

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ELCLA No. E010 OF 2024

BETWEEN

PATROBA ONSERIO MIKAE
APPELLANT

AND

MATOKE NYABERO
1ST RESPONDENT
THE LAND REGISTRAR NYAMIRA 2ND
RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate’s Court at Nyamira (C I Agutu, Senior Resident Magistrate) delivered on 2nd October 2024 in Nyamira MCELC No. E015 of 2024)

JUDGMENT

1. Litigation leading to this appeal commenced in the Subordinate Court on 19th March 2024 when the Appellant filed Plaintiff dated 5th March 2024 against Matoke Nyabero (hereinafter ‘Nyabero’) and the Second Respondent. He averred that he was the legal and rightful owner of the parcel of land known as North Mugirango/Boisanga 1/934 (suit property) and that he agreed with “the Defendant” (I believe he meant Nyabero) to sell to Nyabero the suit property at a consideration of KShs 2,100,000.

2. He further averred that Nyabero paid him a sum of KShs 200,000 being part of the purchase price but failed to clear the balance. That Nyabero then proceeded to take possession and ownership of the suit property and fraudulently transferred it to himself. He therefore prayed for judgment against Nyabero and the Second Respondent for:

- (a) *A Declaration that the transfer of the suit land herein known as North Mugirango/Boisanga 1/934 was done fraudulently by the 1st Defendant herein Matoke Nyabero.*
- (b) *An order does issue declaring the Plaintiff herein by the name Patroba Onserio Mikae as the rightful and bonafide owner and proprietor of that parcel of land known as North Mugirango/Boisanga 1/934.*
- (c) *That the 2nd Defendant herein be directed and or ordered to revert back the title deed known as North Mugirango/Boisanga 1/934 back to the Plaintiff herein by the name Patroba Onserio Mikae.*
- (d) *An eviction order does issue as against the 1st Defendant herein and his agents and they be ordered to vacate the suit land herein known as North Mugirango/Boisanga 1/934.*
- (e) *The OCS Nyamira North Police Station be directed to assist in enforcing the said Court Orders.*

(f) Costs of the case plus interest thereto be awarded to the Plaintiff herein.

3. Nyabero reacted to the suit by filing Notice of Preliminary Objection dated 2nd April 2024, through which he raised the following grounds of objection:

1. The Honourable Court is bereft of jurisdiction to hear and determine the instant suit on grounds that the same is statute barred by dint of Section 4 of the Limitation of Actions Act Chapter 21 Laws of Kenya.

2. The Notice of Motion Application and the suit herein is misconceived, frivolous and/or otherwise an abuse of the due process of the court.

3. In the premises, the suit herein and the Notice of Motion Application are legally untenable.

4. Upon hearing the Preliminary Objection, the Subordinate Court rendered its ruling on 2nd October 2024. It upheld the objection and proceeded to dismiss the suit with costs to Nyabero.

5. Dissatisfied with the outcome, the Appellant filed this appeal through Memorandum of Appeal dated 23rd October 2024 and prayed that the be set aside and that it be ordered that the suit proceeds to full hearing on merit.

6. The following grounds of appeal are listed on the face of the Memorandum of Appeal:

- 1. The trial Magistrate erred in law and in fact for failing to notice that the cause of action is different from the ruling itself i.e. the two do not go line in line.*
- 2. The trial Magistrate erred in law and fact for basing her finding on the law of contract whereby the case itself is based on a land dispute and as per section 26 of limitation of actions act chapter 22 a person is supposed to bring a suit for recovery of land within 12 years.*
7. Shortly after filing the appeal, Nyabero passed away on 4th November 2024. Subsequently, Limited Grant of Letters of Administration Ad Litem in respect of his estate was issued to Dickonus Atere Matoke on 16th July 2025 in Nyamira CM Misc. Succession Cause No. E053 of 2025. Later, this Court made an order on 1st October 2025 substituting Nyabero with Dickonus Atere Matoke.
8. The appeal was canvassed through written submissions. The Appellant filed submissions dated 24th November 2025 while the First Respondent filed submissions dated 3rd February 2026. The Second Respondent did not file any submissions.
9. It was submitted on behalf of the Appellant that the subject matter of his case was a claim for recovery of land and not payment of the balance of the purchase price and that the plaint could only be said to be based on contract only if he had prayed for the balance. It was also submitted that learned

Magistrate concentrated on paragraph 4 to 9 of the plaint which only addressed how the relationship between the parties originated through sale of land and overlooked the focus of the prayers.

