



REPUBLIC OF KENYA



KENYA LAW
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Silas & another v Machwanda & another (Environment and Land Appeal E001 of 2023) [2025] KEELC 225 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEELC 225 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

**DO OHUNGO, J
JANUARY 30, 2025**

BETWEEN

LYDIA NAMUSIA SILAS 1ST APPELLANT

JANE NJERI NJENGA 2ND APPELLANT

AND

THOMAS LUTTA MACHWANDA 1ST RESPONDENT

BENEAH CHIMELANI NYAPOLA 2ND RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate's Court at Kakamega (Hon. H. Wandere, Senior Principal Magistrate) delivered on 11th February 2022 in Kakamega MCELC No. E056 of 2020)

JUDGMENT

1. Litigation leading to this appeal started in the Subordinate Court on 23rd November 2020, when the Respondents filed Plaintiff dated 18th November 2020, against the Appellants. The initial Plaintiff was later replaced with Amended Plaintiff dated 28th July 2021.
2. The Respondents averred in the Amended Plaintiff that the Appellants were the administrators of the estate of Ramadhan Kweyu Amulabu (deceased) who was the registered proprietor of land parcel number E. Wanga/Isongo/385 (the suit property). That the First Respondent purchased 3 acres of the suit property from the deceased through sale agreement dated 22nd August 1996 and later acquired a further one acre of the suit property through a consent dated 16th June 1999 in Kakamega High Court Civil Appeal No. 68 of 1995. That subsequently, the First Respondent disposed of the entire four acres to the Second Respondent.
3. The Respondents further averred that they took possession of and used their respective portions of the suit property since 1996, and that constructive trust was thereby created in their favour in respect of the



three acres that were purchased. The Respondents therefore sought judgment against the Appellants as follows:

- a. A declaration that the plaintiffs jointly and severally are entitled to 4 acres of land comprised in land parcel no. E Wanga/Isongo/385 by operation of law - one acre through court proceedings and the 3 acres through a constructive trust by virtue of having taken vacant possession thereof upon purchase.
 - b. The defendants do transfer four (4) acres of land comprised in title no. E. Wanga/Isongo/385 and in default the executive officer of this court to execute the necessary documents to effect the transfer.
 - c. That any other order this court may deem just and expedient to grant.
 - d. Costs and interest.
4. The Appellants filed a statement of Defence in which they averred that the Subordinate Court did not have jurisdiction in view of the provisions of Section 7 of the *Civil Procedure Act*, Section 2 (1) of the *Law of Succession Act* and Section 7 of the *Limitation of Actions Act*. They denied the Respondents' other averments and stated that any sale of the suit property by the deceased was null and void. They urged the Subordinate Court to dismiss the suit with costs.
5. Upon hearing the suit, the Subordinate Court (Hon. H. Wandere, Senior Principal Magistrate) delivered judgment on 11th February 2022 as follows:

I therefore find that indeed the Plaintiffs have proved their case that a constructive trust has developed in their favour and I thus enter judgment for the Plaintiffs on a balance of probabilities.

6. It will be noted that the Learned Magistrate did not specify any final reliefs.
7. Dissatisfied with the outcome, the Appellants filed this appeal on 1st February 2023, through Memorandum of Appeal dated 30th January 2023. Earlier, they obtained enlargement of time to file the appeal, vide ELC Misc. No. E011 of 2022 (Kakamega), on 17th January 2023. The Appellants prayed that the judgment be set aside.
8. The following are the grounds of the appeal, as listed on the face of the Memorandum of Appeal:
1. That the learned trial Magistrate failed in law and fact to acknowledge the fact that the 2nd Respondent participated in succession cause no. 302 of 2002 at Kakamega High Court hence the suit before the trial court was res judicata against the 2nd Respondent.
 2. That the learned trial Magistrate failed to appreciate the law that at the time of filing the suit in the subordinate court the suit land was still registered in the names of a deceased person hence it was governed by the *Law of succession Act* under section 2(1) not the *Land Registration Act* No. 3 of 2012 or the *Land Act* No. 6 of 2012 as was applied by the trial Magistrate.
 3. That the learned trial Magistrate failed to appreciate the fact and law that the agreement entered into between the 2nd Respondent and deceased Ramadhan Kweyu (who was the proprietor of the suit land) was null and void for failure to obtain land board consent of the relevant are as provided under section 6(1) of the Land Control Board Act.
 4. That the learned trial Magistrate failed to appreciate the fact and law that the agreement entered into between the 1st Respondent and second Respondent was null and void as no consent from



the local land control board was obtained and further the 1st Respondent had no title to pass to the second Respondent.

