



Mugambi v Deputy County Commissioner North Imenti & 3 others (Environment and Land Appeal E012 of 2022) [2023] KEELC 18948 (KLR) (19 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18948 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E012 OF 2022**

**CK NZILI, J
JULY 19, 2023**

BETWEEN

MARY KATHURE MUGAMBI APPELLANT

AND

**THE DEPUTY COUNTY COMMISSIONER NORTH IMENTI 1ST
RESPONDENT**

RUKIA SALEHE 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

**SAINA KANYUA (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE
OF SALEH MUGWIKA – (DECEASED) 4TH RESPONDENT**

*(Being an appeal from the judgment of Hon. L.N Juma (Mrs.)
SRM Meru delivered on 27.1.2022 in ELC case No.257 of 2015)*

JUDGMENT

1. Before this court is a memorandum of appeal dated 25.2.2022 in which the appellant faults the judgment issued by L.N Juma (Mrs.) SRM on 27.1.2022 on the ground that the trial court erred in law and, in fact, in:
 - i. Laying too much emphasis on unpleaded matters on the appellant, unlike the respondent case, who had the burden of proof which he failed to discharge.
 - ii. Finding that the appellant had not completed payment of the purchase price yet the payments were not disputed or a claim raised for the unpaid purchase price.



- iii. Failing to recognize that failure by the plaintiff to enjoin the land control board and the land registrar as parties or call them as witnesses rendered the suit unproven.
 - iv. Failing to establish or note that there was no admission of the appellant's husband's involvement in any fraudulent transfers of undivided shares in 1977 since the validity of the transfer instruments was not disputed.
 - v. Failing to consider that if the subsequent transmission of the appellant had been illegal, the same would not have invalidated the 1977 transaction between Saleh Mugwika and Silas Mugambi.
 - vi. Failing to find the respondent's suit against the appellant as time-barred.
 - vii. Failing to recognize that the suit was not for enforcement of the sale agreement since the title deed had already been registered in the joint names of the appellant's husband and Saleh Mugwika with their shares duly denoted.
 - viii. Delivering a judgment against the weight of evidence and also misinterpreting the law.
 - ix. Exercising its discretion injudiciously and grossly wrong to the extent of occasioning grave injustice to the appellant, bringing the law into disrepute, and inviting anarchy and the law of the jungle.
2. As a first appellate court, this court is mandated to re-hear, rehearse, and re-appraise itself of the lower court record, come up with independent findings on both law and facts while giving enough credit to the trial court, which had the benefit of hearing and seeing the witnesses testify first hand. See *Gitobu Imanyara & 2 others vs AG, Abok, Peters vs Sunday Post* (1958) EA 424.
 3. In this appeal, the suit commenced through a plaint dated 19.8.2015 brought by the appellant. She had claimed that the 2nd respondent's late husband had, by a written agreement dated 13.12.1975, sold to her late husband a portion of land measuring 3 acres, out of L.R. No. Ntima/Ntakira/534 for Kshs.22,000/=, which he paid full consideration and transferred the same to the joint names of Saleh Mugwika with shares of 35/156 and 121/156, in favor of her late husband as reflected in a title deed he had kept.
 4. The appellant averred that the registered joint owners in 1984 applied and paid for the subdivision of their land into two portions as per their shares which the Municipal Council of Meru approved, but before the implementation of the subdivision, both joint owners passed on.
 5. The appellant averred that she applied for succession and obtained the grant for her late husband's estate, transferring her husband's share of 121/156 in the suit land.
 6. The appellant averred that she called out the 2nd respondent to obtain a grant of letters of administration for her late husband's estate so that subdivision would be finalized as had earlier on stopped after he died, in vain, including efforts to seek the intervention of the local area chief and the land registrar who eventually allowed for the land to be subdivided through a land control board consent dated 3.4.2007, which created L.R. No. 4031 measuring 0.34 ha for the 2nd respondent's late husband and L.R. No.4032, measuring 0.16 ha for the appellant.
 7. The appellant averred that the 2nd respondent complained and demanded that the land registrar restricts the land, which it did on 15.5.2007, frustrating the appellant's efforts to acquire a title deed.



