



**Wanguche v Were (Environment and Land Appeal 5 of 2020)
[2024] KEELC 1688 (KLR) (21 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1688 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL 5 OF 2020**

**DO OHUNGO, J
MARCH 21, 2024**

BETWEEN

JOSEPH MUNYENDO WANGUCHE APPELLANT

AND

JUMA KUSINYO WERE RESPONDENT

*(Being an appeal from the judgment and decree of the Senior Principal
Magistrate's Court at Mumias (Hon. T A Odera, Senior Principal Magistrate)
delivered on 17th January 2020 in Mumias MCELC No. 16 of 2018)*

JUDGMENT

1. Litigation leading to this appeal started in the High Court at Kakamega on 14th October 2003 as HCCC No. 79 of 2003 when the Respondent filed plaint dated 17th July 2003, against Honorius John Wanguche (Honorius). He averred that he leased the parcel of land known as North Wanga/ Koyonzo/1033 (the suit property) to Honorius on 27th November 1986 and that on 18th May 1987, Honorius misled him into signing documents that led to the suit property being transferred into Honorius' name on 6th May 1988. He further averred that Honorius acquired the suit property fraudulently. He therefore prayed for judgment against Honorius for a declaration that Honorius was holding the suit property in trust for him and for rectification of the register.
2. Honorius filed a statement of defence dated 16th December 2003 in which he denied the Respondent's allegations and averred that the suit being one for recovery of land was statute barred. Subsequently, Honorius passed away on 7th February 2004 and was substituted with the Appellant. The case was later transferred to this court and then to the Subordinate Court, for hearing and determination.
3. The Respondent filed an Amended Plaint, amended on 30th August 2018, wherein he joined Ali Juma Okumu as First Defendant, John Ndoli Olukolo as Second Defendant, the Respondent as Third Defendant, Saidi Abubakari Were as Fourth Defendant and Hamisi Amakobe Odwori as Fifth



Defendant. The Respondent repeated the averments in the original plaint and added that the First and Second Defendants purchased the suit property from Honorius' estate and that the suit property had been subdivided into parcel numbers North Wanga/Koyonzo/2690, 2691 and 2692 whose registered proprietors were the Fourth and Fifth Defendants.

4. The Respondent therefore prayed for judgment against the Appellant and the Defendants for a declaration that the registration of Honorius as proprietor of the suit property was null and void owing to misrepresentation and fraud, and that the subsequent subdivisions and transfers were also fraudulent. He also prayed for rectification of the register and cancellation of the titles so as to revert the suit property to his name as it existed on 6th May 1988. He further prayed for eviction of the Appellant and Defendants from the suit property, for costs of the suit and interest thereon.
5. Upon hearing the matter, Hon. T A Odera, Senior Principal Magistrate (as she then was), delivered judgment on 17th January 2020 and granted the declarations that were sought by the Respondent. Aggrieved, the Appellant filed this appeal on 10th February 2020, only against the Respondent. He did not join the other parties.
6. The grounds of appeal are listed on the face of the Memorandum of Appeal dated 10th February 2020. In summary, they are that fraud was not established, that the decision went against the weight of evidence and that the learned Magistrate erred in not finding that the suit was barred by statute.
7. Directions were given that the appeal be canvassed through written submissions. The Appellant filed submissions, but the Respondent did not file any.
8. The Appellant argued that fraud was not proved since the Land Registrar who acted upon the registration documents that conferred title upon Honorius was not joined to the suit. Further, that the Respondent contracted himself when he stated in his statement that when they went to Mumias Law Courts Honorius told him to sign documents after which he remained outside as Honorius took the papers into the Magistrate's Chambers for signature yet under cross examination the Respondent stated that he signed the agreements inside the Magistrate's Chambers in the presence of the Magistrate.
9. The Appellant went on to argue that although the Respondent claimed that he was illiterate, he was in fact literate since he signed as opposed to thumb printing his documents on record. Lastly, the Appellant contended that he raised the fundamental question of the suit being time barred by statute, which issue the trial court did not entertain. The Appellant therefore urged this court to allow the appeal.
10. This being a first appeal, the mandate of this court is to re-consider and re-evaluate the pleadings, the evidence, and the material on record and to determine whether the conclusions reached by the learned Magistrate are to stand or not and to give reasons either way. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 and *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
11. I have considered the grounds of appeal, the pleadings, the evidence, the submissions, and the entire record. The issues that arise for determination are whether the Subordinate Court had jurisdiction, and if so, whether the reliefs sought ought to have issued.
12. Jurisdiction, as has often been stated, is everything. It is the very life and soul of any proceedings. Without it, the proceedings come to a certain end and the court cannot make any further step. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR and *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR. One of the ways in which a court can lose jurisdiction is when the claim before it is barred by statute.



13. Right from the onset of the litigation herein, Honorius filed statement of defence dated 16th December 2003 in which he averred that the suit being one for recovery of land, was statute barred. A perusal of both the initial plaint and the amended plaint leaves no doubt that the Respondent's claim was one for recovery of land in which he sought cancellation of Honorius' title to the suit property together with the titles in respect of the resulting subdivisions with a view to returning the suit property to its status as of 6th May 1988.
14. Section 7 of the *Limitation of Actions Act* 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. As the Court of Appeal stated in *Mukuru Munge v Florence Shingi Mwawana & 2 others* [2016] eKLR, the "purpose of the law on limitation of actions is to avoid stale claims, based on the sensible and rationale appreciation that over time memories fade and evidence is lost. The law of limitation therefore seeks to compel claimants not to sleep on their rights and to bring their claims to court promptly. Secondly, the law on limitation of actions ensures that claims are instituted within reasonable time after the cause of action has arisen, so as to secure fair trial when all the evidence is available and to ensure that justice is not delayed. In our minds, those are important constitutional values and principles, which are underpinned by legislation on limitation of actions."
15. The Respondent's case as pleaded and as prosecuted before the Subordinate Court was that on 18th May 1987, Honorius misled him into signing documents that led to the suit property being transferred into Honorius' name on 6th May 1988. The key dates are thus 18th May 1987 when he contends he was misled and 6th May 1988 when he maintains the suit property was transferred into Honorius' name. I have perused the copy of the register in respect of the suit property which was produced in evidence, and I note that it confirms that Honorius became the registered proprietor on 6th May 1988. Consequently, the cause of action accrued on 6th May 1988.
16. The Respondent filed his case on 14th October 2003, through plaint dated 17th July 2003. By the time of commencement of the litigation, a total of 15 years and 5 months had passed from the date the cause of action accrued. It follows therefore that the Subordinate Court did not have jurisdiction to hear and determine the suit, in view of the provisions of Section 7 of the *Limitation of Actions Act*. As the Court of Appeal stated in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR, a suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. The only recourse available to the Subordinate Court was to strike out the suit.
17. In view of the foregoing discourse, I find merit in this appeal, and I therefore allow it. I set aside the judgment of the Subordinate Court and replace it with an order striking out the Respondent's case. The Appellant shall have costs of both this appeal and of the proceedings in the Subordinate Court.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 21ST DAY OF MARCH 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Mukavale for the Appellant

Respondent present in person

Court Assistant: M Nguyayi

