

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
EMBU
ELC APPEAL NO. E017 OF 2023

CHARLES NYAGA.....1ST

APPELLANT

ROSEMARY NYAGA.....2ND

APPELLANT

VERSUS

**THE HON ATTORNEY GENERAL (Suing on behalf of
Ministry of Education State Department of Early Learning
and
Basic Education DEB Kavutiri Primary School).....
.....RESPONDENT**

JUDGMENT

1. Being aggrieved by the ruling of Honourable R.G Mundia, Principal Magistrate delivered on 22/8/2023 in Embu ELC Case No. E039 of 2022, the Appellant lodged this appeal. The Respondent filed that suit claiming that DEB Kavutiri Primary School (the School) purchased the land known as Gaturi/Nembure/4297 (the suit land) from Jackness Kambura Nyaga after the land was transmitted to her from her late husband, Dawson Nyaga, the original proprietor, as the administrator of his estate.

2. The Respondent averred that the title to the land was not transferred to the School despite it paying the agreed full purchase price and signing all the relevant transfer documents including obtaining consent the land to transfer from the Land Control Board (LCB). On 20/6/2011, Jackness Kambura Nyaga illegally and fraudulently transferred the suit land to the Appellants. They sought a cancellation of the titles issued to the Appellants and a declaration that the suit land belongs to the School.
3. The Appellants filed a defence and counterclaim and denied that Jackness Kambura Nyaga who is their mother sold the suit land to the School. They denied the allegations of fraud and objected to the suit on the ground that it was statute barred and ought to be struck out for offending Sections 4 and 7 of the Limitation of Actions Act.
4. The trial court heard the preliminary objection and in its ruling found that the preliminary objection raised disputed facts in that the Appellants claim that the suit was time barred yet the Respondent maintains that he was well within the timeframe envisaged by Section 26 of the Limitation of Actions Act. The court dismissed the preliminary objection.
5. In the appeal, the Appellants faulted the trial court for dismissing the preliminary objection and maintained that the Respondent's suit was statute barred and contrary to Sections 4 and 7 of the Limitation of Actions Act. They also faulted the court for dismissing the objection with costs and argued that the Respondent's case does not fall within the exemptions under

Section 26 of the Limitation of Actions Act. The court was invited to set aside the ruling of the trial court, allow the appeal and strike out the Respondents suit and award the Appellant costs.

6. The appeal was canvassed through written submissions. The Appellants submitted that the Respondent's suit was statute barred under Sections 4 and 7 of the Limitation of Actions Act, since it was based on an agreement entered into in 1973 for the sale of the suit land, for which consent to transfer was obtained in 1983 but no transfer effected thereafter. The Appellants urged that to the extent that the Respondent sought to enforce that sale agreement, the claim was an action founded on contract and was therefore governed by Section 4(1) of the Act, which prescribes a limitation period of six years from the date the cause of action arose.
7. According to them, that period lapsed by 1979, thereby extinguishing any contractual claim for specific performance or damages. Further, they argued that the claim for recovery of land fell under Section 7, which limits such actions to twelve years from when the cause of action accrued. They argued that the right to recover the land accrued by 1983, and any suit should have been filed by 1995. They contended that the suit filed in 2022 was brought more than forty years later after the agreement, without explanation or justification and was time-barred. They emphasised that once limitation sets in, the court was divested of jurisdiction, and the claim cannot be salvaged by invoking equitable grounds or general allegations of injustice.

8. Further, the Appellants submitted that the trial court erred in applying Section 26 of the Limitation of Actions Act to defeat their objection and that Section 26 only extended limitation periods where the fraud was recently discovered or could not have been discovered earlier with reasonable diligence. They contended that the Respondent did not plead or demonstrate when the alleged fraud was discovered, nor demonstrate that it could not have been discovered earlier with due diligence.
9. They submitted that the allegation that the suit property was registered in the name of the Appellants' mother and later transferred to the Appellants without the Respondent's consent was not supported by evidence and did not meet the legal threshold for fraud under Section 26. They argued that the mere transfer of land by a registered proprietor to her children does not constitute fraud, and that any alleged fraud would have been attributed to the original seller in 1973, and not the Appellants, who were not parties to the transaction. They proffered the case of **Sohanhal Durgadass Rajput & another v Divisional Integrated Development Programmes Co. Ltd (2021) eKLR** in support of the appeal.
10. The Respondents submitted that they pleaded fraud and stated that the fraud was only discovered on 6/5/2022 after investigations revealed that the suit land meant for DEB Kavutiri Primary School, had been irregularly transferred and registered in another party's name. They urged that these averments bring the claim within the exception under Section 26(c) of the Limitation of Actions Act, which suspends time from running until

