



**Maghanga v Nyagah & 2 others (Environment and Land Appeal
27 of 2022) [2023] KEELC 18119 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18119 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 27 OF 2022
NA MATHEKA, J
JUNE 21, 2023**

BETWEEN

ELIAKIM MNGODO MAGHANGA APPELLANT

AND

MARGARET MUKAMI NYAGAH 1ST RESPONDENT

BETH NDUTA NDUNGU 2ND RESPONDENT

JEMIMAH WAKESHO DAWSON MABRUKI 3RD RESPONDENT

JUDGMENT

1. The Appellant Eliakim Mngodo Maghanga being dissatisfied with ruling and orders of the Chief Magistrate's Court sitting at Voi (Honourable AM Obura (CM) made on July 8, 2022 in Voi Chief Magistrate's Court ELC No 5 of 2018 Margaret Mukami Nyagah, Beth Nduta Ndungu, Jemimah Wakesho Dawson Mabruki v Eliakim Mngodo Maghanga prefers an appeal against the whole of the Judgement on the following grounds of appeal;
 1. The Trial Court erred in law and fact by allowing the Plaintiffs' suit when they had not proved their case on a balance of probability as required in law.
 2. The Trial Court erred in law and fact by shifting the burden of proof from the Respondents to the Appellant
 3. The Trial Court erred in law and fact by holding that the suit was not time barred contrary to Section 7 of the Limitations of Actions Act (Cap 22) Laws of Kenya because the cause of action occurred on December 6, 2011 which does not relate at all with the suit (while there is no letter dated January 26, 2012) when there was direct Plaintiff's evidence that the allegedly trespassed therein in 1990 or alternatively that the cause of action on November 24, 1998 after Plaintiffs



were allegedly issued with the allotment letter and thereby misinterpreting and applying the law (ie Section 7 of the *Civil Procedure Act*).

4. The Trial Court erred in law and fact by relying on the demand letters (including the letter dated January 10, 2012 which is irrelevant in this case) instead of the Plaintiff's direct evidence to determine the accrual of the cause of action.
5. The Trial Court erred in law and fact by failing to hold that the Plaintiffs' evidence was full of contradictions hence incoherent, unbelievable and untrustworthy which would have led to the dismissal of the Plaintiff's suit.
6. The Trial Court erred in law and fact by holding that the Plaintiffs were issued with the certificate of grant after complying with the letter of allotment requirements when there was no evidence of such compliance especially no evidence of;
 - a. Acceptance of the offer of allotment.
 - b. Payment of stand premium and other items in par. 2 of the letter totaling Kshs 30,865.00 within 30 days of the date thereof (ie November 24, 1998).
 - c. Compliance with the special conditions attached to the letter and in default of all or any of the above the offer would and lapsed automatically.
7. The Trial Court erred in law and fact by holding that it had not been demonstrated that the Plaintiff's property was acquired fraudulently or by misrepresentation when there was ample evidence both oral and written and especially the letter dated May 24, 2000 (DEx 10) which fully demonstrated and proved the same.
8. The Trial Court erred in law and fact by failing to notice or address the issue of double allocation of the same property on the same date to other 3rd parties i.e. Benson Mwaluma Mwaliko (DEx 5) thereby raising a lot of suspicion and incredibility of the Plaintiff's letter of allotment. The letter of allotment does not give name of the local Authority and the attached plan for the plot.
9. The Trial Court erred in law and fact by holding that the Plaintiffs had proved ownership of the suit plot on a balance of probabilities when they had not at all. The purported letter of Allotment names are different from those in the certificate of grant hence could not have been the basis of the issuance of grant.
10. The Trial Court erred in law and fact by failing to analyze the impact and effect of the letter dated May 24, 2000 (DEx 10).
11. The Trial Court erred in law and fact by holding that there was no step taken to cancel the allotment to the Plaintiffs, yet the letter dated May 24, 2000 (DEx10) was itself a step towards the same.
12. The Trial Court erred in law and fact by failing to find that the certificate of title was illegal and null and void because the letter dated May 24, 2000 (DEx10) was very clear that no title was to be issued thereafter.
13. The Trial Court erred in law and fact by failing to hold that the subject properties were part of the assets listed as those of the Defendant's late father in Msa HCC No. 107 of 1991, the estate of Edward Maganga Mwang'ombe and which the grant has been issued



