



Warui & another (Suing as the Legal Representatives of Warui Muriu - Deceased) v Njoki (Sued as the and on Behalf of the Estate of Muchogo Muriu) & another (Environment & Land Case E005 of 2023) [2024] KEELC 224 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELC 224 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E005 OF 2023
LN GACHERU, J
JANUARY 25, 2024**

BETWEEN

PETER MWANGI WARUI 1ST PLAINTIFF

FREDRICK IRUNGU WARUI 2ND PLAINTIFF

SUING AS THE LEGAL REPRESENTATIVES OF WARUI MURIU - DECEASED

AND

MARY NJOKI SIMON ALIAS MARY NJOKI SIMON GATHU (SUED AS THE AND ON BEHALF OF THE ESTATE OF MUCHOGO MURIU) 1ST DEFENDANT

THE LAND REGISTRAR, MURANGA 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs herein who are the Administrators and Legal Representatives of the estate of Warui Muriu have brought this suit against the Defendants herein and have sought for judgement against them jointly and severally for:
 - a. A declaration that the Land Dispute Tribunal award in LDT No 41 of 2004, Maragua awarding Muchogo Muriu (now deceased) three (3) Acres from land parcel No Loc 17/ Iganjo/ 3440 was null and void abnitiio
 - b. A declaration that the lower Courts judgement dated 29/7/2021, in SPMCC LDT NO. 66 of 2005, in Murang'a adopting the award in LDT NO. 41 of 2004, Maragua and all other orders emanating there from were irregular, illegal, and /or unlawful hence of no legal effect.
 - c. A declaration that the subdivision of land parcel no Loc 17/Iganjo/ 3440. Into land parcel No Loc 17/ Iganjo/ 3721& 3722, and subsequent transfer and /or registration of the resultant



land parcel Loc 17/ Iganjo/ 3721, in favour of Mary Njoki Simon Gathuu was irregular, illegal and / or unlawful.

- d. An order directing the 2nd Defendant herein to cancel title number Loc 17/ Iganjo/3721&3722, and re-instate the original title number Loc 17/Iganjo/ 3440, in the name of Warui Muriu.
 - e. An order of restriction restraining the Defendant, her servant, employees and /or another person claiming under or through herself from entering into and/or interfering in any manner whatsoever with land parcel No. Loc 17/Iganjo/3440.
 - f. The Defendants be condemned to meet costs of the suit.
 - g. Any other order and/or relief that this honourable Court may deem just and expedient to grant.
2. In their claim, the Plaintiffs had averred that suit property herein was a subdivision of Loc 17/Iganjo/ 1, which was initially owned by one Muriu Gathage Gathege, who was the grandfather to the parties herein. That after the demise of the said Muriu Gathage, Succession Cause was filed and vide a Confirmed Grant, in respect of the estate of Muriu Gathage Gathege, in Murang'a SPM succession cause no 187/91, the said land parcel was subdivided into seven parcels of land in varying acreage and his beneficiaries.
 3. They further averred that their father Warui Muriu was allocated 16 acres out of the suit land and a title deed was issued in his favour on 14th July 2003. The resultant subdivision was Loc 17/ Iganjo/3440, which is referred to as the suit property. It was also alleged that the father to the 1st Defendant was Muchogo Muriu, who did not get a share from land parcel No 1 as he had been allocated land parcel No Loc 17/Iganjo/2, measuring 14 acres during the lifetime of their father Muriu Gathage Gathege. That the said Muchogo Muriu participated in the succession cause and did not object to the mode of distribution.
 4. However, in the year 2004, long after Warui Muriu had obtained his title deed for land parcel No Loc 17/Iganjo/ 3440. Muchogo Muriu, filed a claim at Makuyu LDT being case No LDT 41 of 2004, and claimed that Warui Muriu had disinherited him 3 acres of land.
 5. The matter was heard at the land disputes tribunal at Makuyu, which ruled in favour of Muchogo Muriu. Warui Muriu was aggrieved and he filed an appeal at the Provincial Appeals Board. However, during the pendency of that case, Muchogo Muriu moved to Court and caused the award of the tribunal to be adopted as the order of the Court and the same was adopted on 23rd May 2005.
 6. Further, it was pleaded that the Provincial Appeals Tribunal gave its verdict on 23rd September 2010, and held that the Land Disputes Tribunal had no jurisdiction to entertain such claim. That despite the appeals determination being brought to the attention of the lower Court, it proceeded to reinforce the said award of the Land Disputes Tribunals, the lower Court authorized that the Executive Officer of the Court to sign and/or execute transfer documents on behalf of the Plaintiffs deceased father.
 7. Further, that the 1st Defendant caused the suit property to be subdivided into two parcels of land being Loc. 17/Iganjo/3721& 3722, and land parcel No Loc 17/Iganjo/3721, comprising of 5.286 ha was subsequently on 26th January 2022, registered in the name of the 1st Defendant Mary Njoki Simon Gathuu and the remainder in the name of the Plaintiffs deceased father Warui Muriu.



