

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCLA NO. E020 OF 2023

BENSON ONGABI 1ST APPELLANT

PATRICK MAERA MAKORI 2ND APPELLANT

VERSUS

THOMAS KEMUMA OMAGWA RESPONDENT

JUDGMENT

(Being an appeal from the judgment of Hon. C. Ocharo, Senior Principal Magistrate, delivered on 2 August 2022 in the suit Kisii MCELC No. 227 of 2018)

1. The suit from which this appeal emanates was commenced by the respondent, then acting in person, through a plaint filed on 10 November 2009. He filed suit as the legal representative of the estate of his late mother, Babeta Nyagei Kemuma (Babeta or ‘the deceased’). He pleaded that his late mother was the registered owner of the land parcel then known as Wanjare/Bomorenda/1289 located in Suneka Township. He pleaded that sometimes in the year 1970 or thereabout, his mother invited the 1st appellant (sued as 1st defendant) to a joint business venture on this land and they jointly constructed a semi-permanent house where they carried out business. He pleaded that in 1985, they agreed that the 1st appellant would vacate the premises and that the 1st defendant vacated after demolishing the semi-permanent structure and taking all the building materials. He pleaded that in 1986 the 1st appellant fraudulently carved out a portion measuring 48 by 100 feet from the said land parcel No. 1289 and transferred it to the 2nd appellant as Plot No. 55A/Suneka Market. The following particulars of fraud were pleaded against the 1st appellant.
 - (a) Transferring part of the suit portion as Plot No. 55A/Suneka Market out of Wanjare/Bomorenda/1289 without any legal interest on the suit portion.
 - (b) Fraudulently appearing before the Gusii County Council and obtained consent to transfer part of the suit parcel as Plot No. 55A/Suneka Market out of Wanjare/Bomorenda/1289 to the 2nd defendant without knowledge and/or permission of the deceased family.

- (c) Pretending to be the owner of part of the suit portion as Plot No.55A/Suneka Market out of Wanjare/Bomorenda/1289.
 - (d) Obtaining proprietorship of part of the suit parcel as Plot No. 55A/Suneka Market out of Wanjare/Bomorenda/1289 without permission and/or consent of the deceased or her family.
2. Against the 2nd appellant, the following particulars of fraud were pleaded i.e,
- (a) Obtaining transfer of part of the suit portion being Plot No. 55A/Suneka Market from the 1st defendant who had no legal interest in the suit portion.
 - (b) Fraudulently appearing before the Gusii County Council and obtaining consent to be registered as owner of part of the suit parcel being Plot No. 55A/Suneka Market without knowledge and/or permission of the deceased family.
 - (c) Obtaining proprietorship of part of the suit parcel being Plot No. 55A/Suneka Market without permission and/or consent of the deceased family.
3. In the plaint, the respondent asked for the following orders :
- (a) An order of cancellation of the 2nd defendant (2nd appellant herein) as owner of Plot No. 55A/Suneka Market and registration of the plaintiff (respondent herein) thereon as owner.
 - (b) Costs of the suit.
 - (c) Any other relief the court may deem fit to grant.
4. The appellants appointed counsel and filed a joint defence. On his part the 2nd appellant added a counterclaim. They denied the allegations of the plaintiff. They denied that the Plot No. 55A was carved out of the land parcel Wanjare/Bomorenda/1289 and asserted that if this was so, then the land parcel Wanjare/Bomorenda/1289 could not maintain the same registration number. In the counterclaim, the 2nd appellant sued both the 1st appellant and the respondent. He pleaded that the Plot No. 55A was transferred to him by the 1st appellant vide Minute No. 17/86 (E) (3) of 5 June 1986 of the Works Town Planning and Markets Committee. In the counterclaim he asked for a declaration that he is the lawful owner/allottee of the said Plot No. 55A/Suneka Market.
5. The respondent filed a reply to defence and defence to counterclaim . He pleaded that the Plot No. 55A was a subdivision of Plot No. 55 measuring 50 by 100 feet and that the Plot No. 55B was transferred to a third party for consideration.
6. PW – 1 was the respondent. He relied on a witness statement that he had recorded. It was a very brief statement. He stated that his mother died on 10 June 1986 and owned the land parcel Wanjare/Bomorenda/1289. He stated that in 1970 his mother invited the 1st

appellant to do business together and a semi-permanent structure was built. He stated that the 1st appellant transferred to the 2nd appellant a portion measuring 48 by 100 feet without involving the family of the deceased and appeared before the Gusii County Council pretending to be the owner of the plot. He stated that there was no transfer from his mother to anybody. As exhibits, he produced the grant of letters of administration, Minutes of the County Council of Gusii of 1971, a receipt dated 27 January 2010, and a copy of the town plan for Suneka Market. Cross-examined he testified that there was no agreement between his mother and the 1st appellant. With that evidence he closed his case.

