



Masogo (Suing as the Administrator and Personal Representative of the Estate of Domnick Masogo Umayya) v Adundo & another (Environment and Land Appeal E024 of 2024) [2025] KEELC 4118 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEELC 4118 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAAYA
ENVIRONMENT AND LAND APPEAL E024 OF 2024**

AE DENA, J

MAY 29, 2025

BETWEEN

SABINA AKINYI MASOGO (SUING AS THE ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF DOMNICK MASOGO U MAYA) APPELLANT

AND

JOSEPH AWALA ADUNDO 1ST RESPONDENT

DISTRICT LAND REGISTRAR 2ND RESPONDENT

JUDGMENT

1. This judgement arises from the determination of Hon J.P.Nandi in Bondo ELC Case No. E43 of 2023. The Appellant Sabina Akinyi Masogo was the plaintiff in the said matter. The suit in the lower court revolved around the ownership of parcel Number South Sakwa/Bar Kowino/2805 (suit property) registered in the name of Joseph Agola Adundo the 1st Respondent.
2. The suit property was said to have been owned by the Appellants late husband Domnick Masogo Umayya. It was averred that when the appellant wanted to undertake succession in respect of the deceased she discovered the suit property had already been transferred in the name of the 1st Respondent without her knowledge and consent. It is averred that the 1st respondent in collusion with the 2nd respondent caused himself to be registered as owner of the suit property illegally, unprocedurally and fraudulently. The appellant is said to be in occupation of the suit property.
3. The respondent wanted the lower court to order the land registrar to rectify the records and have the land parcel number South Sakwa/Bar Kowino/2805 registered in her name and eviction of therefrom since she was the rightful beneficiary to the estate of the deceased.



4. The 1st respondent denied the appellants claim. By way of defence dated 8/9/2023 he pleaded that Domnick Masogo was the registered owner of the suit property until he transferred the same to the 1st respondent in the year 1988. All the allegations raised against the 1st respondent were denied and the appellant was put to strict proof thereof. It was averred that the transfer transaction between the 1st respondent and Domnick Masogo Umayya happened long before the plaintiff was married to the said deceased. That the purported occupation of the suit property by the appellant was false as it is the 1st defendant who built the premises thereon and was collecting rent. That out of goodwill arising from the relationship between the deceased and the 1st defendant, he gave part of the premises to the plaintiff to collect rent to assist her in paying school fees.
5. During the hearing both parties testified on their behalf and did not call additional witnesses. The 2nd defendant did not enter appearance. After considering the evidence and submissions of the parties the trial court found that the suit was not tenable as it was filed outside the limitation period of 3 years. Further that the appellant had failed to prove her case on balance of probabilities.
6. Ultimately, the suit was determined in favour of the respondent the suit being dismissed with costs to the respondent. The outcome of the judgment is what gave rise to this appeal.
7. The Memorandum of Appeal dated 24/07/2024 raises five (5) grounds, which are as follows:
 1. The learned magistrate completely misunderstood the evidence before him, wrongly analysed the evidence and therefore came to wrong conclusions of fact and law.
 2. The learned magistrate erred in law and in fact dismissing the suit herein for being filed out of time without taking into consideration that it had no jurisdiction to dismiss the suit if was time barred and he could only struck it out.
 3. The learned magistrate erred in fact and in law in finding that the suit herein was not tenable in law since the same was filed four years after discovery of fraud without taking into consideration that an action to recover land should be filed within a period of 12 years
 4. The learned magistrate erred in fact and in law by failing to take into consideration the evidence of the appellant that the respondent obtained the suit parcel of land through fraud and the respondent on their part failed to prove to court on how they acquired the said parcel of land.
 5. The learned judge totally misunderstood and wrongly evaluated the evidence before her and therefore arrived at the wrong conclusion.
8. The appellant urges this Honourable Court as follows;-
 - a. That this appeal be allowed
 - b. That the court be pleased to reassess and re appreciate the evidence afresh and to arrive at independent conclusion
 - c. The appellant be awarded the costs of this appeal

Submissions

9. The appeal was canvassed by way of written submissions. The appellant submissions are dated 30/01/2025 and the respondents 4/02/2025.



Appellants Submissions

10. On the issue of limitation, it is submitted that section 7 of the [Limitation of Actions Act](#) provides an action to recover land may not be brought after 12 years from the date the right accrued. The fraud was discovered in 2019 which is only 4 years from the time the present suit was filed. Reliance was placed in the case of *Justus Tureti Obara v Peter Koipetai* [2014] eKLR..
11. On whether the 1st respondent illegally obtained the suit property it is submitted that the 1st respondent's failure to produce any evidence on how they acquired the suit property leads to the fact that the 1st respondent colluded with the 2nd respondent to fraudulently, irregularly, illegally to transfer the land to the 1st respondent. Consequently, the title cannot be protected under article 40 of [the Constitution](#). That it did not confer upon the 1st respondent absolute indefeasible title under section 26(1) of the [Land Registration Act](#). The court is urged to dismiss the appeal and evaluate the evidence afresh.

