



**Kariuki & 2 others v Waruingi (Environment and Land Appeal
33 of 2019) [2023] KEELC 19055 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19055 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 33 OF 2019**

**JO OLOLA, J
JULY 28, 2023**

BETWEEN

**PETERSON WAIGURU KARIUKI 1ST APPELLANT
JOAN WANJA NDANYU 2ND APPELLANT
MILTON NYAGA KABOI 3RD APPELLANT**

AND

TOM KIMARU WARUINGI RESPONDENT

JUDGMENT

1. This is an Appeal arising from the Ruling of the Honourable Mathias Okuche, Principal Magistrate, delivered on 22nd November, 2019 in Nyeri CMELC Case No. 67 of 2019.
2. By an undated Plaint filed in Court on 19th August 2019, Tom Kimaru Waruingi (the Respondent) had sought Judgment against the three (3) Appellants together with the Land Registrar Nyeri County for orders:
 - (a) That a declaratory order do issue to the effect that he is the bona fide purchaser of the subject suit properties namely, Ruguru/Gachika/1323 and 1324;
 - (b) That a permanent injunction do issue restraining the 1st, 2nd and 3rd Defendants, either by themselves their servants, agents and/or employees from trespassing in the Plaintiffs said parcel of land and in any way interfering with his lawful ownership and/or possession of the said parcels of land known as Ruguru/Gachika/1323 and 1324;
 - (c) The 4th Defendant be compelled to cancel the title deeds issued to the 2nd and 3rd Defendants and to register both of them in the Plaintiff's name;



- (d) The 2nd and 3rd Defendants be ordered to cover the trenches dug up and to remove the building materials deposited on the subject suit properties at their own expenses;
 - (e) Costs of the suit; and
 - (f) Any other or such further relief that this Honourable Court may deem fit to grant in the circumstances.
3. Those prayers arose from the Respondent's contention that on or about 7th December 2000, he had purchased from the 1st Appellant two plots which had been hewn out of the land parcel known as Ruguru/Gachika/251 situated at Kiganjo in Nyeri County. The 1st Appellant subsequently subdivided the said parcel of land and obtained title deeds for the said plots being Ruguru/Gachika/1323 and 1324 for purposes of transfer to the Respondent.
 4. The Respondent asserted that contrary to their agreement with the 1st Appellant, on or about 18th July 2019, he carried out an official search of the two properties only to realise that the 1st Appellant had instead transferred the same to the 2nd and 3rd Appellants. It was the Respondent's case that the sale of the said parcels of land to the 2nd and 3rd Appellants were illegal, fraudulent and maliciously geared toward depriving him of his rightful ownership of the same.
 5. In his Written Statement of Defence dated and filed on 30th September 2019, Peterson Waiguru Kariuki (the 1st Appellant) asserted that even if they had entered into the said sale agreement, the same had become unenforceable in terms of Sections 4 and 7 of the [Limitation of Actions Act](#) as 19 years had lapsed since the date of the alleged execution.
 6. The 1st Appellant denied receiving the sum of Kshs.20,000/- from the Respondent to facilitate processing of the title deeds for the two parcel of land and asserted that he never obtained any Land Control Board Consent in favour of the Respondent as required under Sections 6 and 8 of the [Land Control Act](#).
 7. The 1st Appellant further asserted that the Respondent had never taken possession of suit properties and that it was the 2nd and 3rd Appellants who were in possession thereof and had erected a fence and commenced construction thereon.
 8. Joan Wanja Ndanyu and Milton Nyaga Kaboi (the 2nd and 3rd Appellants) were equally opposed to the Respondent's claim. In their joint Statement of Defence equally dated and filed in Court on 30th September 2019, the two asserted that they are the legally registered proprietors and were in occupation of the suit properties having purchased the same from the 1st Appellant.
 9. The 2nd and 3rd Appellants joined the 1st Appellant in asserting that the Respondent's claim was statutorily time-barred and that his contract with the 1st Appellant was no longer enforceable.
 10. The two Appellants further asserted that there was no caveat, restriction and/or prohibitory order registered as against the two titles in favour of the Respondent as at the time they purchased the same and had the titles transferred to their respective names from that of the 1st Appellant.



