

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ELCLA NO. E017 OF 2025

(Being an appeal from ELC CASE NO E066 OF 2014(VIHIGA) of the ruling of the Hon. J. A. Agonda SPM on the 16th September 2025)

KEITH JAPHETH ASILLA (Suing as an administrator
Of the estate of WYCLIFFE JOHN ASILLA (deceased) APPELLANT
VERSUS
TIMOTHY KWISA MARENDE.....RESPONDENT

JUDGEMENT

Introduction

The appellant herein was the plaintiff in Vihiga SPMC ELC No. E066 of 2024(herein called the suit), wherein he had sued the respondent.

The appellant, who had filed the suit in the capacity of administrator of the estate of Wycliffe John Asilla, deceased, claimed that the deceased had bought land parcel NO. WEST BUNYORE/EBUSIKHALE/2965 (herein called the suit land) from the respondent, but thereafter the respondent refused to release the shop thereon and the access road to the deceased. The appellant therefore sought orders that:

- a) The honourable court do declare that the access path and the shop constituted the purchase of the suit land and direct that the defendant allow the plaintiff the use of the access path and the shop.
- b) General damages and mesne profits.
- c) Costs of the suit.

In response to the claim, the Respondent herein filed a Notice of preliminary objection dated 27th June 2025, seeking that the plaint be struck out. The grounds of the Preliminary objection were that:

- i. The plaintiff's suit is statute-barred under the Limitation of Actions Act, Cap 22 Laws of Kenya, the cause of action being based on an alleged sale agreement purportedly executed on or about 29th November 1997, which is over 27 years ago, and no leave of court has been sought or obtained to file the suit out of time.
- ii. The plaintiff is total violation of section 4(1) Limitation of Actions Act, Cap 22 Laws of Kenya.
- iii. The plaintiff lacks the legal capacity (*locus standi*) to institute this suit as he is not the registered proprietor of the suit properties, namely LR No. WEST BUNYORE/EBUSIKHALE/2965 and WEST BUNYORE/EBUSIKHALE/667 and has no legally recognizable interest therein.
- iv. The Chief Magistrate at Vihiga in MCSUCC No. 71 OF 1997, made orders reverting the ownership of the suit properties to the name of the deceased Nyangute Marende Mbuti, thereby nullifying any purported interest the plaintiff may claim to have had.
- v. In light of the above, the suit is incompetent, bad in law, misconceived, and an abuse of the court process and ought to be struck out with costs.

The record shows that the preliminary objection was heard by way of written submissions and a ruling delivered on 16th September 2025, vide which the trial court found that the preliminary objection was merited, upheld the preliminary objection with costs, and struck out the plaint with costs.

The appeal

Aggrieved by the ruling dated 16th September 2025, the appellant filed the present appeal vide the Memorandum of Appeal dated 30th September 2025. The grounds of appeal, as contained in the Memorandum of Appeal, are that the learned Magistrate erred in law and fact

1. By finding that the legal time upon which time ought to start counting in instituting a cause of action was at the time the payment towards the purchase of the suit land in 1997, notwithstanding that the plaintiff had pleaded fraud contrary to the provisions of section 26 of the Limitation of Actions Act.
2. In invoking the res judicata, notwithstanding that the respondent did not provide any material to the effect that Succession cause No. 71 of 1997 existed or such other suit, if it did exist, involved the parties in respect to the same subject matter that gave rise to the suit in the lower court.
3. By making a finding on an issue of fact that required the court to ascertain the existence of such fact, which issue cannot be determined as a preliminary objection.
4. By misapplying the principle of lack of locus standi on the part of the appellant despite the fact that the appellant aptly demonstrated locus standi in the lower court.
5. By ruling contrary to the general rule of pleadings binding upon the parties by failing to take note of the fact the defence admitted in paragraph 14 therein that no other previous suit existed between the parties on the same issue pleaded in the plaint.

