



**M'anampiu v M'anampiu (Environment and Land Appeal
E011 of 2022) [2023] KEELC 18651 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18651 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E011 OF 2022**

CK YANO, J

JULY 12, 2023

BETWEEN

M'IKUNYUA M'ANAMPIU APPELLANT

AND

EDWARD MUGAMBI M'ANAMPIU RESPONDENT

JUDGMENT

1. The respondent filed suit vide a plaint dated 12th January, 2021 against the appellant seeking for a declaration that plot No. 7 Mikinduri Market is the property of the estate of M'anampiu Kajau alias M'anampiu Kanyau (Deceased) and an order of rectification of the register of the suit property and have it revert to the estate of the deceased.
2. The respondent and the appellant are brothers and sons of the deceased who is said to have died in the year 1971 and the respondent is the legal representative of the estate. The respondent averred that in the year 1984 unknown to him and other family members, the appellant without any colour of right unlawfully, unprocedurally and fraudulently transferred the suit property to his name without obtaining letters of administration, orders of court and or consent of the other family members. The respondent enumerated the particulars of fraud on the part of the appellant namely, using malicious and fraudulent influence to transfer the deceased's property to his name, intermeddling with the estate of the deceased, unprocedurally and unlawfully transferring the plot, acting criminally and wrongly and corruptly.
3. The respondent averred that as a result of the appellant's actions, the estate of the deceased suffered loss and damage and deprived other family members their rightful inheritance.
4. At the hearing before the trial court, the respondent was the sole witness and adopted his witness statement dated 11th January, 2021 in which he reiterated the contents of the plaint. He produced the Limited Grant of Letters of Administration Ad Litem issued in Tigania PMC MISC. Succession cause



- No. 50 of 2019, minutes of town planning markets and housing committee dated 18th November, 1974 and a copy of register as exhibits. He was cross examined and re-examined.
5. The appellant denied the respondent's claim *vide* his statement of defence dated 1st March 2021. He pleaded that the said plot was sold and transferred to him at a consideration in August 1969 by the original owner M'Anampaiu Kajau (deceased) and M'Itunga M'araya and that the transfer was duly approved by the Trade and Market committee of the then Meru County Council . He stated that the plot had a small timber house which he demolished and fully developed it openly with the knowledge of the deceased and other family members who never objected. The appellant averred that he has been the registered and beneficial owner and in full occupation and utilization thereof with the knowledge of the respondent, his other siblings and their deceased father. It was his contention that the plot was sold and transferred to the respondent during the lifetime of their deceased father and therefore did not constitute the estate of the deceased.
 6. At the hearing, the appellant was the sole witness and he adopted his witness statement dated 15th November, 2021 as his evidence-in-chief and was cross examined and re-examined. He also produced a receipt dated 8th April 2019 from Meru County Government, minutes of Meru County council dated 13th and 14th August 1969, minutes dated 8th October, 1969 plot rent receipts and photographs of the developments on the said plot as exhibits. In his evidence, the appellant basically reiterated the contents of his statement of defence.
 7. After considering the evidence adduced, the learned trial magistrate found that the respondent had proved the land belonged to the deceased and that the appellant had failed to prove that he bought the plot during the lifetime of the deceased. The respondent's claim was therefore allowed.
 8. The appellant was dissatisfied with the said decision and filed this appeal on the following grounds-;
 1. The learned Senior Resident Magistrate erred in law in failing to find that the respondent having not pleaded, particularized and or proved fraud then the respondent's case ought to have failed as enunciated in *Laban Omubaka Otumbula vs Truphosa Okutoyi* (2019) eKLR and *Koinange & 13 others Charles Karuga Koinange* (1986) KLR.
 2. The learned Senior Resident Magistrate erred in law and fact in failing to find that there was no way the appellant would have solely committed the alleged fraud to transfer the subject plot to himself without participation of County Council officials and the respondent having not enjoined the Meru county as party the lower court suit was fatally defective and could not be sustained.
 3. The Learned Senior Resident Magistrate erred in law and fact in failing to find that the respondent having admitted on cross examination that he learnt of the alleged transfer to the appellant way back in the year 1984 then the lower court suit was time barred by dint of Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
 4. the Learned Senior Resident Magistrate erred in law and fact in failing to find that the appellant bought the subject plot number 7 Mikinduri market from his father M'Anampiu Kajau alias M'Anampiu M'Kanyau - (deceased) and erroneously proceeding to find that the appellant had not proved that he bought the plot from the deceased and M'Itunga M'Araya.
 5. The Learned Senior Resident Magistrate erred in law and fact in failing to find the respondent's minutes in support of his case were inadequate in comparison to the minutes of the appellant and proceeding to rely on the former to arrive at an erroneous finding of fact.



