



Base Titanium Limited v Kitaka (Suing for and on Behalf of the Estate of Kitaka Mulonzi - (Deceased) & 3 others (Environment and Land Appeal E002 of 2023) [2025] KEELC 532 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEELC 532 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND APPEAL E002 OF 2023
AE DENA, J
FEBRUARY 13, 2025**

BETWEEN

BASE TITANIUM LIMITED APPELLANT

AND

TITUS MULONZI KITAKA (SUING FOR AND ON BEHALF OF THE ESTATE OF KITAKA MULONZI - (DECEASED) 1ST RESPONDENT

MONICA M MUTUA (SUED AS THE LEGAL REPRESENTATIVE AND ADMINISTRATRIX OF THE ESTATE OF FREDRICK MUTUA MULINGE 2ND RESPONDENT

LAND REGISTRAR KWALE 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. The Appellant herein Base Titanium Limited, was the 2nd Defendant in Kwale Land Case No. E057 of 2022. The Respondents herein, Titus Mulonzi Kitaka was the Plaintiff in the above stated suit while the rest of the Respondents were still Respondents in the lower court. The Plaintiff (the 1st Respondent herein) had via a Plaint dated 12/10/2022 sought for the following orders against the Appellant and the rest of the Respondents herein: -
 - a. An order directing the Land Registrar, Kwale to immediately rectify the register for property title number Kwale/Mchingirini/809 by deleting the name of Fredrick Mutua Mulinge and replacing thereof with Kitaka Mulonzi
 - b. An order directing the Defendant to compensate the Plaintiff in damages for trespass over property title number Kwale/Mchingirini/809



- c. In the alternative to [b] above, the 2nd Defendant to compensate the Plaintiff, the value of the suit property and/or part thereof already excavated/mined at the prevailing market rate
 - d. A permanent injunction restraining the Defendants, their agents or persons acting under their directions from further excavating, mining, leasing, selling or in any way dealing with property title number Kwale/Mchingirini/809
 - e. An order directing the 1st and 2nd Defendants to jointly and severally pay punitive damages for the illegalities highlighted herein
 - f. Costs and interests of the suit.
2. The 2nd Defendant in the lower court suit and who is the appellant herein raised a preliminary objection dated 7/3/2023. It was stated that the court lacked jurisdiction on the grounds;
 1. That the suit is time barred vide Section 4[1][a] and 7 read together with Section 26 of the *Limitation of Actions Act* cap 22 Laws of Kenya
 2. Without prejudice to the above ground, in terms of the provisions of Sections 153[6], section 154 and section 155 of the *Mining Act* No 12 of 2016, the jurisdiction to hear and determine any suit against the 2nd Defendant that is not time barred vide *Limitation of Actions Act* cap 21 Laws of Kenya is conferred on the cabinet secretary
 3. If a party is aggrieved by the decision or determination of the cabinet secretary, such aggrieved party has a right of appeal to the High court which has the jurisdiction to hear the appeal and make a final determination of the dispute.
 3. The trial court considered the preliminary objection and held that the parties were in contention as to when fraud was discovered by the plaintiff. That for the reason the preliminary objection could not survive as the same was not just an issue of law but fact as to when fraud was established. On jurisdiction of the court, the learned magistrate held that the gist of the dispute was on the trespass by the appellant and not with regard to the mining activities carried out on the suit property. That for the said reason the provisions of the *Mining Act* were not applicable in the instant case. The court found that it had the jurisdiction to determine the suit to its logical conclusion.
 4. The Appellant, aggrieved by the above decision filed the instant appeal vide a Memorandum of Appeal dated 29/11/2023. The following are the grounds of the appeal; -
 1. The learned magistrate erred in law by misapprehending, misapplying and/or incorrectly applying provisions of Section 7 of The *Limitation of Actions Act* Cap 22 laws of Kenya to the facts provided and finding that the suit was not time barred.
 2. The learned magistrate erred in law in finding that the court had jurisdiction and power to adjudicate a cause of action against the 2nd Defendant emanating from a claim for compensation arising out of the exercise of a mineral right under the *Mining Act* when in fact the claim should be in the first instance submitted to the Cabinet Secretary Mining, Blue Economy and Maritime Affairs [the cabinet secretary] pursuant to Sections 153,154,155 and 156 of the *Mining Act* No 12 of 2016[the *mining act*]
 3. The learned magistrate erred in law and in fact by misapprehending, misapplying and/or incorrectly applying the provisions of the *Mining Act* to declare that the court had jurisdiction and power to adjudicate the cause of action against the 2nd Defendant



