



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC APPEAL NO. E006 OF 2023

JONES MITU KAMAU.....
APPELLANT

VERSUS

LATIS KITANA.....1ST
RESPONDENT

DANIEL MAKAU.....2ND
RESPONDENT

JOSEPHAT MUKIIMA.....3RD
RESPONDENT

JUDGMENT

[Appeal from the ruling of Hon. C.N. Ondieki, PM,
delivered on 26/01/2023 in Machakos Magistrate’s Court
ELC Civil Suit No. E056 of 2022 between Jones Mitu Kamau
versus Latis Kitana, Daniel Makau and Josephat Mukiima]

Background

1. To help understand the impugned ruling of 26/01/2023 and the appeal, it is important to clarify the subject matter of the

dispute that was originally before the trial court and is now before this court.

2. From the plaint dated 8/06/2022, the appellant sued the respondents over land parcel no. **Machakos Kiandani/241 (“suit property”)**. It was alleged that the appellant purchased the suit property from its owner, Mbithi Kituku, long before the land adjudication process commenced over it. He asserted that upon purchase, the beacons were pointed out to him; he took immediate possession, fenced it, and planted trees on it. He stated that in January 2022, during a routine visit to the suit property, he found the trees had been cleared by a stranger and the land prepared for construction. Accordingly, he pleaded and particularised fraud against the respondents.
3. In response, and concurrently with filing a statement of defence dated 14/07/2022, the first respondent filed a notice of preliminary objection (**“PO”**) dated 29/06/2022 that impeached the jurisdiction of the trial court by contending that the suit was time-barred. The points of law raised therein were that: -

a. THAT the suit offends the mandatory provisions under Section 4(1(a)) of the Limitation of Actions Act, Cap 22, the Laws of Kenya, as the appellant’s claim is premised on a contract dated and/or cause of action that arose on or

about the 5th June 1968, and the claim is time-barred.

b. THAT the suit offends the mandatory provisions under Section 7 of the Limitation of Actions Act, Cap 22, the Laws of Kenya, as the appellants claim is for recovery of land alleged to have been purchased on or about the 5th June 1968, and the claim is time-barred.

4. Upon hearing the parties, the learned trial magistrate in the impugned ruling recognised that the cause of action was not based on a contract but on a claim for the recovery of land. The learned trial magistrate further affirmed that even if the claim was founded on fraud, the appellant was required to seek the court's permission for an extension of time to file the suit, under **Section 26** of the **Limitation of Actions Act**. In consequence, the learned trial magistrate thereafter struck out the suit for being filed without following the proper legal procedure.

Appeal to this court and the hearing

5. This decision did not sit well with the appellant, and he exercised his right to appeal by submitting his memorandum of appeal dated 20/02/2023, which was officially filed on 21/02/2023, challenging the learned trial magistrate's decision on six grounds for erring in law and fact by: -

- a. Holding that the PO was based on a pure point of law.*
 - b. Holding that the appellant should have applied for an extension of time.*
 - c. Holding that the suit was statute-barred.*
 - d. Holding that the issue of limitation could be determined at the preliminary stage.*
 - e. Relying on wrong provisions of the law.*
 - f. Failing to consider the appellant's submissions.*
6. Although the appeal initially contained six grounds, the appellant, in his submissions dated 27/02/2025, later abandoned some of the grounds and consolidated others into a single ground, which was that the learned trial magistrate erred in failing to appreciate that the appellant's claim fell within the exceptions envisaged by **Section 26** of the **Limitation of Actions Act**. Accordingly, the appellant urged this court to allow the appeal, set aside the impugned ruling and consequent order, and award costs of the appeal.
7. Thereafter, this matter was brought before this court for hearing, and as directed by the court, it was considered through well-argued written submissions received from the law firms of **Ms Fred K. Musyimi & Associates**, and **J. A. Makau & Co. Advocates**, for the first respondent, dated 24/03/2025.

Issues for Determination, Analysis, and Determination

8. As this is a first appeal, **Section 78** of the **Civil Procedure Act** empowers this court to make a final decision on a case; to remand a case; to frame issues and refer them for trial; to take additional evidence or require the evidence to be taken; or to order a new trial. Thus, it is called upon to re-evaluate and reconsider the entirety of evidence presented before the trial court and to draw its own conclusions. This role of an appellate court was well stated in **Selle & Another v Association Motor Boat Co. Ltd & others (1968) EA 123**, as follows: -

“An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound to follow the trial judge’s findings of fact if it appears that either he clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally. (Abdul Hameed

Saif -Vs- Ali Mohamed Sholani (1955) 22 EACA 270).

This decision of **Selle (Supra)** has been cited in several court cases, including **Timsales Ltd V Wilson Libuywa [2008] Kehc 460 (KLR)**.

9. Accordingly, this court has examined the memorandum of appeal, the record of appeal, the submissions of the appellant and the first respondent, the relevant legal provisions relied upon, and the authorities cited therein. Therefore, in this court's humble view, this appeal can be adequately decided by considering the single consolidated ground of appeal, which is **whether the learned trial magistrate erred in failing to appreciate that the appellant's claim fell within the exceptions envisaged in Section 26 of the Limitation of Actions Act.**

10. This issue was thoroughly addressed in the submissions before this court. Therefore, it is important to emphasise the relevant legal provisions and prevailing jurisprudence regarding timelines for filing a claim for land fraud. In this context, the applicable law can be found in **Sections 7 and 26** of the **Limitation of Actions Act**, which state: -

Section 7

"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.”

