



REPUBLIC OF KENYA



**Marira & 2 others v Mutiso & 4 others (Civil Appeal E112 of 2022)
[2025] KECA 1437 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1437 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL E112 OF 2022**

S OLE KANTAL, JW LESSIT & AO MUCHELULE, JJA

JULY 31, 2025

BETWEEN

FRANCIS KARIUKI MARIRA 1ST APPELLANT

ASHA SHABANNI GATHURI 2ND APPELLANT

MORRIS GIKURI KARIUKI 3RD APPELLANT

AND

NATHAN MUNYAO MUTISO 1ST RESPONDENT

WAYUWA NGETI GACANGI 2ND RESPONDENT

LAND REGISTRAR - KIRINYAGA 3RD RESPONDENT

COUNTY COUNCIL OF KIRINYAGA 4TH RESPONDENT

HON. ATTORNEY GENERAL 5TH RESPONDENT

*(An appeal against the judgment and decree of the Environment and Land Court
at Nyeri (E.C. Cheronu, J.) dated 3rd December 2021 in ELC NO. 694 OF 2013)*

JUDGMENT

1. In a plaint dated 30th April 2009, Nathan Munyao Mutiso (the 1st respondent) and Wayuwa Ngeti Gacangi (the 2nd respondent) sued Saban Said Gathuri (now deceased), Francis Kariuki Marira (1st appellant), the Land Registrar Kirinyaga (the 3rd respondent), County Council of Kirinyaga (the 4th respondent) and the Attorney General (the 5th respondent) claiming land parcels Kirinyaga/Gathigiriri/303 and Kirinyaga/Gathigiriri/ 304 (the suit properties). Their case was that the 2nd respondent was the legal allottee of the suit properties by the 4th respondent. She and her family were settled for over 20 years but somehow the properties were fraudulently registered in the names of the 1st appellant and the deceased, respectively. They wanted the registrations cancelled and the titles rectified



to reflect them as the owners. They further sought an injunction and exemplary damages. The 2nd respondent was the mother of the 1st respondent.

2. The 1st appellant filed a defence to deny the claims. He denied that he was the registered owner of Kirinyaga/Gathigiriri/303, and stated that he had in 2009 transferred the parcel to Morris Gikuri Kariuki (the 2nd appellant). The 2nd appellant joined the proceedings following application. He filed a defence and counterclaim to state that he was the registered proprietor of Kirinyaga/Gathigiriri/303 which he stated had been obtained legally from his father (the 1st appellant). He denied the claims of fraud, and counterclaimed by stating that the claimants were living on the land unlawfully and he sought that they give vacant possession of the parcel of land.
3. Subsequently, Zainabu Shaban Said and Asha Shaban Gathuri (the 3rd appellant) were joined in the suit as interested parties. Their case was that they were the daughters of the deceased Saban Said Gathuri who had been sued as the 1st defendant but who had died on 13th May 1983, long before the suit was filed. They filed a notice of preliminary objection to say that the suit was incompetent and fatally defective as the same had been brought in the deceased's personal capacity instead of being brought against the administrator of his estate. The deceased was the registered owner of Kirinyaga/Gathigiriri/304.
4. The 2nd respondent died in 2015 while the suit was pending. She was not substituted.
5. This is the dispute that was heard by the Environment and Land Court at Kerugoya. In a judgment that was delivered on 3rd December 2021, the learned E.C. Cheronu, J. allowed the claim by the 1st and 2nd respondents by finding that they had become entitled to the suit properties by adverse possession because they had proved that they had openly and continuously without interruption occupied the properties from 1975 to date. The 3rd respondent was directed to rectify the registers of the properties by cancelling the names of the 2nd appellant and the deceased Saban Said Gathuri, respectively, and replacing them with those of the 1st and 2nd respondents as the registered proprietors.
6. The appellants were aggrieved by the decision and came before this Court in this appeal. The memorandum of appeal contained eleven (11) grounds, but we consider that the appeal can be resolved on grounds 1, 2, 3, 5 and 6 as follows:-

“ 1. The Honourable Judge of the Superior court erred in law and fact by holding that, the 1st Plaintiff/Respondent had locus standi to maintain the suit on his behalf and on behalf of his parents including the mother 2nd Respondent who died in year 2015 when the proceedings were pending and hence her suit had abated by the operation of law notwithstanding the fact that, the 1st Respondent had not taken out any letters of Administration in respect of his parent's Estate and hence was not a legal representative of the said parents estate and therefore lacked relevant locus standi to sustain the suit herein.

