Githae v Njuguna (Suing as the next of kin and legal representative of Estate of Sammie Seka Barah - Deceased) & 2 others (Environment and Land Appeal 18 of 2024) [2025] KEELC 6301 (KLR) (Environment and Land) (25 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6301 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ENVIRONMENT AND LAND

ENVIRONMENT AND LAND APPEAL 18 OF 2024

MC OUNDO, J

SEPTEMBER 25, 2025

BETWEEN

CHARLES MUTURI GITHAE ..... APPELLANT

AND

DOROTHOY WANJIRU NJUGUNA (SUING AS THE NEXT OF KIN AND LEGAL REPRESENTATIVE OF ESTATE OF SAMMIE SEKA BARAH - DECEASED) ..... 1ST RESPONDENT

JAMES MWANGI MBUTHIA T/A PUPS PROPERTIES ..... 2ND RESPONDENT

HENRY MBUTHIA GITHU ..... 3RD RESPONDENT

(Being an Appeal against the Judgement delivered by Honourable L. Arika, CM delivered on 15th February, 2022)

JUDGMENT

1. Before me for determination on Appeal is a matter which was heard and determined by Hon. Lilian A. Arika, Chief Magistrate, wherein upon considering the evidence of both parties, vide her Judgment delivered on 15th February, 2022, the learned Magistrate entered Judgment in favour of the Plaintiff against the Defendants.

2. The 2nd Defendant/Appellant being dissatisfied with the said findings and Judgement, has now filed the present Appeal based on the following grounds in his Amended Memorandum of Appeal:

    i. That the Learned Trial Magistrate erred in law and in fact in holding that plot Nos. 34 and 35 were the same as Title Number Naivasha/Maraigushu Block 1/1212 and Title Number Naivasha Maraigushu Block 1/1213 respectively without any evidence in that regard.

ii. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the claim for the value of the 2 plots was a claim for special damages that were not specifically pleaded and proved at the trial.

iii. The Learned Trial Magistrate erred in law in ordering for the valuation of the 2 plots and in so doing granted a remedy that had not been pleaded or prayed for by the 1st Respondent.

iv. The learned Trial Magistrate erred in law in descending into the arena by ordering a valuation of the 2 plots in an attempt to assist the 1st Respondent prove her case.

v. That the Learned Magistrate erred in fact in not considering the pleadings, evidence and submissions filed on behalf of the Appellant and if she did (which they denied) she reached wrong conclusions on the evidence and made wrong findings on the evidence adduced.

vi. That the Learned Trial Magistrate erred in law and in fact in finding that the Appellant should bear the Plaintiff's costs.

vii. The decision was arrived at on consideration, to the extent that that was done, on wrong principles of law and/or contrary to the principles of law.

viii. That the decision was against the weight of evidence.

ix. The Learned Trial Magistrate erred in law in failing to find that the 1st Respondent's suit was statute time barred.

x. The Learned Trial Magistrate erred in law in failing to find that there cannot be extension of time for a claim relating to land.

xi. That the Learned trial Magistrate erred in law in failing to find that the ex-parte extension of time was without merit.

3. The Appellant thus prayed for the following orders:

i. That the Honourable Court be pleased to allow the Appeal by reversing and setting aside the judgement and Decree in Nakuru CM ELC 517 of 2018 and in place dismiss the Respondent's claim against the Appellant with costs.

ii. That the 1st Respondent be condemned to pay costs of the Appeal and the costs of the suit in the lower court.

4. The Appeal was disposed of by way of Witten submissions.

Appellant's Submissions.

5. The Appellant founded his submissions on the decided case of Selle- vs- Associated Motor Boat Company Ltd and Others [1968] EA 1 to the effect that the court had the duty to re-evaluate the evidence and make its own conclusions taking into account the fact that, unlike the trial court, it did not have the advantage of seeing the demeanor of the witnesses.

6. On ground 1 of his Memorandum of Appeal, the Appellant submitted that there was no evidence adduced in court that there was a nexus between Plot Nos. 34 and 35, and Title Number Naivasha/Maraigushu Block 1/1212 and 1213. That the 1st Respondent had testified that her deceased son had purchased plot Nos. 34 and 35 being part of Title Number Naivasha/Maraigushu Block 1/298 as per the sale agreement and receipts therein produced. That under cross- examination she had admitted that the documents did not indicate the size of the plots and neither had she provided the area list or the

survey maps or any proof that plot Nos.34 and 35 had been registered as Title Numbers Naivasha/ Maraigushu Block 1/1212 and Naivasha/Maraigushu Block 1/1213 respectively.

7. On ground No. 2, he submitted that the value of the plots having not been specifically pleaded and proved, the learned trial Magistrate erred by awarding compensation, at the current and prevailing market prices, as a claim in the nature of special damages. That the claim by the 1st Respondent for monetary compensation to recover the subject properties at the current and prevailing commercial market value was not a claim for general damages but a claim for special damages. That the 1st Respondent ought to have pleaded the value of the plots in her amended Plaint to give the Appellant an opportunity to respond.