Section 26

“Where, in the case of an action for which a period of limitation is prescribed, either—

(a)the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b)the right of action is concealed by the fraud of any such person as aforesaid; or

(c)the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

.....”

11. Both parties have thoughtfully referred to these provisions of the law when making their arguments. In presenting his arguments, the first respondent has maintained that for a party to invoke the applicability of **Section 26 (a), (b), and (c)**, that party must explicitly plead fraud and provide the particulars of the fraud, which, in his view, was not pleaded in the plaint. Nevertheless, after examining the plaint, it is evident that the first respondent overlooked **paragraph 8** of the plaint, where

the appellant has alleged fraud and mistake and has provided particulars against the respondents under paragraphs **8(a)** - **8(c)** of the plaint.

12. Consequently, it is clear to this court's mind that the appellant pleaded and specified fraud. In bolstering his arguments, counsel has placed reliance on the decision of **Viginiah Kairigo Runji v Christopher Nthia Gucutha & 17 others [2020] KEELC 2036 (KLR)**, which stated: -

“It is evident from the application and the draft plaint that the Applicant’s claim is based upon recovery of land which has a separate limitation period of 12 years prescribed under Section 7 of the Act. There is no provision under the Act for the extension of the limitation period prescribed under Section 7 of the Act. It would thus appear that the legislature did not intend to provide for extension of time with respect to cases for recovery of land unless the case fell within the exceptions set out in Section 26 of the LAA.”

13. As for the appellant, he contended that the learned trial magistrate misinterpreted the law by erroneously concluding that, before commencing a claim of fraud and invoking **Section 26** of the **Limitation of Actions Act**, a party must submit a formal application for leave to file a suit out of time.

To reinforce this argument, counsel relied on **Nzoia Sugar Company Ltd v Kenya Ports Authority [1990] KEHC 36 (KLR)**, which stated:-

“Although section 22 and 26 of the Limitation of Actions Act refer to extension of the limitation period in case of disability or fraud or mistake respectively, it seems to me that these sections do not envisage an application for leave to extend the limitation period and an application based on those sections would be incompetent. Rather these provisions empower a party to file a suit despite the expiry of the limitation period prescribed for the action and give the court jurisdiction to disregard the limitation period prescribed for the action if the suit falls within the scope of section 22 and 26 of the Limitation of Actions Act.”

14. Imperatively, upon reading the provisions of **Sections 7 and 26** and guided by judicial precedents relied upon by both counsel, it is evident to this court’s mind that although an individual may not initiate an action to recover land after a period of 12 years from the date it accrued, nonetheless, in cases where the claimant asserts that fraud or mistake were committed and it did not come to his notice or was not known to him as a party affected by the fraud or mistake, then, in

such instances, he is entitled to file suit, as time does not accrue in these circumstances. A similar position to this was taken in **Vision Afrika Housing Co-operative Society Ltd & another v Gikonyo & another [2025] KEELC 379 (KLR)** as follows: -

“These two limitation periods serve different purposes and can apply in different contexts, depending on the nature of the claim being made. Indeed from the above captioned provisions of the law, it is possible to recover land even after 12 years where fraud is involved. The Statute of Limitations generally provides a time limit of 12 years within which one must file a lawsuit to recover land. However common law recognizes that fraud can be hidden. So, the clock for the statute of limitations doesn't necessarily start ticking when the fraud occurs, but rather when it is discovered, or when a reasonable person in the same situation would have discovered it. This is often referred to as "delayed discovery" or "concealed fraud.”

15. In paragraph 7 of the plaint, the appellant states that he discovered fraud and a mistake in January 2022 and filed his suit on 9/06/2022, nearly six months after the date of discovery. This indicates that his claim was properly before the trial court. Furthermore, in accordance with law and judicial

precedence, this court has no doubt and agrees with the appellant that he was not required to seek leave before filing his suit. Hence, this court agrees with the appellant that the learned trial magistrate misconstrued the law. It finds that the appellant's suit was competently before the trial court, that the trial court had jurisdiction to hear it, and finally, that the appeal is merited.

16. Ultimately, for the reasons stated above, the appeal is allowed with costs to the appellant. The ruling rendered by the trial court on 26/01/2023 is hereby set aside and substituted with an order dismissing the preliminary objection dated 29/06/2022, with costs, thereby abiding by the outcome of the suit.

Judgment accordingly.

**Delivered and Dated at Machakos this 2nd day of
December, 2025.**

**HON. A. Y. KOROSS
JUDGE
02.12.2025**

**Judgment delivered virtually through Microsoft Teams
Video Conferencing Platform**

In the presence of;

Ms. Kanja Court Assistant.

Miss. Mutunga holding brief for Mr. Musyimi for Appellant.

Mr. Odongo holding brief for Mr. Makau for Respondent.

ORIGINAL