



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Mugure & another v Kimathi & 3 others (Environment and Land Appeal E051 of 2022) [2024] KEELC 3252 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 3252 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E051 OF 2022  
CK YANO, J  
JANUARY 25, 2024**

**BETWEEN**

**REGINA MUGURE ..... 1<sup>ST</sup> APPELLANT**

**STEPHEN MWENDA MUGAMBI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**KENNEDY KIMATHI ..... 1<sup>ST</sup> RESPONDENT**

**MARY NTINYARI ..... 2<sup>ND</sup> RESPONDENT**

**FAMILY BANK LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

*(Being an Appeal from the Judgment and decree of the Chief Magistrate's Court at Meru, Hon. D. W. Nyambu (Chief Magistrate) dated 5th September, 2022 in MCELC No. E032 of 2020)*

**JUDGMENT**

**Introduction**

1. The appellants in this appeal moved the trial court vide a plaint dated 14<sup>th</sup> December, 2020 seeking for a declaration that the 1<sup>st</sup> appellant is the bona fide owner of parcel of land known as Ngusishi Settlement Scheme/1219; a declaration that the 2<sup>nd</sup> appellant is the bona fide owner of Land Known as Ngusishi Settlement Scheme 1218, a declaration that the charge over land Ngusishi Settlement Scheme/1219 by the 3<sup>rd</sup> respondent is void ab initio and thus null and void, an order for cancellation of the title deeds with respect to the said two parcels of land, an order directing the 4<sup>th</sup> respondent to issue the appellants with title deeds for their respective parcels of land, costs of the suit, and any other or further relief that the Honourable court deemed fit to grant.



2. The 1<sup>st</sup> appellant pleaded that she is the owner of land title No. Meru/Ngusishi/466 having acquired the same through transmission from her husband, the late Edward Mwirigi M'marete, and sold off one acre to the 2<sup>nd</sup> appellant who paid the purchase price in full. That they discovered that the 1<sup>st</sup> respondent used fraud, illegalities and misrepresentations to have the land subdivided and some of the resultant subdivisions either transferred or charged. The particulars of fraud and illegality on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were stated that the 1<sup>st</sup> respondent illegally and fraudulently subdivided and transferred the 1<sup>st</sup> appellant's land without her knowledge, illegally transferring one of the resultant subdivisions being Ngusishi Settlement Scheme/1218 to the 2<sup>nd</sup> respondent, and illegally charging one of the resultant subdivision being Ngusishi Settlement Scheme/1219 to the 3<sup>rd</sup> respondent. That the 1<sup>st</sup> respondent sued the 2<sup>nd</sup> appellant in Chief Magistrate's Court at Meru Environment & Land Court Case NO. 5 of 2019 despite not being the registered owner thereof as per the records held at the Land Registry.
3. The 4<sup>th</sup> and 5<sup>th</sup> respondents entered appearance and filed defence on 12<sup>th</sup> January, 2021 denying the appellants' claim. They pleaded that the 1<sup>st</sup> appellant had no authority to enter into a valid Sale Agreement and that the same was tantamount to intermeddling and therefore the alleged contract was void. They stated that if there were any dealings on the suit property, the same was lawful, proper and in execution of their statutory powers and duties. The 4<sup>th</sup> and 5<sup>th</sup> respondents further pleaded that the suit was time barred by dint of Section 3(1) of the *Public Authorities Limitation Act*. The trial court was urged to dismiss the suit.
4. The 3<sup>rd</sup> respondent also entered appearance and filed defence on 16<sup>th</sup> March, 2021 stating that the 1<sup>st</sup> respondent is the registered proprietor of land parcel NO. Ngusishi Settlement Scheme/1219 which title was used to secure loan of Ksh. 3.1 Million from the 3<sup>rd</sup> respondent. That the 3<sup>rd</sup> respondent's rights as a chargee over the said property supersede and could not be extinguished by the appellants' claims. It was also pleaded that the appellants' claims were untenable in law and that their allegations of fraud and illegality were unsubstantiated. The 3<sup>rd</sup> respondent further pleaded that if there were any fraud or illegality, which was denied, the appellants were liable in law for the same either by being participants to and/or complicit to such fraud and illegality and/or by operation of law.
5. Interlocutory judgment in default of appearance and defence was entered against the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
6. Both appellants testified and closed their case. The 3<sup>rd</sup> respondent called one witness and closed their case. The 4<sup>th</sup> and 5<sup>th</sup> respondents did not participate during the hearing.
7. Upon considering the matter the trial court found that the appellants had not proved their case against the respondents on a balance of probabilities and dismissed the same with costs.
8. The appellants were aggrieved by the said judgment and filed this appeal on the following grounds:-
  1. That the Learned Trial Magistrate erred in Law and fact by making a finding that the Appellants had not proved fraud against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
  2. That the Learned Trial Magistrate erred in law and fact by failing make a finding that the Appellant's case against the 1<sup>st</sup> and 2<sup>nd</sup> respondent had not been controverted.
  3. That the Learned Trial Magistrate erred in law and fact by holding that the Appellants could only have proved fraud by reporting the fraudulent transfer of title deed to the police and having the 1<sup>st</sup> and 2<sup>nd</sup> Appellants convicted.



