



Karimi & 2 others (Sued in their capacity as trustees of Majengo Muslim Women’s Group) v Kagendo & 3 others (Environment and Land Appeal E040 of 2022) [2023] KEELC 21707 (KLR) (23 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21707 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E040 OF 2022
CK YANO, J
NOVEMBER 23, 2023**

BETWEEN

**TIME KARIMI 1ST APPELLANT
MAIMUNA HEMED 2ND APPELLANT
JULIA KARUTA 3RD APPELLANT
SUED IN THEIR CAPACITY AS TRUSTEES OF MAJENGO MUSLIM
WOMEN’S GROUP**

AND

**EVELYN KALLEN KAGENDO 1ST RESPONDENT
MUTEMBEI NTWIGA 2ND RESPONDENT
COUNTY LAND REGISTRAR MERU 3RD RESPONDENT
THE HON ATTORNEY GENERAL 4TH RESPONDENT**

(Being an appeal from the judgment of Honourable J. Njoroge Chief Magistrate delivered on 20th July, 2022 in Meru chief magistrates court, ELC suit no. 237 of 2018)

JUDGMENT

Introduction

1. The 1st and 2nd respondents herein filed suit by way of a plaint dated 19th October, 2018 against the appellants and the 3rd and 4th respondents herein alleging that the 1st respondent was the allottee of land known as Meru Municipality Block II/201 and vide an agreement dated 6th June 2017, the 2nd respondent bought the said property from the 1st respondent. That upon purchasing the suit property,



the 2nd respondent has been paying rates to the County Government of Meru, but in the preparation of taking possession discovered that the suit property was already occupied and had been registered in the name of the appellants and certificate of lease issued and new number assigned to it as Meru Municipality Block II/804. It was pleaded that the 1st respondent being initial allottee was not involved in the resurvey that led to the changes. The 1st and 2nd respondents alleged that the resurvey was done maliciously and fraudulently by the 3rd respondent in collusion with and the knowledge and participation of the appellants. The 1st and 2nd respondents gave particulars of the alleged malice and fraud against the appellants and the 3rd respondent.

2. The 1st and 2nd respondents therefore prayed for orders of injunction restraining the appellants from entering, remaining or trespassing, selling, alienating, changing, leasing and/or in any other manner whatsoever dealing with the suit property, an order declaring the 1st respondent as the rightful lawful and legal owner of the said land, an order for cancellation of the appellants as the registered owner of the suit property, an order declaring the resurvey map reference No. 141/81 as illegal, null and void, an order compelling the 3rd respondent herein to issue a certificate of lease to the 2nd respondent for the parcel known as Meru Municipality/Block II/201, an order of eviction against the appellants as well as costs of the suit.
3. In a statement of defence dated 10th December, 2018, the appellants denied the claim stating that they were the legal owner of parcel of land known as Meru Municipality block II/804 having acquired the same from Abongira Motor Garage & Davies Mwenda on 15th December, 1995. That the land was subsequently transferred to them on 17th June 1999 and later acquired title on 16th February, 2000 in the name of the Trustee of the appellants. The appellants stated that they have been in actual possession of the suit land since 1995 and have developed the same by putting up permanent structures for commercial purposes without any challenge from the 1st and 2nd respondents or anyone else. That the 1st and 2nd respondents attempt to place a restriction on the appellants' title was lifted, adding that a letter of allotment has never been proof of ownership of property. The appellants also objected to the jurisdiction of the trial court for the reason that the suit was statute barred.
4. The 3rd and 4th respondents filed a statement of defence dated 26th August 2020 in which they also denied the claim stating that they were not privy to the contents and outcome of any investigations by the Directorate of Criminal Investigations over the suit properties. They averred that it is their statutory duty to carry out survey and register any instrument that is presented for registration that is in compliance with the law. They further averred that they do not issue, cancel or in any way participate in the issuance, cancellation and re-issue of allotment letters and could therefore prove the authenticity or otherwise of the 1st and 2nd respondent's allotment.
5. The 3rd and 4th respondents further averred that any allotment is subject to special conditions attached thereto for which a party who holds one fails to perform or adhere to the special conditions would lose the same. They averred that the records in relation to any parcel have always been available for scrutiny for which the 1st and 2nd respondents base their case due to the openness with which the 3rd and 4th respondents carry out their statutory mandate.
6. The suit was heard by Hon. J. Njoroge (C.M) and in a judgment delivered on 20th July, 2022, the learned trial magistrate concluded that the 1st and 2nd respondents had proved their case on a balance of probabilities and entered judgment against the appellant and the 3rd and 4th respondents as prayed with costs. That decision provoked this appeal through a memorandum of appeal drawn for the appellants by their lawyers, M/S Okubasu Munene & Kazungu Advocates LLP Advocates where 15 grounds of appeal are set out. It is stated in sum that the learned magistrate arrived at the impugned decision against the evidence adduced by the parties, that the magistrate erred in law and fact by elevating a