Respondents Submissions

12. On whether the appellant proved fraud against the 1st respondent to the required standard of proof it is submitted that no evidence was produced to demonstrate a report was made in respect of the alleged fraud and no criminal action was ever instituted against the 1st respondent. Mere allegations do not suffice. That the 1st respondent was gifted the land and proper procedure followed in the transfer. That the appellant was married to the late Masogo in the late 1990's long after the transfer to the 1st respondent. There was no watertight evidence upon which the court would make a finding of fraud. Reliance is placed on the case of *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR.
13. It is contended that the certificate of title in the name of the 1st defendant should be taken as prima facie evidence of his proprietorship pursuant to section 26 of the [Land Registration Act](#). The respondent urges that the according to section 26 of the [Limitation of Actions Act](#) the trial court correctly found the proceedings herein were filed on 21/7/2024 which period was beyond 3 years from the date the fraud was discovered.

Analysis And Determination

14. The court has considered the appeal as filed, the lower court record, and the rival arguments by both sides in support of their cases.
15. The duty of an appellate court is stipulated under Section 78 of the [Civil Procedure Act](#) which states as follows

“Subject to such conditions and limitations as may be prescribed, an appellate court shall have power;

- (a) to determine a case finally;
- (b) to remand a case;
- c. to frame issues and refer them for trial;
- d. to take additional evidence or to require the evidence to be taken;
- e. to order a new trial.



(2,) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

16. Being a first appeal, I will also be guided by the Court of Appeal dictum in the case of *Selle v Associated Motor Boat Co.* (EA.123) that I need not be bound by the findings of the trial court. That the 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.
17. In the case of *Peter M. Kariuki v Attorney General* [2014] eKLR, the Court of Appeal reiterated on the duty of the appellate court as follows:

“We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence”.
18. The appellant has raised five (5) grounds of appeal. However, I am of the view that there are three issues that will best dispense with this appeal which are:
 1. Whether the trial magistrate erred in finding that the suit was time barred
 2. Whether the transfer of the suit property to the 1st respondent is unlawful and fraudulent
 3. Whether the trial magistrate considered the evidence and material on record in determination of the case.

Whether the trial magistrate erred in finding that the suit was time barred

19. In its judgement the trial court identified the 3rd issue of determination as whether the plaintiff suit is statute barred. This appears to have been an issue that the court raised on its own motion as it does not appear to have been raised by the defendant neither does it feature in the submissions filed in the trial court. it was desirable that parties ought to have been invited to submit on the point.
20. The above notwithstanding a finding was made that the suit was not tenable. The trial court referring to section 4 of the Limitations of Actions Act (herein the Act) set out and rightly so the Limitation period for contracts as 6 years and actions founded on tort as 3 years. I do not see the need to rehash the provisions.
21. The trial court relying on the definition of course of action as being the legal theory upon which a plaintiff brings a suit and referring to paragraph 7 of the plaint identified the cause of action as fraud. The court further referred to the provisions of section 26 of the Limitations of Actions Act stipulating that in cases of fraud time starts running at the point when the fraud is discovered. The trial court noted that the same was discovered in 2019 and therefore the plaintiff ought to have instituted a claim by the year 2022 as provided under section 4(1) of the Act.
22. But I think from the outset the trial court erred in going back to the provisions of section 4(1). I say so firstly because the trial court clearly stated the court needed to establish if the plaintiff could seek refuge in section 26 of the Act. Section 26 provides that the limitation period for a claim based on fraud does not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it. The import of Section 26 of the Act is that it extends the limitation period in cases



involving fraud. This means the general limitation periods, such as the three-year period for tort claims or the six-year period for contract claims, do not apply until the fraud is discovered or could have been discovered with reasonable diligence.

