



**Mwai v Mwai (Environment and Land Appeal E003 of 2021)  
[2022] KEELC 14527 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14527 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL E003 OF 2021**

**JO OLOLA, J**

**NOVEMBER 3, 2022**

**BETWEEN**

**JAMES KARIUKI MWAI ..... APPELLANT**

**AND**

**BENSON KABOI MWAI ..... RESPONDENT**

**JUDGMENT**

1. This is an Appeal arising from the Judgment and orders of the Honourable Ann Mwangi, Principal Magistrate issued on 10<sup>th</sup> December, 2020 in Karatina PMELC case No. 73 of 2013.
2. By a Complaint dated 11<sup>th</sup> July 2013, James Kariuki Mwai (the Appellant) had sought Judgment against his brother Benson Kaboi Mwai (the Respondent) for orders framed as follows:
  - (i) Possession of his rightful piece of land;
  - (ii) To be registered as the absolute proprietor to the suit land;
  - (iii) Damages occasioned by his unlawful eviction from the suit land; and
  - (iv) Any other costs the Court may deem fit to award.
3. Those prayers arose from the Appellant's contention that the Respondent herein had sold the family's parcel of land known as Kirimukuyu/Mbogo-ini/633 for Kshs.22,000/-, used the sum of Kshs.8,000/- to defray a loan advanced by the Agricultural Finance Corporation to the family against the land and then fraudulently proceeded without the knowledge of the Plaintiff and/or his mother to transfer the suit land to his name.
4. In his Statement of Defence dated 15<sup>th</sup> August 2013, the Respondent denied the Appellant's accusations and invited the Appellant to strict proof. The Respondent further asserted that the suit



against himself disclosed no cause of action and that if the cause of action were fraud, the suit was barred by the law of limitation.

5. In addition, the Respondent pleaded that the matters raised in the suit had been substantially and directly been in issue before a competent Court and that hence the claim was res judicata.
6. Having heard the dispute and in the Judgment dated and delivered on 10<sup>th</sup> December 2020, the Learned Trial Magistrate determined that the suit was time-barred having been filed out of time and that the Court therefore had no jurisdiction to entertain the same.
7. Aggrieved by the said determination, the Appellant lodged herein the Memorandum of Appeal dated 8<sup>th</sup> January, 2021 seeking to have the same set aside and substituted by a Judgment in favour of the Appellant on the grounds:
  1. That the Learned Magistrate erred in law and in fact in failing to make a finding that the Plaintiff had proved his case on a balance of probabilities;
  2. That the Learned Magistrate erred in law and in fact in failing to make a finding that the Defendant did not prove that he had lawfully acquired the title to the suit land.
  3. That the Learned Magistrate erred in law and in fact in failing to find that the Defendant had obtained title to the suit land through fraud;
  4. That the Learned Magistrate erred in law and in fact in failing to make a finding that the Defendant did not obtain title to the suit land regularly;
  5. That the Learned Magistrate erred in law and in fact in failing to make a finding that the Plaintiff was entitled to the prayers sought;
  6. That the Learned Magistrate erred in law and in fact in awarding the costs of the suit to the Defendant.
8. At Paragraph 2 of Page 2 of the impugned Judgment (page 54 of the Record) the Learned Trial Magistrate states as follows:

“The Defendant has raised two issues that challenge the Court’s jurisdiction to render a decision herein. These are:

1. The suit is time barred.
2. The issues raised herein are (res) judicata.

I will dispense with these two issues first and in the event that the answer to both is in the negative, then I will determine if the defendant’s registration of Kirimukuyu/Mbogo-ini/633 was fraudulently obtained.”

9. Thereafter the Learned Trial Magistrate proceeds with a consideration of whether or not the suit is time barred and after noting that the Appellant did not address the Court on the issue in his submissions concludes at Page 3 of the Judgment (Page 55 of the Record) as follows:

“If one was to accept the Defendant’s claim that the cause of action herein is based on fraud which is a tort then time started running either when the fraudulent transfer was obtained or when the Plaintiff learnt of it. Section 4 of the Limitation of Actions Act provides the limitation period to be three years. The Defendant was registered proprietor of the suit land in 1982. The



Plaintiff however testified that he got to know of the transfer in 1990 when the Defendant went to the land and started cultivating it saying it was his prompting the Plaintiff to visit the Land office where he was informed that the land was registered in the Defendant's name. The suit herein was filed in 2013. This was 23 years after discovery of the Defendant's registration which the Plaintiff claims to be fraudulent. The Plaintiff had until 1993 to file his suit. Further, even if one was to consider the Plaintiff's suit as one for recovery of the suit land, he would still be out of time. This is because under Section 7 of the Limitation of Actions Act actions for recovery of land may not be brought after the end of twelve years, thus the Plaintiff should have filed his suit by the year 2002 (12 years after discovery of the alleged fraud). The Plaintiff's suit is therefore time barred thus the Court has no jurisdiction to entertain it."

10. These then were the issues that informed the striking out of the Appellant's suit and in my considered view, the issues that ought to have been the basis of the Grounds of Appeal. A perusal of the six (6) Grounds of Appeal as listed above reveals none that challenges the Trial Court's finding that this suit as filed was time-barred. Instead, the Appellant proceeds as if the Learned Trial Magistrate had considered the matter in substance and arrived at the wrong conclusion.
11. As can be seen from the Statement of Defence filed by the Respondent in the trial Court (Page 11 of the Record), the issue of Limitation had been raised in the pleadings. The Appellant chose not to respond to the same. It is telling that even when his suit was struck out on the basis of the time-bar, the Appellant continues like the proverbial Ostrich to bury its head in the sand, in the hope that the issue would somehow go away.
12. In my considered view, if there was an Appeal that deserved summary rejection under Section 79(B), this was one such candidate. The same is incompetent and misconceived. It is struck out with costs to the Respondent.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 3RD NOVEMBER, 2022.**

In the presence of:

Mr. Kebuka Wachira holding brief for Nderi for the Respondent

No appearance for the Applicant

Court assistant - Kendi

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**J. O. OLOLA**

**JUDGE**