8. Therefore, the Plaintiffs pray for the cancellation of the resultant titles after illegal subdivision of Loc. 17/Iganjo/3440, and these subdivisions are Loc 17/Iganjo 3721 & 3722. They have urged the Court to revert the suit land to its original title Loc.17/Iganjo 3440, in the name of Warui Muriu.
9. The 1st Defendant Mary Njoki Simon filed her Statement of Defence and Counter-Claim on 3rd March 2023, and denied all the allegations made in the Plaint. The 1st Defendant had alleged that she has no Letters of Administration over the estate of Muchogo Muriu, and she has no capacity to be sued as the Legal Representative of the estate of Muchogo Muriu, and did put the Plaintiffs to strict proof.
10. It was her contention that her father Muchogo Muriu did not participate in the succession proceedings over the estate of Muriu Gathage Gathege, and that the intention of Muriu Gathage Gathege was for both Warui Muriu and Muchogo Muriu to get equal shares and thus the 3 acres in dispute. That the Land Disputes Tribunal noted the anomalies and awarded Muchogo Muriu his claim of 3 acres from land parcel No 3440.
11. Further that, even though the appeal was lodged, the award of the tribunal was adopted as the order of the Court before the verdict of the appeal was out, and since there was no stay proceedings, and that the Provincial Appeals Committee, only advised the Plaintiffs' father to move to the High Court, but did not overturn the award of the District Land Disputes tribunal. She averred that the father to the Plaintiffs did not file any suit at the High Court as advised and so the award of the District Land Disputes Tribunal is unchallenged.
12. The 1st Defendant further averred that the order authorizing the Executive Officer to sign the transfer documents was never challenged even after the Provincial Appeals Tribunal advised the parties to move to the higher Court. It was her contention that the Land Control Board consent to subdivide Loc 17/ Iganjo/ 3440, was given on 31st July 2008, but the 1st Defendant was registered on 26th January 2022, and that was before the Plaintiffs had filed their Misc Application No1 of 2022.
13. Therefore, the 1st Defendant content that the suit is a non-starter, an abuse of the Court process and that the order for cancellation of title deeds for Loc. 17/ Iganjo/ 3721& 3722, should not be allowed as the two titles were obtained through a lawful Court process, which the Plaintiffs have always been aware and they never appealed against. She urged the Court to dismiss the Plaintiffs suit with costs.
14. In her Counter- claim, the 1st Defendant reiterated that the Court did issue lawful orders authorising the Executive Officer of the Court to sign the transfer forms that are necessary for transfer of Loc 17/ Iganjo/ 3721, to herself. Further, that using the said Court order, she had the land parcel No Loc 17/ Iganjo/ 3721, registered in her name on 26th January 2022, and so she is the lawful registered owner of the said land parcel.
15. It was her contention that on 24th February 2022, she issued the Plaintiffs with notice to vacate the suit property Loc 17/Iganjo/3721, but the Plaintiffs and/or their servants, and agents have continued to stay on the suit property.
16. Consequently, the 1st Defendant in her Counter-claim prayed for these prayers against the Plaintiffs.
 - a. An order of eviction against the Plaintiffs jointly and severally their respective agents, privies, servants and whatsoever claiming through them from land parcel Loc 17/ Iganjo/ 3721, forthwith or otherwise be forcibly evicted.
 - b. An order of permanent injunction against the Plaintiffs jointly and severally, their respective agents, privies, servants and whatsoever claiming through them from entering, trespassing,



tilling, constructing, wasting, harvesting trees thereon and /or in any manner whatsoever, dealing with land parcel No. Loc 17/ Iganjo/ 3721.

- c. General damages for trespass
 - d. Any other or further orders as this Court may deem fit to grant.
 - e. Costs of the counter-claim.
17. The 2nd Defendant; the Land Registrar, Murang'a, though served with summons to enter appearance and file defence, failed to enter such Appearance and /or file defence. The matter proceeded in the absence of the 2nd Defendant.
 18. The matter was prosecuted through viva voce evidence. The Plaintiffs called one witness and closed their case. On her part, the 1st Defendant too gave evidence for herself and called no witness. Thereafter, the parties exchanged written submissions, which the Court thoroughly considered.
 19. For the Plaintiffs, PWI Fredrick Irungu Warui, testified on his own behalf and on behalf of Peter Mwangi Warui, his co administrators for the estate of Warui Muriu. He testified that they have grant of Letters of Administration for the estate of their father Warui Muriu. He also testified that they are related to Mary Njoki Simon, the 1st Defendant herein who is a daughter to Muchogo Muriu, a step-brother to their father Warui Muriu. He further testified that they have sued the 1st Defendant over land parcel no Loc 17/Iganjo/3440.
 20. He also stated that land parcels No. Loc 17/Iganjo/3721&3722, are subdivisions of land parcel No Loc 17/ Iganjo/3440. Further, that land parcel No. Loc 17/ Iganjo/3440, is a subdivision of Loc 17/ Iganjo/1, which was approx. 51 acres and was owned by Muriu Gathage Gathege, the grandfather to the 1st Defendant and the Plaintiffs herein. He also produced his witness statement dated as his evidence in Court. Further, he produced the list of documents as PEXH 1-13 and the 2nd bundle of documents as P EXH 14.
 21. The Witness Statement referred to was a joint statement of the Plaintiffs herein and they reiterated most of the averments made in the Plaintiff. They also stated that their mother Monica Wanjiru Warui, had been forcefully compelled to be substituted in place of their father who is deceased. That vide HCCC MISC NO. 1 of 2022, their mother moved the Court to declare an earlier award of the tribunal null and void, but while the application was still pending, the 1st Defendant caused the land parcel No Loc 17/ Iganjo /3721, to be transferred to herself.
 22. That vide a ruling of the Court in Misc No 1 of 2022, the Court directed that a substantive suit be filed for cancellation of the titles. He contended that if the father to the 1st Defendant was unhappy with the confirmed grant, he ought to have sought for revocation of grant, but not to file a case at the Land Disputes Tribunal, which had no jurisdiction. Therefore, he urged the Court to order for cancellation of the two titles Loc 17/ Iganjo/3721 & 3722, which came about through an award of the tribunal that did not have jurisdiction to determines such matters.
 23. He also reiterated that Muchogo Muriu was not entitled to the orders he got from the tribunal as the succession cause was done during his lifetime and he did not object to it. That the Land Disputes Tribunal allowed the 1st Defendants father to have a share of their father's land which was not right.
 24. In cross examination, he confirmed that the award of the tribunal was made a Judgement of the Court, although his father had informed the Court that there was an appeal pending in Nyeri before the Provincial Appeals Committee. He also stated that he was not aware if stay orders had been issued against all the transactions.