4. That the Learned Trial Magistrate erred in law and fact by holding that there was a valid charge with respect to Ngusishi Settlement Scheme/1219.
  5. That the Learned Trial magistrate erred in law and fact by holding that the 3<sup>rd</sup> respondent was not supposed to carry out due diligence before registering a charge on Ngusishi Settlement Scheme/1219.
  6. That the Learned trial Magistrate erred in law and fact by holding that a title that was fraudulent acquired can lead to a lawful charge.
  7. That the Learned trial Magistrate erred in law and fact by failing to find that the fact that the 1<sup>st</sup> respondent was not servicing his loan with the 3<sup>rd</sup> respondent was evidence of fraud.
  8. That the learned trial Magistrate erred in Law and fact by holding that the 1<sup>st</sup> appellant intermeddled in the estate of her late husband.
  9. That the learned trial Magistrate erred in law and fact by holding that the Appellants' claim against the 4<sup>th</sup> and 5<sup>th</sup> respondents was time barred by dint of Section 3(1) of the *Public Authorities Limitation Act*.
  10. That the Learned trial Magistrate erred in law and fact by failing to find that the 4<sup>th</sup> and 5<sup>th</sup> respondents as the custodians of land records were bound to produce the copies of documents evidencing ownership of the suit parcels of land.
  11. That the Learned trial Magistrate erred in Law and fact by failing to find that the missing land documents with respect to the suit parcels of land were evidence of fraud on the part of the Respondents.
  12. That the Learned Magistrate erred in law and fact by finding in favour of the 4<sup>th</sup> and 5<sup>th</sup> respondents despite the fact that they did not participate in the proceedings.
  13. That the Learned trial Magistrate erred in law and fact by failing to consider the submissions and authorities cited by the Appellants.
9. The appellants are praying for the appeal to be allowed and the decision of the learned trial magistrate dismissing the appellants' suit to be set aside and substituted with an order allowing the same as well as costs of both the appeal and of the lower court.
  10. The appeal was canvassed by way of written submissions. The appellants filed their submissions dated 6<sup>th</sup> November, 2023 through the firm of Mutuma & Koskei Advocates. The 3<sup>rd</sup> respondent filed their submissions dated 7<sup>th</sup> November, 2023 through the firm of Karanja & Gisore Advocates while the 4<sup>th</sup> and 5<sup>th</sup> respondents filed theirs dated 12<sup>th</sup> October, 2023 through the Honourable Attorney General.

### **Appellants Submissions**

11. The appellants counsel combined grounds 1, 2 and 3 of the appeal challenging the trial court's finding that the appellants had not proved their case despite the same having been controverted and the finding that fraud could only be proved by reporting the fraudulent transfer to police and having the respondents convicted. The appellants' counsel gave a summary of the evidence adduced by the parties and submitted that the 1<sup>st</sup> respondent needed to demonstrate that he acquired a genuine title to any of the resultant subdivisions of the suit land. That in the absence of any evidence from the respondents, the trial court had no mandate to find out if a report had been made to the police or not. Learned counsel for the appellants submitted that there is no requirement for a litigant to make a report before



filing a claim based on fraud and relied on the case of Environment and Land Suit no. 260 of 2017 Wanjiru Richu Versus Cyrus Gathata Kibui and Environment and Land Court at Kajiado ELC Case No. 843 of 2017 Patrick Kivai Ndura Versus Noah Moneria Ole Kurrarru & Others.

