



**Kariuki v Mburu & another (Environment and Land Appeal E024 of 2023)
[2024] KEELC 13965 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13965 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E024 OF 2023
LN GACHERU, J
DECEMBER 19, 2024**

BETWEEN

PETER NDUNGU KARIUKI APPELLANT

AND

CHARLES MWANGI MBURU 1ST RESPONDENT

PAUL WAIHAKA MBURU 2ND RESPONDENT

(Being an Appeal from the Ruling of Honorable M.E. Analo (Senior Resident Magistrate), in the Chief Magistrate's Court at Murang'a delivered on 1st day of November 2023 in E.L.C Misc. suit No. E005 of 2023)

JUDGMENT

1. The Appellant herein, Peter Ndung'u Kariuki, vide a Memorandum of Appeal dated 20th November 2023, appealed against the Ruling of Hon. M.E Analo(SRM), which was delivered on 1st November 2023, and sought for these orders.
 - a. This appeal be allowed and the Appellant be granted leave to file suit out of time.
 - b. That the costs of this appeal be provided for.
2. The Appellant filed this Appeal in his capacity as the administrator of the estate of the Estate of Primus Oloo Abwayo, the registered proprietor of land parcel number L.R Makuyu Karia-ini Block 3/19 (the suit property) pursuant to Letters of Administration dated 11th February 2019, appearing on page 12 of the Record of appeal.
3. The Appellant's Application was filed before the trial Court on 26th April, 2023 in Misc. Application No. E005 of 2023 (The Chief Magistrate's Court at MURANG'A), wherein he sought for leave to file his claim out of time. The said Application was disallowed by the trial Court through a Ruling



delivered on 1st November, 2023. In the said Application, the Appellant disclosed to the trial Court that he had filed MURANGA CM ELC 246/2013, in 2013, which was dismissed by way of Preliminary Objection for having been filed out of time, and that the said suit was not determined on merit.

4. The Appeal is premised on the following eleven (11) grounds:

1. That the trial Court erred in law and in fact in finding that the Appellant did not satisfy the threshold for the grant of the Orders sought in his Application dated 26th April, 2023.
2. That the trial Court erred in law and in fact by failing to peruse and consider the Draft Plaint annexed in the Applicant's Application hence disregarding the issue of fraud which can only be determined through the evidence adduced at the trial.
3. That the trial Court erred in law and in fact by disregarding the Appellant's annexures that demonstrate that on 8th July, 2009 despite there being a restriction in place, the Respondents and/or their fathers acquired the suit property through fraud with the aid of persons from the Land Registry, Murang'a.
4. That the trial Court erred in law and in fact by the Appellant that whereas the Respondent's father James Mburu Mwangi was in possession of a copy of Title Deed dated 2nd February, 1990, the certificate of Official search done on 6th September 2006 showed that land parcel number L.R Makuyu Karia-ini Block 3/19 was registered in the name of the Government of Kenya and the family of the late PRIMUS OLOO laid claim to the aforesaid land parcel on the basis of certificate of Official search dated 6th September 2006 whereupon they were requested by the Land Registrar, Murang'a to present a letter from Marema Farm Cooperative Society attesting that Primus Oloo was the true owner of the same.
5. That the trial Court erred in law and in fact by overlooking the Appellant's assertion that on 17th November, 2006 an official letter was sent to the Land Registrar, Muranga by Marema Farm Cooperative Society stating that Primus Oloo Abwayo is the registered proprietor of land parcel number L.R Makuyu Karia-ini Block 3/19. Subsequently, the name of Primus Oloo Abwayo was entered in the official records as the owner of land parcel number L.R Makuyu Karia-ini Block 3/19.
6. That the trial Court erred in law and in fact by disregarding the Appellant's assertions that the alleged sale agreements, letters and receipts relied upon by the Respondents were forgeries and the Appellant is in possession of witness testimony from Marema Farm Cooperative Society attesting to the aforesaid forgeries.
7. That the trial Court erred in law and in fact by failing to appreciate the Appellant's right to ownership of land as envisioned by Article 40 of *the Constitution* of Kenya.
8. That the trial Court erred in law and in fact by failing to appreciate the Overriding Objective of Sections 1A, 1B & 3A of the *Civil procedure Act* & Article 159 (2) (d) of *the Constitution* to the effect that justice shall be administered without undue regard to procedural technicalities.
9. That the trial Court erred in law and in fact by disregarding that the suit in question being Murang'a CM ELC 246/2023 Peter Ndungu Kariuki (Suing as the Administrator of the Estate of Primus Oloo Abwayo) V Charles Mwangi Mburu & Another was dismissed on a preliminary objection, therefore the Appellant is entitled upon application to enlargement of time so that his claim can be determined on the merits.



10. That the trial Court erred in law and in fact by failing to appreciate that disputes ought to be determined on the merits and lapses should not act as a bar preventing litigants from vindicating their rights.
 11. That the trial Court erred in law and in fact by failing to consider and/or misdirecting himself on recent case-law on the same subject-matter, particularly, the holding in *Dina Management Limited vs County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR).
4. After this appeal was admitted under the provisions of Section 79B, of the *Civil Procedure Act*, the court directed that the same be dispensed by way of written submissions, which directions were duly adhered to.

