

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ELCLC No. E037 OF 2025

PEMUGA AUTO SPARES

LIMITED.....PLAINTIFF/APPLICANT

-VERSUS

MULTIPLE GENERAL HARDWARE

& MERCHANDISE LTD.....1st DEFENDANT/RESPONDENT

THE CHIEF LAND REGISTRAR.....2nd DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL.....3rd DEFENDANT/RESPONDENT

RULING

1. Coming up for determination is a Notice of Motion Application dated 31st July 2025 brought under the provisions of Articles 40, 47 & 50 of the Constitution of Kenya, Sections 1A, 1B & 3A of the Civil Procedure Act, Sections 26 & 79 of the Land Registration Act, Sections 44 & 45 of the Land Act, Order 40 Rules 1 & 2 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law where the Plaintiff/Applicant seeks an order of temporary injunction restraining the Defendants/Respondents either by themselves, their agents, servants, employees and/or any other persons acting at their behest howsoever from entering upon, taking possession of, selling, transferring, registering, subdividing, charging, developing or in any other manner whatsoever dealing with all that parcel of land known as L.R. No. 20591/119 (formerly L.R. No. 20591/11/65) pending the hearing and determination of the main suit.
2. The Applicant further seeks an order of inhibition and/or restriction to be registered against L.R. No. 20591/119 (formerly L.R. No. 20591/11/65),

inhibiting any further dealings, transactions or entries in the register as well as for costs.

3. The said Application is premised on the ground on its face and the Supporting Affidavit of equal date sworn by Agnes Wanjiku, the Plaintiff/Applicant's director who deponed that in 1996, the Plaintiff applied to the Agricultural Development Corporation (ADC) for 400 acres of land wherein allocation had been approved in June 1996.
4. That the Plaintiff paid the full purchase price of Kshs. 5,160,000/= in installments, for which they hold official receipts. That the Property was originally part of a larger complex, wherein the land had been subdivided in 2007, resulting in the current suit property (L.R. No. 20591/119).
5. That around the year 2008, the Deed Plan was misplaced at the Ministry of Lands wherein between 2009 and 2013, the ADC and the Plaintiff made multiple formal attempts to replace the missing Deed Plan, including swearing affidavits and making formal requests to the Director of Survey.
6. That despite the Plaintiff consistently being assured by ADC that the property was secure and no adverse claims existed, in April 2025, while attempting to finalize registration, the Plaintiff discovered the land had been registered to the 1st Defendant (Multiple General Hardware & Merchandise Ltd) under Title No. IR 268741 wherein the transfer to the 1st Defendant was dated 2003, despite the company having been incorporated in the year 2007.
7. That the transfer had purportedly been executed by two directors, although the company only had one director (Geoffrey Tenai) at the time, wherein the land had been "sold" to the Defendant for Kshs. 785,000/= which was a gross undervaluation compared to the Plaintiff's Kshs. 5.16 million.
8. That the former ADC Managing Director William Kirwa swore an affidavit stating he did not sign the transfer and that the signature used is a forgery. That the arbitrary deprivation of property was contrary to the

provisions of Article 40 of the Constitution and a violation of fair administrative action under Article 47 of the Constitution.

9. That the Plaintiff/Applicant fears the 1st Defendant will further subdivide, sell, or charge the land to third parties, making it impossible to recover and therefore seeks urgent injunctive and conservatory orders to maintain the status quo and prevent any further dealings with the land until the case is determined.
10. The application was opposed through the 1st Defendant/Respondents Notice of Motion dated the 16th October, 2025 to the effect that the both the Plaintiff and the Application dated the 31st July, 2025 be struck out in limine and the suit be dismissed with costs for reason that the suit was time-barred, the Plaintiffs did not have any reasonable cause of action against the 1st Defendant or sufficient stake to justify a cause of action against the 1st Defendant/Respondent. That further, the Plaintiff lacked the locus standi to institute and maintain the suit for which the honorable court therefore lacked the jurisdiction to hear and determine this suit. That maintenance of this suit was a waste of judicial time and it should be struck out.
11. The Application was supported by the grounds therein and the supporting affidavit sworn by Geoffrey Tenai on the 16th October, 2025 and Alice Njoki Kamau's Affidavit sworn on the 28th October, 2025.
12. Geoffrey Tenai deponed that he was a director of the 1st Defendant (Multiple General Hardware & Merchandise Ltd), and that the Plaintiff's case was built on fraud and legal impossibilities.
13. That the Plaintiff claimed to have applied for and purchased the land in 1996 whereas in accordance to the CR-12 form (Annexure GT 3) the same showed that the Plaintiff company was only incorporated on 6th May 2004. That it was legally impossible for a company to enter into a contract or be allocated land eight years before it was incorporated.
14. He deponed that the Plaintiff had approached the court with "unclean hands" and was using forged documents for reasons that the transfer

