

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL SUIT NO.E008 OF 2025

**SHIV CONSTRUCTION COMPANY LIMITED
PLAINTIFF**

VERSUS

**COUNTY GOVERNMENT OF KAKAMEGA1ST DEFENDANT
CHIEF OFFICER, DEPARTMENT OF TRADE,
INDUSTRIALIZATION AND TOURISM**

**COUNTY GOVERNMENT OG KAKAMEGA2ND
DEFENDANT**

CHIEF OFFICER, FINANCE

COUNTY GOVERNMENT OF KAKAMEGA3RD DEFENDANT

COUNTY ATTORNEY, KAKAMEGA4TH DEFENDANT

RULING

1. By a Plaint dated 18/02/2025, the Plaintiff this suit against the Defendants seeking the following orders:

a. **A Declaration that the 1st Defendant is in Breach of the Proposed Construction of Kakamega Tea Factory in Shinyalu Sub-County No. 805709 Agreement dated 8/08/2021.**

b. **An order for payment of sum of money of Kshs. 10,000,00/= in paragraph 18.**

c. Loss of anticipated profits of Kshs. 41,742,864/=.

d. Special damages as follows;

i. Additional supervision and management costs	5,281,124.00
ii. Head office overheads	792,168.00
iii. Outstanding payments and interest	1,236,164.38
iv. Preliminaries	17,470,088.59
v. Contractor's Performance bond premiums	50,000.00
vi. Total	35,829,544.97
vii. VAT at 16% for vi above	

e. Interest accruing from b, c, d, and e above to be calculated on the basis of number of days delayed at the rate three points above the Central Bank of Kenya average rate for base lending prevailing as of the first day the payment becomes overdue and when payable.

f. Costs of the suit.

g. Any other or further relief that that this Honorable Court may deem fit, fair and just to grant.

2. The Defendants in their defence filed a Statement of Defence dated 2nd July 2025 denying all the allegation preferred against them. The Defendants also

filed a Notice of Preliminary Objection dated 2nd July 2025 raising (3) grounds inter alia that:

- 1) **The Honorable Court lacks jurisdiction to hear and determine the instant suit.**
 - 2) **The suit herein is statute barred contrary to the express provisions of Section 3(2) of the Public Authority Limitation Act Cap 39.**
 - 3) **The entire Complaint is brought in bad faith, is frivolous, vexatious and an abuse of this Honorable Court process hence ought to be dismissed with costs to the Defendants.**
3. The Preliminary Objection was canvassed vide written submissions. The Defendants filed submissions dated 27th October 2025 while the Petitioner filed submissions dated 29th October 2025.

The Defendants' Submissions

4. On limitation of actions, Counsel for the Defendants submitted that the purpose of law on limitation of actions is to avoid stale claims and to compel the Claimants not to sleep on their rights and to bring their claims to Court immediately. Counsel urged that in the instant suit, the Plaintiff slept on its right to bring its claim within the stipulated timelines. Counsel cited Section **3(2)** of the **Public Authorities Limitation Act, Cap 39** in regard to the limitation of actions against the government and submitted that the said provision explicitly bars any person from instituting any proceedings

founded on contract against the government or local authority after the lapse of three years from the date which the right of action accrued to them.

5. Counsel observed that it clear that the Plaintiff's suit is brought against the County Government of Kakamega as per the statement of its object. Counsel maintained that although the County Government is not expressly mentioned in the said Act, this statute applies to the County Government by virtue of being a government entity.
6. In regard to a cause of action, Counsel relied on the definition as given in the case of **Attorney General & another v Andrew Maina Githinji & Another [2016] KECA 817 (KLR)** inter alia, to be an act on the part of the defendant which gives the plaintiff his cause of complaint. Counsel observed that at paragraph 6 of the Plaintiff, the Plaintiff avers that they entered into a binding Agreement namely "Proposed Construction of Kakamega Tea Factory in Shinyalu Sub-County" with the 1st Defendant which Agreement was executed on 19th August 2020 by the 2nd, 3rd and 4th Defendants who are the legitimate officers and representatives and that the commencement was also 19th August 2020.
7. Counsel further observed that the Plaintiff further aver at paragraph 12 that the Defendants despite signing the contract on 19th August 2020, they inordinately delayed the site handover to 6th September 2021, a year later from the commencement date. Counsel therefore urged that from these averments, it evident that the first cause of action arose when the Defendants failed to hand over the site immediately after execution of the agreement which means that the same happened in 2020. That additionally, on 18th

March 2021 the Plaintiff wrote a letter to the Defendants expressing its disappointment of not receiving any feedback over the site and drawing.

