



THE JUDICIARY



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A
ELCLA E020 OF 2025

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

VERSUS

GEOFFREY IRUNGU MUGWE1ST RESPONDENT
MURANG'A LAND REGISTRAR2ND RESPONDENT
THE HONOURABLE ATTORNEY GENERAL3RD RESPONDENT

***(Being an Appeal from the Judgment of the Court Murang'a MC ELC Case No. E076 of 2024
as delivered on the 30/04/2025 by Hon. Peter Ndwiga- CM)***

JUDGMENT

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

(a) The ruling delivered on 30-4-2025 be set aside in its entirety.

(b) The preliminary objection be dismissed with costs.

(c) The suit in MCELC No. E076 of 2024 be reinstated for hearing on merits before a different magistrate.

(d) 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 documents 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 to justice and their 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 Appellant's written submissions and supporting documents which showed prima facie evidence of fraudulent dealings hence occasioning a miscarriage of justice.**

(3) The preliminary objection which led 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/1100 was registered in the name of the 1st Defendant in 1990, 34 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 failure to comply with **Order 9 rule 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 trial magistrate did not make any finding on the second ground of the preliminary objection.

(5) On 2-12-2025, the Court gave directions as to the filing of written submissions by the Appellants and the Respondents. The only submissions that I have seen 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 written submissions by the 1st Respondent identified only one issue.

1. 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 issue 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 constitutional and statutory 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' submissions made any difference to the first ground of the preliminary objection.**
- (v) **Whether the learned trial magistrate ought to have considered the second ground of the preliminary objection.**

(7) On the first ground, I find that the leaned 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)** of the Civil Procedure Rules stood in the way of the Appellants.

It required them to first seek the Court approval before filing the suit. The Appellants' failure to seek this approval is not explained anywhere in the Appellants' 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 of appeal which all relate 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 the requisite *locus standi* to bring the suit on behalf of their father. Having failed to do so, the Court could not have considered the roles of the institutions if there was no trial and final judgment. I therefore find no merit in the 4th and 5th grounds of appeal.

- (9) While it is true that **Articles 48, 50(1) and 159(2) (d)** of the constitution guarantee 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 the suit does not bar their father from instituting the suit himself. The rights of access to justice and fair hearing will be accorded only to the parties with capacity. I find no merit in the 6th ground of appeal.
- (10) No amount of written submissions would have altered the fact that the Appellants did not comply with the mandatory provisions of **Order 9 rule 2 (a)** of the Civil Procedure Rules as regards obtaining prior approval of the Court by a holder of a power of attorney before instituting a suit. The Appellants' written 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 place of their father. The Appellants' written submissions were not of much assistance to the critical issue before the lower Court. I do not therefore find any merit in the 7th ground of appeal.
- (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 bared because the Appellants have pleaded fraud in the plaint and in the witness statement that it is only recently that they found that there is 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 an action for which a period of limitation is prescribed, either –

(a) The action is based upon the fraud of the Defendant or his agents, or through any other person through whom he claims on his agent...the period of limitation does not begin to run until the Plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it...”

The learned magistrate was wrong not to have considered the second ground. He was also wrong to find that he had no jurisdiction. He had jurisdiction. There was no disability on the part of the Court. The disability was on the part of the Appellants. They lacked capacity for failure to seek the approval of the Court yet they filed the suit on the strength of a power of attorney.

For the above stated reasons, I find **no merit** in the appeal by the Appellants and I **dismiss** it 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 – Mwangi Njonjo
2nd Appellant – present
1st Respondent’s Counsel – Mr Mbutia