8. In regard to grounds 3 and 4, the Appellant's submission was that the 1st Respondent having made a nebulous prayer on monetary compensation at the current and prevailing commercial market value, it was incumbent upon the 1st Respondent to prove that market value at the trial. There having been no prayer for valuation of the two plots, and there having been no such proof, by ordering the parties to conduct a joint valuation, the trial Magistrate had descended into the arena in a bid to assist the 1st Respondent by granting a favorable order not prayed for which was meant to salvage her case. The simple finding of the court should have been that the current and prevailing commercial market value had not been proved on a balance of probabilities as no valuation report had produced. Reliance was placed on the decisions in the cases of Antony Francis Warehaun t/a Warehaun & 2 others v Kenya Post Office Saving Bank [2004] eKLR and North Kisii Central Farmers Limited v Jeremiah Mayaka Ombui & 4 Others [2014] eKLR.

9. While submitting on Grounds 5, 6, 7 and 8, the Appellant's argument was that the 1st Respondent's case having been that her son had paid a sum of Kshs. 34,000/= to the 2nd and 3rd Respondents for the purchase of Plot Nos. 34 and 35 wherein they had declined to transfer the said properties to him, the trial Magistrate had erred in finding the case in her favor because the 1st Respondent did not prove her case on a balance of probabilities for the reasons that: -

    i. The sale agreement was between Pups Properties and Sammie Seka Barah wherein the former was not the owner and therefore had no interest to sell and further, that the Appellant was not a party to the said agreement.

    ii. According to the records of Pups Properties, there had been no money received from the deceased. The acknowledgement dated 6th May, 1996 in alleged prove that the Appellant had received some money paid by the deceased, had been challenged in cross- examination and was of no probative value for reasons that;

        a. It did not relate to plot Nos. 34 and 35.

        b. It did not acknowledge Kshs. 34,000/= as an alleged purchase price but an advance payment of collectable rent.

        c. The hand-written endorsement/addition to the acknowledgement had not been countersigned.

        d. The 2nd Defendant refuted having signed the said acknowledgement.

10. That whereas the learned trail Magistrate held that the sale of the 2 plots had been fraudulent, the standard of proof of fraud had not been discharged by the 1st Respondent. He placed reliance in the decided case of Elizabeth Kamene Ndolo v George Matata Ndolo (1996) eKLR.

11. In reference to grounds 9, 10 and 11 of his Memorandum of Appeal, the Appellant's submission had been that the 1st Respondent's suit was statute time barred. That despite the cause of action having occurred in the year 1995, yet the suit had been filed in October, 2016, a period of over 21years. That whereas the 1st Respondent had relied on the ruling by Hon. Mulwa J. dated 15th September, 2016 extending time to file suit up to 14th October, 2016, it was his submission that the court had no such jurisdiction to extend time for which the said ruling had been contrary to Law. That the law did not provide for an extension of time for a cause of action based on breach of contract. He placed reliance on the decisions in the cases of Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & Desidery Tyson Otieno Malidi CACA No. 39 &40 of 2016 and Pius Kimaiyo Langat v The Co-Operative Bank of Kenya Limited Nairobi CACA No. 48 of 2015.

12. He further placed reliance on the provisions of Section 7 of the Limitations of Actions to the effect that claim for recovery of land may not be brought after 12 years from the date of accrual of the cause of action and on the decision in the case of Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR to buttress his submissions.

13. While also placing reliance was on the decision in the cases of Gathoni v Kenya Co-operative Creameries Ltd [1982] eKLR 104 and Margaret Wairimu Mgugu -V—Karura Investment Limited & 4 Others [2019] eKLR, he submitted that for the provision of Section 26(c) of the Limitation of Action Act to apply, the Plaintiff must have been diligent but not indolent. That the Certificates of official search had shown that parcel Nos. Naivasha Maraigushu Block 1/1212 and 1213 were registered in the names of Christine Wangui Maina and Veronica Wambui Gathirwa, respectively on 4th October, 2003. That subsequently, from that date, any alleged fraud could not have been said to be concealed for which the 1st Respondent could, with reasonable diligence, have discovered the alleged fraud. That the 1st Respondent did not visit the suit land from the 1995 until the year 2012, a period of 17 years hence she was indolent and accordingly, she could call to her aid the provision of Section 26 (c) of the *Limitation of Actions Act*. He thus urged the court to allow the appeal with costs in both courts.

1st Respondent's Submissions

14. In response, the 1st Respondent vide her submissions dated 30th June 2025 summarized the factual background of the matter and then framed her issues for determination as follows:

    i. Whether the Trial Court erred by declaring that the plots No. 34 and 35 are currently Naivasha/Maraigushu Block 1/1212 and 1213.

    ii. Whether the Trial Court erred in allowing the prayer for monetary compensation in recovery of the suit properties at the current and prevailing commercial market value, rate and/or price.

    iii. Whether the Trial Court erred by declaring that the 1st Respondent proved her case on a balance of probability.

    iv. Whether the Trial Court Suit was time barred.

    v. Whether the Appellant is bound by the Interlocutory Judgement issued on 16th October, 2020 against the 2nd and 3rd Respondents as his agents.

15. On the first issue for determination the 1st Respondent submitted that there had been no dispute that Plots Numbers 34 and 35 were currently Naivasha/Maraigushu Block 1/1212 and 1213. That in any case, she had produced a registered caution lodged at the Lands Registry in relation to the said suit properties which had duly been registered as such.

16. It was her submission that a mere denial without further proof was not a proper defence at all. That the Appellant did not produce any document or adduce any evidence to validate such denial, hence his allegations had been mere statements with no probative value. That the trial court made a proper finding to that effect. She placed reliance in the Court of Appeal's decision in the case of Magunga General Stores v Pepco Distributors Limited (1987) 2 KAR 89, to submit that the said ground of Appeal was misplaced and had no merit.