5. That the learned trial Magistrate erred in law and fact in granting the part of the estate or suit land to the Respondents when the alleged deceased Saleh Amulavu had no title to transfer to the Respondents further the deceased Saleh Amulavu at the time of filing the suit at the subordinate court his estate was unrepresented.
6. That the learned trial Magistrate failed to appreciate the fact and law that at the time the suit was filed on 23/11/2020 before the trial court by the 1st Respondent 21 years had already lapsed from the date, he made his final agreement with the alleged vendor on 16/06/1997 therefore the suit was statutory barred under the law of Limitations of Actions.
7. That the learned trial Magistrate failed to appreciate the fact that the 2nd Respondent's rights flowed from the 1st Respondent and where the 1st Respondent's rights were inhibited by law then the 2nd Respondents had no rights and further there was no privity of contract between the Appellants' predecessors with the 2nd Respondent.
8. That the learned trial Magistrate failed to appreciate the law that the 1st appellant could not enter into any agreement for sale of land to the 2nd Respondent without first having the land of a deceased person confirmed as provided under section 82(b)(ii) of the [law of succession act](#).
9. The appeal was canvassed through written submissions. The Appellants argued that the suit was res judicata since the Second Respondent participated in Succession Cause No. 302 of 2002 where he sought four acres of the suit property. That, consequently, the suit violated Section 7 of the [Civil Procedure Act](#). They went on to argue that the documents presented before the Subordinate Court showed that the registered proprietor of the suit property was the deceased and that in the circumstances the suit property is still governed by Section 2 (1) of the [Law of Succession Act](#) and not the [Land Registration Act](#).
10. The Appellants also argued, in regard to grounds 3 and 4 of the appeal, that the First Respondent did not produce any document from the Land Control Board to validate his transaction with the deceased and that in the circumstances, the sale transaction was in breach of Section 6 (1) of the [Land Control Act](#) and void. They also argued that the transaction between the Respondents was void since the First Respondent had no title to pass to the Second Respondent.
11. On ground 5 of the appeal, the Appellants argued that the alleged land sale transaction between Saleh Amulavu and the Respondents was a nullity since Saleh Amulavu lacked capacity to pass title to the Respondents and that from the time the suit was filed in the Subordinate Court until its conclusion, the estate of Saleh Amulavu did not have a personal representative.
12. Regarding grounds 6 to 8 of the appeal, the Appellants argued that the sale agreements were executed between 4th January 1997 and 16th June 1999 while the suit was filed on 23rd November 2020. That the cause of action arose between 16th June 1999 and 16th June 2011 and that the Respondents filed the suit after their rights had been extinguished pursuant to Section 7 of the [Limitation of Actions Act](#). They further argued that the First Respondent did not have any title to pass to the Second Respondent and that in the circumstances, the Second Respondent has no right to claim against the Appellants since his transaction with the First Respondent was void. They also contended that the First Appellant lacked any capacity to enter into any land sale agreement without any confirmation of grant in respect of the deceased's estate as required by Section 82 (b) (ii) of the [Law of Succession Act](#). They therefore urged the Court to set aside the judgment of the Subordinate Court.



