



REPUBLIC OF KENYA



**KENYA LAW**  
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**Rapemo v Ogile (Environment and Land Appeal E057 of 2022)  
[2025] KEELC 3347 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3347 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E057 OF 2022**

**FO NYAGAKA, J**

**APRIL 3, 2025**

**BETWEEN**

**DANIEL OWUOR RAPEMO ..... APPELLANT**

**AND**

**ELINA ALUOCH OGILE ..... RESPONDENT**

*(Being an appeal from the judgment of the Principal Magistrate, Homabay Hon. Mark Olando (PM) delivered on the 14th September, 2021 in Homabay Civil Case 66 of 2019)*

**JUDGMENT**

**Introduction**

1. This is an appeal arising from the ruling of Honourable Mark Olando Principal Magistrate, delivered on 14<sup>th</sup> September, 2021 in Homabay Civil Case No. 66 of 2019.
2. The Appellant filed a Memorandum of Appeal dated 16<sup>th</sup> September, 2021 appealing against the said judgment on the following grounds: -
  1. That the Learned Trial Magistrate erred in Law and/or in fact by ignoring the Appellants evidence and treating it superficially.
  2. That the Learned Trial Magistrate erred in fact and in law in finding and holding that the Appellant herein had not proved and/or established his case against the Respondent herein and thus warranting judgment in her apparent favour, notwithstanding the evident and contradictions between the pleadings and the evidence on record.
  3. That in finding and holding that the Appellant had failed to prove that the Respondent had capacity to sell the suit land, the Learned trial Magistrate, failed to appreciate that the Respondent was a co-registered owner with the other two deceased persons hence had all the legal capacity to sell her portion of the land.



4. That the Learned Trial Magistrate erred in Law & in fact in finding and holding that the agreement relied upon by the Appellant was void whereas the Respondent at the time she entered into the agreement to sale, she was a registered owner of a portion of the said land hence had all the capacity to affix her thumb print and/or signature on the said agreement as a vendor.
  5. That the Learned Trial Magistrate erred in Law and in fact in ignoring the provisions of section 4(1) (a) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya and the fact that the cause of action which was breach of the contract started when the defendant concluded the succession process and refused to transfer the land pursuant to clause 5 of the agreement for sale entered between the parties.
  6. That the Learned Trial Magistrate erred in law and fact in that he disregarded the Appellant's submissions 4 and judicial authorities with the resultant miscarriage of justice to the appellant.
  7. That the Learned Trial Magistrate erred in Law and fact by failing to evaluate the entire evidence on record and make a finding that the Appellant had proved his case against the Respondent on a balance of probability and thereby arrived on wrong findings on the issues before the court.
3. The Appellant seeks orders allowing the appeal and setting aside the trial magistrate's judgment dated 14<sup>th</sup> September, 2021. He also prays for costs of the present appeal and that of the subordinate court.

#### **Brief Facts**

4. The Appellant had filed in the trial court a suit against the Respondent vide a Complaint dated 27<sup>th</sup> June, 2017 seeking specific performance of the contract that the Respondent does transfer to him Kanyada/Kanyabala/2248 the suit land together with costs of the suit.
5. The Respondent denied the allegations in the Complaint vide her statement of Defence dated 1<sup>st</sup> August, 2019.
6. The trial magistrate in his judgment dated 14<sup>th</sup> September, 2021 dismissed the Appellant's case having found that the suit was time barred thus the Appellant had not proved his case on a balance of probabilities.
7. The Appellant being dissatisfied with the judgment filed the present appeal which was canvassed by way of written submissions.

#### **Submissions**

8. Counsel for the Appellant file his submissions dated 25<sup>th</sup> November, 2024 where he identified two issues for determination. The first issue was whether the Respondent unlawfully dealt with and/or had capacity to deal with the suit property. It was counsel's submission that it was not in dispute that at the time both the Appellant and Respondent entered into the agreement for sale, the suit land was registered in the Respondent's name and two others as joint owners and were deceased. He relied on Section 49 and 91(4) of the *Land Act* and Section 60 of the *Land Registration Act*. Counsel also relied on the cases of *Isabel Chelangat V Samuel Tiro Rotich & 5 Others* [2012] eKLR and *Julius Omondi Odeny & Another V John Obanga & 4 Others* [2022] eKLR that explained the difference between joint tenancy and tenancy in common. It was his submission that upon the demise of the other two deceased persons that were jointly registered with the Respondent, the property solely devolved upon the Respondent as the sole proprietor. He added that Section 60 of the *Land Registration Act* does not require a joint tenant to obtain grant of letters of administration of the estate of a deceased joint tenant



before he can deal with such property. He submits that the Respondent after selling the land to the Appellant in 2012, commenced the succession process of the two deceased which was not necessary. He added that after completion of the same, refused to transfer the same to the Appellant. He cited the case in *Re Estate of Johnson Njogu Gichohi (Deceased)* [2018] eKLR that cited the case of *Diana Muchiri V Lydia Warirara Njenga & Another* [2021] eKLR.

