

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT ELDORET**  
**ELC CASE No. E002 OF 2025**

**BARTILOL KOMEN .....PLAINTIFF**

***VERSUS***

**MOSES YATOR .....DEFENDANT**

R U L I N G

1. The Defendant (hereinafter referred to as “the Applicant”) did file a Notice of Preliminary Objection dated 27.05.2025 (hereinafter referred to as “**the present P.O.**”) against the Plaint dated 20.01.2025 instituted by the Plaintiff (hereinafter referred to as “**the Respondent**”) seeking the following Orders; -
  - A. The Plaint dated 20.11.2025 be struck out forthwith.
  - B. The Defendant be awarded costs thereof.
2. The grounds adduced in support of the present PO were outlined as follows; -
  - (i) The cause of action pleaded by the Respondent against the Applicant is time barred under Section 7 of the Limitation of Actions Act, Cap 22.
  - (ii) According to the Applicant, he was registered as the lawful owner of the suit property on the 16.03.2004.
  - (iii) Consequently, the Respondent was required to institute any legal proceedings against the Applicant within a period of 12 years from the date of registration.
  - (iv) However, it is now 21 years since the Applicant was registered as the lawful owner of the suit property is when the Respondent is filing the present suit.

- (v) Consequently, the Applicant is of the view that the cause of action contained in the present suit has been extinguished by operation of Section 7 of the Limitation of Actions Act, Cap 22.
- (vi) In conclusion, the Applicant did plead that the present suit is an abuse of the Court process and should therefore be struck out.
3. The Honourable court then directed that the present P.O would be canvassed by way of written submissions.
4. The Defendant filed his submissions dated 05.11.2025 while the Plaintiff filed his submissions dated 24.11.2025.
5. The Honourable Court has perused the present P.O together with the submissions of both the Defendant and the Plaintiff and is convinced that the issues for determination in the present PO are as follows:-

**ISSUE NO.1 - WHETHER THE SUIT IS TIME BARRED BY THE PROVISIONS OF SECTION 7 OF THE LIMITATION OF ACTIONS ACT**

**ISSUE NO 2 - WHETHER THE DEFENDANTS PRELIMINARY OBJECTION MERITED**

**ISSUE NO 3 - WHO SHALL BEAR THE COSTS OF THIS PO?**

6. Having identified the said issues for determination, the Honourable Court shall proceed to look at the facts and make its conclusions on the PO.

**ISSUE NO.1 - WHETHER THE SUIT IS TIME BARRED BY THE PROVISIONS OF SECTION 7 OF THE LIMITATION OF ACTIONS ACT?**

7. The first issue for determination is whether the cause of action contained in the Respondent's Complaint dated 20.01.2025 is time barred or not in line with the provisions of Section 7 of the Limitation of Actions Act, Cap 22.
8. To make this finding, the Applicant did elect to file the present PO.
9. In dealing with any Preliminary Objection, the Court must be guided by the principles provided in the case of **MUKHISA BISCUITS MANUFACTURING COMPANY LIMITED-VERSUS-WESTEND DISTRICTORS LIMITED (1969) EA,696** which did observe the following; -  
  

***“A Preliminary Objection 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.”***
10. The interpretation of the above observation is that a Preliminary Objection should be only raised where the facts as pleaded the opposing parties are assumed to be correct and do not require any ascertainment by the Court in exercising its judicial discretion.
11. In other words, where the facts as pleaded by the parties are at variance and controverted, then it would require the Court to ascertain the same through exercising its judicial discretion.
12. Turning to the present suit, the Respondent herein through the Complaint dated 20.01.2025 plead that the property known as LR.NO.KIPLOMBE/KIPLOMBE BLOCK 10 (GROWEL)/165 (hereinafter referred to as **“the suit property”**) was his property.

