



**Kamicha v Nderitu & another (Environment and Land Appeal  
E054 of 2021) [2023] KEELC 18212 (KLR) (13 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18212 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND APPEAL E054 OF 2021**

**JM ONYANGO, J**

**JUNE 13, 2023**

**BETWEEN**

**ZACHARIAH MBUTHI WANJAU KAMICHA ..... APPELLANT**

**AND**

**EUNICE WANGARI NDERITU ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, UASIN GISHU COUNTY ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the ruling and order of Hon. N. Wairimu,  
Senior Principle Magistrate delivered on 19th November 2021  
in Eldoret Chief Magistrate's Court ELC Case No. E152 of 2021)*

**JUDGMENT**

1. This suit commenced in the Chief Magistrate's court where the Appellant filed suit against the Respondents alleging the Respondents had fraudulently transferred the Appellant's land parcel number Eldoret Municipality Block 9/17 (border Farm) /94 to the 1<sup>st</sup> Respondent's name and that the 1<sup>st</sup> Respondent had occupied the Appellant's said parcel of land without his consent. The Appellant subsequently filed an application dated July 28, 2021 seeking a temporary injunction to restrain the 1<sup>st</sup> Respondent from interfering with the Appellant's quiet possession of said parcel of the land pending the hearing and determination of the main suit.
2. The 1<sup>st</sup> Respondent filed a Replying Affidavit in opposition to the application in which she averred that she is the registered owner of land parcel number Eldoret Municipality Block 9/17 (border Farm) /94 having bought it in 2007. She further averred that after she bought the land she took possession thereof and constructed some rental houses thereon in 2011.



3. In addition to the Replying Affidavit, the 1<sup>st</sup> Respondent filed a Notice of Preliminary Objection on the ground that the Appellant's suit was statute barred pursuant the provisions of section 7 of the [Limitation of Actions Act](#) Cap 22 of the Laws of Kenya and hence the court lacked the capacity to hear it.
4. The trial court directed that the Preliminary Objection be heard first and the same was disposed of by way of written submissions filed by both parties. The court then delivered its ruling dated 19<sup>th</sup> November in which it upheld the Preliminary Objection.
5. Being dissatisfied with the said ruling, the Appellant filed this appeal citing the following grounds;
  - i. The learned trial magistrate erred in law and fact by upholding the Preliminary Objection that the suit was statutory time barred (sic)
  - ii. The learned trial magistrate erred in law and in fact in ignoring the fact that there was fraud on the actions of the Respondent.
  - iii. The learned trial magistrate erred in law and in fact when she misdirected herself when she held that the suit was incompetently before her and proceeded to allow the preliminary objection whose effect was to dismiss the suit.
  - iv. The learned trial magistrate erred in law and in fact in ignoring the evidence adduced by the defendant/appellant in support of his Grounds of Opposition.
  - v. The learned trial magistrate erred in law and in fact by relying entirely on the submissions tendered by the Respondent and ignored those tendered by the Plaintiff, now Appellant.
  - vi. The appellant urged the court to allow the appeal and set aside the ruling of the trial magistrate.
6. The appeal was disposed of by way of written submission and both parties filed their submissions.

### **Appellant's Submissions**

7. In support of the Appeal learned counsel for the Appellant submitted that the Preliminary Objection ought not to have been allowed as the Appellant raised the issue of fraud and he should have been protected by the proviso to section 26 of the [Limitation of Actions Act](#). He relied on the cases of [Kuria Tharao & another v Joseph Kinyanjui Mwai & 3 others](#) (2014) eKLR where the court observed that although the section 7 of the [Limitation of Actions Act](#) provides that a suit for the recovery of land must be instituted within 12 years from the date when the cause of action arose, there is a reprieve granted under section 26 ( c) of the Act in cases of fraud.
8. Counsel submitted that the trial magistrate erred by dismissing the suit without embarking on a trial in order to ascertain the allegations made by the Appellant. He relied on the case of [Sylvia Wanjiru Gathendu v Lillian Mwai & 4 others](#) (2021) eKLR where the court cited the case of [UCB v Mukoome Agencies](#) (1982 ) HCB 22 for the proposition that where fraud is alleged, the party alleging it must be given an opportunity to prove it.
9. It was his contention that that through his Grounds of Opposition, the Appellant had raised facts that ought to have been ascertained by the trial magistrate before coming to a conclusion.

