



Muchui & 4 others ((Sued as the personal representative of the Estate of Muriuki Tarichia (Deceased)) v Chokera ((Suing as the legal representative of the Estate of Gakangi Chokera Gakuaya (Deceased)) (Environment and Land Appeal E015 of 2022) [2023] KEELC 15705 (KLR) (22 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15705 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E015 OF 2022
CK YANO, J
FEBRUARY 22, 2023**

BETWEEN

**DOUGLAS MUCHUI (SUED AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF MURIUKI TARICHIA (DECEASED)) 1ST APPELLANT
PENINA KIMAIYO (SUED AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF MURIUKI TARICHIA (DECEASED)) 2ND APPELLANT
DISTRICT LAND ADJUDICATION OFFICER TIGANIA 3RD APPELLANT
LAND REGISTRAR TIGANIA WEST DISTRICT 4TH APPELLANT
OFFICE OF THE ATTORNEY GENERAL 5TH APPELLANT
(SUED AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF MURIUKI TARICHIA (DECEASED))**

AND

**FELIX MUGAMBI CHOKERA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GAKANGI CHOKERA GAKUAYA (DECEASED)) RESPONDENT
(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GAKANGI CHOKERA GAKUAYA (DECEASED))**

JUDGMENT

Introduction

1. Vide a plaint dated November 5, 2021 the respondent sued the appellants seeking for a permanent and perpetual injunction, a declaration that the respondent is the legal and rightful owner of the



property Land Parcel Title No Kianjai/Kianjai/7112 measuring 0.75 acres, an order for cancellation and revocation of the title deed of plot No Kianjai/Kianjai/1926 issued to the 1st appellant and rectification of the cadastral map and acreage record and issue the respondent with a new title deed reflecting the true acreage of 0.75 acres, an order compelling the 4th appellants the land registrar to issue the respondent with a corrected title deed in respect of parcel No Kianjai/Kianjai/7112 as well as general damages for trespass.

2. The respondent pleaded that he was the legal representative of the estate of Gakangi Chokera Gakuaya (deceased). That the deceased bought parcel No Kianjai/Kianjai/7112, measuring 0.75 acres from one Muriuki Tarichia who is the deceased father of the 1st appellant. That however, the 3rd appellant refused to reflect the proper acreage of the land on the title deed despite the fact that the adjudication record showed the proper acreage. It was the respondent's contention that the 1st and 2nd appellants have illegally and irregularly taken possession of the land to the detriment of the respondent.
3. In their joint statement of defence dated December 2, 2021, the 1st and 2nd appellants who were sued as personal representatives of the estate of Muriuki Tarichia (deceased) stated that the lawful owner of the suit a land is Muriuki Tarichia. They added that they weren't aware of any fraud or irregularity and that they own the land.
4. From the record, it appears that the 3rd, 4th and 5th appellants never entered appearance nor filed defence.
5. After the hearing the learned trial magistrate held that the respondent had proved his claim on a balance of probabilities and entered judgment accordingly. However, general damages was not granted since the court found that the same was not proved.
6. Being dissatisfied with the judgment and decree of the trial court, the 1st and 2nd appellants preferred this appeal vide the memorandum of appeal dated March 15, 2022 on the following grounds.-
 1. The learned trial magistrate erred in law and in fact in enforcing an alleged oral agreement to sell and that is expressly void ab initio and incapable of being given effect by dint of Section 3 of the Law Contract Act Cap 23 Laws of Kenya
 2. The learned trial magistrate erred in law and in fact in entertaining a suit based on an alleged oral agreement for sale of land when it was obviously statute barred by dint of the Limitation of Actions Act.
 3. The learned trial magistrate erred in law and in fact in that even after finding for a fact that the 1st and 2nd appellants did not have capacity to sue he nevertheless held that they had the capacity to be sued.
 4. The learned trial Magistrate erred in law and in fact in ordering a title deed that is not registered in the 1st and 2nd appellant's names to be cancelled and revoked.
 5. The learned trial magistrate erred in law and in fact in arriving to a conclusion that Land Parcel No Kianjai/Kianjai/7112 resulted from the subdivision of land parcel No Kianjai/Kianjai/1926 when no evidence to that effect was presented before court.
 6. The learned trial magistrate erred in law and in fact by ordering the commencement of hearing of the main suit even before a judgment in default of appearance and or defence had been entered against the 3rd, 4th and 5th defendants thereby making the impugned judgment an irregular one.
 7. The judgment of the learned trial magistrate was against the weight of the law and evidence.



