



**Wandaka v Wamwiri (Environment and Land Appeal 26 of 2024)  
[2024] KEELC 13198 (KLR) (Environment and Land) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13198 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA  
ENVIRONMENT AND LAND  
ENVIRONMENT AND LAND APPEAL 26 OF 2024  
MC OUNDO, J  
NOVEMBER 14, 2024  
(FORMERLY NAKURU ELC APPEAL NO. 29 OF 2023)**

**BETWEEN**

**RAPHAEL K WANDAKA ..... APPELLANT**

**AND**

**JOSEPH N WAMWIRI ..... RESPONDENT**

*(Being an Appeal from the Judgement and/ or Decree of the Hon. Y. I. Khatambi,  
Principal Magistrate dated 13th October, 2023 in Naivasha ELC Case No. 92 of 2018)*

**JUDGMENT**

1. What is before me for determination on Appeal is a matter which was heard and determined by Hon. Y.I Khatambi, Principal Magistrate wherein upon considering the evidence of both parties, vide her Judgment dated 13<sup>th</sup> October, 2023, the learned Magistrate found that the Plaintiff had not proved his case on a balance of probabilities and proceeded to dismiss the same with costs.
2. The Appellant, being dissatisfied with the Judgment and Decree of the trial Magistrate has now filed the present Appeal based on the following grounds in his Memorandum of Appeal:
  - i. That the learned trial Magistrate erred both in law and in fact in that she failed to comprehend the Plaintiff's evidence both in Chief and on cross-examination (because at no one time did the Plaintiff state that he found Konoike Water Co. on the suit land but indicated that he took possession of the land, started cultivating thereon and was on the ground even as at the time of the hearing of the case) as a result of which she ended up dismissing the Appellant's case.
  - ii. That the learned trial Magistrate erred both in law and fact in that she failed to appreciate the evidence of PW2 (because at no time did the Chairman of Mukinye Farmers' Co-operative



Society indicate that he was aware that the Society at some point sold Ballots that were not paid for and in this case Ballot No. 043 to the Respondent which Ballot ought to have generated the title to the land to the rightful owner as was in the title which was in the name of the Respondent L.R Title No. Gilgil/Karunga Block 5/43 (Mukinye) hence arrived at the wrong decision of dismissing the Appellant's case.

- iii. That the learned trial Magistrate erred both in law and fact in that she misapprehended the Appellant's evidence because at no one time just as PW2 did the Appellant indicate that he was aware that Ballots including the one owned by Ngugi Gacheru that is to say Ballot No. 043 may have been sold to third parties and in this case the Respondent, even when there was no evidence at all that Mukinye Farmers' Co-operative Society had advertised for sale of Ballot No. 043.
  - iv. That the learned trial Magistrate erred both in law and fact in that she relied on the evidence produced by the Respondent (the alleged receipts of buying the land from Mukinye Farmers' Co-operative Society) which evidence was being disputed by the chairman (PW2) yet the Respondent did not call any witness from Mukinye Farmers' Co-operative Society to collaborate his evidence especially the hand written minutes allegedly by officials of the said Society dated 30<sup>th</sup> May, 1987 that could not even be authenticated.
  - v. That the learned trial Magistrate erred both in law and fact in that she appreciated that the Appellant was well within time to allege the fraud that may have been committed by the Respondent but failed to appreciate that indeed with the evidence of PW1 and PW2 the weight of the evidence by the Plaintiff viz-a-viz that by the sole Respondent who was not and has never been in actual physical possession of the land was more than sufficient on a balance of probabilities to have found in favour of the Appellant instead of dismissing his case.
3. The Appellant thus sought that the instant Appeal be allowed with costs and the judgement and/or Decree of the trial Magistrate dated 13<sup>th</sup> October 2023 be set aside and substituted by an order allowing the Appellant's case and granting the orders as had been sought before the trial court in the Plaint dated and filed on 19<sup>th</sup> September, 2013.
  4. The Appeal was admitted on 12<sup>th</sup> June, 2024 and directions issued for the same to be disposed of by way of written submissions wherein the Appellant submitted that pursuant to the evidence he had been adduced in court, he had arrived on the land after Konoike Water Company had finalized its project wherein he had immediately occupied the same, cultivated and had been planting maize to date, yet the trial learned Magistrate had found that the said Konoike Company had been on the ground and therefore the Appellant could not have occupied the land immediately.
  5. On Grounds 2 and 3, the Appellant submitted that the evidence by PW2 who was the chairman of Mukinye Farmers' Co-operative Society in the trial court had been that the society had sold some of the ballots whose owners had not paid up wherein such changes were to reflect in the official register. That however, at no one time had there been report of the buying of ballot No. 043 that had been owned by Ngugi Gacheru which ballot was the only one that could have generated title for L.R No. Gilgil/Karunga Block 5/43 (Mukinye) the suit land in the proceedings herein. That nonetheless, the trial court had misapprehended the said evidence in lines wherein she had held that;