7. DW – 1 was the 2nd appellant. He testified that the 1st appellant sold to him the suit plot. He testified that at the time of purchase the plot was in the name of the 2nd appellant and it was transferred to his name. He produced a plot card dated 17 November 1986, a sale agreement dated 12 October 1986 and some receipts for payment of plot rent and rates to demonstrate that he was the one recognized by the Gusii County Council as owner of the plot.
8. DW – 2 was the 1st appellant. He testified that he was the proprietor of the suit plot and he transferred it to the 2nd appellant through minutes of 5 June 1986 and 18 July 1986. Cross-examined, he testified that the plot was allocated to him by Gusii County Council in 1986 and he sold the plot 4 years later in 1990. He knew Babeta (the deceased) but denied ever doing business with her.
9. With that evidence the defence closed its case.
10. Counsel were invited to file submissions, which they did, culminating into the impugned judgment.
11. In her judgment, the trial court found that the respondent had failed to establish that there ever existed the land parcel Wanjare/Bomorenda/1289 or that such land was owned by the deceased, or that the suit plot i.e Plot No. 55A/Suneka Market was carved out of such land. She however found that the evidence showed that the deceased owned the Plot No. 55 Nyambuna Market which was then subdivided into the Plots No. 55A and 55B in 1971. She got this from the Minutes of 29 June 1971 and 16 August 1971 of the Gusii County Council. She found that from the minutes, the deceased retained Plot No. 55A while Plot No. 55B was allotted to one Henry Matundura. She held that the 1st appellant did not demonstrate how he got registered as owner of the Plot No. 55A to enable him transfer it to the 2nd appellant. She also held that the sale was in 1990 and not 1986 as claimed by the 2nd appellant. She impressed that it mattered little that the 2nd appellant was paying rents and rates to the authorities. She further held that the appellants did not

produce minutes of meetings of 5 June 1986 and 18 July 1986 that purportedly gave rights to the 1st appellant. She concluded that the acquisition of the suit plot by both appellants was marred with irregularities and it was immaterial that the 2nd appellant held the title document. She concluded that though the respondent asked for registration as proprietor of the Plot this could only be granted through a succession process. She made the following final orders :

(a) An order of cancellation of the 2nd defendant (2nd appellant) as owner of the Plot No. 55A Suneka Market.

(b) Costs of the suit and interest from the date of judgment.

(c) The counterclaim be and is hereby dismissed with costs to the plaintiff.

12. Aggrieved, the appellants have preferred this appeal. There are sixteen grounds listed, covering four pages, and I see no need of copying them. Inter alia however, the appellants contend that the trial court erred in cancelling the title of the 2nd appellant and that the suit was time barred. They seek that the judgment be set aside; that the suit of the respondent be dismissed; and that the counterclaim of the 2nd appellant be allowed.

13. The appeal was argued through written submissions and I have taken note of the submissions filed. I observe that in his submissions, Mr. Ochwangi, learned counsel for the appellants, inter alia urged that the suit was incompetent as the title did not indicate that the respondent was suing on behalf of the estate of the deceased. He also submitted that the case of the respondent was premised on the contention that the suit Plot No. 55A was carved out of the parcel Wanjare/Bomorenda/1289 yet the respondent produced no document to that effect. He also referred to some documents, including a letter dated 12 September 1991 from the County Council of Gusii attached to an application after judgment, and urged that it affirms that the claim of the respondent was baseless. He further urged that the claim of the respondent was out of time pursuant to Section 4 of the Limitation of Actions Act, and he argued that a claim of fraud has a 3 year limitation period. He also urged that a claim for land has a limitation period of 12 years which had expired. He submitted that the documents of the respondent showed the plot as Nyambunwa and not Suneka Market.

