



REPUBLIC OF KENYA



**Muchina v Christopher (Environment and Land Appeal E13 of 2022)  
[2024] KEELC 7386 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7386 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL E13 OF 2022**

**JM MUTUNGI, J**

**NOVEMBER 7, 2024**

**BETWEEN**

**JULIUS MURIUKI MUCHINA ..... APPELLANT**

**AND**

**JAMES KARANO CHRISTOPHER ..... RESPONDENT**

*(An Appeal arising from the Ruling of Honourable Magistrate. G. W. Kirugumi – Principal Magistrate delivered on 11th May, 2022 in Kerugoya CMCELC No. E53 of 2021 in the Chief Magistrate’s Court at Kerugoya)*

**JUDGMENT**

1. This Appeal arises from the Ruling delivered by Hon. Grace W. Kirugumi (PM) on 11<sup>th</sup> May, 2022 in Kerugoya CMELC Case No. E53 of 2021 on a Preliminary Objection raised by the Respondent (Defendant in the Lower Court), that the suit was statute barred on account of Section 4 and 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya. The Appellant who was the Plaintiff before the Lower Court was aggrieved and dissatisfied with the Ruling and has Appealed to this Court.
2. Briefly the Appellant before the subordinate Court vide the Plaint dated 16<sup>th</sup> March, 2021 pleaded that during the year 2002 he entered into an agreement of sale with the Respondent for the purchase of a portion of One (1) Acre out of land parcel No. Mutira/Kathare/221. However, before the subdivision could be undertaken and the transfer of the resultant portion effected to the Appellant, the Respondent’s father and siblings placed a caution on the title which frustrated the transaction. Both the Appellant and Respondent filed suits in Embu High Court being Embu HCCC No. 81 of 2012 and HCCC No. 63 of 2003 (consolidated and heard as Embu ELC No. 104 of 2017) seeking the eviction of the Defendants and removal of the cautions they had registered. The Defendants in the Embu case pleaded a Counterclaim that the Appellant was registered to hold the suit land in trust for himself and themselves. In a Judgment delivered by Angima, J on 27<sup>th</sup> September, 2018 the Appellant’s



and Respondent's claims were dismissed and the Judge declared that the Respondent held the suit land in trust for himself and his siblings in equal shares of 1.52 Acres each.

3. In the suit before the Lower Court the Appellant prayed for Judgment against respondent for:-
  - a. A declaration that the Plaintiff had acquired one acre out of the portion of land owned by the Defendant on land parcel No. Mutira/Kathare/221 by way of adverse possession and/or in the alternative the Defendant be ordered to refund the purchase price of Kshs 200,000/- plus interest at the rate of 35% per annum from the date of the agreement until payment in full.
  - b. Costs of the suit and interest.
4. The preliminary Objection taken by the Respondent before the Lower Court was on the following grounds:-
  1. That the entire suit and the notice be struck out with costs for want of compliance with provision of Sections 4 of the Limitation Actions Act Cap 22 Laws of Kenya.
  2. That the entire suit and the notice be struck out with costs for want of compliance with provision of Sections 7 of the Limitation Actions Act Cap 22 Laws of Kenya.
5. The Learned Trial Magistrate in her Ruling held that to the extent the Appellant's claim was predicated on the sale contract entered into in 2002 it was time barred as the Limitation period of Six years under Section 4 of the Limitations of Actions Act, had lapsed. As regards the claim under adverse possession the Learned Trial Magistrate held that the Appellants had instituted a suit for recovery of land in 2003 where Judgment in the matter was delivered by the Embu ELC Court in 2018.
6. The Appellant set out the following grounds of Appeal vide his Memorandum of Appeal:-
  1. That the Learned Magistrate erred in Law and fact in analysing issues of facts while making a determination that the suit was barred by the provision of Section 7 of the Limitations of Actions Act relating to suits on recovery of land.
  2. That the Learned Magistrate erred in Law and fact in disregarding that the Appellant had also sought an alternative prayer for refund of Kshs 200,000/- plus interest at the rate of 35% from the date of agreement.
  3. That the Learned Magistrate erred in Law and fact by failing to analyse why the Appellant's alternative claim for refund of Kshs 200,000/- plus interest at the rate of 35% offends Section 4 of the Limitations of Actions Act on the actions relating to contracts.
  4. That the Learned Magistrate erred in Law and fact by making a determination on the issue of adverse possession without hearing any evidence on the same.
  5. That the Learned Magistrate erred in Law and fact in disregarding the Appellant's submissions when making its determination.
  6. That the Learned Magistrate erred in Law and fact by misapplying the principles governing a Preliminary Objection by upholding the Preliminary Objection raised by the Respondent and striking out the Appellant's suit.
  7. That the Learned Magistrate erred in Law and fact in disregarding the Appellant's submissions when making its determination.