- 8.** Counsel submitted that computing time from 19th August 2020 when the Defendants failed to immediately handover the site after execution of the Agreement or 18th March 2021 when the Plaintiff wrote the letter to the Defendants, the statutory period of (3) years for bringing an action against the Defendants had lapsed on 19th August 2023 or 18th March 2024 respectively.
- 9.** Counsel further submitted that the Plaintiff contends that the Defendants wrote to them vide a letter dated 30th September 2020 informing them that the delayed site handover was due to Covid-19, and then proceeded to handover the site on 6th September 2021 and were to send them the construction drawings. That further, vide the letter dated 25th October 2021, the Plaintiff raised the complaint on the delayed commencement of the project due to the Defendants failure to send them the construction drawings as without the said construction drawings they could not commence the work.
- 10.** Counsel argued that from these averments, the second cause of action arose on 6th September 2021 when the Defendants failed to handover the drawings and on 25th October 2021 when the Plaintiff raised its concerns vide the said letter. Counsel thus submitted that in computing time from 25th October 2021, the Plaintiff ought to have filed the instant suit on or before 25th October 2024, however, the Plaintiff file this suit (115) days later.

11. Counsel thus urged that this Court lacks jurisdiction to adjudicate and determine the instant suit, the Plaintiff's suit having been filed past the statutory timeline for instituting the suit. In this regard, he relied on holding in the case of **Transafrica Motors Limited v County Government of Mombasa [2025] KEHC 9448 (KLR)**, **IGA v Makerere University [1972] EA 65**, **Gathoni v Kenya Co-operative Creameries Ltd, [1982] KLR, 104**, **St John Chrisotom Kudho Sec. School v Jemique Enterprises (Civil Appeal E063 of 2024) [2024] KEHC 15627 (KLR)** among many others on the submission that this suit being time barred.

12. Counsel further submitted that going by the said case laws, it is evident that Courts will not hesitate to strike out and dismiss suit that have been filed outside of the statutory timelines and added that even as the Plaintiff might plead the delay in filing the suit was because they were trying to negotiate with the Defendants, he urged that negotiations are not an exception to the strict limitation period provided under **Section 3 of the Public Authorities Limitation Act**. He submitted that that perhaps a safer course for the Plaintiff would have been to file the suit as prescribed and engage or continue with the alleged negotiations and relied on the case of **Transafrica Motors Limited v County Government of Mombasa [2025] KEHC 9448 (KLR)** (Supra) in that regard.

13. Counsel maintained that a Plaintiff which is barred by limitation is Plaintiff barred by law, maintaining that the said **Section 3(2) of the Public Authorities Limitation Act** is couched in mandatory terms. Counsel thus urged that the instant Plaintiff is barred by the law, the Plaintiff having filed the suit against the Defendant founded on a contract after the lapse of the (3)

year period and that this court is therefore bereft of jurisdiction to hear and determine the instant suit and cited the case of **Peter Gichuki King'ara v Independent Electoral And Boundaries Commission & 2 others [2013] KECA 278 (KLR)** in support.

14. On jurisdiction, Counsel submitted that compliance with the timelines under this Section is a jurisdictional prerequisite. He relied on the definition of **“jurisdiction”** cited in the **Black’s Law Dictionary, 9th Edition** and submitted that the jurisdiction of a Court is the authority that is reposed on a Court of law to take cognizance of matters placed before it for adjudication. Counsel pointed out that jurisdiction of a Court may be conferred by the Constitution, statute or both and that whatever the case, a court being a creature of the Constitution must only exercise the jurisdiction that is conferred upon it.

15. He cited the case of **Mutia Muindi t/a Mutibra Auctioneers v CFC Stanbic Bank Ltd Garnishee & another [2015] KEELRC 623 (KLR)** in support thereof. Counsel further submitted that statutory prescribed timelines within which a claim is to be brought goes to the jurisdiction of the court and the sum total of the claim being time barred is that authority of the court over it is extinguished.

