

KENYA / JUDGMENT

Nabaala v Nkurumua & another

[2026] KEELC 5433 (KLR)

[2026] KEELC 5433 (KLR)**COURT**

Environment and Land Court

BEFORE

LN Gacheru

CASE / FILE NUMBER

Environment and Land Case E049 of 2025

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REPUBLIC OF KENYA**IN THE ENVIRONMENT AND LAND COURT AT NAROK****ELC CASE NO. E049 OF 2025*****NICHOLAS LEMISOS NABAALA.....PLAINTIFF******-VS-******KASATWA NKURUMUA.....1ST DEFENDANT/OBJECTOR******HENRY NYAEMA T/A BOMA SURVEYORS.....2ND DEFENDANT*****RULING**

1. The matter for determination is the ***Notice of Preliminary* *Objection*** dated ***20th January 2026,*** brought by the 1st Defendant(***Kasatwa Nkurumua***), seeking for orders that the Plaintiff's suit be dismissed on the following grounds:
2. **THAT *the plaintiff's suit is statute barred under Section7 of the Limitation of Actions Act, the cause of action being a claim for recovery of land and/or enforcement of a sale agreement dated 25th September 2004, having arisen more than twelve (12) years prior to the institution of this suit, thereby divesting this Court's jurisdiction*.**
3. ***THAT the Plaintiff's claim is bad in law, incompetent and unsustainable, being founded on an agreement for the disposition of agricultural land dated 25th September 2004 which, by operation of Section 6 and 8 of the Land Control Act, became void for all purposes.***

4. The Plaintiff's claim as contained in the Plaint dated **10th December 2025** is that his deceased father, ***Salaton Ole Nabaala*** entered into a ***Land Sale Agreement*** for the purchase of ***70 acres*** on ***25th September 2004***, comprised in parcel ***No. CIS-MARA/LEMEK/3585*** measuring approximately ***29.54 Hectares*** from ***Leposo Ole Nkurumwa (deceased)***.
5. The Plaintiff averred that his deceased father procured all the requisite ***Land Control Board consents*** to sub divide Land parcel ***No. CIS-MARA/LEMEK/1140,*** measuring approximately ***50.60 Hectares*** or thereabouts into three portions measuring approximately ***29.54*** Hectares, ***8.09*** Hectares and ***12.55*** Hectares respectively.
6. Further, that the ***70 acres*** offered for sale to his deceased father was registered as ***CIS-MARA/LEMEK/3585,*** measuring approximately ***29.54 Hectares*** on or about ***2005,*** while awaiting issuance of the title deed in his names.
7. That his deceased father then took vacant possession of land parcel ***No. CIS-MARA/LEMEK/3585,*** measuring approximately 29.54 Hectares. Further, that it was not until ***September 2025,*** that the 1st Defendant herein started laying claim to the approximately ***29.54* *Hectares piece*** of land that he had obtained registration in his names. Thereafter the plaintiff conducted a ***search*** over the suit land and discovered that the same had been registered in the names of the 1st Defendant.
8. It is the Plaintiff's contention that this registration was done by the 1st Defendant in collusion with the 2nd Defendant. The Plaintiff also averred that the 1st Defendant's acts amount to ***fraud*** and particularized the fraud at paragraph 17 of his Plaint as follows:
9. Consequently, the Plaintiff sought for declaratory orders in favor of his deceased father, orders compelling the 1st Defendant to transfer the suit land to the beneficiaries of ***Salaton Ole Nabaala***, Orders to the ***District Land Registrar Narok North/East/West/South Sub County*** to recall the title in the names of the 1st Defendant for ***cancellation***, ***prohibitory* *orders of injunction***, General and Special damages and costs of this suit.
10. The Notice of ***Preliminary Objection*** is opposed by the Plaintiff and was disposed of by way of written submissions. The 1st Defendant filed his written submissions dated ***29th April 2026*** through the Law Firm of ***Korir, Barasa & Company Advocates,*** while the Plaintiff filed his submissions dated ***16th July 2026*** through the Law Firm of ***Lelei & Associates Advocates.*** The 2nd Defendant did not file any submissions, but relied on the 1st Defendant's written submissions.