25. In further cross exam, he confirmed that the Appeal Committee ruled that the parties can follow the dispute in Court, and his father did not move to the formal Court after the appeal. It was his allegations that since they were not satisfied with the decision of the tribunal, they have filed this case. He further stated that the family of Warui is using the whole land and it has not been subdivided. He denied that they uprooted beacons on the said parcel of land.
26. In re-exam, he confirmed that his father was satisfied with the decision of the Succession Court, and he had all the documents relating to the succession proceedings. Further, that he was not happy with the process that the 1st Defendant used to get the portion of his father's land. That is from Loc 17/ Iganjo/ 3440.
27. The 1st Defendant, as DW1, Mary Njoki Simon Gathuu, testified on her own behalf and adopted her witness statement dated. She also produced her list of documents as DEXH 1-18.
It was her contention that in her, Counter-claim she had claimed that she is the owner of the suit property and the Plaintiffs should be evicted from her parcel of land. She urged the Court to allow her counter claim and then order the Plaintiffs to move out of her suit property.
28. She also averred that she has not been properly enjoined in this suit as she is not the legal representative of the estate of Muchogo Muriu. she claimed that the letters of administration given to her were limited to only substitution in LDT No. 66 OF 2005, and therefore the Plaintiffs cannot use the same letters to sue her for the land as a legal representative of the estate of Muchogo Muriu(deceased).
29. In cross exam, by the counsel for the Plaintiffs, the 1st Defendant confirmed that land parcel No 3721 is in her name. she also stated that though Warui Muriu filed an Appeal in Nyeri, she was not aware of the outcome of that appeal. However, she was aware that the tribunal had advised Warui to go to the High Court, but the Appeal tribunal did not make any decision.
30. Further she confirmed that the succession proceedings for Muriu Gathage, Gathage's estate were filed during the life time of her father Muchogo Muriu, and he was involved in the said succession proceedings. That there was indeed a confirmed grant and her father did not appeal the decision of the succession Court. However, His father filed a claim at the District Land Disputes Tribunal at Mukuyu, which tribunal ruled in his favour. She also confirmed that she got her parcel of land through transmission and the Court order in her favour was issued in 2021. She claimed that she relied on the award of the tribunal, which was later made an order of the Court.
31. Thereafter, the parties through their respective advocates filed and exchanged written submissions. The Plaintiffs filed their submissions on 6th July 2023, through Waithira Mwangi & Co Advocates and submitted that the Plaintiffs have proved their case on the required standard of balance of probabilities and their claim should be allowed as prayed. The Plaintiffs raised four issues determination.
32. On whether the District Land Disputes Tribunal had jurisdiction to determine the matter, it was submitted that what the 1st Defendant father was claiming was a beneficial interest, which ought to have been claimed in a succession proceeding. That a claim over registered land or any claim challenging title as this matter was clearly outside the jurisdiction of the land disputes tribunal.
33. For this, the Plaintiffs relied on Section 3 of the Land Disputes Tribunal(repealed) which gives the jurisdiction of the said Land Disputes Tribunal as follows:

3.

- (1) Subject to this Act, all cases of a civil nature involving a dispute as to—



- (a) the division of, or the determination of boundaries to land, including land held in common;
- (b) a claim to occupy or work land; or
- (c) trespass to land, shall be heard and determined by a Tribunal established under Section 4.

34. It was therefore, submitted that if the late Muchogo Muriu had any claim on the share awarded to Warui Muriu, then the recourse was to apply for revocation of the grant or file a civil suit on the basis that Warui Muriu was holding 3 acres due to him, but not to file a claim before the land disputes tribunal.
35. Reliance was placed on the case of Joseph Malakwen Lelei & another vs Rift valley land Disputes Appeals committee & 2 Others (2014) eKLR, where the Court of Appeal addressed the issue of jurisdiction and held as follows;
- “evidently the above provision does not include jurisdiction to deal with issues of determination of title to or ownership of registered land. Having found that the tribunal and the appeals committee lacked jurisdiction to arbitrate on the matter before them, then all other grounds become moot. We say so because it is trite that where a Court or tribunal takes upon itself to exercise a jurisdiction which it does not possess. Its proceedings and decisions are null and void. It then follows that every other proceedings, decision, or award that results from such a process must be construed as a nullity....”
36. It was the further submissions of the Plaintiffs that the Land Disputes Tribunal at Makuyu having lacked jurisdiction, then it follows that the award and subsequent orders were a nullity as the hearing and determination of the issue of ownership of land whose title had already been issued did not fall under the mandate of the tribunal.
37. On whether the 1st Defendant has been rightly sued on her own behalf and as Legal Representative of the estate of the late Muchogo Muriu, it was submitted that the 1st Defendant is sued in her personal capacity for reasons that after subdividing the land, she registered the resultant land parcel Loc 17/ Iganjo/3721, in her name. this is in spite of the fact that she had applied for grant ad litem to enable her pursue the case on behalf of the estate of Muchogo Muriu and the title that is sought to be cancelled is held by the 1st Defendant herein.
38. On whether the 1st Defendant had legal entitlement or authority to have the 3 acres registered in her names, it was submitted that at the time of transfer of the suit property Loc 17/ Iganjo/3721, to the 1st Defendant, she only had letters of administration ad litem for the sole purpose of making a follow up on whatever claims her father was entitled to. That the claim was by Muchogo Muriu for 3 acres and if the said 3 acres were to be registered, then they were to be registered in the name of Muchogo Muriu or his estate, but not to 1st Defendant. Therefore, the 1st Defendant had no capacity to have the suit land registered in her own personal name and as such, the title of the suit property was procured through fraud.
39. For this submissions, reliance was placed in the case of Dina Management Ltd vs County Govt of Mombasa & 5 Others (Petition NO. 8(E010) OF 2021, where the Supreme Court held that a title document can be invalidated if it is proven that the initial allocation process was illegal or unprocedural. Therefore, possession of a registered title document by a property owner is not conclusive proof of ownership and the same will be cancelled once invalidated.



