

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**  
**ENVIRONMENT AND LAND COURT LAND APPEAL NO.**  
**E018 OF 2024**

**JOHN MURIMI MARIGIRI.....**

**.....APPELLANT**

**SAMWEL OMOGO sued as the administrator of the Estate  
of Petro Ochola (Deceased).....1<sup>ST</sup>**

**RESPONDENT**

**SUNHIL PARSHOTTAM NATHA PATEL.....2<sup>ND</sup>**

**RESPONDENT**

**GONDA ELKANA SYONGOH.....3<sup>RD</sup>**

**RESPONDENT**

**MAKADIYA KAMSHIKKUMAR JAMNADAS.....4<sup>TH</sup>**

**RESPONDENT**

**BANSI WHOLESALERS.....5<sup>TH</sup>**

**RESPONDENT**

***(Being an Appeal from the Ruling of Hon. N. Wairimu in  
Migori CMELCC 76A of 2023 delivered on 5<sup>th</sup> September  
2024)***

**JUDGEMENT**

**1.** This Appeal arises from the ruling of the trial court on the application dated 11<sup>th</sup> April 2024 delivered in Migori CMELCC No. 76A of 2023 wherein the Appellant had sought the following orders;

**1) That this suit be dismissed with costs for being an abuse of the process of this Honourable court and for want of jurisdiction as the suit offends the**

**Provisions of Sections 7 & 8 of the Civil Procedure Act being that subject matter, facts, parties and the issues in the current suit are directly and substantially the same to the subject matter, facts, parties and issues which were already heard and determined in KISII HIGH COURT CONSTITUTIONAL PETITION NO. 8 OF 2012.**

- 2) This suit be dismissed with costs for the reason that this Honourable court lacks jurisdiction to hear and determine this suit because this suit being a cause of action founded on fraud, which is a civil tort, is time barred under Section 4 (a) & 26 of the Limitation of Actions Act as the suit ought to have been brought within 3 years from the date when the cause of action arose or from the date when the plaintiff realized that the cause of action had arisen.**
2. In the Affidavit in support of the application, the Appellant, then the 1<sup>st</sup> Applicant, and 4<sup>th</sup> Respondent pleaded that the Plaintiff sued on behalf of the Estate of Murimi Marigiria and in regard to LR Bukira/Buhiringera/248 on the cause of action, being fraud. That in the year 2012 the same Estate of the deceased Murimi Marigiria, through the administrator one William Koroso Magabe, filed Kisii High Court Constitutional Petition No. 8 of 2012 against the 1<sup>st</sup> to the 4<sup>th</sup> defendants. In it the Estate claimed ownership of the suit parcel on the ground that they had acquired registration of the suit parcel fraudulently. The Administrator pleaded that the Respondent has filed this suit in total disregard of the fact that the subject

matter, facts, parties and the issues in the current suit are directly and substantively the same to those in the Petition. He stated that the petition was dismissed on 21<sup>st</sup> October 2016 and annexed a copy of the dismissal order. He urged that the suit was *res judicata*. Further, that the plaintiff had failed to disclose to the court that he had filed the petition which was dismissed. He prayed the court dismiss the suit as it lacked the jurisdiction to hear the same.

- 3.** In opposition to the application, the respondent filed a replying affidavit dated 24<sup>th</sup> April 2024 where he urged that the application was baseless and laid no sufficient basis for the orders sought. Further, that the suit did not in any way offend the provisions of Sections 7 and 8 of the Civil Procedure Act since the issues raised through the Plaint had never been heard and determined. He maintained that the court was clothed with the jurisdiction to hear and determine the questions in issue as Section 26 of the Limitation of Actions Act offers extension of time in claims that arise out of fraudulent transactions such as in the instant suit. He prayed that the Application be dismissed with costs.
- 4.** Upon considering the submissions of the parties and the pleadings tendered, the trial court, vide a ruling dated 5<sup>th</sup> September 2024, dismissed the application with costs.
- 5.** Being aggrieved with the decision of the trial court, the Appellant instituted the present appeal vide a memorandum of Appeal dated 16<sup>th</sup> September 2024 premised on the following grounds;