- Therefore, the appellant prayed for lifting of the restriction on the initial parcel of land and the subsequent resultant subdivision. The plaint was accompanied by witness statements dated 22.7.2021 and a list of documents dated 19.8.2015 and 22.7.2021 as well as issues dated 22.7.2021.
8. The 1st & 3rd respondents opposed the suit by a statement of defense and preliminary objection dated 15.9.2015 for offending Section 12 (1) & 13 A of the *Government Proceedings act* (Cap 40), Section 3 of the *Public Authorities Limitation Act* Cap 39, and disclosing no cause of action against them. In an application dated 24.7.2018, the 2nd respondent sought and was allowed to join Saina Kanyua as a 4th defendant.
 9. By an amended defense and counterclaim dated 13.9.2018, the 2nd & 4th respondents denied any alleged sale of 3 acres of land from L.R. No. Ntima/Ntakira/534 in 1975. They termed the sale agreement relied upon by the appellant as fraudulent since parties merely viewed the portion of land as separated by an access road that cuts across the suit land and amicably offered for sale to the appellant's late husband the part on one side of the access road for Kshs. 22,000/= while the 2nd respondent's husband was to retain the portion on the other side of the road, who only paid Kshs.8,000/= and failed to clear the balance on time or at all making the sale agreement unenforceable.
 10. The 2nd respondent denied that a land surveyor did any actual measurement or survey works at the time of the sale. She, therefore, termed any alleged sub-divisions of the parcel of land in two portions as fraudulent or unilaterally undertaken in the absence of her late husband. The 2nd & 4th respondents' alleged that the appellant and her late husband must have perpetuated the fraud by using a forged sale agreement and presenting false documents, initializing the process, and undertaking it secretly. Further, the 2nd & 4th respondents termed the alleged land transfers out of the unilateral subdivisions illegal, null and void. Additionally, the 2nd and 4th respondents termed the report and action taken by the 1st and 3rd respondents as lawful and legal to secure her land rights, following the appellant's illegal subdivisions, transfer, and registration of the resultant parcel numbers.
 11. By way of a counterclaim, the 2nd & 4th respondents, as the legal representatives of the estate of Saleh Mugwika, the plaintiff in the counterclaim, sued the plaintiff in the main suit as a defendant in the counterclaim claiming that she was in actual possession of the suit land. Though she admitted that there had been an agreement in 1975, as pleaded in her defense to the main claim, which was frustrated by the appellant. She averred that the appellant caused the subdivisions, transfer, and registration of the resultant sub-divisions through misrepresentation, fraud, secrecy, and false pretenses. The 4th respondent sought for a declaration that the entries made or recorded on L.R. No. Ntima/Ntakira/534 were invalid; cancellation of all the changes or entries to the title, reinstatement of the suitland to the original owner; invalidation of the initial sale agreement due to breach or frustration; invalidation of the approved subdivisions over the land by the Municipal Council of Meru and a permanent injunction restraining the appellant from in any way interfering or occupying, fencing, surveying or utilizing the suit land. The amended defense and the counterclaim were accompanied by a list of witnesses' statements and documents dated 20.8.2021.
 12. In response to the defense and counterclaim, by the 1st -3rd and the 2nd respondents' defense, the appellant filed a reply and defense to the counterclaim. She insisted that there was a sale involving 3 acres of the suit land followed by the handing over of vacant possession. That after her husband passed on, the appellant continued utilizing the suit land. Further, the appellant averred that the balance of Kshs.22,000 was cleared as agreed, following which the suit land was jointly registered as belonging to the two parties. The appellant denied the particulars of fraud or illegality and termed the 4th respondent's claim, if any, as time-barred.