instrument relied upon by the Plaintiff was not signed or sealed by the ADC, but by a different legal entity. That further the said document was never witnessed or certified by an advocate as required by law and that the name and stamp of the advocate on the Plaintiff's documents were forged.

15. He deponed that even if a sale agreement existed in 1996, the Plaintiff's claim was time-barred in that contract claims under the law ought to be brought within 6 years and land recovery claims within 12 years.
16. That because the Plaintiff never held a registered interest and did not exist in 1996, he deponed that it had no legal standing (*locus standi*) to sue. That there had been no contract or legal relationship between the Plaintiff and the 1st Defendant.
17. That pursuant to the certificate of search annexed as GT 4, the 1st Defendant was the legally registered owner of the suit parcel of land for which it was currently in physical possession, tilling and preparing it for the next planting season as supported by photographs annexed as GT 3). That the suit as frivolous, vexatious, and an abuse of the court process and should be struck out and or dismissed with costs while upholding the 1st Defendant's right to the land based on the sanctity of their registered title.
18. Alice Njoki Kamau in her sworn affidavit of 28th October 2025, deponed that she was an advocate of 38 years of experience having been admitted to the Bar in 1987. That she runs the firm Alice N. Kamau & Co. Advocates and had sworn the Affidavit to formally disassociate herself from the land transfer documents relied upon by the Plaintiff.
19. She identified several red flags in the Transfer Instrument dated 14th May, 2009 categorically stating that the signature appearing above her official Advocate's stamp was not hers. She provided samples of her genuine signature as annexure ANK 2 for comparison.

20. She further deponed that the signatures of the company directors were purportedly witnessed by a "James Onyango," identified as a Public Health Officer, instead of an Advocate or authorized person and noted that the Plaintiff's documents had no company seal affixed to the transfer instrument, which was a legal requirement for corporate land transactions.
21. She also deponed that she had never met, represented, or known the Plaintiff (Pemuga Auto Spares Ltd) or any of its directors noting that the document was purportedly drawn by a different firm of Munene & Company Advocates. That in her 38 years of practice, she deponed that neither witnessed nor certified documents that she did not personally draw. That the sequence of witnessing and certification in the Plaintiff's document was incomplete and "fatally defective" under standard conveyancing practice.
22. That the use of her stamp and the forged signature was a criminal act of forgery intended to "sanctify a fraudulent scheme." That the entire transfer instrument was null and void. She thus supported the 1st Defendant's application to have the suit struck out in limine as the same was a "fragrant abuse of the court process."
23. In response, the Applicant vide its Replying Affidavit sworn on 11th November 2025 by Agnes Wanjiku the Plaintiff/Applicant's director deponed that that the Defendant's application was a "technical smokescreen" designed to hide a massive land fraud.
24. That under Section 26 of the Limitation of Actions Act, the countdown for a lawsuit only begins when the fraud is discovered. That the Plaintiff only discovered the 1st Defendant's title in April 2025 and filed the suit in July 2025, which was well within the legal limit.
25. That "fraud vitiated everything," and time did not run in favor of someone who stole property through forgery. That the Plaintiff was first registered as a Business Name in February 1997 as per annexure AW 16

wherein later it had been converted/incorporated into a Limited Liability Company in the year 2004.