- 1)The Learned Magistrate erred in law and fact in finding that the plaintiffs claim was filed way past 3 years allowed for filing of suit in instances of fraud.**
  - 2)The Learned Trial Magistrate erred in both law and fact in finding that the plaintiff ought to have sought leave of the court to file his claim.**
  - 3)The Learned Trial Magistrate erred in both law and tact when she dismissed the plaintiffs claim on grounds that it was time barred.**
  - 4)The Learned Trial Magistrate erred in law and fact in misinterpreting the claim on record thereby arriving to a wrong conclusion.**
  - 5)The Learned Trial Magistrate failed to consider and/or ignored the submissions of the Appellants and consequently reached a decision which is erroneous in law**
- 6.** The 4<sup>th</sup> and 5<sup>th</sup> Respondents filed a Cross Appeal dated 30<sup>th</sup> September 2025. It was premised on the following grounds;
- 1)The learned Trial Magistrate erred in law and in fact when she held that Kisii High Court Constitutional Petition No. 8 of 2012 was withdrawn yet vet there is an extract of court order clearly showing that the said petition was dismissed for want of prosecution on 21<sup>st</sup> October 2025.**
  - 2)The learned trial magistrate rightly held that the issues raised by the petitioner herein were the same issues raised in the Kisii High Court Constitutional Petition No. 8 of 2012 but erred in**

**law and in facts when she failed to address herself on the issue which had been raised by the cross-appellants at prayer number one (1) of the application on whether the suit was an abuse of the court process and for want of jurisdiction as the suit offends provisions of section 7 & 8 of the Civil Procedure Act being that the subject matter, facts, parties and the issues in the current suit are directly and substantially the same to the subject matter, facts, parties and issues in Kisii High Court Constitutional Petition No. 8 of 2012 which had been dismissed for want of prosecution on 21<sup>st</sup> October 2025.**

7. The parties filed submissions on the appeal. The Appellant filed his dated 29<sup>th</sup> July 2025, while the Respondents filed theirs dated 30<sup>th</sup> September 2025.

### **Appellants' submissions**

8. The learned counsel for the Appellant urged that a look at the pleadings shows that the appellant is claiming land that was fraudulently transferred for the name of his deceased father by the defendant. He wants the transfers declared null and void and the land reverted to the name of his deceased father. He is not claiming that the defendants have trespassed into the land. The law applicable to him on limitation is therefore not Section 4(2) or 4(a) of the Limitation of Actions Act as adverted to by the Respondent. He urged that the Limitation period applicable to the defendant is Section 7 of the Limitation of Actions Act. That

even assuming that the Appellant's claim fell under Sections 4(a) or 4(2) of the Limitation of Actions Act, there is Section 26 of the Limitation of Actions Act which alters the position to. "The period of Limitation does not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it"

- 9.** Counsel reproduced the provisions of section 7 of the Limitation of Action Act and urged that from the pleadings, particularly the plaintiff's statement filed in court, it is clear that the right of action accrued him in the year 2022 when he discovered the fraud. But again, even assuming that the limitation applicable to him was that under tort which is 3 years S.26 clearly provides that time starts to run when he has discovered the fraud which in the circumstances of this suit is the year 2022 and filed his case in 2023, clearly within time. Counsel cited the case of *Mitina Eire Keton Koponi (suing as legal representative of the estate of Keton Ole Koponi Parsena (deceased) -vs- Francis Njakwe Gathiari & 2 others (2018) eKLR* in this regard and urged that the learned magistrate was wrong to hold that the plaintiffs' suit was time barred under S.4(a) and 26 of the Limitation of Actions Act.
- 10.** On whether the claim is *res judicata*, Counsel urged that the Appellant's suit is not *Res-judicata* and ought not be subjected to the provisions of S.7 & 8 of the Civil Procedure Act. He stated that it is trite that the element of *Res-judicata* have been held to be conjunctive rather than disjunctive. As such qualifying factors have to be met before a suit or an issue is deemed as being *Res-judicata* on account of a former

suit. These factors have been identified as (a) The suit or issue was directly and substantially in issue in the former suit; (b) The former suit was between the same parties or parties under whom they or any of them claim; (c) Those parties were litigating under the same title and; (d) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in action the issue is raised.