### **1st Respondent's Submissions**

10. Learned counsel for the 1<sup>st</sup> Respondent submitted that the Appeal was incompetent as the firm of Magare Musundi & Co Advocates were not properly on record. It was his contention that the said firm filed a Notice of Change of Advocates instead of seeking leave of the court to come on record



- after the suit was dismissed. Reliance was placed on the case *Monica Moraa v Keninindia Assurance Co Ltd* (2012) eKLR for the proposition that the provisions of Order 9 rule 9 of the *Civil Procedure Rules* must be complied with.
11. With regards to the Preliminary Objection, counsel submitted the trial court was justified in upholding the same. He contended that that section 7 of the *Limitation of Actions Act* Cap 22 of the Laws of Kenya was clear that an action for recovery of land cannot be brought after the end of 12 years from the date on which the cause of action arose. He relied on the case of *Beatrice Wambui Kiarie v Beatrice Wambui Kiarie & 9 Others* (2018) eKLR where the court held that a suit that had been filed 24 years after the cause of action arose without having obtained leave for extension of time was statute barred.
  12. He submitted that in the instant case, time started running from 2007 when the 1<sup>st</sup> respondent purchased the suit property and took possession thereof. It was his submission that once a suit is statute-barred the court lacks jurisdiction to hear it. He relied on the case of *Motor Vessel Lillian S v Caltex Oil (Kenya) Limited* (1983) 1 KLR.
  13. Having considered the Record of Appeal and the submissions filed by the parties, the main issues for determination are;
    - i. Whether the appeal is incompetent for failure to comply with the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*.
    - ii. Whether the preliminary Objection is valid.
  14. With regards to the first issue, it is not in dispute that the firm of Magare Musundi & Company Advocates came on record on February 4, 2022 by filing a Notice of Change of Advocates after the Memorandum of Appeal had been filed by the firm of M/s Koech Lelei & Company Advocates.
  15. Order 9 Rule 5 of the *Civil Procedure Rules* which stipulates that:-
    - "i. A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal."
  16. In addition, Order 9 Rule 7 of the *Civil Procedure Rules* states that:-

“Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.”
  17. Order 9 Rule 9 of the *Civil Procedure Rules* that states as follows:-
    - "a. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
      - a. upon an application with notice to all the parties; or



- b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
18. It is evident that before a Notice of Change of Advocates can be filed after judgment has been delivered, it must be preceded by either an application by the incoming advocate seeking leave to come on record for a party or by a consent between the outgoing and proposed incoming advocate or party intending to act in person as the case may be.
19. It is clear therefore that the firm of Magare Musundi & Co Advocates did not comply with the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*. However, the Court of Appeal in the case of *Tobias M Wafubwa v Ben Butali* (2017) eKLR took the view that failure to adhere to the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* was not fatal so long as there is no prejudice occasioned to the other party. The court rendered itself as follows: -
- “a. Once a Judgment is entered save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate Court is not a continuation of proceedings in the lower Court but a commencement of new proceedings in another Court where different rules may be applicable, for instance, the Court of Appeal Rules 2010 or the Supreme Court Rules 2010. Parties should therefore have the right to choose whether to remain with the same counsel or engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned Court to be placed on record in substitution of the previous advocate.” Emphasis added.
20. The court further observed that:
- “a. We would go further to add that, provided that where the failure to comply with rule 9 did not undermine the jurisdiction of the Court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to miscarriage of justice, then Article 159 of the Constitution and the overriding principles could be called upon to aid the Court to dispense substantive justice through just, efficient and timely disposal of proceedings.”
21. Since the Respondent has not demonstrated that the failure by the firm of Magare Musundi & Company Advocates to comply with Order 9 rule 9 has occasioned him prejudice, I see no reason why the appeal should be struck out as being incompetent.
22. I shall now proceed to consider whether the Preliminary Objection raised on the basis that the suit was statute barred should have been upheld.
23. Section 7 of the *Limitation of Actions Act* provides as follows:
7. “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. From the above provision of the law it is clear that an action for recovery of land must be filed before the end of 12 years from the date when the cause of action arose. In the instant suit, the Appellant’s claim is for recovery of land based on trespass and fraud. Although the 1<sup>st</sup> Defendant avers that she