7. The Appellant prayed that the appeal be allowed and the order striking out the Appellant's suit be set aside and substituted with an order dismissing the Respondent's Preliminary Objection; and reinstating the suit for hearing and determination on merits.
8. This Court in keeping with the principle established in the Case of *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* (1968) EA 123 has an obligation on appeal to evaluate and reconsider the evidence tendered before the Lower Court to satisfy itself whether the decision reached by the Lower Court was justified or not justified. The Court can make its own findings and reach its own conclusions after re-evaluating the evidence, the facts and the Law.
9. The Learned Trial Magistrate in determining the Preliminary Objection held that the claim offended both Section 4 and 7 of the Limitations of Actions Act.

Section 4(1)(a) and 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya provide as follows:-

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(1)

(a) 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;

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.
10. The Ruling of the Learned Trial Magistrate was brief and did not elaborate how the suit offended the said provisions save that the Learned Magistrate observed the contract that the Appellant was basing his suit on was entered into in the year 2002. The Judge in the consolidated suit before the Embu Court made a finding on the Appellant's claim. The Court held that the Appellant was not a bonafide purchaser for value of the portion of one acre as he failed to do the requisite due diligence which would have revealed the Respondent held the land in trust and therefore would not have been available for sale. Paragraph 28 and 29 of the Judgment in the Embu case were as follows:-
    28. The only question for determination was whether such purchase was bona fide and without notice of the Defendant's interest or claim over the suit property. During cross-examination by the Defendants' Advocate, the 2<sup>nd</sup> Plaintiff conceded that the Defendants were in occupation of the suit property at the time of purchase. He stated that he did not inquire from them why they were in occupation. It was also his evidence that the 1<sup>st</sup> Plaintiff did not explain to him the basis for the Defendants' occupation. He was not bothered with those details because the particular portion he was interested in was not occupied.
    29. The Court is of the opinion that although the 2<sup>nd</sup> Plaintiff was a purchaser for value, he was not a bona fide purchaser without notice of the Defendants' interest in the suit property. He was aware of their occupation but he did not make any inquiries at all on the basis of their occupation despite having had an opportunity to do so. It may be concluded that the 2<sup>nd</sup> Plaintiff simply shut his eyes to the obvious when he had an opportunity to know more. The Court, therefore, holds that he was not a bona fide purchaser without notice.
  10. The Court effectively determined the Appellant's transaction with the Respondent was not enforceable as the sale was subject to the trust that the Respondent held the land. It follows therefore



the Respondent could not have validly dealt with the land such that he could have transferred any interest over the land to the Appellant. Neither the Appellant nor the Respondent appealed against the Judgment in the Embu case and as such the Judgment constituted a final determination of the rights and interest of the Appellant and the Respondent in the land the subject of the suit.

11. In the suit before the Lower Court the Appellant was laying claim to a portion of one acre which he claimed to have purchased from the Respondent from Land parcel Mutira/Kathare/221. The sale agreement was entered into on 20<sup>th</sup> November 2002. This is the agreement that the ELC Court at Embu invalidated on the basis that Respondent was a trustee and could not transact in regard to the suit property. In the alternative the Appellant prayed that he be awarded the one acre portion by virtue of being in adverse possession or be refunded the purchase price of Kshs 200,000/- together with interest at 35% as was provided in the agreement of sale.
12. The Appellant pleaded the sale agreement under Paragraph 3 of the Plea and without any doubt the suit before the Lower Court was founded on the sale agreement entered into in 2002. The claim for adverse possession in the face of the decision in the Embu ELC Case No. 104 of 2017 would be unsustainable.
13. In the Embu case the Defendants had sought orders that the Respondent held the suit land in trust for them. The court indeed found the Defendants were residing and were in occupation of the suit property and had effected developments thereon. As the Defendants were contesting ownership and the Court agreed with them, adverse possession could not arise.
14. The Appellant's claim to the extent that it was founded on the contract of sale entered into in 2002 was statute barred. Further the Appellant and the Respondent having been parties in Embu ELC Case No. 104 of 2017 were privy to the fact that the Court had decreed that the 1<sup>st</sup> Plaintiff (Respondent herein) held the suit land in trust for the Defendants who were not joined as parties in the suit before the Lower Court or in this appeal. The suit before the Lower Court was unsustainable as clearly it offended the provisions of Section 4(1)(a) of the *Limitation of Actions Act*. The payment of the purchase price was made pursuant to the agreement of sale executed on 20<sup>th</sup> November, 2002. The provision for refund of purchase price together with interest at 35% in the event of default was provided under clause (e) of the agreement. The Appellant's suit in the Lower Court essentially was seeking the enforcement of the contract of sale which unfortunately had been caught up by Limitation. The Court lacks the jurisdiction to entertain suits that are statute barred and the suit before the Lower Court was such a suit.
16. The Learned Trial Magistrate rightly upheld the Preliminary Objection and struck out the Appellants suit. The appeal lacks merit and is dismissed with costs to the Respondent.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 7<sup>TH</sup> DAY OF NOVEMBER 2024.**

**J. M. MUTUNGI**

**ELC - JUDGE**