40. On whether the Counter claim has been proven, it was submitted that the Counter claim was founded on the award of the District Land Disputes Tribunal, and the adoption of the award by the Court. The said tribunal did not have jurisdiction and so all awards and subsequent decisions from the said award were a nullity and title acquired was invalid title, which the Plaintiffs have sought to have it cancelled. That the land Disputes Tribunal lacked jurisdiction and everything that flowed from its award is null and void and that included the adoption of the award as well as the registration of the parcel of land in the name of the 1st Defendant.
41. The Plaintiffs urged the Court to cancel the title of the land parcel No. Loc 17/ Iganjo/ 3721& 3722, and restoration of the old title to land parcel No. Loc 17/ Iganjo /3440 by the 2nd Defendant, and costs be awarded to the Plaintiffs.
42. The 1st Defendant on her part filed her written submissions on 19th July 2023, through the law firm of R.M Kimani & Co Advocates. She submitted that indeed there was a land dispute award in favour of Muchogo Muriu, her father which Warui Muriu, the father to the Plaintiffs was not happy with. That the Said Warui Muriu filed an Appeal at the provincial appeals committee, but he did not seek for stay of execution.
43. It was her submissions that the award of the District Land Disputes Tribunal was adopted as the order of the Court on 22nd December 2005, and on 23rd may 2008, the Court issued an order for the Executive Officer to be authorized to sign all the relevant documents for transfer of 3 acres to the 1st Defendant's father Muchogo Muriu. Further that the Land Control Board issued a letter of consent to subdivide the land into two portions on 31st July 2008. That the Plaintiffs father filed an application for stay pending appeal on 8th September, 2008, but by then the award of the tribunal had already been adopted as the order of the Court.
44. It was also submitted that the Provincial Appeals Committee pronounced itself on 23rd September 2010, but by then the award had been adopted and the said committee did not quash or set aside the award of the District Land Disputes tribunal, but advised the parties to seek redress at the high Court. Therefore, the Provincial Appeals Committee did not deal with the matter, but recused itself based on want of jurisdiction.
45. It was also submitted that Muchogo Muriu died on 20th November 2008, way after the land had been subdivided and before the appeal was heard and 1st Defendant obtained grant Ad Litem to continue with Murang'a LDT No. 66 of 2005. It was also her submissions that all the orders made in favour of Muchogo Muriu have never been set aside and the only recourse available was to file an appeal, but not filling a fresh suit. She submitted that this suit is res judicata ELC Misc No 1 of 2022.
46. It was also submitted that this matter has been caught by the limitation period as 12 years had lapsed since the award was adopted by the Court. Reliance was placed on Section 7 of the [Limitation of Actions Act](#) which provides.
- “ An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
47. Therefore, it was her submissions that if the land disputes tribunal lacked jurisdiction, then the Plaintiffs ought to have appealed against that decision within 12 year of the said decision. However, they failed to do so and are time barred.



48. Reliance was placed on the case of *Mehta vs Shah* (1965) E.A 321, where the Court held;
- “the object of any limitation is to prevent a Plaintiff from- prosecuting stale claims on one hand, and on the other hand protect a Defendant after he has lost evidence for the defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case”
49. Further, she also relied on the case of *Gathoni vs Kenya Co-operative Creameries Ltd* (1982) 104, where the Court of Appeal held as follows;
- “The law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest”
50. It was the 1st Defendant further submissions that a suit barred by limitation is a claim barred by law, hence by operation of law and the Court cannot grant the relief sought. For this, reliance was placed on the case of: *Iga vs Makerere University* (1972) E.A, where the Court held: -
- “A Plaint which is barred by limitation is a Plaint barred by laws. Reading- these Provisions together, it seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The limitation Act- does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred, the Court cannot grant the remedy sought”
51. Therefore, she submitted that the Plaintiffs are seeking declarations over actions allegedly done in 2004 and 2005, and hence the limitation period has kicked in and thus the suit is time barred. She urged the Court to dismiss the Plaintiffs’ case and allow her Counter-claim, which has been proved on the required standard.
52. The above is the available evidence and the submissions by the parties. Before the Court delves into the issues for determination, it will point out the undisputed facts herein. It is evident that the parties herein are related; they are cousins. They share a grandfather Muriu Gathage Gathege, who was the father to Warui Muriu, the father to the Plaintiffs and Muchogo Muriu, the father to the 1st Defendant.
53. It is also evident that Muriu Gathage Gathege owned land parcel No. Loc 17/Iganjo/1, which was later subdivided through a succession proceeding and it gave rise to 7 parcels of land of different acreages and the resultant subdivisions were acquired by the different beneficiaries of the estate of Muriu Gathage Gathege.
54. It is evident that land parcel No Loc 17/ Iganjo /3440, was one of the resultant subdivisions, and it was registered in favour of Warui Muriu, the father to the Plaintiffs in the year 2003, and was approx. 16 acres. It was evident that Muchogo Muriu did not get a share from this land parcel Loc 17/ Iganjo/1, as it was alleged that he had been given another land parcel No. Loc 17/ Iganjo/2, of approx. 14 acres during the lifetime of their father.
55. Thereafter, in the year 2004, Muchogo Muriu, filed a claim before the District Land disputes tribunal, which tribunal ruled in his favour and gave an award to the effect that Muchogo Muriu was entitled to 3 acres of land from Warui Muriu’s parcel of Land Loc 17/ Iganjo/ 3440. This award was later adopted by the Court in 2005, though an Appeal had been lodged at Provincial Appeals Committee in Nyeri. Eventually land parcel No Loc 17/ Iganjo/ 3440, was subdivided as enforcement of the orders



