

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ELCA NO. E027 of 2024

JUDY WANJIKU NGURE MWANGI

APPELLANT

VERSUS

CHARITY WAKUTHII GATUMUTA

RESPONDENT

JUDGMENT

[Being an appeal from the judgment of Hon. Grace Kirugumi, SPM, delivered on 15th May 2024 in Kerugoya MELC Case No. E185 of 2022]

1. This is an appeal from the judgment of **Hon. Grace Kirugumi, SPM**, delivered on **15th May 2024** in **Kerugoya MELC Case No. E185 of 2022**. In the said impugned decision, the learned trial magistrate held that the agreement for the sale of **Land Parcel Mutira/Kangai/1060**, entered into on 20th September 2012, between the Appellant, Judy Wanjiku Ngure Mwangi, and the Respondent, Charity Wakuthii Gatumuta, did not constitute a valid contract for sale.

The court noted that the property was at the time registered in the name of the Appellant's late husband, who had died on 5th August 2012, and further that the

Appellant had not demonstrated how she came to acquire title to the land scarcely a month after his demise. On that basis, the court concluded that the Appellant's title was tainted, incapable of conferring any lawful interest, and that the sale was null and void ab initio and unenforceable.

Consequently, the trial court ordered the Appellant to refund the purchase price of **Kshs. 190,000/=** to the Respondent, together with interest at court rates from the date of the agreement. The trial court also directed that each party to bear their own costs.

2. Aggrieved and dissatisfied with the trial court's decision, the Appellant lodged the present appeal through the Amended Memorandum of Appeal dated 22nd May 2024, setting out the following five (5) grounds:

1) That the learned magistrate erred in law and fact in holding that the sale agreement dated 20th September 2012 did not constitute a valid contract for the sale of land while simultaneously finding that there was a valid Land Control Board consent;

2) That the learned magistrate erred in failing to find that the suit as filed was time-barred and liable to dismissal;

- 3) That the learned magistrate erred in law and fact by holding that **Section 4 of the Limitation of Actions Act** must be read together with **Section 7**;
- 4) That the learned magistrate erred in ignoring the pleadings and evidence before her and in determining matters that had neither been pleaded nor proved by any party; and
- 5) That the learned magistrate erred in directing the Appellant to refund the Respondent the sum of **Kshs. 190,000/=** with interest from the date of the agreement despite the Respondent having been in occupation and use of the land from 20th September 2012 to date without payment of rent.

On the basis of these grounds, the Appellant prays that the appeal be allowed with costs; the judgment delivered on 15th May 2024 be set aside, and that the Respondent's suit in Kerugoya MELC No. E185 of 2022 be dismissed.

3. The suit giving rise to this appeal was initiated in the subordinate court by the Respondent through a Plaint dated 30th November 2022. In that suit, the Respondent

sought an order compelling the Defendant, now Appellant, to refund the purchase price paid for a portion of **Land Parcel Mutira/Kianjege/1060**, together with interest, and to compensate her for developments allegedly undertaken on the said property. She also prayed for the costs of the suit.

The Respondent's case, as pleaded, was that by a sale agreement dated 20th September 2012, she purchased **0.10 hectares** out of **Land Parcel Mutira/Kianjege/1060** from the Appellant, paid the agreed purchase price, and took possession with the expectation that the property would be transferred to her. She contended that the Appellant breached the agreement by refusing to effect the transfer or to refund the purchase price, and instead allocated the land to her children. It was her position that owing to that breach, she was entitled to a refund of the purchase price together with interest, as well as compensation for developments she claimed to have effected on the suit land.

4. In response to the suit, the Appellant filed a Statement of Defence dated 11th July 2023, in which she denied the allegations contained in the Plaint. She averred that at the time she entered into the sale agreement with the Respondent, the suit land had been registered in her name.

She further pleaded that in 2013, she was sued by Elizabeth Wambura Mwaniki in respect of the same parcel of land, a fact which she contended was known to the Respondent, and that the purchase price paid by the Respondent was utilised to defend that suit.

The Appellant's case was that she ultimately lost the said suit, following which the court ordered the cancellation of her registration and directed that the suit land revert to the name of her deceased husband, with further orders that a succession cause be undertaken. She stated that succession proceedings relating to the estate were still pending in court, and that the Respondent had laid her claim therein. The Appellant denied that the sale agreement contemplated immediate entry or possession by the Respondent and asserted that the Respondent's entry upon the land was unlawful and in breach of the agreement.

She further averred that the land was already developed at the time of the alleged entry, with mature trees, coffee, and banana crops, and on that basis claimed mesne profits or rent for the Respondent's alleged illegal occupation and use of the land from September 2011 to December 2022.

Finally, the Appellant contended that the question of ownership of the suit land was the subject of ongoing

litigation in Kerugoya **Succession Cause No. E562 of 2022**, and that the subordinate court suit was therefore sub judice, and offended the doctrine of *lis pendens*.

