

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELCL APPEAL NO. E020 OF 2024

MUSA BALAGASH KATANA
APPELLANT

VERSUS

DORIS KASICHANA CHILIFI **2ND**
RESPONDENT

LAND REGISTRAR KILIFI **2ND**
RESPONDENT

ATTORNEY GENERAL **3RD**
RESPONDENT

JUDGMENT

1. In the Memorandum of Appeal dated 30th May 2024 the following grounds are set out:

- a. That the learned trial magistrate erred in law and fact by failing to uphold the preliminary objection that the suit is time barred by reason of effluxion of time;
- b. The learned trial magistrate erred in law and in fact by failing to hold that a suit for contract can only be filed within 6 years from the day of the consent and the respondent's suit was time barred by dint of law;
- c. That the learned magistrate erred in law and in fact by applying wrong principle of law and arrived at a wrong decision;
- d. That the learned trial magistrate erred in law and fact by rewriting the agreement for the parties, placing in a presumption that time started running when the defendant transferred the suit property into his name and yet the 6-year period for the agreement of 2009 had already expired;
- e. That the learned trial magistrate erred in law and fact by deciding the preliminary objection contrary to the known principles guiding limitation of action and particularly on action based on contract.

2. It is proposed that:

- a. This appeal be allowed;
- b. The preliminary objection dated 12th April 2024 be upheld and the suit be struck out;
- c. The costs of this appeal and of the suit be provided for.

3. The background to this appeal is as follows: the 1st respondent sued the appellant in **Kilifi Magistrates ELC Case Number 176 Of 2023** vide plaint dated 10th November 2023, claiming that she is the *bona fide* purchaser and proprietor of **Kilifi/Mtwapa/574** (which is currently known as **Kilifi/Mtwapa/6644**) measuring approximately one acre, having purchased the same from the appellant herein for **Kenya Shillings 450,000/-** on 29th November 2008. The 1st respondent averred that the appellant refused to transfer and register the suit property in the name of the 1st respondent despite having received consideration therefor, and even went into hiding to avoid handing over of the suit property. After the demise of his other brothers, he subdivided the mother title and failed to honour the agreement in favour of the plaintiff who has now learnt that the land is already solely registered in the name of the appellant. The 1st respondent claimed fraud and set out **2** particulars of fraud and one particular of breach of trust/agreement on the part of the appellant. She then sought orders of specific performance, an order directing the Land Registrar Kilifi to execute land transfer forms, mutation forms and other requisite documents in order to effect the transfer of her entitlement to her, damages for breach of contract at current market value together with accrued interest from the date of breach, and in the alternative to prayers number 1 and 2 the appellant do pay a sum equivalent to the current market value of 1 acre of the land, costs and interest, and any other relief that the court may deem fit and just.

4. The appellant filed a statement of defence denying the claim and stating as follows: that the claim was barred by limitation and the 1st respondent could not seek specific performance to enforce an agreement made on 29th November 2008. Jurisdiction of the court was also denied.
5. The appellant also filed a preliminary objection on the basis of statutory limitation under **Section 4** of Limitation of Actions Act Cap 22, and he sought that the suit be dismissed with costs.
6. In the Magistrate's ruling dated 21st May 2024 which is the subject of this appeal, she dealt with a preliminary objection regarding limitation and lack of jurisdiction. She set out the provisions of **Section 4** and **Section 7** of the Limitation of Actions Act as well as **Section 9(3)** of the same Act. She examined the provisions of **Section 26** of the Act. She made an analysis which arrived at the findings that the objection is not merited and dismissed it, hence the present appeal.
7. The appeal was disposed of by way of written submissions which the 1st respondent and the appellant filed on different dates. The 2nd and 3rd respondents did not participate in the appeal.

ANALYSIS AND DETERMINATION

8. The sole issue that arises for determination in the present appeal is whether the Magistrate correctly applied the principles of law and whether she arrived at the correct decision in failing to uphold the preliminary objection.

