

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELCLC CASE NO. E084 OF 2025

PETER GATHUMBI NJUNGUNA:.....1ST PLAINTIFF
JOB ONDITI NYANGWESO:.....2ND PLAINTIFF
EMMANUAEL SIFUNA MUCHANGA:.....3RD PLAINTIFF
AGGREY INDIAVO NDAGALA:.....4TH PLAINTIFF
RUKIA KOSHELE MOHAMMED :.....5TH PLAINTIFF
CHARLES KISINGWA OTIENO:.....6TH PLAINTIFF
JUDY WANZA DAVID:.....7TH PLAINTIFF
BENJAMIN NZYOKA MUINDI:.....8TH PLAINTIFF
JOSEPH MWANZIA MALONZA:.....9TH PLAINTIFF
GLORIA MUTINDI:.....10TH PLAINTIFF
DAVID GATHOGO GAKURE:.....11TH PLAINTIFF
ROSALIND WANJUGU KARIUKI:.....12TH PLAINTIFF
EMILY A. KITOTO:.....13TH PLAINTIFF
SUSAN MUTHONI KARIUKI:.....14TH PLAINTIFF
LEAH WANJIKU NDUNGU:.....15TH PLAINTIFF
JOSEPH THINGITHU MAILUTHA:.....16TH PLAINTIFF
ISMAIL OKIOGA MECHA:.....17TH PLAINTIFF
HERMAN ODHIAMBO ODUOR:.....18TH PLAINTIFF
**MARTIN SUA MUSUMBI&CHRISTINE FAITH
NYANBERA:.....19TH PLAINTIFF**
MATHEW KIOKO MUSAU:.....20TH PLAINTIFF
DAVID KIPLAGAT RUTO TOO:.....21ST PLAINTIFF

VERSUS

MBUKONI HOLDINGS LIMITED:.....1ST DEFENDANT

RICHARD MUTUKU KATIMBA (*sued as the administrator of the estate of Jonathan Katimba Nthwao*):.....**2ND DEFENDANT**

RULING

The 2nd Defendant raised a Preliminary Objection to have the Notice of Motion dated 27/06/2025 and the entire suit be dismissed with costs on the following grounds of the law: -

1. The application and the suit are time barred having been filed outside the statutory limitation of Actions Act cap 22.
2. The Plaintiff entire suit is incompetent, bad in law, barred in law, an abuse of the court process and the same should be dismissed with costs to the 2nd Defendant.
3. The Court lacks jurisdiction to hear ad determine a suit which is statutorily time barred.

This court has considered the Preliminary Objection and submissions therein. According to the Black Law Dictionary a Preliminary Objection is defined as being;

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal proposition has been made in the case of Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd. (1969) E.A. 696 where the court held that;

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer 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 in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

In the case of Attorney General & Another vs Andrew Mwaura Githinji & another (2016) eKLR the court outlined the scope and nature of preliminary objection as;

(i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

(ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

(iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. I find that the filed preliminary objection by the 2nd Defendant herein was properly brought before the court.

I have perused the court record and find that by a Plaint filed in court on the 18th June 2025 the Plaintiffs aver that he entered into a sale agreements with the 1st Defendant for the purchase of plots in the property known as LR No. 12715/127. That despite paying the purchase price and taking possession the Defendants have not transferred ownership. They submit and alternative claim of adverse possession. The 1st Defendant submitted that this is a matter suit are time barred having been filed outside the statutory limitation of Actions Act cap 22 having

been brought in contravention of Section 7 and even if it was relating to contracts and that it ought to have been brought to court within six years.

Section 7 of the Limitation of Actions Act provides as follows;

“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, to that person.”

In the case of Edward Moonge Lengusuranga vs James Lanaiyara & Another (2019) eKLR, it was held as follows;

“Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the first Defendant having bought the suit land in the year 1999 (as per Paragraph 6 of the Plaintiff) and taken possession of the same, the Plaintiff herein could only seek to recover it from the 1st Defendants, but only if he did so within twelve years after the Sale Agreement.”

The 2nd Defendant further submitted that the suit is founded on contract and in accordance with section 4(1) of the Limitation of Actions Act, it ought to have

been instituted within a period of six years from the date when the cause of action accrued. The said section provides as follows:

Section 4(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

The purpose of the Law of Limitation was stated in the case of *Mehta vs Shah* (1965) E.A 321, as follows;

“The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”

In the case of *Gathoni vs Kenya Co-operative Creameries Ltd* (1982) KLR 104, the Court of Appeal held as follows;

“...The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

A suit barred by limitation is a claim barred by law, hence by operation of law, the Court cannot grant the relief sought. In the case of Iga vs Makerere University (1972) EA, the Court had this to say on the Law of Limitation;

“A Complaint which is barred by limitation is a Complaint barred by law. Reading these Provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the Court cannot grant the remedy or relief sought.”

Section 4 of the Limitation of Actions Act provides that an action based on contract may not be brought after the lapse of 6 years from the date the right of action accrued to the plaintiffs/respondents.

In my view, this suit requires a trial to ascertain as to when the Plaintiffs discovered that their contracts were breached or the fact that they would not get any ownership. The Plaintiffs aver in their Complaint the payments were made towards the purchase as late as on the 2009 and most of them took possession. I rely on the authority of Justus Tureti Obara vs Peter Koipetai Nengiso (2014) e KLR where Okongo J. Stated that;

“.....The proviso to section 26 (a) of the Limitation of Actions Act, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the defendant is a matter to be ascertained at the trial.”

I therefore find that this suit is not time barred. I therefore find that the preliminary objection is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF MARCH 2026.

N.A. MATHEKA

JUDGE