26. That the actual transfer of land from the ADC to the Plaintiff happened in 2009 which was (5) five years after the company was fully incorporated and therefore the company had absolute legal capacity to receive the title.
27. She deponed that the 1st Defendant claims a transfer dated December 2003, but their own records showed that the 1st Defendant company was not incorporated until 2007. That the Defendant's document had two signatures, but their CR-12 only showed one director (Geoffrey Tenai).
28. That an affidavit from the former ADC Managing Director, William Kirwa, was to the effect that he had officially disowned the signature on the Defendant's documents. Citing the provisions of Article 40 of the Constitution, (Right to Property) and Article 162 (Jurisdiction of the Environment and Land Court) she deponed that the court had full authority to hear the suit. That a case involving serious allegations of forgery and fraud could not be dismissed on a "preliminary objection" but required a full trial with witnesses (viva voce evidence) to determine the truth. She thus urged the Court to dismiss the 1st Defendant's motion, stating that the suit was not "hopeless" but was based on documented facts. That dismissing the suit at this stage would violate the Plaintiff's right to a fair hearing. That the balance of justice favored a full trial to expose the alleged illegality.
29. The application was disposed of through written submissions wherein the **1st Defendant submitted** that the foundation of every case is "A cause of action" without which a litigant has no legs to stand on and a suit devoid of a cause of action will be struck out. Order 2 Rule 15 (c) of the Civil Procedure Rules, 2022. That a cause of action founded on contract cannot be pursued after six (6) years from the date the cause of action arose. Reliance was placed on section 4 of Limitation of Actions Act, wherein an action for recovery of land cannot be undertaken after expiry

of twelve (12) years as provided for under Section 7 of the Limitation of Actions Act.

30. It relying on the decisions in **Letang -vs- Cooper [1964] 2 ALL ER, Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] KECA 152 (KLR) and Tororo Cement Co Ltd v Frokina International Ltd (Civil Appeal 2 of 2001) 2002 UGSC 24 (24 April 2002)**, amongst other cases, the Applicant submitted that for one to sustain a cause of action, he must prove all the three ingredients of a cause of action as set out in the the decision of the East African Court of Appeal in **Auto Garage vs. Motokov (No.3) (1971) EA** being that he must prove:-

- a) He has a right;
- b) The right has been violated; and
- c) The Defendant is liable.

31. That in its Complaint, the Plaintiff had sought inter alia that:

- a).....
- b) The register of the Land be rectified to reflect the Plaintiff as the registered proprietor of the suit land.

32. That a glance of this prayer was clear that the Plaintiff's desired reliefs was recovery of land. That unlike the Plaintiff's submission, fraud was not a cause of action reserved for trial by this court as an independent action. That the Plaintiff did not have a justifiable right to seek recovery of this land. That Article162(2)(b) of the constitution of Kenya, 2010, established this court with the mandate to adjudicate upon three questions, "causes of action", which were: -

- a) Land title
- b) Land use, and
- c) Right of occupation

33. That the mandate was amplified by the Environment and Land Court Act at Section 13 (1). That it was a settled fact that the Applicant do not have a title to the suit land, neither does it use the land or occupy it. That they had therefore not established any real triable issue on whether it should be registered as the proprietor of the suit land.
34. They relied on the provisions of Section 43(2) of the Land Registration Act to submit that the Plaintiff's unregistered instrument was irregular on account that it had not been attested to or certified by an advocate or any other person authorized by law; given that the signature of the advocate whose name, signature and stamp randomly appears on the transfer instrument neither drew nor attested to the transfer instrument and secondly that the transfer instrument was witnessed by a public health officer as opposed to being witnessed by an advocate or another authorized person as is by law required. That lastly, the transfer instrument which purportedly transferred the Agricultural Development Corporation's ("ADC") land to the Plaintiff/respondent was neither signed nor sealed by the seal of ADC as transferor but by a different entity being "Lands Limited" which was not the proprietor of the suit land.
35. That without a cause of action such as the instant one, the Plaintiff's suit was frivolous within the meaning of Order 2 Rule 15 of the Civil Procedure Rules, 2022 and was liable to be struck out as was held in the case of **Law Society of Kenya v Martin Day & 3 others [2015] KEHC 1336 (KLR)**.
36. That an action to enforce any right conferred by an instrument, which right they maintained had not accrued, such actions to recover any land or enforce any right in respect to any land should have been pursued within 12 years from May, 2009. Reliance was placed on the decision in **Benson Oketch Okello vs. Benson Nyandiga Onguru [2019] eKLR**.
37. That where the Plaintiff's action was not founded on the non-existent sale agreement of 1996, on the defective instrument of transfer of the 14th May, 2009, and neither did it produce a title to the suit land in its