2. The Honourable Judge of the Superior court erred in law and fact by not finding that the suit against the 1st Defendant SABAN SAID GATHURI the registered proprietor of L.R Kiinyaga/Gathigiriri/304 was bad in law as he was sued while way dead having died on 13.5.1983 and was sued posthumously on 30.4.2009 and without enjoining his legal representative and proceeded to pronounce Judgment against a dead person hence made an erroneous Judgment despite the Honourable court having been made aware of the said facts vide a Notice of Preliminary objection dated 24.8.2017.



3. That Honourable Judge of the Superior court erred in law and fact by not finding that, the Respondents suit was bad in law and statutory time barred by virtue of the statute of *Limitation of Actions Act* Chapter 22 Laws of Kenya in that the Respondents claim was one based on claim to land alleging fraudulent registration and that the cause of action if any arose on 20.6.1975 when Title deeds for L.R Kirinyaga/ Gathigiriri/303 and L.R Kirinyaga/Gathigiriri/304 were issued yet the suit was instituted in year 2009 and no leave of the Honourable court was granted to file the suit out of time.
4.
7. The Honourable Judge erred in law and fact by holding that, the Plaintiffs/Respondents are entitled to the Appellants suitlands L.R Kirinyaga/Gathigiriri/303 and L.R Kirinyaga/Gathigiriri/304 by virtue of the doctrine of Adverse possession yet such issue was never pleaded by the Plaintiffs/Respondents and was never an issue for determination by either parties to the suit and same only arose as an afterthought by the 1st Respondent during cross-examination and hence, the Honourable Judge proceeded to deliver a Judgment/Decree not supported by pleadings or evidence by the parties against the established legal principles on delivering of a considered Judgment.
6. The Learned Honourable Judge erred in law and fact by not finding that, even if the Honourable court was seized of the Jurisdiction to entertain and determine an issue of Adverse possession which is denied then, the same was NOT properly pleaded as required by virtue of the Provisions of Order 37 of the Civil Procedure Rules 2010 and hence the issue breached the rules of Procedure on pleadings governing Adverse possession.”
8. The parties on appeal were represented, and filed written submissions on which they relied.
9. Our mandate on first appeal is to reconsider and evaluate the evidence that was tendered by the parties before the trial court and to independently determine whether the court was right, both on fact and the law, while bearing in mind that we did not have the advantage of seeing or hearing the witnesses (see Peter M. Kariuki -vs- Attorney General [2014] eKLR).
10. From the plaint dated 30th April 2009 filed by the 1st and 2nd respondents, their case was based on fraud. It was pleaded as follows:-
 - “7) At all material times the 2nd plaintiff herein was the legal Allottee of the two parcel of land being Kirinyaga/Gathigiriri/303 and Kirinyaga/Gathigiriri/304 registered in the defendant’s name fraudulently without any notice to the plaintiffs being the original Allottee of the said parcel of land.”
11. The record shows that in the written submissions dated 28th July 2021 filed on behalf of the 1st and 2nd appellants during the trial, it was submitted that the 2nd appellant had pleaded that the suit was fatally defective and did not disclose a reasonable cause of action because, having been founded on fraud, it was time-barred under the *Limitation of Actions Act*. We have looked at the entire judgment of the Judge. This issue was not considered. The 1st and 2nd appellants were entitled to the consideration of this substantial issue that they had raised against the claim. They were entitled to a decision thereon. The Judge was required to determine when it was that the 1st and 2nd respondents discovered the fraud and whether the claim was brought within time. The law on limitation of actions in respect of fraud stipulates under section 26 of the *Limitation of Actions Act* as follows:-

“Where, in the case 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 consequences of a 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:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

- i. in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- ii. (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

12. In IGA -vs- Makerere University [1972] EA 65 it was held that:-

“A plaint which is barred by limitation is a plaint “barred by law”. A reading of the provisions of sections 3 and 4 of the Limitations Act Cap. 21 together with Order 7 Rule 6 of Uganda which has the same provisions with Limitations Act of Kenya seems clear that unless the applicant in this case has put himself within the limitation period by showing ground 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 or relief.”

