



Casper (Suing as the Legal Representative of the Estate of Catherine Muthoni Mwangi) v Kahawa Sukari Limited & another (Environment and Land Case E003 of 2025) [2025] KEELC 4942 (KLR) (3 July 2025) (Ruling)

Neutral citation: [2025] KEELC 4942 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND CASE E003 OF 2025**

JM ONYANGO, J

JULY 3, 2025

BETWEEN

PAUL MWANGI CASPER (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CATHERINE MUTHONI MWANGI) PLAINTIFF

AND

KAHAWA SUKARI LIMITED 1ST DEFENDANT

GEOFFREY KIMANI GACHERU 2ND DEFENDANT

RULING

1. By a Notice of Motion dated 26th February 2025, the Plaintiff filed an application seeking a range of prayers, among them being an order that the Honourable court do grant the Plaintiff/Applicant leave to file this suit out of time and extend the time within which the suit should be filed. This ruling is confined to the question of limitation /extension of time as a preliminary issue.
2. The application is premised on the grounds set out in the Notice of Motion and the Applicant's supporting affidavit sworn on 26th February 2025.
3. In the said affidavit the he deposes that he obtained a Limited Grant in respect of the estate of Catherine Muthoni Mwangi (Deceased) who was his mother. He asserts that he has filed the application seeking leave to file this suit out of time in order to safeguard, enforce and protect the constitutional rights violated by the Defendants but also to pursue his case against the Defendants for recovery of the suit land which belongs to the estate of his late mother.
4. It is his contention that upon his visit to Kenya in May 2024, he conducted a search on the suit property which revealed that it was registered in the name of the 2nd defendant. It took him a while to obtain the necessary document and it was not until February 2025 that he was able to sue.



5. He avers that he relocated to Germany in the mid-80s at the age of 5 years and returned to Kenya in 2002 to bury his late mother after which he returned to Germany. He later came back to Kenya in May 2024 to file succession proceedings in respect of his late mother's estate only to discover that the Defendant had transferred the suit property to its name and sold it to the 2nd defendant.
6. The Applicant avers that during his mother's funeral, some of his mother's siblings were staying in the house on the suit property and this gave him the assurance that his mother's property was intact. It was only when he spoke to his uncle at the beginning of 2024 that he discovered that there were deep family divisions between his late mother's siblings relating to property. This became clear when he returned to Kenya in May 2024 as he discovered that the 1st defendant had transferred the suit property to the 2nd defendant. He visited the suit property and found that it had been rented to 5 tenants. After obtaining the necessary documents, he filed this suit.
7. The application was opposed by Geoffrey Kimani Gacheru, the 2nd defendant herein, through his Replying affidavit sworn on 15th April 2025. He averred that he acquired the suit property from one Stephen Mwangi Kamau who had a letter of allotment from the 1st Defendant. They entered into a sale agreement dated 9th April 2011 and after he paid the agreed purchase price he was given vacant possession of the suit property. The 1st Defendant subsequently transferred the land to him on 26th September 2012 and he was issued with a certificate of lease.
8. It is his contention that he purchased the suit property for valuable consideration without any fraud. He adds that the Plaintiff has not demonstrated that he could not have, with reasonable diligence discovered that the 2nd defendant was asserting an interest in the suit property.
9. He points out that the Plaintiff's suit is time barred. He faults the Plaintiff for failing to follow up on his mother's estate before the expiry of the limitation period.
10. Pursuant to the court's directions, the Plaintiff and the 2nd Defendant filed their submissions on the question of limitation.

Plaintiff's Submissions

11. In her submissions dated 14.4.2025 learned counsel for the plaintiff contends that the transaction between the Defendants in respect of the suit property was marred with fraud and illegalities that the same violated the constitutional rights of the estate of Catherine Muthoni Mwangi under Articles 35, 39, 40(1) and 47 of *the Constitution*. She submits that the Plaintiff highlights the acts of fraud against the defendants and that the court has jurisdiction to hear and determine the suit outside the 12 year limitation period pursuant to section 26 o (a) and (b) which provides that time does not begin to run until the fraud has been discovered.
12. She submits that the plaintiff believed that the 1st Defendant had transferred the suit property to his late mother and only discovered the fraud when he came back to Kenya in 2024 to process his late mother's succession proceedings.
13. Counsel placed reliance on the case of Justus Tureti Obara v Peter Koipeitai Nengiosi (2014) eKLR where Justice Okong'o held that time only starts to run when the plaintiff discovers the fraud and that the ascertainment of fraud is a matter to be left for the trial. She also relied on the case of Delilah Ondari v Francis Ondieki (2022)KLR where the court held that it would be prejudicial to the interest of justice not to determine the suit on merit. Further in Mtana Lewa v Kahindi Ngala Mwanghandi (2015) the court held that in the case of fraud or mistake, the period of limitation does not begin to run until the fraud or mistake is discovered.



14. It was counsel's further submission that there is no limitation period in seeking justice on matters relating to violation of constitutional rights. She relied on the case of *Monica Wangu Wamwere & 6 Others v The Attorney General, SC Petitions Nos 26, 34 and 35 of 2019*.

