

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. E035 OF 2025

RAEL MUMBUA KALA *alias*

LAEL MUMBUA SCHMITT:.....PLAINTIFF

VERSUS

MILTON MUTISYA MUTISO:.....DEFENDANT

RULING

The Defendant herein raised a Preliminary Objection and applied for the suit to be struck out and/or be dismissed with costs on the grounds that;

- i. The suit herein is time barred by dint of Section 4(1) (a) of the Limitation of Actions Act as the same is predicated on a contract purportedly done on 10th February, 1996.
- ii. The suit herein is time barred by dint of Section 7 of the Limitation of Actions Act having been instituted 29 years from the date the cause of action is alleged to have arisen.
- iii. The suit is fatally and incurably defective.

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.....”

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”

In the case of Attorney General & Another vs Andrew Mwaura Githinji & another (2016) eKLR the court outlined the scope and nature of preliminary 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.

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 Defendant has raised the issue of limitation. I find that the filed preliminary objection by the Defendant herein was properly brought before the court.

The point of law the Defendant argues the suit is time barred Section 4 and 7 of the Limitation of Actions Act.

The Defendant 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

Section 7 of the Limitation of Actions Act provides as follows;

“An action may not be brought by any person to recover land 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.”

In the case of Edward Moonge Lengusuranga vs James Lanaiyara & Another (2019) eKLR, it was held as follows;

“Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the first Defendant having bought the suit land in the year 1999 (as per Paragraph 6 of the Plaintiff) and taken possession of the same, the Plaintiff herein could only seek to recover it from the 1st Defendants, but only if he did so within twelve years after the Sale Agreement.”

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.”

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.”

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 stated that;

“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.”

Section 7 of the Limitation of Actions Act provides that an action for recovery of land may not be brought after the lapse of 12 years from the date the right of action accrued to the Plaintiff.

The Plaintiff submitted that on the 10th January 2025 they held a meeting with the Defendant and they reached a consensus that the Defendant was to subdivide the land and she was entitled to nine acres which were to be transferred to her. The Defendant does not deny signing this agreement. Failure to comply with this agreement is what precipitated this suit. That the Defendant held the suit land in trust for himself and the Plaintiff.

I have perused the court record and find that by a plaint filed in court on the 26th March 2025, the Plaintiff avers that she entered into a sale agreement dated 10th January 2025 with the Defendant for the subdivision for the suit property known as Mbiuni/Ulaani/871. That Defendants breached the contract and they now demand inter alia specific performance or a refund of the same. The Defendant submitted that this is a matter relating to contract and that it ought to have been brought to court within six years and the contract in question was in contract purportedly done on 10th February, 1996. I find that this matter relates to a contract touching on the purchase of the suit land.

In my view, this suit requires a trial to ascertain as to when the Plaintiff discovered the contract would not be honoured or the fact that she would not get any ownership. I rely on the authority of *Justus Tureti Obara vs Peter Koipetai Nengisoi* (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.”

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 27TH DAY OF
JANUARY 2026.**

**N.A. MATHEKA
JUDGE**