13. The second issue that the appellants raised during the trial was that, the claim was based on fraud but that during evidence and in the written submissions by the 1st and 2nd respondents they had introduced the issue of adverse possession; that they were bound by their own pleadings in which the claim was based on fraud and not on adverse possession. The appellants have reiterated the issue in the submissions before us.

14. In the judgment by the Judge, this is how the court went about the issue:-

“Though the plaintiffs did not specifically plead for a claim of the suit properties under the doctrine of adverse possession, the averment under paragraph 8 of the plaint leaves no doubt in the mind of this court that the plaintiffs are seeking a declaration that they have acquired the suit properties by way of adverse possession. In his testimony, the 1st plaintiff stated that he was born in the suit properties in the year 1964 where they have lived openly without interruption and permission from the defendants. ”

15. In the written submissions on behalf of the 1st respondent and on behalf of the 3rd and 5th respondents the issue of the plaint being based on fraud and a decision being based on adverse possession was raised. The parties blamed the Judge for deciding the case beyond the pleadings.



16. In one case of Galaxy Paints Company Limited -vs- Falcon Guards Limited, Civil Appeal No. 219 of 1998 it was stated that –

“Issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce on the issues arising from the pleadings or such issues as the parties have framed for the court’s determination.”

17. A claim of adverse possession must be specifically pleaded in a legal sense. This means that the party claiming adverse possession must clearly state in his pleadings that he is seeking ownership of the land based on the principle of adverse possession. In this case, it was not enough to simply state that the 1st and 2nd respondents were on the suit properties from 1975 to date. They needed to explicitly state that their possession was adverse, meaning that it was without the owner’s permission and with intent to claim ownership. Pleading adverse possession provides a clear notice to the opposite party that the claimant is asserting a right of ownership based on the specific legal doctrine of adverse possession. Such a plea will allow the opposite side a fair opportunity to respond to the claim and present their case. Ultimately, a proper pleading ensures fairness and due process.

18. In Amollo -vs- Okong’o & 2 Others, Civil Appeal No. 73 of 2019 [2023] KECA 789 (KLR)), this Court was dealing with an appeal in which the appellant was asking that although he did not plead adverse possession in his plaint, his plea could be inferred from the pleadings and during cross-examination in which he asserted that he and his family had stayed on the suit property for over 39 years. The Court reiterated that parties were bound by their pleadings, and that where a party seeks to rely on adverse possession he has to specifically plead the same.

19. In the instant case, the plaint was not based on adverse possession. In fact, when the 1st respondent testified before the trial court and was cross-examined, this is what he told the court:-

“I am claiming the suit land for having lived on the land for many years and have acquired the same by adverse possession. (Referred to the plaint). I have not sought for adverse possession in my plaint but my lawyer has sought for it.”

20. With the admission, we find that the Judge fell into grave error by deciding the suit on the basis of adverse possession when the suit was based on fraud.

21. The third issue on which the Judge was faulted was that, the 1st respondent informed the court in 2021 that the 2nd respondent had died in 2015. The appellants complained in the appeal that the Judge did not seek her substitution; and that by the time the court was allowing her claim on 3rd December 2021 the claim had long abated. We consider that the appellants raised this issue in their written submissions before the trial court, and submitted that the 2nd respondent’s claim had abated by operation of the law upon the expiry of 12 months from 2015. The Judge did not address the issue in the judgment. Once again, the appellants were entitled to a determination on the issue. We agree with the appellants that by the time of the judgment the claim by the 2nd respondent had long abated. The judgment delivered in her favour was a nullity.

22. The fourth ground relates to the fact that by the time Saban Said Gathuri was being sued in his personal name in 2009, he had died in 1983. The 3rd appellant and her sister raised this in a preliminary objection, and in her written submissions leading to the judgment, but the matter did not receive the attention of the court. They testified that they were not the legal representatives of the deceased’s estate, and that, over the estate, no grant had been issued.



23. Under section 82(1) of the *Law of Succession Act*, it is only personal or legal representatives who have 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 the death of his personal representative.”

