

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

LAND AND ENVIRONMENT CASE NO.216 OF 2017

MARGARET ANYANGO ODERA (Suing as
the legal representative of the estate of

PHILIP ODERA OWI (deceased) PLAINTIFF

-VERSUS-

1. ALBERT OWI ODHIAMBO 1ST DEFENDANT

2. ANNETTE ATIENO ODERA 2ND DEFENDANT

3. GILBERT ODHIAMBO OKETCH 3RD DEFENDANT

4. MARY GORETTY ADHIAMBO NYAWADE 4TH DEFENDANT

5. HESBORN LISIMI 5TH DEFENDANT

6. SUSAN MORAA KENGEONA LIMISI 6TH DEFENDANT

7. KENYA COMMERCIAL BANK LTD 7TH DEFENDANT

8. COUNTY LAND REGISTRAR, KISUMU 8TH DEFENDANT

9. HON. ATTORNEY GENERAL 9TH DEFENDANT

10. LEONIDA OPIYO WERE 10TH DEFENDANT

R U L I N G

1. This ruling is in respect of the Preliminary Objection raised by
the 10th Defendant vide the Notice of Preliminary Objection
dated 5th June, 2025. The grounds on which the Preliminary

Objection was raised are that the Plaintiff's suit is statutorily time-barred under the provisions of sections 7 and 9(2) of the Limitation of Actions Act, Cap 22 Laws of Kenya.

2. Though directions on disposal of the Preliminary Objection were taken on 7th October, 2025, and 26th January, 2026, in the presence of representation for the Plaintiff, the 1st, 3rd, 6th, 8th, and 10th Defendants, only the Plaintiff and the 3rd Defendant responded to the Preliminary Objection.

The Plaintiff opposed the Preliminary Objection vide the Grounds of Opposition dated 7th July, 2025; that the action based on fraud which the Plaintiff discovered in December, 2016 and filed the suit on 29th June, 2017 was within the statutory period, that under the provisions of section 26 of the Limitation of Actions Act, time does not start to run until the fraud is discovered and that the objection is predicated on the facts which can only be ascertained by production of evidence.

3. It was submitted on behalf of the 10th Defendant, who raised the preliminary objection that the preliminary objection is based on pure points of law and falls within the confines of the parameters set out in Mukisa Biscuits Manufacturing Co. Ltd - vs- West End Distributors Ltd (1969)EA 696. Quoting the

pleadings in paragraphs 15 and 16 of the plaint, Counsel submitted that the suit was statutorily time-barred under sections 7 and 9(2) of the Limitation of Actions Act because L.R. NO. EAST KISUMU/DAGO/232 was transferred into the name of the 1st Defendant in the year 1988, which is approximately 29 years before the filing of the suit.

That the suit is also time-barred since the title in respect of land parcel No.232 was closed in the year 1988 upon subdivision, and that the Plaintiff, who purports to litigate on behalf of the estate of the late Philip Odera Owi, took out Letters of Administration in the year 2017, yet the cause of action she pleaded arose in the year 1988.

Counsel submitted that the cause of action arose in 1988 when the land parcel No. EAST KISUMU/DAGO/232 was transferred from the original owners, Odhiambo Owi, and Philip Odera Owi, and this was 22 years before the demise of Philip Odhiambo Owi in respect of whose estate the Plaintiff is the Administrator. That by the time the said deceased was dying, the cause of action was statute-barred.

That at the time the Plaintiff filed the suit, the cause of action had been caught up in statutory limitation. Counsel submitted that, hence, there is no suit to proceed to trial.

Counsel further relied on the case of Nasra Ibrahim Ibrem -vs- IEBC & 2 Others, Supreme Court Petition No.19 of 2018, to submit that time limitation is a jurisdictional question and that if a matter is time-barred, a court has no jurisdiction to entertain it.

Counsel urged the court to strike out the suit with costs.

4. On behalf of the 3rd Respondent, it was submitted that although the Plaintiff conveniently failed to mention it, the green card indicates that parcel No. EAST KISUMU/DAGO/232 was transmitted to the names of Odhiambo Owi and Philip Odera Owi in equal shares and was transferred to Albert Owi Odhiambo, the 1st Defendant, on 15th September, 1988. That the cause of action therefore arose on 15th September, 1988. That this must be distinguished from 2010 when the subdivisions were undertaken by the 1st and 9th Defendants and the subsequent transfers effected to the Defendants.

That by the time of his death on 1st August, 2006, the deceased Philip Odera Owi had not commenced any action in fraud against the 1st Defendant.

That section 7 of the Limitation of Actions Act forbids any actions to recover land against the Defendants after 12 years from the date the cause of action first accrued to the deceased. Counsel submitted that no particulars of fraud were pleaded in the plaint as required by Order 2 Rule 4 of the Civil Procedure Rules.

Further, that the Plaintiff failed to file a reply to the defence by the 3rd Defendant, as required by Order 2 Rule 4 of the Civil Procedure Rules.

That a party is bound by its pleadings. That the plaint dated 29th June, 2017, contains no pleading that the fraud was discovered in 2016.