17. On the second issue for determination the 1st respondent submitted that the trial court had not erred in allowing the prayer for monetary compensation in recovery of the suit properties at the current and prevailing commercial market value, rate and/or price. That the Court had exercised its discretion as provided by the law in proposing that parties conduct a joint valuation, to chart a way forward. That the nature of the monetary compensation in the circumstances of case was inclined as general damages. That in any case, the said prayer was not the main prayer but an alternative thereto for which she could plead in the event that she did not get the suit properties. That the court could make an order for monetary compensation in line with the principle of loss of user.

18. She hinged her reliance in the decided case of Jebrock Sugarcane Growers Co. Limited v. Jackson Chege Busi, Civil Appeal No. 10 of 1991 (Kisumu) (unreported) to submit that it was not an error for the court to issue the prayer of monetary compensation and propose a joint valuation to determine the amount as payment because at the time of filing suit, it had not been possible to give a figure on the exact value of the Suit Properties there having been uncertainty as to when the case would be concluded and Judgement delivered. That the Trial Court had only given the parties an option to have the joint valuation, at their own liberty hence the assertions that the Court had made an Order for joint valuation wherein the same had not been pleaded in the Plaint had been farfetched and unmerited. That in any case, the 1st Respondent had sought for any other Orders as the Court deemed fit hence the court in its discretion had deemed fit to propose that parties be at liberty to do a joint valuation.

19. On the third issue for determination, she submitted that she had proved her case on a balance of probability wherein she had produced the Sale Agreement dated 27th May, 1995, Letter of Offer dated 6th November, 1995 proof of monies disbursed for the Suit Properties and an Acknowledgement Agreement dated 6th May, 1996 executed by the Appellant. That it was not in contention that the 2nd and 3rd Respondents were agents of the Appellant for which he had given them the Power of Attorney to that effect. That subsequently, any transactions relating to the Suit Properties between the deceased and the 2nd and 3rd Respondent had been legal and binding.

20. That the receipts that had been produced tallied with the Appellant's version that the plots sold for Kshs. 17,000/= each being the total sum that the deceased had made of Kshs. 34,000/= in purchase of the Suit Properties. It was her submission that that the assertions by the Appellant that he never received any funds form his agents were neither here nor there and did not invalidate the transactions in the sale and purchase of the Suit Properties. That she had discharged the burden of proof placed upon her by virtue of the provisions of Sections 107, 108 and 109 of the *Evidence Act*.

21. That the Appellant's assertions that the Acknowledgement Agreement dated 6th May, 1996, was forged was mere speculations, there having been no evidence in the form of a document examiner presented, to confirm that the same was fraudulent, nor any document presented to controvert her evidence. That in any case, the 2nd and 3rd Respondents never filed any defence to refute the said produced documents thus the same were undisputed. It was thus her submission that the Court did not error by declaring that the 1st Respondent had proved her case on a balance of probability.

22. That her suit was not time barred otherwise the matter would not have proceeded up to the delivery of the judgement. That further, the Court had rendered itself on the issue and as such had proceeded with the suit. That had the Appellant been aggrieved with the suit proceeding pursuant to an earlier ruling that it was properly in Court, he ought to have moved the Court appropriately, but he did not.

23. She submitted that the cause of action in the present case had arose on or around 29th August, 2012 when she discovered through the searches at the lands Registry that the properties had been fraudulently, illegally and unlawfully transferred to third parties without her son's knowledge, approval, authority and/or consent. That the Suit had been filed four (4) years later and since the matter was based on a breach of contract, the time would have lapsed on or about 29th August, 2018. That she was therefore within time.

24. That even if the 1st Respondent's claim had been for recovery of land as had been alleged by the Appellant, then the applicable law would have been the provisions of Section 7 of the *Limitation of Actions Act*. That subsequently, the right of action in the present case being the date when the 1st Respondent had discovered that the suit properties had been transferred to third parties through the Official Land Searches on 29th August, 2012 and having filed the Suit herein in the year 2016, she would be deemed well within the statutory period to recover land as it was within twelve (12) years.

25. She also placed reliance on the provisions of Section 9 of the *Limitation of Actions Act* to submit that even if the Trial Suit had been for recovery of land of the deceased, then the right of action had accrued on the date of death. That the deceased had been declared legally dead, on 5th June, 2006 by the High Court hence the trial suit having been filed on 13th October, 2016, the same had been filed within ten (10) years from the date of presumed death which was within the requisite period of twelve (12) years for recovery of land. That further and without prejudice, even if the same was had been time barred, the Court had in a Ruling dated 15th September, 2016 extended the time to file the Suit based on the circumstances leading to the institution of the suit and pursuant to the provisions of Section 26 of the *Limitation of Actions Act*. Reliance was placed on the decision by the Environment and Land Court at Thika in ELC Misc No. 68 of 2019 Sylvia Wanjiru Gathendu vs Lilian Waithera Mwai & 4 Others to submit that the Appellant had not demonstrated that the Trial Suit was incompetent as alleged and neither had he proved that the same was statute time barred.

26. That lastly, that the Appellant was bound by the interlocutory judgement issued on 16th October 2020 against the 2nd and 3rd Respondents who undisputedly were his agents over the sale of the suit properties. That np evidence had been adduced to the effect that the instructions that he had issued had not been followed. She placed reliance in the decided case of Karanja v Phoenix of EA Assurance Co Ltd [1991] eKLR to submit that the Appellant having been the principal, his agents' actions were binding on him since the act of an agent within the scope of his actual or apparent authority did not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests. She thus sought for the dismissal of the Appellant's Appeal for being unmeritorious.