13. At the trial, Caroline Rimita advocate testified as PW1. She adopted her witness statement dated 22.7.2021 as her evidence in chief and confirmed that the sale agreement dated 13.12.1975 was drafted and witnessed by her late father, the then proprietor of Maitai Rimita and Co. Advocates. She produced it as P. Exh No. (1). Her testimony was that after the deposit of Kshs.8,000/=, the balance was to be paid in monthly installments of Kshs.1,000/= till payment in full, but could not confirm clearance since it was supposed to be paid directly to the seller.
14. The appellant testified as PW 2 and adopted her witness statements dated 19.8.2019 and 22.7.2021 as her evidence in chief. She referred to the sale agreement and produced an application to the land control board dated 15.12.1975 as P. Exh No. 2, a copy of transfers dated 13.4.1977 as P. Exh No. (3), copy of the title deed in joint names dated 13.1.1977 as P. Exh No. (4), payment receipts for land rates as P. Exh No. (5) & (6) dated 29.5.1976 and 3.1.1984, copies of the application for the portions, physical planner payments, survey fees, and certificate of payment dated 4.1.1984 as P. Exh No. (7), chief's letter dated 17.1.2006 as P. Exh No. (8), chiefs letter dated 22.2.2013 as P. Exh No. (9), certificate of confirmation of the grant dated 10.11.1999 as P. Exh No. (10), an application for land subdivision and consent as P. Exh No. (11), mutation form as P. Exh No. (12), letter to the land registrar for filing restrictions as P. Exh No. (13), demand letter to 1st respondent as P. Exh No. (14), 2nd respondents reply as P. Exh No. (15), response to P. Exh No. 15 above as P. Exh No. (16), and the statutory notice to the Hon. Attorney General as P. Exh No. (17).
15. In cross-examination, PW 2 said that an access road separated the suit land from the seller's land. She insisted that her late husband, who passed on in August 1993, had cleared all the purchase price even though clause No. 1 (b) of P. Exh No. (1) showed that the balance would be paid after the transfer. PW2 did not produce any receipts acknowledging the payments from the seller. Regarding the application for subdivisions in 1984, PW 2 was uncertain if her late husband knew that the transferor had passed on in 1983. Additionally, PW 2 told the court that she unsuccessfully involved the 4th respondent before and after visiting the land registrar's offices on the way forward, even though the mutation form before the court lacked the particulars of the 2nd respondent. PW2 clarified that the 2nd & 4th respondents failed to attend the ground when a land surveyor named Kiambati and Associates visited the land, even though they had been notified of the impending visit. PW 2 denied that a physical planner allegedly stopped the subdivision process in 1984 after the 2nd respondent complained about subdivisions. Similarly, PW 2 told the court that she had been cultivating on the land since 1976 and was unaware of the complaint allegedly raised by the 2nd respondent in 2007.
16. Zacharia Ringera testified as PW 3. He testified that the late Mugambi contracted him to build a house on the suit land he had just bought from the late Swaleh. Joseph Mbaya was PW 4 and adopted his witness statement dated 22.7.2021. He denied witnessing the sale agreement. Mary Alice Njiru, the Land Registrar of Meru Central Land District, as PW 5. Her testimony was that the late Saleh M'Mugwika, as per the green card, became the registered owner of LR No. Ntima/Ntakira/534 on 7.4.1965, whose details were later on corrected to read Salehe M'Mugwika.
17. PW 5 testified that on 26.4.1977, registration of a subdivision to the names of Cyrus Mugambi Mugwika and Saleh Mugwika in shares of 121/156 of the land to the former, while the latter retained the balance. She produced the green card as P. Exh No. 18. Her further evidence was that on 28.4.1977, a title deed was issued to the joint proprietors, while on 23.9.2005, the appellant was issued with a title deed out of a succession cause in Meru HCC No.333 of 1996, for the share belonging to Cyrus Mugambi, while the one of 35/156 remained in the names of Saleh Mugwika. PW 5 clarified that she had not come across a copy of the green card for the land, application for the land control board