12. On grounds 4,5, and 6 of the appeal challenging the trial courts' holding that there was a valid charge with respect to Ngusishi Settlement Scheme/1219 and that the 3<sup>rd</sup> respondent was not required to carry out due diligence before registering a charge on the said parcel of land of land and that a fraudulently acquired title can lead to a lawful charge, counsel for the appellants submitted that a valid charge flows from a valid title deed and in its absence, no valid charge can be created. It is their submission that the 3<sup>rd</sup> respondent did not carry out proper due diligence as would be required of a financial institution. That the negligence by the 3<sup>rd</sup> respondent means that it should not lay a claim to the applicants' property but pursue the 1<sup>st</sup> respondent for compensation. The appellants' counsel relied on the case of Patrick Kivai Ndura (supra).
13. With regards to ground 7 of the appeal which challenges the trial court's failure to make a finding that the failure to make a finding that the failure by the 1<sup>st</sup> respondent to service his loan with the 3<sup>rd</sup> respondent was evidence of fraud, learned counsel for the appellants referred to the evidence of DW1 and submitted that it is clear that all efforts to have the 1<sup>st</sup> respondent repay the sum due from him had not borne fruits and that the 1<sup>st</sup> respondent engaged in fraud for purposes of obtaining money from other parties, including the 3<sup>rd</sup> respondent. That it is strange that a person could borrow money from a banking institution and offer his land as security and fail to make any attempts to salvage the property. That it cannot be by coincidence that the 1<sup>st</sup> respondent defaulted on his loan repayment and also did not deem it necessary to defend the matter before the trial court. It is the appellants submission that the bank did not carry out a property due diligence or its officials were complicit in the fraud perpetrated by the 1<sup>st</sup> respondent.
14. Regarding ground of 8 of the Appeal which is challenging the trial court's finding that the 1<sup>st</sup> appellant had intermeddled in the estate of her late husband, the appellants counsel cited Section 45(1) & (2) of the Law of Succession Act and submitted that an administrator cannot possibly intermeddle in a deceased's estate. That in this case, the 1<sup>st</sup> appellant was the Sole beneficiary and personal representative of the estate of her deceased husband and could not be accused of intermeddling. That the 1<sup>st</sup> appellant sold part of the deceased's estate to meet the costs of administration of the estate. The appellants counsel cited Section 83(2) which empowers a personal representative to pay, out of the estate of the deceased, all expenses of obtaining the grant or representation and all other reasonable expenses of administration. That even if the 1<sup>st</sup> appellant entered into a transaction before obtaining the grant of representation, she cannot be faulted for having taken reasonable steps to ensure the administration of the estate of her late husband.
15. Regarding ground 9 of the appeal challenging the trial court's finding that the appellants' claim against the 4<sup>th</sup> and 5<sup>th</sup> respondents was time barred by dint of Section 3(1) of the Public Authorities Limitations Act, the appellants counsel submitted that the claim by the appellants against the 4<sup>th</sup> and 5<sup>th</sup> respondents do not fall under the ambit of Section 3(1) of Cap 39. That even if the court was to agree that the said Section applied, the time with respect to limitation would only have started running once the fraud was discovered. That suit subject of this appeal was filed on 15<sup>th</sup> December, 2020 which is exactly a year after Meru MC. ELC NO. 5 of 2019 was filed. That in any event it was incumbent upon the 4<sup>th</sup> and 5<sup>th</sup> respondents to advance that line of argument and not the trial court. The appellants counsel relied on the High Court of Kenya at Kisii ELC Case NO. 126 of 2011 Justus Tureti Obara Versus Peter Koipeitai Nengisoi.