She also claimed that the Respondent should have sued her at the expiry of 6 months required by the **Land Control Act**, rather than waiting for 11 years. She concluded that the suit was time barred by **Section 4 (1) (a) of the Limitation of Actions Act Chapter 22 of Laws of Kenya**.

5. On 7th November 2024, this Court directed the appeal to be canvassed, by way of written submissions. The learned counsel for the Appellant filed their submissions dated 5th December 2024, submitting inter alia that the learned trial magistrate erred in law and fact by failing to find that the suit as filed was statute time barred, and by declining to dismiss it on that basis.

Counsel further faulted the trial court for holding that **Section 4 of the Limitation of Actions Act** must be read together with **Section 7**, contending that such an interpretation improperly assumes that all contracts are land contracts.

It was counsel's submission that the Plaintiff was silent on the alleged date of breach and that no demand notice had been pleaded or produced. Counsel nonetheless noted

that Land Control Board consent to subdivide the suit land into two portions of **0.10 hectares** was issued on 27th September 2012.

It was further submitted that there was no consensus ad idem between the parties, asserting that whereas the Appellant believed she was leasing out the land for a period of twelve years, the Respondent understood the transaction to be a sale. On that basis, counsel argued that the cause of action accrued on 20th March 2013, and that the Respondent's suit, having been filed on 2nd December 2022, was clearly time barred.

The counsel went on to submit that parties are bound by their pleadings and faulted the learned trial magistrate for finding that the agreement was null and void in the absence of any pleading by either party challenging its validity. Counsel contended that the court determined issues that were neither pleaded nor proved. That the learned trial magistrate erred in directing the Appellant to refund **Kshs. 190,000/=** with interest from the date of the agreement, notwithstanding that the Respondent had been in occupation and use of the land from 20th September 2012, without payment of rent. Counsel argued that while the court found the transaction to be illegal and void ab initio, it nonetheless allowed the Respondent to retain possession of the land without accounting for rent or mesne profits, thereby permitting

her to *“have her cake and eat it.”* Counsel urged the court to allow the appeal.

6. The learned counsel for the Respondent filed her submissions dated 4th June 2025, and submitted that the suit was not time barred, arguing that since the Appellant had asserted that the arrangement between the parties was a lease for a term of twelve years, the alleged lease would have been valid until 2024, and that the suit, having been filed in 2022, was instituted within the subsistence of that term.

Counsel further submitted that the Appellant was estopped from raising the defence of limitation on the basis of promissory estoppel, contending that the Appellant had promised to transfer the land to the Respondent upon conclusion of the succession proceedings. Counsel noted that the Appellant had conceded that the Respondent remained in possession of the suit land.

Counsel relied on **Section 39 of the Limitation of Actions Act**, which provides that a period of limitation does not run where a person is estopped from pleading limitation, including by equitable or promissory estoppel.

Counsel further submitted that although the agreement was dated 20th September 2012, time began to run upon

breach, which he argued occurred when the Appellant filed the succession cause without providing for the Respondent. It was counsel's position that the limitation therefore began to run on 1st August 2022.

It was further submitted that the Respondent was entitled to the remedies granted by the trial court. He argued that the Appellant admitted having received the purchase price and failed to obtain Land Control Board consent to effect the transfer, which he contended was her responsibility. On that basis, counsel urged the court to uphold the trial court's decision.

7. The following are the issues arising in this appeal for the court's determinations:

- a. *Whether the Respondent's suit in **Kerugoya MELC No. E185 of 2022** was statute barred under the **Limitation of Actions Act**.*
- b. *Whether the learned trial magistrate erred in law and fact in finding that the agreement for sale dated 20th September 2012 was null and void ab initio and incapable of enforcement.*
- c. *Whether the learned trial magistrate determined issues that were neither pleaded nor proved by the parties, contrary to the principle that parties are bound by their pleadings.*

d. Whether the learned trial magistrate erred in ordering the Appellant to refund the purchase price of **Kshs. 190,000/=** with interest from the date of the agreement, notwithstanding the Respondent's continued occupation and use of the suit land.

e. Who pays the coats?

8. I have carefully considered the grounds on the memorandum of appeal, record of appeal, the submissions by the learned counsel for the parties and come to the following conclusions:

a. This being a first appeal, the duty of this Court is to re-evaluate the evidence afresh and draw its own conclusions, while bearing in mind that it did not see or hear the witnesses. This principle was stated in **Selle & Another versus Associated Motor Boat Co. Ltd & Others [1968] EA 123**, where the **Court of Appeal** held:

“This Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court is by way of retrial... this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always

bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

- b. On whether the Respondent’s suit in **Kerugoya MELC No. E185 of 2022** was statute time-barred; it is trite that the question of limitation goes to jurisdiction. A court has no power to entertain a claim that is statute time barred. Under **Section 4(1)(a) of the Limitation of Actions Act**, actions founded on contract may not be brought after the end of six years from the date the cause of action accrued.

It is settled law that a cause of action in contract accrues when the breach occurs, and time begins to run from that date. Where the contract is one for the disposition of agricultural land, the provisions of the **Land Control Act** are not merely procedural but go to the legality and enforceability of the transaction.

