



REPUBLIC OF KENYA



**Mululu & 4 others v Barasa & 2 others (Environment and Land Appeal  
3 of 2023) [2024] KEELC 6749 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6749 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL 3 OF 2023  
EC CHERONO, J  
OCTOBER 11, 2024**

**BETWEEN**

**DUNCAN BARASA MULULU ..... 1<sup>ST</sup> APPELLANT  
HELLEN MAKHUMA MULULU ..... 2<sup>ND</sup> APPELLANT  
ANNAH NANJALA WALUNYWA ..... 3<sup>RD</sup> APPELLANT  
JONES NAMUKURU WANYAMA ..... 4<sup>TH</sup> APPELLANT  
KEVIN SIMIYU ..... 5<sup>TH</sup> APPELLANT**

**AND**

**HENRY KIKWAMETI BARASA ..... 1<sup>ST</sup> RESPONDENT  
GAMALIEL N. WATILA ..... 2<sup>ND</sup> RESPONDENT  
JOHN KHAPESI WAKOLI ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal arising from the ruling delivered by Hon. T. M. Olando  
(PM) in Bungoma CM's ELC Case No. 62 of 2021 on 19th July, 2023.)*

**JUDGMENT**

**Introduction**

1. The Appellant was aggrieved with the Judgment/decree of the trial court dated 19<sup>th</sup> July 2023 where it allowed the Respondents' claim (for a permanent injunction and ordered the issuance of a title to the Respondents) and filed a memorandum of appeal dated 25<sup>th</sup> July, 2023 challenging the said Judgment and decree.
2. A brief background of the case is that the Appellants were the Defendants and the Respondents were the Plaintiffs in the former suit Bungoma CM's ELC Case No. No. 62 of 2021. The substantive claim



as contained in the plaint dated 31<sup>st</sup> August, 2021 was for an order of a permanent injunction against the Appellants from dealing with land parcel no. E. BUKUSU/N.KANDUYI/630, the cancellation of the title and the issuance of a new title to them. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Appellants filed their statement of defence dated 30<sup>th</sup> September, 2021 denying the Respondents claim.

3. The Respondents called three (3) witnesses. PW1 HENRY BARASA KIKWAMETI testified that he bought a total of 2 ¼ acres forming part of land parcel no. E.Bukusu/ N.Kanduyi/630(the suit land) from the 1<sup>st</sup> appellant and one Silas Simiyu Wekesa who had bought from the 1<sup>st</sup> appellant on or about 28/4/2000, 18/11,2003, 4/2/2004 and 13/1/2005. It was his evidence that he was included in the succession proceedings i.e. CMCC SUCC CASE No. 115 of 2017 but has never received a title for his alleged share. In cross-examination he testified that the land is registered in the name of Mark Mululu Walunywa who is deceased and that the 1<sup>st</sup> Appellant is the administrator of the estate. He testified that he has been in the suit land for over 21 years and that he wanted the administrator to give him his share.
4. PW2 JOHN KAPESI WAKOLI testified that he purchased a total of 2 ¾ acres to be curved out of land parcel no. E.Bukusu/ N.Kanduyi/630 from the 1<sup>st</sup> Appellant and one John Teka Nalimae on various dates i.e 23/8/1998, 15/6/2000, 21/1/2004, 4/3/2004 and 25/12/2004 and that his prayer was to be issued with a title for his alleged share which he has been occupying for the last 25 years.
5. PW3 GAMAJEL WATILA 21/2/2004 he purchased ¾ acres from the 1<sup>st</sup> Appellant to be curved out of land parcel no. E.Bukusu/ N.Kanduyi/630 and that his prayer was to be issued with a title for his alleged share.
6. The Appellant called one witness DW1 DUNCAN BARSAS MULULU testified that he is a son of Mark Mululu Walunya-Dcd and that he only sold two (2) acres out of the suit land to the Respondents and leased out the rest to them to use for cultivation but they illegally took ownership of the entire land. It was his evidence that he leased to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents land in the year 2005 for a period of 12 years at a rate of Kshs. 2,000/= per year per acre but when the land was being surveyed they claimed ownership. He stated that the Respondents have since filed for revocation of grant issued in Bungoma CMC SUCCESSION CAUSE NO. 115 OF 2017 IN THE MATTER OF THE ESTATE OF THE LATE MARK MULULU WALUNYWA (DECEASED) which summons are pending ruling. During cross examination the witness testified that neither him nor his siblings occupy the suit land.
7. Upon determination of the suit, the trial court delivered its judgment on 19<sup>th</sup> July, 2023 allowing the Respondents claim in its entirety. Being aggrieved by the Trial Courts Judgment, the Appellants preferred the current appeal.