“the witness confirmed that he was aware that the company had repossessed land belonging to the defaulters and the land was sold to 3<sup>rd</sup> parties. This position was reiterated by the defendant who confirmed that he purchased the land after repossession.



6. That the Respondent herein, having allegedly bought the said Ballot No. 043, he had not gone back to the office after obtaining the title to the suit land so that the ownership changes could be reflected in the register. That further, both Mukinye Farmers' Sacco Ltd and the County Registrar of Co-operative Offices were not aware that the Defendant/Respondent had either bought Ballot No.043 or that he had obtained a title deed to the suit land. That pursuant to a letter dated 2<sup>nd</sup> August, 2018 by the Office of County Government Nakuru, Department of Trade, Indoctrination, Co-operatives and Tourism, the Government of Kenya, their records reflected that Ballot No. 043 belonged to Ngugi Gacheru whereas Ballot No. 377 was owned by the Respondent.
7. In regard to ground 4 of his Memorandum, the Appellant's submission was that Mukinye Farmers' Co-operative Society always had officials who succeeded each other in perpetuity. That after the Respondent gave evidence that he had bought Ballot No. 043 after its owner had defaulted wherein he had been issued with receipts by Mukinye Farmers Sacco Ltd and therefore his title was valid, PW2, the Chairman of Mukinye Farmers' Sacco who was the custodian of the records of the Sacco, had disputed these allegations for which the Respondent had failed to call any official of the Sacco to collaborate this disputed evidence. That despite the alleged Sacco's record and Minutes, showing that ballot Nos. 043 and 377 belonged to the Respondent, having been hand written by the Respondent himself an therefore could not be authenticated, yet the learned trial Magistrate had placed much weight on the same while ignoring the evidence contained in the government records contrary to the provisions of Section 38 of the Evidence Act.
8. That there had been no evidence to collaborate the Respondent's evidence to the effect that he had been issued with the title to the suit land by the former treasurer of the Sacco.
9. In relation to ground 5 of his Memorandum the Appellant submitted that in light of the fact that the Respondent's evidence was not collaborated and unauthenticated, he (Appellant) had proved his case on a balance of probabilities. That in any event, the evidence by the Registrar of Co-operatives at Gilgil that had demonstrated that the owner of ballot No. 043 was Ngugi Gacheru had been enough proof of fraud. He placed reliance in the decided case of Fredrick Kiura Nyaga & 2 Others vs. Justino Njue M'mbuchi & 24 Others [2014] eKLR and sought that his Appeal be allowed with costs.
10. In response to the Appellant 's Appeal and in opposition thereto, the Respondent vide his written submissions dated 22<sup>nd</sup> July 2024, submitted that ground 1 of the Appellant 's Memorandum Appeal raised the issue of possession of the said suit parcel of land which was challenged. That whereas the Appellant claimed ownership of parcel of land No. Gilgil/Karunga Block 5/43 as a purchaser from one Monica Waithera Kariuki vide an Agreement dated 12<sup>th</sup> February 1998, in his evidence in Chief that he had bought plot Nos. 42 and 43 from Ngugi Gacheru was at variance with the Agreement to the effect that; the said Ngugi Gacheru was deceased at the time of the Sale Agreement, the letter dated 12<sup>th</sup> March 2012 that had been produced as Pf exh 5, showed that Monica Gacheru was the wife of Ngungi Gacheru's brother and lastly that at the time of the Agreement, the said Waithera Monica did not possess Letters of Administration in respect to the estate of Ngungi Gacheru.
11. That whilst the Appellant had claimed being in possession and ownership of the suit land pursuant to the said Agreement, on cross-examination he had admitted that a company known as Konoike NKKJU Water Project had been utilizing the suit land. He was unable to confirm when he had taken possession of the suit land and what had been on the ground at the time of hearing but had only alleged that he had planted maize therein without specifying when.
12. That the Respondent's evidence on the other hand had been to the effect that he had purchased the suit land from Mukinye Co-operative Society Ltd after the society had repossessed the same from the



