



**Githae (Suing as the Personal Representative of the Estate of Simon Mwai Macharia) v Muriuki
(Civil Appeal E019 of 2021) [2025] KEELC 694 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 694 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
CIVIL APPEAL E019 OF 2021
JM MUTUNGI, J
FEBRUARY 20, 2025**

BETWEEN

**GRACE WANGECHI GITHAE APPELLANT
SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF SIMON
MWAI MACHARIA**

AND

MARY NYAWIRA MURIUKI RESPONDENT

*(Being an appeal from the Ruling of Hon. Cheruto C. Kipkorir (P.M),
in Kerugoya MELC E057 of 2021 delivered on 18th August, 2021)*

JUDGMENT

1. The Appellant, in this case, filed a claim against the Respondent in the Lower Court vide a Plaint dated 9th April 2021. She sought a declaration that Mwai Macharia's removal as the proprietor of land parcel number Mwerua/Kanyokora/1535 (suit land) was fraudulent and unlawful. Further, the Appellant sought an order to reinstate Mwai Macharia as the proprietor of a 1/2 share of the land parcel identified as Mwerua/Kanyokora/1535.
2. The Respondent filed a Preliminary Objection dated 22nd June 2021, arguing that the suit is time barred pursuant to Section 4(2) and Section 26 of the Limitation of Actions Act. The Respondent's contention was that since the claim was based on fraud, it should have been filed within three years from 2014 when the fraud was discovered or became known to the Appellant. The Respondent thus argued that the Lower Court lacked jurisdiction to hear the case as it was statutorily barred.
3. In a Ruling delivered on 18th August 2021, the Lower Court upheld the Preliminary Objection taken by the Respondent and struck out the Appellant's suit with costs.



4. The Appellant, dissatisfied and aggrieved by the Ruling, filed the instant Appeal and by the Memorandum of Appeal dated 16th September, 2021 raised the following grounds:-
 - a. The Learned Trial Magistrate totally erred in law and fact in the manner that she analysed the pleadings and made a finding that the Appellant's claim is not for recovery of land.
 - b. The Learned Trial Magistrate erred in law and fact in the manner that she made factual findings whereas a preliminary objection is purely a point of law.
 - c. The Learned Trial Magistrate erred in law and fact in considering documents that had not been produced as exhibits.
 - d. The Learned Trial Magistrate failed to critically analyse the case, applicable law, the Appellant's submissions and the authorities attached therein.
5. The Appellant sought the following;
 - a. This Appeal be allowed.
 - b. That the Ruling delivered on 18th August, 2021 be set aside.
 - c. The Court does issue such further orders and directions as it may deem fit in the interest of Justice.
6. The parties canvassed the Appeal by way of written submissions. The Appellant filed her submissions dated 7th August, 2024 while the Respondent had earlier filed hers dated 28th June 2024. The Appellant's primary contention was that the Learned Trial Magistrate erred when she held the Appellant's suit before the Lower Court was founded on fraud and consequently ought to have been commenced within three years from the date the fraud was committed and/or discovered by the Appellant. The Appellant's assertion in responding to the Preliminary Objection that the suit was statute barred was that her claim was for recovery of land after she discovered the same had been fraudulently transferred and/or transmitted to the Respondent following the removal of the deceased name (Mwai Macharia) whom the Appellant contended was registered in common in equal share with the Respondent.
7. The Respondent for her part submitted the Learned Trial Magistrate properly appraised the matter and reached the correct decision in upholding the preliminary objection that the suit was founded on fraud and therefore ought to have been brought within three years from the time the Appellant became aware of the fraud.
8. As is the norm this being a first Appeal, this Court as the Appellate Court has to reconsider and evaluate the evidence, the pleadings and the material that was before the Learned Trial Magistrate to determine whether the decision reached by the Lower Court was justified. This is in keeping with the principle enunciated by the Court of Appeal in the Case of *Selle & Another -vs- Associated Motor Boat Co & Others* (1968) EA 123 where the Court inter alia stated:-

“--- this Court is not bound necessarily to accept the findings of fact by the Court below.”

An appeal to this Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect---“.