6. The Learned Senior Resident Magistrate erred in law and fact in relying on a wrong finding that it is only one person who transferred the plot to the appellant yet the minute marked as Defence Exhibit Number 2 clearly showed that the transfer was done by M'itunga M'Araya and co" and proceeding to rely on this erroneous finding to find that the appellant had not bought the plot.
7. The learned Senior Resident Magistrate erred in law and fact in relying on trivialities in determining the suit that was before him.
8. The judgment/decreed is against the weight of evidence before the lower court.
9. The appellant proposed to the Honourable court for an order setting aside the Decree/ judgment of the lower court and therewith substitute an order dismissing the respondent's lower court and therewith substitute an order dismissing the respondent's lower court case with costs of the appeal and the court below.
10. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 23rd March, 2023 through the firm of Thurairaja Atheru & Co. Advocates while the respondent filed his dated 24th May 2023 through the firm of Maitai Rimita & Co. advocates.

Appellant's Submissions

11. The appellant submitted that the respondent did not prove the allegation of fraud as required by law. The appellant relied on the case of *Kinyanjui Kamau vs George Kamau Njoroge* (2015 eKLR which cited the case of *Ndolo vs Ndolo* (2008) 1KLR G&F 742.
12. The appellant submitted that the burden of proving that there was indeed fraud was on the respondent who alleged that the appellant fraudulently transferred the suit property from the deceased name to himself. The appellant submitted that the burden was also higher than that required in ordinary civil proceedings.
13. It is the appellant's contention that no evidence was laid before the court during trial to prove the allegation of fraud and that merely particularizing the allegation of fraud at paragraph 5 of the plaint was not enough. That the respondent needed to lead evidence upon which the court could make a finding and which was not done.
14. The appellant submitted that the respondent merely stated that the transfer was conducted after the death of the deceased and did not produce the certificate of death to confirm when in fact the deceased passed on. That further, the appellant failed to call an officer from the office of the County Government of Meru to assist him buttress the allegations of fraud.
15. The appellant contended that it is notable that other family members never reported the issue of fraud to the police even after discovering it way back in the year 1974. The appellant relied in the case of *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representative of the estate of Sospeter Mukuru Mbeere (deceased) vs Stephen Njoroge Macharia* (2020) eKLR.
16. It is therefore the appellant's contention that the respondent failed to prove his allegation of fraud.
17. The appellant further submitted that the failure to enjoin the County Government of Meru in the proceedings was fatal and stated that the Respondent's failure to enjoin the County Government of Meru, the then County Council of Meru, who is the custodian of documents purported to be forgery was fatal. The appellant argued that the alleged fraudulent transfer could not have been committed by the appellant alone and that the same would have been facilitated by the then County Council of Meru.