- previous allottees who had failed to clear their outstanding dues. This evidence had been supported by production of receipts dated 12<sup>th</sup> February, 1988, minutes authorizing the repossession and subsequent issuance of a title to him on 4<sup>th</sup> January, 1991 by the officials of Mukinye Farmers' Co-operative Society Ltd.
13. Evidence had been to the effect that the Respondent had leased out the suit land to Konoike NKKJU Water Project, vide a lease dated 28<sup>th</sup> December 1989, who were in occupation of the suit land.
  14. The validity of the Agreement for Sale had been challenged for reasons that the vendor therein had neither been a member of Mukinye Farmers' Co-operative Society Ltd nor the administrator of the estate of Ngugi Gacheru (Deceased) to enable her enter into such an Agreement. He placed reliance in the decided case of Zacharia Wambugu Gathimu & Another v John Ndung'u Maina [2019] eKLR.
  15. His submission was therefore that the learned Magistrate had not erred in her finding that the Appellant had failed to prove purchase of the suit land to enable him lay any claim. Thus the issue of possession could not accrue to him on the ground of ownership.
  16. On grounds 2, 3 and 4 of the Memorandum of Appeal, the Respondent submitted that there had been sufficient evidence to confirm that he had bought the two suit properties being No. 43 and 377 from Mukinye Farmers' Co-operative Society Ltd wherein he had obtained a title deed to the same as herein above explained. That the learned Magistrate had therefore correctly found that the Appellant had failed to establish how he had acquired the suit land 10 years after the Respondent had acquired the title to the same.
  17. On ground 5 of the Memorandum of Appeal, the Respondent wondered whether the Appellant was entitled to enforce the right of ownership on behalf of the estate of Ngugi Gacheru (deceased), having argued the Respondent's ownership of the suit land was marred by fraud, the receipts at the Registrar of Co-operatives at Gilgil having confirmed that the suit land belonged to Ngugi Gacheru (deceased).
  18. He relied on the provisions of Section 26(1) of the *Land Registration Act* and the decided case of Kinyanjui Kamau v George Kamau [2015] eKLR to submit that the learned trial Magistrate in examining the issue of fraud as alleged by the Appellant did find that the said allegations had not been proved. That the process of ownership and occupation of the suit land by the Respondent had been consistent with the evidence on record, which evidence had not been controverted by the Appellant.
  19. That the Appellant having failed to dislodge the ownership of the suit land by the Respondent, the learned trial Magistrate had been right in dismissing the suit in its entirety and so should the court find.

#### **Determination.**

20. I have considered the record of Appeal, the holding by the trial Magistrate, the written submissions by learned Counsel and the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the decision Appealed against, assess it and make my own conclusions as was held in *Selle vs. Associated Motor Boat Co. Ltd.* [1968] EA 123.
21. According to the trial Court proceedings herein, the Appellant herein instituted a suit against the Respondent herein in Naivasha Chief Magistrate's Court ELC Case No. 92 of 2018 (Formerly Nakuru ELC Case No. 539 of 2013) vide a Plaint dated 19<sup>th</sup> September 2013 wherein he had sought for the following;
  - i. A declaration that the Plaintiff as the owner of plot No. 043 Mukinye Farmers' Co-operative Society Ltd (now L.R Title No. Gilgil/Karunga Block 5/43) is the rightful owner of the land.



