



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muchoki v Irungu (Environment and Land Appeal E014 of 2023)  
[2024] KEELC 6420 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6420 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND APPEAL E014 OF 2023  
LN GACHERU, J  
OCTOBER 3, 2024**

**BETWEEN**

**BENSON MAINA MUCHOKI ..... APPELLANT**

**AND**

**PHYLIS NYAMBURA IRUNGU ..... RESPONDENT**

*(Being an Appeal from the entire Ruling of the Hon. P.N. Maina -Chief  
Magistrate delivered on 20th April 2023 in Murang'a CM LDT No. 67 of 2008)*

**JUDGMENT**

1. The Appeal herein was filed vide an Amended Memorandum of Appeal dated November 21, 2023, anchored on Order 43, Rule 3 of the Civil Procedure Rules, wherein the Appellant has sought for the following reliefs:
  1. That the appeal be allowed.
  2. The order dismissing the application dated February 6, 2023, be set aside and the application be allowed as prayed and the respondent meets the costs in this Court and the Court below.
2. The Appellant herein was the Plaintiff in the suit before the trial Court, and vide his Notice of Motion Application dated 6<sup>th</sup> February, 2023, he sought for the following orders:
  1. That the Court be pleased to authorize the administrator of this Court to sign all such documents on behalf of the defendants so as to enable the transfer of land parcel No. Makuyu/Makuyu block1/5479, to the Plaintiff.
  2. That the Court may dispense with the production of title documents held by the defendants over the said parcel Makuyu/Makuyu block1/5479 and her documents, to wit, identity card, KRA PIN and passport size photograph during the conveyancing of the said land.



3. That the Land Registrar, the Land Control Board and any other lawful authority be authorized to carry out the conveyance of land parcel No. Makuyu/Makuyu block1/5479 without requiring the defendant/judgment debtor, Phylis Nyambura Irungu identity, KRA PIN and passport photographs.
  4. That the costs of this application be provided for.”
3. The Appellant contended that vide a Judgment entered on 29<sup>th</sup> September 2011, which adopted the award of the Land Disputes Tribunal (LDT), in respect of SPM LDT Case No. 76 of 2008, he was declared the owner of land parcel number Makuyu/Makuyu block1/5479 (the suit property). That he sought to execute the said Judgment against the Respondent through his Notice of Motion Application dated 6<sup>th</sup> February 2023, which was filed before the trial Court.
4. The Appeal herein challenges the decision of the trial Court (the Chief Magistrates Court At Murang’a in CMLDT NO.67 OF 2008), delivered on 20<sup>th</sup> April, 2023, dismissing the Appellant’s Notice of Motion Application dated 6<sup>th</sup> February, 2023.
  5. The Respondent had opposed the Appellant’s suit before the trial Court through her Replying Affidavit dated 15<sup>th</sup> March, 2023. She had averred that she is the registered owner of land parcel No. Makuyu/Makuyu block1/5479, since 9<sup>th</sup> January, 2006. That she was a stranger to the Plaintiff’s suit since commencement of the same in year 2008, as she was not served with the requisite Notices, and only became aware of the Plaintiff’s suit upon being served with the Application dated 6<sup>th</sup> February, 2023.
  6. . The Respondent also averred that on 14<sup>th</sup> June, 2022, she conducted a search in respect of the suit property whereupon she discovered that the Appellant had lodged a caution on the suit land. That she applied for the removal of the said caution on 14<sup>th</sup> November, 2022, before the Land Registrar (Murang’a). Further, that the Land Registrar (Murang’a), upon affording the Cautioner (Applicant) an opportunity to be heard issued an order dated 10<sup>th</sup> January, 2023, for the removal of the said caution.
  7. Further, that before the trial Court the Respondent was not served with the decree obtained by the Appellant, and therefore, she was not afforded an opportunity to enforce the same as required by law.
  8. Vide its Ruling delivered on 20<sup>th</sup> April, 2023, the trial Court found and held that the suit was anchored on Section 98 of the *Civil Procedure Act*, and that the Appellant failed to demonstrate that he ever attempted to effect the transfer of the suit property, and that process was stopped on account of the non-availability of such documents.
  9. Further, the trial Court held that Section 98 of the *Civil Procedure Act*, does not empower the Court to dispense with the production of any documents required during the process of transfer of land. The trial Court determined that the Appellant’s claim was Statute-barred in addition to being unsupported by the evidence on record.
  10. The Appeal is premised on the following six (6) grounds:
    1. The trial Court misapprehended the Application of Section 4 of the *Limitation of Actions Act* in failing to realize that the Judgment of the Court which was sought to be executed was not yet 12 years and would hit that age by 30<sup>th</sup> September, 2023.
    2. The trial Court made an error of fact in reckoning that time so as to come up with its findings that 15 years had elapsed since the Judgment of the court.