18. The appellant relied on the case of *Agnes Nafula Chebosi Vs Joseph Chebosi Kilwake* [2018] eKLR.
19. The appellant further submitted that the claim by the respondent was fatally defective for failure to enjoin the County Government as the appellant could not have committed the act of fraud by himself and that consequently the County Government was a necessary party to the proceedings to ensure that in the event of any fraud, they can be able to produce any requisite document, noting that they are the custodians of the land documents, to prove the allegation.
20. The appellant submitted that the respondent commenced the proceedings *vide* a plaint dated 12th January, 2021 and it was the evidence by the respondent during trial that the family discovered that the suit property had been fraudulently transferred to the appellant in the year 1974. The appellant pointed out that the year of transfer as indicated in the pleadings is 1984 and submitted the same is way over the stipulated amount of time as provided by the law and that it was also never explained why the respondent commenced the proceedings 47 years after discovery of the fraud. The appellant placed reliance on Section 7 of the *Limitation of Action Act* and submitted that the suit was time barred. That it is trite law that a claim founded on recovery of land should be filed within a period of 12 years failure to which it is time barred. The appellant submitted that the suit is therefore statute barred as the same was instituted after 47 years which is contrary to the provisions of the *Limitation of Actions Act*. The appellant relied on the findings in *Francis Munyiri Kamau vs Margaret Nyawira & 2 others* [2008] eKLR.
21. The appellant submitted that the suit commenced by the respondent was time barred and the Honourable court lacked jurisdiction to hear and determine the matter.
22. On whether the appellant proved that he bought the suit plot and whether the appellant's minutes were sufficient, the appellant submitted that he produced minute extracts of Trade and Market committee as defence Exhibit 2 and the same was approved by the full council meeting according to the minutes extracts of 8th October, 1969 as evidenced by Defence Exhibit 3. That these minutes were certified to be true copies of the original by the County Government of Meru on 17th April 2019 as can be seen on the face of the document. The appellant submitted that the two exhibits was enough evidence to confirm that the two deceased persons who were owners of the suit property transferred the plot to the appellant and that the transfer was in fact approved by the County Council. That no evidence was produced by the respondent to controvert the evidence by the appellant. The appellant relied in the case of *Joyce Mwachira M'engengi vs Gerald Ngeera* [2013] eKLR. The appellant also pointed out that he continues to pay rates to the County Government of Meru and is the person recognized by the county as the owner of the suit property.
23. The appellant's counsel submitted that it should be noted that the appellant is a very old and elderly man who may have inadvertently stated that the transfer was after the death of the deceased and submitted that the same is not possible as the transferor and the transferee with witnesses had to sign the transfer form (which doubled up as an agreement) before the approval by the council.
24. The other issue submitted by the appellant was whether only one person transferred the suit property to the appellant. It was his contention that the trial court erred in law and in fact in reaching a finding that only one person transferred the suit property. The appellant submitted that the trial court relied on an erroneous finding in determining that the suit property was transferred by one person and that the evidence of the appellant and in particular the minutes proved that the suit property was jointly owned by M'Anampiu Kajau alias M'anampiu M'Kanyua and M'Itunga M'Iraya (both deceased) who agreed to have the plot transferred to the appellant.



25. It is therefore the appellant's submission that he is the legal owner of the suit plot adding that the suit was fatally defective having not enjoined the County Government of Meru and for being time barred.