- ii. This honorable court be pleased to issue an order of cancellation of the Title now in the name of the Defendant known as L.R Title No. Gilgil/Karunga Block 5/43 & a fresh title be issued to the Plaintiff by the lands office Naivasha.
  - iii. Cost of the suit against the Defendant.
  - iv. Any other/ such other/ reliefs as this honorable court may deem fit/ just to grant.
22. Subsequent to the filing of the suit, the Respondent filed his Defence dated 14<sup>th</sup> October, 2013 denying all the allegations contained in the Plaint and the particulars of fraud therein claimed wherein he had sought for the Appellant's suit to be dismissed with costs.
23. At the hearing of the case, on the 20<sup>th</sup> July 2023, the Appellant appearing as PW1 had adopted his witness statement as his evidence in Chief and produced the documents filed as Pf exh 1-7 wherein he proceeded to testify that the suit land was owned by Mukinye farmers limited and that he had bought the same from Ngugi Gacheru. That he had received a ballot for the land No. 042 and 043 but was in court in respect to land No.043.
24. His evidence was that Ngugi was now deceased and that he had married Waithera Monica who also died on 1<sup>st</sup> February 2017, after he had bought the land. He produced the burial permit as Pf exh 8.
25. That he had a sale agreement dated 12<sup>th</sup> February 1998 wherein he had paid Kshs. 95,000/= for plot No. 043. That he had gone to Mukinye farmers wherein the Chairman Alex Nganga Chege had prepared a letter at Page 11. That the said Chairman had also died in the year 2011. That he had begun tilling the land which measured 2<sup>1</sup>/<sub>2</sub> acres after the Chairman had showed him where land was and which land had been bare. That he had taken possession of land for 25 years. That the title deed had not been issued to him and when he went to the land registry at Naivasha, he had been informed that the same had been issued to Joseph Njuguna in year 2012 wherein he had placed a caution on the land. That as per document at page 12, he had lodged a report with Mukinye before the death of Chairman wherein he had been issued with a register from which had noted that deceased Ngugi was the owner. That the list of members was at page 14.
26. That the Defendant had a title deed wherein he claimed ownership of the land. That there had been no counter claim to evict him. He thus sought to be granted the orders in his Plaint and the title be registered in his name.
27. On cross examination, he had confirmed that he had a sale agreement between himself and deceased's wife. That the Land had been left in the care of Kariuki Gacheru who was already deceased during the purchase of the same. He confirmed that it had been one Waithera who had sold to him the land. He also conceded that he had no proof that Gacheru was deceased and that Monica did not show him any letters for administration.
28. He proceeded to state that the balloting had been for plot No. 042 and 043, and that the letter at page 9 of his list of documents was evidence that some items had been burnt save for the ballot which in the possession of is daughter.
29. That he had bought the land in 1998 and reiterated that he had gone to the offices of Mukinye prior wherein he had been shown the register. That he was not aware of the Defendant's title, but confirmed that he had placed the caution in the year 2012. That he had come to court in the year 2013, after he had learned of the Defendant's title in 2012, which was almost 15 years later.