Analyses of the evidence.

27. According to the proceedings in the trial court, Dorothy Wanjiru Njuguna, the Plaintiff/1st Respondent herein instituted suit against James Mwangi Irungu, Charles Muturi Githae (the Appellant herein) and Henry Mbuthia Githu as the 1st to 3rd Defendants respectively, vide Nakuru CMCELC No.517 of 2018 in the Plaint dated 11th October 2016 and amended on 23rd October, 2019, wherein she had sought for the following orders;

i. A declaration that Sammie Seka Barah is the truthful and equitable owner of the properties known as Plot numbers 34 and 35 being part of Naivasha/Maraigushu Block 1/298 (now currently Naivasha/Maraigushu Block 1/1212 and 1213 respectively);

ii. A further declaration that any purported sale, transfer and registration of the subject properties is fraudulent, illegal and invalid and as such the Title documents should be cancelled;

iii. An Order for specific performance to compel the Defendants to transfer the properties known as Plot numbers 34 and 35 being part of Naivasha/Maraigushu Block 1/298 [now currently Naivasha/Maraigushu Block 1/1212 and 1213 respectively] to the Plaintiff and should the Defendants refuse to sigh the transfer documents the Deputy Registrar of the Honourable Court to do so;

iv. In the alternative and without prejudice to the foregoing, monetary compensation in recovery of the subject properties at the current and prevailing commercial market value, rate and/or price;

v. Damages for breach of contract, fraud, loss and suffering;

vi. Damages for loss of bargain in the Subject properties.

vii. Costs of the suit together with interest thereon at Court rates.

viii. Any other or further relief as the Honourable Court may deem appropriate.

28. Subsequent to the filing of the suit, the 2nd Defendant/Appellant filed his Statement of Defence dated 22nd November 2016 denying the allegations contained in the Plaint that he sold Plot Numbers 34 and 35 (now known as Naivasha/Maraigushu Block 1/1212 20 Naivasha/Maraigushu Block 1/1213) or any other plot to Sammie Seka Barah (Deceased) and nor was he privy to a written agreement dated 27th May 1995. That the Plaintiff's suit was incompetent as it was statute time barred and he would challenge the extension of time, granted exparte on 15th September 2016, to file the suit because the leave was unmerited wherein the court had no jurisdiction to extend time where the cause of action was a breach of contract. He thus prayed that the Plaintiff's suit be dismissed with costs.

29. In her Reply to the Defence, the Plaintiff/1st Respondent reiterated the contents of her Plaint stating that the 2nd Defendant's Statement of Defence was a sham and a mere denial, was incurably defective, bad in Law, frivolous and vexatious and an abuse of the Court process hence should be struck out with costs. That the delays, failure, refusal and/or neglect by the Defendants to honor their obligations as provided in the Agreement of 27th May, 1995, had constituted a breach of the Agreement as a result of which the Deceased's Estate and the Plaintiff had suffered and continued to suffer significant damage. That the suit herein was competent, merited, proper in law, genuine, bonafide and ought to be allowed as prayed.

30. The 1st and 3rd Defendant's neither entered appearance nor filed any Defence hence an Interlocutory Judgement had been entered against them as had been prayed in the Plaint.

31. Subsequently, the case proceeded for hearing wherein the Plaintiff while testifying as PW1 adopted her witness statement, Supplementary Statement and Further Witness Statement as her evidence in chief and also produced the documents in her filed list and supplementary list of documents in evidence as follows;

i. Sale Agreement dated 27th May, 1995 as 1.

ii. Letter of Offer dated 6th November, 1995 from 1st Defendant addressed to the Deceased as Pf exh 2.

iii. Copies of Receipts showing payment of purchase price as Pf exh 3.

iv. Acknowledgement Letter dated 6th May, 1996 as Pf exh 4.

v. Missing Person Newspaper advertisement as Pf exh 5.

vi. Police Abstract dated 1st August, 1997 as Pf exh 6.

vii. High Court Ruling issued on 5th June, 2006 as Pf exh 7.

viii. High Court Order issued on 4th August,2006 as Pf exh 8.

ix. Official Searches dated 29th August, 2012 as Pf exh 9.

x. Caution as Pf exh 10.

xi. Letter dated 13th September, 2012 from the Permanent Secretary to Naivasha District Land Registrar as Pf exh 11.

xii. Grant of Letters of Administration issued on 12th June,2013 as Pf exh 12.

xiii. Demand Letters dated 20th August, 2013 and 25th September, 2013 from the Plaintiff's Advocates to the Defendants as Pf exh 13.

xiv. Letters dated 21st August, 2013 and 28th September, 2013 from Waigwa Ngunjiri & Company Advocates addressed to the Plaintiff's Advocates as Pf exh 14.

xv. High Court Ruling dated 15th September 2016 as Pf exh 15.

xvi. Business Registration Service as Pf exh 16.

xvii. Deceased's Identification Card as Pf exh 17.

32. She had then proceeded to testify that her son Sammy Seka Barah had bought the shamba at a purchase price of Kshs. 34,000/= as per the receipt produced as Pf exh 3. That Sammy Seka disappeared without trace in July 1997. That subsequently, she had filed a suit in court over her son's disappearance wherein on 5th June, 2006, she had been given an order declaring him legally dead.