Respondent's Submissions

26. The respondent raised three issues in his submissions. The first issue was in regard to introduction of new issues at the appeal stage. It is the respondent's contention that ground No. 2 and 3 of the Memorandum of appeal dated 23rd February, 2023 introduced new issues at the appeal stage which were not adjudicated before the trial court. The respondent submitted that the issue of limitation of action and the introduction of third party proceedings and or enjoining the Meru County Government were neither raised nor adjudicated before the trial court and were not among the issues which were placed for determination before the trial court and as a result it cannot properly be made a basis for determination of this appeal for reasons that its determination required a factual finding be made as to whether or not a notice was issued. The respondent placed reliance on the case of *Wachira V Ndanjeru* (1987) KLR 252, Civil appeal 33 of 1984 *Nyangau V Nyakwara* (1985) eKLR *Kenya commercial Bank Ltd Vs James Osebe* CA 60 of 1982 *Kenya Hotels Limited Vs Oriental Commercial Bank Limited* (2016) eKLR. and *County Government of Migori vs Hope Self Help Group* (2020) eKLR.
27. The respondent submitted that the role of the respondent before the trial court is to present his case and prove the same to the required standards that is on the balance of probability and that it is upon the appellant to introduce a third party who aided or abated ensuring the transaction, action or omissions of the appellant were successfully done irrespective of whether they were illegal, unprocedural and fraudulent. The respondent cited Order 1 Rule 15 (1) of the *Civil Procedure Rules* and relied on the case of *Ocean Freight (EA) Ltd Vs Technomatic Ltd & another, Kenya Commercial Bank Vs Suntra Investment Bank Ltd* (2015) eKLR *Hass Petroleum (K) Limited Vs Iota Engineering and construction Limited (formerly) Iota Excavation and Rentals Ltd, white Lotus project Limited (intended 3rd Party* [2021] eKLR.
28. The respondent further submitted that the appellant had every opportunity to introduce the third party during trial but failed to do so and therefore cannot pass the blame to the respondent since he was well represented at the trial court and that issue should have been raised at the point.
29. It is the respondent's submission that the decision of the trial court was well reasoned, sound, just and fair and that the trial magistrate correctly analyzed the evidence before the court and applied the law accordingly. The respondent submitted that he pleaded particulars of fraud, proved the same before the trial court on the required standards of law on a balance of probability and prayed that the court to uphold and reaffirm the decision of the trial court and dismiss the appeal with costs.

Analysis And Determination

30. This court's role on appeal was settled in case of *Selle & another Vs Associated Motor Boat Co. Ltd* (1968) EA 123. This being a first appeal this court has the liberty to consider, evaluate and draw its own conclusion on both law and fact. In *Gitobu Imanyara & 2 others Vs Attorney General* [2016] eKLR the Court of appeal stated that-;

“[A] In appeal to this court from a trial by the High court it's by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it would always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”



31. There are four issues that call for determination-;
- i. Whether the suit was time barred.
 - ii. Whether fraud was proved.
 - iii. Whether the failure to join Meru county Government as a party to the suit was fatal.
 - iv. Whether judgment/decision of the trial court was against the weight of the evidence and the law.
 - v. Who should bear the costs.

Whether the suit was time barred

32. In this case, the respondent commenced the suit vide a plaint dated 12th January, 2021. The respondent pleaded that in 1984, unknown to the family members, the appellant unlawfully unporcedurally, fraudulently transferred the suit plot to his name without obtaining letters of administration or orders of court or consent of other family members. It is pleaded that the deceased died in the year 1971. Indeed the plaintiff produced a Limited Grant of Letters of Administration Ad Litem showing that the deceased died in the year 1971. In his evidence, the respondent testified and confirmed that they discovered that the suit plot had been transferred to the appellant in the year 1974. The respondent only filed his claim in the year 2021 which was 47 years after discovering the alleged fraud. In this case, the appellant has raised the issue of limitation, albeit at the appeal stage.
33. In the case of *Gathoni Vs Kenya Cooperative Creameries Ltd* (1982) KLR 104 the court observed that-;
- “ the law of Limitation of Action is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intended plaintiff to exercise reasonable diligence and take reasonable steps in his own interest”.
34. Further in *Iga vs Makerere University*(1972) EA it was held that -;
- “ A plaint which is barred by limitation is a plaint barred by law. A reading of the provisions of Section 3 and 4 of the Limitation Act Cap 70 together with Order 7 rule 6 of the Civil Procedure Rules of Uganda which has same provisions with the Limitation of Actions of Kenya seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds, upon which he could claim exemption the court shall reject his claim. The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief.”
35. In *Bosire Ogero vs Royal Media Services* [2015] eKLR it was stated that; “The law of Limitation of Actions is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in the bringing of suits against them.”
- The court further stated that “... the issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raided by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over. See the case of *Pauline Wanjiru Thuo Vs David Mutegi Njuru* CA 2778 of 1998...”