7. The appellants pray for orders that the judgment and decree of the lower court to be set aside in its entirety and the same be substituted with an order of dismissal and to be awarded costs both in this appeal and in the subordinate court.
8. The appeal was canvassed by way of written submissions. The 1st and 2nd appellants filed their submissions on October 6, 2022, through the firm of Mwenda Mwarania, Akwalu & Co. Advocates while the respondent filed his on November 16, 2022 through the firm of Mutura Mwenda & Company Advocates.

The 1st & 2nd Appellants' Submissions

9. In their submissions, the 1st and 2nd appellants argued grounds 1 and 2 together and grounds 3, 4 and 5 separately. They abandoned grounds 6 and 7. They submitted that the learned trial magistrate erred in relying on Civil Case No 571 of 2015 *Mamta Peeush Mahajan (suing on behalf of the estate of the late Peeush Premla Mahajan) Vs Yashwant Kumari Mahajan (sued personally and as executrix of the estate and beneficiary of the estate of the late Krishau Lal Mahajan)* [2017] eKLR for the proposition that it is not uncommon and not illegal to find that not all agreements are in writing and holding that the oral agreement for sale of land was valid while the said case involved the sale of shares in a company.
10. Learned counsel for the 1st and 2nd appellants cited the provisions of Section 3 (3) of the *Law Contract Act*, cap 23 Laws of Kenya, and submitted that the alleged oral agreement for sale of land entered into in 2005 is a nullity and void ab initio and was incapable of being given effect as it was not in writing as required under the said section. Counsel for the 1st and 2nd appellants relied on the case of *Daudi Ledama Morintat vs Mary Christine Kiarie & 2 others* [2017] eKLR in which Mutungi J. struck out a plaint which was seeking to effectuate a contract on a disposition of an interest in land because the agreement was not in writing.
11. It was further submitted that the claim was time barred and offended Section 4 (1) (a) of the *Limitation of Actions*, since the suit in the lower court was filed in the year 2021 about 16 years from the year 2005 when the agreement is alleged to have been entered. The section provides that actions founded on contract may not be brought after the end of 6 years from the date on which the cause of action accrued and faulted the trial magistrate for having entertained the suit from inception.
12. Learned counsel for the 1st and 2nd appellants, submitted that the trial court acknowledged that the 1st and 2nd appellants herein had no Letters of Administration to be filed on behalf of the deceased vendor, and therefore did not have capacity to be sued. They cited the provisions of Section 3 (1) and 79 of the *Law of Succession Act* Cap 160 Laws of Kenya and relied on the case of *Trouistik Union International & another v Mrs Jane Mbeyu & another* [1997] eKLR and submitted that the trial court ought to have refused to entertain the suit that was before him.
13. The 1st and 2nd appellants further submitted that the trial court made orders against a deceased person and who was not before court and therefore erred. That by doing so, the trial court was being asked to contravene the provisions of Section 45 of the Law of Succession Act which prohibits intermeddling with the property of a deceased person.
14. It is the 1st and 2nd appellants submissions that there was no evidence produced by the respondent to prove the assertion that Land parcel No Kianjai/Kianjai/7112 originated from parcel No 1926 and referred to the letter by the Tigania West Sub County Land and Settlement Officer dated January 12, 2022 in the supplementary record of appeal. For those reasons, the 1st and 2nd appellants urged the court to allow the appeal as prayed.



The Respondent's Submissions

15. In his submissions in response to grounds 1 and 2 of the appeal the respondent urged the court to find those grounds of appeal as untenable and a misapprehension of the dispute at hand as the lower court was not urged to inquire as to the authenticity of the sale agreement the same having taken place as between the vendor and the purchaser during their lifetime. The respondent submitted that the parties' intention having been effectuated during their lifetime upon the transfer, occupation, possession and use is clearly discernable and therefore the respondent should be allowed to peaceably live in his property.
16. In response to grounds 3 and 4 of the appeal, the respondent posits that the 1st and 2nd appellants at all material times have been in occupation, use and possession of parcel No Kianjai/Kianjai/1926 which is registered in the name of Muriuki Tarichia (deceased) and that the dispute arose when the 1st and 2nd appellants started encroaching into and laying claim on the respondent's adjacent land. That whereas it is true that the land in question is registered in the name of the deceased, it was not the estate of the deceased that was on trial, but rather the encroachers. That the 1st and 2nd appellants were sued accordingly to stop them from encroaching and trespassing onto respondent's land. It was argued that to that extent, the question of intermeddling with the estate of the deceased estate does not arise. It was further argued that the rectification of error or mistake on the face of records of title cannot be restricted by the death of a party, adding that both the Land Registrar and the courts are empowered pursuant to Section 79 and 80 of the [Land Registration Act, 2012](#). The respondent's counsel therefore submitted that the question of capacity to be sued on the part of the 1st and 2nd appellants in the circumstances does not arise, adding that a title deed that is riddled with mistake, omission or fraud can be cancelled by the court on a finding of the same. The respondent's counsel relied on the case of *Mary Ruguru Njoroge Vs John Samuel Gathuma Mbugu* [2014] eKLR and [Rachel Nyambura Muraya vs Margaret Waitthera Njibia](#) [2015] eKLR.
17. In response to grounds 5 of the appeal, the respondent reiterated that parcel No Kianjai/Kianjai/7112 was hived from parcel No Kianjai/Kianjai 1926 as per the land records and the letter at page 6 of the supplementary record of appeal was never part of the record at the lower court and should be expunged from the record of appeal. That Order 45 Rule 27 on production of additional evidence in appellate court does not entitle parties to produce additional evidence whether oral or documentary in the court to which the appeal is preferred without leave. It is the respondent's submission that the adjudication records as submitted at the lower court were never controverted by the appellants at all nor did the appellants furnish the lower court with the true root of the account in respect to parcel No Kianjai/Kianjai/1926. The respondent therefore urged that the decision of the lower court be upheld and the appeal to be dismissed with costs.