33. That Sammy had a wife and 2 children. That his disappearance and subsequent search for him in vain had resulted into her health issues including being diabetic and having arthritis hence she had been using a crutch. That Sammy's wife died out of shock and thus she had been taking care of their children on her own. That she had obtained authority from court to stand in as an administrator to Sammy's estate vide a letter of administration dated 12th June, 2013. That whereas Sammy had fenced the shamba using barbed wire, when she found that all the wires had been removed, she decided to conduct a search.

34. That the search result had shown that the shamba had been bought from Wa-Githae (2nd defendant) and that it was PUPS properties (the 1st Defendant herein) who had been the agent. That she had then decided to seek for help from the Permanent Secretary Lands wherein a caution had been placed over the suit properties at Naivasha. That a demand letter had been written to the 2nd Defendant wherein she had personally served him at Naivasha.

35. She explained that since she had taken time to search for her son without trace, she had sought from court and had been granted leave to file the suit hence the delay in filing the suit. She prayed for judgment so that she could use the land.

36. That were the land still been her son's, she would have built a home to retire to, and sold a portion of it to cater for her medical expenses for arthritis and diabetes, including an eye surgery that was pending at Kabete. That however, were the court to determine that she be given monetary compensation, then the same should be at current market value and price of over Kshs. 1,000,000/=.

37. She maintained that she could not file the suit before obtaining the letter of administration which was dated 12th June 2013. That when she had learnt that the property had been transferred, she had started following up on the issue and that it was not until 29th August 2012 that she had learnt that the land had been illegally and fraudulently transferred otherwise she had no prior knowledge of the same.

38. In cross examination, she confirmed that as per Pf exh 1, the shamba being sold belonged to the 2nd Defendant and the sale agreement had been drafted on the letterhead of Pups Properties who had been the vendor. That the same had been signed by James Mwangi (the 1st Defendant herein) although the 2nd Defendant's name was not in the said agreement and neither had she seen his signature. That it was true that she had gone to see the shamba, which was a plot and not a farm and that the same was near the Traffic stands in town.

39. When she was referred to Pf exh 1, she confirmed that the same had indicated Plots 34 and 35 but did not state the size of the plots. On being referred to Pf exh 3, she also confirmed that the same were two receipts, for plot numbers 34 and 35 which also did not indicate the size of the plots. In reference to Pf exh 4, she confirmed that the same was an acknowledgment which neither mentioned Plot number 34 or 35. That whereas the bottom of the aforementioned acknowledgement had been handwritten, she could not tell who written the same. That whilst there had been no signature, the words Samie Seka Barah had been written although the size of the plot had not been indicated.

40. She admitted that there had been no indication that the Land Control Board had given its consent. When she was referred Pf exh 9, she confirmed that the search result had been for parcel Nos. Naivasha/ Maraigushu Block 1/ 1212 and 1213. That whereas Plot 1212 had belonged to Christine Maina, while Plot 1213 belonged to Veronicah Wambui according to the search result, persons whom she did not sue. That whereas she could not tell who had sold the land to the two, she knew that his son had bought two plots. That between 1997 when he disappeared, to the time that she had done a search, she had been following up on the land. That it had thus been in the year 2012 that she had found the wires had been removed that she had taken an action. That in the year 2006, she did not know the plots had a problem. That whereas she had had accompanied her son whenever he had gone to make payments to the people, she had not witnessed him make payments.

41. In re-examination, she testified that whereas the receipts did not show the size of the shamba, the searches had shown the sizes of the shamba. She reiterated that the said acknowledgment note produced as Pf exh 4, bore her son's name and that the 2nd Defendant had received and signed for the money from Pups Properties (the 1st Defendant herein) which money had been from her son.

42. That Pf exh 4 had referred to a plot number, 298 which plot number was in the documents she had retrieved from amongst his son's properties. She denied having written anything on the said documents and maintained that her son had bought plot numbers 34 and 35 but later when the titles were issued, the land references had changed.

43. When she was referred to Pf exh 10, she confirmed that the citation had been signed by a Land Registrar called Nyangweso, and that the same had shown the land title. He confirmed that whenever his son went to make payment, she would go with him. That since she had been born in Naivasha, she knew the area and that the plots were being shared out.

44. She maintained that the payment had been made by her son to Pup's properties, the 1st Defendant herein and that she had accompanied him although she did not enter the premises. On being referred to Pf exh 11, she confirmed that the same had been written by the Land Registrar. That Pup Properties were merely the agents hence there had been no need for them to sign.

The Plaintiff had thus closed her case

45. The Defence case proceeded with the testimony of Charles Muturi Githae, the 2nd Defendant who while testifying as DW1, adopted his witness statement as his evidence in chief and proceeded to state that he was the owner of land No. 298 which he had subdivided into plots and asked the 1st Defendant to sell the same on his behalf at a purchase price of Kshs. 17,000/=per plot. He denied having sold plot numbers 34 and 35 to Sammie Seka whom he neither knew or had met.

46. When he was referred Pf exh 1, the Sale Agreement herein, he denied ever signing the same as the seller although the Shamba was his. That whereas he had given the 1st Defendant power of Attorney to sell, his instructions were that when a buyer was found, he was to be present when the sale went on, so that he could meet the buyer and sign the Agreement before an Advocate.

47. When he was referred to the receipts, he denied having received any receipts from the 1st Defendant or the said Sammie Seka. In reference to Pf exh 4, he refuted having received any funds from the 1st Defendant as an advance. That whilst the said acknowledgement had referred to “rent”, he had no rental properties. That the same was null and void as it had not identified any plot number and some parts thereof had been hand written by someone he did not know. That there had been no stamp affixed on it.