14. For the respondent, Mr. Masolo, learned counsel, referred to Section 26 of the Land Registration Act, 2012, on the genuineness of title. He submitted that the 1st appellant did not produce an allotment letter issued to him in 1971 nor demonstrate that he followed the correct process to own the Plot No. 55A. He submitted that the Minute No. 21/71 showed that the deceased owned Plot No. 55 and 55A. He also submitted that no sale agreement

was availed between the appellants. On the issue of limitation of time, he submitted that time in a suit for fraud does not begin to run until the discovery of the fraud. He acknowledged that the plaint does not indicate the date of discovery of the fraud but submitted that the appellants did not point with precision when the respondent or his mother discovered the fraud.

15. I have considered all the material presented.
16. In as much as the respondent did not title his case properly, i.e to show that he was suing as an administrator of the estate of his deceased mother, paragraph 1 of the plaint did indicate that he was filing suit in that capacity. The failure to indicate the proper title is therefore a mere irregularity which can be waived pursuant to Article 159 (2) (d) of the Constitution.
17. On the substance of the case, the respondent in his plaint contended that the suit plot was carved out of the land parcel Wanjare/Bomorenda/1289 which land he contended was registered in the name of his late mother. He contended that through fraud, the 1st appellant caused the suit plot to be transferred out of this land parcel No. 1289. There was actually no evidence whatsoever of the ownership of the land parcel Wanjare/Bomorenda/1289. Neither was there any evidence that the suit plot i.e Plot No. 55A Suneka Market was subdivided from this land parcel No. 1289. The pleadings of the respondent were clearly off the mark in respect of the suit plot vis-à-vis the land parcel Wanjare/Bomorenda/1289. The trial court was however persuaded that the deceased owned the Plot No. 55 which was subdivided into the Plots No. 55A and 55B in 1971 and she referred to what was said to be minutes of the Gusii County Council of 29 June and 16 August 1971. Actually, what was produced was a document prepared on 27 February 2010, said to be copying the extract of minute 21/71 of the Trades and Markets Committee held on 29 June and 16 August 1971. It is not clear to me from a reading of that extract whether the Minute 21/71 is of 29 June or 16 August 1971. Be that as it may, that Minute provides as follows :

Minute 21/71 . Application for Division of Plots

The following applicants were recommended for divisional of :

A. Bosongo Area Council

3. Babeta Nyagei, Nyambunwa market, plot No. 55 to be

(a) Babeta Nyagei plot No. 55A Retail Trade.

(b) Henry Matundura Plot No. 55B Hotel.

18. The trial court was persuaded that out of this record, Babeta Nyagei retained Plot No. 55A which is the suit plot. Of course, in his submissions, Mr. Ochwangi did submit that this was indicative of Nyambunwa Market and not Suneka Market but I think the description was then Nyambunwa Market for I have also seen that the plot card produced by the 2nd appellant to demonstrate ownership bears the description Nyambunwa Market. It cannot therefore be argued that we are talking of two different plots. I was saying that this record persuaded the trial court to find that Babeta was left with Plot No. 55A. While I am on this point of the Minutes, I am aware that Mr. Ochwangi referred to a letter dated 12 September 1991 from the County Council of Gusii, which determined that this minute was doctored. I am afraid I cannot say much on this letter because it was never produced in evidence. It was only attached to a post-judgment application and it cannot now be introduced on appeal without the requisite application to adduce additional evidence on appeal being made. I will therefore not make any further reference to that letter.
19. The trial court held that pursuant to the minute 21/71 Babeta was owner of Plot No. 55A. The trial court did not find any record of transfer of this plot from Babeta to the 1st appellant and that is what induced the holding in favour of the respondent. In his evidence, the 1st appellant testified that he was allocated this plot by the Gusii County Council. In her judgment the trial Magistrate held that she could not find any evidence as to how the 1st appellant acquired the suit plot. On this, I agree with the trial court. The 1st appellant did not actually produce any evidence of how he acquired the plot. However, it is not correct that no evidence of how the plot was transferred to the 2nd appellant was produced. The appellants actually exhibited a letter dated 4 April 2000 from the Clerk to Council, which letter was addressed to the Clerk, Suneka Town Council. That letter informed the Clerk of the Town Council that the Plot No. 55A “*was transferred to Patrick Maera from Benson Ongabi under Min 17/86 (E) (3) of 5th June and 18th July 1986 of Works, Town Planning and Marketts Committee and the plot card was issued to him.*” I see no much difference between this letter and the letter dated 27 February 2010 availed by the respondent which copied what was said to be an extract of minutes. The 2nd appellant indeed produced a plot card dated 17 November 1986 and documents showing that he paid rates for the plot. I am persuaded that there was thus a transfer of the plot to the 2nd appellant on 17 November 1986. From 1986, the County Council of Gusii recognized the 2nd appellant as owner of the suit plot as indeed confirmed in the letter dated 4 April 2000 and the various rates receipts.