30. His evidence was that all the receipts had burnt in Monica's house in 1992 and that he had not been aware that the plots had been sold off due to non-payment. That he had bought two plots wherein he had been issued with a title to plot No. 42 in the year 2013.
31. He confirmed that his name was not captured in the register for Mukinye but was adamant that the Defendant had obtained title fraudulently since he too was not in the Mukinye register.
32. He also confirmed that he had found Konoike Ranch/Water Project on land as they had just completed a project. That he lived on the land and had tilled and planted maize thereon in March. He denied the presence of the Defendant on the land.
33. In re-examination, he confirmed that page 9 of his list of documents had contained a Chief's letter indicating how the documents burnt and that he had placed a caution on the land claiming ownership interest before he decided to sue Defendant.
34. PW 2, Gabriel Getheru Mbugua also adopted his witness statement dated 10<sup>th</sup> August 2018 as his evidence in Chief and produced his list of documents as Pf exh 9 before proceeding to testify that he was a member and current Chairman of Mukinye. That Alexander Njenga was the previous Chairman who died in 2014. That the matter before the court was in relation to Gilgil Block 5/43.
35. That the list of members in the Register at page 7 of the 2<sup>nd</sup> bundle was available at the Co-operative office and lands office Naivasha and that the same was duly certified by Commissioner. He confirmed that ballot 043 belonged to the deceased Ngugi Gacheru while Joseph Waweru owned plot No. 377.
36. That at lands office, they had presented copy of ballot paper and a register. That the receipts held by the Defendant were for No. 377. That receipts would not show the plot unless one was a member. That members had ballot papers to demonstrate ownership.
37. That they only had one official register. That the register in court had been handwritten, while their register was typed. That the Register presented bore no stamp from Mukinye nor was it commissioned and further that the Defendant was expected to produce copy of ballot paper.
38. His evidence was that he did not know who was in occupation of the suit land, and that once the land was bought and the owner required to change ownership they had to present the original ballot and title deeds. He also stated that he had not been aware that the Defendant possessed a title deed.
39. In cross examination PW2 confirmed that he had been Chairman as from the year 2014, was a member of Mukinye as a trustee of his father's land upon having taken up Letters of Administration.
40. He confirmed not having seen Letters of Administration for Ngugi's land and that only the ballot and an agreement between Waithera and the Plaintiff had been presented. That Waithera was not a member and therefore he did not know how the land had been sold since he too had not been a member/official by then.
41. His evidence was that to change ownership, the ballot paper had to be presented to confirm registration which ought to be the same as the entry in the register. That the Plaintiff did not appear in his list of members in his register. That the Plaintiff was not a member since he lacked title. He confirmed that the Defendant was a member of society.
42. He also confirmed that in the year 1987 Mukinye had decided to sell off land belonging to members who had failed to pay up for the same. That he was aware that some members had been issued with titles.



43. In re-examination he confirmed that the register had changed when the titles and ballot papers had been presented and that the Defendant never went back.
44. The Plaintiff closed his case wherein the Defendant testified as DW1 to the effect that he lived in Olkalou, was a farmer and had been sued in relation to Block 5/43. He confirmed that he was not a member and that after some members had defaulted to pay the surveyor's fee, they had been notified and the land had been repossessed. That he had purchased his land on 2<sup>nd</sup> February 1988 being plot No. 043 and 377 after it had been repossessed wherein he had been issued with receipts.
45. That after the purchase of the two plots from Mukinye Farmers he had made full payment wherein he had also been directed to pay Ksh 2,000/= for the survey and title and had been issued with receipts. That the office followed up on title deed wherein he had been issued with 2 title deeds by the official, Joseph Kariuki Kibicho who was the Treasurer.
46. That he had subsequently leased the land to Konoike a water Company on 29<sup>th</sup> December 1989 at Ksh1,000/= per acre, via a lease agreement wherein they had put land in use. That they had been on the land from 29<sup>th</sup> December 1989 to 28<sup>th</sup> December 1991 wherein he had received a letter terminating the lease. That they had back filled the holes and left notice for No. 43.
47. His evidence was that the Plaintiff whom he referred to as Raphael, was not in occupation of land. That whereas he did not know Monica, she was not the owner of plots 42 and 43. That the land was vacant with no occupation, house or maize on the same. That apart from Raphael, he had not received any complaint from Ngugi Gacheru or Mukinye Farmers Limited.
48. His evidence was that he had documents to prove that his title was genuine. That there had been no complainant in regard to plot No. 377, and that he had become a member by virtue of the sale of land belonging to Defendant by Mukinye. He produced his documents as Df exh 1-8 per his filed list before stating that the title was issued in 1991. That the period from 1991 to 2013 was 22 years and therefore the Plaintiff's suit was not justified and should be dismissed.
49. In cross examination, the defendant confirmed that he was not an original member of Mukinye but had become one upon purchase of plot. That the letter of 1987 for a general meeting from Mukinye was handwritten with no stamp from Mukinye which was a company with officials.
50. That current chair of Mukinye had testified and spoken of a previous chair. That there had been no proof that the Chair in letter was alive. He confirmed that his register was handwritten and although he did not have the original register, his register had been extracted from original register. He also confirmed that he had been issued with receipts for block 43 and 377 which receipts did not specify the plot numbers.
51. He stated that his witness, the treasurer was deceased and that he did not see the need to call officials from Mukinye. He reiterated that Joseph Kibicho presented him with a title and that one need not utilize all land owned.
52. His response to re-examination was that Joseph Kibicho was treasurer of company by then. That the current Chair had confirmed that the defaulters' lands had been sold off. That the Minutes presented were for the meeting in the year 1987, whereas the receipts bore the name of Mukinye farmers, were stamped and showed the purchase of 2 plots in 1988. That he had received his list of members from the deceased treasurer Mr. Kariuki Kibicho.