9. The present Appeal arises from a Preliminary Objection take by the Respondent and the same turns on whether the cause of action was the alleged fraudulent dealing or was recovery of land that may have been fraudulently taken away from the estate of Mwai Macharia (deceased). If the cause of action was fraud and was tortious, then the suit ought to have been instituted within three (3) years from when the fraudulent action took place and/or three (3) years from when the alleged fraudulent action was discovered. Section 4(2) and Section 26 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya provide for both situations. If action is not brought within the three (3) years period, the action is considered to be statutorily barred and cannot be brought.
10. However if the action is one for the recovery of land, the period of Limitation is 12 years as provided under Section 7 of the *Limitation of Actions Act*, which provides as follows:-
7. 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.
11. The purpose of the Law of Limitation was stated in the case of *Mehta v Shah* [1965] E.A 321, as follows;
- “The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his 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.”
12. In the Case of *Gathoni v Kenya Co-operative Creameries Ltd* [1982] KLR 104, 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.”
13. In the suit in the Lower Court the Appellant pleaded under Paragraph 5 of the Plaintiff as follows:-
5. The estate of Muriuki Macharia alias Muriuki Macharia filed Kerugoya Succession Cause number 215 of 2010. After the completion of the Succession Cause, Mwai and the Defendant were registered as proprietors in common of land parcel number Mwerua/Kanyokora/1535.
14. The Appellant further under paragraph 6 of the Plaintiff pleaded that after the death of Mwai, the Respondent fraudulently caused the name of Simon Mwai Macharia to be removed as proprietor of ½ share of the suit land. Further under Paragraph 7 of the Plaintiff the Appellant stated her claim was for a declaration that the removal of the deceased as proprietor of ½ share of land parcel Mwerua/Kanyokora/1535 was fraudulent and unlawful and therefore sought an order restoring the deceased as proprietor of ½ share of the suit land. The Appellant prayed for Judgment as follows:-
- i) A declaration that the removal of Mwai Macharia as the proprietor of land parcel number Mwerua/Kanyokora/1535 was fraudulent and unlawful.
- ii) An order restoring Mwai Macharia as the proprietor of ½ share out of land parcel number Mwerua/Kanyokora/1535.
14. I have reviewed the record of appeal and note that the Respondent and the deceased (Mwai Macharia) were registered together (not clear whether jointly or in common in equal shares as owners of land parcel Mwerua/Kanyokora/1535 as per the abstract of title (green card) on 21st February 2013 and title



deed issued. As per the copy of the Ad Litem Grant issued to the Appellant on 8th February 2021 the deceased died on 7th February 2014. On 16th April, 2014 the Respondent registered the deceased death and on the same date had the deceased name removed from the title register and she was issued with a title deed denoting she was the sole and absolute owner of the suit property.

15. It is this removal of the deceased's name from the title of the suit land, the Appellant alleges was fraudulently effected as the suit land was held by the deceased and the Respondent jointly in equal shares and hence the interest of the deceased in the land could only be devolved through transmission. The Appellant in instituting the suit before the Lower Court was seeking to recover the interest of the deceased in the suit land that allegedly had fraudulently been devolved to the Respondent without being subjected to succession proceedings. The alleged fraudulent act leading to the transfer of the deceased interest in the suit land occurred in 2014 and that was when the cause of action to recover the land accrued. Of course the issue to be tried by the Trial Court, was whether the land was jointly held in undefined and undivided shares and/or whether it was held by the deceased and the Respondent in common in equal shares. I have to be cautious not to express my view on the issue as the issue stands to be determined by the Trial Court after taking the evidence of the parties, should the appeal be successful and the suit before the Lower has to proceed to be heard. However, it bears noting that Section 91 of the [Land Registration Act](#), 2012 makes provisions as to how co-tenancies and joint ownerships are to be construed and dealt with.
16. In my view a clear appraisal and consideration of the pleadings in this matter particularly having regard to the Appellant's plaint and the prayers thereon, ought to have led the Learned Trial Magistrate to find that the suit before her was infact a claim for recovery of land and that the incidence of the alleged fraud in 2014 was but the action that culminated in the change in the ownership status of the suit land. Oloa, J in the Case of Muchiri Mutero –vs- Patrick Muriuki Njeru & Others (2015) eKLR where like in the present matter a Preliminary Objection was raised on similar grounds that the suit was statute barred under Section 4(2) of the [Limitation of Actions Act](#). In dismissing the objection the Judge stated:-

“ The other limb of the Preliminary Objection is that the suit is statute barred since it is founded on fraud which is a tort and under Section 4(2) of the [Limitation of Actions Act](#), such an action cannot be brought after the end of three years. Therefore since the fraud was committed in 2003 when the original title No. Kabare/Kiritine/1763 was subdivided and registered in the names of the Defendants; it is the Defendants arguments that this became time barred in 2006.

That argument cannot be correct. Firstly, this suit is a claim for recovery of land from the Defendants and under Section 7 of the [Limitation of Actions Act](#), the Limitation period for such a claim is 12 years. The suit was filed in 2007 which is well within the time allowed by law.”
17. I have made a finding that the claim that confronted the Learned Trial Magistrate was indeed a claim for recovery of the ½ share of the suit property that the Appellant alleged was fraudulently transmitted to the Respondent. The fraud was supposedly perpetrated in 2014 and the Appellant filed the suit in 2021 well within the Limitation period since 12 years had not elapsed since the cause of action accrued. The Learned Trial Magistrate therefore fell in error in finding the suit was statute barred under the provisions of Section 4(2) of the [Limitation of Actions Act](#), Cap 22 Laws of Kenya.
18. The upshot is that the Appeal has merit and I allow the same. The Ruling by the Learned Trial Magistrate delivered on 18th August, 2021 is set aside and the suit is reinstated for hearing on merits before any other Magistrate other than Hon. Cheruto C. Kipkorir (PM).
19. The Appellant is awarded the costs of the Appeal.



JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 20TH DAY OF FEBRUARY 2025.

J. M. MUTUNGI

ELC - JUDGE