The 1st Defendants Submissions

1. It was the 1st Defendant submissions that the issues for determination are;
2. **Whether the Plaintiff's suit is statute barred.**

3. Whether the Plaintiff's suit is **incompetent** for failure to obtain the requisite **Land Control Board** consent.
4. Who should bear the costs of the present proceedings.
5. On whether the Plaintiff's suit is statute barred, the 1st Defendant relied on **Section 7 of the Limitation of Actions Act** which states 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, to that person."****

1. The 1st Defendant further submitted that the Plaintiff reliance on a **sale agreement** allegedly entered into on **25th September 2004,** and that the cause of action arose on that date or at least within six (6) months thereafter when the transaction became incapable of completion for want of consent of the **Land Control Board**.
2. It was his further submissions that this suit having been instituted in **2025,** a period of over **20 years** from the date of the cause of action, it falls outside the **statutory limitation period** of **twelve years** prescribed under **Section 7 of** the **Limitation of Actions Act.**
3. Reliance was sought in the case of **Divecon Limited v Samani** which held:

****"No one shall have the right or power to bring an action after the end of six years from the date on which the cause of action accrued...The court has no jurisdiction to entertain a claim that is statute barred."****

1. The 1st Defendant also submitted that the Plaintiff has slept on his rights for over **two decades** and cannot now seek refuge in court.
2. On whether the plaintiff's suit is **incompetent** having been founded on an **sale agreement** that is **void for failure** to obtain the requisite **Land Control Board Consent**, the 1st Defendant relied on **Section 6(1) of the Land Control Act** which provides that:

****"Each of the following transactions... is void for all purposes unless the Land Control Board.... has given its consent in respect of the transaction,"****

1. He also relied on **Section 8(1) of the same Act,** which states that:

****"An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement."****

1. The 1st Defendant further submitted that the Plaintiff's deceased father did not obtain the **Land Control Board Consent** within the **6 months** prescribed period from **25th September 2004,** and that the agreement thus became void.
2. Reliance was sought in the case of **Mwangi and another Vs Mwangi** where the court stated:

“Where a transaction becomes void under the Land Control Act, no party can enforce it and no interest in land can pass thereunder.”

1. The 1st Defendant also relied in the Supreme Court case of ***Willy Kimutai Kitilit v Michael Kibet*** where the court clarified that ***equitable doctrines*** such as ***constructive trust*** and ***proprietary estoppel*** may in certain instances be invoked, such relief must be specifically pleaded and strictly proved.
2. It was his submissions that in the present case no such equitable claim has been properly laid before the court. Lastly the 1st Defendant prayed for costs of these proceedings.

Plaintiff's Submissions

1. The Plaintiff set out the issues for determination as follows;
2. ***Whether the suit is fatally defective under Sections 6 and 8 of the Land control Act.***
3. ***Whether the Preliminary Objection herein is merited.***
4. ***Whether the Plaintiff's suit is statute barred under Section 7 of the Limitation of Actions Act*.**
5. On whether the suit is fatally defective under ***Sections 6 and 8*** of the ***Land Control Act***, the Plaintiff submitted that the present suit is not merely for enforcement of the sale agreement of ***25th September 2004,*** but also concerns the legality of the subsequent dealings affecting the suit property after the plaintiff had taken substantial steps in implementing it.
6. The Plaintiff further submitted that his late father stayed on the suit property peacefully till ***2015,*** where after his family continued uninterrupted possession. Further, that his suit also challenges the registration of the suit property in the names of the 1st Defendant alleging that the same was procured ***fraudulently*** and ***unlawfully***.
7. It was his submissions that the application for ***Land Control Board*** consent was made on ***3rd February 2010,*** and consent was subsequently granted on ***18th February 2010.*** That this is evidence enough that the vendor continued treating the transaction as existing long after its execution. He also submitted that whether this gave rise to equitable interests are matters that require evidence, and cannot be properly determined through a ***Preliminary Objection***
8. The Plaintiff relied in the ***Supreme Court's decision in Kitilit v Kibet (Civil Appeal No. 51 of 2015) [2018] KECA 573(KLR) paragraph 24-25,*** where the court fundamentally clarified the relationship between the ***Land Control Act*** and ***equitable principles*** and held:

“The equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and unenforceable for lack of consent of the Land Control Board.”

1. The court in arriving at this decision relied on ***Article 10(2)(b)*** of the ***Constitution*** which makes equity a ***national value*** binding upon courts in interpretation and application of all laws.
2. Further, that his deceased father paid the entire purchase price, entered into possession, established his homestead and remained in occupation till his death and his family continued to remain in occupation of the suit property for approximately 20 years
3. Despite this, the suit property was registered in the names of the 1st Defendant. Further, that whether those allegations are ultimately proved are matters of trial, and that at the current stage this Court must proceed on the assumption that the pleaded facts are true.
4. On whether the ***Preliminary Objection*** raised meets the threshold of ***a competent Preliminary Objection***, the plaintiff submitted that the ***Preliminary Objection*** is founded on assumptions that are ***intertwined*** with ***contested facts, evidentiary evaluation*** and ***interpretative questions*** regarding the chronology, nature and effect of the land transaction, and subsequent dealings over the suit property.
5. The Plaintiff relied on the case of ***Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 969 and Hassan Ali Joho and Another Vs Suleiman Said Shabhal and 2 Others (2014) Eklr*** where the Court stated that:

“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...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.”