36. Whichever way one looks at the respondent's suit, the claim was certainly out of time, since the alleged transfer to the appellant was discovered in the year 1974 and the suit was only filed in 2021. Having carefully considered the record and grounds in memorandum of appeal and rival submissions, I have come to the inescapable conclusion that the suit was statute barred.

Whether fraud was proved

37. The respondent pleaded and particularized fraud in paragraph 5 of his plaint dated 12th January 2021. It is trite law that any allegations of fraud must be pleaded and strictly proved. I am guided by the Court of Appeal in case of *Kuria Kiarie & 2 others vs Sammy Magera* [2018] eKLR, where Tunoi, JA (as he then was) states as follows-;

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

38. As regards the standard of proof, the court in the case of *Kinyanjui Kamau Vs George Kamau* [2015] eKLR expressed itself as follows-;

“... it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo Vs Ndolo* [2008]1 KLR G & F) 742 wherein the court stated that “... We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities, but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in Criminal cases...” In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.

39. The burden of proving that there was indeed fraud was on the respondent who alleged that the appellant fraudulently transferred the suit property from the deceased name to himself. It was the appellant's evidence during the hearing that M'anampiu Kajau and M'Itunga M'Araya (both deceased) initially owned the suit land and that they sold him in the year 1969 and the same was approved by the County Council. The appellant produced minutes dated August 1969. The deceased died in 1971 and therefore was still alive in 1969. The respondent's evidence that the sellers were not alive at the time of the agreement cannot therefore be true. The respondent did not adduce any evidence to controvert that produced by the appellant. To succeed in his claim for fraud, the respondent needed to not only plead and particularize it, but also lay a basis by way of evidence upon which the court would make a finding. In this case, no such evidence was adduced. In this appeal, there is no evidence that the lower court came to the conclusion that there was fraud proved. In my view, the appellant acquired the suit plot lawfully during the lifetime of the deceased and the respondent's allegation of fraud had not been proved to the required standard.

Whether the failure to join Meru county Government as a party was fatal.



40. Order 1 Rule 15 (1) of the *Civil Procedure Rules* stipulates that-;

“Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party);

(a) That he is entitled to contribution or indemnity or

(b) That he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff or © that any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the court within fourteen days after the close of pleading for leave of the court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit...

41. In *Kenya Commercial Bank Vs Suntra Investment Bank Ltd* (2015) eKLR the Court held that-;

“In law, a third party is enjoined in a suit at the instance of the defendant and through the set procedure under Order 1 Rule 15 – 22 of the Civil Procedure Rules. And, Liability between the defendant and the third party is determined between the defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the defendant, and has given direction under Order 1 Rule 22 of the Civil Procedure Rules.”

42. Meru County Government was not a party to the suit herein and either party should have moved the court to join them or to be summoned to come and shed light in the matter if they so wished.

Whether the judgment/decision of the trial court was against the weight of the evidence and the law

43. This court has already reached a finding that the respondent’s claim was time barred. The court has also found that the respondent had not proved that that the appellant acquired the suit property fraudulently. Indeed the appellant produced minutes showing that the plot was transferred to him in the year 1969. By then the deceased was still alive as he only died later in 1971. Therefore, there was no basis upon which the trial court based upon its decision. The respondent had certainly not made a case for the grant of he orders sought.

44. In the result, I find that this appeal has merit and the same is allowed. The judgment and decree of the lower court is set aside and I substitute it with an order dismissing the respondent’s suit in the subordinate court.

45. Costs of this appeal and of the lower court are awarded to the appellant against the respondent.

46. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 12TH DAY OF JULY, 2023.

IN THE PRESENCE OF

Court assistant – V. Kiragu



Atheru for appellant

Mwendwa for respondent

C.K YANO

JUDGE