11. Subsequently and by a Notice of Preliminary Objection dated 21st August 2019, the three (3) Appellants objected to the Respondent's suit on the grounds that:
 1. Pursuant to the provisions of Sections 4 and 7 of the *Limitation of Actions Act*, Cap. 22 of the Laws of Kenya, the entire Plaintiff's suit is statutory barred (sic); and
 2. The Honourable Court has no jurisdiction over this suit.
12. The said Preliminary Objection together with a Notice of Motion application by the Respondent dated 9th August, 2019 seeking orders of injunction were jointly heard by the Honourable M. Okuche, Principal Magistrate. In his Ruling dated and delivered on 22nd November 2019, the Learned Magistrate dismissed the Appellant's Preliminary Objection and proceeded to allow the Respondent's application thereby restraining the 2nd and 3rd Appellants from selling, charging, leasing or in any other way parting with possession of the two parcels of land pending the hearing and determination of the suit.
13. Aggrieved by the said Ruling, the Appellants lodged the Memorandum of Appeal herein dated and filed on 16th December, 2019 urging this Court to quash and/or set aside the said Ruling on the grounds set out therein as follows:
 1. The Learned Magistrate erred in fact and in law in failing to uphold the Preliminary Objection dated 21st August, 2019 on the ground that the Plaintiff's entire suit was statute barred pursuant to the provisions of Sections 4 and 7 of the Limitation of Actions (Act) Cap. 22 (of) the Laws of Kenya as the cause of action arose in the year 2000 and a period of 19 years had lapsed hence the enforcement of the subject contract subject of this suit was brought after the end of six years period and further the action for recovery of land was not available after expiry of 12 years period;
 2. The Learned Magistrate erred in fact and law in failing to appreciate the object or purpose and effect of the law of Limitation enactment set out herein above, that the Plaintiff was barred from prosecuting (a) stale claim as there were no remedies available and the Defendants were protected from being disturbed after unreasonable delay and failure to exercise reasonable diligence and steps in lodging the suit/claim;
 3. The Learned Trial Magistrate erred in fact and law in misapplying the provisions of Section 26 of the Law of Limitation that the cause of action accrued and/or arose in the year 2019 based on fraud and no particulars thereof are pleaded whereas the dealing between the Plaintiff and the 1st Defendant were purely contractual in the year 2000 and on the other hand the 2nd and 3rd Defendants were bonafide purchasers for value and the title deeds in regard to the suit lands could not fall within the exception of Section 26(1) of the *Land Registration Act*, 2012;
 4. The Learned Trial Magistrate erred in fact and law in finding that the Notice of Motion dated 9th August, 2019 was merited in terms of Prayer 3 thereby issuing adverse orders of injunction against the 2nd and 3rd Defendant when indeed the principles laid down in Cass Man Brown -vs- Gielsman (sic) were



not established and the Court had no jurisdiction to issue any remedy in favour of the Plaintiff as none was available as the suit was statute barred; and

5. The Learned Trial Magistrate erred in law and fact in ignoring all the Appellants' submissions and case laws and subsequently exercised the discretion afforded in law unfairly as no satisfactory analyses as to issues, the law and reasons were advanced to inform the decision.
14. As the first appellate Court, the duty of this Court as set out in *Selle and Another -vs- Associated Motor Boat Company Limited & Others* (1968) EA 123, is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law.
15. By their Notice of Preliminary Objection as filed in the trial Court, the Appellants contended that pursuant to the provisions of Section 4 and 7 of the *Limitation of Actions Act*, the entire suit as filed by the Plaintiff was statute-barred and that hence the Court had no jurisdiction to deal with the suit.
16. It was the Appellants' case that as provided under Section 7 of the *Limitation of Actions Act*, any action for recovery of land ought to be brought before the end of twelve (12) years from the date on which the right of action accrued to him. The Appellants submitted before the trial Court that arising from the pleadings filed by the Respondent, it was apparent that the sale agreement said to have given rise to the suit was executed in the year 2000 and that a period of 19 years had lapsed from the date on which the right of action had accrued before the filing of the claim by the Respondent.
17. On his part, the Respondent contended that his suit was anchored on fraud on the part of the Appellants. He told the Court he had only discovered the said fraud in the year 2019 when he conducted a search on the suit properties only to discover that they had been registered in the names of the 2nd and 3rd Appellants. It was accordingly the Respondent's case that pursuant to the provisions of Section 26 of the *Limitation of Actions Act*, the period of limitation did not begin to run until the year 2019 when he discovered the fraud.
18. Having heard the objection and the issues raised, the Learned Trial Magistrate concluded as follows:

“The Plaintiff in Paragraph 11 of the Plaint avers that he carried out a search on the two suit titles and it is when he discovered that the parcel of land has been registered in the names of the second and third defendants respectively. The said registration was without his consent hence done fraudulently.

