



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC SUIT NO. E063 OF 2022

FATUMA MOLE MBITA (Suing as the administrator of

Mole Mbita Angore deceased)

..... PLAINTIFF

-VERSUS-

FRANN INVESTMENTS LIMITED..... 1ST

DEFENDANT

LAND REGISTRAR KILIFI.2ND

DEFENDANT

ATTORNEY GENERAL3RD

DEFENDANT

ELIZABETH ARBERT KOMBE.....INTERESTED

PARTY

RULING

- 1.** Notice of Motion dated October 22, 2025, seeks orders that the Plaintiffs' plaint dated November 3, 2022, be struck out and/or dismissed with costs for being time-barred under the Limitation of Actions Act, Cap 22, and for lack of jurisdiction with costs.
- 2.** The application is supported by the affidavit of the applicant, David Mwangi Wahome, sworn on October 22, 2025.
- 3.** The Respondent has filed a replying affidavit outlining the background and legal grounds for opposing the application.
- 4.** The application was canvassed through written submissions. I acknowledge receipt of submissions from learned counsel for the applicant, Mr. Gikandi, and learned counsel for the respondent, Ms. Omollo, with much appreciation, as the same went a long way in assisting the court to reach a verdict on the issues raised in the application.
- 5.** Based on the materials and submissions before me, the issues for the court's decision that I frame are whether the current suit should be dismissed for lack of jurisdiction due to the law on the statute of limitations, and who should bear the costs of the application.

6. The applicant states that on April 26, 2007, the 1st defendant was legally registered as the owner of Plot No. Kilifi/Mtwapa/99, as shown by the Certificate of Title and Official Search attached to the supporting affidavit of David Mwangi Wahome, sworn on October 22, 2025, and marked as exhibits "DMW-1" and "DMW-2" respectively. These are official documents from the Land Registry.
7. That after registering the suit property, the 1st defendant took immediate possession and has maintained open, notorious, continuous, and uninterrupted control of it for eighteen years to date (paragraph 5 of the Supporting Affidavit). The plaintiff filed her lawsuit on November 3, 2022. The timeline is clear: the property was registered on April 26, 2007, and the lawsuit was filed on November 3, 2022, a period of 15 years and 7 months. Therefore, legally, this lawsuit was clearly filed outside the statutory period.
8. The applicant contends that this is because Section 7 of the Limitation of Actions Act, Cap 22, states in clear, unambiguous, and mandatory language:

"No action shall be brought by any person to recover any land after the expiration of twelve years from the date when the right of action accrued to him..."

9. The applicant argues that the word "shall" indicates a mandatory requirement with no room for discretion. This is a legal obligation, not merely a guideline, and it applies to all courts. Even if we accept the plaintiff's most generous interpretation that the cause of action began on April 26, 2007—the date the suit property was registered, as shown in exhibits "DMW-1" and "DMW-2"—the twelve-year limitation period expired on April 25, 2019. The plaintiff, however, filed her lawsuit on November 3, 2022, which is over three years and six months past the statutory deadline. As a result, the suit is at least three years and six months barred by the statute of limitations.

10. The applicant further contends that the plaintiff's own statement in paragraph 9 of the plaint dated November 3, 2022, states:

'The Plaintiff further avers that after Kadzo Mole Mbitha (now deceased) and her stepson Sammy Mole Mbitha (now deceased) successfully transferred the suit property into their names, they went ahead and illegally sold the same property to Francis Githui Wahome and Ann Gathoni Githui in 1994 and never shared the proceeds with other family members or

beneficiaries. Later, the property was transferred to Karen Wandia Wahome, who later sold it to the 1st Defendant herein.'

11. Furthermore, the plaintiff also submitted a verifying affidavit stating that the contents of the plaint were true, indicating that the plaintiff is aware that the title of the suit property was transferred to Mr. and Mrs. Francis Githui Wahome's family company, Frann Investments Limited. Given this information, it is clear that the plaintiff cannot deny that their family lost the suit property as a result of the 1994 transfer. Under Section 7 of the Limitations of Actions Act, the plaintiff's family had 12 years to file a suit to recover the loss. Reliance was placed on Section 17 of the Limitation of Actions Act, which states:

"At the expiration of the period prescribed by this Act for any person to bring an action to recover land, the title of that person to the land shall be extinguished."

12. The applicant asserts that the term "*extinguished*" means destroyed, terminated, nullified, or obliterated. Once the limitation period expires, the claimant's title and right of action cease to exist entirely. Therefore, by operation of Section 17, as of January 1, 2007, since the plaintiff has filed

no suit to challenge the registration of the Githuis or their successors in title as the owners of the suit property, the plaintiff's family's title to the land was extinguished on that date, marking twelve years after the transfer in 1994.

13. Conversely, the respondent contends that the applicant argues that the suit is not barred by time because the title to the property was registered in its name in 2007. However, the respondent claims that the cause of action arose when she discovered the fraud in June 2021, after obtaining an official search from the Kilifi Land Registry that revealed fraudulent transfers involving the estate property known as Kilifi/Mtwapa/99.

14. According to the respondent, the time started to run for the limitation of actions from June 2021. Hence, the court has jurisdiction to handle this matter.