emanating from the tribunal award and which had been adopted by the Court as its orders. The said tribunal's award is the genesis of this case.

56. The above being the undisputed facts, the Court finds the issues for determination are; -
- i. Whether the suit is barred by limitation of actions.
 - ii. Whether the 1st Defendant was wrongly sued.
 - iii. Is the suit res- judicata?
 - iv. If the above issues are in the negative, did Makuyu Land Disputes tribunal have jurisdiction to deal with the matter.
 - v. Did the 1st Defendant have any legal entitlement to the 3 acres registered in her name?
 - vi. Whether the counter- claim is merited.
 - vii. Who will bear costs of the suit?

Whether the suit herein is time barred by limitation of actions.

57. The 1st Defendant in her defence did not plead this defence of limitation of time. However, she brought it out in her submissions and quoted various authority to support her submissions. Though, it is trite that parties are bound by their proceedings and the fact that the 1st Defendant did not plead the issue of limitation of action, the Court finds that limitation goes to the jurisdiction of the Court and the Court is bound to determine that issue first. See the case of *Bosire Ogero v Royoa Medial Services* [2015]eKLR, where the Court held that

“...The law of limitation of actions is intended to bar the Plaintiffs from instituting claims that are stale and aimed at protecting Defendants against unreasonable delay in the bringing of suits against them. The issue of limitation goes to the jurisdiction of Court to entertain claims and therefore if a matter is statute barred, the Court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the Court cannot entertain a suit.”

58. It is trite that Limitation of action is a statutory remedy which prevents a claimant from bringing proceedings after the expiration of a specified time limits. The philosophy behind this remedy is that a Defendant should not suffer the prejudice of stale proceedings and that claimant should be encouraged to avoid delay.

59. For a claim to recover land, the statutory period is 12 years as provided by Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya. The said Section 7 of the *Limitation of Actions Act*, which provides that:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

60. Therefore, the 1st Defendant herein has submitted that the cause of action arose in the year 2004 and 2005, and by the time this suit was filed, it was well after 12 years and therefore, the suit had been barred by *limitation of actions act*.

The Plaintiffs have disputed that the suit is caught by limitation and submitted that the title deed to be cancelled was issued in the year 2021.



61. The Court has looked at the prayers sought by the Plaintiffs and has noted that the award issued by Makuyu Land Disputes Tribunal (LDT), was issued in the year 2004, but there was an appeal filed at the Provincial Appeals Committee. The Appeal was determined in 2010, and it advised the parties to move to the high Court as the tribunal had no jurisdiction to deal with a registered land. Further, the title sought to be cancelled were issued in the year 2021. The titles having been issued in 2021 and this suit was filed in 2023, then certainly the suit is not barred by *Limitation Of Actions Act*. The 1st Defendant was earlier involved in another litigation with Monicah Wanjiku Warui, the mother to the Plaintiffs herein being Elc Misc Appl. No 1 of 2022.
62. This Court has considered the ruling of the Court in Elc Misc No 1 of 2022, and the Court had in page 9 held that;

“the Applicants must as a matter of law and procedure, move this Court for orders of cancellation of the title if any, and this Court will then have the opportunity to adequately interrogate the facts and evidence and issue appropriate orders”.

This is certainly the said suit, and as the Court had observed above, the title deed was issued to the 1st Defendant in the year 2021, and therefore, this suit is not statutory barred.

(ii) Whether the 1st Defendant was wrongly sued or she had no locus to defend this suit?

62. In her defence, the 1st Defendant averred that she does not have the letters of administration to be sued as the Legal Representative of Muchogo Muriu and she did put the Plaintiffs to strict proof. On their part, the Plaintiffs averred that they have sued the 1st Defendant in her own behalf and as a Legal Representative of the estate of her deceased father. The Plaintiffs alleged that they sued the 1st Defendant as she is the one who presented herself with a limited grant over the estate of Muchogo Muriu and eventually got registered as a proprietor of Loc 17/Iganjo/ 3721, which is a subdivision of land parcel No. Loc 17/ Iganjo/3440, which was initially registered in favour of Warui Muriu through transmission.
63. For a party to sue or be sued, he/she must have standing or locus standi, which means the right to appear in Court or file an action. Without standing, even when a party has a meritorious case, he cannot be heard. See the case of Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000, where the Court held as follows: -

“Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau and Others -Vs- City Council of Nairobi [1982] KAR 229, the Court also held that: -

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

64. Locus standi is so important that in the absence of the same, a party has no basis to claim anything or be sued. The 1st Defendant had averred that she did not have letters of administration, to be sued on behalf of the estate of her late father Muchogo Muriu.

It is trite that any action on behalf of a deceased person can only be brought to Court or defended by the Personal Representative or Administrator of the deceased estate.



