uphold a preliminary objection filed by the Defendant. The issues for determination then are whether the Preliminary Objection is merited, and if so, who to bear the costs of both the Objection and suit, and if not, then who to bear the costs of the objection.

15. Regarding the general understanding of that which constitutes a Preliminary Objection, I begin by discussing its definition. Without appearing to re-invent the wheel, this court echoes the words of the learned judges in the seminal case of ***Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696.***

16. In it they defined what constitutes a preliminary objection as follows:

“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. 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... 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.”

17. One key point is that the point of law ought to be clear and precise. The Court of Appeal, in ***Grace Mwenda Munjuri v Trustees of the Agricultural Society of Kenya [2017] eKLR***, held that:

“We agree with counsel for the appellant that grounds of preliminary objection were vague and did not specify the point of law that was in issue We find that the preliminary objection contained contested matters and was vague as far as the point of law was concerned.” What their Lordships are stating in their decision is that one must state with precision the point of law he or she is raising against another so that both the court and that other party are aware of the match before him or her.

18. Also, in ***Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others [2004] e KLR***, the same Court stated as follows:

“We must point out from the outset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them. We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”

19. Further, in ***SUSAN WAIRIMU NDIANGUI V PAULINE W. THUO & ANOTHER [2005] eKLR***, Musinga J (as he then was) held that

“a preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”

20. The first limb of the objection is that the suit is res judicata. In ***Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others [2014] eKLR*** the Court of Appeal stated as follows:

“To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.”

21. In this matter the Defendant’s contention is that the issues in it were directly and substantially in issue in the case before the Land Tribunal and was decided and judgment issued later adopted as an Order of the Court vide Miscellaneous Application No. 1 of 2002, Joshua Arun vs Ogolla Ogonyo. This

is an issue that calls for investigation of evidence and the need to find out if indeed there was a tribunal decision in the alleged award and its outcome. Thus, this limb fails.

22. The second issue or point is that the suit contravenes Sections 7 and 26 of the Limitation of Actions Act, hence irretrievably time barred. Section 7 provides for the nonrecovery of possession of land by way of a suit after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

23. Section 26 of the Act is on extension of leave to file suit in case of expiry of time upon discovery of mistake or fraud.

24. This court has carefully examined the pleadings. The issues as to whether leave has been granted to file this suit is a matter of fact. Similarly, the fact on whether this matter relates to the 2002 decision is question of fact. It can only be determined by looking at the evidence. That being so, then the second point fails.

25. Lastly, on the point on the lack of jurisdiction of the court, this court is of the view that in the wider interpretation of the

issue of jurisdiction, the fact that a suit is time barred it does not divest of the court the jurisdiction to hear and determine a dispute such as the instant one. The court ought to examine whether, indeed, the matter was filed out of time or not. When it has found, if at all, that the matter is time barred, that is when the court downs its tools forthwith.

26. The upshot is that the Preliminary Objection fails in entirety. It is dismissed with costs to the /respondent.

27. The application dated 30th July 2025 is fixed on 5th February 2026. The Respondent has up to 15h January 2026 to reply and serve the response thereto. The Applicant had seven days from the date of service of the response to submit and serve the Respondent while the latter shall have seven (7) days to submit.

28. Orders accordingly.

Ruling dated, signed and delivered virtually via the Teams Platform this 17th December 2025.

Hon. Dr. iur Nyagaka,

Judge

In the presence of,

Ms. Ochieng for the Plaintiff

Ms. Kwarikwar for Mr. Achach for the Defendants