3. The trial Court erred in law in dismissing the Application dated 6<sup>th</sup> February 2023, if indeed the Court found that it had no power to allow the same. The Court failed to take guidance from the case of *Bethwell Mwangi Githinji & 2 others V Harrison Wachira Wanjohi & Another* [2019] eKLR, where the Court struck out the application instead of dismissing it, on the understanding that the failure of such an application did not take away the right of the decree holder to enjoy the fruits of the judgment.
  4. The trial Court failed to consider for a fact that over the course of almost 12 years, the judgment remained unexecuted hence clear evidence that the Respondent was non-compliant.
  5. The trial Court erred in law in failing to allow the execution of judgment which had not been reviewed, set aside or appealed from.
  6. The trial Court erred in fact and in law in admitting onto the record the Respondent's Replying Affidavit after having reserved a ruling date without reference or direction that the Appellant be duly served. In doing so, the trial Court shut the Appellant out of his right to respond to the Replying Affidavit if need be. In the process the Respondent was accorded an unfair advantage contrary to the tenets of natural justice."
11. This Appeal was admitted under Section 79B of the *Civil Procedure Act*, with directions that the same be canvassed by way of written submissions.

### **The Appellant's Submissions**

12. The Appellant filed his written submissions dated 21<sup>st</sup> February, 2024, through the Law Firm of J.N Mbuthia & Co. Advocates, and submitted that he is the beneficiary of the Judgment of the Court dated 29<sup>th</sup> August 2011, which adopted the Elders' award rendered in SPM LDT Case No. 67 of 2008, as the Judgment of the Court.
13. He further submitted that in the proceedings before the trial Court, an advocate identified as Mr. Wainaina did appear on behalf of the Defendant, and addressed the Court to the effect that he had received instructions from the Defendant to file the necessary documents, to which the Court responded with the statement: "noted."
14. The Appellant further stated that from the record of the proceedings before the trial Court, it is not shown when the Respondent filed her Replying Affidavit, and there is also no record of the same having been served upon his Advocates on record at the trial Court.
15. Citing the provisions of Section 4(4) of the *Limitation of Actions Act* CAP 22, as read together with Section 7 (2) of the Land Disputes Tribunal Act, the Appellant submitted that the operative word therein is "judgment" as opposed to "award." He argued that from the two mentioned provisions of the law, the time begins to run from the entry of the judgment in question, and not from the reading of the award, because it is only upon such judgment that a decree is issued and executed as per the Civil Procedure Rules.
16. Further reliance was placed in the decision of the Court in the case of *Florence Nyaboke Machani V Mogere Amosi Ombui & 2 others* [2014] eKLR, to anchor the proposition that once a judgment is entered in terms of an award, the award itself ceases to exist from the date of delivery of that Judgment, meaning that upon the expiry of 12 years, such judgment cannot be executed and any action founded on the same is statutorily-barred. That as at the date of delivery of the trial Court's Judgment, which is the subject of the current appeal, there was a period of six months to the lapse of the judgment rendered on 29<sup>th</sup> August, 2011.