- consent, the consent from the land control board issued to the appellant, and a copy of the mutation form, even though she had not searched for them at the land registry.
18. Further, PW 5 told the court that there was no entry in their land records that Saleh Mugwika was deceased. Her evidence was that once one of the joint proprietors was dead, an application would be made to remove the deceased proprietor's name accompanied by a death certificate and a chief's letter. PW 5 also said that she was unsure if the appellant had made such an application. She further testified that even though the mutation report before the court had a recent Item No. 420, it had only been assessed at Kshs.500/= but there was no evidence if it was subsequently registered and payments of Kshs.600/= paid for it to be effected in the green card. However, she clarified that a land control board consent regarding the parcel number was approved on 3.4.2007.
 19. Saina Kanyua, the 4th respondent and first-born daughter of the late Saleh Mugwika and the 2nd respondent, who passed on during the pendency of the suit, testified as DW 1. She adopted her witness statement dated 20.8.2021 and produced a copy of the death certificate for her father dated 12.4.1984, showing that he passed on 4.9.1983 as D. Exh No. (1). DW1 also produced a letter to the land registrar dated 7.1.1984 as D. Exh No. (2), letter to physical planner dated 7.1.1984 as D. Exh No.(3), letter to land registrar dated 18.4.2007 as D. Exh No. (4) and green card for LR Ntima/Ntakira/534 as D. Exh No. (5).
 20. In cross-examination, D.W. 1 told the court that she knew about his late father selling a portion of their land in 1974 but could not tell whether he had affected any transfers in joint names with the late Cyrus Mugambi. She admitted that the green card showed that her late father passed on 4.12.1994. She testified that what was sold to the deceased was not 3 acres as indicated in P. Exh No. (1).
 21. D.W. 1 told the court her late father reportedly sent her to collect his title deed, only for her to be notified by the land registrar that Cyrus Mugambi, the appellant's husband, had already picked it. Her testimony was that, at the time, Cyrus Mugambi had allegedly entered the land and was still on it.
 22. At this juncture, the trial court marked the 3rd & 4th respondents' defense closed for non-attendance. Parties eventually filed written submissions, after which the trial court rendered the judgment, the subject matter of this appeal.
 23. With leave of court, parties opted to canvass the appeal through written submissions, whose deadline to file was 31.5.2023. Through written submissions dated 30.5.2023, the appellant submitted that the 2nd respondent learned about the alleged transfers in 1984 when she cautioned the land. Going by the sale agreement dated 13.12.1975 and the title deed issued showing transfer at the time; the appellant submitted that this was during the lifetime of the deceased, who never complained or objected about the entries until he passed on in 1983, only for the 2nd & 4th respondents to lay the claim in 2015, while still in occupation of the land.
 24. The appellant submitted that the 2nd and 4th respondents' claims, if any, accrued in 1975; they were aware of the occupation, and in 1977, they knew a title deed had been issued to and collected by her late husband. Therefore, as per Sections 7 & 26 of the Limitation of action of Actiosn Act (Cap) 22, any cause of action was already statute barred. Reliance was placed on Gathoni v Kenya Cooperatives Creameries Ltd [1982] KLR 104, Rawal vs Rawal [1990] KLR 275, Bosire Ogero v Royal Media Services Ltd[2015], Lemita Ole Lemein vs A.G. & others [2020] eKLR Nyagao v Nyakwara [1986] KLR, Haron Ongucha v National Police Service Commission and another [2017] eKLR. In sum, the appellant submitted that the counterclaim was time-barred, no explanation for the delay was offered, and or leave to file the same out of time was ever sought or granted.