only awaiting confirmation and the Assistant Public Trustee, the Administrator of the Estate (DW-2) evidence was clear on this and which the Plaintiffs had not filed any objections.

14. The Trial Court erred in law and fact by finding that nobody had shed light on the letter dated May 24, 2000 when in fact the Assistant Public Trustee (DW-2) had shed all light and confirmed the authenticity of the said letter,
15. The Trial Court erred in law and fact by holding that the Plaintiffs had legally acquired their title and there was no evidence led to rebut this fact when there was both verbal and written evidence to fully rebut the same.
16. The Trial Court erred in law and fact by holding that the Defendant cannot claim adverse possession when the Defendant was not claiming the same thereby trying to justify and buttress the Plaintiff's claim an outright bias,
17. The Trial Court erred in law and fact by holding that the Defendant had not shown or claimed any overriding interest when the issue of the Defendant's occupation of the property was not disputed and which constituted an overriding interest.
18. The Trial Court erred in law and fact by holding that prior to allotment the subject property was government land and again failing to hold that after cancellation of the allotment by the same government, the Land reverted back to the government thereby contradicting herself
19. The Trial Court erred in law and fact by holding that the Plaintiffs had proved and were entitled to the equitable reliefs sought when they had not and were not deserving of the same and were also guilty of equity especially on the doctrine of laches.
20. The Trial Court erred in law and fact by awarding damages which was not prayed for.
21. The Trial Court erred in law and fact by relying on the survey report which was improperly introduced in court and /or had no relevant evidence.
22. The Trial Court erred in law and fact by awarding damages for encroachment when there was no evidence of the same or that it was the Defendant who built the structures thereon and/ or in the alternative that there was the Plaintiff's own evidence that by the time of the alleged allotment the was occupation therein which therefore cannot amount to trespass otherwise would amount to retrospective application of the law which is unlawful.
23. The Trial Court erred in law and fact by holding that the Plaintiffs had proved an unjustifiable intrusion by the Defendant when there was evidence that by the time of entry to the land, the Plaintiffs had not obtained the alleged letter of allotment hence the land was not theirs hence there could not have been any "intrusion".
24. The Trial Court erred in law and fact by failing to notice the Plaintiff's contradictions in their evidence thereby rendering the same incredible and capable of sustaining the suit.
25. The Trial Court erred in law and fact by allowing the 1st and 2nd Plaintiff's case who had not filed any witness statement contrary to Order 3 Rule 2 (C) of the [Civil Procedure Rules](#).
26. The Trial Court erred in law and fact by failing to consider or properly consider the Defendant's written submissions and authorities which if well considered could have led to a different finding dismissing the Plaintiff's suit with costs.
27. The Trial Court erred in law and fact by failing to find that the court had no jurisdiction over the matter which was raised by the Defendant in his defence because the Plaintiffs pleaded



in paragraph 8 of the plaint that the property is located in Mombasa which is not within the geographical jurisdiction of the court and parties are bound by their pleadings.

2. The Appellant prays that this Appeal be allowed with costs and the Judgement and orders of the Chief Magistrate's Court made on July 8, 2022 in Voi CMC/ELC No. 5 of 2018 be set aside and be substituted with a finding of this court dismissing the Plaintiffs' suit with costs.

3. This court has carefully considered the Appeal and the submissions therein. This being a first appeal, this court has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. In the case of *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR, the Court of Appeal held that;

“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

4. This duty was emphasized by the Court of Appeal in *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2 EA 212 where the court stated that;

“on a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

5. The first issue is on a point of law that the Trial Court erred in law and fact by holding that the suit was not time barred contrary to Section 7 of the *Limitations of Actions Act* (Cap. 22) Laws of Kenya. In the case of *Edward Moonge Lengusuranga v James Lanaiyara & Another* (2019) eKLR, it was held as follows;

“Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the first Defendant having bought the suit land in the year 1999 (as per Paragraph 6 of the Plaint) and taken possession of the same, the Plaintiff herein could only seek to recover it from the 1st Defendants, but only if he did so within twelve years after the Sale Agreement.”

6. Section 7 of the *Limitation of Actions 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, if it first accrued to some person through whom he claims, to that person.”

7. The purpose of the Law of Limitation was stated in the case of *Mebta v Shab* (1965) EA 321, as follows;

“The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his



defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”

8. In the case of *Gathoni v Kenya Co-operative Creameries Ltd* (1982) KLR 104, the Court of Appeal held as follows;

“...The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

9. A suit barred by limitation is a claim barred by law, hence by operation of law, the Court cannot grant the relief sought. In the case of *Iga v Makerere University* (1972) EA, the Court had this to say on the Law of Limitation;

“A Plaint which is barred by limitation is a Plaint barred by law. Reading these Provisions together it 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 Limitations 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 sought.”

10. Section 7 of the *Limitation of Actions Act* provides that an action for recovery of land may not be brought after the lapse of 12 years from the date the right of action accrued to the Plaintiff. I have perused the Plaintiff's documents and considered the evidence in this matter. I note that PW1, produced the allotment letter of the suit land dated 24th November 1998 (PEX1). The Certificate of grant issued to the Plaintiffs is dated 4th February 2011(PEX2). The Plaintiffs demand letter is dated 6th December 2011(PEX3) and the Defendants letter reacting to the same is dated 26th January 2012 (PEX5). It is clear that the cause of action arose somewhere between 2011 and 2012 and this is barely a year after the grant was issued. I find that this suit is not time barred contrary to Section 7 of the Limitations of Actions Act (Cap. 22) Laws of Kenya.

11. Going back to the evidence, I have perused the proceedings of the lower court and find that the 3rd Plaintiff and the Defendant both gave evidence. PW1 testified that they were allotted the suit plot LR No 1956/276 by a letter of allotment dated November 24, 1998 (PEX1) after complying with the conditions of the allotment they were issued with the certificate of grant from November 1, 1998. That the Defendants encroached around 2011/2012. The Defendant testified that his late father owned the said land and that they have been in occupation since 1960s. they stated that the subject properties were part of the assets listed as those of the Defendant's late father in Msa HCC No. 107 of 1991, the Estate of Edward Maganga Mwang'ombe and which the grant has been issued only awaiting confirmation and the Assistant Public Trustee, the Administrator of the Estate (DW-2). The Defendant conceded that his father had no allotment letter but that the Plaintiff's title was fraudulently acquired. No evidence of this fraud was adduced. No evidence of his father's occupation since 1960s was adduced in court. The mere fact that the subject properties were part of the assets listed as those of the Defendant's late father in Msa HCC No. 107 of 1991, the Estate of Edward Maganga Mwang'ombe is not sufficient evidence to prove ownership. Section 107 of the *Evidence Act* Cap 80 of the laws of Kenya states that;

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.



12. In *Mbogo & Another v Shah* (1968) EA 93, the Court, (Sir Newbold, P) stated at page 96;

“A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice.”

13. In the case of *Nkuba v Nyamiro* (1983) KLR 403, the same court stated that;

“A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

14. I agree with the Trial Magistrate that from the evidence on record the Plaintiffs have proved their case on a balance of probabilities. For these reasons I find this appeal is not merited and I dismiss it with costs.

15. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST JUNE 2023.

N.A. MATHEKA

JUDGE