9. The second issue was whether the Respondent is in breach of the sale agreement dated 15/11/2012 and whether the same is enforceable. He relied on Section 3(3) of the Law of Contract and Section 97 of the *Evidence Act* and submits that the sale agreement dated 15<sup>th</sup> November, 2012 adhered to the provisions of the said sections. He argues that the Appellant paid to the Respondent the sum of Kshs. 200,000 and the remaining balance to be paid after the title had been transferred in his favour. He added that the Respondent declined to transfer the title to the Appellant. He relied on the case of *Alghussein Establishment V Elton College* (1991) 1 ALL ER PP267. He urged the court to allow the appeal.
10. Counsel for the Respondent, on the other hand, filed his submissions dated 15<sup>th</sup> November, 2024 and identified one issue for determination being whether the Appellant's appeal has merit. While submitting in the negative, he relied on the case in *Civil Appeal No. 68 of 2019 Jordan Properties Ltd V Margaret Njoki Migwi*. He argues that at the time of the alleged contract, the said parcel was co-registered in three people wherefore the two deceased at the time of contract. He further submits that by that time, succession had been conducted over the estate of the deceased persons and as such no one including the Respondent had the capacity to transact anything over the two deceased's estate. He relied on Section 45 and 82 (b) (i) of the Succession Act which provided for intermeddling of the deceased's estate. It was counsel's submissions that the contract the Appellant seeks the court to enforce was illegal and unenforceable. He urged the court to dismiss the appeal with costs for lack of merit.

### **Analysis and Determination**

11. Upon consideration of the grounds of appeal, pleadings, submissions and the authorities cited, the following issues are for determination:
  1. Whether the appeal is merited.
  2. Who should bear the cost of the appeal.
12. Being a first appeal, the court relies on a number of principles as set out in *Selle and another V Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”
13. Further, in the case of *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] KECA 208 (KLR) the court held that:

“This being a first appeal, this court's mandate is to re-evaluate, re-assess and re-analyze the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect.”



14. In the case of *Alice Chemutai Too V Nickson Kipkurui Korir & 2 others* [2015] KEELC 151 (KLR) the court held as follows:

“...The deceased herein died in the year 1987. It has not been shown how the 1st respondent had himself registered as proprietor of the suit property 25 years after the death of the previous registered owner. No succession proceedings have ever been filed in respect of the estate of the deceased and it follows that the estate of the deceased has not been distributed. I do not think it necessary to belabour the point that the title of the 1st respondent was improperly acquired.”

15. This Court has considered the evidence of the parties deeply and carefully. The issue is whether or not the court could grant relief of specific performance over the transaction between the parties. The Plaintiff testified that he and the seller entered into an agreement for the purchase of the suit land.

16. It is this court’s view that the genesis of the present appeal was the sale agreement dated 15<sup>th</sup> November, 2012 by which the Appellant allegedly purchased the suit land from the Respondent. During cross examination, he confirmed that there was no agreement that he was to wait for completion of the succession process for the deceased persons.

17. I have keenly perused the sale agreement and it is not in contention that the suit land was registered in the names of the Appellant, Joseph Ogile Ulu (deceased) and Romannus Omuto Ogile (deceased). This evidence contradicted the express provisions of Clause 1 of the Sale Agreement, PExhibit 1, dated 15<sup>th</sup> November, 2012. In the Clause it stated “SUBJECT: A complete transfer of all that parcel of land registered in the name of the vendor, Josph Ogile Ulu (deceased) and Romanus Omuto Ogile (deceased) as land parcel No. Kanyada/Kanyabala/2248...” It is clear from the agreement that the land was registered in the names of the two persons. It is not clear why, if indeed the land was registered in the names of the three persons, namely, the Respondent and the two deceased individuals, why the Appellant did not produce a copy of the time and an extract of title to the same. The purported copy of the official search, referred to as PExhibit 2, was neither produced in the original file nor annexed in the Record of Appeal as an Exhibit. It was not even filed with the original List of Documents which the Plaintiff now appellant was to rely on. It means, to this Court, that indeed the appellant has everything to hide about the joint ownership of the land, right from the beginning of his case to the end thereof.

18. Having carefully considered the evidence of the Plaintiff, I find that the contention that the land was a jointly owned property is mere inadmissible hearsay which should be ignored and dismissed. That said, it is clear to me that all the Appellant’s submissions about joint ownership of the suit land is irrelevant. Much as I agree with them regarding the law on joint ownership of a property and how it devolves to the surviving joint owner(s) it is my humble view that the instant case is not one of those one. The submissions on that point of law are therefore irrelevant.

19. Again, the Respondent stated that she had entered into an agreement on 18<sup>th</sup> January, 2012 for the sale of the suit land with one Benson Oumo Otieno and not the Appellant. But her evidence was not supported by any document. However, that is neither here nor there since the issue is proof of the Plaintiff’s claim. It was not upon the Defendant to prove that she sold the land to another party other than the Plaintiff.

20. Section 45 of the *Law of Succession Act* provides as follows:

1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.