Analysis And Determination

18. I have perused and considered the record of appeal, the grounds of appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusions reached by the learned magistrate were justified on the basis of the evidence presented and the law.
19. The issues for determination in this appeal as I can deduce from the grounds of appeal are-;
 - i. Whether the 1st and 2nd appellants had the capacity to be sued on behalf of the deceased vendor.
 - ii. Whether there was any enforceable contract between the respondent's deceased father and the deceased vendor.



- iii. Whether the suit was statute barred.
- iv. Whether the decision of the learned trial magistrate was against the weight of evidence

Whether the 1st and 2nd appellants had the capacity to be sued on behalf of the deceased vendor.

20. In the plaint dated 5th November, 2021 the respondent pleaded that the 1st and 2nd appellants, herein were sued as the personal representative of the estate of Muriuki Tarichia (deceased). The 1st and 2nd appellants are the son and widow of the late Muriuki Tarichia (deceased) The respondent's claim was that his late father Gakangi Chokera Gakuaya (deceased) bought land parcel No Kianjai/Kianjai/7112 measuring 0.75 acres from the late Muriuki Tarichia (deceased), but the 3rd appellant refused to reflect the proper acreage of the land on the title deed and that the 1st and 2nd appellants have illegally and irregularly taken possession of the said land to the detriment of the respondent. Among the prayers sought by the respondent and which was granted by the trial court in the impugned judgment was an order directing that the title deed issued to the 1st appellant on parcel No Kianjai/Kianjai/1926 be cancelled and revoked, rectification of the cadastral map and acreage record and the respondent to be issued with a new title reflecting the said acreage of 0.75 acres.
21. In their statement of defence, the 1st and 2nd appellants pleaded inter alia, that the respondent's suit was bad in law, totally defective and an abuse of the court process and were to apply for the same to be struck out. The 1st and 2nd appellants have submitted that they could not be sued on behalf of the deceased vendor since they have not been issued with Letters of Administration of the estate of Muriuki Tarichia (deceased) and had no capacity to be sued. I have also perused the proceedings. During the hearing before the subordinate court, the learned trial magistrate recorded that the 1st appellant said that he had not done succession for their father's land.
22. To constitute and prosecute (and also to defend) an action in respect of a deceased person, a litigant is clothed with locus upon obtaining a Limited Grant or a full grant of Letters of Administration. In the case of *Otieno vs Ougo & another* (1986- 1989) EALR 468, the court of appeal rendered itself thus
- “... an administrator is not entitled to bring any action as administrator before he has taken out Letters of Administration. If he does, the action is incompetent as of the date of inception...”
23. The court further stated to state that:
- “To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no *locus standi* means he cannot be heard, even on whether or not he has a case worth listening to...”
24. The Court of Appeal in the case of *Alfred Njau & 5 others vs City Council of Nairobi* [1983] eKLR defined *locus standi* as follows;
- “The term *locus standi* means a right to appear in court, and conversely as is stated in Jowitt's Dictionary of English Law, to say that a person has no *locus standi* means that he has no right to appear or be heard in such a proceedings,”



