

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT SIAYA

ELC LAND CASE NO. E018 OF 2024

CHARLES OCHIENG NDIGA.....
PLAINTIFF

VERSUS

NEREAH MICHAEL SAID.....1ST
DEFENDANT

KENYA COMMERCIAL BANK.....2ND
DEFENDANT/RESPONDENT

RULING

1. The Defendant has raised a preliminary objection dated 26/08/2024 on two limbs namely 1) the court lacks jurisdiction to hear and determine the suit herein and 2) That the Plaintiffs claim are bad in law pursuant to the Limitation of Actions Act.
2. The preliminary objection was argued by way of written submissions. The 1st Defendants submissions are dated 20/01/2026 and the Plaintiffs 27/9/2026 and 27/10/2026 by way of supplementary submissions with leave of the court.

ANALYSIS AND DETERMINATION

3. I have considered the preliminary objection raised and the submissions of counsel on record in support of the objection and against.

- 1) Whether the preliminary objection is properly raised
- 2) Whether the Plaintiff's claim is time barred
- 3) Whether the Court lacks Pecuniary Jurisdiction

Whether the preliminary objection is properly raised

4. Counsel on record for the plaintiff relying on the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] EA 696** submitted that the objection does not meet the requisite threshold which requires a preliminary objection should be premised on pure point of law.

5. It is now trite following the holding in the **Mukisa Biscuit Manufacturing Co. Ltd (supra)** that; -

“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.”

6. In John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR Mwita J elaborated the legal position thus; -

“The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.”

7. It is submitted on behalf of the plaintiff that the Plaintiff and 1st Defendant were husband and wife. That before the court can consider whether the rights of the Plaintiff were extinguished and thus barring him from filing this suit it must consider when did the rights to sue accrue to the plaintiff and whether he could sue for a claim for land while still in a legal marriage. That this can only be done by looking at the facts pleaded and evidence in support of the same.
8. I respectfully disagree with the above arguments because the same are arguments that are based on issues of law.

Even the issue on when the rights accrued does not require to be ascertained from facts dates have been pleaded.

9. It is therefore the finding of this court that the preliminary objection is properly raised.
10. Having resolved the above I will proceed to consider if the suit herein is time barred.

Whether the Plaintiff's suit is time barred

11. The 1st defendant submits that by dint of the provisions of section 7 of the Limitation of Actions Act the suit is time barred. It is submitted that time ought to start running from 26/5/1999 when the suit property was registered in the name of the 1st Defendant and the same lapsed on 25/11/2011. That even if time were to be computed from the year 2004 when the property was charged then the suit would still suffer the blow.
12. On the other hand, the plaintiff in his response posits that the cause of action arose upon the decree of dissolution of Marriage and determination on Divisional of Matrimonial property hence within time.
13. My perusal of the Judgement reported as **CON v NMS [2022] KEHC 792 (KLR)** shows that the learned judge final orders were to the effect she declared the suit property not matrimonial property as it was acquired by petitioner and transferred in the name of the respondent before the two got married. Additionally, I note that the

learned judge observed at paragraph 140 of the judgement that inspite of the above finding it can be available to be claimed in other forum.

14. I have looked at the Plaint commencing these proceedings. At paragraph 10 and 11 reference is made to the court decision in High Court Siaya Civil Case (OS) No. E009 of 2021 where it is alleged that the court ruled in the plaintiffs favor. While this is contested at paragraph 9 of the 1st Defendants statement of Defence it would appear from a look at the entire pleadings it is the finding in those proceedings that has given the plaintiff the impetus to bring the present proceedings.
15. The 1st Defendant case is that she is the registered owner of the suit property, Title Number Uholo/Ugunja/1019 since 26th May,1999 prior the purported marriage with the Plaintiff and the same was offered as a security to a loan facility advanced by the 2nd Defendant in the year 2004. That in the judgment delivered on 4th April, 2021 by Hon. Justice A.E Aburili, the court made a finding that the suit property was not matrimonial property as the same was acquired and registered in the 1st Defendant's name prior to the marriage between the Plaintiff and the 1st Defendant. That therefore the period of 12 years ought to be counted from 26th May, 1999 when the 1st Defendant was registered as the owner and the title deed issued in her favour, the same lapsed on 25th May, 2011. In any event, even if time

was to be calculated from the year 2004 when the property was charged then suit would still suffer the blow of limitation.