bought the land in 2007 and took possession thereof in the same year the plaintiff claims that he only discovered that the 1<sup>st</sup> Defendant had trespassed on his land in 2018. He also discovered that she had fraudulently registered the suit property in her name.

25. Section 26 of the *Limitation of Actions Act* which provides as follows :

26. “ Where in an action for which a period pf 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. Provided that this section does not enable an action to be brought to recover or enforce any mortgage upon, or set aside any transaction affecting any property which
    - i. in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
    - ii. in the case of mistake has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

26. Considering the fact that the Plaintiff discovered the acts of trespass and fraud in 2018, this case falls within the provisions of section 26(c) of the *Limitation of Actions Act*. In arriving at this finding I concur with the decision in the case of *Kuria Tharao & Another v Joseph Kinyanjui Mwai & 3 Others* (2014) eKLR where the court observed as follows:

“The significant words are that “ 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.” In such an event the limitation period starts running from the discovery of the fraud or the period when the plaintiff could have discovered the fraud by exercise of reasonable diligence.

....From the foregoing legal provisions , there is no doubt that this court has the power at any stage to strike out a pleading including a plaint. However, the courts have been asked to be slow in using their inherent and discretionary powers in striking out pleadings as it is a harsh and drastic move that can drive a litigant from the seat of justice. It is only granted in cases where it is clear that the pleadings objected to really disclose no arguable case and can only be granted where the case is plain, obvious and weak and one that cannot be redeemed by amendment.



27. The trial court ought not to have been quick to draw the conclusion that the Plaintiff should have noticed the developments on the suit property before 2018 as these are matters of fact that ought to have been ascertained at the trial. The date when the 1<sup>st</sup> Defendant entered the suit property is also a question of fact that can only be ascertained at the trial. In the case of Mugo Murnachimba v Moffat Nyaga Kagua & 2 Others (2020) eKLR the court rendered itself thus:

“Although a plea of limitation is capable of being canvassed as a preliminary objection, the same cannot be effectively canvassed if some facts have to be ascertained. The court is of the opinion that in the instant case, the date of accrual of the plaintiff’s cause of action has to be ascertained in terms of section 7 and part 111 of the Limitation of Actions Act. Section 26 of the Act provides for extension of the period of limitation on account of disability, acknowledgement, fraud, mistake and ignorance of material facts.... The court is thus of the opinion that some facts have to be established in relation to when the plaintiff’s cause of action accrued. For instance, the plaintiff has pleaded that he discovered the alleged fraud in 2000. This is a question of fact to be established at the trial. The question of whether or not the plaintiff could, with due diligence have discovered the fraud earlier is also a question of fact to be established at the trial. The question of whether or not the first defendant’s father was a bona fide purchaser for value is also a question of fact which is best established at the trial.”

28. The courts have held time and again that where fraud is alleged, the parties ought to be given an opportunity to prove the allegations of fraud. See the case of Syliva Wanjiru Gathendu v Lillian Mwai & 4 Others ( 2021) eKLR.

29. In view of the foregoing I am persuaded that the appeal has merit and it is hereby allowed. The order allowing the preliminary objection is hereby set aside and substituted with an order dismissing the preliminary objection. The order striking out the suit though not expressly stated in the ruling but which is implied in the notice of preliminary objection is hereby set aside. the suit shall be set down for hearing on the merits.

30. The cost of the appeal shall be borne by the 1<sup>st</sup> respondent.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF JUNE 2023.**

.....

**J.M ONYANGO**

**JUDGE**

**In the Presence of;**

Mr. Nyambegera for Mr. Musundi for the Appellant

No appearance for the Respondent

Court Assistant: A. Oniala

