



**Munene v Njoka & another (Environment and Land Appeal  
E005 of 2021) [2024] KEELC 828 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 828 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL E005 OF 2021  
JM MUTUNGI, J  
FEBRUARY 22, 2024**

**BETWEEN**

**JOSEPH MURIITHI MUNENE ..... APPELLANT**

**AND**

**FRANCIS GITARI NJOKA ..... 1<sup>ST</sup> RESPONDENT**

**HELLEN KARAMBU GITARI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal against the Ruling and subsequent Orders of the Hon. A.K Ithuku,  
Chief Magistrate sitting in Kerugoya ELC Suit No. 127 of 2017 and dated 5.12.2019)*

**JUDGMENT**

1. The subject of this appeal is the Ruling of the Chief Magistrate, Honourable A.K Ithuku delivered on 5.12.2019 striking out the Appellant's plaint dated 16.08.2017 on the grounds that the same was filed outside the limitation period prescribed under Section 4 (1) of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya.
2. From the proceedings of the lower court, the parties herein entered into two separate agreements both dated 30.01.2001, for the sale of their respective parcels of land. The Appellant entered into an agreement with the 1<sup>st</sup> Respondent for sale of his parcel of land Plot No. BCR 6 Kerugoya Township, for the consideration of Kenya Shilling Four Hundred Thousand (Kshs 400,000/-) while the 2<sup>nd</sup> Respondent who was the 1<sup>st</sup> Respondent's wife sold her parcel of land Plot No. BCR 15 on Plot No. 250/281 Kerugoya Township to the Appellant for the price of Kenya Shillings Three Hundred Thousand (Kshs 300,000/-). According to the Minutes of Kerugoya/Kutus Town Planning Works and Housing sub-committee meeting held on 22<sup>nd</sup> September, 2004, the forms for transfer of the parcels of land were filled on 30<sup>th</sup> January 2001 and approved vide minutes No. 11/2001 (2). After the transfer of the parcels of land, the Appellant through a letter dated 3<sup>rd</sup> December 2003, wrote to the Town Clerk of Kerugoya/Kutus requesting him to halt any transaction concerning BCR 6



(his initial parcel of land) for the reasons that Plot No. BCR. 15 which initially belonged to the 2<sup>nd</sup> Respondent was in dispute and that he wished to reverse the transaction. On 22<sup>nd</sup> September 2004, the parties attended a sub-committee meeting of Kerugoya/Kutus Town Planning & Housing where it was resolved that; the Appellant and the 2<sup>nd</sup> Respondent do retain Plot No. BCR 15 and BCR 6 respectively as per the exchange/sale agreements, the Surveyor to establish the actual ground of BCR No 15 and the Appellant to seek for legal advice in regard to the matter, from his Advocates. By a letter dated 5.05.2008, the Appellant instructed the Firm of Solonka & Co. Advocates to demand for the title documents in respect of land parcel No. BCR 6 due to the fact that he had rescinded the contract between them for the reasons that the appellant had established that Plot No. BCR 15 which the 1<sup>st</sup> Respondent sold to the Appellant did not exist on the ground and a third party was claiming ownership of the plot sold to him.

3. The Appellant filed a plaint dated 6.08.2017 seeking for:
  1. An Order directing the Defendants to return all the relevant title documents of Plot No. BCR 6 within Kerugoya Township duly transferred in favour of the Plaintiff to enable the Plaintiff registered Plot Number BCR 6 in his name.
  2. A permanent injunction restraining the defendants from interfering, trespassing, transacting and/or dealing with or in any manner whatsoever with respect to Plot No. BCR 6 within Kerugoya Township.
  3. Costs of the suit plus interest.
  4. Any other or further relief.
4. The Respondents filed their joint statement of defence dated 12.10.2017 and under paragraph 18 they gave notice that they would raise a Preliminary Objection and simultaneously with the defence filed a notice of Preliminary Objection that the suit was statute barred on account Section 4(1) of the Limitation of Actions Act. Consequently the Respondents filed the Notice of Motion dated 14/1/2018 seeking the following order:-

“That this Honourable Court be pleased to strike out the Plaintiff’s plaint dated 16<sup>th</sup> August, 2017 with costs.”

The application was predicated on the following grounds:-

1. The Plaintiff filed the instance suit without the leave of court despite the fact that time for instituting it had lapsed.
2. The Plaintiff did not make an application before the court of law for the extension of time.
3. The contract between the Plaintiff and the Defendants was entered on the 30<sup>th</sup> January 2001.
4. The Plaintiff started complaining to the town clerk of Kerugoya/Kutus municipal council over the exchanged plots on the 3<sup>rd</sup> December 2003.
5. The Plaintiff on his own admission recorded in his documents that he discovered that all was not well in regard to Plot BCR 6 and BCR 15 on 3<sup>rd</sup> December 2003 when he wrote to the town clerk of Kerugoya/Kutus M.C.
6. The Plaintiff’s time to institute his claim lapsed on the 30<sup>th</sup> December 2008.