The Defence then closed its case.



53. I have considered the Plaintiff's statement recorded on the 19<sup>th</sup> September 2013 in which he had stated that he had acquired the suit land being plot No. 043 at Mukinya Farmers' Co-operative Society Limited from Monica Waithira Kariuki who was the wife of Kariuki Gacheru (Deceased) the brother to Ngugi Gacheru (who was also deceased but without a family). That after the death of the said Ngugi, his properties including plot Nos. 042 and 043 had been inherited by his brother Kariuki Gacheru (deceased) whose wife Monica Waithira Kariuki had sold the suit land to the Plaintiff on or about the 12<sup>th</sup> February, 1998 at a purchase price of Kshs. 95,000/= . That he had thereafter started farming thereon and was farming to date a period of about 16 years without interruption while the Defendant had never been on the suit land. That it had been until on or about January 2013 that he heard a rumor that somebody had received the title to plot No. 043 and upon conducting a search, he learnt that the said title had been fraudulently issued to the Defendant as L.R Title No. Gilgil/Karunga Block 5/43 hence the institution of the instant suit and the prayers sought therein.
54. The Plaintiff relied on his list of documents herein filed on 19<sup>th</sup> September 2013 and a Further List of Documents filed on 10<sup>th</sup> August, 2018 which documents he produced as Pf Exh as follows;
- i. Original card of allotment issued to Ngugi Gacheru (Deceased) by Mukinye Farmers' Co-operative Society Ltd.
  - ii. National Identity Card of Monica Waithira Kariuki.
  - iii. Letter from Assistant Chief Kiboko Sub-location, Kwanzari location, Matungulu District-Machakos County.
  - iv. Sale Agreement for plots Nos. 042 and 043 dated 12<sup>th</sup> February, 1998.
  - v. Letters from chairman of Mukinye Farmers' Co-operative Society Ltd dated 12<sup>th</sup> March, 2013
  - vi. Search Certificate to LR. Title No. Gilgil/Karunga Block 5/43 and its receipt.
  - vii. Copy of register of plot owners of Mukinye Farmers' Co-operative Society.
  - viii. Burial Permit for the death and burial of Monica Waithira Kariuki.
  - ix. Mukinye Farmers' Co-operative Society Ltd members register from the Co-operative office and Lands Registrar Naivasha.
  - x. Mukinye Farmers' Co-operative Society members register as held by the Chairman.
55. I have also looked at the Defendant's witness statement recorded on the 14<sup>th</sup> October 2013, wherein he had stated that he had applied for shares at Mukinye Farmers' Co-operative Society Ltd in the year 1988 after a resolution by the members that interested parties be allowed to buy shares that had not been bought. That he had purchased 2 shares and paid a sum of Kshs. 16,000/= as well as the survey and transfer fees. That on 29<sup>th</sup> December, 1989, he had paid fees for his two title deeds being LR. No. Mukinye Farm Plot Nos. 043 and 377.
56. That thereafter, he had taken possession and use of his properties in the year 1989 when he had leased plot No. 5/43 to Konoike-NKK JU Company that was dealing with water. That the lease had been terminated on 10<sup>th</sup> January, 1992. That whereas he did not live on the suit land, he had at all material times been in possession and use of the same.
57. That the Plaintiff, Ngugi Gacheru, Kariuki Gacheru and Monica Waithira Kariuki from whom the Plaintiff purported to have purchased the suit land from were all strangers to him. That on unknown date in the year 2012, he had found a constructed hut on the suit land which he had later learnt that