- 11.** Going by the above provisions on Res-judicata, he urged that that legal principal has no bearing on the present suit since the Appellant/Plaintiff herein, John Murimi Marigiri was not a party to the Kisii High Court Constitutional Petition No. 8 of 2012 as alleged by the defendants Respondents. Further to that, the 5<sup>th</sup> Defendant/Respondent was also not a party to the said proceedings. It cannot thus be said that the present suit falls within the class of suits barred under S.7 & 8 of the Civil Procedure Act. Having established that the parties in the former Kisii suit are not particularly similar to the parties in the current suit, it is then up for question as to whether the suit was heard and determined thus making the filing of the present suit frustrated by the legal dictates of Res-judicata. He submitted that making an assumption that the parties in the impugned petition and the instant suit were the same, this court would then have to make a determination on the issue of whether the dismissal of the said petition for want of prosecution bar the plaintiff from instituting the present suit. He highlighted Order 12 Rule 6(1) of the Civil Procedure Rules 2010 and urged that for section 7 of the CPA to apply the

matter, apart from being between the same parties, over the same cause of action, it ought to have been heard and determined and decided by a court of competent jurisdiction.

**12.** Counsel submitted that in Kisii Petition No.8 of 2012 on which the Respondents placed reliance, the suit was dismissed for want of prosecution before the parties therein got the opportunity to have the case heard and determined on its merit. He placed reliance on the decisions on *The Tee Gee Electricals & Plastics Co. Ltd vs Kenya Industrial Estates, Kisumu CACA No. 333 of 2001*, *Enock Kirao Muhanji vs Hamid Abdalla Nbarak (2013) eKLR* and *Njoe Ngai vs Ephantus Njiru Ngai & Another (2016) eKLR* in this regard and submitted that the bar raised for Res-judicata applies only if the matter directly and substantially in issue in the former suit has been heard and finally decided by a court of competent jurisdiction to try such suit. That if the former suit is dismissed without any adjudication on the matter in issue merely on a technical ground of non-joinder, that cannot operate as res-judicata.

**13.** Counsel maintained that the suit was not time barred under the Limitation of Actions Act and it is also clear that the suit was not res-judicata since the parties are not the same and neither was the suit in Kisii Constitutional no.8 of 2012 heard and determined on its merit. He urged the court to set aside the decision of the trial court.

### **Respondents' submissions**

**14.** Counsel for the respondent submitted that the learned trial magistrate did not make any error when she dismissed the

plaintiff's suit for being time barred because the plaintiff's cause of action having been founded on fraud, which is a civil tort, was time barred under Section 4 (a) & 26 of the Limitation of Actions Act. Further, that the trial court lacked jurisdiction to hear and determine the suit because the suit being a cause of action founded on fraud, which is a civil tort, was time barred under Section 4 (a) & 26 of the Limitation of Actions Act as the suit ought to have been brought within 3 years from the date when the cause of action arose or from the date when the plaintiff & appellant realized that the cause of action had arisen. He placed reliance on the case of *Bosire Ongero -vs- Royal Media Services* [2015] eKLR in this regard. Counsel cited Section 4 (2) of the Limitation of Actions Act and urged that there is nowhere under the Limitations of Actions Act where Section 26 unconditionally extends time in claims that arise out of fraudulent activities. He urged that Section 26 of the Limitation Actions Act is very clear that 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. It therefore means that extension of time under Section 26 is only applicable as to when the other party came to be aware of the alleged fraudulent activities/transactions being challenged. When it can be proved that the other party was aware of the alleged fraudulent transactions or dealings then the three (3) years' timeline starts running automatically and that timeline can only be extended by a court of law through appropriate application for leave to file a suit out of time and

to extend time, where necessary but before filing the main suit.