4. The learned magistrate erred in law by failing to abide by the principles of exhaustion of alternative remedies and means of dispute resolution under Article 159[2][c] of the constitution of Kenya and failing to abide by common law principles of judicial abstention and restraint as upheld by binding decisions of the court of appeal and the supreme court on the same
 5. The learned magistrate erred in law by failing to refer the claim for compensation against the 2nd Defendant to the cabinet secretary
 6. The learned magistrate erred in dismissing the Appellant's Notice of Preliminary Objection dated 7th March 2023 when in fact it raised a fundamental issue of jurisdiction based on sections 153,154,155 and 157 of the Mining Act
 7. In all the circumstances of the case, findings of the learned magistrate are insupportable in law.
5. The Appellant seeks for the following orders before this court;-
1. This appeal be allowed
 2. The ruling by Hon Christine Kemuma Auka Senior Resident Magistrate delivered at the Principal Magistrate's Court at Kwale on 15 November 2023 in ELC E057 of 2022 be set aside and substituted with an order upholding the Appellant's Notice of Preliminary Objection dated 7th March 2023 and
 3. The Appellant's be awarded costs of this appeal and costs of the proceedings in the lower court.
6. The appeal was by orders of this court dispensed by way written submissions.

Appellant's Submissions

7. The Appellant's submissions rehashed the issues in the grounds of appeal. On ground 1 it was submitted that the claim filed in the trial court was time barred by dint of Section 4[1] [a] and 7 as read together with Section 26 of the Limitation of Actions Act. That from the 1st Respondents own pleadings and his admission, that fraud was discovered in the year 2001. That it is stated in 2001 the late Kitaka wrote a letter to the District Officer Msambweni division protesting a report from the land registry kwale that the late Fredrick Mutua Mulinge had collected title to the suit property. That from the pleadings the late Kitaka and his family continued to occupy the suit property while pursuing justice and made further attempts in pursuing justice by reporting the matter to the Deputy County Commissioner.
8. That the cause of action arose on 12/7/1992 when the land sale agreement was entered into or 8/10/1999 when the 2nd Respondent was issued with a title deed over the suit property, then the suit is time barred as 12 years lapsed long ago. That in the event the 1st Respondent takes refuge under Section 26 of the Limitation of Actions Act, then it should be known that Kitaka became aware of the fraud on 25/2/2001 and thus by the time this suit was filed the same was still statute barred.
9. On grounds 2,3,4,5 and 6 it is submitted that the learned magistrate erred in finding that she had jurisdiction and power to adjudicate a cause of action against the Appellant despite the cause of action emanating from a claim for compensation arising out of the exercise of its rights under a special mining lease granted under the former Mining Act. The Appellant maintains that the decision by the trial court is an affront to the doctrine of exhaustion. The 1st Respondent has failed to exhaust the dispute resolution mechanisms provided under the Mining Act and the court should find so.



1st Respondents Submissions

10. The 1st Respondent has identified the following issues for determination;
 - i. Whether the learned magistrate incorrectly applied the provisions of section 7 of the Limitations of Actions Act
 - ii. Whether the learned magistrate erred in law by finding that the lower court herein has jurisdiction to hear and determine the suit filed before it
 - iii. Who should bear the costs of this appeal.
11. On the 1st issue for determination it is submitted that the Plaintiff Titus Mulonzi Kitaka reported the matter to the Deputy County Commissioner vide a letter dated 2/11/2015 as soon as he discovered the fraudulent activities. That therefore time started running when fraud was discovered in November 2015. That the preliminary objection failed to pass the test laid down in the Mukisa Biscuits Case. On the issue of jurisdiction, the 1st Respondent maintains that the *Mining Act* details several forums for dispute resolution but does not oust the jurisdiction of the magistrate's court. The 1st Respondent states that the Appellant has failed to demonstrate that the appeal is merited and the same ought to be dismissed with costs.

Determination

12. From the grounds of appeal outlined by the appellant in the Memorandum of Appeal herein, this court will compound the same into three main issues;
 1. Whether the preliminary objection dated 7/3/23 was properly raised?
 2. If the answer to 1 above is yes, whether the suit is time barred.
 3. Whether the lower court was devoid of jurisdiction to determine the instant suit.