16. Regarding grounds 10, 11 and 12 of the appeal challenging the trial court's failure to find that the 4<sup>th</sup> and 5<sup>th</sup> respondents were bound to produce copies of documents evidencing ownership of the suit parcels of land and failure to do so was fraud and that in any event the trial court could not find in favour of parties who did not participate in the proceedings. Learned counsel for the appellants submitted that the allegation contained in the statement of defence by the 4<sup>th</sup> and 5<sup>th</sup> respondents who did not participate in the hearing before the trial court remained just allegations. That the 4<sup>th</sup> respondent was duty bound to produce the respective parcel files which would have shown the transactions that took place with respect to the suit parcel of land. The appellants counsel argued that the role of the 4<sup>th</sup> and 5<sup>th</sup> respondents cannot be equated to that of ordinary litigants, and that since they hold public office, they should be held to higher standard than the ordinary litigants.

That according to the appellants, the documents that were involved in the fraudulent scheme were missing from the land registry and that this assertion was never challenged, and thus the 4<sup>th</sup> respondent failed in its duty to demonstrate what records it held and how those records had been changed and who participated in the impugned changes.

17. With regard to ground 13 of the Appeal challenging the trial court's failure to consider the submissions and authorities by the appellants, the appellants counsel submitted that the said submissions and authorities could have aided the trial court in arriving at a just determination. The court was urged to allow the appeal with costs to the appellants.

### **3<sup>rd</sup> Respondent's Submissions**

18. Learned counsel for the 3<sup>rd</sup> respondent submitted that the Memorandum of Appeal contains a myriad of grounds which are not proper legal grounds of Appeal but mere lamentations of what the appellants would have wanted the learned magistrate to hold but did not hold, rather than highlighting the errors of law or fact.
19. It is the 3<sup>rd</sup> respondent's submission that the appellants did not prove allegations of fraud on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Learned counsel for the 3<sup>rd</sup> respondent relied on of the case of the Court of Appeal at Nairobi in Civil Appeal NO. 246 of 2013.
20. It is also submitted that the 1<sup>st</sup> appellant certainly had some dealings with the 1<sup>st</sup> respondent which led to the sub-division of Ngusishi Settlement Scheme/466 and subsequent transfer of Ngusishi Settlement Scheme/1218 and 1219. That the suit in the lower court and this appeal are attempts to disown the dealings she had with the 1<sup>st</sup> respondent, which include transfer of Ngusishi Settlement Scheme/1218 and 1219 to the 1<sup>st</sup> respondent. It is argued that the 1<sup>st</sup> appellant in her dealing with the 1<sup>st</sup> respondent was involved in, or aided, facilitated, abetted, condoned, contributed to or participated, connived with and/or colluded with the 1<sup>st</sup> respondent in the dealings that she alleges. The 3<sup>rd</sup> respondent's counsel submitted that it is inexplicable why the 1<sup>st</sup> respondent (sic) filed suit 18 years after the subdivision and transfer took place, and argued that it can only be inferred by the court that she colluded with or worked in cohorts with the 1<sup>st</sup> respondent in their dealings. It was pointed out that Ngusishi settlement scheme/1219 had been charged to Agricultural Finance Corporation in 2006 and yet the 1<sup>st</sup> appellant did not raise a finger and only comes to the scene when the 1<sup>st</sup> respondent defaults repaying the loan to the 3<sup>rd</sup> respondent.
21. The 3<sup>rd</sup> respondent counsel submitted that the sub-division of Ngusishi Settlement Scheme/466 was done in the year 2002 and the transfers to the 1<sup>st</sup> respondent were done in the same year. They questioned the 1<sup>st</sup> appellant's allegation that she got the Title deed from the 1<sup>st</sup> respondent 18 years after subdivision. That the 1<sup>st</sup> appellant had some dealings with the 1<sup>st</sup> respondent that she is not disclosing.



That the 1<sup>st</sup> appellant must have known that the subdivision and transfer had been done and was comfortable with the status of the land for the 18 years. That if the suit in the lower court had been presented a year or two from the time of subdivision, it would have forestalled innocent third parties without notice such as the 3<sup>rd</sup> respondent from acquiring rights as chargee over Ngusishi Settlement Scheme/1219.