the fraud is discovered or with reasonable diligence could have been discovered. They cited the case of **John Gakuo & Another v County Government of Nairobi & Another (2017) eKLR** to buttress their case.

11. They averred that since the Appellants dispute the date and circumstances of the discovery of the fraud, deny the existence of any sale agreement and allege procedural irregularity in the registration process, that those denials and counterclaims give rise to contested factual issues, which cannot be resolved at the preliminary stage without leading evidence. They cited **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** and **Oraro v Mbaja (2005) eKLR** where it was held that a preliminary objection must raise a pure point of law and ceases to qualify where facts are disputed. They submitted that the trial court applied this reasoning correctly.
12. They also cited **IEBC v Jane Cheperenger & 2 Others (2015) eKLR** where the Supreme Court held that preliminary objections should not be used to short-circuit matters requiring a full trial. They urged that in this case, the Respondent's suit disclosed triable issues that required factual inquiry, production of documents, examination of witnesses and scrutiny of the lands registry's conduct. They urged the court to uphold the trial court ruling.
13. The issue for determination is whether the Learned Magistrate erred in dismissing the Appellants' preliminary objection and finding that the suit was not barred by Sections 4 and 7 of the Limitation of Actions Act.

14. The Appellants' position is that the Respondent's claim, founded on a sale agreement executed in 1973 and for which consent to transfer was obtained in 1983, was time-barred under Section 4(1)(a) and Section 7 of the Act. Their contention is that any contractual claim lapsed by 1979 and any claim for the recovery of land by 1995. They argued that the Respondent cannot invoke Section 26 of the Limitation of Actions Act because the Respondent neither pleaded nor proved when the alleged fraud was discovered, nor was it demonstrated that the fraud could not have been discovered earlier with reasonable diligence.
15. The Respondent argued that they pleaded fraud and that the fraudulent transfer of the land was only discovered on 6/5/2022, upon investigations revealing that the suit land had been irregularly transferred and registered in the Appellants' names. They relied on Section 26(c) of the Limitation of Actions Act, which provides that in cases of fraud, limitation does not begin to run until the fraud is discovered or could with reasonable diligence have been discovered. The Respondent maintained that the allegations of fraud, when it was discovered and the circumstances surrounding the transfer of the land to the Appellants are all factual matters that cannot be determined at a preliminary stage.
16. A preliminary objection, as established in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, must raise a pure point of law capable of disposing of the matter without the need to ascertain contested facts. Section 4 (1) (a) of the Limitation of Actions Act requires that claims based

on contract must be brought within six years from the time the cause of action arose while Section 7 of that Act provides that actions to recover land must be brought within 12 years.

17. Further, Section 26 of Act provides that in cases of fraud, time does not begin to run until the fraud is discovered or could with reasonable diligence have been discovered. In this case, the issue of limitation depends on the determination of when the alleged fraud was discovered. The time when the alleged fraud was discovered and whether the Respondents could have with reasonable diligence discovered the alleged fraud much earlier is a matter that must be determined upon full trial. The trial court, therefore, correctly found that the objection could not be determined as a pure point of law.
18. The Learned Magistrate did not misdirect himself in the findings he made. The preliminary objection did not meet the threshold of a pure point of law and the trial court was justified in dismissing it.
19. The appeal lacks merit and is dismissed. The costs of this appeal shall abide the outcome of the suit before the trial court.

Delivered virtually at Embu this 13th day of October 2025.

**K. BOR
JUDGE**

In the presence of: -

Ms. Muthoni Ndeke for the Appellant

Diana Kemboi- Court Assistant

No appearance for the Respondent