5. The Appellant filed his Replying Affidavit on 21<sup>st</sup> February 2019 where he stated that after the transfer of land parcel Plot No. BCR 15 he realized that there was a Third Party who was claiming the land and after his investigation he confirmed that indeed the land did not belong to the Respondent. The Appellant further stated one of the resolutions of the meeting that was held by the sub-committee on 22<sup>nd</sup> September 2004 was that a Surveyor was to be engaged for purposes of establishing the actual ground position of Plot No. BCR 15, which the Appellant stated was done by the County Government of Kirinyaga and which confirmed through its letter dated 14<sup>th</sup> June 2017 that the Plot No. BCR 15 occupied the same ground as UNS BCR Plot Number 281 registered in the name of Nancy Wangeci Karimi. Accordingly, the Appellant averred that he discovered the alleged fraudulent acts perpetrated by the Respondents when he received the report from the County Government of Kirinyaga on 14<sup>th</sup> June 2017.
6. On 19.09.2019, the lower court directed the parties to file their respective submissions in regard to the application which they did. The Learned Trial Magistrate delivered the Ruling on 5/12/2019 and in the Ruling he addressed his mind on two issues: whether the suit is time barred and whether it should have been filed with leave of Court and who should bear the cost. On the first issue, the Learned Magistrate held that the letter by the Appellant's advocate to the 1<sup>st</sup> Respondent disclosed sufficient reasons to show that the Appellant discovered or ought to have discovered the fraud if any at least by 5.05.2008 when it was drafted. The Learned Trial Magistrate held that the cause of action accrued on 5/05/2008 and hence the Appellant should have filed his suit on or before 5.05.2014 and having not done so, the suit was improperly before the Lower Court and struck out the suit for having been filed outside the Limitation period and awarded the costs of the suit to the Respondents.
7. Aggrieved and dissatisfied by the decision of the lower court, the Appellant filed a memorandum and record of appeal dated 18.02.2021 and 22.12.2021 respectively.
8. The Appellant's Memorandum of Appeal sets out 6 grounds of appeal, as follows:
  1. That the Learned Trial Magistrate erred in law and fact when he made a finding that the Appellant's claim was time barred without considering the aspect of fraud raised by the Appellant.
  2. That the Learned Trial Magistrate erred in law and fact when he failed to appreciate the Appellant's suit was founded on fraud and that the time limit prescribed under section 4 of the *Limitation of Actions Act* did not run until discovery of fraud by dint of Section 26 of the *Limitation of Actions Act*.
  3. That the Learned Trial Magistrate erred in law and fact by making a holding that the Appellant by a letter dated 5.05.2008 had established that the property sold by the Defendants belonged to a third party and that such knowledge constitutes discovery of fraud by the Plaintiff.
  4. That the Learned Trial Magistrate erred in law and fact by failing to hold that the Appellant discovered fraud upon receiving the Surveyor's Report on the 14<sup>th</sup> June 2017 and that the suit was filed within time.
  5. That the Learned Trial Magistrate erred in law and fact by failing to consider the Appellant's evidence.
  6. That the Ruling of the Learned Trial Magistrate go against the weight of the evidence on record.



The Appellant prays; that the Appeal be allowed and the Ruling of A.K Ithuku (CM) be set aside; his suit be reinstated and the same be heard and determined on merit; costs of the Appeal and any other orders the Honourable Court may deem fit to grant.

## 9. Appellants' Submissions

The appellant filed his written submissions on 4.09.2023. In regard to the issue whether the suit was time barred, the Appellant submitted that the cause of action of the suit was fraud which he discovered vide the county surveyor's report dated 14.07.2017 and that the Learned Trial Magistrate failed to appreciate that the Respondents had obtained the Appellant's plot No. BCR 6 fraudulently. The Appellant further submitted that it was evident from the report that the Respondent fraudulently acquired the Appellant's Plot No. BCR 6 with the full knowledge that their Plot Number BCR 15 did not exist. He submitted that the Learned Trial Magistrate misdirected himself by finding that the Appellant had discovered the alleged fraudulent acts on or before 5.05.2008. Counsel for the Appellant relied on the cases of *Mintina Ene Kenton Koponi Versus Francis Njakwa & Another* (2018) eKLR, *Chemitei Kandagor Versus Jos Kipandi Chebon & Another* (2021) eKLR, *Delilah Ondari Versus Francis Ondieki* (2022) eKLR and *Kenneth Kipkosgei Kemboi & Another Versus Leah Tuwei* (2021) eKLR to support his position. He concluded by submitting that the Learned Trial Magistrate erred by not considering all the evidence presented before him and urged this Honourable Court to set aside the Ruling dated 5<sup>th</sup> December 2019.