- 15.** Counsel submitted that a perusal of both the Plaint filed herein and the Petition in the former suit clearly indicated that the Plaintiff pleaded fraud concerning the same subject matter being L.R No. BUKIRA/BUHINGERA/248. Essentially, the cause of action in both suits was founded on the alleged fraudulent transactions as repeatedly averred on the face of the Plaint. He stated that it is clear that the Plaintiff/appellant was aware of the alleged fraud way back in 2012 at the time of filing the suit in Kisii which they later dismissed for want of prosecution in the year 2025. This suit was filed over eleven years later without leave of court being which is a delay of over Eight (8) years. He cited Nyakundi Okerio & another v Elijah Sokobe Obot & 2 others [2021] eKLR and the case of Edward Moonge Lengusuranga -v James Lanaiyara & another [2019]eKLR in this regard, urging that the trial magistrate did no error in law and/or facts when she dismissed the plaintiffs' suit for being time barred.
- 16.** Counsel submitted that the Trial Magistrate erred in law and in fact when she held that Kisii High Court Constitutional Petition No. 8 of 2012 was withdrawn yet there is an extract of court order clearly showing that the said petition was dismissed for want of prosecution on 21<sup>st</sup> October 2025 as can be seen at page 44 of the record of appeal. He stated that the trial magistrate rightly held that the issues raised by the petitioner herein were the same issues raised in the Kisii High Court Constitutional Petition No. 8 of 2012 but erred in

law and in facts when she failed to address herself on the issue which had been raised by the cross-appellants at prayer number one of the application on whether the suit was an abuse of the court process and for want of jurisdiction as the suit offends provisions of section 7 & 8 of the Civil Procedure Act being that the subject matter, facts, parties and the issues in the current suit are directly and substantially the same to the subject matter, facts, parties and issues in Kisii High Court Constitutional Petition No. 8 of 2012 which had been dismissed for want of prosecution on 21<sup>st</sup> October 2025.

- 17.** He cited the celebrated case of Owners of the Motor Vessel 'Lilian' -v Caltex Oil (Kenya) Ltd [1989]KLR on jurisdiction and urged that it is not disputed that that the Appellant had filed Kisii High Court Constitutional Petition No. 8 of 2012 where the subject matter, facts, parties and the issues in the current suit are directly and substantially the same to the subject matter, facts, parties and issues which were in dispute in Kish High Court Constitutional Petition No. 8 of 2012. It is also not in dispute that the said Kish High Court Constitutional Petition No. 8 of 20 IS was dismissed for want of prosecution on 21<sup>st</sup> October 2015 and there is a court order to that effect. He submitted that superior courts have always held, that a party whose suit has been dismissed for want of prosecution does not enjoy the right of filing a fresh suit but can only file an application for review or setting aside to have the dismissed suit reinstated for hearing. He cited the decision in Mombasa High Court Constitutional Petition Number E007 of 2020,

Peter Mumira vs Attorney General [2022] eKLR in this regard and urged that the only remedies which were available to the plaintiff/appellant after his Kisii High Court Constitutional Petition No. 8 of 2012 was dismissed for want of prosecution on 21<sup>st</sup> October 2015 was to either apply to set aside the order dismissing the Petition for want of prosecution or apply for review of the order or prefer an appeal against the dismissal. The plaintiff did not have the opening or latitude of filing a fresh suit as he has just done.

- 18.** Counsel urged that the suit at the trial court should be dismissed with costs for being an abuse of the process of this court and for want of jurisdiction as the suit offends the Provisions of Sections 7 & 8 of the Civil Procedure Act being that the subject matter, facts, parties and the issues in the current suit are directly and substantially the same to the subject matter, facts, parties and issues which were already in dispute in Kisii High Court Constitutional Petition No. 8 of 2012. He prayed the court dismiss the appeal with costs and further, that the cross- appeal has merit and should be allowed with costs.

### **Analysis and Determination**

- 19.** The following issues arise for determination; Whether the trial court erred in finding that the claim was time barred.
- 20.** The suit in the trial court was instituted vide a Plaint dated 30<sup>th</sup> January 2023. In it the Appellant sought a declaration that the transfer of Bukira/Buhirengera/248 to the defendants therein was fraudulent. He pleaded that he discovered the fraud in the year 2017. This court has to analyse the

pleadings to make a finding as to whether indeed that was the position. This is because from a reading of the Complaint, it is clear that the claim was founded on allegations of fraud, and the period or date of discovery were known and specified. Before doing so, the provisions of the law that provide for limitation of time ought to be made clear.