48. That having not received any funds from the 1st Defendant, he had decided to engage a different agent wherein Naivasha Afya Sacco had bought the entire shamba in a transaction he had engaged in with their directors. He confirmed that he knew where Plot numbers 34 and 35 were situated. He maintained that the Sacco had bought the entire shamba and he paid off his debts.

49. That he was surprised to hear the issue about Sammie since he did not know him. On being referred to Pf exh 9, he testified that he did not know the people personally since he had only interacted with the Sacco and its directors, not the members of the Sacco. He sought for the dismissal of the suit with costs.

50. In cross-examination, he confirmed ownership of the shamba and that he had subdivided the same. That whereas he did not know the persons listed in the search, yet they were members of the Sacco whom he did not meet save their directors. That he knew both James Mwangi Irungu and Henry Mbuthia, the 1st and 3rd Defendants respectively, as Directors of PUPs Properties Limited.

51. That he had given instructions to PUPS Properties in regard to the shamba that had been subdivided into plots. That PUPS Properties had sold plot Nos. 34 and 35 as his agents but did not give him the sale proceeds although they had agreed on their commissions. That it was PUPS Properties looked for the buyers.

52. That he never reported PUPS properties to the police nor filed any suit in court. He confirmed that since each plot was sold for the price of Ksh. 17,000/=, wherein two plots amounted to Ksh. 34,000/

=. He confirmed that the agreement produced by the Plaintiff had indicated a purchase price of Kshs. 34,000/=.

53. He confirmed that he knew the Plaintiff whom he had met in the year 2005 through a family friend. That the Plaintiff had said that he had sold two plots to her son and asked for the said plots or a refund of the money. That he had taken her to his agents, PUPS Properties where they had met the 3rd Defendant who denied any knowledge of the sale and had found no documents to that effect. The denied having shown her a plot that he would give her in substitution.

54. He confirmed that he had a bank loan and since the land had always been advertised in the newspapers for sale, people had offered very low funds hence he had to refund them after he got a better deal from the second sale and which funds had been adequate to repay off the bank loan. That whereas it was true that the parcels had been sold twice, he had refunded genuine buyers.

55. When he was referred to Pf exh 4, he confirmed that there was a plot number on it wherein block 1/298 had been indicated therein. He explained that the same was the plot number for the mother title. He also confirmed that the acknowledgment was on the Letter head of PUPS Properties. That however, the signature on it was a forgery although the ID number was his. When he was probed further, he stated that the witness's name was not known to him, and that there was no ID number. Nonetheless, he confirmed that stamp therein belonged to PUPS Properties.

56. In re-examination, he confirmed that they had met the 3rd Defendant when he took the Plaintiff to PUP's Properties in the year 2005 but they found no proof of sale documents.

The 1st Defendant had thus closed his case.

Determination.

57. I have considered the record of appeal, the evidence as adduced in the trial court, the holding by the trial Magistrate, the written submissions by learned Counsel, the authorities cited and the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the decision appealed against, assess it and make my own conclusions as was stated by the Court of Appeal in Paramount Bank Limited vs. First National Bank Limited & 2 Others (Civil Appeal 468 of 2018) [2023] KECA 1424 (KLR) where the court held as follows;

> " A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the *Civil Procedure Act*, a first Appellate Court can appreciate the entire evidence and come to a different conclusion."

58. The summary of the evidence adduced by the Plaintiff /1st Respondent in the trial court as well as her adopted witness statement, was to the effect that she was the biological Mother of Sammie Seka Barah [Deceased] who on the 27th May, 1995 had entered into a Sale Agreement, with the Defendants, for sale and purchase of Plot numbers 34 and 35 which were subdivisions of Naivasha/Maraigushu Block 1/298. That while the 2nd Defendant was the owner of the subject Plots, 1st Defendant and the 3rd Defendant were his land Agents. That an acknowledgment note produced as Pf exh 4, bore her son's name wherein the Appellant had received and signed for the money from Pups Properties (the 1st Defendant herein) which money had been from her son.

59. That after the payment in full of the two plots at a purchase price of Kshs. 34,000/= as per the receipt produced as Pf exh 3, and which plots were for investment purposes, her son had taken possession of the same by fencing around the property with barbed wire.

60. That sometimes around 26th July 1997 her son Sammie Seka Barah disappeared wherein the matter had been reported at Hardy Police Post, Nairobi on or around 1st August, 1997 by his wife Doris Njoki Barah [now deceased]. That on or around 21st February, 2006 when all hope was lost, she had instructed her Advocates on record to petition the High Court for a declaration of his death wherein the High Court of Kenya at Nairobi, in Family Division Miscellaneous Application Number 7 of 2006, vide its Orders in a Ruling delivered on 5th June, 2006, her son Sammie Seka Barah had legally been declared dead.

61. That prior to his death, her son had been following up on the transfer of the subject property to himself by the Defendants who had undertaken to do so upon payment of the Purchase price and which purchase price had fully been paid. That on or around 29th August, 2012, she had proceeded to the Naivasha District Lands Registry for purposes of conducting an official search on the subject properties after noticing that the fencing had been removed, wherein she had discovered that the properties had been fraudulently, illegally and unlawfully transferred to third parties without their knowledge, approval, authority and consent. That she had lodged a complaint with the Permanent Secretary Ministry of Lands wherein she had been advised to lodge a Caution on the subject-properties.