## 10. Respondents' Submissions

The Respondents filed written submissions dated 15.08.2023. The Respondents submitted that the Learned Trial Magistrate considered the issue of fraud and also considered when the fraud was discovered by the Appellant. The Respondents argued that the Learned Trial Magistrate took into account all the evidence availed by the parties and gave due consideration of the evidence in his ruling. The Respondents on the Case of *James M. Musa & Another Versus the Kenya Hospital Association & Ano* (2017) eKLR where the Court of Appeal upheld the decision of the Trial Court to strike out a suit that had been filed out of the prescribed period without leave of the court.

11. In the instant Appeal, it is clear that the singular issue that arises for determination is;
  1. Whether the Learned Trial Magistrate erred in law and fact by striking out the Plaintiff's plaint dated 16.08.2017 for being statute barred.

## 12. Analysis and determination

This being an appeal of first instance, the Court is duty bound to appraise and re-evaluate the evidence in keeping with the principle enunciated in the Court of Appeal Case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123.

13. The Appellant contends that the Learned Trial Magistrate did not consider the issue of fraud raised by the Appellant while making his determination. It is clear from the Plaint that the Appellant's cause of action against the Respondents was predicated on fraud.

The same was clearly highlighted and particularized under paragraph 13 of the Plaint. In the said paragraph the Appellant averred that based on the surveyor's report it was clear that the Defendants acquired his Plot No. BCR 6 fraudulently and with full knowledge that their Plot No. BCR 15 was not in existence. He went on to particularise the elements of fraud as follows:

1. Purporting to exchange Plot Number BCR 15 with the Plaintiff's plot number BCR 6 with the full knowledge that Plot Number BCR 15 does not exist.



2. Falsely representing themselves as the owners of Plot No. BCR 15 while knowing that the said plot belonged to another party.
  3. Fraudulently obtaining the Plaintiffs plot No. BCR 6 in exchange with Plot Number BCR 15 which does not exist on the ground.
14. Though the instant suit is founded on the contracts entered into between the parties on 30/1/2001 it is clear that the Appellant predicated his cause of action on alleged fraud that the Appellant claimed he discovered in 2017 when the County Surveyor prepared a Survey report regarding the two plots which were the subject of the transaction. The 1<sup>st</sup> Respondent in his Affidavit in support of the application that gave rise to the Ruling the subject of this Appeal, acknowledged that the cause of action was fraud. The 1<sup>st</sup> Respondent however contended that the Appellant had as early as 3/12/2003 discovered that Plot No. BCR 15 had issues which led him to raise complaints respecting the physical location of the plot with the Clerk of the Town Council. The Complaint by the Appellant resulted in the Town Planning subcommittee meeting on 22/9/2004 to consider and resolve the dispute. The Town Planning subcommittee acknowledged the parties had entered into exchange agreements on 30/1/2001 and the Surveyor affirmed Plot BCR No. 15 existed on the ground. The Town Planning Sub Committee inter alia resolved that the parties were to retain the plots as exchanged and the Surveyor was to establish the actual location of plot BCR No 15 on the ground.
15. It does appear following the resolution of the dispute by the Kerugoya/Kutus Town Planning Works & Housing Committee on 22<sup>nd</sup> September 2004, the matter went to rest until 14<sup>th</sup> June 2017 when the Surveyor of the County issued a report on the location of plot No. BCR 6 and BCR 15. The report identified the location of Plot No. BCR 6 which was described as being next to old Kerugoya Slaughter House and was developed with residential houses. Plot BCR 15 was said to be located behind the Survey of Kenya land and touched Kathigai-ini stream. However, the report indicated the plot was on the same ground as UNS BCR plot No. 281 Kerugoya claimed by one Nancy Wangeci Karimi who was indicated to have been allocated the plot on 25/3/1999. It is noteworthy that the Town Clerk had vide a letter dated 5/10/2011 to the DCIO Kirinyaga affirmed plot No. BCR NO. 15 was allocated to the 2<sup>nd</sup> Respondent on 6<sup>th</sup> December, 1992 and existed on the ground.
16. The Appellant vide a Form of Transfer dated 21<sup>st</sup> June 2001 exhibited at Page 21 of the Record of Appeal effected transfer of BCR 6 to the 1<sup>st</sup> Respondent. The Appellant likewise executed a certificate of compliance (undated) of the transactions exhibited at Page 20 of the Record of Appeal. As per the evidence therefore there was no doubt Plot No. BCR 6 and BCR 15 existed on the ground except that in regard to plot No. BCR 15 there is a claim by the Third Party that her plot No. 281 is on the same ground where plot BCR 15 is located. The Clerk to the Council as highlighted above confirmed plot No. BCR 15 was allocated in 1992 while the Third Party's plot 281 was apparently allocated in 1999. The legal position remains where land is allocated and the allottee has accepted the allotment, the same land cannot be available to be allocated to someone else. Also where there are two letters of allotment over the same parcel of land, the earlier in time, unless it was revoked, takes precedence.
17. In the circumstances, the claim by the Appellant that the Respondents fraudulently effected the exchange of Plot BCR 15 knowing that it did not exist was not proved. The Town Clerk affirmed the existence of plot BCR 15 on the ground and the fact that a Third Party maybe staking claim of a different plot on the same ground does not mean the Third Party is right. The issue thus is one of the location of Plot BCR 15 and the UNS Plot No. 281 claimed by the 3<sup>rd</sup> party. The exchange transaction between the Appellant and the Respondents having been completed, the dispute arising between the Appellant and the Third Party cannot involve the Respondents as they executed their part of the transaction. At best they can only be witnesses that they were the initial owners of Plot