20. There is of course doubt as to whether the 1st appellant acquired a good title which he could transfer to the 2nd appellant and the respondent may have had an argument on that issue. However, we cannot escape nor run away from the question of limitation. One can have a good case, but if it is not brought within the stipulated period, such case cannot hold any water. For example if A owed B a debt dating back 8 years, A cannot claim that debt because it will be caught up by the 6 year limitation period prescribed in Section 4 (1) (d) of the Limitation of Actions Act, Cap 21, Laws of Kenya. ‘A’ may not have been paid, but he cannot sue to recover that money for being out of time. That is the harsh reality regarding periods of limitation.
21. In our case, limitation was raised in the submissions of the appellants before the trial court. I however see no address on this issue in her judgment and it is apparent to me that the trial court did not address its mind on this point.
22. It has been urged in this appeal, just as it was urged in the submissions filed before the trial court, that the suit of the respondent was time barred. The suit was one for recovery of land and the limitation period is 12 years as stipulated in Section 7 of the Limitation of Actions Act which provides as follows :
- 7. Actions to recover land*
- 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.*
23. When it comes to fraud, the limitation period starts running from the date of discovery of the fraud as stipulated in Section 26 of the Limitation of Actions Act which is drawn as follows :
- 26. Extension of limitation period in case of fraud or mistake*
- 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.*
24. In our case, this suit was filed in 2009. The 2nd appellant obtained registration as proprietor of the plot in 1986. From 1986 to 2009 was a period of 23 years which is certainly beyond the 12 years stipulated in Section 7 of the Limitation of Actions Act. For

the cause of action to survive, the respondent needed to demonstrate that he came to know of the fraud within 12 years of filing the suit. In this case, the respondent led nil evidence of the time he came to discover the fraud. Indeed, in his submissions, Mr. Masolo, learned counsel for the respondent, acknowledged that no evidence of when the fraud was discovered was ever led though he ventured to submit that the appellants needed to lead this evidence. Well, the appellants could certainly not be burdened to lead evidence of when the respondent discovered fraud, because that was a matter within the knowledge of the respondent not the appellants. The onus was clearly on the respondent to lead evidence of when he discovered the fraud but he led no such evidence. Without demonstrating that he discovered the fraud within 12 years of filing the suit in 2010, then the period in Section 7 of the Limitation of Actions Act caught up with him. It therefore matters not that the respondent may have had a good case. His case was out of time. I am afraid that this being the scenario, the case of the respondent could not survive and was one for dismissal.

25. The 2nd appellant had a counterclaim for a declaration of ownership but I do not see its place because there was no other third party holding a title to that land. His title was already recognized by the County Council of Gusii and there was no need to file such a counterclaim. What I will hold is that the suit of the respondent was caught up by time and he could not succeed in his quest to have the title of the 2nd respondent as the registered owner of the suit Plot No. 55A/Suneka Market cancelled. It is a sorry result for the respondent but I am afraid that he was out of time and my hands are tied in that regard.
26. I proceed to substitute the judgment of the trial court with the result that the respondent's suit is dismissed. This appeal succeeds to that extent.
27. The last issue is costs. In my view, it is best, given the circumstances that each party bears his/her own costs of the suit.
28. Judgment accordingly.

DATED AND DELIVERED THIS 10 DAY OF DECEMBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Ochwangi for the appellants

Mr. Masolo for the respondent

Court Assistant – David Ochieng