65. Personal Representative is defined in Section 3(1) of the *Law of Succession Act* to mean the executor or administrator, as the case may be, of a deceased person. A personal Representative is appointed by the Court after filing the necessary application as is provided by Section 51 of the *Law of Succession Act*.

66. Section 79 of the said Succession Act, specifies the powers and duties of the Personal Representative as follows;

“the executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of the grant, and subject to any limitation imposed by the grant, all property of the deceased shall vest in him as personal representative.”

67. Further Section 82(a) of the same Act imposes the role of the Personal Representative as follows;

“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 personal representative”.
- b.
- c.
- d.

68. From the above descriptions of a Personal Representative, is there evidence that 1st Defendant herein was sued as the Representative of the estate of Muchogo Muriu? This Court has considered the Plaintiff as filed and it is clear that the 1st Defendant has been sued on her own behalf as the Legal Representative of the estate of Muchogo Muriu. As part of their exhibits to support these allegations, they produced a limited grant of letters of administration ad litem issued on 22nd March, 2020, to Mary Njoki Simon Gathuu, the 1st Defendant herein. It was on the strength of the above Letters of Administration that the 1st Defendant got registered as the proprietor of land Parcel No Loc 17/ Iganjo/ 3721.

69. Though the 1st Defendant has alleged that she does not have letters of administration over the estate of Muchogo Muriu, she did not avail any contrary grant. Even if the burden of proof is on the Plaintiffs and never shifts, once the 1st Defendant alleged that she did not have letters of administration over the estate of her father, and fact that letters of administration Ad litem were produced by the Plaintiffs to support their claim, and which letters the 1st Defendant had used to have the suit property registered in her name, then the evidential burden of proof shifted upon her and she needed to disapprove the allegations that she did not have Letters of Administration by producing the evidence of who is the person with the letters of administration.

70. In the case of *Mbuthia Macharia v Annah Mutua & Another* [2017] eKLR, where the Court of Appeal discussed the burden of proof and stated thus:-

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.”



71. Since the 1st Defendant did not adduce evidence to rebut the fact that she was the legal Representative of the estate of Muchogo Muriu , by virtue of the Letters of Administration Ad Litem produced by the Plaintiffs, then this Court has no reasons but to find that it is probable that she is the Legal Representative of her father’s estate and she was properly sued as provided by Section 2 of the *Civil Procedure Act*, which defines the legal representative to mean a person who in law represents the estate of a deceased person, and where a party sues or is sued in representative character, the person whom the estate devolves on the death of the party- so suing or sued.
72. Further, it is also clear from the Complaint that the 1st Defendant is sued on her own behalf too and the Plaintiffs have sought for cancellation of the title deed held by the 1st Defendant over land parcel No. Loc 17/ Iganjo/3721, which is a subdivision of the suit property Loc 17/Iganjo/ 3440. The 1st Defendant having been sued also on her own behalf, she cannot claim that she is non- suited.

(iii) Whether the suit is res-judicata?

73. In her Defence, the 1st Defendant did not plead that the Plaintiffs’ suit is resjudicata. However, in her submissions at paragraph 19, the 1st Defendant submitted that the suit herein is res judicata Murang’a ELC Misc No.1 of 2022. It is trite that parties are bound by their pleadings and cannot include a claim in their submissions.
74. For this, the Court will rely on the case of IEBC & Another vs Stephen Mutinda Mule & 3 others (2014) eKLR, which cited with approval the Nigerian case of Aduon Oladel (NIG) vs Nigeria Breweries Plc. SC 91/2002, where the Court held as follows;

“... it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way which is at variance with the averments of pleadings goes to no issue and must be disregarded.....

..... in fact, parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issue as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation”

75. The 1st Defendant herein did not plead resjudicata nor did she adduce evidence on the same. She only broached this issue at the submissions stage. Though resjudicata is a defence and is a doctrine that bars a party from litigating the same dispute again once a final judgement has been rendered by a competent Court, the same having not been pleaded or brought out during the hearing, this Court finds the said submissions as a surprise and ambush on the Plaintiffs and will ignore the same.

(iv) If the above issues are in the negative, did Makuyu Land Disputes Tribunal have jurisdiction to determine the matter as it did?

76. This Court has found all the three issues are in the negative. The next issue for determination is whether Makuyu Land disputes tribunal had jurisdiction to determine the issues as it did.

It is evident that the genesis of this case is the award made by the District Land Disputes Tribunal which awarded Muchogo Muriu, 3 acres out of land parcel No. Loc.17/ Iganjo/3440. This parcel of land had been transmitted to Warui Muriu through a succession cause. Muchogo Muriu was dissatisfied with the size of land given to Warui Muriu, and he lodged a claim before the District Land Disputes Tribunal at Makuyu, which tribunal ruled in his favour.



77. This award of the tribunal, though appealed against was adopted as the order of the Court. Enforcement of the said Court Order led to the subdivision of Loc 17/ Iganjo/3340, into two parcels of land. Land parcel No. Loc 17/Iganjo/3721, was one said subdivisions. This parcel of land is registered in the name of the 1st Defendant. It is out of this registration that the 1st Defendant has filed her Counter - Claim.
78. From the above piece of evidence, it is clear that Muchogo Warui was dissatisfied with the outcome of the succession proceedings specifically the mode of distribution. He alleged that Warui Muriu was holding his 3 acres which were due to him. The parties were all in agreement that during the succession proceedings that led to land parcel No Loc 17/ Iganjo/ 3440, being transmitted to Warui Muriu, Muchogo Muriu was aware of the said proceedings and he did not object to the mode of distribution.
77. Section 71 of the Succession Act, in the proviso provides that at the hearing of an application for confirmation of grant, in cases of intestacy, the letters of administration shall not be confirmed until the Court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.
78. The succession Court must have satisfied itself of the above position. If Muchogo Muriu had any issue with the mode of distribution, he ought to have raised it during the confirmation of grant stage. There is no evidence that he ever did raise any objection. See the case of *In re Estate of Johnstone Ochwang'i Moronge (Deceased)* [2022] eKLR where the Court held;