17. With regard to the trial Court's determination that the Appellant failed to demonstrate that he presented the necessary documents for the transfer of the suit property, it was submitted that pursuant to the holding of the Court in the case of *Bethwell Mwangi Githinji & 2 others V Harrison Wachira & Another* [2019] eKLR, the trial Court ought to have struck out his Notice of Motion Application instead of dismissing the same entirely.
18. He further submitted that if the Respondent had been willing to avail and sign the necessary documents to undertake the transfer of the suit land to the Appellant, she would have stated so in her Replying Affidavit. He sought reliance in paragraphs 15, 16 and 17 of the Respondent's Replying Affidavit to anchor the argument that the trial Court ought not to have dismissed his Application because it would have been futile for the Appellant to seek out the Respondent for the purpose of surrender of the documents required to effect the transfer of the suit property.
19. Further reliance was sought in the decision of the Court in the case of *In re Estate of Philip Kiogo Tunga (deceased)* [2020] eKLR, to buttress the argument that the Court has power to make an order for dispensing with the old title deed, and the Court is also empowered to order that other documents required for registration be dispensed with as well. Further reliance was placed on the provisions of Article 159 (2) (d) and (e) of *the Constitution*.
20. The Appellant also relied on the decision of the Court in the cases of *Gitau vs Kenya Methodist University (Kemu Petition 5 of 2020)* [2021] KEHC 322 (KLR) (8 December 2021) Ruling; and, *Kenya Ports Authority V Kenya Power & Lighting Company Limited* (2012) eKLR, to buttress the position that faced with Judgment which has not been overturned or expired, its execution should not be rendered impossible by the Court through procedural technicalities.
21. That the failure to serve both the Respondent with the transfer documents and the Land Registrar with a request to dispense with the production of the old title did not render the judgment dated 29<sup>th</sup> August, 2011, unenforceable. The Appellant also distinguished the holding in *Kenya Commercial Bank vs Alcon Holdings Limited* [2021] eKLR.
22. It was his submissions that the trial Court did not consider the fact that the Judgment dated 29<sup>th</sup> August, 2011 remained unexecuted for a period of almost 12 years, which fact points to the Respondent's unwillingness to enforce the same.
23. It was the Appellant's further submission that the trial Court's dismissal of his Application resulted in a denial of his right to execute a valid Judgment of the Court.

### **The Respondent's Submissions**

24. The Respondent filed his written submissions dated 28<sup>th</sup> February, 2024, through the Law Firm of Wainaina Njoroge & Co Advocates. Three (3) issues for determination were identified as follows:
  - I. Whether the trial Court erred in law by dismissing the Application dated 6<sup>th</sup> February, 2023.
  - II. Whether the trial Court erred in law in failing to allow for execution of Judgment.
  - III. Which party should bear the costs?
25. It was submitted that the Appellant has been indolent and is guilty of laches having initiated an Application dated 6<sup>th</sup> February, 2023, to execute the award of the Makuyu Land Disputes Tribunal dated 29<sup>th</sup> July, 2008.



26. Reliance was sought in the holding of the Court in the case of *Monata Matiko Chonchorio vs John Marwa Chabaro* [2021] eKLR. The Respondent submitted that 15 years had lapsed from the date of the said award to the commencement of the Appellant’s suit, filed before the trial Court which amounted to inordinate delay.
27. Citing the provisions of Section 7 of the Land Disputes Tribunal Act (CAP 303A), the Respondent further submitted that as the only duty of the Magistrate’s Court under the above provision of law is to adopt the award in question as a Judgment of the Court, therefore, time began to run following the delivery of the award by the LDT. Further reliance was sought in the holding of the Court in the case *Thomas Musyoka Muanga vs Mutunga Muanga & Another* [2021] eKLR.
28. It was further submitted that the Respondent was not afforded an opportunity to be heard in respect of the proceedings before the Makuyu Land Disputes Tribunal, culminating in the award dated 29<sup>th</sup> July, 2008. That she could not execute transfer documents of her own parcel of land on the strength of a Decree not served upon her.
29. It was the Respondent’s further submission that at the trial Court, the Appellant failed to establish that he had prepared the transfer documents, and served them upon the Respondent; or, had summoned the Respondent through his Advocate to sign the same and she declined.
30. Relying on the decision of the Court in the case of *Monata Matiko Chonchorio vs John Marwa Chabaro* [2021] eKLR, she submitted that the effect of a matter being statute-barred is that it deprives the Court an opportunity to hear and determine a matter, and grant reliefs sought.
31. The Respondent argued that pursuant to the reasoning of the Supreme Court in the case of *Nicholas Kiptoo arap Korir Salat V IEBC & 6 Others* [2013] eKLR, the “oxygen principle” as contained in Article 159 of *the Constitution* does not apply to matters which are statute-barred.
32. Having considered the Memo, and the Record of Appeal, the rival written submissions, and cited authorities, the Court finds the issues for determination are;
  - i). Whether the Appellant is entitled to the Orders sought?
  - ii). Who shall bear the costs of this Appeal?