Whether the preliminary objection dated 7/3/23 was properly raised?

13. I have perused the ruling dated 15/11/23. The preliminary objection was raised on two main grounds time bar and jurisdiction of the Magistrates to handle a claim of compensation arising from the *Mining Act*. It was contended by the 2nd Defendant that Plaintiff's suit was time barred by virtue of the provisions of Section 4 (1), 7 and 26 of the *Limitation of Actions Act*. The Hon trial magistrate after reviewing the submissions of the parties vis the provisions of section 7 and section 26(a) and (c) of the Limitations of Actions Act posed to itself the following question (see paragraph 27 of the ruling)

With the above in mind the question I'm then asking myself at this point is when did the Plaintiff in this case discover the fraud? '

14. The trial magistrate picked two dates raised by the parties in answer to the above question. For the plaintiff the lower court noted it was November 2015 and for the 2nd and 3rd Defendants the year 2001. Based on this the learned magistrate found that from the rival submissions there being two versions it was not clear as to when the plaintiff discovered the fraud and when time started to run for purposes of limitation. Citing the rival submissions and referring to the definition and or character of a preliminary



objection as outlined in the case of Mukhisa Biscuits Manufacturing Co. Ltd (1969) EA the court at paragraph 33 of the ruling pronounced itself thus;-

In my view and based on the rival evidence herein, I am satisfied that there is an issue as to when the time started running and in my humble view, I can only determine this issue after hearing the evidence of the of all parties herein.’

15. The trial magistrate then made a finding that the preliminary objection with regard to limitation did not meet the test in Mukisa Biscuit (supra). Was the trial court right in arriving at this conclusion.

16. The nature of a preliminary objection is now well established. In the case of Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors [1969] E.A. 696 where Law JA at page 700 stated;

“... 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 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. Justice Newbold in the said suit argues 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”

18. The 1st port of call would be the pleadings filed and the assumption that all the facts pleaded by other side are correct. If there is any fact that has to be ascertained then the objection ceases to be on a pure point of law. It has nothing to do with sensitivity of land cases this is not a test provided under the Mukisa Biscuit case (supra).

19. This is what this court gathers from the Plaint. The 1st Defendant in the lower court purchased the suit property from the Plaintiff's father vide an agreement made on 14/7/1992. That the 1st Defendant did not however pay the balance of the purchase price of Kshs 26,000/- but instead went ahead to transfer the suit property in his names. That sometime on 6/11/1999 the late Kitaka on express communication rescinded the contract between him and the 1st Defendant. That on 25/2/2001 the late Kitaka wrote to the District officer protesting the report from the lands registry Kwale that unknown to the late Kitaka on 8/10/1999 the 1st defend ant had collected title document in his favour. The date of November 2015 is pleaded in paragraph 13 of the plaint when the Deputy County Commissioner summoned the parties for resolution of the dispute. The suit herein was filed in the lower court on 12/10/2022.

20. Therefore, from the Plaint the dates from which time could be computed are very clear and the court need not go outside the pleadings to ascertain whether the suit is time barred both in terms of contract or even in relation to when fraud was discovered. The learned magistrate referred to paragraph 9 of the Plaintiffs submission which states

the provisions as relied upon by the 2nd defendant in objecting the plaintiffs suit are correct. However as to when the cause of action arose versus the period within which the suit should have been filled requires no magic, as it should be a matter of computation time.’



21. The above caption to me goes to support my observation above that from the pleadings one could be able to compute time. It is the finding of this court therefore that the preliminary objection raised on limitation was properly raised as a pure point of law.

Whether the suit is time barred.

22. Having resolved the 1st issue then the court must consider whether the suit is time barred. It is also noteworthy that the trial magistrate did not make a finding whether the suit is time barred or not. The provisions of the law upon which the preliminary objection is premised read as follows;-

Section 4 (1) of the *Limitation of Actions Act* provides that:

- (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;
 - (b)
 - (c)
 - (d)
 - (e)

23. 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.”

24. Section 26 of the *Limitation of Actions Act* reads;-

“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.