letter of allotment above a title deed issued to the appellants over 20 years before the institution of the suit, that the magistrate ignored the fact that the appellants had been in possession and developed the suit property and occupied the same for over 20 years, that the learned magistrate should have found that the 1st and 2nd respondents sat on their rights for over 20 years and failed to comply with the conditions in the letter of allotment, that the trial court failed to appreciate the purport of Section 7 of the [Limitation of Actions Act](#) and misinterpreted Section 26 of the [Land Registration Act](#) and that the Learned Magistrate failed to find that the suit was caught by the doctrine of laches and that the same was filed as an afterthought.

7. The appeal was canvassed by way of written submissions. The appellant filed their submissions dated 10th August 2023 through the firm of Okubasu Munene & Kazungu advocates LLP advocates. The 1st and 2nd respondents' submissions are dated 14th September, 2023 filed through the firm of Wesonga, Mutembei & Kigen advocates while the 3rd and 4th respondents did not file submissions within the time directed by the court or at all.

Appellant's Submissions

8. The appellant's advocates gave a brief background of the case and urged the court to carry out a rehearing, re-evaluation and reconsideration of the evidence afresh and render a just determination after drawing its own conclusions as was held in *Abok James Odera t/a A J. Odera & associates Vs John Patrick Macharia t/a Machira & co Advocates* [2013] eKLR. Counsel for the appellants identified the issue for determination as whether the learned magistrate erred in law and fact in elevating a letter of allotment above a certificate of lease issued to the appellant on 16th February, 2000 over 20 years before institution of the suit, whether the learned magistrate erred in law and fact by finding no fault whatsoever with the 1st respondent having sat on her purported rights for over 20 years and having failed to comply with the conditions in the letter of allotment, whether the learned magistrate erred in fact in ignoring the fact that the appellants had been in possession and had actually developed the suit property and occupied the same for over 20 years, whether the learned magistrate erred in fact and law in ignoring the defence by the appellants and not appreciating sufficiently the evidence and submissions of the appellants, whether the learned Magistrate erred in law and fact by failing to find that the plaintiffs' suit was caught up by the doctrine of laches, offended Section 7 of the [Limitation of Actions Act](#) and the same was filed late as an afterthought and whether the learned trial magistrate erred in law and fact by allowing the plaintiff's suit together with costs when there was insufficient evidence to warrant orders sought.
9. Learned counsel for the appellants stated that the appellants produced a certificate of lease as proof of ownership of plot No. Meru Municipality Block II/804 while the 1st respondent on the other hand produced a letter of allotment as proof of ownership of plot No. Meru Municipality Block II/201, and submitted that it is trite law that upon failure to comply with the terms of letter of allotment, the said offer lapses and the party thereafter cannot rely on the letter of allotment to claim ownership. The appellants' counsel further submitted that Section 26 of the [Land Registration Act](#) affirms that certificate of title is conclusive evidence of proprietorship and that the learned magistrate erred in law and fact in finding in favour of allotment. The appellants' counsel relied in Nairobi Civil Appeal No. 123 of 2019, *Edward Mutinda Ndetei Vs Alois Muia* which also quoted *Muthiora Vs Marion Muthama Kiara* (suing on behalf of the Estate of Erastus Muthamia Kiara (deceased)) [2002] eKLR.
10. Counsel for the appellants submitted that for a letter of allotment to supersede a certificate of lease, it has to be demonstrated that the transaction leading to registration of owner was fraudulent and the owner was a party to such fraud. They stated that the appellants produced the letter as D exhibit 3 from the chief land registrar dated 29th October, 2018 which showed the preliminary transactions that



led to registration and issuance of lease certificate to the appellants That the letter clearly stated that plot No. Meru Municipality Block II/804 was allocated to Maringa Motor Garage & Davies Mwenda vide the letter of allotment dated 15th December, 1995 and the proprietors then transferred the parcel to the appellants herein vide a form of transfer dated 17th June 1999 after stamp duty of \$. 200 was paid. That the Chief Land Registrar was quite categorical that the transfer and registration process was quite overboard and that there was no reason as to why the restriction should not be lifted, and that the District Surveyor (P.w 4) testified that there was no irregularity in resurvey of plot No. Meru Municipality Block 11/804 that took place in 1999 and there was registration index map prepared to reflect that. It is therefore the appellants submissions that the trial magistrate erred in finding that the letter of allotment valid and cancelling the certificate of lease issued to the appellants whereas no evidence was tendered showing the appellants acquired the certificate of lease fraudulently and or was a party to such a fraud. That the 1st respondent's claim was based on quicksand as it is trite law that registered proprietor interest's ranks higher than the transient rights in the letter of allotment.