1. The Plaintiff further submitted that his case consists of series of factual assertions, including the existence of a sale agreement, the subsequent subdivision of the mother title, the subsequent involvement of the 2nd Defendant in survey and beaconing of the purchased portion, the entry into possession by deceased father on or about ***2015,*** construction of ***residential*** developments thereon, and ***continuous*** and ***uninterrupted*** ***occupation*** of the suit property by his family for close to two decades thereafter.
2. Further, that these facts form the substratum upon which the Plaintiff’s claim of entitlement, ***fraud, illegality***, and wrongful registration are founded.

3. It was the Plaintiff's further submissions that the 1st Defendant's objection seeks to extinguish the entire suit by isolating selected aspects of the dispute. That the 1st Defendant's objection assumes as uncontested fact that the cause of action accrued in the year **2004,** and remained frozen in time thereafter. The Plaintiff thus submitted that the 1st Defendant's objection includes issues of facts, which cannot be determined at this stage.
4. Reliance was sought in the case of **Oraro Vs Mbaja (2005)1KLR* *141,** where the court observed that:

****"Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence."****

1. It was the Plaintiff's further submissions that in the present circumstances this Court cannot determine the instant **Preliminary Objection** without examining the circumstances surrounding the sale, the subdivision process, the survey work allegedly undertaken, the nature and duration of possession, the circumstances under which the suit property became registered in the name of the first Defendant when the family of the Plaintiff are in **occupation** and **possession** and the allegations of **fraud** pleaded by the Plaintiff.
2. Regarding whether the Plaintiff's suit is **statute barred** under **Section 7** of the **Limitation of Action's Act**, the Plaintiff submitted that his claim did not arise in the **2004,** and that the family of the deceased purchaser remained in **consistent occupation** of the suit property till **2025,** when they were summoned by the **Directorate of Criminal Investigations* (DCIO)** and for the first time became aware that the 1st Defendant was laying claim to the suit land on the basis of a title allegedly issued in his favor.
3. In conclusion, the Plaintiff submitted that the **Preliminary Objection** herein does not meet the threshold of a **competent objection**, capable of disposing off this suit at this stage and should be dismissed with costs.
4. The court has carefully considered the instant Preliminary Objection, the grounds and submissions in support of the same, and the rival written submissions and finds the following issues arise for Determination:
5. ****Whether the Notice of Preliminary Objection dated 20th January 2026 is merited****
6. ****Who bears the costs of these proceedings****

Analysis and Determination

1. ****Whether the Notice of Preliminary Objection dated 20th January 2026 is merited****
2. The law relating to preliminary objections is now well settled. In **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**, the Court stated thus:

““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.....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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop*.”

1. The 1st Defendant's ***Notice of Preliminary Objection*** is premised on the assumption that the Plaintiff's suit is one for recovery of land founded on a sale agreement dated ***25th September 2004***, and that having been filed in ***December 2025***, which is more than twelve years, later, it is barred by ***Section 7 of the Limitation of Actions Act.***
2. Accordingly, the 1st Defendant contended and submitted that the cause of action accrued, and time began running, on ***25th September 2004***, and ran uninterrupted thereafter. The Plaintiff disputes this premise on two independent bases.
3. Firstly, the Plaintiff pleaded and contended, which contention was not contradicted on the face of the pleadings, that his deceased father and thereafter his family remained in ***continuous, peaceful and uninterrupted occupation*** of the suit property from the date of purchase ***until 2025***. Whether such ***long, open and continuous possession*** is capable of founding or preserving an equitable interest, and what bearing that has on when a cause of action for recovery properly accrues, is a matter requiring evidence and cannot be resolved on the pleadings alone.
4. Secondly, the Plaintiff's claim is expressly and specifically founded on ***fraud*** as particularized at paragraph 17 of his Plaintiff against the 1st Defendant, in collusion with the 2nd Defendant, in procuring registration of the suit property in the 1st Defendant's name notwithstanding actual or constructive knowledge of the prior sale to, and consent obtained in favor of the Plaintiff's deceased father.
5. The Plaintiff at paragraphs 12-13 of his Plaintiff further pleads that this fraud was only discovered in ***September 2025***, when the 1st Defendant first laid claim to the suit property and a search revealed the registration in his name
6. **Section 7 of the Limitation of Action's Act** states 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, to that person.