25. The contract for sale of the suit property was entered into on 14/7/1992 and the Plaintiff was filed in the lower court on 12/10/2022 which was thirty (30) years after the cause of action arose and this indeed offended Section 4 of the *Limitation of Actions Act*. The Section provides that an action founded on contract should be brought within six (6) years. The 1st Respondent argues that it is the current plaintiff that discovered the fraud but the contents of the plaintiff speak otherwise. Fraud has indeed been particularised at paragraph 21 of the plaintiff however the same was discovered by the plaintiff's deceased father in the year 2001 when he wrote a letter of protest to the District Officer protesting the report from the land registrar over ownership of the suit property. Clearly the fraud was discovered over 20 years before filing of the plaintiff and therefore section 26 herein would not apply.



26. In *Gathoni v Kenya Co-Operative Creameries Ltd.* [1982] KLR 104, Potter, JA at page 107 the court expressed itself thus:

“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.” In the case of *Mehta v Shah* [1965] E.A 321, it was held 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.” (Emphasis mine).

27. Based on the foregoing the court makes a finding that the suit filed by the Plaintiffs is time barred.

Whether the lower court was devoid of jurisdiction to determine the instant suit.

28. The next question then is whether as provided by the outlined provisions of law, the Magistrate’s court has the jurisdiction to determine disputes arising from the *Mining Act*. In this regard the trial Magistrate after considering sections 153, 154, 155, 156 and 157 of the *Mining Act* No. 12 of 2016 and the submissions of the parties concluded that issue before court touching on the 2nd Defendant was an issue of trespass and not legality of mining activities and that the provisions of the *Mining Act* did not apply. The objectors contention is that jurisdiction is conferred upon the Cabinet Secretary and thereafter to the High Court on appeal and in this case the ELC being a court of equal status.

29. Before I get into the issue of jurisdiction proper, I must determine whether the conclusion by the trial Magistrate that the suit against the 2nd Defendant is on trespass was proper. I think for me one cannot delink the reasons why the 2nd Defendant has been roped into these proceedings. The plaintiff at paragraph 24 of the submissions filed in the lower court cited paragraph 19 of the plaint and urged that ‘the plaintiff has pleaded trespass by the 2nd Defendant who has carried out mining activities on the suit property. To me this is clear that the trespass is based on the Mining activities and the two cannot be delinked. As pleaded in paragraph 16 of the Plaint the activities of the 2nd defendant can only be in tandem with its business. This is confirmed by paragraph 19 (iii) alluding to illegal excavating, mining and defacing the suit property. A claim of compensation arises at 19(iv) where the 2nd Defendant is said to have failed to compensate the family from the illegalities which illegalities are those cited in 19(iii).

30. From the above therefore this case is not a pure case of trespass and I find that the learned trial Magistrate erred in the finding that the suit against the 2nd defendant was based on trespass. However had this finding been correct then the Magistrate court would have jurisdiction to entertain the suit subject to its pecuniary limits as provided under the Magistrates Act.

31. I will now deal with the issue of jurisdiction based on the provisions of the *Mining Act* – sections 153[6], 154 and 155 which I will highlight.

32. Section 153(6) allows parties to refer a claim to the Cabinet Secretary where a dispute cannot be resolved through negotiations and covers principles of compensation.

33. Section 154 is on general provisions on dispute resolution arising from mining activities and reads;-

Any dispute arising as a result of a mineral right issued under the *Mining Act*, may be determined in any of the following manners-



- a. By the Cabinet Secretary as prescribed in this Act;
- b. Through a mediation or arbitration process as may be agreed upon by the disputing parties or as may be stated in an agreement or
- c. Through a court of competent jurisdiction

34. Section 155 reads;-

Subject to the provisions of this Act, the Cabinet Secretary may inquire into and determine the following matters;

- a. A dispute of the boundaries of an area held under a prospecting or mining right
- b. Any wrongful act committed or omitted in the course of prospecting and mining operations, by any persons against any other person
- c. A claim by any person to be entitled to erect, cut, construct or use any pump, line of pumps, flume, race, drain dam.....
- d. A claim to have any priority of water taken.....
- e. Assessment and payment of compensation where provided for under this Act.