### **Whether the Appellant is entitled to the Orders sought?**

33. In the instant Appeal, the bone of contention between the parties is the starting point in terms of computing the time for purposes of determining whether the Appellant’s Notice of Motion Application dated 6<sup>th</sup> February, 2023, was stale as at the time of its filing it before the trial Court.
34. The Respondent argued and submitted that time began to run from 29<sup>th</sup> July, 2008, on which date the LDT rendered its award. The Appellant on the other hand, argued and submitted that the time should be computed from 29<sup>th</sup> August 2011, on which date the aforesaid award was adopted by the Court as its Judgment.
35. Section 4(4) of the *Limitation of Actions Act* stipulates as follows:

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent Order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and



no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

36. Further, Section 7 of the *Limitation of Actions Act*, which provides that:

“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.”

37. In the case of *Iga vs. Makerere University* [1972] EA, the Court pronounced itself as follows:

“A plaint which is barred by limitation is a plaint barred by law. A reading of the provisions of Section 3 and 4 of the Limitations Act Cap 70 together with Order 7 Rule 6 of the Civil Procedure Rule of Uganda which has same provisions with Limitations Act of Kenya seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief.”

38. In the case of *In Gathoni vs. Kenya Co-Operative Creameries Ltd.* [1982] KLR 104, the Court declared as follows:

“The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

39. Further, in the case of *Bosire Ogero v Royoa Medial Services* [2015]eKLR, the Court held that:

“The law of limitation of actions is intended to bar the Plaintiffs from instituting claims that are stale and aimed at protecting Defendants against unreasonable delay in the bringing of suits against them. The issue of limitation goes to the jurisdiction of Court to entertain claims and therefore if a matter is statute barred, the Court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the Court cannot entertain a suit.”

40. The rationale informing statutory timelines was elaborated in the case of *Warui & another (Suing as the Legal Representatives of Warui Muriu - Deceased) v Njoki (Sued as the and on Behalf of the Estate of Muchogo Muriu) & another (Environment & Land Case E005 of 2023)* [2024] KEELC 224 (KLR) (25 January 2024) (Judgment) as follows:

“It is trite that Limitation of action is a statutory remedy which prevents a claimant from bringing proceedings after the expiration of a specified time limits. The philosophy behind this remedy is that a Defendant should not suffer the prejudice of stale proceedings and that claimant should be encouraged to avoid delay.

41. Further, in the case of *Moses Kipkurui Bor vs John Chirchir ELC* case No. HCC NO 763 OF 1992, the Court held as follows:

“My view of the matter is that if one files an application for vacant possession of land in execution of a decree, he must take steps to prosecute such application at the latest within



12 years of filing such application, or at least within this period of time, take steps towards prosecution of that application so that even if a decision is made outside the 12 years, this would not be because the application has remained unprosecuted for that duration of time. If such decree holder does not take steps to prosecute such application within 12 years of filing it, my view of the matter is that the application will be caught up by Section 4 (4) of the *Limitation of Actions Act*, and would be statute barred. It certainly could not be the intention of the law to have a party simply file an application for vacant possession and fail to prosecute it for an indefinite period of time, then at whatever time in the future, seek to now prosecute it. In matters of land, it should be appreciated that time starts running in favour of the occupant, who can claim adverse possession if 12 years lapse when his occupation is undisturbed. To me, failure to prosecute such application would be akin to allowing the possessor quiet occupation of the suit land, and after 12 years, any action which attempts to reclaim the suit land would be time barred. This reasoning appears to be backed up by the Court of Appeal decision in the M’Ikiara M’Rikinkanya & Another vs Gilbert Kabeere M’Mbijiwe (2007) eKLR.”

42. Section 7 (1) and (2) of the Land Disputes Tribunal Act (repealed) provided as follows:

- “(1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate’s court together with any depositions or documents which have been taken or proved before the Tribunal.
- (2) The court shall enter judgement in accordance with the decision of the Tribunal, and upon judgement being entered, a decree shall issue and shall be enforceable in the manner provided for under the *Civil Procedure Act*.”