- had been constructed by the Plaintiff without his consent or authority. That he had not committed any fraud as had been alleged by the Plaintiff since he had received his title deed in the year 1991 from Mukinye Farmers' Co-operative Society.
58. That subsequently, the present suit had been misdirected against him since neither the Plaintiff nor the other parties who purported to have sold the land to him had any documents of ownership.
59. In his evidence, the Defendant relied on his list of documents dated the 14<sup>th</sup> October, 2013 which he had produced as Df exh 1-8:
- i. Certificate of Title for Gilgil/Karunga Block 5/43
  - ii. Copies of Register of Mukinye Farmers' Co-operative Society Ltd.
  - iii. Receipts for payment from Mukinye Farmers' Co-operative Society.
  - iv. Minutes of Mukinye Farmers' Co-operative Society
  - v. Minutes of Mukenyi Farmers' Co-operative Society dated 30<sup>th</sup> May, 1987
  - vi. Lease Agreement with Konoike-NKKJU Company dated 28<sup>th</sup> December, 1989
  - vii. Termination of Lease with Konoike-NKKJU Company dated 10<sup>th</sup> January, 1992.
  - viii. Receipts of the Title from Department of lands
60. Having considered the evidence adduced before the trial court, the issue that come out clearly for determination is as follows;
- i. Whether the learned trial Magistrate erred in law and in fact in dismissing the Plaintiff's suit.
  - ii. Whether the Appellant's suit was time barred.
61. Before going into the merits of the appeal counsel for the Appellant must be reminded that order 42 Rule 2 (2) of the Civil Procedure Rules demands that a Memorandum of Appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. Counsel must therefore strive to make drafting of grounds of appeal an art, not an exercise in verbosity and repetition.
62. To begin with, it has not been contested that the suit parcel of land herein was the property of Mukenyi Farmers' Co-operative Society and that both the Plaintiff and the Defendant herein were not members.
63. It is further not contested that ballot No 043 and which is the subject suit herein belonged to the deceased one Ngugi Gacheru as per the Copy of register of plot owners of Mukinye Farmers' Co-operative Society herein produced as Pf exh 7.
64. Further that vide a special general meeting of 30<sup>th</sup> May, 1987 herein produced as Df exh 5, it had been resolved that since some members of the society had not paid money for the survey, their respective plots of land would be sold to other members so as to raise the fee for survey.
65. It is trite law that a claim to land may only be maintained pursuant to its lawful registration in the land Register. With this in mind, and the fact that it is not contested that by that time Ngugi Gacheru passed away, he only had only balloted for the suit land but the land had not been registered to his name as it's proprietor, it cannot therefor be said that he was the registered proprietor of the same or that his estate had a good title to pass as ballots are only allotment documents which have to be cleared to facilitate processing of title in the name of the allottee.