16. In this regard, Counsel cited **Misc Application No. 2 of 2015 Mutia Muindi Ya Matiba Auctioneers v CFC Stanbic Ltd & Anor [2015] Eklr, Civil Appeal No. 50 of 1989 Owners of Motor Vessel “Lillian” S v Caltex Oil(Kenya Ltd [1989] KLR1, Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR,**

Kiage JA in Nrb Civil Appeal No. (Application) 228 of 2013 Nicholas Kiptoo Arap Korir Salat v Independent and Boundaries Commission & 6 Others, [2013] KECA 113(KLR) eKLR among others and submitted the legal position flowing from the said decision is that a Court of law must only exercise jurisdiction conferred upon it either by the Constitution, the law or both but it cannot exercise jurisdiction it does not have, exceed jurisdiction conferred it or even confer jurisdiction on itself through some form of innovation.

17. Counsel urged that jurisdiction is everything, without it, a court has no power to make one more step and the moment it holds the opinion that it is without jurisdiction it must down its tools. Counsel contended that any action taken by the Court without jurisdiction or exceeding jurisdiction would be unconstitutional and illegal and further submitted that the statutory time limit is not merely procedural but a matter of principle in law. Counsel added that the stipulation of time by statute demonstrates legislative intent to limit the Court's discretion and ensure finality of decisions and legal certainty. He relied on the holding in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] KECA 113 eKLR(Supra)** to buttress this submission.

18. Counsel reiterated that that the terms of **Section 3(2) of the Public Authorities Limitation Act Cap 39** are couched in terms that are plain and unambiguous, that no claim founded on contract shall be brought against the Government after (3) years and reiterated his submissions on when the causes of action arose as already herein summarized. He therefore submitted

that the Plaintiff's Complaint dated 18th February 2025 is statute barred and the same should be dismissed with costs.

19. Regarding costs, Counsel submitted that costs follow the event and that the Court has discretion to award costs or not to award. He cited the Halsbury Laws of England 5th Edition and the case of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] KEHC 7064 (KLR)** and urged that the defendants are entitled to costs

The Plaintiff's Submissions

20. Counsel for the Plaintiff submitted that from his observation, the Defendants' Preliminary Objection is summarily on the basis that the Court lacks jurisdiction to hear the matter in view of **Section 3(2) of the Public Authorities Limitation Act Cap 39**. He then submitted that on whether the Preliminary Objection fulfils the merited threshold, the case of **Majimoto Group Ranch v Matunke & another [2024] KEELC 5028 (KLR)** wherein the court belabored the *locus classicus* case of **Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1968) EA 696** is relevant.

21. Counsel submitted that from this definition, it is unambiguous that the Preliminary Objection's sustenance is based on the presupposition that the facts asserted by one party are not at odds with the other and if proved it disposes of the suit preliminarily as a point of law. That this then prompts a revisit of the facts as relayed.

22. Counsel observed that the Defendants assert that the suit's cause of action against the Defendants has been nullified with effluxion of time as the allegations therein ought to have been brought within three years as a County Government is within the statutory limitation period as prescribed by the **Public Authorities Limitation Act**. Counsel added that the contended causes of action circle around the delay in site handover and in availing the drawings. Counsel submitted that the Plaintiff's response to the allegation however, is that the said causes of action while subsisting, they do not form the primary premise of the case since for the site handover the same was remedied when it was presented on 6th September 2021 and is therefore not relevant save for its implication as a compensation event in the contract that to the benefit of the Plaintiff creates more room for the claim to be within the statutory periods.

23. Counsel submitted that the drawings ought to have been presented at reasonable time after execution and/or site handover but the same was not done causing the service of the letter dated 25th October 2021, 17th March 2022, 14th July 2022 and 7th November 2022 that were unanswered. Counsel stated that even though they were ultimately presented, the structures had been reoriented and therefore calling for revised structural drawings through the letter dated 16th September 2022.

24. Counsel urged that causes of action in the present suit ought to be brought within three years and with the Plaint dated 18th February 2025 and filed on 19th February 2025 the causes of action must therefore arise between 19th February 2022 and the filing dated of 19th February 2025 to be termed as the

period of legitimacy. He relied on the case of **Wainaina v Sunrise Synthetics Limited [2023] KEELC 21669 (KLR)** in this regard.

25. Counsel submitted that it is a common understanding that a cause of action is an act or omission attributed to and/or caused by the part of the Defendant giving the Plaintiff a cause of complaint and stated that having discussed the two unsubstantiated premises of the Defendant's Preliminary Objection he shall proceed to discuss the causes of action from his viewpoint, as premised on the remedies sought in the plaint *to wit* an order for payment of the sum of money due of Ks. 10, 000, 000/- and a declaration that the defendants are in breach of the proposed construction of Kakamega Tea Factory in Shinyalu Sub-County No. 805709 Agreement and the resultant prayer for damages.