10. On the other hand, it was submitted on behalf of the First Respondent that the Appellant's averment in his plaint that he was the legal and rightful owner of the suit property was incorrect since the Court in Nyamira ELC JR No. E002 of 2023 had quashed the decision to restore the Appellant as registered proprietor thereby reinstating the First Respondent as proprietor.

11. It was also submitted that the Appellant did not have title when he lodged the suit before the Subordinate Court hence could not claim to recover same as **Section 7** of the **Limitation of Actions Act** only applies to owners of the land by giving registered owners 12 years to recover their land and in default, the occupier of the land acquires title to the land by prescription. That, consequently, the Appellant's argument that his suit was for recovery of land could not hold since the First Respondent was the registered owner and in occupation.

12. It was further submitted that the suit was based on fraud and brought too late in the day since the Appellant alleged fraud nine years after transferring the suit property to the First Respondent. That the Appellant was also raising breach of contract which could only be claimed within six years from

2015 and that the reliefs sought in the Plaintiff could not be granted as the suit was statute barred and *res judicata* by virtue of the orders of Nyamira CMCC ELC No. 35 of 2019, Nyamira ELCA No. 2 of 2021 and Nyamira ELC JR No. E002 of 2023. Relying on the cases of **J E N v D O K [20181 eKLR, Javed Iqbal Abdul Rahman & Anor. v Bernard Alfred Wekesa Sambu & Anor. CACA No. 11 of 2001, Patrick S.K. Kimiti v John Ngugi Gachau & Another [2015] eKLR** and **John Gatumu Nyaga & 10 Others v Boniface Njuki Rungi & 6 Others Embu ELC No. 47 Of 2016**, the First Respondent urged the Court to dismiss the appeal with costs to him.

13.The Second Respondent did not file any submissions.

14.This is a first appeal. Consequently, this Court has an obligation to re-consider and re-evaluate the preliminary objection, the pleadings, and the material on record and to determine whether the conclusions reached by the Learned Magistrate are to stand or not and to give reasons either way. See **Selle & Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123** and **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.**

15.I have considered the pleadings and the submissions. The issues that arise for determination are whether preliminary

objection should have been upheld and who bears the costs of this appeal.

16. What was before the Subordinate Court for determination was the Notice of Preliminary Objection dated 2nd April 2024. The law on preliminary objections has remained settled for decades. Suffice it to refer to the holding of Law, JA. in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** thus:

So far as I'm aware, 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.

17. At the core of every valid preliminary objection is the question of jurisdiction. In turn, jurisdiction is at the heart of all litigation and is the very lifeblood and soul of such proceedings. Without it, the proceedings come to a certain end and the court cannot take any further step. See **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** and **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR**.

18. The Supreme Court emphasised the centrality of jurisdiction in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** thus:

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.

19. In view of the holding in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd** (supra), a valid preliminary objection must raise a pure point of law, and it is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

20. In **Oraro v Mbaja [2005] eKLR**, Ojwang, J. (as he then was) stated:

I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified 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, and 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. I am in agreement with learned counsel, Mr. Ougo , that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.”

21.The thrust of the objection was that the suit was barred by **Section 4** of the **Limitation of Actions Act**. The section provides that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued and that 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.

22.As is manifest from his submissions in this appeal, the First Respondent contends that the Appellant’s suit was founded on contract or tort and that consequently, it could not benefit from the 12 years limitation period provided under **Section 7** of the **Limitation of Actions Act** as regards claims for recovery of land. The First Respondent has gone to great lengths to explain why the claim was not one for recovery of land. He introduced a lot of allegations of fact that did not emanate from the plaint.