name, or any other proof of any form of proprietorship of the suit land, then it followed that the Plaintiff had not shown any right over the suit land nor established a root to the title and therefore there was no basis for grant of the prayers sought.

38. That where a Plaintiff had not proved on prima facie that it had a right or sufficient personal interest to pursue a case, unless it was a Petition in public interest under Article 258 (c) of the Constitution, 2010, such a litigant was a mere busy body. Reliance was placed on the decision in **Karakire and 3 Others v Kagire (Miscellaneous Application 330 of 2023) 2023 UGHCFD 181 (13 December 2023)**
39. That at Prayer (d) of the Plaint, the Plaintiff sought orders to cancel title and to have its name registered as the proprietor of the suit land. By dint of this prayer, it is clear beyond per adventure that it was seeking to recover land without any justification, the instrument of transfer having been irregular and fatally defective.
40. That the said instrument was executed on 14th May, 2009. It was never registered. No stamp duty was paid against it. Twelve (12) years from the date of its purported execution lapsed in May, 2017 which was over seven (7) years ago. Reliance was placed on the provisions of Section 7 of the Limitation of Action Act, to submit that the said provision of the law prohibits institution of proceedings to recover land after expiry of twelve (12) years. Reliance was placed on the decision by the court of Appeal in **Mtana Lewa v Kahindi Ngala Mwagandi [2015] KECA 532 (KLR)**.
41. That the Plaintiff has failed in establishing a cause of action. That fraud was not a cause of action but may be a basis for a cause of action or a ground for a cause of action but it did not confer any right on the Plaintiff.
42. That Parties could not pursue suits that were statute barred. That Section 4 of the Limitation of Actions Act, prohibited the prosecution of claims founded on contract after the expiry of six (6) years. The Plaintiff's averment had been that it purchased the suit land in 1996 wherein six years lapsed some time in 2002 an although it deponed at paragraph 25

of its Replying Affidavit that the suit was not based on any contractual rights, but on an irregular unregistered instrument of transfer. That fraud was criminal in nature and not actionable within the jurisdiction of this court. That no right of the Plaintiff had been violated. The Plaintiff had no cause of action for which the suit ought to be struck out.

Plaintiff's submissions.

43. In response, the Plaintiff submitted that the 1st Defendant's application was frivolous, misconceived, and an abuse of the court process because it did not raise any "pure point of law" capable of disposing of the suit. Instead, it raised deep factual disputes (especially concerning fraud and ownership) which issues could only be resolved through a full trial with witness testimony and document examination.
44. The Plaintiff then gave a factual background to the effect that it had applied for 400 acres of land from ADC, wherein it had been allocated and and paid the full purchase price of Kshs. 5,160,000/= in installments. That ADC executed a Transfer Instrument in its favor on 14th May 2009, acknowledging full payment.
45. That the registration process stalled because the original Deed Plan was misplaced at the Ministry of Lands. That it had diligently followed up the matter for years and even obtained police abstract in April 2025. That it had been during the follow-up, that it discovered that the land had been registered to the 1st Defendant, Multiple General Hardware & Merchandise Ltd, using a Transfer dated 17th December 2003, wherein a Title had been issued.
46. It pointed out the hallmarks of Fraud on the Defendant's Title to the effect that;
 - i. the 1st Defendant company was incorporated in 2007, four years after its purported 2003 transfer.
 - ii. That the transfer was executed by an entity called "Lands Limited," not ADC.

