



**Kasona & another (Both being the administrators of the Estate of Dominic Kasona Kaleli) v Muindi (Substituted in place of Mutanu Muindi Ngumi suing as the administrator of the Estate of Muindi Ngumi) (Environment and Land Appeal E001 of 2024) [2025] KEELC 6017 (KLR) (16 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6017 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E001 OF 2024**

**AY KOROSS, J  
SEPTEMBER 16, 2025**

**BETWEEN**

**LYDIA NDULU KASONA ..... 1<sup>ST</sup> APPELLANT  
FESTUS MUSILA KASONA ..... 2<sup>ND</sup> APPELLANT  
BOTH BEING THE ADMINISTRATORS OF THE ESTATE OF DOMINIC  
KASONA KALELI**

**AND**

**JONES KIMENYE MUINDI (SUBSTITUTED IN PLACE OF MUTANU MUINDI  
NGUMI SUING AS THE ADMINISTRATOR OF THE ESTATE OF MUINDI  
NGUMI) ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. F. Andanyi, Chief Magistrate,  
Machakos Law Courts of 19/1/2024 in Machakos MELC/NO. 309 OF 2019 Jones  
Kimenye Muindi (substituted in place of Mutanu Muindi Ngumi suing as the  
administrator of the estate of Muindi Ngumi) versus Lydia Ndulu Kasona & Festus  
Musila Kasona (both being administrators of the estate of Dominic Kasona Kaleli)*

**JUDGMENT**

**Background of the appeal**

1. The background of this appeal is that the respondent instituted suit against the appellants by way of a plaint dated 3/06/2019 over land parcel no. Muputi/Kiima Kimwee/2591 (“suit property”) ostensibly belonging to the estate of Muindi Ngumi (deceased respondent) but registered in the names of Dominic Kasona Kaleli (deceased appellant).



2. It was her case that the suit property originally emanated from land parcel no. Muputi/Kiima Kimwe/633 (mother parcel) owned by the deceased respondent, who sold a portion to the deceased appellant and causing the land to be subdivided into two portions, namely, Muputi Kiima Kimwe/2289, which was registered in the deceased's respondent's name and and Muputi/ Kiima Kimwe/2290, which was registered in the deceased appellant's name.
3. Further, it was her case that Muputi Kiima Kimwe/2289 was further subdivided into Muputi Kiima Kimwe/2311, which was registered in the deceased respondent's name, and Muputi Kiima Kimwe/2312, which was sold to a third party by the name Kamba. The respondent averred that Muputi Kiima Kimwe/2289 was further subdivided to create the suit property and Muputi/Kiima Kimwee/2592, which the deceased appellant transferred to one of the deceased respondent's sons, Simeon Kimuyu Muindi (Simeon).
4. The respondent maintained that she has been in possession and occupation of the suit property until recently, when she conducted an official search on it and found out that the deceased appellant had carried out illegal and irregular dealings over Muputi Kiima Kimwe/2311 by having it transferred to his name and illegally subdivided it. She pleaded and particularised fraud and prayed for judgment against the deceased appellant for: -
  - a. An order for permanent injunction restraining the appellants, either by themselves and/or their authorised agents, relatives and/or servants, from interfering with the respondent's quiet possession and enjoyment and use of the suit property.
  - b. A declaration that the suit property belongs to the estate of the deceased respondent, and does not form part of the estate of the deceased appellant.
  - c. An order directed to the land registrar of Machakos County compelling her to cancel the title documents of the suit property in the names of the deceased appellant and issue a new title in the names of the respondent.
  - d. Costs of the suit and interests at court rates.
5. In response and opposition to the claim, the appellants filed a statement of defence dated 18/06/2019, whereby they denied the allegations set out in the plaint and put the respondent to strict proof thereof. To them, the suit was time-barred as the documents the plaintiff intended to rely upon as her evidence showed she was privy to the alleged fraud as far back as 15/02/2005, yet she filed suit without any leave of court. They urged the trial court to dismiss the suit with costs.
6. Afterwards, the matter was heard, parties called their respective witnesses, and they placed reliance on witness statements, oral testimonies and produced documents. In the appellants' case, their evidence consisted of themselves, whereas the respondent's evidence was composed of that of Jones Kimenye Muindi and Amos Kimoti.
7. In consequence, the learned magistrate Hon. Andayi.W. Francis (as he then was) entered judgment in the deceased respondent's favour on 19/01/2024 as sought in the plaint and in doing so, framed 2 issues for determination which were inter alia; whether the suit was time barred by dint of Section 7 of the [Limitation of Actions Act](#) and whether the respondent had made out a case on a balance of probabilities to entitle her to the orders sought. The 1<sup>st</sup> issue was found in the negative and the 2<sup>nd</sup> in the positive.