2. Any person who contravenes the provisions of this section shall—
  - a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
  - b. be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”
21. From the above, it is this court’s view that the seller did not have the capacity to sell the suit land to the Appellant. Capacity, in the law of contract, is so important an ingredient that without it a contract cannot be valid. In relation to land, one can only have capacity to deal with it if he/she is the owner or has been duly authorized by law, for example, an auctioneer acting on behalf of the charge, among other legal instances. It is a fact that there was no evidence that the Respondent acted on behalf of the two other deceased vendors as rightly found by the trial magistrate.
22. In the case of *M’Rukunga v Nkina* ((Sued as the legal representative of Kaburo Kiara)) [2023] KEELC 421 (KLR) the court held that:

“Without a grant, the defendant herein cannot purport to represent the registered owner, no matter the family relationship which subsisted prior to her death.”
23. It is trite law that the property of a deceased person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the law. The said authority emanates from a grant of representation, which the seller did not produce during the sale, or will in case the person died testate or probate confirming the will. It cannot be gainsaid that the vendor sold the suit property estate without the deceased’s authority and is thus guilty of intermeddling. It is this court’s view that the sale agreement was an illegality because the seller had no capacity to deal with the estate of the deceased persons because the estate was yet to be succeeded and administered. I therefore find that the sale of the suit land on 15<sup>th</sup> November, 2012 was illegal null and void and no interest whatsoever was conveyed by the Respondent to the Appellant.
24. Lastly, even if the Respondent could have had capacity to sell the land, the law on Limitation of Actions catches up with the Appellant’s claim over the agreement. From PExhibit 1 the agreement was entered into on 15<sup>th</sup> November 2012. This suit was instituted on 2<sup>nd</sup> July 2019. It means it was instituted after six (6) years and eight (8) months. The Plaintiff seeks enforcement of the contract for breach and seeks specific performance thereof.
25. Section 4(1)(a) of the *Limitation of Actions Act* provides as follows:

“The following actions may not be brought after the end of six years from the date on which the cause of action accrued— (a) actions founded on contract;”
26. Assuming that the Agreement dated 15/11/2012 could have been valid, which this Court has found not, the Appellant could only rightly sue under it before the end of six years. No evidence was led that the agreement was breached nine months into it. In any event, going by the provisions the parties made themselves under Clause 8 about the Vendor obtaining a Land Control Board Consent, it follows that Section 8 of the *Land Control Act*, Chapter 301 of the Laws of Kenya which provides for consent to be obtained within six (6) months of the agreement was breached. It means the agreement, even if it could be valid, was breached by the end of six months. Going by that, the Appellant ought to have sued



under it by the 15<sup>th</sup> May, 2019, although the period of six years from the time of agreement should have been before 15<sup>th</sup> November 2018. The agreement may not have been breached the same date it was made so as to entitle a claim to flow from then to 14<sup>th</sup> November, 2018 but it certainly was breached by the end of six months of being made. This was a jurisdictional issue that operated against the Plaintiff now Appellant and does to date. The claim was stale and should be let to rest at that.

27. The Court of Appeal, in *Anaclet Kalia Musau v Attorney General & 2 Others* [2020] eKLR, held as follows;

“The solitary issue in this appeal is, whether the suit before the High Court was statutorily time barred. To demonstrate that time limitation is a jurisdictional question and that if a matter is statute-barred a court has no jurisdiction to entertain it, we cite the decision of the Supreme Court in the case of *Nasra Ibrahim Ibren V. Independent Electoral and Boundaries Commission & 2 others*, Supreme Court Petition No. 19 of 2018, where that court stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue suo motu. It said:

“40 A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in *Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B”* [2008] 1 EA 367 stated thus:

“25. What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...” (Emphasis supplied).

We fortify that view by quoting yet another passage from the East African Court of Appeal in the matter of *Iga V. Makerere University* (1972) E.A 62, where it was stated that;

“The limitation Act does not extinguish 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 or relief.....

The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the pleadings, and no grounds of exemption are shown in the pleadings, the suit must be rejected. (Our emphasis).”

28. It was apparent from the Plaintiff's pleadings that the contract was entered into on 15/11/2012. The suit instituted on 2<sup>nd</sup> July 2019. A judicial officer just like a judge is endowed with wisdom and intellect to enable him to be alert and keen so as not to let anything that goes against the interests of justice to sieve into his/her decision. It matters not whether it has been raised by the adverse party or not. It is simply a matter of doing the right thing as a temple and guardian of justice for him/her to point such an issue out and make a determination thereof. Thus, the Appellant having not sued within six years of the breach put himself outside of the legal limits of justice hence the suit was time barred in the first place and should have been dismissed on that account. Be that as it may, I have already found that the agreement was not valid but rather null and void. These two critical findings above work against the success of this appeal.

29. The upshot of the foregoing is that the appeal lacks merit and the same is hereby dismissed with costs to the Respondent.



30. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 3<sup>RD</sup> DAY  
OF APRIL, 2025.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE**

