



REPUBLIC OF KENYA



KENYA LAW
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**Njoroge & another v Pere (Land Case Appeal E025 of 2024)
[2025] KEELC 4592 (KLR) (19 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4592 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
LAND CASE APPEAL E025 OF 2024
MN MWANYALE, J
JUNE 19, 2025**

BETWEEN

STEPHEN KANYONI NJOROGE 1ST APPELLANT

MWANYUMA SENEYIA KIPASENWA 2ND APPELLANT

AND

SAMWEL NYABOLI PERE RESPONDENT

JUDGMENT

1. The Appellants Stephen Kanyoni Njoroge and Mwamjuma Seneiya Kipasenwa, being dissatisfied by the decision of Hon. W.C. was delivered on 12th July 2024 in Kilgoris CMELC No. E020 of 2024 between Stephen Kanyoni Njoroge and Mwamjuma Seneiya Kipasenwa as plaintiffs versus Samuel Nyaboli Pere preferred this Appeal and vide their memorandum of Appeal penning 6 grounds thereof.
2. They sought the following orders:
 - i. The appeal be allowed.
 - ii. That the judgement and consequential decree entered by the trial court be set aside and on order granting judgement in favour of the Appellants as per the reliefs in the plant dated 7th March 2024 be entered.
 - iii. That the Respondents be ordered to pay the costs of the appeal and that of the trial court.
3. The grounds of appeal are that; -
 - i. The Learned Magistrate erred in law and fact by holding that the suit was statute barred.
 - ii. The Learned Magistrate erred in law and in fact striking out the Appellants suit without considering the entire evidence on record as tendered by them.



- iii. The learned magistrate erred in law and in fact by failing to appreciate that parties are bound by their pleadings and therefore it was wrong for the court to determine issues that were not pleaded in the defence and/or counter-claim by the Defendant.
 - iv. The Learned Magistrate erred in law and in fact by making a determination and/or orders on which neither the parties herein had addressed the court on.
 - v. The Learned Magistrate erred in law and fact in failing to hold that the appellants did prove their case on a balance in the face of the ample evidence tendered before him.
 - vi. The decision of the Learned Magistrate was against the weight of evidence adduced by the Appellants.
4. On the strength of the above grounds of Appeal the Appellants sought for the prayers set out at paragraph 2.
5. Upon admission of the appeal parties were directed to file written submission.

Appellants submission

6. The Appellants have framed and submitted on three issues for determination.
- a. Whether the Appellants are entitled to ten (10) acres of land comprised in L.R No. Transmara/Kapune/170?
 - b. Whether the appeal is merited?
 - c. Which orders to grant in the circumstances.
7. The Appellants submit that the suit was filed on behalf of the Estate of the Late James Kanyoni Njoroge as pleaded at paragraph 4 of the plaint hence the court had no basis in findings that the suit was not instituted on behalf of the Estate of a deceased the late James Kanyoni Njoroge and the suit was not defective but curable under Article 159 of *the constitution*.
8. The Appellants submit that they produced an Agreement for sale for purchase of the 10 acres within the Transmara/Kapune/170 and further an agreement for a cheque of Kshs. 50,000/= hence they complied with Section 3(3) of the *Law of Contract Act*.
9. The Appellants submit that the Learned Magistrate erred in holding that the Agreements dated 2nd May 1988 and 26th June 1998 were statute barred, and placed reliance on the decision in the case of Willy Kimutai Kitilit Vs. Michael Kilet; and Macharia Mwangi and 7 Others Vs. Davidson Mwangi, being a common intention was created, by virtue of the agreement and hence a Constructive Trust existed.
10. The Appellants on the strength of the above thus submit the Appeal be allowed.

Respondent's Submission

11. The Respondent has framed and submitted on 4 issues, to wit
- i. Whether there was a valid Land Agreement between the Respondent and Appellants Late father?
 - ii. Whether the Appellants are entitled to a portion measuring 10 acres in the suit property either through purchase or adverse possession?