The Appellant's Submissions

5. The Appellant filed his written submissions dated 1st August 2024, through the Law Firm of Clement Kathangu & Co Advocates, and submitted that the trial Court erroneously misapprehended the claim before it in its Ruling dated 1st November 2023, wherein it ruled that the Appellant's Application dated 26th April 2023, was rendered res judicata on account of the decision delivered in CMCC ELC No. 246 of 2013.
6. Relying on the provisions of Section 7 of the *Civil Procedure Act*, the Appellant submitted that for a suit to be rendered res judicata, there must have been a former suit in respect of the same subject-matter, which was not the case with regard to the Appellant's Application dated 26th April 2023, being the first time that the Appellant was seeking for enlargement of time.
7. He also submitted that the subject-matter in CMCC ELC No. 246 of 2013, concerned substantive Orders as opposed to the subject-matter in Misc. Application No. E005 of 2023 (The Chief Magistrate's Court at MURANG'A), wherein, the Appellant was merely seeking for enlargement of time.
8. Further, that for a suit to be rendered res judicata, the issues for determination must have been heard and finally decided by the Court which was not the case herein, because the Appellant's Application filed in CMCC ELC No. 246 of 2013, was dismissed at preliminary stage.
9. Reliance was placed in the holding of the Court in the cases of *John Florence Maritime Services Ltd & Another Vs Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR; *Athman & 3 others Vs Art 680 Limited & 2 Others* (ELC Civil Suit no. E021 OF 2023) [2024] KEELC 217 (KLR) (30 January 2024) (Ruling). Further reliance was sought in the provisions of Articles 2(5) and (6) of *the Constitution*.
10. Citing the Supreme Court's reasoning in the case of *Nicholas Kiptoo Salat Vs IEBC & 7 others* (2014) eKLR, the Appellant submitted that the trial Court in its Ruling dated 1st November 2023, failed to evaluate the merits of the Appellant's Application dated 26th April 2023.
11. On the question of what amounts to excusable delay, reliance was placed in the case of *Njoroge vs Kimani* (Civil Application Nairobi No. E049 OF 2022) KECA 1188 (KLR) (28 October 2022) (Ruling). Further reliance was also placed in the provisions of Article 159 (2) (d) and (e) of *the Constitution* of Kenya and Sections 1A, 1B and 3A of the *Civil Procedure Act*.
12. The Appellant also relied on the following cases; *Langat & Another V Muchai* (Civil Appeal No. 73 of 2020) [2022] KEHC 3117 (KLR) (5 May 2022) (Judgment); *Nkorui V Meru South Farmers*



Cooperative Society Ltd (Misc. Appl. No. e007 of 2023) [2024] KEELRC 781 (KLR) (12 April 2024) (Ruling); David Kiptanui Yego & 134 Others V Benjamin Rono & 3 others [2021] eKLR; and, Wachira Karani V Bildad Wachira [2016] eKLR.

The Respondents' Submissions

13. The Respondents filed their written submissions dated 22nd August, 2024 through the Law Firm of Bikundo & Associates Advocates, and Two (2) issues were identified for determination by the Court;
 - i). Whether the Appellant's grounds of appeal are properly drawn and in compliance with the law.
 - ii). Did the trial Court err in law and in fact by disallowing the Appellant's application for leave to file suit out of time?
14. The Respondent submitted that the grounds upon which the instant appeal is anchored offend the provisions of Order 42 Rule 1 of the Civil Procedure Rules, which requires brevity in terms of the crafting of grounds of appeal.
15. For this submission, reliance was placed in the decision of the Court in the cases of Robinson Kiplagat Tuwei vs Kipchoge Limo Langat [2020] eKLR; Abdi Ali Dere vs Firoz Hussein Tundal & 2 others [2013] eKLR; Kenya Ports Authority vs Threways Shipping Services (K0 Ltd [2019] eKLR.
16. The Respondent argued that in his submissions, the Appellant abandoned his grounds of appeal and brought up the issue of res judicata anew. Reliance was placed in the holding of the Court in the case of Daniel Otieno Migore vs South Nyanza Sugar Co. Ltd [2018] eKLR, to buttress the submission that parties are bound by their pleadings. Further, that submissions cannot take the place of evidence as was held in the case of Daniel Toroitich Arap Moi V Mwangi Stephen Murithi & Another [2014] eKLR.
17. Further, that the trial Court's decision dated 1st November 2023, was sound and based on a correct reading of the law because the suit land was first registered in the name of JAMES MBURU MWANGI (deceased) on 2nd February 1990, which title was transmitted to the Respondent through Succession by virtue of being sons to the registered proprietor.
18. That the Appellant took more than 33 years to challenge the title held by the Respondents, and that pursuant to the provisions of Section 27 of the *Limitation of Actions Act*, a cause of action relating to land is rendered moot if not pursued within 12 years since it first arose. The Respondent relied on the following cases: Mary Osundwa V Nzoia Sugar Co. Ltd; William Onditi Odhiambo vs Gateway Insurance Co. Ltd; Mehata V Shah [1965] EA 321; Gathoni vs Kenya Cooperative Creameries Ltd [1982] KLR 104; and, Mtana Lewa V Kahindi Ngala Mwangandi (2015) eKLR.
19. The Respondent argued that the Appellant's suit could not benefit from the provisions of Section 26 of the *Limitation of Actions Act* pertaining to the period of discovery of fraud because the Respondents acquired ownership over the suit property in year 1990, during which time the Appellant's father Primus Oloo Abwayo was alive, and did not challenge the occupation of the property by the Respondents' father.
20. Further, that the father to the Respondents died in year 2004, having occupied the suit property for 14 years, while the Appellant brought his suit through Originating Summons in year 2013.
21. This court has considered the Memo of Appeal, the Record of Appeal, and the rival written submissions, and finds the issues for determination are; -
 - I. Whether the appeal is merited.
 - II. Who shall bear the costs of the appeal