Under section 3 of the Act, such personal representatives are the ones to whom a grant of letters of administration has been made.

24. The 1st and 2nd respondents illegally sued Saban Said Gathuri who was deceased. He had died in 1983. He was the registered owner of Kirinyaga/Gathigiriri/304. Being the registered owner, the cause of action survived him. His estate was entitled to be heard in the claim before a judgment was issued against him. His estate could only defend the claim through his personal representatives. We note that this issue was brought to the attention of the Judge by the 3rd appellant and her sister, but was inexplicably ignored. We find that the claim against Saban Said Gathuri was incompetent (See *Trouistik Union & Another -vs- Mrs. Jane Mbeyu & Another*, Civil Appeal No. NAI 269 of 1997).

25. The last issue that we shall consider is whether the 1st and 2nd respondents proved fraud against the appellants. To start with, the evidence of the 1st respondent was that his parents were allocated the suit properties by the 4th respondent in 1974. He was born in 1964, and therefore he was 10 years old. His parents are deceased. He did not produce any document to show the said allocation. When he was cross-examined, he stated that, he filed the suit on behalf of his parents who had been allocated the suit properties. First, he had not taken out letters of administration to be able to sue for the properties on behalf of his deceased parents. The suit would be incompetent for being filed by persons who had no locus standi. Secondly, if the 1st respondent did not witness the allocation, and had no documents to prove the same, it meant that he had not established his parents’ relationship with the suit properties. He had not established that they owned the properties. If they did not own the suit properties, how could it be said that the same had been fraudulently taken by the appellants?

26. Against the evidence of the 1st respondent, the evidence of the 1st and 2nd appellants was that Kirinyaga/Gathigiriri/303 was allocated to the 1st appellant on 20th June 1975; and that on 14th April 2005 he became the registered owner. On 16th September 2009 the 1st appellant gifted it to his son (the 2nd appellant). The appellants produced evidence of allocation and registration.

27. This Court in the case of *Vijay Morjaria -vs- Nansingh Madhusing Darbar & Another* [2000] eKLR stated as follows:-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently.

It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from facts.”

28. The burden of proof lies on the alleging party. In this case the 1st and 2nd respondents alleged fraud against the appellants. It was up to them to plead and particularise the fraud, and then call credible evidence upon which the court would make a finding that indeed there was fraud in the transaction leading to the registration of the suit properties in the names of the appellants (See *Moses Parantai and Peris Wanjiku Mukuru* (suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) -vs- Stephen Njoroge Macharia [2020] eKLR). Lastly, the burden of proof for fraud is



higher than that required in civil cases but lower than that required in criminal cases. In *Ndolo -vs- Ndolo* [2008] I KLR (G & F) 742, it was stated as follows:-

“Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases. ”

29. On the available evidence, we find that the 1st and 2nd appellants proved that they owned Kirinyaga/Gathigiriri/303, and that the claim by the 1st and 2nd respondents to the same was without basis. In other words, the claim by the 1st and 2nd respondents that the suit property had been fraudulently obtained from them had no factual and legal foundation.
30. The 2nd appellant asked that his counterclaim dated 19th July 2010 be allowed. We have found in the foregoing that the 1st and 2nd appellants proved that land parcel Kirinyaga/Gathigiriri/303 belonged to the 2nd appellant. This followed its transfer to him by the 1st appellant who had been allocated the same in 1975 by the 4th respondent. The 1st respondent testified that since 2009, the 1st and 2nd appellants had been claiming the suit property and had sought his eviction, and that of his family. Since then, they have had the 1st respondent arrested by police and charged variously for forcible detainer. On the recorded evidence, we conclude that the counterclaim was established. The suit property (Kirinyaga/Gathigiriri/303) belonged to the 2nd appellant, and he was entitled to its quiet possession and enjoyment.
31. In conclusion, therefore, we allow the appeal. The judgment dated 3rd March 2021 and the decree dated 29th July 2022 are hereby set aside. In their place, there shall be a judgment dismissing with costs the plaint dated 30th April 2009 by the 1st and 2nd respondents, and allowing with costs the counterclaim dated 19th July 2010 by the 2nd appellant.
32. Costs of the appeal shall be borne by the 1st respondent to the appellants.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF JULY, 2025

S. OLE KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