26. Regarding the order for payment of the sum of money due being Ks. 10,000,000/-, Counsel submitted that the sum is a claim for advance payment provided in Standard Tender Document for Procurement of Works (Building and Associated Civil Engineering Works) issued by the Public Procurement Oversight Authority in January 2007, forming part of the contract which states he shall henceforth refer to as Standard Tender Document. Counsel reproduced Sub-clause 23.7 of the said document which is as follows;

In the event that an advance payment is granted, the following shall apply: -

a)

b) On signature of the contract, the Contractor shall at his request, and without furnishing proof of expenditure, be entitled

to an advance of 10%(ten percent) of the original amount of the contract. The advance shall not be subject to retention money.

27. Counsel submitted that in such pursuit the Plaintiff served an invoice dated 28th June 2022 for Ks. 10,000,000/- to the Defendants but the same remains unsettled and unpaid. Counsel urged that on this ambit, the 28th June 2022 when the claim was notified is within the period of legitimacy even before computing additional period for assessing the claim.

28. On the order seeking a declaration that the Defendants are in breach of the proposed construction of Kakamega Tea Factory in Shinyalu Sub-County – No.805709 Agreement, Counsel submitted that the Standard Tender Document in Clause 33 provides that the Employer or Contractor may terminate the contract if the other party causes fundamental breach of the contract. In this regard, he submitted that the part of the obligation that the Defendant breached was payment of the advance payment after its due notice on 28th June 2022 as well as other breaches of the contract entailed in the Plaintiff consisting of delay in site and drawings handover, failing to extend time and adjusting the prices and as a consequence of which vide the letter dated 12th January 2024, the Plaintiff notified the Defendant, terminating the contract which took effect two weeks thereafter on 26th January 2025.

29. Counsel urged that this called for payment upon termination in Clause 34 of the Standard Tender Document it states that if “the Contract is terminated for the employer’s convenience or because of a fundamental breach of Contract by the employer, the Project manager shall issue a Certificate for the value of the work done, materials ordered, the reasonable cost of

removal of equipment, repatriation of the contractor’s personnel employed solely on the Works and the Contractor’s costs for protecting and securing Works.”

30.Counsel submitted that despite being aware of the termination the Project Manager has until today failed to provide the final termination of contract account and the Plaintiff went ahead to prepare a copy of documentary calculation booklet for additional payments titled “Proposed Kakamega Global Tea Factory for County Government of Kakamega – Contractual Claim dated February, 2024. Counsel maintained that it is from the fundamental breach that the termination of contract arose and called for the reparation of the payment of the terminal amount which on the default of the Defendants they have not prepared for it to be due and that in any case they were raised in January, 2024 together with the tabulated accounts thus definitely within the period of legitimacy.

31.Counsel submitted that it is also noteworthy that the Standard Tender Document provided in Clause 24 that “compensation events which would cause additional cost or would prevent the Work being completed before the Intended Completion Date, the Contract Price shall be increased and/or the Intended Completion Date shall be extended.” Counsel urged that some of the events enumerated and relevant to the Plaintiff are the delay in site handover and drawings, ground conditions and additional work due to change of structural orientation.

32.Counsel further submitted that the contract was executed on 19th August 2020 to run for 48 weeks with an anticipated completion dated of the 21st

July 2021 but the site possession was delayed until 6th September 2022 with new anticipated completion on 8th August 2022. Counsel argued that however with the alteration of the new structures orientation and delay in providing the revised drawings the contract period extended and ought to have extended to include lost days on default of the Defendants.

33. Counsel submitted that with compensation period not approved and the breach continuing, it is not alien to state that the time stopped and were it not for the termination, the contract would still be subsisting until today and the causes of action for breach of contract is still enforceable for being within time.

34. Regarding this Court's jurisdiction to hear the matter, Counsel submitted the above discussion elaborates and clears out that the causes of action for breach of contract that gave rise to the remedy of payment of loss of profits and the special and other general damages as well as payment of the advance amount are valid and enforceable and still within time.

35. On costs, Counsel submitted that the general rule is that costs of action or proceedings shall follow the event. In the instant case, Counsel urged that the Defendants have not discharged the requisites of raising a Preliminary Objection and thus they ought to bear the costs of the suit.

Determination

36. Having considered the issues raised in Preliminary Objection by the Applicant herein and the submissions made by Counsel on the same, I am of the opinion that the issue for determination is;

Whether the issues therein raised have met the threshold of a Preliminary Objection so as to clothe it with the requisite merit.