- iii. Whether the Appeal is merited?
 - iv. Who should bear the costs of this appeal?
12. On issue number 1, the Respondent submit that there was no valid agreement for sale between the Appellant's Late father and the Respondent, the 1st Agreement was a money lending agreement and was titled "Mapatano ya cheki". On the 2nd Agreement the Respondent submits that the same he was not aware of the same.
 13. Reliance was placed on Section 3(3) of the Law of Contract Act and Section 38 of the Land Act, for the proposition that a disposition in land was to be evidenced by an Agreement in writing.
 14. The Respondent submit that adverse possession could not have arisen as there was no occupation of the suit land.
 15. Placing reliance on Section 107 of the Evidence Act, the Respondent submit that the Appellants did not prove any facts so as judgment could be entered in their favour.
 16. On the 2nd issue the Respondent submits that as there was no sale, the Appellants were not entitled to the same and that adverse possession could not arise as the Appellant's father used the portion with the consent of the Respondent.
 17. The Respondents further submit that 6 years from the date of the alleged contract lapsed, as well as 12 years to claim of adverse possession also lapsed hence the suit is time barred and defective.
 18. On the 3rd issue for determination the Respondent submits that the Appeal is not merited and it ought to be dismissed.
 19. Before framing issues for determination, the court notes that the trial court made an observation at paragraph 51 of the impugned judgment that the plaintiffs ought to have filed the suit as legal representatives in the following manner.

"Stephen Kanyoni Njoroge and Mwajuma Senaiya Kipsenwa suing as legal representative of the Estate of the Late James Kanyoni Njoroge..."

and that at paragraph 49 of the impugned judgment, the court took issue with the suit as filed as the plaintiffs sued in their own capacity and not as legal representatives of their deceased father James Kanyoni, and/or his Estate.
 20. The court also notes that the plaintiff's case was struck out for being time barred.

Issues for Determination

21. Upon analyzing the record of Appeal, the submissions of the parties, and considering the law, the court frames the following as issues for determination
 - i. Whether or not the plaintiff's suit before the trial court was competent.
 - ii. Whether or not the appeal is merited, and in determining this issue the court shall examine whether or not there was a valid agreement for sale between the Appellants father and the Respondent and/or whether or not adverse possession was proven?
 - iii. What reliefs ought to issue?
 - iv. Who bears the cost of the suit?



Analysis and Determination

22. In order to fulfill its duty as a first Appellate court, the duties, of “re-considering the evidence, evaluate it itself and drawing its own conclusion...” as stated in *Selle and Another Vs. Associated Motor Boats* and has reviewed the record of Appeal.
23. In formulating issue No. 1 for determination, the court noted that paragraphs 47 to 51 of the impugned judgment dealt with the said issue of competence of the suit however the trial court did not pronounce itself on it, although at paragraph 71 of the judgment the Learned Magistrate nonetheless struck out the plaintiff’s suit, for being fatally defective, as a result of the suit being time barred as can be observed at paragraph 64 of the impugned judgment.
24. It follows that having struck out the suit as being time barred the court lacked jurisdiction to make a determination on merits through grant of reliefs b and c of paragraph 77 of the judgment.
25. On whether there was a competent suit, the Appellants submitted that any defect as to title of the suit could be cured under Article 159 of *the Constitution* while the Respondent’s submission on this issue were silent.
26. It is apparent from the record that the plaintiffs were suing on behalf of the Late James Kanyoni, as the administrators, and in their own capacity and the Learned Magistrate was right in finding that the suit ought then to have equally been brought on behalf of the deceased’s Estate too as required under Order 3 rule 7. Indeed at paragraph 4 of the Plaint whereas the plaintiff pleaded that “they were administrators of the said the Late James Kanyoni”, they did not plead that the suit was brought on behalf of his Estate as required under Order 3 Rule 7 of the Civil Procedure Rules but instead brought the suit in their own capacity only.
27. This omission is not a merely misdescription of the parties which would be a technical issue curable under Article 159 of *the Constitution* as submitted by the Appellants but it rendered the suit fatally defective, and the trial court having observed the same to have made a finding thereon.
28. Having found the suit before the trial to have been fatally defective, the trial court should not have dealt in its merits or otherwise.
29. Equally having found that the suit was fatally defective, the court shall not deal with the merits or otherwise of the Appeal, in terms of issues for determination 2 and 3 as framed herein.
30. The upshot is that whereas the Learned Magistrate was correct in striking out the fatally defective suit, the fatal defect was premised on noncompliance with Order 3 Rule 7, and not on the suit being time barred which is a substantive issue in any event. Hence the court hereby sets aside the judgment of the trial court striking out the suit for being fatally defective on account of the same being time barred and sets aside paragraph 77 (b) and (c) of the said judgment which were determination on merits of the suit and substitutes thereof with an order striking out the plaintiff’s suit for non-compliance with Order 3 Rule 7. With costs of the Appeal and trial court to the Respondents.
31. The Appellants are at liberty to file a competent suit to be heard and determined on its merits.
32. Judgment accordingly.

DATED AT KILGORIS THIS 19TH DAY OF JUNE, 2025.

HON. M.N MWANYALE

JUDGE



In the presence of
CA – Emmanuel/Sylvia/Sandra
Ms. Pion for the respondents
Mr. Opar for the Appellants.