**21.** Section 4(2) of the Limitation of Actions Act provides as hereunder:

**(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued**

**22.** Section 26 on the other hand provides that:

**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.**

**23.** The pleadings before the trial court show that in the year 2012 the Plaintiff filed a Petition in the Kisii High Court. It was Kisii High Court Constitutional Petition No. 08 of 2012 filed on 30<sup>th</sup> July 2012. In it he challenged, among others the validity

of the title and wished the court to grant a relief over his rights over the suit parcel of land. He knew, by that time, about the fraud regarding the title. It is the finding of this court that the Appellant discovered the alleged fraud in the year 2012 when he filed the Constitutional Petition or some time before then and that was why he moved the court accordingly in the Petition.

**24.** Thus, applying the provisions of Section 4(2) of the Limitation of Actions Act, the Appellant's suit was filed way after the time permitted by law had lapsed. It goes without saying that the filed the suit in the year 2023 vide the plaint filed on 9<sup>th</sup> February 2023 was time barred since it was brought eleven (11) years after the appellant discovered the alleged fraud in the transfer of the suit land. In my calculations, the period from when the Petition was filed, and withdrawn by consent on 10<sup>th</sup> August 2015 then to the filing of the suit in the trial court was quite a long period. Further, the pendency of any proceedings did not in any way stop the period of filing the claim for fraud from running. In any event, Sections 26 and 27 of the Limitation of Actions Act regarding extension of time for the filing of suits where time has expired do not include enlargement of time for such reasons as the pendency of other proceedings over the same subject: though this was not urged before me.

**25.** This now turns me to the merits or otherwise of the cross appeal. In light of this sequence of events, I find that the issues raised in the cross appeal are also settled. The cross appellants faulted the trial court for holding that the

constitutional petition was withdrawn, yet the record in the Petition clearly shows that the same was dismissed for want of prosecution. The finding of the trial court had no bearing on the decision of the court. The point is that the Constitutional Petition was withdrawn by the consent of the parties. It means that whether the court observed the finding on withdrawal or the dismissal for want of prosecution such could not and was not the basis of determining the preliminary objection on limitation or computation of time.

**26.** The cross appellants also faulted the trial court for not addressing the issue of *res judicata* under sections 7 and 8 of the Civil Procedure Act, despite finding that the issues raised in the Petition were the same as those in the Suit before it. It is worth noting that the impugned ruling was on a preliminary objection on a point of law. It is trite law that if one point of law raised in a preliminary objection is found to be merited, that is enough for the objection to succeed and the matter ends there or at that stage. That notwithstanding, given that the constitutional petition was withdrawn by consent, which withdrawal was by consent of the parties and before the dismissal for want of prosecution (although it is funny that the court would purport to dismiss a withdrawn suit), the same could be said to have been determined on its merits. For *res judicata* to apply the issue ought to have been determined on merits. Therefore, the subsequent determination as was sought by the Plaintiff in the suit before the trial court would not fall within the ambit of

principle of res judicata. Thus, the cross appeal would not succeed on that account.

**27.** On the above I am persuaded by the decision in **Washe & another v Kaduka & 13 others (Environment and Land Case 155 of 2015) [2025] KEELC 6497 (KLR) (1 October 2025) (Ruling)** where the court held as follows;

***To the extent that the Defendants seek to invoke the doctrine of res judicata, the court finds the argument misconceived. A suit that has been withdrawn does not culminate in a determination on the merits and cannot form the basis of a res judicata bar.***

**28.** The upshot of the foregoing is that the trial court did not err in finding that the suit was time barred. Therefore, both the appeal and the Cross Appeal are dismissed. Each party is to bear their own costs.

**29.** It is so ordered.

**Judgment dated, signed and delivered virtually via the Teams Platform this 10<sup>th</sup> day of March 2026.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE**

**In the presence of,**

Court Assistant: Ms. Lola

Kerario Marwa Advocate for the Appellant

D. Otieno Advocate for the Respondent

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