- c. Under **Section 8(1) of the Land Control Act**, a transaction for the sale of agricultural land becomes void for all purposes unless the consent of the Land Control Board is obtained within six months of the making of the agreement, or within such extended period as the court may allow. This **Section** provides that:

(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.

Accordingly, where no valid consent to transfer is obtained within six months or the time extended, if any, the agreement becomes void by operation of law upon the expiry of that period; and that moment marks the point at which breach occurs, and the cause of action crystallises.

d. In the present case, it is not disputed that the agreement for sale was executed on 20th September 2012. It is further common ground that the suit land is agricultural land within a land control area.

While evidence was led that consent to subdivide was issued on 27th September 2012, no consent to transfer the suit portion to the Respondent was obtained within the statutory six months, nor was any extension sought. By operation of **Section 6(1) of the Land Control Act**, the agreement therefore became void for all purposes upon the expiry of six months, that is, on or about 20th March 2013. In law, that is the point at which the agreement ceased to be enforceable and the Respondent's cause of action, if any, accrued.

- e. The Respondent's suit before the subordinate court was pleaded as one founded on the sale agreement and sought, in the alternative, a refund of the purchase price together with interest and compensation for developments. The cause of action was therefore plainly contractual, attracting the six-year limitation period under **Section 4(1)(a) of the Limitation of Actions Act**. Time thus began to run in March 2013 and lapsed in March 2019. The suit was filed on 30th November 2022, more than nine years after the cause of action accrued. On the face of the pleadings alone, the suit was irredeemably statute time barred.
- f. The learned trial magistrate held that **Section 4 of the Limitation of Actions Act** must be read

together with **Section 7**. With respect, that approach was erroneous. **Section 7** applies to actions for the recovery of land. The Respondent did not seek recovery of land; she sought a refund arising from a failed sale agreement. The applicable limitation provision was therefore **Section 4**, not **Section 7**. The Respondent's argument that time began to run in August 2022, when succession proceedings were filed, has no legal basis. Limitation cannot be postponed by subsequent events once a contract has become void by statute.

Similarly, the reliance on promissory estoppel under **Section 39 of the Act** was misplaced. Estoppel was neither pleaded nor proved, and in any event cannot be used to revive a cause of action that had already become statute time barred. This Court therefore finds that the subordinate court lacked jurisdiction to entertain the Respondent's suit.

- g. Having found that the suit was statute-barred, issue No. 2 is substantially resolved. Once a court finds that it lacks jurisdiction on account of limitation, it must down its tools. It cannot proceed to interrogate the merits of the dispute or pronounce itself on the validity or otherwise of the contract. In that regard, the learned trial magistrate erred in proceeding to determine the validity of the sale agreement and in

declaring it null and void ab initio, and further in issuing consequential orders for refund. Those findings and orders were made without jurisdiction and cannot stand.

h. Having found that the Respondent's suit before the subordinate court was statute time-barred, and that the trial court consequently lacked jurisdiction to entertain it, this Court is satisfied that issue No^s. 3 and 4 are rendered moot. Any interrogation of whether the learned trial magistrate determined matters not pleaded, or whether the order for refund of the purchase price was warranted in light of the Respondent's occupation of the suit land, would amount to a consideration of the merits of a suit, that the court below had no jurisdiction to determine. This Court therefore declines to determine issue No^s. 3 and 4, as any pronouncement thereon would be academic. In view of this analysis and findings, I find the appeal has merit.

i. **Section 27 of the Civil Procedure Act, Chapter 21 of Laws of Kenya** provides that costs shall ordinarily follow the event unless the court, for good reason, orders otherwise.

The court in the case of *re Estate of Monica Wanjiru Macharia (Deceased) (Family Appeal 15 of 2023) [2024] KEHC 14780 (KLR)* held that:

“Section 27 of the Act is clear that it lies in the discretion of the court to award costs in a suit. This discretion must be exercised judiciously.”

The court finds no reasonable cause to deviate from that edict and awards the successful party, the appellant, the costs.

9. In the result, and for the reasons set out above, the court finds the appeal is meritorious and orders as follows:

- a. That the appeal has merit and is hereby allowed.**
- b. The judgment and decree of the Hon. Grace Kirugumi, SPM, delivered on 15th May 2024 in Kerugoya MCELC No. E185 of 2022, together with all consequential orders, are hereby set aside in their entirety.**
- c. The Respondent’s suit in Kerugoya MELC No. E185 of 2022 is hereby dismissed for want of jurisdiction, as it was statute time barred**

under the provisions of Section 4(1)(a) of the Limitation of Actions Act.

d. The costs of the suit before the subordinate court and of this appeal shall be borne by the Respondent.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 22ND DAY OF APRIL 2026.

Kibunja

JUDGE

In the presence of:

Appellant - Mr. Muriithi

Respondent - Mrs Muya for Mwangi Kennedy

Kinyua - Court Assistant

Kibunja, J.

JUDGE

S. M.

ELC

S. M.

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