62. That she subsequently obtained Grant of Letters of Administration on 12th June, 2013 to her son's estate and proceeded to pursue a claim for recovery of his land vide the current suit since the Defendants had breached the terms of the Agreement by failing to either refund the Purchase Price at the current market price and/or exchange/substitute the subject plots with two other plots. That the Defendants had also committed acts of fraud as particularized in her Plaint.

63. That her suit for recovery of land was not time barred the same having been filed on the 13th October, 2016 which was only ten (10) years after her late son had been legally declared dead. That on the breach of contract, her suit was filed four (4) years after the discovery of the fraudulent transfer.

64. The 2nd Defendant/Appellant's evidence and adopted witness statement on the other hand had been that he was the owner of the subject, parcel of land known as Naivasha/Maraigushu Block 1/298 which land had been subdivided into several plots wherein he had authorized Pups Properties to get buyers on his behalf so that he could sell the plots to them. That each plot was to be sold for Kshs 17,000/= out of which he was to pay Pup Properties a commission. That having not received any funds from Pups Properties, he had decided to engage a different agent wherein Naivasha Afya Sacco had bought the entire shamba in a transaction he had only engaged with the directors and not its members. That since portions of the land had been sold twice, he had refunded genuine buyers.

65. That he neither participated in the sale agreement of 27th May 1995 nor did he receive any proceeds of the alleged sale from the 1st Defendant. He confirmed having met the Plaintiff in the year 2005 through a family friend. That she had informed him of her son's purchase seeking for either a replacement or a refund of the purchase price. That he had taken her to his agents, PUPS Properties where they had met the 3rd Defendant who denied any knowledge of the sale. They also found no documents to that effect. That subsequently, he was not a necessary party to the suit and hence he could not refund the sum of Kshs 34,000/= sought by the Plaintiff whose suit he sought to be dismissed with costs.

66. His further position was that the Plaintiff's suit was statute time barred for which an extension of time, granted ex-parte on 15th September 2016, to file it, was unmerited because the court had no jurisdiction to extend such time.

67. Having given a brief history of the matter herein, I find the issues arising therein for determination as follows:

i. Whether the 1st Respondents' suit in the trial court was time barred if not,

ii. Whether there was a valid sale agreement for land plot No. 34 and 35 which plots are currently Naivasha/Maraigushu Block 1/1212 and 1213 respectively.

iii. Whether the 1st Respondent was entitled to the orders sought in her Plaint.

iv. Whether or not the Appeal is merited.

68. On the first issue for determination, there is no dispute judging from the prayers sought in the Plaint dated the 11th October 2016 and amended on 23rd October, 2019, that the Plaintiff/ 1st Respondent therein had sought for the recovery of her deceased son's parcel of land. It is trite that a time-barred suit is a legal claim that cannot be pursued in court because the period of time for filing it has expired after an event has occurred. Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued and stipulates 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

69. In the case before me, it is not in dispute that the 1st Respondent herein filed suit on behalf of her deceased son, to recover land. Section 9(2) of the *Limitation of Actions Act* stipulates as follows:

> ''(2) Where a person brings an action to recover land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of his death in possession of the land, and was the last person entitled to the land to be in possession of the land, the right of action accrues on the date of death."

70. In essence therefore, this provision of the law deals with the accrual of a right of action in cases involving an interest in land and specifies the exact moment in time when the clock starts ticking for the purpose of the statute of limitations for lawsuits concerning land. The provision of the law envisages a situation where a person suing to recover the deceased's land does so on the date of the person's death, provided that the deceased was in possession of the land at that time.

71. Essentially, therefore the provision of Section 9 of the *Limitation of Actions Act* is crucial for determining whether a lawsuit to recover land is time-barred for the "start date" for the 12-year limitation period stipulated in Section 7 of the same Act.

72. It is not disputed that pursuant to the 1st Respondent's son, Sammy Seka having disappeared without trace in July 1997 wherein vide an order of 4th August 2006 issued in the High Court at Nairobi (Family Division) in Misc. Application No. 7 of 2006, he had legally been declared dead. This means that the 1st Respondent could only sue to recover the suit land from the Defendants within twelve years after the said declaration wherein time started ticking and stopped ticking in August of 2018. The suit in the lower court had been filed on 13th October 2016 vide a Plaint dated the 11th October 2016 which was then amended on 23rd October, 2019. Up to this point we may be tempted to conclude that the suit was not time barred, however, there is a proviso of the said provision of Section 9 of the *Limitation of Actions Act* that comes into play and that is that the deceased person must have been or ought to have been ''in possession'' of the land for the clock to start ticking for the purpose of the statute of

limitations. In the present case this provision of the law was inapplicable in the circumstance as no evidence had been tendered to the effect that the deceased, Sammy Seka had been in possession of the suit parcels of land.

73. The 1st Respondent's argument had been that vide a ruling of 15th September 2016, she had been granted leave by the High Court at Nakuru in Misc. Application No. 83 of 2014, herein produced as Pf exh 15 to file suit against the Defendants, out of time. I have considered the terms of said Ruling herein which stipulated as follows;

74. The Applicant sought orders as follows;

> " That the Court be pleased to extend the period within which to file a suit against James Mwangi Mbuthia T/a Pups Properties and Charles Muturi Githae, for damages for breach of agreement and fraud and compensation and any other claim with regard to the suit properties pursuant to the agreement.''