“Rule 17 of the Probate and Administration Rules states; -

1. Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has been already applied for by another person may do so by lodging within the period specified in the notice of the application published under rule 7(4), or such longer period as the court may allow, either in the registry in which the pending application has been made or in the principal registry, an objection in Form 76 or 77 in triplicate stating his full name and address for service, his relationship (if any) to the deceased and the grounds of his objection.
79. Even after the grant was confirmed, if the said Muchogo Muriu was dissatisfied with the confirmed grant as he did, he ought to have applied for revocation of the said grant as provided by Section 76 of the Succession Act, which provides as follows;

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the Court decides, either on application by any interested party or of its own motion—

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the Court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d)



80. This was also the findings in the case of Jamleck Maina Njoroge –vs- Mary Wanjiru Mwangi (2015) eKLR, where the Court discussed circumstances when a grant can be revoked and observed as follows;

“The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the Court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

81. Therefore, it was incumbent upon the late Muchogo Muriu, who was dissatisfied with the Confirmed Grant that granted Warui Muriu, 16 acres out of land parcel Loc 17/ Iganjo/1, and the said distribution brought about land parcel No. Loc 17/ Iganjo/ 3440, to move the Succession Court that had confirmed the said grant for revocation of it, instead of moving to the Land Disputes tribunal for determination of his claim which stemmed from a succession cause or proceedings.

82. The jurisdiction of the defund Land Disputes Tribunal is provided for in Section 3(1) of the Land Disputes Tribunal Act, of 1990, (repealed) which provides;

“subject to this act, all cases of civil nature involving a dispute as to-

- a. The division of, or the determination of boundaries to land, including land held in common;
- b. A claim to occupy or work land; or
- c. Trespass to land

Shall be heard and determined by a tribunal established under section 4.”

83. From the above provision of law, it is clear a that registered land is not subject of the Land Disputes Tribunal. The land parcel No Loc 17/ Iganjo/ 3440, was registered in the name of Warui Muriu in 2003, and a title deed was issued to that effect.

84. In the case of Republic v. Chairman, Lurambi Land Dispute Tribunal & 2 others (2006) eKLR, the Court held as follows;

“The powers vested in the tribunal under section 3(1) of Act 18 of 1990 do not include power to determine issues of or affecting title to land. The tribunal clearly acted beyond the purview of its jurisdiction and its decision was clearly ultra vires its powers under section 3(1) of the Land Disputes Tribunal Act No.18 of 1990...”

85. Further, in the case of Mateo Githua Ngurukie vs. Hon. Attorney General and 5 Others; Nyeri High Court Civil Suit No. 206 of 1999, the Court also held;

“Over and again the Court of Appeal and High Court have held that the Land Disputes Tribunal lacks jurisdiction over registered land especially where the matter at hand touches on title of land. (See Wachira Wambugu Case (supra) and Julius Mburu Mbuthia case, supra). It follows therefore that the instant issues are not Res judicata due to the fact that they were deliberated upon and determined by an incompetent tribunal that lacked jurisdiction over the same.



86. It is clear from the above cited cases, that the Makuyu District Land Disputes Tribunal that heard and determined a claim by the late Muchogo Muriu over a claim of 3 acres from Loc 17/Iganjo/ 3440, held by Warui Muriu through transmission, did not have jurisdiction to hear and determine issues touching on title to land. The Provincial appeals committee had also observed that the Makuyu LDT had no jurisdiction to decide as it did and advice parties to take the matters to the High Court. Therefore, the decision held by Makuyu Land Disputes Tribunal was a nullity.
87. See also the case of Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 others (2012) eKLR, where the Court stated: -
- “...A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
88. Jurisdiction is everything, and without it, any decision rendered by such body without jurisdiction is a nullity. See the case of Owners of the Motor Vessel Lilian S Vs Caltex Oil (Kenya) Ltd,(1989) EKLR where the Court of Appeal held that without jurisdiction, the Court has no power to make one more step and that a Court of law down its tools the moment if holds an opinion that it has no jurisdiction.
89. Further, in the case of Macfoy vs United Africa Co. Ltd 1961 3 All ER 1169, the Court held that;
- “if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. it is automatically null and void without more ado, though it is sometimes convenient to have a Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”
90. In conclusion to issue No.4, this Court finds that the Makuyu Land Disputes Tribunal did not have jurisdiction to find as it did over land parcel no Loc 17/ Iganjo/ 3440, since it was a creature of succession proceedings and any discord ought to have been filed in a succession Court either as a protest or objection during the succession registered parcel of land, the said land disputes tribunal had no jurisdiction over registered land or ownership of such land. (See Joseph Malakwen Lelei & Another vs Rift Valley Land Disputes Appeals Committee & 2 Others(2014) eKLR.

(v) Whether the 1st Defendant had any legal entitlement to have 3 acres registered in her name as she did?