13. The Respondent did give a number of facts which gave rise to the title of the suit property being registered in the name of the Applicant herein.
14. In essence, the Respondent did state that the Applicant's registration as the owner of the suit property was in trust and did not bestow any ownership rights on the Applicant over the same.
15. The Applicant on the other hand through a Defence dated 10.03.2025 did deny the allegations that the suit property was purchased by funds from the Respondent.
16. The Applicant did also claim that the suit property was lawful purchased by him and therefore he was the lawful and legitimate owner as provided in the Title Deed.
17. In addition to the Defence dated 10.03.2025 by the Applicant, there was also a Counter-Claim against the Respondent seeking for a declaration that his ownership was indefeasible on the basis of first registration.
18. The Applicant further did seek this Court to deem the Respondent's suit as full of laches.
19. Lastly, the Applicant did seek this Court an Order that the Respondent herein was allocated a property known as KIPLOMBE/KIPLOMBE BLOCK 10 (GROWELL)/201 with other 4 co-owners.
20. Based on the Plaintiff dated 20.01.2025 and the Defence and Counter-Claim dated 10.03.2025, it is clear in the mind of this Court that the facts as pleaded by the parties herein are at variance and cannot be assumed to be correct.
21. In other words, the Court requires to hear the parties herein to be able to understand that facts regarding the dispute and

exercise its jurisdiction discretion in determining the dispute as hand.

22. In addition to the above, the Court does takes notice that the cause of action by the Respondent against the Applicant is one that is based on the doctrine of trust.
23. The provisions of Section 20 (1) of the Limitation of Actions Act, Cap 22 provides as follows; -

***“ 20. Actions concerning trust property***

***(1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action—***

***(a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or***

***(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.”***

24. According to the proviso hereinabove, where a party pleads breach of trust as the cause of action, then the various limitation of periods provided in the Limitation of Actions Act, Cap 22 do not apply.
25. In case of **STEPHENS & 6 OTHERS-VERSUS- STEPHENS & ANOTHER (1987) KECA 54 (KLR)**, the Court while discussing the import of Section 20 of the Limitation of Actions Act held that:-

***“The philosophy underlying the English Limitation Act seems to be, that where confidence is reposed and abused, a defaulting fiduciary in possession of trust property or which he converted to his use, should not be shielded by time bar.***

***So no plea of limitation is available to a fiduciary in such a case. (See section 19 (1) of the Limitation Act 1939).***

***The parliament of Kenya clearly shares that policy and in the Limitation of Actions Act (cap 22) enacted a similar provision in almost identical language. Section 20(1)(b) of the Limitation of Actions Act (cap 22) provides that:***

***‘None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust which is an action to recover from the trustee, trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.’***

26. Consequently, this Court is of the considered view and finding that the Applicant’s ground in the present PO that the cause of action by the Respondent is time barred under the Limitation of Actions Act, Cap 22 is not merited in view of the fact that it is premised on breach of trust by the Applicant.

### **ISSUE NO 2-WHETHER THE DEFENDANTS PRELIMINARY OBJECTION MERITED OR NOT?**

27. Based on the findings in Issue No. 1, this Court is of the considered finding that the present PO is not merited and cannot be granted.

### **ISSUE NO 3 - WHO SHALL BEAR THE COSTS OF THIS PRESENT PO?**

28. The present PO having been found not merited, then the Applicant is condemned to pay costs to the Respondent.

### **CONCLUSION**

29. In conclusion, the Court hereby makes the following determination as relates to the present PO; -

**A. THE PRELIMINARY OBJECTION DATED 27.05.2025 IS NOT MERITED AND THEREFORE DISMISSED FORTHWITH.**

**B. THE APPLICANT IS CONDEMNED TO PAY COSTS TO THE RESPONDENT.**

**DATED, SIGNED and DELIVERED in ELDORET this 11<sup>TH</sup> DAY OF FEBRUARY, 2026.**

**EMMANUEL.M. WASHE  
JUDGE**

**IN THE PRESENCE OF:**

Court Assistant: Brian

Counsel for the Applicant: Ms. Khayeli holding brief for Mr. Sambu

Counsel for the Respondent: Ms. Nafula holding brief for Ms. Lagat