i). whether the Appeal herein is merited.

22. The trial Court while dismissing the Appellant’s Application dated 26th April, 2023 reasoned as follows:

“Upon perusal of the attached decree in CM.ELC No. 246 of 2013, the same is between the same parties as those illustrated in the attached plaint to the instant suit, and the same is in regard to the same parcel of land. Similarly, I noted that vide the said suit, a ruling was delivered by my sister Hon. Ochanda on 11th April, 2023 whereof the same was addressing the issue of limitation of time whereof the court noted that the suit was time barred.”

23. From the foregoing, it is clear that the trial Court appreciated that the question of enlargement of time was raised by the Appellant through an Application filed in CMCC ELC No. 246 of 2013, and dismissed by the Court.

24. The doctrine of res judicata is set out in Section 7 of the Civil Procedure Act in the following terms:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

25. In the case of Mulu Mbuvi vs Carolyn K Mumbo & Co Advocates [2020] eKLR, the Court understood the doctrine of res judicata as follows:

“It is apparent that the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and that the same were determined on merit by a Court of competent jurisdiction.”

26. The Court has perused the decision of the Court (Hon. Ochanda) delivered in CMCC ELC No. 246 of 2013, allowing the Defendants (now Respondents) Notice of Preliminary Objection as against the Appellant’s suit seeking leave to file suit out of time, and appearing on pages 26, 27 and 28 of the record, whereby, the Court reasoned as follows:

“When a suit is time-barred, parties ought to seek leave to file suit out of time...The land in question in this instant case was transmitted through a sale agreement which falls under the law of contract. The limitation of action for such a cause of action is 6 years. The said limitation applies to the cause of action being presented before the Court and not any other forum. The fraud alleged was discovered in 2006. Time began to run then. Of course, the Plaintiff has explained events that prevented him from coming to Court sooner. As much [as] the issues raised are weighty, they do not trample the provisions that a party ought to seek leave before filing suit out of time. As a result, the preliminary objection succeeds.”

27. From the above holding of the court, it is evident that the Appellant had not sought leave to file suit out of time with respect to CMCC ELC No. 246 of 2013, and as a result, the Court upheld the Respondents’ Preliminary Objection.



28. In the case of Kabutia & another vs Karimi (Suing as the guardian and next friend of Morine Gatwiri) (Civil Appeal E024 & E025 of 2022 (Consolidated)) [2022] KEHC 10690 (KLR) (30 June 2022) (Ruling), the Court ruled as follows:

“Accordingly, for the reason set out above, and in line with the policy of the court not to drive a litigant from the seat of judgment without a hearing, this court will thus exercise its discretion and reinstate the appeal.”

29. This Court is satisfied that the trial Court in its Ruling dated 1st November 2023, failed to appreciate that in CMCC ELC No. 246 of 2013, the court did not entertain or adjudicate on any prayer for the enlargement of time by the Appellant. Therefore, it is the finding and holding of this Court that, the trial Court was not correct in holding that the Appellant’s application seeking leave to file suit out of time was rendered res judicata on account of the decision issued by Hon. Ochanda in CMCC ELC No. 246 of 2013.

30. On the question of the Appellant’s grounds lacking brevity as submitted by the Respondents, the Court upon perusal of the said grounds of appeal finds the argument and submissions advanced thereon to be devoid of merit, and is accordingly disregarded.

31. Accordingly, this Court finds and holds that the Appeal herein is merited, and the same is allowed in terms of prayer number (a) in the Appellant’s Memorandum of Appeal dated 20th November 2023. The Ruling of the trial court dated 1st November 2023, is hereby upset/ and or set aside, and the Appeal herein is allowed, in terms of prayer No.(a) of the said Memo of Appeal

32. On the issue of costs, the court finds that costs to abide the outcome of the suit.

Appeal is allowed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 19TH DAY OF DECEMBER 2024.

L. GACHERU

JUDGE

19/12/2024

Delivered online in the presence of:

Joel Njonjo – Court Assistant

Mr Mutwa H/B for Mr Kathangu for the Appellant.

Mr Ongeru for the Respondent

L. GACHERU

JUDGE

19/12/2024