16. According to the Plaint, the Plaintiff seeks inter alia the following order 'A declaratory order that the 1st Defendant holds title No. Uholo/Unguja/1019 in trust for the plaintiff.' In my understanding the Plaintiff is in other words pleading constructive/implied trust.

17. Section 20 of the ***Limitation of Actions Act***, Chapter 22 of the laws of Kenya provides that; -

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.

18. In light of the express provisions of section 20 of the Limitation of Actions Act, trust is exempted from limitation. This position is affirmed in the case of **Kabogo Vs Gitau Civil Appeal No. 82/2019 (2025) KECA 193 KLR** where the Court of Appeal held thus: -

'The particulars of fraud were set out in paragraph 7 of the plaint one of which was that the respondent sold and transferred LR No. 12825/33 without the appellant's consent in breach of their oral agreement. Our understanding of the appellant's case was, to paraphrase section 20(1) of the Limitation of Actions Act, that he was a beneficiary under a trust, in respect of a fraud or fraudulent breach of trust to which the trustee (the respondent) was a party or privy and he intended to recover from the trustee (the respondent) trust property (suit properties) or the proceeds thereof in the possession of the trustee (the respondent) or previously received by the trustee (respondent) and converted to his use.

32. In our view, the appellant, having pleaded and particularised trust, pursuant to section 20(1) of the Limitation of Actions Act, the issue ought to have gone to full hearing since section 4 of the same Act became irrelevant and inapplicable. This is our understanding of the well settled legal position in the celebrated case of Mukisa Biscuits Manufacturing Ltd. v West End Distributors Ltd. [1969] EA 696 where Newbold, P held that:

19. It is therefore the finding of this court that the Plaintiffs' suit is not time barred.

Whether the Court lacks Pecuniary Jurisdiction

20. The main ground for this objection is that the suit property has been valued and found to have a value of less than Kshs. 8,000,000.
21. The jurisdiction of the Environment and Land Court is drawn from article 162 (2) of the Constitution of Kenya 2010 read together with section 3 of the Environment and Land Court Act.
- 22. Article 162 (2) (b)** of the Constitution provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land, and shall determine the jurisdiction and functions of these courts.
23. The jurisdiction of the said courts is found in **section 13 of the Environment and Land Court Act of 2012** which provides that the court shall hear disputes relating to:
- (a)** *environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*
 - (b)** *compulsory acquisition of land;*
 - (c)** *land administration and management;*
 - (d)** *public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*

(e) any other dispute relating to environment and land.

24. Arising from the above ,the jurisdiction of the Environment and Land Court is not limited in terms of pecuniary jurisdiction. Equally section 101 of the Land Registration Act 2012 does not impose a pecuniary limitation.
25. It is the finding of this court that it has unlimited pecuniary jurisdiction to handle this case.
26. The upshot of the foregoing is that the preliminary objection lacks merit and it is dismissed. Costs shall abide the outcome of the main suit.

Orders accordingly

Dated, signed and delivered at Siaya this 16th day of February 2026.

HON. JUSTICE A. E. DENA

JUDGE

16/02/2026

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Ms. Ondieki Holding Brief for Mr. Abidha for 1st Defendant

Mr. Kapinde Holding Brief for Mr. Anuro for 2nd Defendant

No appearance for the Plaintiff

Plaintiff Present in court (virtually)

Court assistant: Elisha Mboya

ORIGINAL