25. On whether the trial court misinterpreted the evidence, law, and facts, the appellant submitted that the 2nd & 4th respondents knew of the sale, occupation and the issuance of a title deed in favor of her deceased husband but failed to claim for the alleged balance of the purchase price or regarding the fraud. The appellant submitted that her exhibits were never challenged, a transfer of an undivided share did not require any mutation forms, and that it was normal for her to pursue succession cause so long as she did not interfere with the 2nd & 4th respondents' share of the suit land.
26. In the absence of any complaint by the deceased over the land during his lifetime, the appellant submitted that the trial court should have made a finding that the 2nd and 4th respondents knew of the transactions, took too long to complain, handed over vacant possession and were therefore estopped from claiming the land.
27. Relying on Section 50 (1) of the Land Act (2013), the appellant submitted that as personal representative of the joint proprietor of the land, upon production of a confirmed grant of letters of administration, was entitled to registration of her name in place of her late husband, and since she did not interfere with the joint owner's share, the trial court was wrong to rule otherwise.
28. On the other hand, the 2nd & 4th respondents submitted that their defense and a counterclaim based on fraud, irregularity, impropriety, and illegality was proved, more so through PW 5, who had confirmed that the procedure to terminate a joint proprietorship was not followed. Further, the 2nd and 4th respondents submitted that the sale agreement was frustrated for non-payment of the balance of Kshs.14,000/= by the purchaser. Reliance was placed on *Sisto Wambugu vs Kamau Njuguna* [1983] eKLR and *EACC vs Simon Thuo Muchiri* [2022].
29. On time limitation, the 2nd and 4th respondents submitted that the issue was not raised before the trial court and in any case, time began to run when the appellant filed the suit. Reliance was placed on *Adan Chuda Sode vs Madina Oshe Jira & another* [2021] eKLR, *Republic v Tribunal of inquiry to investigate the conduct of Puisne Judge Tom Mbaloto ex parte Tom Mbaluto* [2018] eKLR.
30. The court having carefully reviewed the lower court file, grounds of appeal, written submissions, and the law. Isolates the following issues for its determination:-
 - i. If the appellant proved her claim for removing the restriction placed on 15.5.2007.
 - ii. If the trial court had jurisdiction to entertain the appellant's dispute.
 - iii. If the 1st respondent was justified in restricting the appellant's title to the land and the subsequent subdivisions.
 - iv. If the 2nd respondent could claim her deceased husband's estate to the extent of restricting the title.
 - v. If the claim by the 2nd & 4th respondents was statute barred.
 - vi. If the claim by the 4th respondent was paid for and, therefore, properly before the court.
 - vii. If the 4th respondent could sustain her defense and counterclaim and obtain a decree without amending the counterclaim given the admitted death of the 2nd respondent on March 2021.
 - viii. If the 3rd respondent had proved her counterclaim to the required standard.



31. It is trite law that pleadings bind parties, and issues flow from them. See *Mutinda Mule vs. IEBC* (2014) eKLR. In this appeal, the primary pleadings before the trial court were the plaint dated 19.8.2015, the 1st & 3rd respondents' defense dated 15.9.2015, the 2nd respondent's defense dated 21.9.2015 later on amended to incorporate a 4th respondents defense, and a counterclaim dated 13.9.2018 as well as the replies to defense and defense to counterclaim dated 12.10.2015 and 24.2.2020, respectively.
32. The appellant had pleaded that under a confirmed grant of letters of administration issued on 10.11.1994 in Nairobi High Court No.333 of 1996, she became the registered owner of L.R. No. Ntima/Ntakira/534, which she caused to be portioned in favor of herself and the late Saleh Mugwika in shares 121/156 and 35/156, but which the respondents unlawfully placed a restriction on 15.5.2022, on the strength of letters dated 15.5.2007.
33. The appellant had averred that the respondents had no legal justification for placing the caution, as per the official search alleging a family dispute. The appellant had averred that the suit land was jointly owned by the late Saleh Mugwika and Silas Mugambi Mwirichia, as per a title deed produced as P. Exh No. 2, following a sale as per P. Exh No. (1) as per the defined share. She averred that the two registered owners passed on before the land was partitioned, even though the two had lodged documents with the defunct Municipal Council of Meru as per P. Exh Nos. 3, 4, 5 & 6. She said that attempts or efforts to request the 2nd respondent to apply for the letters of administration and consent for the partition were fruitless, until the land registrar gave her to go ahead and applied for the same, which was effected but afterward restricted by the 2nd respondent.
34. In defense, the 2nd respondent termed the sale agreement, registrations, subdivisions, transfers, and subsequent subdivisions tainted with fraud, irregularities, illegalities, and fraud.
35. The power to effect a restriction is bestowed upon a land registrar under Sections 71-78 of the [Land Registration Act](#) to prevent fraud or improper dealing or for any sufficient cause after directing such inquiries to be made and notices to be served and hearing of such persons as he thinks fit. A restriction may be for a particular period, event, or until making of a further order. The land registrar must notify the parties affected in writing of a restriction or caution.
36. In this appeal, the statement of defense by the 1st & 3rd respondents did not answer whether they followed the law and gave the appellant a fair hearing before and after restricting the suit land. The 1st & 3rd respondents failed to appear before the trial court to support their pleadings by way of evidence to justify the caution. Without evidence, the pleadings by the 1st and 3rd respondents remained mere words. The basis of the family dispute alleged in the restriction was not substantiated. The land registrar owed an explanation to both the appellant and the trial court why it gave an open restriction contrary to the laws of natural justice. When the appellant moved to court, the respondents were duty-bound to substantiate and provide a justifiable reason or basis for restricting the suit properties for over 12 years. See *Mary Wanjiku vs Muranga County Government* (2011) eKLR, *Michael Njiru Kariuki vs Ferdinard Waititu* (2021) eKLR.
37. The appellant was justified in filing the suit after giving statutory notice to the respondents as per P. Exh No's 13, 14, 15, 16 & 17. Filing a restriction and not moving an inch violated the appellant's constitutional and statutory rights. The defense by the 2nd and 4th respondents was that the 1st & 3rd respondents were justified to do so. The 1st & 3rd respondents should have shown the justification and basis by producing whatever the 2nd & 4th respondents' had presented to them to justify the restriction. Due to the inaction by the land registrar, the trial court's jurisdiction had properly been invoked by the appellant. See *Nicholas Njeru v A.G. & others* [2013] eKLR and *Tabitha Njoki Kagano v Jacob Kinua Kagano & another* [2022] eKLR.