No. BCR 15. According to the Learned Trial Magistrate what needed to be determined was when the cause of action arose. On the one hand, the Appellant contended that the cause of action arose on 14.06.2017 when the surveyor gave his report concerning Plot No. BCR 15. He stated that was the time when he found out that the Respondent had sold him land that was non-existent. On the other hand, the Respondent averred that the cause of action arose on 3.12.2003 when the Appellant wrote to the Town Clerk stating that he wanted the transaction concerning plot No. BCR 6 halted because he had found out that plot BCR 15 was in dispute. In making the determination, the Learned Trial Magistrate considered the letter from the Appellant's advocates dated 5.05.2008, the letter by the Appellant to the Town Clerk dated 3/12/2003, and the letter by the surveyor dated 14.06.2017. The Learned Trial Magistrate concluded that the cause of action arose on or before 5.05.2008 due to the fact that the letter disclosed that the Appellant had established that the property sold to him belonged to a third party which the Appellant averred constituted fraud on the part of the Respondents. He further held that the Appellant having discovered the fraud on 5.05.2008, he ought to have filed his claim on or before 5.05.2014 and having not done so, the Trial Magistrate held that the instant suit was improperly before the Court as it was filed out of time.

18. I have carefully reviewed and considered the evidence produced and the impugned ruling, and find the Learned Trial Magistrate rightly and properly addressed the issue of fraud and there is no basis to fault the Learned Trial Magistrate in reaching the decision that he did.

It is the law that where fraud is alleged, time starts to run from the moment such fraud is discovered. The Appellant admitted that he suspected foul play and wrote a letter of complaint dated 3.12.2003 to the Town Clerk resulting in the convening of Town Planning Works and Housing Subcommittee on 22<sup>nd</sup> September 2004, where the Appellant's complaint was considered and a resolution made that the Appellant and the Respondents retain their plots as per the exchange arrangement. Notwithstanding the resolution by the County Council, the Appellant through his Advocate wrote the demand letter dated 5/5/2008 where he intimated he had established plot No. BCR 15 did not exist on the ground and that the ground identified to him belonged to a third party whose particulars the 1<sup>st</sup> Respondent was aware of. The Appellant purported to rescind the contract at that juncture and gave the 1<sup>st</sup> Respondent fifteen days to return the title documents belonging to Plot No BCR 6, failure to which he would institute legal proceedings against him. Therefore in case there was any fraud on the part of the Respondents the Appellant had made a discovery of the fraud by the time he issued the letter dated 5/5/2008 to the Respondents and hence any time limitation of any legal action founded on fraud began to run from the date the letter was issued. The Appellant did not discover the fraud at the time the County Surveyor issued his report as he alleged.

Section 26 of the *Limitation of Actions Act* Cap 22 Laws of Kenya is clear as when action founded on fraud accrues. It provides as follows:-

26. Where, in the cause of an action for which a period of Limitation is prescribed either:-
- a) The action is based upon, the fraud of the Defendant or his Agent or of any person through whom he claims or his agent; or
  - b) the right of action is concealed by the fraud of any such person as aforesaid; or
  - c) the action is for relief from the consequence of mistake, the period of Limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.

19. In the instant matter the Appellant was no doubt aware of the alleged fraud if not by 3<sup>rd</sup> December 2003 by 5/5/2008 when he wrote letters respecting a dispute over plot BCR 15 on account of a claim



over the same plot by a Third Party. It is not correct that he discovered the alleged fraud in 2017 when he filed the suit. The Learned Trial Magistrate in my view correctly held that the Appellant's suit was filed outside the period of limitation and properly struck out the same.

20. The Appeal is without any merit and the same is ordered dismissed with costs to the Respondents.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KERUGOYA VITRUALY Via VIDEO LINK THIS 22<sup>ND</sup> DAY OF FEBRUARY 2024.**

**J. M. MUTUNGI**

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**ELC - JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

