



REPUBLIC OF KENYA



KENYA LAW
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Ongaya v Registered Trustees of Kambare Secondary School (Environment and Land Case E040 of 2025) [2026] KEELC 2772 (KLR) (12 May 2026) (Ruling)

Neutral citation: [2026] KEELC 2772 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND CASE E040 OF 2025**

AE DENA, J

MAY 12, 2026

BETWEEN

JOSEPH ABONDO ONGAYA PLAINTIFF

AND

**THE REGISTERED TRUSTEES OF KAMBARE SECONDARY
SCHOOL DEFENDANT**

RULING

1. The Plaintiff commenced this suit vide Originating Summons dated 18/10/2025 claiming to have acquired the parcel of land known as L.R. No. SOUTH GEM/KAMBARE/645 (hereinafter referred to as “the suit property”), by way of adverse possession.
2. In response, the Defendant, through the Office of the Attorney General, filed a Notice Preliminary Objection (hereinafter “the present PO”), dated 18/12/2025 on the following grounds: -
 1. That the application is incompetent and discloses no cause of action, as the doctrine of adverse possession does not apply to public land or land held for public purposes.
 2. That the suit property L.R. No. South Gem/Kambare/645 is registered in the name of the Registered Trustees of Kambare Secondary School, an institution established for public educational purposes, and is therefore land held in trust for the public benefit.
 3. That this Honourable Court lacks jurisdiction to entertain a claim for adverse possession over land held for public educational purposes, rendering the Originating Summons fatally defective and an abuse of the court process.



3. The Plaintiff filed a Replying Affidavit opposing the present PO. He alleged that the suit property originally belonged to his uncle John Pande Oyweka, and he inherited it upon his said uncle's death. He averred that he took possession and has been cultivating it for over 12 years without interruption. He averred that the Respondent had been unable to explain how the suit property was transferred without carrying out succession yet the registered proprietor is dead.
4. The Plaintiff acknowledged that Section 41 of the Limitation of Actions Act excludes public land from adverse possession claims. On the contrary, however, he asserts that the suit property herein is not public land within the meaning of Article 62 of *the Constitution* of Kenya. He added that the Respondent had failed to demonstrate any express reservation, transfer or registration vesting the land in the state. He further averred that privately owned land that is used to run a school remains private land despite receiving government capitation.
5. The Plaintiff averred that the Defendant had neither received the land from the NLC, nor applied to the Land Registrar for registration of the suit property as public land in accordance with the Land (Amendment) Act and the *Land Registration Act*. He averred that this court has jurisdiction to entertain the claim for adverse possession as the suit land is not public land. For this reason, he asked that the Defendant's PO be dismissed with costs for being a miscomprehension of the law, incompetent, misconceived, misplaced and an abuse of court.

Submissions

6. The preliminary objection was canvassed by way of written submissions. The Defendant's submissions filed in support of the PO are dated 11/03/2026. The Plaintiff also filed his submissions dated 24/02/2026 in opposition of the PO.

The Defendant's Submissions

7. In the Defendant's submissions, Counsel sought to answer the question whether a claim for adverse possession can be sustained against public land. Counsel submitted that the suit land is held by the Defendant in trust for Kambare Secondary School, which is a public basic education institution under Sections 2 and 43 of the *Basic Education Act*. Counsel submitted that the school is funded by public funds and is thus a public body.
8. Counsel argued that under Article 62(1) of *the Constitution* land held by a school is classified as public land, and cannot be subject of private allocation, neither can it be lost or acquired through inaction or lapse of time. He submitted that the suit land is reserved for and occupied by a public school, one established to serve the public by providing education, and thus falls within Article 62 of *the Constitution*. Counsel argued that an adverse possession claim is thus incompetent against the said land.
9. Counsel urged that the Plaintiff is statutorily barred under Section 41 of the Limitation of Action Act from claiming it as such. Counsel asked the Court to uphold the preliminary objection and strike out the suit with costs. Counsel cited Board of Management, Frere Town Primary School vs County Government of Mombasa (2024) KEELC 13697 and Yako Supermarket (K) Limited vs National Land Commission & 3 Others (2024) KECA 125.

The Plaintiff's Submissions

10. On the other hand, Counsel for the Plaintiff reiterated the Plaintiff's claims that the PO is misconceived and a misapprehension of the law since the land was private land inherited from his uncle. Counsel submitted that the Respondent had not explained how transfer was effected on 16/07/1986 yet the registered proprietor had died on 17/07/1984 without carrying out succession.