- iii. That the former ADC Managing Director, William Kirwa, swore an affidavit disowning his signature on the 1st Defendant's transfer, confirming it was a forgery.
47. In response to the Defendant, the Plaintiff submitted that Section 26 of the Limitation of Actions Act is the governing law, which provides that time does not begin to run where an action is based on a Defendant's fraud or concealment, until the Plaintiff discovers the fraud.
48. That the suit was filed in July 2025, barely three months after the fraud was discovered in April 2025. The plea of limitation is therefore factually and legally unsustainable.
49. Citing the case in **Divecon Ltd vs Samani [1995- 1998] EA 48 at page 54**, the Plaintiff contends that the question of when the cause of action accrued (the discovery date) is a disputed factual issue for which the matter must proceed to a full hearing and cannot be determined on affidavits alone.
50. That the suit is not a claim for breach of contract, but a challenge to a fraudulent transfer; thus, the six-year contract limitation period is irrelevant.
51. The Plaintiff submitted that it possesses a clear, sufficient, and legally recognizable interest by virtue of being the lawful equitable owner, having paid the full sum of Kshs. 5,160,000/= to purchase price, and securing an executed transfer from the rightful owner (ADC), wherein they maintained continuous possession.
52. That the 1st Defendant's fraudulent registration could not divest the Plaintiff of this proprietary right. That denying it audience would be a "grave miscarriage of justice."
53. That its legal capacity was secure because it was incorporated as a legal person in 2004, years before its 2009 Transfer Instrument was executed.
54. It asserted that the Environment and Land Court was properly vested with jurisdiction under Article 162(2)(b) of the Constitution and Section 13

of the ELC Act to hear all disputes concerning title, possession, ownership, and fraud relating to land. That the subject matter—fraudulent deprivation of land—lay at the very heart of this Court's mandate, and the objection is hollow.

55. Citing **D.T. Dobie & Co. (Kenya) Ltd v Muchina [1982] KLR 1** the Plaintiff asserted that the suit was not "hopeless" but was founded on clear and credible evidence of fraudulent deprivation of property. It submitted that the Defendant's challenge required a factual examination of documents, which, pursuant to the ruling in **Oraro v Mbaja [2005] eKLR** could not be the basis of a preliminary objection.
56. That as far as its cause of action was concerned, the legal theory was grounded on fraudulent deprivation of property, supported by evidence of allocation, full payment, and a duly executed, albeit unregistered, transfer.
57. To conclude, the Plaintiff contended that the application was a calculated strategy to defeat justice and shield a transaction, bearing every hallmark of fraud, from judicial scrutiny. The objections were not pure points of law but were deeply factual and required a full trial. That the 1st Defendant's application ought to be dismissed with costs.

Determination.

58. The issue for determination by this court is whether the Plaintiff/Applicant, in its application seeking temporary injunctive orders against the Defendants/Respondents restraining them from dealing in any manner whatsoever with all that parcel of land known as L.R. No. 20591/119 (formerly L.R. No. 20591/11/65) should be allowed as against the 1st Defendant/Respondent's opposition that the suit was time-barred, the Plaintiffs had no reasonable cause of action, they lacked the locus standi to institute and maintain the suit, for which the honorable court therefore lacked the jurisdiction to hear and determine this suit. That the suit should be struck out.

59. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled in the case of **Giella vs. Cassman Brown [1973] EA 358** which sets out the conditions that the Applicant needs to satisfy for the grant of an interlocutory injunction which is firstly establishing and demonstrating that they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the court is in any doubt in regard to the first two conditions the court may determine the matter by considering in whose favor the balance of convenience tilts.
60. At this stage, the Court is only required to determine whether the Applicants are deserving of the interim injunctive orders sought. The Court is not required to determine the merit of the case.
61. I have considered all the material facts placed before me and find that the Applicants' main ground for seeking interim orders against the Respondents was that in 1996, the Plaintiff applied for and was allocated 400 acres of land by the Agricultural Development Corporation (ADC) in June 1996 wherein it had paid the full purchase price of Ksh. 5,160,000/= in installments.
62. That the suit land was part of a larger parcel of land which was subdivided in 2007, resulting in the current suit property (L.R. No. 20591/119). That subsequently, the around the year 2008, the Deed Plan was misplaced at the Ministry of Lands wherein frantic efforts were made to try and retrieve it to no avail. However, in April 2025, while attempting to finalize registration, the Plaintiff discovered the land had been fraudulently registered to the 1st Defendant (Multiple General Hardware & Merchandise Ltd) under Title No. IR 268741.
63. That this was an arbitrary deprivation of property (Article 40) and a violation of fair administrative action (Article 47) and it feared that 1st Defendant will further subdivide, sell, or charge the land to third parties,

making it impossible to recover. It thus seeks urgent injunctive and conservatory orders to maintain the status quo and prevent any further dealings with the land until the case is heard and determined.

64. The Defendants opposition was that the Plaintiff's case is built on fraud and legal impossibilities. That whereas the Plaintiff claims to have applied for and purchased the land in 1996, it was only incorporated on 6th May 2004 and therefore it could not have entered into a contract or allocated land eight years before it was incorporated.
65. That the Plaintiff had approached the court with "unclean hands" and was using forged transfer instrument which was not legally executed. That further, even if a sale agreement existed in 1996, the Plaintiff's suit was time-barred as contract claims must be brought within 6 years and land recovery claims within 12 years.
66. That the Plaintiff had no Locus Standi to sue as it did not hold a registered interest and did not exist in 1996. That there had been no, contract or legal relationship between the Plaintiff and the 1st Defendant who was the legally registered owner, was currently in physical occupation and possession of the suit land. That the suit was frivolous, vexatious, an abuse of the court process and should be struck out.
67. In the present case, there is no dispute that the 1st Defendant holds a Title to No. IR 268741 and is therefore the registered proprietor as lessee of land measuring 172.1 hectares for a term of 948 years from 1st February 1957 which then constitutes the 1st Defendant as an absolute proprietor conferred with all rights, privileges and appurtenances thereto, free from all other interests and claims, which rights, privileges and appurtenances were not liable to be defeated except as provided in the Land Registration Act.
68. The rights of a proprietor are set out in Section 25 of the Land Registration Act, which provides as follows.

Section 25 (1) provides:-

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges thereto, free from all other interests and claims whatsoever, but subject:-

- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register, and*
- b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.*

69. Section 26 (1) of the Act provides that the certificate of title is to be taken as conclusive evidence of proprietorship section 26 (1) provides: -

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that subject to challenge, except

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party, or*
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.*

70. The Plaintiff has argued and asserted that the 1st Defendant’s title was illegally and unlawfully procured and therefore cannot be deserving of protection under the law. However, there is no evidence that the Government has recalled and/or revoked the title. Both the Land Registration Act Section 26 (1) that provides for the indefeasibility of title and Article 40 (6) of the Constitution envisage that where a registered

title is impugned on the grounds set out in the provisions, that due process would be followed to have such title revoked, cancelled and/or annulled. The courts have in a series of cases in the recent past held that due process has to be followed before a registered title can be revoked on the grounds of having been fraudulently or irregularly issued.

71. The 1st Defendant having demonstrated that it was the registered owner of the suit property Title No. IR 268741 and having been issued with a title, prima facie its title is indefeasible and the burden shifts to the Plaintiff to show or demonstrate that the title is challengeable within the provisions of the law.

72. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the 1st Defendant's title but the mere proof that it holds a duly registered certificate which on the face of it was properly acquired is sufficient to lead the court to hold that the Applicant has not established a prima facie case.