22. It was also pointed out that the Appellants by their own admission, entered into an illegal agreement that amounts to intermeddling with the estate of the 1<sup>st</sup> appellant's late husband, Edward Mutugi Marete.
23. Learned counsel for the 3<sup>rd</sup> respondent submitted that the learned trial magistrate correctly made a finding that the appellants did not prove the allegation of illegality and fraud as alleged and particularized in the plaint. They cited Section 80 of the *Land Registration Act* 2012 and relied on Civil Appeal No. 246 of 2013 between Arthi Highway Developers Limited Versus West End Butchery & Others, and Civil Appeal NO. 16 of 2020 between Bandi Versus Nzomo & 76 Others and submitted that the 3<sup>rd</sup> respondent is a bona fide chargee without notice of the fraud or illegality alleged. Further, that they never participated in such alleged fraud or illegality. That in any case, no fraud or illegality had been proved by the appellants. The 3<sup>rd</sup> respondent urged the court to uphold the lower court's decision and dismiss the appeal with costs as it lacks merit.

#### **4<sup>th</sup> And 5<sup>th</sup> Respondents' Submissions**

25. The Honourable Attorney General on behalf of the 4<sup>th</sup> and 5<sup>th</sup> respondents gave a brief background of the case and submitted that the 1<sup>st</sup> appellant intermeddled with the deceased's property. Learned counsel for the 4<sup>th</sup> and 5<sup>th</sup> respondents cited Section 45 of the *Law of Succession Act* and submitted that the sale Agreement between the 1<sup>st</sup> appellant and 2<sup>nd</sup> appellant is a nullity as the 1<sup>st</sup> appellant had no authority to have any dealings with the deceased's property. They relied on the case of Veronica Njoki Wakagoto (deceased) [2013]eKLR; Re Estate of Paul M'Maria (Deceased) [2017]eKLR and submitted that the learned trial magistrate properly determined that the 1<sup>st</sup> appellant had intermeddled in the deceased's property and could therefore not sell the land to the 2<sup>nd</sup> appellant.
26. On whether the learned trial magistrate erred in law and fact by holding that the Appellants' claim against the 4<sup>th</sup> and 5<sup>th</sup> respondents was time barred, counsel for the 4<sup>th</sup> and 5<sup>th</sup> respondents submitted that the learned trial magistrate made a proper finding and cited Section 3(1) of the Public Authority Limitation Act Cap. 39 and submitted that the evidence produced by the appellants in the trial court shows that the suit land was transferred from the 1<sup>st</sup> appellant to the 1<sup>st</sup> respondent on 29<sup>th</sup> November, 2002 and therefore the suit should have been instituted within 12 months from the said date, but instead the appellants' instituted it in 2020. That allowing such a case against the 4<sup>th</sup> and 5<sup>th</sup> respondents would be in contravention of Section 3(1) of the said Act. The 4<sup>th</sup> and 5<sup>th</sup> respondents counsel relied on the case of Mohlomi Versus Minister of Defence (1996) Zacc 20,1997 (1) SA 124, 129.
27. On whether the learned trial magistrate erred in law and fact by failing to find that there was fraudulent conduct on the part of the respondents, counsel for the 4<sup>th</sup> and 5<sup>th</sup> respondents submitted that the appellants allege that the missing documents is proof that there was fraud committed by the respondents. It is their submission that this proves nothing of the sort and that if at all the documents are untraceable, it is occasioned by the inordinate delay of the appellants to institute the suit. They relied on the case of Mohlomi (supra) and Rawal Versus Rawal [1990]KLR 275, Joseph Karisa Mutsonga Versus Johnson Nyati [1984] eKLR and Virjay Morjaria Versus Nansingh Madhusingh Darbar & Another [2000]eKLR and cited Section 107 of the *Evidence Act*.



It is their submission that the trial court appropriately determined the absence of fraud , adding that the standard of proof being higher than that of a balance of probabilities required the appellants to distinctly prove their allegations.