It is clear that his cause of action is based on fraud. He made the discovery in the year 2019, that is when the cause of action arises.

I have found that the provisions of Section 26 of the Act applies herein and not Section 4 and 7 of the Act. The Preliminary Objection is overruled.”
19. As it were “fraud” has been defined in Black's Law Dictionary 11th Edition as –

“A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.”
20. As was stated by the Court of Appeal in *Virjay Morjaria v Nansing Madhusing Darbar and Another* [2000] eKLR:

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of



course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

21. The circumstances leading to the Plaintiff’s suit can be discerned from a perusal of Paragraphs 3 to 13 of the Plaint filed in the trial Court on 19th August 2019. It is the Respondent’s case that he acquired two plots of land from the 1st Appellant by way of sale on 7th December, 2000 which plots were to be sub-divided from the 1st Appellant’s parcel of land known as Ruguru/Gachika/251 situated at Kiganjo area of Nyeri County.
22. The Respondent asserts that despite his paying the purchase price of Kshs.230,000/- for the parcels of land as well as an additional Kshs.20,000/- that was required towards the processing of the title deeds, the 1st Appellant did not do so and merely kept underscoring his commitment to complete the process in due time. In that respect, the 1st Appellant did not hand over the titles to the two plots to the Respondent and the Respondent only came to learn some 19 years after making the payments, in particular, on 18th July, 2019 that the 1st Appellant had transferred the suit properties to the 2nd and 3rd Appellants.
23. It is on that basis that the Respondent contended that the sale and transfer of the two pieces of land to the 2nd and 3rd Appellants were illegal, fraudulent and maliciously geared towards depriving him of his rightful ownership of the same.
24. As it were, those pleadings do not particularise any of the alleged acts of fraud committed by any of the Appellants. From a perusal of Paragraph 6 of the Supporting Affidavit to the Respondent’s Notice of Motion dated 9th August 2019, it was apparent that the Respondent was aware that the 1st Appellant sub-divided the two parcels of land. Rather than have the same registered in the Respondent’s name, the extracts of the titles annexed to the affidavit reveal that both the resulting parcel Nos. Ruguru/Gachika/1323 and 1324 were on 31st May, 2001 registered in the name of the 1st Appellant.
25. While the 1st Appellant was most likely dishonest in his dealing with the Respondent, I was unable to see how in the absence of any registration of the Respondent’s interests on the titles, the acquisition by the 2nd and 3rd Appellants of the said titles some 19 years later could be termed as fraudulent.
26. As it were the titles remained registered in the name of the 1st Appellant from whom the 2nd and 3rd Appellants acquired the same and based on the material so far before the Court, the two can only be construed to have been bonafide purchasers for value as they assert given the sanctity of title provided for under Section 26 of the *Land Registration Act*. I did not hear the Respondent to claim that his name had been cancelled or irregularly removed from the title and the assertion that he discovered any fraud on the title when he conducted a search thereon on 18th July, 2019 was devoid of any substance and merely intended to mislead the Court as to when the cause of action first accrued.
27. From the material placed before the Court, it was apparent that the basis of the Respondent’s claim is the contract dated 17th December, 2000 between himself and the 1st Appellant. This suit having been filed on 19th August, 2019 arrived some 19 years after the cause of action accrued. He had six (6) years to make a claim under the agreement by dint of Section 4 of the *Limitation of Actions Act*. On the other hand, under Section 7 of the said Act, he had twelve (12) years to try and recover the land from the 1st Appellant. He did not take either of those steps and his claim as submitted by the Appellants had become stale.



28. As was stated in Iga v Makerere University [1972] EA 65:

“A Plaintiff which is barred by limitation is a Plaintiff barred by law. Reading these provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The Limitation Act does not distinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the Court cannot grant the remedy sought.”

29. Again as was stated by Potter J.A in Gathoni v Kenya Co-operative Creameries Limited [1982] KLR 104:

“... The law of Limitation of Actions is intended to protect the 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. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.”

30. Arising from the totality of the circumstances herein, I was persuaded that there was merit in the Appeal. Accordingly, I hereby set aside the orders of 22nd September, 2019 and hereby strike out the Respondent’s suit as filed in the Lower Court, with costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 28TH DAY OF JULY, 2023.

In the presence of

Mr. Wabandi Gacheru for the Appellants

No appearance for the Respondent

Court assistant - Kendi

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J. O. OLOLA

JUDGE