



**Kathendu v Karanja (Environment and Land Appeal E003 of 2023)
[2025] KEELC 5870 (KLR) (7 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5870 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL E003 OF 2023**

**AK BOR, J
JULY 7, 2025**

BETWEEN

JAMES N KATHENDU APPELLANT

AND

ELIZABETH KORI KARANJA RESPONDENT

(Appeal arises from the ruling of Hon R.G Mundia, Principal Magistrate, delivered on 13/6/2023 in Embu ELC Case no. E048 of 2022)

JUDGMENT

1. This appeal arises from the ruling of Hon R.G Mundia, Principal Magistrate, delivered on 13/6/2023 in Embu ELC Case no. E048 of 2022 James N. Kathendu v Elizabeth Kori Karanja. The Appellant instituted that suit claiming that he entered into an agreement dated 9/12/2011 with the Respondent, vide which the Respondent agreed to sell to him an acre of land out of Ngandori/Ngovio/1488 for the sum at Kshs. 400,000/=. He claimed that the agreement was subject to the finalisation of Embu High Court Succession Case No. 252 of 2011.
2. The Appellant claimed that he paid the Respondent Kshs. 375,000/= leaving a balance of Kshs. 25,000/= which was to be paid after subdivision and the transfer of the one acre to his name. He averred that the High Court Succession Case no. 252 of 2011 was finalised on 16/10/2019 and the Respondent was awarded one acre out of the suit land but the Respondent refused to transfer the land to him. He sought a refund of the sum of Kshs. 375,000/=:, agreed damages of 35%, interest from 9/12/2011 until payment and the costs of the suit.
3. The Respondent raised a preliminary objection on the grounds that the suit was time barred for being brought after the six-year limitation period for actions in contract. Further, that the matter was res judicata as it was the subject of litigation in Embu ELC Case No. E033 of 2021 James N. Kathendu v Elizabeth Kori Karanja between the same parties and over the same cause of action.



4. The trial court in its ruling identified three issues for determination being: whether there was a valid contract entered into on the 9/12/2011; when time started running and whether the matter was res judicata. In allowing the preliminary objection, the trial court relied on *Re Estate of Mwanje Nzavili Nyale (Deceased) (2021) eKLR* where it was held that any sale of a deceased's intestate property before the issuance and confirmation of a grant of letters of administration was invalid and amounted to intermeddling, rendering such transactions void under Sections 45 and 82 of the *Law of Succession Act*. Further, the court held that without a confirmed grant, the beneficiaries lacked the legal capacity to sell, transfer, or alienate the deceased's property, making the purported sale legally unenforceable.
5. The trial court found that the survivors in the instant suit similarly had no legal capacity to enter into a contract for sale of the suit land and opted not to belabor on any further issues raised. That is what led to this appeal.
6. The memorandum of appeal dated 12/7/2023 raised five grounds of appeal. The Appellant faulted the Learned Magistrate for finding that the court lacked jurisdiction to entertain the Appellant's case and for failing to consider, or comprehend, the Appellant's claim as laid out in the plaint. It was urged that the trial court erred when it failed to consider the Appellant's legal rights and legal recourse in a failed land transaction. Lastly, the Learned Magistrate was faulted for dismissing the Appellant's suit without giving valid or legal reasons.
7. The issue for determination is whether the appeal has merit. The trial court allowed the preliminary objection solely on the ground that the Respondent lacked the legal capacity to enter into an agreement for the sale of land belonging to a deceased person without first obtaining a confirmed grant of letters of administration. The court held that the agreement was void under Sections 45 and 82 of the *Law of Succession Act*. This court takes the view that, even where a transaction is declared void because one party lacked the legal capacity to enter into the agreement, courts still have the power to grant other appropriate remedies to ensure justice is done. Courts have, in the past, applied equitable principles such as constructive trust, restitution, or proprietary estoppel to prevent situations where one party unfairly benefits at the expense of another.
8. These principles are meant to prevent the unjust enrichment where a person receives money or other benefits but refuses to return the money after the transaction fails. In this case, the Appellant's claim was sought not only damages for breach of contract but also a refund of Kshs. 375,000/= which he claimed to have paid under the failed agreement. The trial court acted prematurely when it struck out the entire suit without considering whether the Appellant was entitled to a refund or any other equitable relief.
9. On whether the claim was time barred, the Respondent argued that the suit was filed outside the six year limitation period provided under Section 4(1) of the *Limitation of Actions Act* for actions based on contract. The agreement between the parties was made on 9/11/2011, and ordinarily, a claim founded on breach of contract would need to be brought within six years from the date the cause of action arose. The Appellant's claim was not based solely on the enforcement of the contract but it also sought the refund of money paid under a transaction that ultimately failed.
10. The cause of action for such a claim does not arise on the date the agreement was made, rather it arises when it becomes clear that the agreement cannot be completed or performed. The Succession Cause was finalised on 16/10/2019, when the Respondent was awarded the land. It is the Appellant's case that the Respondent refused to transfer the land after the conclusion of the succession proceedings as per the agreement, and it was that refusal that gave rise to the claim for a refund of monies paid. Time for purposes of the limitation period started running when the Respondent failed to perform her part



of the bargain after obtaining the confirmed grant on 16/10/2019, not from the date of the initial agreement. The suit was filed on 21/10/2022, three years later and was therefore filed within time.

11. On the issue of res judicata, the Respondent argued that the matter had already been determined in Embu ELC Case No. E033 of 2021 and that that suit involved the same parties and the same cause of action. The doctrine of res judicata bars parties from re-litigating issues that have already been heard and conclusively determined by a court of competent jurisdiction. For the doctrine to apply, it must be demonstrated that the issues raised in the current suit were directly and substantially in issue in the previous suit, and that those issues were finally determined on their merits. From the material before this court, it is not in dispute that the parties in Embu ELC Case No. E033 of 2021 are the same parties in the present case.
12. In that previous suit, the Appellant sought specific performance of the same agreement that is now the subject of this dispute. That suit was dismissed for being time barred for reasons given by that court. A claim for specific performance and a claim for refund of money are distinct and separate causes of action. This suit is not res judicata.
13. The appeal has merit, and is allowed. The matter is remitted back to the trial court for hearing and determination on merit by a different Honourable Magistrate.
14. The Appellant will have the costs for the appeal.

DELIVERED VIRTUALLY AT EMBU THIS 7TH DAY OF JULY 2025.

K. BOR

JUDGE

In the presence of: -

Ms. Siprose Ombongi for the Appellant

No appearance for the Respondent