13. In reply, the Respondents filed submissions dated 3rd June 2023. They conceded that the Second Respondent participated in Succession Cause No. 302 of 2002 where he was listed as a liability in the deceased's estate. They cited the judgment in the said succession cause where the trial Judge stated that the succession Court did not have jurisdiction to determine title to land and argued that there was no final determination on the merits and res judicata was in those circumstances. They relied on the case of *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR in support of those arguments.
14. In response to the Appellants' contention, under ground 2 of the appeal, that the suit property was governed by the *Law of succession Act* as opposed to the *Land Registration Act* and the *Land Act*, the Respondents argued that the *Law of succession Act* does not deal with registration of title to land and that at the time of filing of the suit, the High Court had earlier on 31st October 2019 held in its judgment that the Appellants were administrators of the deceased's estate. That since the claim concerned title to land, the Court had jurisdiction pursuant to Article 162(2) (b) of *the Constitution*.
15. With regard to grounds 3 and 4 of the appeal, the Respondents relied on the case of *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* [2014] eKLR and argued that although they acknowledged that they did not have consent of the Land Control Board, absence of the consent did not vitiate the sale by the deceased. That having used the suit property with the consent of the deceased and the Appellants, a constructive trust was created in their favour.
16. In response to ground 6 of the appeal, the Respondents argued that the suit was not barred under Section 7 of *Limitation of Actions Act* since they were merely enforcing a land sale transaction. Lastly, they argued that the Appellants had filed an application for review of the judgment and that the said application was pending alongside this appeal. That in view of Section 80 of the *Civil Procedure Act*, party cannot pursue both review and an appeal against the same judgment and that in the circumstances, the Appellants had lost their right of appeal. The Respondents concluded by urging this Court to dismiss the appeal with costs.
17. This being a first appeal, this court has an obligation to re-consider and re-evaluate the pleadings and the material on record and to determine whether the conclusions reached by the Learned Magistrate are to stand or not and to give reasons either way. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 and *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
18. I have considered the grounds of appeal, the pleadings, the evidence and the parties' submissions. The issues that arise for determination are whether the Subordinate Court had jurisdiction, whether constructive trust was established and whether the reliefs sought were available.
19. The question of jurisdiction is in two parts: whether the claim was barred under Section 7 of the *Limitation of Actions Act* and if not, whether it was res judicata. As has been regularly restated by the courts, jurisdiction is the very life and soul of any judicial proceedings. Without jurisdiction, the proceedings come to a certain end and the court cannot take any further step. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR. Although the Appellants raised the issue of limitation in both their defence and final submissions, the Learned Magistrate did not address the issue in the judgment.



20. 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.

21. The Respondents filed the suit in the Subordinate Court on 23rd November 2020. Their cause of action, as disclosed in Amended Plaint dated 28th July 2021, was a claim for recovery of four acres of land parcel number E. Wanga/Isongo/385 (the suit property). A perusal of the Amended Plaint reveals that the cause of action arose on 22nd August 1996 when the First Respondent contends that he purchased three acres of the suit property from the deceased and on 16th June 1999 when he claims he acquired a further one acre of the suit property through a consent. Pursuant to Section 7 of the *Limitation of Actions Act*, an action to recover the three acres allegedly purchased on 22nd August 1996 should have been filed by 22nd August 2008. As regards the one acre claimed to have been acquired through a consent, any action to recover the same should have been filed by 16th June 2011, pursuant to Section 4 (4) of the *Limitation of Actions Act*. By filing the suit on 23rd November 2020, the Respondents were way out of the limitation period.
22. The Respondents' argument that they were merely enforcing a land sale transaction does not assist them since if the dispute were to be viewed simply as a contractual one, the limitation period under Section 4 (1) (a) of the *Limitation of Actions Act* would be a shorter period of six years. Either way, the suit remains statute barred. I find that the Respondents' case was barred under the *Limitation of Actions Act*. In view of that outcome, I need not consider the remaining issues for determination.
23. The Respondents argued that the Appellants had filed an application for review of the judgment and that in view of Section 80 of the *Civil Procedure Act*, the Appellants had thereby lost their right of appeal. While it is correct that both Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procure Rules make it abundantly clear that an appeal and an application for review in respect of the same decree or order cannot co-exist, such a conflict is resolved by having the issues determined in the appeal. The application for review must give way to the appeal. and the matter sought to be remedied by review must merge in the appeal. See *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR and *William Karani & 47 others v Wamalwa Kijana & 2 others* [1987] eKLR. In this case, this Court was informed that the application for review is still pending before the Subordinate Court. The outcome of this appeal will by extension and implication resolve the said application.
24. Arising from the foregoing discourse, I find merit in this appeal. I set aside the judgment of the Subordinate Court and replace it with an order dismissing the Respondents' case with costs to the Appellants. The Appellants shall also have costs of this appeal.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 30TH DAY OF JANUARY 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

No appearance for the Appellants

No appearance for the First Respondent



The Second Respondent present

Court Assistant: B Kerubo

