



**Barmao v Macharia (Environment and Land Appeal E003 of 2021)  
[2023] KEELC 16894 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16894 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND APPEAL E003 OF 2021**

**EO OBAGA, J**

**APRIL 20, 2023**

**BETWEEN**

**ABIGAELE BARMAO ..... APPLICANT**

**AND**

**GRACE WAMBOI MACHARIA ..... RESPONDENT**

*(Being an appeal against the ruling of S. Wewa – Senior Resident Magistrate delivered on 17/12/2020 in Eldoret CMCC No. 108 of 2019 between the Appellant and Respondent)*

**JUDGMENT**

1. The respondent in this appeal had filed a suit before the chief magistrate's court against the appellant and three others in which she sought the following reliefs: -
  - a. A declaration that the plaintiff is the lawful owner of all that parcel of land known as Uasin Gishu/ Kahungura Scheme/237 and any purported transfer be declared null and void and the land be reverted to the Plaintiff.
  - b. An eviction order do issue against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to leave vacant possession of all that parcel of land known as Uasin Gishu/kahungura Scheme/237.
  - c. A permanent injunction restraining the Defendant, their agents and/or servants from in any way interfering with the Plaintiff's quiet possession of all that parcel of land known as Uasin Gishu/kahungura Scheme/237.
  - d. Costs of this suit.
  - e. Any other or further relief as this Honourable court may deem fit and just to grant.
2. Before the case could be heard, the appellant filed a preliminary objection on the ground that the respondents suit was statute barred. The preliminary objection was canvassed before the trial



magistrate who in a ruling delivered on 17/12/2020 dismissed the same holding that the issue of limitation should be addressed during the hearing.

3. It is the ruling of the trial magistrate which triggered the present appeal in which the appellant raised the following grounds of appeal: -
  1. That the learned magistrate erred in law and fact by failing to uphold the Appellant's preliminary objection to the effect that the Respondents claim was statute barred having been filed out of time.
  2. That the learned magistrate erred in law and in fact and misdirected herself in holding that the issue of limitation can only be argued at the trial.
  3. That the learned trial magistrate erred in law and fact and misdirected herself by holding that the issue of limitation should be determined at trial via oral evidence.
  4. That the learned trial magistrate erred in law and fact by dismissing the preliminary objection by the Appellant when the same was full of merits.
  5. That the learned magistrate erred in law and fact by failing to give due consideration to the submissions by the Appellant.
  6. That the learned magistrate erred in law and fact by over relying on the Respondent's submissions in arriving at this decision dismissing the Appellant's preliminary objection.
  7. That the learned magistrate erred in law and fact by considering extraneous issues in arriving at her decision.
  8. That the learned magistrate erred in law and fact in disregarding the authorities relied upon by the Appellant.
4. Parties were directed to file written submissions. The Appellant filed her submissions on 11/10/2022. The Respondent filed her submissions on 21/11/2022. I have gone through the submissions by the parties as well as the record of appeal. The only issue for determination is whether the trial magistrate erred in holding that the issue of limitation was to be dealt with during the hearing.
5. The duty of a first appellate court was spelt out in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 where it was stated as follows:-

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ...is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
6. A preliminary objection was defined in the case of *Mukisa Biscuit Manufacturing Ltd v West End Distributors* (1969) EA 696 as follows: -

“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 preliminary point may dispose off 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 nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all 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.”

7. I looked at the plaint which the Respondent filed before the lower court. The claim is hinged on fraud which was committed by the 2<sup>nd</sup> Defendant in the suit which was filed by the Respondent.

8. Section 26 of the *Limitation of Actions Act* states as follows:-

“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.”

9. I have looked at the plaint filed by the respondent as well as her witness statement. It is not clear when she discovered the fraud which she attributes to the 2<sup>nd</sup> Defendant in the suit. This being the case, this fact will only be ascertained during the trial.

10. In the case of *Justus Tareti Obara v Peter Koitapei* (2014) eKLR, it was held as follows: -

“I am in agreement with the Plaintiff’s submissions that the Plaintiff’s claim 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...as to when the plaintiff herein discovered the fraud alleged against the defendant is matter to be ascertained at trial.”

11. The appellant in her submissions has submitted that the respondent was aware of the fraud as early as 2004. The appellant pointed out to the official search which was carried out on 7/4/2004 in which the respondent is shown to have registered a caution against the title claiming beneficiary interest. I have looked at the submissions by the appellant on the preliminary objection before the lower court. The submissions never touched on the search of 7/4/2004. This being the case, the trial magistrate was right in holding that the issue of limitation should be canvassed at the trial. The appellant is trying to raise the issue of the search at appeal stage without having sought leave of court to address additional evidence at the appeal stage.

12. I therefore find that whatever reasoning the trial magistrate adopted in arriving at a finding that the issue of limitation be canvassed at the trial, she arrived at a correct finding which cannot be faulted. I therefore find no merit in this appeal which is dismissed with costs to the respondent. The lower court file should be remitted back for hearing and determination.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 20<sup>TH</sup> DAY OF APRIL, 2023.**



**E. OBAGA**

**JUDGE**

In the virtual presence of;

Ms. Kosgei for Mr. Omboto for Respondent

Ms. Lungwe for Appellant

Court Assistant –Laban

**E. OBAGA**

**JUDGE**

**20<sup>TH</sup> APRIL, 2023**