#### **THE APPELLANTS CASE.**

8. The Appellant's case is contained in the grounds of appeal in the memorandum of appeal as follows:
  - a. The learned trial magistrate erred in law and in fact in allowing a claim over a parcel of land whose registered owner was deceased therefore the claim amounted to allowing the parties to intermeddle in the estate of a deceased person.
  - b. The learned trial magistrate erred in law in allowing the claim amounted to denying the Appellants their rightful share in the estate.
  - c. The learned trial magistrate erred in law and in delivering a judgment that amounted to contradicting pending probate and administration proceedings.
  - d. The learned trial magistrate erred in law and in not finding that the Respondent claim was statutory time barred.



- e. The trial magistrate erred in law and when he gave a judgment in a defendant suit that was devoid of a concise statement of the case, the points for determination thereon, and the reasons for such decision.
  - f. The learned trial magistrate erred in law when he failed to properly analyze the evidence on record and arrived at an erroneous decision.
  - g. The learned trial magistrate erred in law when he issued an order for cancellation/transfer of titles that were yet to be issued to the Respondents.
  - h. The learned trial magistrate erred in law and in not finding that the claim was statutorily time barred under the *limitation of actions Act*.
9. The Appellant submitted that the Trial court in allowing the Respondents claim allowed the intermeddling of the estate of Mark Mululu Walunywa-dcd in contravention of Section 45 of the *Law of Succession Act*, Cap 160 Laws of Kenya. Reliance was placed in the case of Muchanga vs. Wabomba (ELCA E006 OF 2021) (2024) KEEL 3277(KLR). The Appellants argued that there was a succession cause being heard concurrently with the primary suit herein and the judgment of the trial court which disinherited them contradicted the pending probate and administration proceeding.
10. It was submitted that the Respondents claim which was founded on various contracts dating 28/4/2000, 21/2/2004 and 23/8/1998 was statute/time barred by dint of Section 4(1) of the *Limitation of Actions Act*. It was the Appellants contention that the Trial Courts judgment was improper for not having being concise on the case of both parties, the points for determination, the applicable law, the decision and the reason for the decision. Lastly, it was submitted that the trial court erred in issuing an order for cancellation of titles which had not been issued.

## RESPONDENTS' CASE

11. The Respondents through their written submissions dated 10<sup>th</sup> June, 2024 opposed the appeal. They contend that during the primary suit, only one Appellant was active while the others refrained from participating in the suit. It was further submitted that the issue of the Respondents suit being time barred was not raised before the trial court and that the same cannot therefore be raised at this stage. It was also submitted that the Appellants' acquiesced the court's jurisdiction.

## ISSUES FOR DETERMINATION

12. This being a first appeal, this court is under a duty to reconsider the evidence adduced and analyze it so as to be able to reach its own independent conclusions and thus determine whether the conclusions reached by the trial court are consistent with the evidence and the applicable law. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court held that:

“this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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.”

13. I have read the Memorandum of Appeal, the Record of Appeal, written submissions filed by the parties and the court record generally and although the Appellant raised eight (8) grounds of appeal, the court is of the opinion that the Appeal may conclusively be determined on the following three grounds: -:



- a. Whether failure to frame issues for determination vitiates the judgment.
- b. Whether the Respondents suit was statute barred.
- c. Whether the Respondents are entitled to the various portions.

#### **Whether failure to frame issues for determination vitiates the judgment.**

14. The Appellant lamented that the trial magistrate erred in law and fact by failing to concisely frame a statement of the case, the issues for determination, the decision and the reason thereof.
15. Order 21 Rules 4 and 5 of the Civil Procedure Rules provides as follows:-
  - 4) Judgments in defended suits shall contain a concise statement of the case, the points of determination, the decision thereon, and the reasons for the decision.
  - 5) In suits in which issues have been framed, the court shall state its findings or decision with the reasons therefore upon each separate issue.
16. In the case of *Rukidi vs Iguru and Another* (1995-1998) 2 EA 318 the court held that:-

“Framing of the issues is an important step in the determination of a case as it defines the areas of controversy and narrows down the scope of inquiry. It makes the hearing of the case more focus oriented and saves the time of the court .....

”
17. Similarly in the case of *Peter Ngumi Gichoho alias Peter Ngumi Gichoho Ngugi vs Ambrose Wanjohi Migwi T/A Migan Hardware Store Nyeri HCCA NO. 138 OF 2003* the court held that:-

“The deficiency in failing to frame the issues can be corrected by the first appellate court”.
18. In the matter at hand, the trial magistrate did not frame the issues for determination which he was enjoined to do under Order 2 Rule 5 of the Civil Procedure Rules. However, a perusal of the record shows that the trial magistrate analyzed the evidence presented before him. This court finds and holds that failure to frame the issues was an irregularity which can be cured in the present appeal.