38. The title deed before the trial court showed that the joint proprietorship occurred during the lifetime of the joint owners. The two were said to have died in 1983 and 1993, respectively. The appellant averred that the respective shares had been duly defined in the title deed. On the other hand, the 2nd & 4th respondents alleged fraud and illegality in not only the sale agreement and the original title deed but also the resultant subdivisions, registration, and transfers. It is trite law that fraud must be pleaded and specifically proved. See *Arthi Highway Developers vs West End Butchery Ltd & 6 others* [2015] eKLR, *Vijay Morjaria v Nansigh Madhusing Darbar & another* [2000] eKLR.
39. In this appeal, the sale agreement was made in 1975. In cross-examination, PW 1 was not put to task for any fraudulent procurement of the sale agreement. The signatures appended therein were not subjected to any forensic investigation. No letters were produced to show that any complaints had been made to the land registrar in 1984, since 1977, raising any irregularities towards the registration and issuance of title in the joint names of the proprietors. No evidence was tendered to show that P. Exh No's. 1 – 16 were forgeries, illegally obtained, or procured.
40. Section 101 of the Registered *Land Act* was complied with in issuing the title deed in 1977. Sections 102 & 103 of the Registered *Land Act* (repealed) provided that on the death of a joint proprietor, his interest shall vest jointly in the surviving proprietor or to the surviving proprietors. Sub Section Rule (3) provided that a joint proprietor, not a trustee, could execute an instruction in the prescribed form signifying that they had agreed to sever the joint proprietorship.
41. In this appeal, the record from the title deed indicated ownership was in common with defined shares. In such a case, once one proprietor died, his share did not vest in the surviving proprietor but in his estate. See *Moses Bill v Kericho District Land Registrar & another* [2015] eKLR.
42. In *Isabel Chelangat v Samuel Tiro Rotich & others* [2018] eKLR, the court observed that tenants in common arose where two or more holders of the land in equal undivided but distinct share in the property, which is not yet divided among co-tenants. The court said that unlike in joint tenancy, where there was a doctrine of survivorship, the share of one tenant was not affected by the death of one of the co-owners and devolved not to the other co-owners but to the estate of the deceased co-owner.
43. In this appeal, the 2nd respondent failed to produce any letters of administration for the estate of her deceased husband, who was a co-tenant over the suit land when she allegedly registered the restriction. It was only obtained by the 4th respondent on 26.10.2015 under High Court Meru Misc Succession Application No. 308 of 2015.
44. So, if there were no such letters of grant by 2003, on what capacity and basis did the 1st & 3rd respondents restrict the land? The 2nd respondent had no basis in law to claim the alleged property of her deceased husband in the absence of letters of administration. Similarly, any pleadings in her defense dated 21.9.2015 and subsequently amended on 12.9.2018 remained hollow, lacking basis, and unsubstantiated. See *Beatrice Kuri Francis vs Susan Gatiria M'Mukira & 4 others; Eco Bank Ltd (Applicant)* (2021) eKLR.
45. The next issue is whether the 2nd and 4th respondents paid fees for the five prayers in the amended defense and counterclaim. Each of the prayers attracted Kshs.15,000. What was charged was Kshs.6,050/=, which is short of Kshs.1,500/=. Therefore, there was non-payment of statutory fees.
46. The next issue is whether the claim by the 2nd & 4th respondents was statute barred. Already the court has found that the 2nd respondent had no locus standi to advance the interests of the estate of the late Swaleh Mugwika. As of 1975, the 4th respondent admitted that she knew both the sale agreement and the existence of the title deed in the names of the late Swaleh Mugwika and Silas Mugambi Mwirichia.