## **Appeal to this court and the hearing**

8. This decision did not sit well with the appellants, and in exercise of their right to appeal, the appellants invoked this court's jurisdiction by filing a memorandum of appeal dated 24/01/2024 and filed on the instant date. They raised the following grounds and have faulted the learned trial magistrate for: -
  - a. Erring in law and finding that the deceased appellant was guilty of fraud, and finding that the suit property was fraudulently acquired.
  - b. Erring in law and fact by not finding the suit was time-barred.
  - c. Being biased.
  - d. Erring in law and in fact by completely ignoring the weight and importance of all the arguments set forth by the appellants.
  - e. Erring in law and fact in accepting documents allegedly from the land's registry.
  - f. Erring in law and fact by shifting the burden of proof to the appellant and/ or lowering the standard of proof.
9. Accordingly, the appellants implored this court to allow the appeal, set aside the impugned judgment in its entirety with costs and make a finding that the suit property forms part of the estate of the deceased appellant.
10. As directed by the court, the appeal was canvassed by well-articulated written submissions that were received from the law firms of Ms. Gachiengo Gitau & Co. Advocates for the appellant, dated 19/04/2024, and Ms. Andrew Makundi & Co. Advocates for the respondent, dated 29/07/2024.

## **Issues for Determination, Analysis, and Determination**

11. Being a 1<sup>st</sup> appeal, the power of this court is set out in Order 42 Rule 32 of the Civil Procedure Rules. Being steered by the principles enunciated in the well-cited case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, this court will not interfere with the impugned judgment, save this court satisfies itself that the learned trial magistrate misdirected himself, thus arrived at an erroneous decision, undoubtedly exercised his discretion wrongly and occasioned injustice by such erroneous exercise.
12. Therefore, this court has carefully considered the records, parties' rival submissions, provisions of law and authorities relied upon, and the issues that arise for determination are: (a) whether the learned trial magistrate erred in finding the suit was not time-barred and (b) finding the deceased respondent had proved his case to the required standards. For good order, these issues shall be addressed shortly in a sequential manner.

### **I. Whether the learned trial magistrate erred in finding the suit was not time-barred**

13. In dealing with this issue, which both parties' counsels addressed in their submissions, it is necessary for this court to highlight the relevant provisions of law. On matters of law, fraud is a tortious action and, by Section 4 (2) of the *Limitation of Actions Act*, it may not be brought after the end of three years from the date from which the cause of action accrued.
14. Nonetheless, there are exemptions as established by Section 26 of the said Act, which extends the running of time to start from the time the mistake or fraud is discovered. Counsels agree that the latter provision is what applies to the circumstances of this case, and both agree that the cause of action



occurred from when the fraud was discovered. The question that was before the trial court and lurking herein is when the respondent made this discovery of the fraud.

15. In considering this issue, the learned trial magistrate, albeit considering the relevant law, including Sections 4 (2) and 7 of the *Limitation of Actions Act*, found the claim of fraud fell within the exceptions set by Section 26(a) of the *Limitation of Actions Act*. However, he fell into grave error in overlooking Section 26(c) thereof by failing to establish when this fraud was discovered. This provision of the law specially states: -

“26. 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.” Emphasis added.

16. Regarding prevailing jurisprudence, this court draws guidance from the Court of Appeal decision of *Ogaga (Suing as the Legal Representative of the Estate of Turufena Kemunto Ogaga-Deceased) v Ogaga & 3 others (Civil Appeal 45 of 2018) [2022] KECA 1422 (KLR) (16 December 2022) (Judgment)*, which held: -

“She was therefore within the requisite time frame as the limitation of time with respect to a claim alleging fraud is three years. She cites section 4 (2) of the Limitation of Action that provides that an action founded on tort should not be brought after the expiry of 3 years from the date on which the cause of action accrued...The appellant is correct with regard to the law on limitation of time with respect to fraud- that time does not begin to run for purposes of limitation until the plaintiff discovers the fraud.”