91. During the course of the proceedings of the tribunal case, Muchogo Muriu, the father to the 1st Defendant passed on. After his death, the 1st Defendant took out Letters of Administration Ad Litem. After taking out Letters of Administration Ad Litem, she continued with the said case before the Magistrate’s Court and eventually had land parcel no Loc 17/ Iganjo/ 3721, registered in her name.
92. The Limited Grant of Letters of Administration ad litem were issued on 22nd March 2010, for a limited purpose of filing suit or defending SPMCC LDT No 66 of 2005. This limited grant was made under section 54 of the Succession Act. The letters were limited only for purposes of defending the suit. However, the 1st Defendant used the said letter to have the resultant subdivision of land parcel No Loc 17/ Iganjo/ 3440, registered in her name. This action went against the scope of the Limited grant of letters of Administration Ad Litem issued to 1st Defendant



93. This grant issued to the 1st Defendant was a grant issued for a special purpose of filing the suit, but not to inherit the outcome of the suit. The Letters of Administration were Grant Ad Litem, limited for a purpose.
94. In Re Estate of Jennifer Kusuro Musiwa (Deceased) [2021] eKLR, the Court held as follows;
- “... This form is clear on the purpose for which the grant is limited - filing suit. It is envisaged that there is a cause of action for which the deceased has standing and having passed on, his/her personal representatives’ steps in order to pursue that claim on behalf of the estate of the deceased. By extension, to defend an existing or suit against a deceased person. Once granted, the administrator has no power to distribute the estate if successful in his/her claim on behalf of the deceased...”
95. Further in Re the estate of Helena Wangechi Njoroge (Deceased) (2015) Eklr, the Court held the following concerning letters of administration ‘ad litem’
- “..... It was limited to the purpose of filing suit to preserve the three assets of the estate. It is what is called a grant of letters of administration ad litem. The suit envisaged to be filed on the strength of a grant ad litem is not a probate or succession case, or an interlocutory application within a probate or succession cause, but rather a civil suit. Indeed, one need not obtain a grant of any sort to enable him file a succession cause. A grant of representation is only necessary where one intends to file a civil suit to protect or defence the estate against third party.”
96. This Court will concur with the above decisions that once limited grant Ad Litem is issued, the Applicant even if successful in the suit has no powers to distribute the estate. Thus the 1st Defendant was not entitled to be registered as the proprietor of the 3 acres of land registered in her name over Land Parcel No. Loc 17/ Iganjo/ 3721, as she did get registered on 26th January 2022, and obtained a title deed to that effect.

(vi) Whether the Counter claim by the 1st Defendant is merited?

97. . In her counter claim, the 1st Defendant has sought for eviction of the Plaintiffs from the resultant subdivision of land parcel No. Loc 17/ Iganjo/ 3440, being land parcel No 3721. The Court found the process that led to this subdivision was null and void as the Makuyu Land Disputes Tribunal that initially found for Muchogo Muriu(deceased) had no jurisdiction to find as it did.
98. Without jurisdiction, all the subsequent decisions, proceedings and decrees were also a nullity. Therefore, the 1st Defendant does not have a valid title and thus she is not the owner of the suit property. Consequently, the 1st Defendant cannot be issued with any favourable orders against the Plaintiffs herein.
- She is thus not entitled to any of the orders sought in her counter claim.

99. Whether the Plaintiffs are entitled to orders sought in their claim?

100. This Court has found and held that the proceedings held at Makuyu Land Disputes Tribunal over land parcel No Loc 17/ Iganjo/ 3440, was a nullity for want of jurisdiction. Having found that the tribunal had no jurisdiction, this Court finds and holds that the award made by the said tribunal was thus null and void. See *Macfoy vs united*(supra).



101. Consequently, given that the award of the tribunal was null and void, there was no judgement to be adopted by the Court. Therefore, the said Judgement was irregular and of no legal effect.
102. Since the subdivision of Loc 17/ Iganjo/ 3440, was done out of an irregular judgement, the Court finds the subsequent transfers of the resultant subdivision being Loc 17/ Iganjo/ 3721, to Mary Njoki Simon Gathuu on was irregular.
103. As provided by Section 80 of the [Land Registration Act](#), having found that land parcels No Loc 17/ Iganjo/ 3721 & 3722, were created out of an irregular process, then this Court has the power to rectify the Register by cancelling the two resultant subdivisions and reverting the land to Loc 17/ Iganjo/3440, in the name of Warui Muriu(deceased), which will now be subject to the succession proceedings over his estate.
104. The Plaintiffs are also entitled to restraining orders against the 1st Defendant so as to protect the suit property. In a nutshell, the Plaintiffs are entitled to the orders sought in their Plaint.

(vii) Who is entitled to costs of this suit?

105. Section 27 of the [Civil Procedure Act](#) stipulates the general rule for award of costs. It provides as follows;

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or judge shall for good reason otherwise order.

106. This provision has seen several judicial pronouncements. In the case of Supermarine Handling Services Ltd –vs- Kenya Revenue Authority Civil Appeal No. 85 of 2006, the Court of Appeal expressed itself thus:

“Costs of any action or other matter or issue shall follow the event unless Court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance.....”

107. The Plaintiffs herein are the successful litigants and are thus entitled to costs of this suit.
108. Having now carefully considered the available evidence and the relevant provisions of law, the Court finds that the Plaintiffs have been able to prove their case on the required standard of balance of probabilities. The 1st Defendant failed to prove her Counter Claim on the required standard.
109. For the above reasons, judgement is entered for the Plaintiffs against the Defendants herein jointly and severally as prayed in the Plaint dated 7th February 2023, in terms of prayers No. a, b, c, d and e.



110. The Plaintiffs are also entitled to costs of the suit and interest thereon from the date of this judgement to payment in full.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 25TH DAY OF JANUARY, 2024

L. GACHERU

JUDGE.

Delivered online in the presence of;

Ms Mwangi for the Plaintiffs

Miss Kimani for the 1st Defendant

2nd Defendant- Absent

Joel Njonjo - Court Assistant.

L. GACHERU

JUDGE.

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