The restriction was placed in 2002. The counterclaim was filed on 14.9.2018. Time in a claim based on fraud starts to run upon discovery of the fraud under Section 26 of the Limitations of Actions Act. Leave was not sought in 2015 when the 2nd respondent raised the claim, and in September 2018, when the amended defense and counterclaim were filed, 12 years had expired from 1977 and 2002, when the lawsuit was filed in 2015 and 2019.

47. In *Mary Osundwa v Nzoia Sugar Co. Ltd* [2002] eKLR, the court held that Sections 27 of the [Land Adjudication Act](#) did not give jurisdiction to extend the time for filing a suit in cases based on contract or any other cause of action other than those in tort. See also *Nzoia Sugar Co. Ltd v KPA* [1990] eKLR, *Alba Petroleum Ltd or Total Marketing (K) Ltd* [2019] eKLR.
48. In *Gathoni vs KCC* (supra), the court held that the law of limitation of action was intended to protect the defendant against unreasonable delay in bringing suit against him and that the statute expected intending plaintiffs to exercise reasonable diligence and take appropriate steps in its interests.
49. In *Pius Mbogo Oduma v Brian Ochieng Owino and others* [2022], eKLR cited with approval *Edward Moonge Lengusuranga v James Lenaiyara and another* [2019] eKLR on a cause of action as a set of facts sufficient to justify a right to sue and obtain property or enforcement of a right against a party.
50. The 2nd - 4th respondents' cause of action was based on fraud discovered in 1975 or 1977, when the appellant took vacant possession, and the title deed was issued. The deceased father or husband did not complain against the tenant in common and the land registrar, who had given the title deed until he passed on in 1983. The 2nd and 4th respondents did not obtain the letters of administration to recover the land until 2015, yet they knew the facts that the appellant was taking claim on the land based on the sale agreement and the title deed.
51. In my view, the claim was stale by the time the amended defense and counterclaim were filed. The 2nd and 4th respondents did not object to the exhibits the appellant used to justify ownership of the suit land. The evidence of PW 5 did not help the 2nd and 4th respondents in any way since PW 5 did not disown any of the exhibits, which had been authored and registered by her land officers, who approved and issued the title deeds and subdivision in favor of the appellant. The 2nd and 3rd respondents failed to substantiate their claim to the required standard.
52. The upshot is that I find the trial court's judgment unsupported by the pleadings, evidence, and the law. The same is set aside. The appellant's claim is allowed while the 4th respondent's defense and counterclaim, as well as that of the 1st and 3rd respondents, are dismissed with costs. Costs of the appeal to the appellant.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 19TH DAY OF JULY 2023

In presence of

C.A John Paul

HON. CK NZILI

ELC JUDGE