2nd Defendant's Submissions

15. On his part, learned counsel for the 2nd Defendant filed his submissions on 18th June 2025. He submitted that section 26 of the Limitation of Actions Act only applies if a person proves that he could not have, with reasonable diligence discovered the fraud on which he found his action within time or that the Defendant concealed the fraud.
16. He faults the Plaintiff for making vague and general allegations of fraud against the 2nd defendant. Although he concedes that allegations of fraud can only be proved at a full trial he is of the view that the ascertainment of when the fraud was discovered is central to the determination of an application for extension of time because it is the said discovery that sets the time running. He contends that the Plaintiff has not given any satisfactory explanation why he could not have discovered the alleged fraud within time.
17. He is of the opinion that if the plaintiff had acted diligently, he would have discovered the alleged fraud before the expiry of 12 years after the 2nd defendant acquired a beneficial interest in the suit property. He relied on the case of *Wandaka & 2 Others v Elizabeth Wambui Mwangi (Civil Appeal No. 36 of 2019) [2024] KECA 1315 KLR* where the court observed that due diligence means such diligence as a prudent man would exercise in the conduct of his own affairs. He argued that the plaintiff failed to exercise due diligence.
18. On whether the Plaintiff is exempt from statutory limitation by virtue of pleading constitutional violations, counsel, urged the court to find that this was a ruse to evade statutory limitation. He opined that the Plaintiff's claim was a simple claim for recovery of land and the Plaintiff had gratuitously invoked constitutional provisions to shield him from the defence of limitation.
19. He placed reliance on the case of *Gathuiru v Nelson & 5 Others, Ngwaro Interested Party (Civil Appeal 11 of 2029)[2024] KECA956 (26 July 20240 (judgment)* where the Court of Appeal dismissed an appeal arising from a Petition filed in the Environment and Land Court and observed that the Appellant's attempt to cover the petition with a disguised constitutional gown was a red herring as it remained a claim for recovery of land which did not raise an constitutional issue.
20. It was his contention that similarly the Plaintiff's claim did not raise any constitutional issue and the alleged constitutional violations were merely intended to evade the application of section 7 of the *Limitation of Actions Act*.

Analysis and Determination

21. The main issue for determination is whether the Plaintiff's suit is time- barred.
22. It is not in dispute that the cause of action herein relates to recovery of land although the suit is based on fraud.
23. Section 7 of the *Limitation of Actions Act* 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”.



24. The above section makes it clear that a suit for recovery of land must be filed within 12 years. However, Section 26 of the Act stipulates that:

“Where, in the case of an action for which a period of limitation is prescribed, either-

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which-

- (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

25. I have read the decision of *Wandaka & 2 Others v Elizabeth Wambui Mwangi* (supra) and apart from defining what due diligence means it is distinguishable from the facts of this case as it relates to an application to adduce new evidence on appeal. Whereas I agree with the definition of due diligence in the said decision, each case must be determined on its own facts.

26. In the instant case the plaintiff has in his supporting affidavit explained that he left Kenya at the age of 5 years and has been living in Germany. He only returned to Kenya in 2002 to bury his late mother after which he returned to Germany. He has further alleged that he was aware that his late mother had purchased a piece of land from the 1st Defendant and he assumed that they had transferred it to her name since she had taken possession thereof and constructed a house thereon. When he came back to Kenya in 2002, his late mother’s siblings were occupying the said house and he had no reason to suspect that anything was amiss.

27. The Plaintiff only came to realize that things were not right in 2024 when he spoke to his uncle and he realized that there were serious divisions between his mother’s siblings over the suit property. It is at this point that he travelled back to Kenya to commence succession proceedings in respect of his mother’s estate. This is when he conducted an official search and discovered that the suit property had fraudulently been transferred to the 2nd defendant by the 1st defendant. During his visit to the suit property he established that the 2nd defendant had rented his mother’s house to some tenants.

28. From the circumstances of this case, I am unable to fault the plaintiff for having failed to file the case earlier. His long absence from the country and the assumption that his late mother’s siblings were



taking care of his mother's property may have given him a false sense of security that all was well with his late mother's estate. He only discovered the alleged fraud in May 2024 after which he swiftly moved to obtain a limited Grant of letters of administration and file this suit in January 2025. I do not believe that the Plaintiff was expected to be a paragon of circumspection by frequently conducting official searches on the suit property. The suit therefore falls within the provisions of section 26 (a), (b) and (c) of the [Limitation of Actions Act](#).

29. On whether the claim based on the alleged violation of the Plaintiff's constitution rights would exempt the suit from the provisions of the [Limitation of Actions Act](#), I agree with learned counsel for the 2nd Defendant that the claim herein is simply one for recovery of land as opposed to a constitutional claim.
30. I am of the view that the plaintiff did not need to seek any extension of time based on the provisions of section 26 of the [Limitation of Actions Act](#) as the said section allows a person who has discovered fraud or mistake outside the period of limitation to file suit as soon as the fraud is discovered. It is therefore my finding that the suit as filed is proper and I decline to strike it out.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF JULY 2025.

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J. M ONYANGO

JUDGE

In the presence of :

1. Mr. Audi for the Plaintiff
2. Mr. Nduli for the 1st Defendant
3. Miss Chege for the 2nd defendant

Court Assistant: Hinga