11. Counsel argued that the registration of the Respondent as the proprietor of the suit parcel was improper. Counsel submitted that the suit property does not fit into the description of public land as given under Article 62. He reiterated that the Respondent had not demonstrated the existence of any express reservation, transfer or registration vesting the land in the state as required under Section 15 of the *Land Act*.
12. Counsel further reiterated the averments in the Plaintiff's Replying Affidavit and submitted that the court has jurisdiction to entertain this claim for adverse possession since the land is not public land. Counsel asked that the objection be dismissed with costs, and relied on *Mugwika, Liquidator of Abogeta Farmers Cooperative Society Limited vs CECM Lands, Housing Urban Areas and Physical Planning of the County Government of Meru & 8 Others; Service & 3 Others (Interested Parties) (2024) KEELC 6728 (KLR)*.

Analysis And Determination

13. The Court has carefully read and considered the Preliminary Objection raised, the Replying Affidavit opposing it as well as the rival submissions filed by the parties. The main issues arising for determination are: -
 - i. Whether the defendant has met the threshold for a Preliminary Objection; and
 - ii. If the answer to (i) above is in the affirmative, whether the Preliminary Objection raised is merited.
 - iii. Who should bear the costs of the Preliminary Objection?

The court will deal with all the above issues contemporaneously.

14. The first issue is to determine whether the preliminary objection as raised by the Defendant meets the threshold of a proper preliminary objection. It is therefore necessary to start by setting out what a proper preliminary objection is.
15. According to the Court of Appeal in *Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors Ltd (1969) EA 696*, a preliminary objection can be described as hereunder: -

“So far as I am 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.”

16. In the same case, Sir Charles Newbold, JA further explained 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

17. In summary, a preliminary objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have



- to be ascertained or if what is sought is the exercise of judicial discretion. Further, a preliminary objection must stem from the pleadings and should not deal with disputed facts nor should it derive its foundation from factual information.
18. In the present case, the Defendant has claimed that the suit by the Plaintiff is untenable as it is barred by statute. This objection is founded on the claim that the suit property sought to be acquired by adverse possession is public land. The Defendant avers that Section 41 of the *Limitation of Actions Act* excludes the application of the Act with regards to public land. For this reason, the Defendant has also claimed that the court has no jurisdiction to entertain the suit.
 19. Opposing the objection, the Plaintiff claims that the land was initially private land that was registered in the name of John Pande Oyweka, his uncle, from whom he inherited it. He challenged the Defendant for not demonstrating how the land was transferred from the name of the Deceased proprietor without succession being carried out. He thus averred that the registration of the Defendant as the proprietor of the land is improper.
 20. In addition, the Plaintiff claimed that there is no proof that there was any express reservation, transfer or registration vesting the land in the state, or that it was allocated to the School by the NLC or Land Registrar. He also claimed that privately owned land that is used to run a school remains private land despite receiving government capitation. Under this issue, the first step is to determine whether the land is indeed public land as claimed by the Defendant.
 21. I note from the pleadings filed that the Plaintiff has annexed an extract of the Green Card of the suit land herein. From a look at the same, Entry No. 1 thereon made on 03/03/1986 was in the name of the said John Pande Oyweka. The land was then transferred to John Ogan Otieno vide Entry No. 3 made on 07/04/1986. At Entry No. 5 thereon made on 6/07/1986, the current registered proprietor is the Registered Trustees of Kambare Secondary School, and Entry No. 6, being the last entry, is the issuance of the title deed in favour of the Defendant made on the same date.
 22. While the interpretation of a statute is undoubtedly a point of law, the application of that statute to a particular factual matrix often entails mixed questions of fact and law. The conversion of the land is highly contested and the issue of whether the land is public land must be decided based on the merits of the case after hearing both parties. I do not see how the court can determine whether the land is public land without interrogating facts, evidence and documentary proof.
 23. All these are issues that would necessitate that the court should delve into the facts and ascertain the allegations from the evidence and facts. A preliminary objection must proceed on the assumption that the facts pleaded by the opposite party are correct and must not require ascertainment of contested facts.
 24. I think I have said enough to demonstrate why the preliminary objection cannot be sustained and has failed the test as propounded in the case of *Mukhisa Biscuits (supra)* as the various contested facts must be ascertained from elsewhere. Let the issues be canvassed at the full trial.
 25. The preliminary objection is hereby struck out with no orders as to costs.

DELIVERED AND DATED AT SIAYA THIS 12TH OF MAY 2026

HON. LADY JUSTICE A.E. DENA

JUDGE

12/05/2026

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:



Joseph Abondo Ongaya Plaintiff

Mr. Okoth for Defendant

Court Assistant: Abiud Wekesa