9. In her ruling the Magistrate found that the agreement was entered into on **29th November 2008**, and the appellant, being the purchaser, undertook to do subdivision of the land and meet all the costs of serving and to take immediate possession of the property while the appellant was to meet the cost of the transfer; that the claim of the 1st respondent is that it is only in 2020 when she realized that the appellant had subdivided the property and transferred it into his name, thus the claim of fraud. The magistrate further observed that by virtue of **Section 9** and **11** of the Act, the cause of action accrued when the agreement was entered into on 29th November 2008; that time therefore started running on 29th November 2008 and the 12-year limitation therefore, expired on 29th November 2020.
10. The Magistrate further noted that whereas the 1st respondent stated that it was only in 2020 that she discovered the fraud; that she ought to have discovered it earlier from 2010 when she lodged a caution against the suit land as a keen and reasonable buyer should have done, having realized that there was a cat and mouse game. She found that the cause of action of fraud accrued on 25th November 2010 when the 1st respondent realized that the appellant might sell the suit property; that the 12-year period started running on 23rd November 2010 and ended on 23rd November 2022.
11. The magistrate stated that for a breach of contract case, the suit should have been brought within **6** years from the date of accrual of the cause of action. She however noted that the plaintiff discovered in 2020

when she carried out an official search; that the appellant transferred title to his name instead of the plaintiff's on 4th June 2020; that in the absence of any timelines set out in the agreement, the 6-year period therefore started running from 4th June 2020 and is set to expire on 4th June 2026. Consequently, she found that under the cause of action of breach of contract the suit was not time-barred and so she dismissed the preliminary objection dated 12th April 2024 for lack of merit.

12. It is clear that the 1st respondent's cause of action lay in both fraud and breach of contract in that despite having received all consideration for the suit property from the 1st respondent, the appellant is said to have transferred the suit property into his name in the year 2020. It was only after the 1st respondent conducted a search in 2020 that she learned that the title deed had been subdivided and the land transferred to the appellant's name.

13. Having focused on the cause of action of fraud the learned trial magistrate was therefore correct in referring to and applying the provision of **Section 26(c)** of the Limitations of Actions Act. That provision provides 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:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

(i)in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii)in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

14. **Section 4 (1)** of the Limitation of Actions Act provides as follows:

“The following actions may not be brought after the end of 6 years from the date on which the cause of action accrued

(a)Actions founded on contract.

(b)”

15. It was the case that the agreement relied on by the parties to this case did not have any timelines in its clauses, though it was executed on 29th November 2008. That being the case, when **Section 26** and **Section 4** of the Limitations of Actions Act are read together, the time begins to run from the date of discovery of the fraud.

16. There is nothing to disprove the 1st respondent’s allegation that she learned of the transfer of the suit land into the name of the appellant in the year 2020. I think the fraud was not actualized in the year 2010 as held by the magistrate.

17. Lodging of a caution was only evidence of suspicion that the appellant may eventually commit fraud. Fraud could only be deciphered from an overt act that showed without doubt the real state of mind of the

appellant, and one that took away the land the 1st respondent was entitled to despite she having paid for it. Subdivision was not the expected overt act. Subdivision could have ended up with a position being issued to the 1st respondent. However, any dealings with the title contrary to the interests of the 1st respondent could be viewed as such overt acts.

18. When viewed in the light of the foregoing analysis, the overt act in respect of fraud and breach of contract did not happen in the year 2010. It happened in the year 2020 when the appellant transferred the land to himself. Consequently, for the purposes of the cause of action of fraud, time began running from the date of discovery of such overt act, which was the same as the date of the discovery of both the fraud and breach of the agreement, and which is the date on which the 1st respondent conducted the official search.

19. This court has examined the record and seen a flurry of activity between the year 2020 and the year 2022; the application for certificate of official search appears to have been made on 24th June 2020 and an OB report was made on 14th August 2020; an application for registration of caution was made on 9th July 2020. In the absence of express timelines in the executed agreement, it is therefore believable that the 1st respondent discovered the fraud and breach of contract in the year 2020 upon conducting an official search.

20. The upshot of the foregoing is that the court finds that though the magistrate was not correct in ruling out fraud on the basis of limitation,

this court does not find any misapplication of the law by the trial magistrate or any application of wrong principle in her decision with respect to the cause of action of breach of contract. Her decision was correct and grounded on the pleadings of a parties.

21. The present appeal therefore lacks merit and it is hereby dismissed with costs to the respondents.

Dated, signed and delivered at Malindi on this 18th day of December 2025.

A rectangular box containing a handwritten signature in blue ink, which appears to read 'Mwangi Njoroge'.

**MWANGI NJOROGE
JUDGE, ELC, MALINDI**