28. On whether the learned trial magistrate erred in law and fact by finding in favour of the 4<sup>th</sup> and 5<sup>th</sup> respondents without their participation in the proceedings, the 4<sup>th</sup> and 5<sup>th</sup> respondents counsel submitted that the learned trial magistrate did not err. That the court is bound to uphold the law at all times and non-participation by the 4<sup>th</sup> and 5<sup>th</sup> respondents does not undermine the efficacy of the Judicial process. That the appellants did not prove their case, adding that the suit was time barred.
29. On whether the trial court erred in law and fact by failing to find that the 4<sup>th</sup> and 5<sup>th</sup> respondents as the custodians of land records were bound to produce the copies of documents evidencing ownership of the suit parcels of land, learned counsel for the 4<sup>th</sup> and 5<sup>th</sup> respondents cited Section 107 of the Evidence Act and submitted that the 4<sup>th</sup> and 5<sup>th</sup> respondents were under no obligation to provide evidence unless specifically required to do so by the court. Counsel relied on the case of Charterhouse Bank Limited (under statutory management) Versus Frank N. Kamau[2016]eKLR and submitted that the suit is a non-starter, frivolous, vexatious, an abuse of court process and should be dismissed.

### **Analysis And Determination**

30. I have perused the record of appeal and the grounds of appeal. I have also considered the submissions made, the authorities cited and the law. This being a first appeal, I am obliged to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusions reached by the Learned trial Magistrate were justified on the basis of the evidence presented and the law. This was settled in the case of *Selle & Another Versus Associated Motor Boat Company Limited* [1968]EA 123 where the Court of Appeal held as follows:-

“I accept counsel for the respondents’ proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider 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.

In particular, this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.

31. This same position has been taken by the court of Appeal in many other cases, and I do believe that the principle applies to appeals from the subordinate court to this court. The issues for determination as I can deduce from the grounds of appeal are: -
  - i. Whether the trial court was justified in holding that the transaction between the 1<sup>st</sup> appellant and the 2<sup>nd</sup> appellant amounted to intermeddling in the estate of a deceased person.
  - ii. Whether the appellants suit was time barred by dint of Section 3(1) of the public Authorities Limitation Act.
  - iii. Whether fraud had been proved by the appellants against the respondents.



- iv. Whether the conclusions reached by the learned trial magistrate were justified on the basis of the evidence presented and the law.
32. In this case, the 1<sup>st</sup> appellant testified that she sold one acre out of land Parcel No. Ngusishi Settlement Scheme/466 to the 2<sup>nd</sup> appellant. The 1<sup>st</sup> appellants late husband Edward Mwirigi M'marete was the registered owner of the said land. From the documents produced as exhibits, the said Edward Mwirigi M'marete is shown to have died on 26<sup>th</sup> June, 1998. The 1<sup>st</sup> appellant applied for letters of administration with respect to her late husband vide Meru High Court Succession Cause NO. 108 of 2000 and the Letters of administration were issued on 9<sup>th</sup> March, 2001 and subsequently confirmed on 11<sup>th</sup> December, 2001.
33. It is trite law that the estate of deceased persons can only be represented in any dealings by a person who is authorized to do so on behalf of the estate. Only a person who has been issued grant of letter of administration has capacity to transact and represent the estate of a deceased person. The powers of personal representatives are set out under Section 82 of the Law of Succession Act which provides as follows:-
82. Personal representatives shall subject only to any limitation imposed by their grant, have the following powers :-
- a. To enforce, by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arising out of his death for his personal representatives;
  - b. To sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them as they think best:-
    - i. Any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased, and
    - ii. No immovable property shall be sold before confirmation of the grant,
34. Section 80(2) of the Law of Succession Act provides as follows: “ 80(2) a grant of letters of administration, with or without the will annexed shall take effect only as from the date of such grant”.
35. Therefore, it is clear from the above provisions of the law that granted letters of administration take effect from the date when it is issued as provided stated under Section 80(2). Section 82(b)(ii) is also clear that no immovable property should be sold before confirmation of the grant. In addition, Section 45 of the Law of Succession Act states as follows.
45. No intermeddling with property of deceased person.
- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any property of a deceased person.
  - (2) Any person who contravenes the provisions of this Section shall:-
    - (a) Be guilty of an offence and liable to a fine not exceeding ten Thousand Shillings or to a term of imprisonment not exceeding one year or both such fine and imprisonment; and



