



**Mathenge v Attorney General (Environment and Land Case
E482 of 2025) [2026] KEELC 576 (KLR) (5 February 2026) (Ruling)**

Neutral citation: [2026] KEELC 576 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E482 OF 2025
MN KULLOW, J
FEBRUARY 5, 2026**

BETWEEN

SIMON KAROKI MATHENGE PLAINTIFF

AND

THE HON ATTORNEY GENERAL DEFENDANT

RULING

Introduction

1. The plaintiff instituted a suit Vide a Plaint dated 22nd November 2024 on allegations of the defendant acquiring industrial Plot No 16 Gikomba herein referred as the suit property without following the right procedure for compulsory acquisition
2. The defendant then responded by filing a notice of preliminary objection dated 24th June 2024. The preliminary objection was anchored on the fact that it offends the provisions of section 7 of the limitations of Actions act cap 22 laws of Kenya
3. The Notice of preliminary objection were canvassed by way of written submissions

Defendant's submissions

4. The defendant submitted that the suit was time barred as in section 7 of the limitations of Actions Act. That the ground raised was a valid point of law hence the preliminary objection was rightfully before the court as an objection. That the suit property in question was allocated in 1996 and the cause of action accrued then when the alleged letter of allotment was cancelled. Counsel submitted that the plaintiff did not challenge the cancellation then making the period of 29 years since cancellation inordinate. He placed reliance on the case of Edward Moonge Lengusuranga v James Lanaiyara & Another (2019) eKLR.



Plaintiff's submissions

5. The plaintiff's case is that he is the owner of the suit property herein having been allocated the property in the year 1994 but the same was cancelled by the commissioner of land in 1996 with the intention of acquiring it for public use which was for construction of a road.

That the defendant went ahead to acquire the property without following the laid down procedures on compulsory acquisition. That the said trespass is evidenced by the road currently in place.

He submitted that the course of action in this case continued to accrue for as long as the trespass persisted and therefore the law of limitation did not apply in this case relying on the case of County Government of Laikipia v James Kimani Mburu & 2 Others, ELCA No.1 of 2019 of Ken Kasinga v Daniel Kiplagat Kirui & 5 others 2015 KEHC1181(KLR).

Analysis and Determination

6. Having considered the Preliminary objection and the submissions herein the only issue for determination is whether the Preliminary Objection dated 24th June 2025 is merited.
7. The threshold of a preliminary objection was set out by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696 as follows:

“...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 objection may dispose of the suit.”

8. The Court went further to note that: -

“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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop. Likewise, the Court in the case Oraro v Mbaja [2005] eKLR 141, on the nature of preliminary objections observed that:

The defendant's preliminary objection is based on the grounds that the court has no jurisdiction to hear and determine the instant suit as it is statute barred. The issue of jurisdiction and whether a suit is time barred is a pure point of law which can determine the matter without having to consider the merits of the case. This was the holding in the case of Bosire Ongero v Royal Media Services [2015]

eKLR. The preliminary objection is on a point of law and the court is satisfied that it has been properly and validly taken. The question whether or not the plaintiff's suit is time barred by statute on account of limitation goes to the jurisdiction to entertain this suit. If the suit is statute barred on account of limitation, then the court lacks jurisdiction to entertain the same.

Section 7 of the *Limitation of Actions Act* cap 22 Laws of Kenya prescribes the limitation period in regard to actions for the recovery of land which is listed as 12 years. To address the issue of whether the suit is statute barred, the court will have to look at what cause of action the plaintiff is pursuing in the plaint to. In the case of Edward Moonge Lengusuranga v James Laniyara & another [2019] eKLR the court defined a cause of action as follows: -



“A cause of action is a set of facts sufficient to justify a right to sue to obtain money, property or the enforcement of a right against another party. The term also refers to the legal theory upon which a plaintiff brings a suit”

9. The prayers in the plaint are
 - i. A declaration that the plaintiff is the owner of the plot No Industrial plot no 16 Gikomba and the defendant be ordered to remove the road and restore the plot to the plaintiff and issue him with a title deed.
 - ii. In the alternative the defendant be ordered to pay compensation to the plaintiff being Ksh 40,000,000/= being the value of the property
10. Basing on the above prayers, the plaintiff primarily seeks for vacant and quiet possession of the suit property through removal of the road which claim is grounded on his averment that he is the proprietor of the suit property and that respondent has illegally occupied it. There is evidence that the defendant entered the suit property in the year 1996 and constructed a road which still existed as the time of filing this suit. In these circumstances, what is before this court is a claim based on the tort of continuing trespass. Section 7 of the [Limitation of Actions Act](#) is therefore not applicable.
11. Trespass is described under the [Trespass Act](#) Cap 403 to mean any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence”
12. Faced with a similar situation, the Court of Appeal stated in Warrakah (Suing as the Administrator and Legal Representative of the Estate of Gakweli Mohamed Warrakah - Deceased) v Mwatsami (Civil Appeal E015 of 2020) [2024] KECA 579 (KLR) (24 May 2024) (Judgment) thus:

“Therefore, it can be discerned that trespass to land occurs when a person directly enters upon land in possession of another without permission and remains there, places or projects any object upon the land, and that the tort of trespass is designed to enforce possessory rights rather than proprietary rights from unlawful interference. As long as the act of trespass persists, it is a continuing trespass.... All we will say is that, since it is plain from the above cited authorities that the cause of action complained of was in respect of the tort of continuous trespass, and was not a claim for recovery of land, the appellant’s suit based on trespass, and more so a continuing one, was not time barred, since section 7 of the [Limitation of Actions Act](#) was not applicable to the suit.”
13. Further in the case of Muthiora v Marion Muthama Kiara (Suing on behalf of the Estate of Erastus Muthamia Kiara - Deceased) (Civil Appeal 43 of 2017) [2022] KECA 28 (KLR) it was held that:“ ...it is clear that any unauthorized entry whether present or continuous is trespass. In this case, it is indeed common ground that the appellant entered into and has remained in occupation of the suit property. The appellant’s continued occupation of the said property from the first date of entry in so far as it is unauthorized by the respondent amounts to trespass and remains as such to date. The respondent’s claim for trespass being a continued tort is, therefore, not time barred.”
14. Anchoring on the reasoning as in the above decided cases, I will not deviate from the same, It follows therefore that the plaintiff is not barred by the [Limitation of Actions Act](#). I agree with the plaintiff that the said trespass is a continuous one and the cause of action still arises as long as the trespass still persists.



Final disposition

15. In view of the above I make the following orders

- i. The Defendant's notice of preliminary objection dated 23rd April 2025 is not merited and hereby dismissed.
- ii. Costs to the plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5TH DAY OF FEBRUARY 2026.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Mr. Wandaka..... for the Plaintiff

No appearance..... for the Defendant

Philomena W. Court Assistant