25. In *Julian Adoyo Ongunga & another vs Francis Kiberenge Bondera (suing as the administrator of the Estate of Fanuel Evans Amudavi, (deceased))* [2016] eKLR the court held that:
- “Simply put, a party without *locus standi* in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. *locus standi* relates mainly to the legal capacity of a party. The impact of a party in a suit without *locus standi* can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth noting that the issue of *locus standi* becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”
26. In the case of *John Makokha Mukenya vs Roselyn Mayaku Shiundu* [2018] eKLR, the court held that the defendant who had not taken out a grant of Letters of Administration in respect of the estate of the registered owner of the suit property lacked the *locus standi* to be sued.
27. In this case, the respondent’s suit in the lower court was instituted against the 1st and 2nd appellants who had not taken out Letters of Administration in respect of the estate of Muriuki Tarichia (deceased) and therefore had no *locus standi* to be sued. Even in this appeal the respondent appreciates the said legal position when he filed a notice of preliminary objection dated October 11, 2022 objecting to the appeal on the ground that the 1st and 2nd appellants have no *locus standi* since they have no Letters of Administration to sue on behalf of the estate of the late Muriuki Tarichia.
28. I have also perused the record herein. The trial court clearly stated that “the evidence on record shows that the plaintiff has a Grant of Letters of Administration Ad Litem that enables him to sue on behalf of his father. None of the defendants however have Letters of Administration to sue on behalf of the deceased vendor”. Having confirmed that the vendor was deceased and that the 1st and 2nd appellants had not been issued with Letters of Administration in respect of the estate of the deceased vendor the late Muriuki Tarichia, the trial court, in my view, should have also found that the respondent’s suit against the 1st and 2nd appellants was a non- starter.
29. It is trite law that only persons holding Letters of Administration have the *locus standi* or legal capacity to represent the estate of a deceased person. Accordingly, the capacity and/ or *locus standi* of the 1st and 2nd appellants to defend the proceedings as pleaded in the plaint had not been established. In the absence of *locus standi* the action herein was incompetent as against the 1st and 2nd appellants and the trial court ought to have refused to entertain the suit that was before him.

Whether there was any enforceable contract between the parties**

30. The provisions of Section 3 (3) of the *Law Contract Act* is very clear that;
- “no suit shall be brought upon a contract for the disposition of an interest on land unless the contract upon which the suit is founded is in writing and is signed by all the parties thereto and their signatures attested by a witness”.
31. It is not in dispute that the claim by the respondent was based on an alleged oral agreement for sale of land. With the admission that there was no agreement that was in writing, the respondent’s suit as presented could not be sustained. The respondent was no doubt seeking to effectuate a contract that clearly did not comply with the provisions of Section 3 (3) of the *Law Contract Act* . Therefore, on this ground also, the appeal must succeed.



Whether the claim was statute barred**

32. Again, I have perused the record of appeal. The respondent states *inter alia* that

“the late Gakaugi Chokera Gakuaya (deceased) during his life time, laid claim over the suit property from the late Muriuki Tarichia (deceased) in 2005”.

If that be the case, it is clear that the cause of action related to a contract entered into in the year 2005. The suit in the lower court was filed in November, 2021 which was about 16 years from the year the agreement is alleged to have been entered into.

33. Section 4 (1) (a) of the *Limitation of Actions Act* provides that “actions founded on contracts may not be brought after the end of 6 years from the date on which the cause of action accrued. Further, the limitation period in regard to an action to recover land under Section 7 of the Law of Limitations Act is twelve years. Section 7 of the said Act provides as follows-;

“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, it first accrued to some person through whom he claims to that person.”

34. In this case, the respondent’s case was that the late Gakangi Chokera Gakuaya (deceased) bought the suit property from the late Muriuki Tarichia (deceased) in the year 2005. Essentially therefore the cause of action arose in the year 2005 when the alleged agreement was entered into between the two deceased persons. Under the provisions of Section 7 of the Law of Limitation Act, an action for the recovery of the land could not be brought after the year 2017 because that is the year when twelve years expired. The respondent instituted the suit in the subordinate court in November, 2021 which was after a period of about 16 years from the date the cause of action accrued.

35. For the above reasons, I find and hold that the learned trial magistrate misdirected himself by allowing a claim which was not only statute barred and unenforceable, but also in which the 1st and 2nd appellants had no *locus standi* to defend the claim against Muriuki Tarichia (deceased.)

36. In the final result, I find that the appeal herein has merit. I allow the appeal and make the following orders-;

- a. The appeal is allowed.
- b. The judgment of the lower court is set aside and substituted with an order dismissing the suit.
- c. I award costs of the appeal and of the suit in the trial court to the 1st and 2nd appellants.

37. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 22ND DAY OF FEBRUARY, 2023.

IN PRESENCE OF:

C.A Kibagendi

Akwalu for appellants

Mutura Mwenda for respondent

C.K YANO

ELC JUDGE

