

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VIHIGA
CIVIL CASE NO E005 OF 2024

**PETER UYUGI KAGEVERA (Suing on behalf of himself and as
Administrator to the Estate of Amos Kagevera Odando)
.....PLAINTIFF**

VERSUS

**KCB BANK
LIMITED.....DEFENDANT**

RULING

INTRODUCTION

1. In his Complaint dated 29th August 2024, the Plaintiff herein prayed for Judgment against the Defendant for:-
 - a) **A declaration that the process of creating the charge against Land Parcel No South/Maragoli Madzoo/1210 done illegally was therefore irregular.**
 - b) **An order against the Defendant to release title to Land Parcel No South/Maragoli/Madzoo/1210 to him unconditionally duly discharged.**
 - c) **Costs of the suit**
 - d) **Any other order or further relief this court deems just to grant.**
2. On 13th December 2024, the Defendant filed a Notice of Preliminary Objection of even date in opposition to the Plaintiff's claim. It contended that the Complaint was defective, incompetent, bad in law and an abuse of this court's process. It asserted that this court was bereft of jurisdiction to hear and determine this suit by virtue of any

remotely conceivable cause of action being time barred as the suit had been filed after the lapse of the statutory period as set out under Section 4(1), (2) and (4) of the Limitation of Actions Act, Chapter 22 (Laws of Kenya).

3. It argued that the subject matter being pleaded as the loan acquired was allegedly issued more than forty-seven (47) years ago in the years 1977 and 1983 way past the acceptable time limit. It further asserted that there was an existing case in the High Court in **Kisumu HCCC No 121 of 1996 Kenya Commercial Bank vs Zedekia Odando & 2 Others** and that notwithstanding the time in which the cause of action arose, twenty-eight (28) years had lapsed.
4. It pointed out that since the institution of the alleged former case, it was clear that no execution orders were obtained as the Plaintiff would not have claimed that the file was untraceable. It added that the Plaintiff was barred from seeking the same orders as in the former suit. It was emphatic that the suit offended the provisions of Section 7 of the Civil Procedure Act, 2010 as the subject matter herein was *res judicata* as the same had already been determined in **Kisumu HCCC No 121 of 1996 Kenya Commercial Bank vs Zedekia Odando & 2 Others.**
5. It further contended that the suit was brought in bad faith and termed it as frivolous, vexatious and/or otherwise an abuse of the court process hence a good candidate for striking out with costs. It argued that the Plaintiff had no cause of action against it and the limitation of actions operated to bar any claim or remedy sought for.

6. Its Written Submissions were dated 19th May 2025 and filed on 20th May 2025 while those of the Plaintiff were dated and filed on 4th June 2025. This Ruling is based on the said Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

7. The Defendant placed reliance on the case of **Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd [1969] EA 696** where it was held that a preliminary objection had to be on a point of law. It argued that the subject matter of the Plaint herein was of a registered charge over the title land Parcel No South/Maragoli Madzoo/1210, (hereinafter referred to as the “subject property”) situated within Vihiga County in the Republic of Kenya, belonging to the late Amos Kagevera Odando who was and still was the registered and absolute proprietor of the said subject property on account of the loan facility obtained. It added that the Plaintiff averred that he was the beneficial owner of the said subject property.
8. It invoked Section 4(1), 2 and 3 and Section 7 of the Limitations Act (Cap 22) Laws of Kenya and submitted that this court was bereft of jurisdiction to hear and determine this suit after the lapse of the statutory period as set out under Section 4 (2) and (4) of the said Act. It cited Section 26 of the Limitations of Actions Act and argued that the Plaintiff was aware of the existence of the Charge since

1996 as evidenced by their defence dated 26th June 1996 in the said suit. To buttress its point, it relied on the cases of **Anthony Lekishon Kilolong vs Charles A. Chebii & Others [2019] KEELC 4843 (KLR)** and **Bundi vs Ouma [2023] KEELC 16203** where the common thread was that the limitation period began to run from the date of the discovery of the fraud.

9. It further relied on Section 7 of the Civil Procedure Act and cited the case of **IEBC vs Maina Kiai & 5 Others [2017]eKLR** where the Supreme Court held that all the elements of *res judicata* must be satisfied conjunctively for the doctrine to be invoked. It noted that the said elements included, the suit or issue was directly and substantially in issue in the former suit, the former suit was between the same parties or parties under whom they or any of them claim, those parties were litigating under the same title, the issue was heard and finally determined in the former suit, the court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue was raised. It urged the court to strike out the suit herein with costs.

10. On his part, the Plaintiff submitted that it was trite law that issues of limitation, especially where facts must be ascertained such as acknowledgement, part payment, fraud or concealment were questions of fact and could not be properly raised as a preliminary objection. In this regard, he relied on the case of **Oraro vs Mbaja [2005] 1 KLR 141** where it was held that a preliminary objection was a point of law which was not to be blurred with factual details

liable to be contested and proved through the processes of evidence.