37. On what a Preliminary Objection ought to be construed to be, the Supreme Court in **Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others** citing the leading decision of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696**, held as follows on what comprises a Preliminary Objection;

“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 has to be ascertained or if what is sought is the exercise of judicial discretion”.

38. Further, the Supreme Court in **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR** made the following observation as relates to the purpose that Preliminary Objections serve;

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

39.Ojwang, J (as he then was) also expressed himself as follows on what a Preliminary Objection properly understood, ought to be in the case of **Oraro vs. Mbaja [2005] 1 KLR 141: -**

“.... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from information, which stands to be tested by normal rules of evidence.”

40.In the instant case, the Defendant is challenging this Court’s jurisdiction to hear and determine the suit in view of **Section 3(2)** of the **Public Authorities Limitation Act**. On this issue, the Supreme Court while echoing the holding of the Court of Appeal in the case of **Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** In the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, (Supra)** held as hereunder;

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. [Also see Articles 165 (5) and 162 (2) of the constitution; and Section 13 of the Environment and Land Court Act]

41.**Section 3 (2)** of the cited **Public Authorities Limitation Act Cap 39** Laws of Kenya provides that:

“Limitation of proceedings

(2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.

42. In considering the issues raised by both Counsel in their submissions to the Preliminary Objection, what is apparent is that the views of the Counsel on when the cause(s) of action accrued are diametrically opposed as already herein summarized. As submitted and accepted as a common understanding between the parties that a cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint or put another way, a factual situation the existence of which entitles one person to obtain from the court a remedy against the other person, the question that the court ought to answer is when the action of the defendant that caused the plaintiff to complain arise.

43. Before answering this question, it is important that the court does not lose sight of what a Preliminary Objection properly so defined is. As stated in the herein cited cases, the following parameters are of note;

- (i) A preliminary objection consists of a pure point of law**
- (ii) A preliminary Objection is argued on the assumption that all the facts pleaded by the other side are correct.**
- (iii) It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.**
- (iv) A Preliminary Objection should consist of a point of law which must not be blurred with factual details liable to be**

contested and in any event, to be proved through the processes of evidence.

- (v) A Preliminary Objection must not itself derive its foundation from information, which stands to be tested by normal rules of evidence.**

44.The above said, it is clear from the submissions made by Counsel that the fact of when the cause(s) of action arose is contested. Each party is relying on their own individual interpretation of what action was taken by the parties, either jointly, or by each party separately, that in their determination, gave rise to the cause of action. The situation pertaining is not such that there is a clear implication from a plain and ordinary reading of the contract, that one can clearly and easily discern when the breach complained of, which then gave rise to the cause of action, occurred.

45.In this regard, the Preliminary Objection has not met the threshold as set out in (i) above because it is not a pure point of law, in (iii), (iv) and (v) above for reasons that the point at which the cause of action arose has to be ascertained as can be gleaned from the contestations by Counsels by way of the arguments advanced by each based on their interpretation of the facts of the case.

46.In the circumstances, it is my very well considered opinion that even though the Preliminary Objection is based on a pure point of law, as I have herein above demonstrated, it derives its foundation from information, which stands to be tested by normal rules of evidence. For this reason, the Objection has not met the required threshold which is that a Preliminary

Objection properly so defined 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.

47. Taking all the above into account, and having considered the representations made on when the cause(s) of action arose, I am persuaded by the submissions by Counsel for the Plaintiff and that the same arose i) when the plaintiff allegedly requisitioned for the 10% down payment and the same was not honored, and ii) when the Plaintiffs gave a notice of the termination of the contract for reasons as alleged that the same had been frustrated by the Defendant as herein summarized.

48. This is because it is the alleged act of frustrating the Contract by the Defendant by failing to pay the 10% as alleged, as well as the Defendant's alleged failure to comply with the requisitions made to it by the Plaintiff to enable the commencement of the proposed works, that then gave the Plaintiff cause to complain and seek redress in court. The relevant dates when the alleged breaches occurred being 28th June 2022 and 12th January 2024 respectively, I am satisfied that the plaint dated 18th February 2025 and filed on 19th February 2025 is very well within the three (3) year time period and is therefore not statute barred in any way. In this regard, I am satisfied that the Preliminary Objection for the reasons herein given lacks merit and the same is accordingly dismissed with costs to the Plaintiff.

Read Dated and Signed at ITEN on 5th March 2026

E. OMINDE
JUDGE