23. The question that must be answered is whether the Appellant's claim as pleaded in the plaint was one founded on contract or tort and if so, whether it was barred by **Section 4** of the **Limitation of Actions Act**. To the extent that the issue was raised through a preliminary objection, the answer to that question had to be sought by exclusively scrutinising the plaint. The First Respondent, as the party raising the objection was not permitted to bring his own evidence to prop up the preliminary objection. That is the essence of the requirement that a preliminary objection must consist of a pure point of law.

24. The Learned Magistrate resolved the preliminary objection by holding as follows:

... Section 4 of the Limitation of Actions Act provide that the Action founded on contract must be brought within six years from the date the cause-of action occurred. In this case, the transaction occurred in 2015, and the plaintiff's claim was initiated in 2023 which is beyond the six-year limitation period. Therefore, the suit is time barred.

.... The plaintiff's claims appears to be an attempt to re-litigate issues that have already been determined by the court in suit No. E002 of 2023 where the court restored the 1st Defendant as the

owner of the suit property. This constitutes an abuse of the court process.

... In light of the above analysis, the preliminary objection raised by the 1st Defendant is upheld. The plaintiff's suit is hereby dismissed with costs to the first Defendant.

25. I have perused the Plaintiff's pleadings. The Appellant did not plead therein any specific date of accrual of the cause of action. Whereas it is clear that he founded his case on the tort of fraud, he did not plead the date that the fraud took place. Further, his pleadings were not accompanied by any witness statements or bundles of documents from which a date of accrual of cause of action could be discerned. He simply stated that witness statements and bundles of documents were to be supplied later.

26. Thus, for purposes of a preliminary objection, the statement in the ruling that "*the transaction occurred in 2015*" is not supported by the Appellant's pleadings as of the date of the objection being raised. The same position applies to the statement to the effect that "*plaintiff's claims appears to be an attempt to re-litigate issues that have already been determined by the court in suit No. E002 of 2023 where the court restored the 1st Defendant as the owner of the suit property.*" Nowhere in his pleadings did the Appellant mention Case number E002 and the issues raised in the said case.

27. I have seen on record a Notice of Motion dated 2nd April 2024, which the First Respondent filed on 3rd April 2024, the same day he filed the notice preliminary objection. The application sought striking out of the suit on grounds, *inter alia*, of being *res judicata* and an abuse of the Court process. The application was never heard, and the ruling was exclusively on the preliminary objection. Perhaps the First Respondent also intended, at the hearing of the application, to advance similar arguments as he did during the hearing of the preliminary objection.

28. Clearly, evidence introduced by the First Respondent in support of the application filtered into the ruling on the preliminary objection. That was a misdirection on the part of the Learned Magistrate. The preliminary objection was to be determined by exclusively examining the plaint and the documents filed with it on 19th March 2024. Evidence introduced in by the First Respondent, however tempting, was to be considered later at the appropriate time and in the correct proceedings.

29. My examination of the plaint and the documents filed with it on 19th March 2024 has not revealed any basis upon which to find, as claimed in the preliminary objection, that the cause of action therein had accrued either three or six years before the filing of the suit and that consequently, the suit was barred by

Section 4 of the **Limitation of Actions Act**. The Learned Magistrate erred in upholding the preliminary objection.

30. In view of the above discourse, I find merit in this appeal. I make the following orders:

a) This appeal is allowed.

b) The ruling and order of the Subordinate Court made on 2nd October 2024 are set aside.

c) The suit in the Subordinate Court and any application pending in it to be considered by a Magistrate other than Hon. C I Agutu.

d) The Appellant shall have costs of this appeal. The First Respondent shall bear the costs.

Dated, signed, and delivered at Nyamira, this 18th day of March 2026.

**D. O. OHUNGO
JUDGE**

Delivered in the presence of:

No appearance for the Appellant

Mr Langat for the First Respondent

Mr Ndiritu for the Second Respondent

Court Assistant: B Kerubo