73. I need not consider the other two conditions for the grant of temporary injunction as established in the **Giella -vs- cassman Brown Ltd case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. The Court of Appeal in the case of **Kenya Commercial Finance Co. Ltd -vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** (as she then was) with approval in the case of **Joseph Wambua Mulusya -vs- David Kitu & Another (2014) eKLR** observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

74. There has arisen the question of whether the Plaintiff's suit is time-barred with the 1st Defendant's argument being that the suit is time-

barred by relying on the standard statutory periods wherein a suit based on a contract should be brought within 6 years (Section 4 of the Limitation of Actions Act) and further that recovery of land must be within 12 years (Section 7 of the Limitation of Actions Act) That the Plaintiff's alleged allotment of the suit land was in 1996 wherein the limitation period expired in 2002. That the Transfer instrument was executed in 2009 wherein the limitation period expired in 2021. The suit was filed in July 2025 which was outside the statutory period and the Court therefore lacks jurisdiction.

75. The Plaintiff, in response invoked the statutory exception for fraud as provided for under Section 26 of the Limitation of Actions Act, arguing that time did not begin to run until the fraud was discovered. That it had discovered the fraud in April 2025 when it was informed that the land was registered to the 1st Defendant. That it subsequently filed suit in July 2025 which was timely. It argued that that the cause of action is not one to enforce a contract, but to challenge a fraudulent transfer and seek rectification of the register, making Section 26 applicable.

76. I find that this set of arguments on limitation is a mixed question of law and fact, wherein the critical fact is when the fraud was, or with reasonable diligence could have been, discovered. Whereas the Plaintiff maintains that it was in April of 2025, the 1st Defendant suggests the delays since 2009 should have prompted earlier action, implying a lack of diligence.

77. In a persuasive case in **Mugo Muruachimba v Moffat Nyaga Kagua & 2 Others (2020) eKLR**, the Court observed that:

"Although a plea of limitation is capable of being canvassed as a preliminary objection, the same cannot be effectively canvassed if some facts have to be ascertained. The court is thus of the opinion that the same facts have to be established in relation to when the plaintiff's cause of action accrued. For instance, the plaintiff has pleaded that he

discovered the alleged fraud in 2000. This is a question of facts to be established at the trial, the question of whether or not the plaintiff could with due diligence have discovered the fraud earlier is also a question of fact to be established at the trial. The question of whether or not the 1st defendant's father was a bona fide purchaser for value is also a question of fact which is best established at the trial. In the circumstances the court is not satisfied that the issue of limitation can be determined as a preliminary objection in this instant suit. It is an issue, which can be determined at the trial upon evidence being taken."

78. **In D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another [1980] KECA 3 (KLR)**, Madan JA had observed as follows:

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

79. As it is trite that a suit cannot be summarily struck out on the ground of limitation if the question depends on contested evidence as to when the cause of action (discovery of fraud) arose, I find that this issue requires a full hearing to determine the facts of the fraud and the date of discovery.

80. Lastly on the issue as to whether the Plaintiff has the requisite *locus standi*, I find that whereas the 1st Defendant's argument is that the Plaintiff lacks the locus Standi for reason that it was never registered as

proprietor to the land and therefore had no legal interest and secondly that the Plaintiff had no direct relationship (contract or shared legal interest) with the 1st Defendant, the current registered owner, the Plaintiff's argument on the other hand was that it possess a superior equitable interest and a sufficient proprietary connection to the land having made full payment of Kshs. 5,160,000/= to ADC wherein it possesses a duly executed Transfer from the rightful vendor (ADC). Whether the Plaintiff's interest is superior to the 1st Defendant's registered title (Title No. IR 268741) I find, requires a factual determination of whether that title was, as alleged, procured by fraud and forgery.

81. In the end, I dismiss both the applications dated 31st July 2025 and Notice of Motion dated the 16th October, 2025. Costs shall abide the outcome of the suit.

82. Parties shall comply with the provisions of Order 11 of the Civil Procedure Rules within the next 21 days in preparation for the hearing of the main suit herein.

**Dated and delivered via Microsoft Teams at Naivasha this 18th day of
December 2025**



M.C. OUNDO
ENVIRONMENT & LAND COURT- JUDGE