66. That said and done, the Plaintiff's case is hinged on a sale agreement dated 12<sup>th</sup> February 1998 for plot No. 043, which sale agreement had been between him and one Monica Waithera Kariuki for the purchase of the suit land wherein he had paid Kshs. 95,000/=. Monica Gacheru according to a letter dated 12<sup>th</sup> March 2013 herein produced as Pf exh 5 was the wife of Ngugi Gacheru's brother. At the time of the agreement, Ngugi Gacheru was deceased and there had been no evidence adduced to the effect that the said Monica Gacheru had obtained Letters of Administration to his estate. In effect therefore, she was not his personal representative in line with the provisions of Section 3 of the [Law of succession Act](#) which defines a personal representative to include the executor or administrator, as the case may be, of a deceased person and therefore could deal with deceased's estate. It therefore goes without saying that Monica Gacheru not having been vested with either letters of administration or title to the suit property, she therefore had no good title to pass to the Appellant herein. If I am wrong then I would move to the next issue for determination.
67. Pursuant to the execution of the impugned sale agreement of 12<sup>th</sup> February 1998 the Appellant filed suit against the Respondent via a plaint dated 19<sup>th</sup> September 2013, the provisions of Section 4(1) (e) of the [Limitation of Actions Act](#), dictate that the limitation period for an action to enforce a land sale contract is six years. Under Section 7 of the [Limitation of Actions Act](#), the limitation period for an action to recover land is twelve years.
68. Section 4(1) (e) of the [Limitation of Actions Act](#) provides as follows;
- Actions of contract and tort and certain other actions
- (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
- (a) actions founded on contract;
- (b) actions to enforce a recognizance;
- (c) actions to enforce an award;
- (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
- (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.
69. The terms of the contract herein lapsed 6 years after the cause of action wherein the Appellant neither sought leave nor made an Application for extension of Limitation periods and therefore the claim is incompetent.
70. Further, Section 7 of the [Limitation of Actions Act](#) 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
71. Section 7 of the [Limitation of Actions Act](#), provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued.



72. The Court of Appeal in the case of Attorney General & another v Andrew Maina Githinji & Another [2016] eKLR held that,
- “A cause of action is an act on the part of the defendant, which gives the Plaintiff his cause of complaint.”
73. That definition was given by Pearson J. in the case of Drummond Jackson vs Britain Medical Association (1970) 2 WLR 688 at pg 616. In an earlier case, Read vs Brown (1889), 22 QBD 128, Lord Esher, M.R. had defined it as:
- “Every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the judgement of the court.”
74. A cause of action is a set of facts to justify a right to sue. What then in this case are the sets of facts that the Appellant used to justify his rights to sue/cause of action? His justification is based on an agreement dated 12<sup>th</sup> February 1998 for sale of land to which the limitation period lapsed on 12<sup>th</sup> February 2010. Essentially therefore, the Appellant’s suit having been filed on 19<sup>th</sup> September 2013, was filed out of the twelve year period after the execution of the agreement. Quite clearly the Appellant’s claim is for the recovery of land from the Respondent after a period of about fifteen (15) years having lapsed since the year 1998 when the impugned agreement was executed.
75. The Court of Appeal in Mukuru Munge vs. Florence Shingi Mwawana & 2 others [2016] eKLR held that:
- “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.”
76. The Appellant needed to commence his claim within the time prescribed under Section 7 of the *Limitation of Actions Act*. It follows therefore that by the time he filed this suit, the claim was already statute barred.
77. In the case of Bosire Ongero vs Royal Media Services [2015] eKLR the court had held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.
78. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1 where Justice Nyarangi of the Court of Appeal had held as follows;
- ‘I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for



a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

79. The Supreme Court in *Ibren v Judges and Magistrates Vetting Board & 2 others* (Petition 19 of 2018) [2018] KESC 75 (KLR) (21 December 2018) (Judgment) held as follows

“A jurisdictional issue is fundamental and can even be raised by the court suo motu, as was persuasively and aptly stated by Odunga J in *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in *Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B”* [2008] 1 EA 367 stated thus:.

What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...”

80. Clearly, the Appellant’s suit was a non-starter. The court upholds the finding of the trial Magistrate’s court with the effect that this Appeal is dismissed with costs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 14<sup>TH</sup> DAY OF NOVEMBER 2024.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