1. The ***Limitation of Actions Act*** makes express provision for this precise circumstance where fraud is pleaded. ***Section 26 of the Limitation of Actions Act*** states that where, in the case of an action for which a period of limitation is prescribed, either—
2. ***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***
3. ***the right of action is concealed by the fraud of any such person as aforesaid; or***
4. ***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.***
5. This provision postpones the running of time until fraud is discovered, or could reasonably have been discovered. In the case of ***Njenga v Mugo & 3 others (Civil Appeal 145 of 2018) [2023] KECA 18 (KLR)*** at ***Paragraph 24,*** the Court of Appeal, reaffirmed that pursuant to ***section 26*** of the ***Limitation of Actions Act***, the commencement of time is triggered when the aggrieved becomes aware of fraud.
6. Upon perusal of the Complaint herein at ***paragraph 12-13***, it is pleaded that ***fraud*** was discovered in ***September 2025.*** Accordingly, this suit was filed in the very same year, when fraud was allegedly discovered.
7. Whether the particulars of ***fraud*** as pleaded by the Plaintiff are ultimately established, and whether the date of discovery as claimed by the Plaintiff withstands scrutiny or ought to be displaced by an earlier date on which the fraud could with reasonable diligence have been discovered are questions of fact. The above call for the evaluation of evidence as to what the Plaintiff and his late father knew, when, and what diligence was reasonably expected of them. Such questions cannot be determined on a preliminary objection.
8. In the case of ***Oraro vs Mbaja [2005] KEHC 3182(KLR),*** the Court stated thus:

“*I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence.”*
1. This Court is satisfied that the particulars of fraud as pleaded at ***paragraph 17*** of the Complaint are not bare or vague assertions pleaded merely to evade limitation, but are sufficiently specific. The said particulars identify the alleged conspirators, the mechanism of the alleged fraud, and the state of knowledge attributed to the 1st Defendant to raise genuine triable issues as to the applicability of ***Section 26*** of the ***Limitation of Actions Act.***

2. The 1st Defendant also alleges that the sale agreement of ***25th September 2004***, being one for the disposition of agricultural land, became void under ***Sections 6 and 8*** of the ***Land Control Act*** for want of ***Land Control Board consent***, which was to be obtained within six months, as per **Mwangi & Another v Mwangi**. (ibid)
3. This does not rest on undisputed facts. The Plaintiff has placed before the Court, and the 1st Defendant does not appear to dispute, that a ***Land Control Board consent*** was applied for on ***3rd February 2010***, and was subsequently granted on ***18th February 2010***, albeit outside the statutory six-month window from the date of making the sale agreement.
4. The legal effect of such a subsequent consent on a transaction otherwise rendered ***void under Section 6***, and whether equitable doctrines such as constructive trust or proprietary estoppel apply in the present case are not matters that can be conclusively ventilated through a ***Preliminary Objection***.
5. The above issues require evidence of the circumstances of the ***2010 consent***, the conduct of the parties over the intervening two decades and the nature and quality of the Plaintiff's family's occupation.
6. Having found and held that ***fraud*** was allegedly discovered in ***2025***, and having found that the issues on the legal effect of failure to obtain the ***LCB Consent***, and equitable doctrines cannot be ventilated in a ***Preliminary Objection***, but by calling evidence in the main suit, this court finds and holds that the 1st Defendant's ***Notice of Preliminary Objection*** dated ***20th January 2026*** is ***not merited*** and the same is ***dismissed*** entirely for being ***unmeritorious***.
7. ***Who bears the costs of the Preliminary Objection?***
8. It is clear that ***Costs*** ordinarily follow the event. The Court has found and held that the instant ***Notice of Preliminary Objection*** is ***not merited***, and thus the Plaintiff is the successful litigant and is entitled to costs.
9. Consequently, it is the court's considered view and findings that costs of the instant ***Notice of Preliminary Objection*** should be awarded to the Plaintiff herein.
10. Having come to the above conclusion, the court finds and holds that the Instant ***Notice of Preliminary Objection*** herein dated ***20th January 2026***, is ***not merited***, ***and thus*** the said Preliminary Objection, be and is ***hereby dismissed***, entirely with costs to the Plaintiff herein.

Dated, Signed and Delivered Virtually, at Narok this 17th day of September 2026.

L. Gacheru

Judge

17/9/2026

***Delivered online in the presence of*Elijah Meyoki...Court Assistant**

No Appearance for the Plaintiff

Mr Mutai for the1st Defendant/Objector

Mr Kiptoo for the 2nd Defendant

L. Gacheru

Judge

17/9/2026

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