75. The court further took into consideration, at para 4, that the Applicant could not possibly bring suit within the stipulated period of six years wherein it had then granted the Applicant leave to file suit after considering the provisions of Section 26 of the *Limitation of Actions Act* which suit was to be filed within 30 days of the court's order delivered on 13th September 2016. The suit was filed on the 13th October 2016.

76. The meaning of the wording of Section 4 (1) of the limitations of Actions Act is clear beyond any doubt that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The said provision of the law provides as follows;

''The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law''.

77. A look at the orders sought for by the Applicant in that matter would point to the fact that the same was sought under the provisions of Section 26 of the *Limitation of Actions Act* which provision of the law extends to the normal limitation period in three specific circumstances being fraud, concealment, or mistake wherein the period of limitation does not begin to run until the Plaintiff has discovered the said fraud or could with reasonable diligence have discovered it. The Applicant therein had sought to file suit for damages for breach of agreement, fraud and compensation but instead filed a suit to recover land for which the order issued therein, with respect, was not applicable. The conduct of the Plaintiff in my view amounted to an illegal conduct. Parties shall be bound by their pleadings.

78. The maxims of ex turpi causa non oritur action and ex dolo malo no oritur action simply mean that no action should be founded on illegal or immoral conduct and or that the Plaintiff will be unable to pursue legal remedy if it arises in connection with his/her own illegal act and or that no right of action

can have its origin in fraud. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. Mtana Lewa v Kahindi Ngala Mwagandi [2015] KECA 532 (KLR)

79. Having found inter alia that the suit filed in the trial court sought to recover the deceased's land, and further having found that the provisions of Section 9 of the *Limitation of Actions Act* were inapplicable in the circumstance, there having been no evidence tendered to the effect that the deceased, Sammy Seka had been in possession of the suit parcels of land, can it therefore be said that the leave granted by the High Court pursuant to the provisions of Section 26 of the *Limitation of Actions Act* was applicable to the subsequent suit wherein the Plaintiff not only introduced new pleadings and parties, but sought to recover land after 12 years? The answer would be in the negative.

80. This is because there is a fundamental and critical distinction between the two aspects of the law, wherein core reason for this lies in the principle of adverse possession. Section 7 of the *Limitation of Actions Act* explicitly states that a suit to recover land cannot be brought after 12 years from the date the right of action accrued. This 12-year period is an absolute time bar. The law assumes that a landowner who fails to take action after 12 years, to remove a trespasser or an unauthorized occupant for such a long period has effectively slept on their rights.

81. Section 17 of the Act further solidifies this position by stating that at the end of the 12-year limitation period, the title of the original owner is extinguished. This means the rightful owner loses their legal ownership, and the adverse possessor can then claim title to the land.

82. Contrast with Section 26 of the *Limitation of Actions Act*, the same provides a way to extend the limitation period in cases of fraud or mistake, and is specifically excluded from applying to land recovery claims after the 12-year period has lapsed. This is a deliberate legal policy to ensure that land titles, which are foundational to economic and social stability, are not perpetually challenged. The integrity of land ownership is protected by this strict time limit. Therefore, even if a Plaintiff argues that they were prevented from suing due to fraud or mistake, once the 12-year statutory period for adverse possession has run out, their right to recover the land is lost forever.

83. Indeed, the Court of appeal in the case of Mtana Lewa v Kahindi Ngala Mwagandi [2015] KECA 532 (KLR) held as follows;

> " ....is that the registered proprietor of land is prohibited from bringing an action to recover land after 12 years from the date when the cause of action accrued. Upon the expiry of that period the proprietor's title to the land is extinguished by operation of the law...."

84. Having said so, and having considered that the founding document that gave rise to the cause of action was a sale agreement dated 27th May, 1995, wherein the Plaintiff filed suit to recover the land from the Defendants vide a Plaint dated 11th October 2016 and amended on the on 23rd October, 2019 a period of about twenty-one (21) years had lapsed wherein the third parties had since been registered as the proprietors of the suit properties in the year 2003 about thirteen years (13) prior to the filing of the suit.

85. The Court of Appeal in Mukuru Munge vs. Florence Shingi Mwawana & 2 others [2016] eKLR held that:

> ''The purpose of the law on limitation of actions is to avoid stale claims, based on the sensible and rationale appreciation that over time memories fade and evidence is lost. The law of limitation therefore seeks to compel claimants not to sleep on their rights and to bring their claims to court promptly. Secondly, the law on limitation of actions ensures that claims are instituted within reasonable time after the cause of action has arisen, so as to secure fair trial when all the evidence is available and to ensure that justice is not delayed. In our minds, those

> are important constitutional values and principles, which are underpinned by legislation on limitation of actions."

86. The Plaintiff needed to commence his claim within the time prescribed under Section 7 of the *Limitation of Actions Act*. It follows therefore that by the time she filed this suit to recover land, the claim was already statute barred.

87. In the case of Bosire Ongero vs Royal Media Services [2015] eKLR the court had held that the issue of limitation went to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.

88. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 where Justice Nyarangi of the Court of Appeal had held as follows;

> 'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

89. Clearly, the trial Court lacked jurisdiction to try the matter and should have downed its tools and taken no further step. To this effect I allow the Appeal and set aside the Judgment of the trial court which is herein substituted with an order of dismissal of the Plaintiff's case in the trial Court. The Appellant shall have the Cost of the Appeal and the suit in the lower court

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 25TH DAY OF SEPTEMBER 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE