



Mwangi (Suing as the Attorney (Donee) of Loice Wangima) v Egerton University (Environment & Land Case 18 of 2013) [2023] KEELC 16568 (KLR) (28 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16568 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 18 OF 2013**

**JM MUTUNGI, J
MARCH 28, 2023**

BETWEEN

**STEPHEN KARERI MWANGI (SUING AS THE ATTORNEY (DONEE) OF
LOICE WANGIMA) PLAINTIFF**

AND

EGERTON UNIVERSITY DEFENDANT

JUDGMENT

1. The Plaintiff instituted the present suit against the Defendant as a Donee of a power of Attorney by Loice Wangima Mwangi. Following the death of Loice Wangima Mwangi, the Plaintiff was subsequently substituted as the personal Legal Representative of Loice Wangima Mwangi (deceased). It was the Plaintiff's claim that the Defendant had leased land parcel Njoro/Njoro 5/64(Ngondu) measuring approximately 2 Acres from the said Loice Wangima in 1978 for a period of 5 years and after the expiry of the lease period the Defendant unlawfully continued in occupation of the land. The Plaintiff averred that the Defendant in 2004 fraudulently acquired title to the suit premises. The Plaintiff referred the dispute to the Land Disputes Tribunal but the Tribunal's decision was quashed by the Court Via *Certiorari* orders. The Plaintiff in the instant suit prays for Judgment against the Defendant for:
 - a) The Defendants title No. Njoro/Njoro 5/64 (Ngodu) be cancelled/annulled and the Plaintiff's principal be declared the owner.
 - b) Mesne profits.
 - c) Cost and interest thereon.
2. The Defendant filed a statement of defence dated 28th March, 2011 which was subsequently amended on 19th January, 2015. The Defendant denied the allegations of fraud particulised in the Plaintiff's



and further contended the Plaintiff's suit was time barred and gave notice that they would take a Preliminary Objection on the issue.

3. The suit was part heard by Munyao, J before whom the Plaintiff(PW1) testified and was completed before me. The Plaintiff called one witness Xavier Luganga (PW-2-) while the Defendant called their Legal Officer (DW-1-) and Nathaniel Githua Advocate (DW-2-) as their witness.

The Plaintiff's Case.

4. The Plaintiff testified that his mother was a shareholder of Ngondu Farmers Co-operative Society. He stated that the shareholders were each to get 17 Acres from the Society's parcel of land but the members were initially allocated 15 Acres each. He stated his mother was issued a certificate of title for the 15 acres and the parcel of land was registered in her name as LR. No. 9727/20. The Plaintiff explained that the shareholders were further allocated an additional portion of 2 acres from the land that remained after the initial allocation of 15 Acres. The Plaintiff stated his mother balloted and got parcel No. 64 but never got title for the same. He stated it was this portion of 2 Acres that his mother leased to the Defendant for 10 years though the Defendant only paid for 5 years of the lease at the rate of Kshs 3,000/- per acre. He stated the lease was entered into in 1979 and the Defendant was to vacate the premises in 1989 but never vacated and continued in possession. Though that Plaintiff stated the Defendant paid for the lease only for the first 5 years, the Plaintiff did not explain what action, if any, was taken against the Defendant when the 5 years lapsed.
5. The Plaintiff stated in his evidence that they filed a case before the Land Disputes Tribunal at Njoro who made an award in favour of the Plaintiff which the Magistrate's Court adopted and issued a Decree that the High Court subsequently quashed ("PEX 2(a)(b) &(c)"). The Plaintiff stated that his mother never sold the land to the Defendant and did not know how the Defendant acquired title to the land. He stated he had sued the Defendant because the Defendant had refused to vacate from the land and wanted the land reverted to his mother and for payment of damages for use of the land unlawfully by the Defendant.
6. In Cross-examination by Mr. Kisilah Advocate for the Defendant, the Plaintiff affirmed the title held in the name of his mother LR No. 9729/20 was 15 acres and that land parcel Njoro/Njoro 5/64 (the Subject matter of the suit) was not part of the title that they hold. He stated land title Njoro/Njoro 5/64 held by the Defendant was approximately 2 ½ Acres. He affirmed that as per the copy of the title held by the Defendant, the register for the land was opened on 17/9/1989. The Plaintiff stated that his mother leased to the Defendant 2 Acres and that the lease was not in writing. He stated the lease was from 1978 and that the Defendant only paid for 5 years but continued in possession and occupation after the period expired. The Plaintiff stated he did not know how the Defendant got title to the suit land. He however stated the Defendant had fenced the land as part of its land and constructed its main gate on the suit land around the year 1994. The Plaintiff affirmed that other than the Land Disputes case they had instituted in 2007 and the present suit they had not instituted any other case against the Defendant.
7. The Plaintiff called Xavier O. Luganga (PW-2) who had been appointed as a liquidator of Ngondu Farmers Co-operative Society in 2011 as a witness and he produced the Plaintiff's supplementary bundle of documents as per the list dated 9th November 2020 ("PEX 1-21"). The witness testified that he was appointed liquidator of Ngondu Farmers Co-operative in 2012 and as such liquidator he was the custodian of the records and documents of Ngondu Farmers Co-operative which he tendered in evidence. The liquidator confirmed that Loice Wangima(Plaintiff's Mother) was a member of Ngondu Farmers and that she had been allocated 15 Acres and an additional 2 Acres. He affirmed that from the records there was no indication that the Plaintiff's mother had sold land to anybody. He further stated



that as per the records, the Defendant was not a member of Ngongdu Farmers Co-operative Society. He affirmed that as liquidator he would effect transactions involving members but he clarified that he never dealt with the suit property and there was no record showing that Loice Wangima had effected any transaction with the Defendant involving the suit property. The Liquidator explained that as per the records Loice Wangima had complained respecting the suit land occupied by the Defendant and there was correspondence to the Vice Chancellor as per letter dated 11/5/2006 and 6/11/2006 to which there was no response.

8. In Cross-examination the liquidator stated he had no list/record of allocation of plots to members of Ngongdu Farmers Co-operative Society. He affirmed he had no specific record showing that Loice Wangima owned land parcel Njoro/Njoro 5/64. The witness stated that although the Society was placed under liquidation in 1983 he was appointed as a liquidator of the Society in 2011/2012 and that even at that time not all transactions relating to the land of the Society had been finalized.
9. The Plaintiff was recalled before the close of the Plaintiff's case to basically comment on the supplementary documents tendered in evidence by the liquidator and the Supplementary bundle of documents filed by the Defendant both of which were filed after the Plaintiff had testified in 2015. The Plaintiff reiterated his earlier evidence and maintained his mother never authorized the transfer of the suit land to the Defendant. He explained that his mother had only leased the land to the University for 5 years 1979-1983 but the University failed to vacate after expiry of the lease. He stated they complained to the area D.O who wrote the letter dated 11/5/2006 to the University and another follow up letter but the University never responded and that prompted them to refer the matter to the Land Disputes Tribunal but the University never honoured the determination of the Tribunal who had awarded the land to them. The award was however quashed for want of jurisdiction by the Tribunal precipitating the filing of the present suit.
10. In Cross-examination, the Plaintiff, affirmed the title of Njoro/Njoro 5/64 held by the Defendant was issued on 11/5/2004 and its register at the Lands Office was opened on 17/11/1989 and the register did not show his mother was at any time registered as owner of the land. He further admitted he had borrowed some money from Barclays Bank which his mother had guaranteed. He stated he paid the debt owned to Barclays Bank and it was not true that the University offset the debt on his behalf in consideration of the suit property being transferred to them by his mother.

Defendant's Case.

11. Ms. Janet Bil, a Legal Officer of the Defendant testified on behalf of the University. She stated she had been at the University since 2007 and relied on her witness statement made on 15th July, 2015. The witness stated from the records held by the University, there was no record to show the University leased the suit property from the Plaintiff's mother. The record showed the Plaintiff had filed a dispute at the Land Disputes Tribunal whose award was quashed by the court. The witness testified that the University was registered as owner of the suit property in May 2004 though the parcel file was opened in 1989. The witness stated that as per the abstract of the Ngongdu Farmers Co-operative Society exhibited, Egerton University had two parcels of land Plot Nos. 64 and 65. She stated the University owned the disputed plot parcel 64 and parcel 65.
12. The witness (DW-1) denied that the University obtained title to the suit property fraudulently and asserted the Defendant's supplementary bundle of documents which were obtained from Creswell Mann & Dodd Advocates who acted for Ngongdu Farmers Co-operative Society, which the Defendant relied on, demonstrated that the Plaintiff's mother disposed her interest in the suit property to the Defendant as illustrated in the letters dated 5/7/1982 and 20/9/1982. DW-1 stated that although the University dealt with Loice Wangima directly, the son, Stephen Kareri Mwangi now substituted as the



personal Legal representative of his mother was aware of the sale of the suit property to the Defendant by the mother. The witness however admitted she had not come across any written lease or agreement entered into between the University and the said Loice Wangima but maintained that on the basis of the documents exhibited, it was evident there was an agreement between the parties which was ultimately performed resulting in the Defendant being registered as the owner of the suit property. The witness affirmed that the University main gate was constructed where the suit property is situated. The witness was clear that Loice Wangima had initially leased the suit land to the University before she sold the same to the University.

13. DW-2 Nathaniel Githua, a Legal Practitioner in Nakuru testified and informed the Court that he joined the Firm of Creswell Mann & Dodd Advocates in 1982. In his evidence Nathaniel Githua Advocate testified that land parcel Njoro/Njoro Block 5/64 was part of a large parcel of land that was owned by Ngondu Farmers Co-operative Society. He stated the Society subdivided the land and allocated to each member 15 acres but a portion of land near the road and Egerton University remained and was not subdivided. The witness testified that Loice Wangima sold her interest to Egerton University before the land that remained was subdivided. He testified that in the sale transaction the Firm of Lawrence Long & Co. Advocates represented Egerton University while their Firm represented Loice Wangima. It was his evidence that the suit property was sold for Kshs 30,000/- which was paid through his Law Firm. According to the witness some of the money was paid to Barclays Bank Ltd, Molo Branch to redeem a debt owed to the Bank of Loice Wangima's son and the balance was released to the vendor. The witness stated he was not able to retrieve the sale agreement from their records but he stated there was supporting correspondence that he gave to the Defendant. He verified that each member of Ngondu Farmers Co-operative Society was allocated an extra portion of 2 acres from the land that remained. He affirmed that at the time they were handling the transaction, the new parcel numbers had not come out. He confirmed their Firm acted for both Ngondu Farmers Cooperative Society and the members.
14. In Cross-examination by Mrs. Mugweru Advocate for the Plaintiff, the witness affirmed that in 1982 the Ngondu Farm had not been subdivided. DW-I stated they never had a register of members of Ngondu Co-operative Society in the Office and that they processed titles for members on the instructions of Ngondu farmers. He further stated he had no record to show that Loice Wangima authorized her plot to be transferred to Egerton University. He stated even though the letter dated 20/5/1982 made reference to an agreement he was not able to trace the agreement in their records. The witness further stated the correspondence, notably letter of 5/7/1982 and 14/4/1986 made reference to plot No. 57 and 58 and that he was not in a position to explain how they related to Plot No. 64 (the suit property). The witness however explained that he authored the letter dated 14th April, 1986 to Egerton University to affirm that after the Surveys the title for the portion of 2 acres would be processed in their favour along with the other titles.

Submissions, Analysis And Determination.

15. The parties filed final closing submissions after the closure of the trial. The Plaintiff filed his submission on 10th May, 2022 and the Defendant filed theirs on 7th June, 2022. The gist of the Plaintiff's submissions, was that Loice Wangima was the owner of the suit land that she had leased to the Defendant for a term of 5 years from 1979 at the rate of Kshs 3,000/- per acre, for which the Defendant paid Kshs 30,000/-. After the expiry of the lease, the Defendant allegedly refused to vacate and/or negotiate a renewal of the lease terms. The Plaintiff submitted the Defendant had not shown that they lawfully purchased the suit property from Loice Wangima and that the documents tendered in evidence by the Defendant did not prove the said Loice Wangima had authorized any sale of the suit property to the Defendant. It was the Plaintiff's position that the Defendant fraudulently caused the



title of the suit premises to be processed and issued in its name. The Plaintiff contended that he and his mother were not aware that the Defendant had fraudulently transferred the suit land to its name until when the award made in the Plaintiff's favour by the Land Disputes Tribunal was quashed by the High Court and they sought verification of the suit land from the Lands Office where they affirmed that the land had indeed been registered in the Defendant's name.

16. The Plaintiff submitted that the Defendant having acquired title to the land fraudulently, did not acquire a valid title and hence the title to the land held by the Defendant was null and void and ought to be cancelled. The Plaintiff in support of this submission relied on the case of *Jane Gachuki Gatheli v Priscilla Nyawira Gitungu* (2008) eKLR. The Plaintiff urged the court to invoke the provisions of Section 80(2) of the *Land Registration Act*, 2012 to order for the revocation of the title. Section 80(1) of the said *Act* provides as follows:

“ 80.

- (1) subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration has been obtained, made or omitted by fraud or mistake”.

17. The Defendant in its submissions argued that the Plaintiff's suit was statute barred on account of the provisions of Section 4(2) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya to the extent that the suit was founded on fraud. The Defendant further submitted the Plaintiff's suit in any event was time barred on account of Section 7 of the *Limitation of Actions Act* having been instituted after the expiry of 12 years from the accrual of the cause of action. Section 4(2) and Section 7 of the *Limitation of Actions Act* provide as follows:-

- “ 4(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of Twelve months from such date.

- (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”.

18. The Defendant submits that it is the Plaintiff's case that the Plaintiff leased the suit premises to the Defendant in 1978 for a term of 5 years and that the Defendant neither vacated the premises after the expiry of the lease term nor renew the lease but continued in occupation and possession. The Defendant further submits even though the Plaintiff avers that the Defendant fraudulently processed and acquired title to the suit property in 2004, the Plaintiff adduced no evidence in proof of the allegations of fraud. The Defendants position is that it acquired title to the land validly through sale and paid valuable consideration. The Defendant submitted that there was clear correspondence that corroborated its evidence of purchase of the suit property notably the letters dated 20th May, 1982, 5th July, 1982, 20th September 1982, 13th November 1982 all exhibited in the Defendant's bundle of documents. The Defendant thus submitted it had acquired a good title that was absolute and indefeasible and was entitled to enjoy the rights vested upon registration as proprietor in terms of Section 24, 25 and 26 of the *Land Registration Act* 2012. The Defendant submitted as its registration was a first registration within the meaning of Section 143 of the *Registered Land Act*, Cap 300 Laws



of Kenya (now repealed) the title would not be amenable to rectification even if it was shown the registration was obtained fraudulently.

19. The Defendant maintained the Plaintiff did not prove the particulars of fraud pleaded under paragraph 5 of the Plaintiff to the standard required. The Defendant placed reliance on the case of *Erastus Kiguta Karanja & Another v Benson Ndere Mbaria & 4 Others* [2021] eKLR where the court emphatically stated that the standard of proof required in proof of fraud in Civil cases may not be so high as to require proof beyond reasonable doubt but is something more than a mere balance of probabilities see also *Mutsonga v Nyati* [1984] KLR 425 and *Kainange & 13 Others v Koinange* [[1986] KLR 23. Consequently, the Plaintiff submitted the Defendant had failed to prove his case on a balance of probabilities and was therefore not entitled to the reliefs sought in the plaintiff.
20. Having reviewed the pleadings, the evidence adduced and the submissions made on behalf of the parties, the following are the issues that arise for determination:-
 - i. Whether the Plaintiff's suit is time barred?
 - ii. Whether the Defendant acquired title to land Njoro/Njoro Block 5/64 fraudulently and/or whether it holds a good title to the property?
 - iii. Whether the Plaintiff and the Defendant entered into any lease or sale agreement in regard to the suit property?
 - iv. Whether the Defendant had been in occupation and possession of the suit land from 1979 up to the time of the Institution of the suit?
 - v. What reliefs and/or orders should the court grant?
21. The Defendant contends that the Plaintiff's suit is time barred. The Defendant argues the Plaintiff's suit is founded on fraud and should therefore have been filed before the expiry of 3 years from the time he fraud occurred or the Plaintiff became aware. As per Paragraph 5 of the Plaintiff, the Plaintiff asserts the fraud occurred in 2004 when the Defendant acquired title to the suit property. As per the pleading the Plaintiff averred that Loice Wangima leased land parcel Njoro/Njoro Block 5/64(Ngongu) to the Defendant for a period of 5 years from 1978 at Kshs 3,000/- per Acre and that the Defendant paid Kshs 30,000/- for the period. After the lease expiry, the Defendant continued in occupation without paying rent until 2004 when the Defendant allegedly fraudulently acquired title to the land. The Defendant of course disputes the Plaintiff's version of events and states they acquired the land from the Plaintiff through purchase as attested by the correspondence exchanged between the Defendant's Advocates, Lawrence Long & Co. Advocates and the Advocates for Ngongu Farmers' Co-operative Society and Loice Wangima, M/s Creswell Mann & Dodd & co. Advocates. If the Defendant indeed continued in occupation and possession of the suit land after the expiry of the lease in 1983, without paying any rent, the Plaintiff never explained what action he took if any, to regain possession of the land for the period of over 20 years from 1983 when the purported lease expired. Considering the evidence adduced there is no clear evidence of there having been a lease between the Plaintiff and the Defendant. The lease was not in writing. What is apparent from the correspondences exhibited by the parties is that during the year 1982 there were negotiations for the sale of the suit property involving Lawyers representing the Defendant and the Plaintiff. Although the correspondences indicate a draft agreement of sale was drawn and the purchase price of Kshs 30,000/- plus legal fees of Kshs 315/- forwarded by M/s Lawrence Long & Co. Advocates who were acting for the Defendant to forward to Creswell Mann & Dodd Advocates who were representing Loice Wangima the seller and Ngongu Farmers Co-operative Society, no formal agreement was tendered in evidence.



22. What appears probable is that the Defendant may have identified the portion of land as being suitable for the University to create an access as the land fronted the main Mau-Narok road and may initially have been allowed by the Plaintiff's mother to occupy the land. There is no evidence to support the existence of a lease as claimed by the Plaintiff. I am on the evidence adduced by the parties persuaded that in 1982 the Plaintiff's mother and the University entered into negotiations whereby the Plaintiff's mother agreed to sell to the University the portion of land for Kshs 30,000/- as the correspondences exchanged between the Lawyers attests.
23. On the evidence adduced I make a finding that there was indeed no lease entered into between the Plaintiff's mother and the Defendant and that the Defendant entered into occupation of the suit premises pursuant to an agreement of sale. Even assuming there was a lease entered into in 1978 as alleged by the Plaintiff, that lease expired in 1983, the occupation of the suit premises from 1983 by the Defendant was unlawful and unless the Plaintiff would have initiated action to recover the land from the Defendant within the Statutory period of 12 years from the date of accrual of the cause of action, any action brought after the expiry of the 12 years would be time barred and unsustainable.
24. In the present matter the Plaintiff by his own evidence admits the Defendant occupied the suit premises from 1983 not as a tenant as they were not paying any rent. The occupation by the Defendant of the land, in the circumstances constituted trespass and was unlawful. The Plaintiff did not institute any legal proceedings for the eviction of the Defendant and/or for the recovery of the land from the Defendant before the expiry of 12 years from when the cause of action accrued. In the circumstances, the Plaintiff's right to bring an action for the eviction or recovery of the land in terms of Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya lapsed at the very latest at the end of 1995 considering that the Defendant's unlawful occupation of the land is admitted to have commenced in 1983.
25. The Plaintiff's instant suit is predicated on alleged fraud by the Defendant in obtaining registration of the suit property in its name in 2004. The Plaintiff alleges the registration was obtained fraudulently and seeks the cancellation of the title issued in favour of the Defendant and for the Plaintiff to be declared as the owner of the land. Though the suit is founded on fraud the suit is essentially one where the Plaintiff seeks the recovery of the land from the Defendant. The case the Plaintiff referred to the Land Disputes Tribunal in 2007 was to recover the land which the University was in occupation of and in respect of which the University had acquired title to. The Land Disputes Tribunal lacked jurisdiction to handle the matter and the High Court rightly quashed the Tribunal's decision revoking the title held by the University and awarding land parcel Njoro/Njoro 5/64 to Loice Wangima Mwangi.
26. From the evidence it is not clear when the Plaintiff discovered the alleged fraud by the Defendant. However, from the decision of the Tribunal rendered on 6/7/2007, the Tribunal made an order that the title deed obtained by Egerton University should be revoked which was an indication that at the time of referring the dispute to the Tribunal, the Plaintiff had knowledge the Defendant had title to the land. The Plaintiff under paragraph 5 of the Plaint pleaded thus:-
- “ 5. That after expiry of 5 years the Defendant continued to occupy the suit property without paying rent until 2004 when the Defendant fraudulently acquired a title deed”.
27. In his submissions, the Plaintiff submits he became aware of the fraud in 2010. This in my view cannot be correct as I have indicated the Tribunal was as early as 2007 ordering that the Defendant's title over the suit property to be cancelled. Besides, by exercising of due diligence the Plaintiff would by carrying out a search at the Lands Office have verified the status of the suit land. Indeed in her evidence before the Tribunal Loice Wangima testified that she sought clarification from the Land Registrar who



advised her to seek assistance of the court. The said Loice Wangima vide an affidavit sworn on 22nd January, 2014 annexed in the Plaintiff's supplementary list of documents dated 9/11/2020 affirms that after the expiry of the lease of 5 years from 1978 the Defendant continued occupying the suit property and that in the year 2004 the Defendant fraudulently acquired title to the land. On the evidence, I am satisfied that Loice Wangima the Plaintiff's mother became aware the Defendant had acquired title to the suit land not in 2010 but before she referred the dispute to the Land Disputes Tribunal and that in all probability she became aware sometime in 2004.

28. In the result it is my determination that even if the suit was solely founded on fraud, the same was brought after the expiry of the Limitation period of 3 years within which a suit founded on a tort such as fraud must be brought. Be it as it maybe, having found and held that this was in essence a suit for recovery of land, the period of limitation against the Plaintiff began to run from 1983 when the Defendant's unlawful occupation of the suit property commenced. After 1995, the Plaintiff was by virtue of Section 7 of the Limitation of Actions Act barred by Limitation from instituting the suit to recover the land.
29. The principle behind prescribing a limitation period within which a suit ought to be brought is in recognition of the fact that there ought to be a period within which a suit must be brought to avoid situations where stale actions are orchestrated. There is also cognizance that with the passage of time memories fade or evidence is lost or destroyed and further that witnesses die, retire from Institutions or become incapacitated as in the present case. It is therefore the duty of a party to institute their actions timeously to avoid being caught up by limitation. Where there is cause for a party to be allowed to bring a suit outside the period of limitation an appropriate application for extension of the period may be made under Section 27 and 28 of the Limitation of Actions Act, Cap 22 Laws of Kenya.
30. Where in a suit, the issue of limitation is raised, it goes to the jurisdiction of the court to entertain the suit and ordinarily ought to be determined as a preliminary issue. In the instant matter it is unfortunate that the issue whether or not the suit was statute barred on account of limitation was not considered as a preliminary issue. Having made a determination that the Plaintiff's suit is statute barred having been filed outside the limitation period, I do not have to consider the other issues, as to do so would be an exercise in futility as, the court had no jurisdiction to entertain the suit. The Plaintiff was non –suited. I accordingly order the Plaintiffs suit dismissed with costs to the Defendant.
31. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED THIS 28TH DAY OF MARCH 2023.

JOHN M. MUTUNGI

E.L.C JUDGE