17. Turning to opposing arguments, in their submissions, both counsels are in consensus that the respondent discovered the fraud ages ago, with the appellants giving the following scenarios: 15/02/2005, which was the date the official search certificate was conducted; 2008, which was the date of the extract of the green card; 13/9/2007 which was the date of the Atangwa clan arbitration and 2011 which was when Machakos High Court Succession Cause No. 1027 of 2011- Dominic Ndulu Kasona & Another -v Mutanu Ngumi was commenced.
18. On their part, the respondent’s counsel has posited a synopsis of 3 situations, which are 24/8/2008, which was when the certified copy of the green card for land parcel no. Muputi/Kiima Kimwe 2289 was obtained, 23/6/2008, which was when a certified copy of the transfer form was obtained, and lastly, 11/5/1989, which was when the respondent received the certified copy of the transfer forms executed between the deceased respondent and deceased appellant.
19. Suffice it to say, all the dates that have been presented by both counsels, with the last date being 2011, all show that the fraud, at least to the extent of their arguments, was, at the very least, discovered 8 years prior to the time of filing suit. Nevertheless, paragraph 8 of the plaint sheds light on the exact date the respondent discovered the fraud or illegality by stating it was established when she conducted an official search of Muputi Kiima Kimwe/2311.



20. So, when was this particular search conducted? From the produced document, it was 15/02/2005. It is clear this was approximately 14 years prior to the time of filing suit on 13/09/2019. Thus, and in conclusion on this issue, this court finds that the learned trial magistrate erred in not finding that the claim of fraud was time-barred and finds that, by being time-barred, the lower court could not grant a remedy as it lacked jurisdiction to entertain the suit.

## **II. The learned trial magistrate erred in finding the deceased respondent had proved his case to the required standards**

21. Even assuming for a moment that this court is wrong in its finding on the first issue, which, for the benefit of doubt, it is not, and in brief, this court would have found that the learned trial magistrate erred in finding that the claim of fraud was proved. This will be demonstrated briefly.
22. The legal framework on the legitimacy of title documents is governed by Sections 24 and 25 of the Land Registration Act. Even so, a title document can be challenged on grounds set out in Section 26 of this Act. Ordinarily, 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 unless challenged on several grounds, including fraud and illegality.
23. When one presents a case of fraud as the circumstances herein, it is trite law that fraudulent conduct must be distinctly alleged and particularly proved on a standard higher than a balance of probabilities but below reasonable doubt. It is not allowable to leave fraud to be inferred from the facts. See the Court of Appeal decision of *Vijay Morjaria v Nansingh Madhusingh Darbar & Hulashiba Nansingh Darbar* (Civil Appeal 106 of 2000) [2000] KECA 223 (KLR) (Civ) (1 December 2000) (Judgment).
24. In the circumstances of this case, the particulars of fraud and illegality were pleaded, and the respondent specified them by stating that the deceased appellant illegally and fraudulently transferred Muputi Kiima Kimwe/2311 and/ or unprocedurally subdivided it without the consent of the respondent. However, no reliefs were sought over this particular parcel of land.
25. Furthermore, it would have been expected that the respondent, if indeed her claim was genuine and obvious, would have sought a cancellation of subdivisions of Muputi Kiima Kimwe/2311, which included the suit property and Muputi/Kiima Kimwee/2592, and would also have sought their reversion to Muputi Kiima Kimwe/2311. However, that was not so.
26. In this court's humble opinion, the respondent's case suggests that one subdivision was genuine and the other not, although they were both allegedly illegally and fraudulently subdivided from Muputi Kiima Kimwe/2311! This act of approbation and reprobation on the claim of fraud and illegality is unacceptable, and had this court not found the suit incompetent, it would have found that the claim of fraud and illegality was not proved to the required standards.
27. In the end, and for the above reasons and findings, this appeal is allowed; the court sets aside the entire lower court judgment rendered on 19/01/2024, and instead substitutes it with an order striking out the respondent's suit with costs of the lower court suit to the appellants. The appellants will have the costs of this appeal.

Judgment accordingly.

**DELIVERED AND DATED AT MACHAKOS THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**HON. A. Y. KOROSS**

**JUDGE**



**16.09.2025**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr Gachiengo Gitau for appellant.

M/s Nzilani for the respondents.

Ms Kanja- Court Assistant.