6. By entertaining questions of evidence while handling a preliminary objection and making determinations on the said issues without the benefit of a full hearing.

Submissions

The appeal was heard by way of written submissions. Written submissions dated 31st December 2025 were filed by Jumba & Co Advocates on behalf of the appellant, while written submissions dated 1st February 2025 were filed by Antony Musili & Company Advocates on behalf of the Respondent.

Analysis and determination

This being a first appeal, this court is obligated to re-analyse the evidence/material placed before the trial court and draw its own conclusions. In *Selle & Another vs Associated Motor Boat Company Limited and Others [1968] EA 123*, it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact by the court below that;

“An appeal to this court is by way of retrial, and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion, though it should always bear

in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.”

The first ground of appeal is that the trial court erred in law and fact in finding that the legal time upon which time ought to start counting in instituting a cause of action was at the time of payment towards the purchase of the suit land in 1997 notwithstanding that the plaintiff had pleaded fraud contrary to the provisions of section 26 of the Limitation of Actions Act.

One of the grounds of the preliminary objection raised by the respondent against the plaintiff’s suit was that the plaintiff’s suit was time-barred under the Limitation of Actions Act, Cap 22, Laws of Kenya. That the cause of action is based on an alleged sale agreement purportedly executed on or about the 29th November 1997, which is over 27 years ago, and no leave of court had been sought or obtained to file the suit out of time.

It was submitted on behalf of the defendant (respondent herein) before the trial court that under section 4(1) (a) of the Limitation of Actions Act, an action founded on contract may not be brought after the end of six (6) years from the date on which the cause of action accrued.

That the sale agreement upon which the plaintiff’s suit was founded was more than 27 years old, which was well beyond the 6-year limitation period imposed by statute. That the plaintiff slept on his right for over 2 decades before filing the suit. Counsel further submitted that, as held in the case of *Bosire Ogero vs- Royal Media Services (2015) eKLR*, the question of limitation touches on the jurisdiction of the court, which means that if a matter is statute-barred, a court would lack

jurisdiction to entertain it. Counsel urged the court to find that it had no jurisdiction to entertain the suit.

The record shows that in response, it had been submitted on behalf of the appellant before the trial court that the suit was properly filed and not statutorily time-barred. That under Section 26 of the Limitation of Actions Act, time starts to run when the fraud is discovered. That the appellant had pleaded fraud in paragraph 11 of the plaint. That section 26, therefore, precluded the respondent from invoking the provisions of section 4(1) of the Act.

The record shows that the trial court, after considering the submissions, found that the suit was time-barred.

The appellant faults the trial court for this finding.

It has been submitted in this appeal on behalf of the appellant that the appellant pleaded fraud on the part of the respondent. That the trial court's finding that the suit was time -barred contradicted the position of law that the court had based her ruling on. The appellant urged this court to find that the trial magistrate erred in law and in fact in arriving at a decision that the suit was time barred.

On behalf of the respondent it has been submitted that the trial Magistrate decision was correct in law and on facts and well-reasoned. That the appellant's suit was founded on an alleged sale agreement dated 19th November 1997 between the deceased and the respondent. That the appellant claimed breach of contract and fraud and sought a declaration over a shop and access path. That the suit was filed over 28 years after the alleged agreement. That section 26 of the Limitation of Actions Act does not stop time merely because the word fraud appears in the pleadings. That it places a burden on the party pleading fraud to demonstrate the

specific acts of fraud complained of, when the fraud was discovered, and that the discovery could not, with reasonable diligence, have been made earlier. That the appellant bore the burden to plead and prove discovery of fraud within the limitation period or with reasonable diligence. Counsel relied on the case of *Virginia Kairigo Runyi vs Christopher Nthia Gaguthe & 17 others (2020) eKLR*, where, as Counsel submitted, the High Court dismissed a fraud-based land claim as time-barred where the plaintiff failed to demonstrate discovery of fraud.