(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

36. The Sale Agreement between the 1<sup>st</sup> appellant and the 2<sup>nd</sup> appellant and in which the appellants based their claim on was executed on 14<sup>th</sup> May 1999. It is clear that by that time, the 1<sup>st</sup> Appellant lacked the legal capacity and had no legal authority to deal with the property of her deceased husband. The effect of the provisions cited hereinabove is that the property of a deceased person cannot be lawfully dealt with by anybody unless such a person is authorized by law and such authority emanates from a grant of representation. Indeed the law specifically restricts the sale or distribution of immovable property before confirmation of grant. The result is that the transaction between the 1<sup>st</sup> Appellant and the 2<sup>nd</sup> appellant was in contravention of the law and was null and void abinitio and could not be sustained. It is my considered view that the learned trial magistrate properly determined that the 1<sup>st</sup> appellant had intermeddled in the property of her deceased husband and the agreement between the appellants was unenforceable and the appellants could not maintain an action based on it.
37. The next issue to consider is whether the suit was time barred. Section 3(1) of the [Public Authorities Limitation Act](#) Cap. 39 Laws of Kenya provides as follows:
- 3(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.
38. From the material on record, the evidence adduced by the appellants in the trial court shows that the suit land was transferred from the 1<sup>st</sup> appellant to the 1<sup>st</sup> respondent on 29<sup>th</sup> November, 2002. The appellants claim against the respondents and specifically the 4<sup>th</sup> and 5<sup>th</sup> respondents was based on alleged fraud which is a claim founded on tort and should have been brought before the end of twelve months from the date on which the cause of action accrued. The suit was instituted in the year 2020, which was 18 years after the subdivision and transfer, which was clearly outside the period stipulated by the Law and was in contravention of Section 3(1) of the Public Authorities Limitation of Action Act. It is therefore my finding that the appellants' claim was time barred as found by the trial court.
39. With regard to the issue as to whether fraud had been proved by the appellants against the respondents, it is factual that the 1<sup>st</sup> respondent is the registered owner of the suit properties which is prima facie evidence of ownership. It was held in the case of Republic Versus Senior Registrar of Titles ex-parte Brookside Court Limited [2012]eKLR that statutorily, the sanctity of the title to land is assured and protected under section 24, 25 and 26 of the [Land Registration Act](#). Although it is equally true that ownership can be challenged on the grounds of fraud or misrepresentation to which the proprietor is proved to by a party, there was no sufficient evidence that was adduced by the appellants to prove that the 1<sup>st</sup> respondent's title which he charged to the 3<sup>rd</sup> respondents was acquired fraudulently or illegally. Indeed, the material on record confirm that the 1<sup>st</sup> appellant had some dealings with the 1<sup>st</sup> respondent herein or his mother. Indeed the 1<sup>st</sup> appellant testified that it was the 1<sup>st</sup> respondent who brought her the titles to the suit properties. The 1<sup>st</sup> appellant did not come out clearly as to how the 1<sup>st</sup> respondent got possession of the said titles in the first place and the only plausible conclusion is that there must have been some transaction between the two. It has been held that charges of fraud should not be lightly made or considered. They must be strictly proved, and although the standard pf proof may not be so heavy as to require beyond reasonable doubt, something more than a mere balance of probabilities is required. It is not allowable to leave fraud to be inferred from the facts. This is due to the seriousness of the offence of fraud and its criminal nature. In my considered view, the appellants



did not prove the alleged fraud to the required standard, and the trial court was correct in its finding on that issue and I have no basis to interfere with it.

39. It is my finding that in this case, the learned trial magistrate rightly reached the conclusions she made. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am satisfied that the Learned Trial Magistrate was justified in arriving at the decision made.

40. In the result, I find no merit in the appellants appeal and the same is dismissed with costs.

41. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 25<sup>TH</sup> DAY OF JANUARY, 2024**

**HON. C. YANO**

**ELC – JUDGE**

In the presence of:-

Court Assistant: Kiragu

Mutuma for Appellants

Ms. Kisui holding brief for Ms. Kendi for 4<sup>th</sup> & 5<sup>th</sup> Respondents

No appearance for 2<sup>nd</sup> & 3<sup>rd</sup> Respondents

No appearance for 1<sup>st</sup> Respondent