That the deceased and the Plaintiff were indolent and that their respective claim cannot be brought within the exception provided by the proviso to section 26(a) of the Limitation of Actions Act.

The 3rd Defendant supported the Preliminary Objection and prayed that the suit be struck out with costs to the Defendants.

5. On behalf of the Plaintiff, written submissions dated 12th January, 2026, were filed. Counsel submitted that as per the pleadings, the cause of action arose in the year 2010 and the suit was filed on 29th June 2017 before the lapse of 12 years statutory period.

That the pleadings were based on the extract of the register issued to the Plaintiff by the 9th Defendant dated 9th October, 2023.

That the said register shows that the land was transferred to the 1st Defendant on 29th June, 2017, before the lapse of 12 years statutory period.

That there is another copy of register also issued by the 9th Defendant which shows that the suit land was transferred to the 1st Defendant on 15th July, 1988.

That the two registers give two contradictory years. That the confusion emanates from the documents issued by the 2nd Defendant and cannot be visited upon the Plaintiff.

That whether the cause of action arose on 23rd October, 2008 or 15th July, 1988 is an issue that can only be ascertained through evidence.

Counsel relied on the cases of Oraro -vs- Mbaja (2005)KLR 141 and Peter Mungai -vs- Joseph Kuria & Another, Leah Njeri Ndichu (Interested Party) [2022] KEELC 279 (KLR).

That the Plaintiff could not have discovered the fraud until he obtained the extracts of the register on 9th June, 2017, and 27th June, 2017.

Counsel further relied on the case of Mukisa Biscuits Co. Ltd - vs- West End Distributors Limited 1969 EA 696, among other authorities, to submit that a preliminary objection must be based on a point of law.

Counsel submitted further that the preliminary objection raised herein, having not been raised in the defence and counterclaim, is reminiscent of trial by ambush and cannot assist the court or the suit to sufficiently prepare to meet the challenge.

That the 11th Defendant did not plead sections 7 and 9(2) of the Limitation of Actions Act in the statement of defence dated 5th March, 2024 hence the preliminary objection dated 5th June, 2025 does not meeting the requirement in Stephen Onyango Achola & Another -vs- Edward Hongo Sule & Another (2004)

KECA 165 (KLR) where the Court of Appeal held that it is trite law that cases must be decided on the issues pleaded.

Counsel urged the court to dismiss the Preliminary Objection.

6. I have considered the grounds of the objection as contained in the Notice of Preliminary Objection dated 5th June, 2026, the grounds of opposition filed by the Plaintiff, and the written submissions filed on behalf of the parties.

The Preliminary Objection is based on the plea of limitation derived from the date the cause of action accrued and based on the provisions of sections 7 and 9(2) of the Limitation of Actions Act.

7. Section 7 of the Limitation of Actions Act provides that;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him, or, if it first accrued to some person through whom he claims, that person.

section 9 ((2) provides that;

“Where a person brings an action to recover land of a deceased person, whether under a will or intestacy, and the deceased person was on the date

of his death in possession of the land and was the last person entitled to the land to be in possession of the land, the right of action accrued on the date of death.

8. The Defendants contend that the right of action accrued more than 12 years before the suit was filed, thus contravening the provisions of section 7 of the Limitation of Actions Act.

The date given in the plaint as the date when the cause of action accrued is the year 2010. The Plaintiff pleaded in paragraph 15 of the plaint that;

“Sometimes in the year 2010 and subsequently thereafter, the 1st Defendant, in collusion with the 9th Defendant, discreetly caused the suit property to be subdivided into LR NO. EAST KISUMU/DAGO/2864, 2866, 2867, 3053, 3206, 3207, 4218, and 4219.”

There is no earlier date pleaded in the plaint. Whether indeed this is the correct/actual date when the cause of action accrued will be proved by evidence. The plaintiff is bound by her pleadings.

The dates relied upon by the Defendants to submit that the suit is time-barred were obtained from documents filed by the parties and are to be produced as evidence.

In *Mukisa Biscuit Manufacturing Co. Ltd - vs- West End Distributors Ltd [1969] E.A 696* relied on by the parties herein, the court held

“...a Preliminary Objection consists of a point of law which has been pleaded, or which 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.”

The court further held 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.”

A preliminary objection thus 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.

The preliminary objection herein invites the court to examine the evidence yet to be produced in the case, namely, the copies of the registers in respect of the suit land, the certificate of death, and transfer documents, among others.

I find that the preliminary objection raised lacks merit and hereby dismiss it. Each party to bear its own costs of the Preliminary Objection.

Orders accordingly.

Ruling dated and signed at Kisumu and delivered this 19th day of March, 2026 virtually through Microsoft Teams Online Application.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen: Court Assistant.

N/A for the Plaintiff

Odhong for the 1st Defendants.

Otieno Oyoo for the 3rd Defendant.

Otuma h/b for Angu for the 7th Defendant

Onyango Jael for the 8th Defendant

Onsongo for the 10th Defendant.