



THE JUDICIARY



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A
ELCLA E021 OF 2025

PAUL IRUNGU MACHARIA1ST APPLICANT
BENSON KURIA MACHARIA2ND APPLICANT
(Both suing under Power of Attorney of their father PETER MACHARIA KIMANI)

VERSUS

PURITY WARUINI GICHURU1ST RESPONDENT
MURANG'A LAND REGISTRAR.....2ND RESPONDENT
THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

***(Being an Appeal from the Ruling of the Court in Murang'a Chief Magistrate's M.C.E.L.C.
Number E077 of 2024 as Delivered by Hon. P N Maina (CM) on 30th April, 2025).***

JUDGMENT

(1) In the Memorandum of appeal dated 10-6-2025, the Appellant seeks the following orders.

- (i) The ruling delivered on 30-4-2025 be set aside in its entirety.**
- (ii) The preliminary objection be dismissed with costs.**
- (iii) Suit No. MCELC No. E077/2024 be reinstated for hearing on merit before a different magistrate.**
- (iv) The costs of this appeal be awarded to the Appellants.**

(2) The Appellants have listed seven(7) grounds of appeal as follows.

- (i) The learned magistrate erred in law and fact by upholding the preliminary objection and striking out the suit despite the Appellants having raised serious allegations of fraud, illegality and irregular land registration.**
- (ii) The Honourable Court misapplied the law by failing to appreciate claims involving fraud, forgery, misrepresentation and abuse of office cannot be determined at the preliminary objection stage without adducing evidence.**
- (iii) The magistrate failed to recognize that fraud vitiates all transactions and the issues raised required a full hearing to test the veracity of facts and documentation presented.**

- (iv) **The Honourable Court erred by failing to consider the statutory and constitutional roles of the Land Registrar Murang'a whose conduct was directly challenged in the suit.**
- (v) **The Court further erred by disregarding the involvement of public institutions and the need to hold them accountable through due process, especially where the land registry's conduct was central to the dispute.**
- (vi) **The ruling violated the Appellant's right to access justice and a fair hearing as guaranteed under Articles 48, 50(1) and 159(2) (d) of the Constitution by locking them out from pursuing serious and substantive grievances.**
- (vii) **The learned magistrate ignored or failed to give weight to the Appellants' written submissions and supporting documents which showed prima facie evidence of fraudulent dealings hence occasioning a miscarriage of justice.**

(3) The preliminary objection which lead to the dismissal of the Appellants' suit is dated 23-1-2025 and reads as follows.

- 1. The suit was filed under a power of attorney without prior leave/approval of the Court under Order 9 rule 2 (a) of the Civil Procedure Rules.**
- 2. The suit is time barred in that land parcel No. Loc.8/Matharite/1099 was registered in the name of the 1st Defendant in 1995, 29 years ago. This suit therefore offends Sections 4 and 7 of the Limitation of Actions Act.**

(4) In his ruling dated 30-4-2025 the learned trial magistrate upheld the first ground in the preliminary objection and struck out the Appellants' suit for failure to comply with **Order 9 rue 2(a)** of the **Civil Procedure Rules** which provides as follows.

“ 9(2) The recognized agents of parties by whom such appearances, applications and acts may be made or done are-

(a) Subject to approval by the Court in any particular suit persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of parties...”

The learned Magistrate did not make any finding on the second ground of the preliminary objection.

(5) On 2-12-2025, directions were given as to the filing of written submissions by the Appellants and the Respondents. The only submissions that I have seen filed are those by the 1st

Respondent. No submissions had been filed by the Appellant by the deadline of 9-1-2026 or even later. The submissions by the 1st Respondent identified only one issue.

(i) Whether the appeal has merit.

(6) I have carefully considered the entire appeal including the grounds, the record, the submissions by learned counsel for the 1st Respondent and I find that the following issues arise.