15. I agree with the applicant's submissions that jurisdiction is the foundation upon which the entire structure of adjudication depends. Without jurisdiction, a court becomes merely a gathering of people in robes with no legal authority to make binding decisions. As the Court of Appeal stated in

**Owners of the Motor Vessel "Lillian S" v Caltex Oil
(Kenya) Ltd [1989] eKLR:**

“..Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

If the jurisdiction of an inferior court or tribunal

(including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

See Words and Phrases Legally defined - Volume 3: I - N Page 113.”

16. Once jurisdiction is challenged, the court must determine it immediately. The question of jurisdiction is not merely a technicality or procedural formality. It is the essential threshold issue, the gateway through which every case must pass before any court can exercise its judicial authority.

17. I agree with the applicant's submissions that the Court of Appeal in **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR**, where the Superior Court held thus:

“We are not persuaded that that proposition by the respondent is correct in law. Jurisdiction is primordial

in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. In another locus classicus in this subject, this Court pronounced; Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989):"

18. With that in mind, this court is asked to determine whether the claim by the plaintiff/respondent is based on land recovery and whether such a claim should have been initiated before the 12-year period expired, considering the property was registered on April 26, 2007, and the lawsuit was filed on November 3, 2022, which is a period of 15 years and 7 months. Therefore, legally, this lawsuit was clearly filed outside the statutory period.

19. The respondent/plaintiff, on the other hand, argues that the suit was filed after discovering fraud in June 2021, following an official search from the Kilifi Land Registry that

revealed fraudulent transfers involving the property known as Kilifi/Mtwapa/99. Therefore, the suit cannot be said to be statutorily barred because time started to run when the fraud was discovered.

20. A review of the plaint indicates in paragraph 16 that the plaintiff will be raising fraud as a basis for the call to cancel the title held by the 1st defendant. The specific date when this fraud was discovered cannot be discerned from the plaint or the plaintiff's statement, but it can be inferred from the record that on October 12, 2022, a certificate of confirmation of grant was issued to the plaintiff by the High Court sitting in Mombasa (Onyiego J.), where the current suit property is listed for distribution to the beneficiaries of the estate of the late Mole Mbitha Angore, the original allottee of the suit property. The circumstances under which the confirmation of a grant was issued cannot be determined through an application but through a hearing.

21. I see no defense to contest the plaintiff's assertion of fraud, disputing when the fraud was discovered.

22. Section 26 of the Limitations of Actions Act states:

“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.”

23. Where fraud is alleged, Section 26 of the Act states that the time ceases to run and is postponed. See **Murichu v Mwaniki; Mungai & another (Interested Parties) [2023] KEELC 17230 (KLR):**

“In the case of Justus Tureti Obara v Peter Koipeitai [2014] eKLR while discussing the import of section 26 of the Limitation of Actions Act, the court held as follows; I am in agreement with the Plaintiff’s submission that the Plaintiff’s claim is for the recovery of the suit property from the Defendant and as such the limitation period for such a claim is 12 years as provided for in section 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya. I would wish to point out further that the Plaintiff’s case although for recovery

of land is based on fraud. 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.”

24. In Bor (sued as the legal representative of the Estate of Michael Kiptonui Kurgat) v. Ruto (sued as the legal representative of the Estate of Laurent Nyokosei A Soi) [2025] KEELC 7096 (KLR), the court held the following:

“In the judicial decision of Sichuan Huashi Enterprises Corp. Limited v Micheal Misiko Muhindi [2019] KEHC 2521 (KLR) the Court held as follows;“13. The law as I understand it is that the defence of limitation of time is a matter for determination at the trial; it cannot be dealt with in a summary manner or at preliminary stage or as a preliminary objection. The Court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial. On this see the case of Oruta &Another vs.

Nyamato [1998] KLR 590, where the Court held that limitation of action:-'... could only be queried at the trial but not by... a preliminary objection... The appellant could raise the objection at the trial and the trial Judge would have to deal with the matter on the evidence to be adduced at the trial'

25. Based on the foregoing analysis, this will not be one of those clear cases to strike out or dismiss summarily, as it is not the court's role to remove parties from the seat of justice but to uphold it, see **Mathew Adams Karauri v Zablon Mathenge Itewa [2018] KEHC 2302 (KLR):**

"I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in any judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT DOBIE case that the Court should aim at

sustaining rather than terminating a suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the "Sword of the Damocles". Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is 'demurer or something worse than a demurer' beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the SHERIDAN J Test in PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at P. 76 (Duffus P.) that:

"...a triable issue ...is an issue which raises a prima facie defence and which should go to trial for adjudication." Therefore, on applying the test, a defence which is a sham should be struck out straight

away. [See *Saudi Arabia Airlines Corporation V Premium Petroleum Company Limited*]."

26. Based on the above, the applicant's application dated October 22, 2025, is unfounded and is therefore dismissed with costs.

Dated, signed, and delivered electronically in Nyeri on this 14th day of April, 2026.

E. K. MAKORI

JUDGE

In the presence of:

Mr. Kinyanjui for the 1st Defendant/Applicant

**Ms.Ndungu H/B for Ms. Omollo for the
Plaintiff/Respondent**

Kendi: Court Assistant