23. I must add that the plaintiffs ultimate claim is to recover the land from the 1st respondent which is alleged to have been obtained fraudulently. According to the prayers the plaintiff wanted the lower court to order the land registrar to rectify the records and have land parcel number South Sakwa/Bar Kowino/2805 registered in her name and eviction therefrom since she was the rightful beneficiary to the estate of the deceased.
24. In the case of *Obonyo & 3 others v Odhiambo & 2 others* (Environment & Land Case E023 of 2022) [2024] KEELC 5682 (KLR) (24 July 2024) (Ruling) Okongo J persuasively stated

“I agree with the 1st Defendant that her claim is a claim for the recovery of the suit properties rather than a claim based on tort. The fact that the 1st Defendant has pleaded fraud against the Plaintiffs does not make her claim a claim in tort. As correctly submitted by the 1st Defendant, the Limitation period for claims for recovery of land is 12 years. Section 26 of the *Limitation of Actions Act* provides that where the claim is based on fraud or mistake the limitation period does not run until the fraud or mistake is discovered.” Emphasis is mine.
25. The question that therefore should arise in my view is what is the limitation period for the recovery of land. This is the period that would be the baseline for purposes of computation of time. The answer has been given in the above dictum and is grounded on the provisions Section 7 of the *Limitation of Actions Act* which provides as follows; -

‘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.’
26. The fraud was discovered in the year 2019 as rightly stated by the trial court and which is the year time started running for purposes of limitation. The other applicable indicator would be the date of the filing of this suit. The plaintiff’s suit was filed on 23/07/2023 vide a plaint dated 21/7/2023. It therefore took 4 years from the time the fraud was discovered for the plaintiff to commence the proceedings for recovery in the trial court. Clearly the suit was not time barred and I agree with the appellant in this regard.
27. It is the finding of this court that the suit is not time barred and the trial court erred in finding it was time barred.

Whether the transfer of the suit property to the 1st respondent is unlawful and fraudulent

28. I will now review the evidence led before the trial court, the analysis thereof that led to the determination that the plaintiff appellant had failed to prove fraud to the required standard. In other words did the plaintiff manage to prove the allegations that the suit property was unlawfully and fraudulently transferred to the 1st respondent.
29. The court notes that the learned Magistrate reviewed caselaw on the burden of proof for fraud which it is trite the same is slightly higher than the normal civil cases one of a balance of probability. That fraud must be specifically pleaded particularized and proved to that standard. The cases cited were *Vijay Morjaria v Nansing Madhisingh Darbar & Others* [2000]eKLR, *Koinange & 13 Others v Charles Kauga Koinange* [1986]KLR and *Kinyanjui Kamau v George Kamau* [2015]eKLR. The trial court then concluded the burden of proof to prove that the title herein was procured fraudulently as alleged



was on the plaintiff. I agree with the trial court on this point which echoes the provisions of section 107 of the *Evidence Act* highlighted elsewhere in this judgement.

30. Having laid out the above the next step was to identify the particulars of fraud pleaded and review them against the evidence led before the court. The particulars are given at paragraph 7 of the plaint. The trial court observed that the same were lumped together and it is not clear which particular fraud each defendant committed. This observation is correct but I note it did not deter the trial court from proceeding with its analysis.

31. I find it necessary at this point to rehash the contents of paragraph 7 of the plaint; -

“The Plaintiff avers that through a well-orchestrated illegal scheme, the 1st Defendant on about 15th of August 1988 illegally, unprocedurally and fraudulently caused the transfer of land parcel number South Sakwa/Bar Kowino/2805 into his name in collusion with the 2nd defendant.

Particulars Of Illegality, Fraud And Collusion

I. Illegally acquiring the Plaintiffs interest in the suit parcel of land without his consent

II. Authorizing transfer without the consent of the lands Control Board

III. Making illegal entries in the land register

IV. Illegally transferring the said parcel of land to the 1st Defendant without following due process of the law

32. The trial court dealing with the allegation that the 1st defendant transferred the suit property into his name without the plaintiffs consent noted that according to the plaintiffs she was informed by the land registry that they suspected there was fraud which was done, which resulted into the impugned transfer. The plaintiff states this is the reason she decided to seek the courts intervention. The trial court pronounced itself thus;-

“Mere suspicion without evidence cannot prove fraud. It was the duty of the plaintiff to lead evidence and produce such documents for the court to prove fraud on the part of the Defendants. There is no letter from the land registrar showing that there was fraud in the transfer of the suit land. The plaintiff has not produced any letter she wrote to the land registrar requesting to be availed with the conveyancing documents in respect of the suit land. No such evidence or documents were produced before court to enable the court deduce fraud or forgery. The Plaintiff must demonstrate that there is fraud and secondly that the 1st defendant is a party to such fraud. It is trite law that the burden of proof lies on the person who alleges fraud. Which burden the plaintiff has not discharged?.”

33. I have looked at the above reasoning vis a vis the law and the evidence. The plaintiff relies on information that she clearly states the land registry told her they ‘suspected’ there was fraud. PW1 wants the court to believe this without more. I took the trouble to look up the definition of the word ‘suspect’. Blacks law Dictionary 11th Edition at page 1747 gives the following definitions

To consider (something) to be probable.