43. From the above provisions of law, it is evident that the role of the Magistrate’s Court upon delivery of the LDT award was limited to adopting the awards rendered by the LDT as Judgments of the Court. The role of the Court being so circumscribed by the law, it is the holding of the Court that for purposes of Section 4(4) of the *Limitation of Actions Act*, the time begins to run from the date of the issuance of the award, not from the date on which the award in question is adopted by the Court as its Judgment as claimed by the Appellant.

44. The Court will next address the validity of the LDT award adopted as a Judgment of the Court on 29<sup>th</sup> August, 2011.

45. Section 3(1) of the Land Disputes Tribunal Act CAP 303 A(repealed) provided as follows:

- “Subject to this Act, all cases of a civil nature involving a dispute as to—
- (a) the division of, or the determination of boundaries to land, including land held in common;
  - (b) a claim to occupy or work land; or
  - (c) trespass to land shall be heard and determined by a Tribunal established under section 4.”

46. The Court has perused the award of the LDT annexed by the Appellant. On its face, it is shown that the award was issued 24<sup>th</sup> June 2008. From the said award, it is also evident that the tribunal dealt with a matter of ownership of land, which issue fell outside the mandate of the said tribunal.



47. In the case of Hezekiah Kungu Kinuthia Vs Ernest Kamau Kinuthia [2002] eKLR, the Court proclaimed as follows:

“Arbitration by elders constituting a land disputes tribunal is not intended to deal with matters connected with title to land so as to reverse the provisions of statute and redistribute land and reallocate titles to land; nor can such arbitration get into trust law. Legal issues of adverse possession, the trust concept, and the land laws of this country, are simply beyond even the slightest comprehension of lay tribunals however much the pretensions of grasp may be. This reality aside, the statute creating these tribunals and defining their jurisdiction loudly excluded these complicated concepts and fundamental rights from the jurisdiction of the tribunals. Any decision of a land disputes tribunal which impinges upon the title of a proprietor of land, or which is based on the trust concept must be struck down as a nullity, and it will be set aside. Likewise, a decision of the tribunal which goes contrary to the law, such as the statute of limitation, will not be allowed to stand. Parliament never intended to set up a tribunal which is free to act outside the jurisprudence of this land.”

48. Further, in the case of James Alukoye Were V Lurambi Division Land Disputes Tribunal, Misc. Civil Appl. No.165 of 2005, the Court held as follows:

“The Land Disputes Tribunal has no powers to arbitrate on matters involving title to land or give such order to grant specific performance to rectify the register”.

49. Moreover, in the case of Gibson Semele Mato V Eastern Province Land Dispute Committee & Another, Nairobi Misc. CA 331 of 2003, the Court held that:

“Makueni District Land Tribunal Appeals Committee had no jurisdiction to determine question of ownership and title to land registered under the Registered *Land Act* and that in doing so, the Tribunal acted ultra vires and the entire proceedings became a nullity.”

50. What is the effect of a tribunal acting without jurisdiction? In the case of Macfoy Vs United Africa Co Ltd (1961) 3 All ER, 1169, the Court declared as follows:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside; and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it.”

51. In this Appeal, and the suit before the trial court, it is clear that the LDT acted ultra vires in rendering the award relied upon by the Appellant, and which was subsequently adopted as an order of the Court. Therefore, it follows that, notwithstanding its subsequent adoption as a Judgment of the Court, the said LDT award was a nullity.

52. For the above reasons, this Court finds that the instant Appeal is not merited, and further finds that the trial court findings is sound, and there are no reasons to upset and/or set it aside. This court finds and holds that this Appeal has failed and the said Appeal is dismissed entirely.



53. On the issue of costs, pursuant to the provisions of Section 27 of the *Civil Procedure Act*, the Respondent is the successful party both in this suit and at the trial Court. Accordingly, the Appellant shall bear the costs of the Appeal and the suit before the trial Court.

This Appeal is dismissed accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A, THIS 3<sup>RD</sup> DAY OF OCTOBER 2024.**

**L. GACHERU JUDGE.**

**3/10/2024**

Delivered online in the presence of;

Joel Njonjo - Court Assistant

N/A for the Appellant

Though Judgement date was given in the

N/A or the Respondent presence of the advocates on 16/7/2024.