11. He asserted that he had pleaded that the Defendant failed to comply with a court order issued in **Civil Suit No 121 of 1996** and that such non-compliance constituted a continuing injury that was not time barred. He placed reliance on Section 7 of the Civil Procedure Act and submitted that he had not sought to re-litigate the earlier case but was instead seeking enforcement and/or redress for non-compliance with the prior decision which was an entirely different cause of action.
12. He argued that the Defendant had not produced a certified copy of the Judgment or Decree in **Civil Suit No 121 of 1996** to prove that the matter was *res judicata*. He added that he was not introducing a new cause of action but was seeking enforcement and/or redress for non-compliance with the prior decision.
13. In this regard, he relied on the case of **ET vs Attorney General & Another** (eKLR citation not given) where it was held that courts must be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy and that the test was whether the Plaintiff in the second suit was trying to bring the court in another way and in a form of a new cause of action which had been resolved by court of competent jurisdiction.
14. He urged the court to dismiss the Defendant's preliminary objection with costs since he had failed to demonstrate how this

court lacked the jurisdiction to handle the suit. He was emphatic that his cause of action was predicated on enforcement of rights connected to property and judicial orders which clearly fell within the jurisdiction of this court.

15. He pointed out that the Defendant's preliminary objection was a delay tactic displayed to miscarry justice, was brought in bad faith and was founded on mixed issues of law and fact and, therefore, fail the test of a proper Preliminary Objection as established in the case of **Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd** (Supra).

16. Notably, Section 4 of the Limitation of Actions Act Cap 22 (Laws of Kenya) provides as follows:-

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;

b. actions to enforce a recognizance;

c. actions to enforce an award;

d. actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

e. actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

2. An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

3. An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action.

18. Further, Section 26 of the said Act provides as follows:-

Where, in the case of an action for which a period of limitation is

prescribed, either—

a. the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

b. the right of action is concealed by the fraud of any such person as aforesaid; or

c. the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it...”

19. Having said so, in his Pleint the Plaintiff averred that his uncle one Zedekiah Odando (Deceased) illegally took a loan from the Defendant against the title to the subject property and that the

Defendant illegally went ahead to register the Charge against the subject property without the consent of his late father who was the registered proprietor. He was emphatic that his late father was not aware of the creation of the Charges over his subject property.

17. He further averred that the **High Court in Kisumu Civil Suit No 121 of 1996 Kenya Commercial Bank vs Zedekiah Odando & 2 Others** issued an order that the title be returned by the Defendant to his late father when he was still alive but that the Defendant had been adamant not to obey the said orders and had been persistent in its illegal acts of repossessing the title to the subject property.

18. It was not clear to this court as to when the Plaintiff learned of the alleged fraudulent act of the Defendant. To determine whether or not the suit herein was statute barred, it was important that this court hear the Plaintiff's case so as to ascertain the exact date the court order in **High Court in Kisumu Civil Suit No 121 of 1996 Kenya Commercial Bank vs Zedekiah Odando & 2 Others** was issued and when he first became aware of the fraudulent nature of the charge.

19. Going further, the law pertaining to the doctrine of *res judicata* was captured under the provisions of Section 7 of the Civil Procedure Act Cap 21 (Laws of Kenya) which states that:-

“No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in

issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

20. In the case of **E.T vs Attorney General & Another [2012] eKLR**, the court stated that courts must be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy. It further held that the test was whether or not the plaintiff in the second suit was trying to bring a new cause of action which had already been resolved by a court of competent jurisdiction in another way.

21. It was trite law that parties could not evade the doctrine of *res judicata* merely by adding causes of action in subsequent proceedings. Indeed, the intention of this doctrine was to lock out parties who had had their day in courts of competent jurisdiction from re-litigating the same issues against the same opponents in the court system. Without it, there would be no end to litigation and the judicial process would be rendered a nuisance and brought to disrepute. The foundation of this doctrine of *res judicata*, therefore, thus rested in the public interest for swift, sure and certain justice.

22. From the circumstances of the case herein, the court noted that the parties did not refer to any judgment to indicate the conclusion of the suit **High Court in Kisumu Civil Suit No 121 of 1996 Kenya**

Commercial Bank vs Zedekiah Odando & 2 Others. This court, on its own motion, also checked the Kenya Law Reports but could not trace the said Judgment. However, it was not in dispute that the subject matter in the previous litigation and the current suit were the same save for the parties as the Plaintiff who was not a party then was now acting on behalf of his late father who was the 1st Plaintiff in the said suit.

23. Although the issues were allegedly the same, this court could also not determine the same without having a glimpse of the said orders that were allegedly disobeyed. A matter that could best be handled at the hearing of the case herein. This court did not, therefore, find the Defendant's Preliminary Objection to have met the threshold in the case of **Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd** (Supra).

24. Indeed, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the Constitution of Kenya, 2010. Even where a party delayed in doing an act, there is always a provision that would give it reprieve to seek justice.

25. It was, therefore, the considered view of this court that dismissing the Plaintiff's suit at this preliminary stage on unsubstantiated facts would amount to a miscarriage of justice on his part.

DISPOSITION

26. For the foregoing reasons, the upshot of this court's decision was that the Defendant's Notice of Preliminary Objection dated and filed on 13th December 2024 was not merited and the same be and is hereby dismissed. Costs of the application will be in the cause.
27. To progress this matter, it is hereby directed that the Plaintiff file his witness statements cross- referenced to an indexed and paginated Bundle of Documents by 11th March 2026.
28. It is hereby directed that the Defendant files its witness statements cross- referenced to an indexed and paginated Bundle of Documents by 17th April 2026.
29. It is also hereby directed that this matter will be mention on 13th May 2026 to confirm compliance and/or for further orders and/or directions.
30. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **23rd** day of **February** 2026

J. KAMAU
JUDGE