#### **Whether the Respondents suit was statute barred.**

19. The Appellants in their grounds of appeal raised the issue that the Respondents claim was time barred since it sought for specific performance yet the land in question was bought over 17 years ago. Indeed, actions for recovery of land are governed by the limitation framework in 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.
20. However, it is noteworthy that from the pleadings in the plaint dated 31<sup>st</sup> August, 2021, the Respondents claim is based on fraud as particularized in paragraph 8. Section 26 of the [\*Limitation of Actions Act\*](#) provides for an extension of the limitation of time in cases of fraud or mistake wherein time starts running at the point when the fraud is discovered by the plaintiff. The section provides as follows:

“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.”

21. It is therefore my finding that the respondents claim is not statute/ time barred.

**Whether the Respondents are entitled to the various portions.**

22. To start with are the undisputed facts. It is not in dispute that the 1<sup>st</sup> Appellant is the legal administrator of the estate of the late Mark Mululu Walunywa. The grant of letters of administration in respect of the estate of the late Mark Mululu Walunywa was issued to the 1<sup>st</sup> Appellant on the 17/9/2004 and confirmed on 29/6/2017 in Bungoma HC Succ Cause No 115 of 2016. It is not also in dispute that the Respondents are in possession of various portions of the suit land. According to the Respondents, they are in possession of the various portions of the suit land by way of purchasers right. The Appellant on the other hand thinks otherwise and believes that the Respondents are trespassers and intermeddlers.
23. The Respondents claim is that they purchased portions of the suit land No. E.Bukusu/ N.Kanduyi/630 (the suit land) measuring 2 ½, ¾ and 2 ¾ respectively from the 1<sup>st</sup> Appellant on various dates between the year 1998 and 2004. The Appellants deny the claim and contend that they leased various portions to the Respondents who later claimed ownership.
24. Although the 1<sup>st</sup> Appellant in his statement of defence denies that he sold the aforementioned portions of the suit land to the Respondents, in his oral testimony however, he confirms selling and leasing out to them portion of the suit land. The Appellants also produced a letter dated 18/3/2019 from the area chief Marakaru sub-location and the said chief confirmed the allegations by the Respondents on the sale. It emerges that while the 1<sup>st</sup> Appellant was the seller, the 2<sup>nd</sup> to 5<sup>th</sup> Appellants were witnesses in the said agreement. From the said letter, it also emerges that the suit land is registered in the name of the late Mark Mululu Walunywa-deceased.
25. The above statements suffice to show that indeed there was a sale transaction and this is the genesis of the root of the answer to the question in issue which is whether the Respondents are entitled to the portions claimed which were purchased on various dates between the year 1998 and 2004. I have found that the owner of the land died on 25/03/1995 and the letters of grant of administration were only issued on the 17/9/2004 and confirmed on 29/6/2017 in favour of the 1<sup>st</sup> Respondent. From the foregoing no doubt, the actions of the 1<sup>st</sup> Appellant in transacting with the Respondents in the various transactions offended Section 45 (1) of the Law of Succession Act which states ;-

- “(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.



26. The wording of the above Section of the law is couched in mandatory language. Lord Denning in the celebrated case of *Majoy vs United African Ltd* (1961)3 ALL ER 1169, 1172 had this to say;
- “if an act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad...And every proceeding which is founded on it is also bad and incurably bad. It will collapse”.
27. In my view, the agreements for sale dated 28/4/2000,18/11/2023,4/2/2004, 13/1/2005, 21/2/2004, 23/8/1998, 15/6/2000, 21/1/2004, 4/3/2004, 25/12/2004 did amount to intermeddling with the property of Mark Mululu Walunywa (deceased). Clearly, they had no legal right to have the property dealt with in any matter before the letters of administration were applied for, obtained and confirmed as per Section 45 of the *Law of Succession Act*.
28. Further, the dealing with the immovable property of a deceased person without a confirmed grant is prohibited under Section 82 (b) (ii) of the *Law of Succession Act* which provides that no immovable property shall be sold before confirmation of grant. Therefore, the transactions that were entered into between the beneficiaries of the estate of the deceased and the Respondents before the Grant of Letters of Administration was confirmed are invalid for offending the provisions of Sections 45 and 82 of the *Law of Succession Act*. The sale transactions are invalid, notwithstanding that they were by the administrators of the estate with letters of administration, so long as the letters were not yet confirmed, they had no power to sell the suit property.
29. The agreement for the purchase of the portions of the suit land are therefore invalid and incurably bad. The Respondents remedies if any should flow from the 1<sup>st</sup> Respondent as an individual.
30. The inescapable conclusion is that the appeal is merited and the same is hereby allowed with no order as to costs. I have declined to issue costs to the Appellants for the simple reason that they are equally to blame for intermeddling with the estate of the deceased.
31. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 11<sup>TH</sup> DAY OF OCTOBER, 2024.**

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

Mr. Were for the Appellants

M/S Wanyama H/B for Sichangi for the Respondents

Bett C/A