To consider (something possible)

To consider a (person) as having probably committed wrong doing without certain truth.

34. Based on the above I must state the information the plaintiff was allegedly told at the lands office remained hearsay in the absence of proof. It required to be ascertained and this would be by documentation. I agree with the trial court that mere suspicion is not enough for purpose of fraud.



I also reviewed the documents produced as part of the plaintiffs evidence these were copies of Green card dated 2/6/1988, Search dated 15/5/2023, Deceased death certificate dated 19/4/2016, plaintiffs ID Card, Agreement dated 20/11/2018.

35. I asked myself how a letter requesting for documents of conveyancing would have helped the court. Had the documents been supplied the court would have been able to tell the procedure that was followed and determine if there were gaps. An independent investigation report would also have gone a long way to help the court because I do not see how the land registry would be the judge and jury in a matter where they are alleged to have committed a fraud.
36. But what about the issue of failure to obtain the Plaintiff consent? I note that the transfer was effected in 1988. The plaintiff ID card shows the plaintiffs date of birth as 6/06/1980 meaning she was only 8 years old then and had not been married. Assuming it was the husbands consent that was not sought there is no way of telling in the absence of the conveyance documents.
37. It has been urged by the appellant that the 1st defendant did not demonstrate the root of its title. The legal basis for the legal burden of proof is provided in Section 107 of the Evidence Act, Cap. 80 of the Laws of Kenya which states as follows: -
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
38. I hear the appellant to be saying that the burden of proof shifted to the 1st defendant which I respectfully disagree. In the absence of proof the court can only presume that the transfer was lawfully undertaken in the absence of evidence in rebuttal thereof. In this regard I will rely on the case of Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] KECA 27 (KLR) where the Court of Appeal rendered itself thus;-
- 86.‘We note that the 1st to 4th respondents contend that the surrender was unlawful. There is a presumption that all acts done by a public official has lawfully been done and that all procedures have been duly followed. The onus is on the 1st and 4th respondents to prove otherwise. They have failed to do this. A bare allegation that a lawful procedure was not followed is not proof of the allegation. It was open to the 1st to 4th respondents to make an application before the trial court to compel the Commissioner of Lands to produce the original instrument of surrender, the memorial and the endorsement thereon. The 1st to 4th respondents failed to do so.’
- 87.In our view, a party making a claim for a declaration of title must succeed on the strength of his case and not on the weakness of the defence. We are however cognizant that where the defendant’s case supports that of the plaintiff and contains evidence on which the plaintiff may rely, the plaintiff is entitled to rely on and make use of such evidence. In a claim for declaration of title, as the instant case, the onus is on the Petitioners to satisfy the Court on the evidence produced by them that they are entitled to the declaratory orders sought.’
39. Moreover Section 26 of the Land Registration Act, 2012, provides as follows :-
- 26.(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—



- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
40. Arising from the above it follows that when a person has been issued with a Certificate of Title, that title, prima facie, demonstrates that the individual named therein is the proper owner of the freehold or leasehold title noted in the said certificate. The law presumes the title to be a good title and therefore if another person claims that the said title is not genuine, then the burden of proof is upon the person claiming as much. It was incumbent upon the Plaintiff to discharge the evidenciary burden, which she have failed to do. For a court to cancel a title, it must be fully convinced that such title is a bad title that cannot be protected. A court cannot cancel a title on the mere statement it was irregular, without anything more.
41. The upshot of the foregoing is that this court finds that the plaintiff did not prove its case to the required standard. I find no reason to disturb the trial magistrate finding on this issue.
42. This appeal succeeds only to the extent that the court finds the suit is not time barred. But the dispute having been heard on merits and the findings of the court upheld, the appeal stands dismissed.
43. Costs ordinarily follow the event pursuant to section 27 of the *Civil procedure Act* but discretion is also permitted. In *Punchlines Limited v Joseph Mugo Kibaria & 10 others* [2018] eKLR, the Court of Appeal quoting with approval the decision of the High Court in *Party of Independent Candidates of Kenya v Mutula Kilonzo & 2 others*, HC EP No. 6 of 2013, had the following to say on the issue of costs under section 27 of the *Civil Procedure Act*; -“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so.”
44. Considering that the plaintiff is a widow and the need to promote reconciliation each party to bear its own costs of this appeal.

Orders accordingly.

JUDGEMENT DATED SIGNED AND DELIVERED AT SIAYA THIS 29TH DAY OF MAY 2025.

HON. LADY JUSTICE A .E .DENA

JUDGE

29/5/2025

Mr. MC Ouma for the 1st Respondent

Mr. Otieno for the Appellant

No appearance the 2nd Respondent

Mr. Ishmael – Court Assistant