35. This court has had occasion to render itself on the above provisions. I have noted the plaintiff cited the case of Kavii Vs Base Titanium Limited & 2 Others (Environment & Land Petition E002 of 2022) (2023) KEELC 18436(KLR) and Base Titanium Limited Vs Jin (Environment and Land Appeal 4 of 2021) (2024)KEELC 4087 (KLR). In the latter case the appeal was before me on the holding of Hon Omido SPM (as he then was) in Kwale CMELC Case No. 1 of 2021 where the trial court dismissed a preliminary objection raised on the ground that the said court did not have the requisite jurisdiction to deal with the matter before it since disputes arising from mining activities are a preserve of the cabinet secretary before being escalated to the High Court. At paragraph 19 to 22 summing up my findings on the provisions of section 154 and 155 of the Mining Act I stated thus;-

19. This court had occasion to make a specific determination on the jurisdiction of the ELC to determine disputes arising from the Mining Act filed before it as a court of 1st instance in Kavii v Base Titanium Limited & 2 others (Environment & Land Petition E002 of 2022) [2023] KEELC 18436 (KLR) (29 June 2023) (Ruling). This is what I stated pertaining section 154;

The above provisions are not drafted in mandatory terms. They are not obligatory but permissive. Unlike other statutes such as the Environmental Management & Coordination Act which provide alternative disputes resolution mechanisms and which must be followed, the Mining Act gives options to the claimants to select. In this case the petitioner chose to approach this court. It has been urged by the 1st respondent that section 153 ousts the jurisdiction of this court but in my view the option in section 154(c) may be deemed to preserve and or recognize the original jurisdiction of the High Court and Courts of equal status (sic) being courts of competent jurisdiction”



20. My position on the above has not changed. I will further add that the use of the word ‘OR’ at the end of 154(b) cements the above dictum. It is disjunctive. According to me section 154 gives a litigant several options on the channels to be explored to resolve a dispute arising from a mining licence. I have also had occasion to read the decision of my brother Justice Yano in the case of Peter Nzeki and 14 Others Versus Base Titanium Limited & 4 Others [2021] eKLR which is only persuasive and I’m not persuaded either by the said decision. 21. But having stated so would the same position apply to the lower court? It is contended that the learned Magistrate was bound by the above decision and which was brought to the said courts attention. Indeed the learned Magistrate appears to have taken the same position on section 154 (c) as this court when he did not have the benefit of my ruling above which was delivered much later. The court has noted the Appellant’s proposition that section 154 provides the mechanism by which the Cabinet Secretary is clothed with jurisdiction at first instance. I respectfully disagree for the reason that section 156 is what sets out the mechanism for hearing the claims listed under section 155 and the attendant regulations if any.’
22. This court has no reason to impugn the learned Magistrate’s interpretation of the above provisions the court having taken the same position. The Magistrate court would be a competent court for purposes of section 154 (c) to entertain a matter brought before it as a court of first instance subject to its pecuniary jurisdiction which is pertinent.’

36 The reasoning in the above paragraphs apply to the present circumstances and I will therefore not re-invent the wheel. This court also makes further reference to article 169(2) of *the Constitution* and section 26(3) and (4) of the Environment and Land Court relating to jurisdiction of the Magistrates courts. It is therefore my finding that the trial court would be seized of jurisdiction to hear the claim against the 2nd Defendant.

37. Having made the above finding I must go back to the finding on whether the present suit is time barred and which I have found in the affirmative. Fraud was discovered way earlier by his father who took no steps in prosecuting the alleged fraudulent transfer of the suit property to the 2nd Respondent. As it has been rightly put in equity, the vigilant are aided and not the indolent. With regard to the agreement it was entered into way back in the year 1992. The suit in the lower court cannot be sustained. The 1st Respondent/Plaintiff is barred by the *Limitation of Actions Act* in instituting the suit.

38. The upshot of the foregoing is that

1. The appeal hereby succeeds on the basis of the preliminary objection relating to *Limitation of Actions Act*.
2. The ruling by Hon Christine Kemuma Auka Senior Resident Magistrate delivered at the Principal Magistrate’s Court at Kwale on 15 November 2023 in ELC E057 of 2022 be set aside and substituted with an order upholding the Appellant’s Notice of Preliminary Objection dated 7th March 2023 as stated in 1 above.
3. The Appellant’s be awarded costs of this appeal.
4. There shall be no orders of costs of the proceedings in the lower court.

Orders accordingly.



DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA CTS THIS 13TH DAY OF
FEBRUARY 2025.

.....

HON. A.E DENA

JUDGE

13/2/2025