I have considered the submissions both here and the submissions at the court below. I have considered the pleadings in the plaint dated 5th November 2024. It is clear from the contents of paragraphs 4 to 10 of the plaint that the suit was based on a contract of sale of land.

Paragraphs 4, 5, and 6 of the plaint referred to the terms of the agreement, paragraphs 7, 8, 9, and 10 alluded to a breach of the terms of said agreement by the respondent, and paragraph 10 itemized the particulars of breach as;

- a) Failing to release and allow the plaintiff to possess the shop,
- b) Failing to allow the plaintiff access through the access path to the suit property.

It is also the law, as contained in section 4 (1) of the Limitation of Actions Act, that claims founded on contract cannot be brought after the expiry of 6 years from the date the cause of action accrued.

It is also clear that the suit filed on 21/11/2024 was filed beyond the six-year limitation period from the date of the agreement on which it was anchored.

The appellant relied on the provisions of section 26 of the Limitation of Actions Act to fault the trial court and to submit that time for filing the claim based on the

tort of fraud was extended under the provisions of section 26. Section 26 provides in part that:

“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 agents; or**
- b) The right of action is concealed by the fraud of any such person as aforesaid;**
- 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 mistake, or could with reasonable diligence have discovered it.”

This provision of the law placed a burden on the plaintiff (appellant herein) to plead fraud, the date the fraud was discovered, and that the fraud could not be discovered earlier, even with reasonable diligence.

In the present case, the plaintiff (Appellant herein) in paragraph 11 of the plaint pleaded that the respondent fraudulently refused to comply with the agreement. The appellant itemized the particulars of fraud as

- a) Receiving monies for the purchase price and refusing to release the shop and denying the plaintiff access to the suit land.
- b) Demanding more money towards the purchase price many years after concluding the sale and transferring the suit property to the deceased.

From the particulars of fraud pleaded, it appears that the fraud, if any, happened from the very inception of the contract when the respondent received monies as the purchase price from the deceased.

It was not pleaded that the fraud, if any, was discovered on any later date. It was not pleaded that the fraud, if any, was concealed by the respondent or at all.

I find that, as correctly submitted by the Respondent, the appellant could not be covered by the provisions of section 26 of the Act. The suit was time-barred, and the trial court rightly found so.

Even if the claim was to be treated as a claim to recover land, still, under the provisions of section 7 of the Act, the claim would be time-barred.

The other grounds of appeal relate to issues of res judicata, locus standi, and the propriety of the Preliminary objection.

The finding that the suit was time-barred was a finding that the suit was not sustainable, hence no need to belabor the other grounds of appeal, save the ground challenging the propriety of the preliminary objection.

The appellant faulted the trial court for erring both in law and fact by entertaining questions of evidence while handling a preliminary objection and making determinations on the said issues without the benefit of a full hearing.

The threshold for a preliminary objection to be sustainable was set in the in the case of *Mukisa Biscuit Manufacturing Co. Ltd – vs- West End Distributors Ltd* [1969] E.A 696 where the court held that;

“...a Preliminary Objection consists a point of law which has been pleaded, or which order 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 a contract giving rise to the suit to refer the dispute to arbitration.”

And further 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.”

Hence a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit/case if argued as a pure point of law and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the court’s discretion.

In the present case, the plea of limitation raised was a point of law, and the same was apparent from the pleadings, namely the plaint.

As held in *Bosire Ogero vs Royal Media Services* [2015] eKLR, the question of limitation is jurisdictional, and once the trial court found that the suit was time-barred, the correct step to take was to strike out the claim as it did

For the foregoing reasons, the court finds that the appeal lacks merit and makes orders that;

- i. The appeal is dismissed.**
- ii. Costs to the respondent.**

Orders accordingly.

Judgment dated and signed at Vihiga and delivered virtually this 12th day of March 2026.

**E. ASATI,
JUDGE.**

In the presence of:

Ajevi- Court Assistant.

Lumwachi h/b for Jumba for the Appellant

Bichi h/b for Musili for the Respondent.