(i) Whether the learned Magistrate misapplied the law for determining a case involving fraud, forgery and misrepresentation without hearing the evidence.

(ii) Whether the learned Magistrate failed to consider the statutory and constitutional roles of the Land Registrar Murang'a and other institutions.

(iii) Whether the Appellants' rights of access to justice and fair hearing under Articles 48, 50(1) and 159 (2) (d) of the constitution were violated.

(iv) Whether the Appellants' submission made any difference to the first ground of the preliminary objection.

(v) Whether the learned magistrate ought to have considered the second ground of the preliminary objection.

(7) On the first issue, I find that the learned magistrate did not misapply the law at all by failing to hear the suit on merit. The *locus standi* of the Appellants was critical to their participation in the suit as parties. **Order 9 rule 2(a)** stood in the way of the Appellants. It required them to first seek the Court's approval before filing the suit. The Appellants failure to seek this approval is not explained anywhere in the plaint dated 25-11-2024. The Appellants needed to convince the Court that they could institute the suit on behalf of their father on the strength of the power of attorney. They should have explained what disability affected their father such that he could not institute the suit himself. I find no merit in the 1st, 2nd and 3rd grounds which all related to failure to hear the suit on merit.

(8) As regards, the second issue, I find that the constitutional and statutory roles of the Land Registrar Murang'a and other public institutions would only have been considered if the Appellants had proved that they had *locus* to bring the suit on behalf of their father. Having failed to prove that they had *locus*, the court could not have considered the roles of the institutions if there was no trial and final judgment.

- (9) While it is true that **Articles 48, 50(1) and 159 (2) (d)** of the Constitution guarantee the rights of access to justice, fair hearing and administration of justice without undue regard to procedural technicalities, such rights are only guaranteed to those who have the necessary *locus standi*. None of those provisions of the constitution allows a person without capacity to institute suits. Capacity to institute the suit was the first barrier that the Appellants had to contend with and this is where they failed. The striking out of their suit does not bar their father from instituting the suit himself. The access to justice and the right to a fair hearing will be accorded to the party with capacity.
- (10) No amount of submissions would have altered the fact that the Appellants did not comply with the mandatory provisions of **Order 9 rule (2) (a)** as regards obtaining prior approval of the court by a holder of a power of attorney before instituting a suit. The Appellants' submissions dated 3-3-2025 raised one main issue of the jurisdiction of the court while the real issue in contention was the *locus standi* of the Appellants to institute the suit in the place of their father. The Appellants' submissions were not of much help to the critical issue before the Court.
- (11) On the final issue, I find that the learned magistrate ought to have determined the second ground of the Preliminary Objection regarding time bar. It is my finding that the suit is not time barred because the Appellants have pleaded fraud both in the Plaint and in the witness statement that it is only recently that they found out that there was a stone house on the suit land built without their knowledge or consent. This is in the witness statement of Benson Kuria Macharia filed in Court on 27-11-2024. Under **section 26 (a) of the Limitation of Actions Act** it is provided as follows.

26. “ Where, in the case of 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 any person through whom he claims or his agent...”

The period of limitation does not begin to run until the Plaintiff has discovered the fraud or mistake or could with reasonable have discovered it...”

The learned magistrate should have dismissed the second ground of the preliminary objection on account of **Section 26** of the **Limitation of Actions Act**.

(12) For the reasons given above I do not find any **merit** in the appeal because of failure by the Appellants to comply with **Order 9 rule (2)** of the Civil Procedure Rules. The learned magistrate was right in dismissing the Appellants suit and striking it out on this ground alone.

The Appellants' appeal is dismissed with costs to the 1st Respondent.

It is so ordered.

Dated, signed and Delivered virtually at Murang'a this 24th day of February, 2026.

**M.N. GICHERU
JUDGE.**

Delivered online in the presence of; -

Court Assistant – Jackline

Appellant – Present

Respondent Counsel –Mr. Mbuthia