11. The appellants' counsel further submitted that the 1st and 2nd respondents' suit was an afterthought and offended the doctrine of laches and argued that the trial court never considered the appellants' submissions on the issue. Counsel for the appellants cited Section 7 of the Limitation of Actions and relied on the case of *Smith Vs Clay* [1767] Eng r 55 (1767)3 Bro CC 646 (1767) 29 ER 743, *Edward Moonge Lenyusuranga Vs James Lanaiyara & another* [2019] EKLK and *Dickson Nginge Ngugi Vs Consolidated Bank Ltd (formerly Jimba Credit Corporation & another* [2020] eKLR and submitted that the 1st respondent was prosecuting a stale claim to the prejudice of the appellants. It is the appellants submission that the learned trial magistrate erred in law and facts in allowing the 1st & 2nd respondents' case in its entirety without considering the evidence of the appellants and urged the court to find that the 1st & 2nd respondents suit was caught by the doctrine of Laches and was filed as an afterthought, the 2nd respondent was not an innocent purchaser for value having purchased the suit parcel without conducting due diligence, ascertaining party in possession and location of suit parcel on ground and verifying survey map/registration documents of the said parcel, the appellants acquired a good title/certificate of lease on 16th February, 2000 and is the rightful owner of Meru Municipality Block II/804, and that the 1st respondent did not comply with the terms and conditions of the letter of allotment and the letter of allotment issued thereto to the 1st respondent was not proof of ownership and could not supersede the certificate of lease issued to the appellants, and prayed that the appeal be allowed as prayed.

1st And 2nd Respondents' Submissions

12. The advocates for the 1st and 2nd respondents also gave a brief background and summary of the case and argued that the appellants submissions do not address the grounds set forth in the memorandum of appeal as it only addressed two issues. The 1st and 2nd respondents counsel restricted their submissions to those two issues which are, whether the 1st respondent's letter of allotment was elevated above a certificate of title and whether the 1st and 2nd respondents suit was an afterthought.
13. With regard to the first issue, learned counsel for the 1st and 2nd respondents submitted that the appellants seem to suggest that a certificate of title is absolute and indefeasible. They cited Section 26 (1) of the *Land Registration Act* and Black's Law Dictionary, Ninth Edition at page 638 – 639 and submitted that prima facie evidence is not irrefutable and can be rebutted by contrary evidence. That the appellant's certificate of title is only prima facie evidence of ownership and is not conclusive and irrebuttable evidence of ownership. Learned counsel for the 1st and 2nd respondents relied on the case of *Edward Ndungu Wambui Vs Francis Kinyanjua Mwangi & 3 others* Civil appeal No. 465 of 2019 (2021 (KECA) 144 (KLR) and submitted that from that decision of the Court of Appeal, a title



acquired illegally, unprocedurally or through a corrupt scheme cannot be endorsed as valid by a court. That no reason was given why the 1st respondents property known as Meru Municipality Block 11/201 was re-surveyed and the number changed to Meru Municipality Block 11/804. They made reference to the evidence of the Meru County Surveyor and submitted that the only inference that can be made from his testimony is that the re-survey and change of number was unprocedural and illegal. The 1st and 2nd respondent's counsel relied on the case of Kenya Anti-Corruption Commission Vs Frann Investments Limited & 6 others [2020] eKLR, the supreme Court decision in Dina Management Limited Vs County Government of Mombasa & others (2023) KESC 30 (KLR) and the court of appeal Decision in Munyu Maina Vs Hiram Gathiha Maina [2013] eKLR which was cited by the Supreme Court in the aforementioned case.

14. Counsel for the 1st and 2nd respondents also cited Section 112 of the *Evidence Act* and submitted that the appellants did not go the extra mile of demonstrating not only that the acquisition of their title was legal, procedural and formal, but also did not rebut the 1st and 2nd respondents' testimonies and documents in support. That the appellants' assertion of ownership began and ended with the certificate of title without any other supporting document.
15. On whether the 1st and 2nd respondents' suit was an afterthought, learned counsel for the 1st and 2nd respondents stated that by a notice of preliminary objection dated 24th November, 2018, the appellants raised the issue of limitation in accord with Section 7 of the *Limitation of Actions Act* and the same was argued by way of submissions and the trial court dismissed the objection by a ruling dated 30th January, 2019 and the appellants did not appeal against the dismissal. It is submitted that the issue of limitation of the suit under Section 7 of the *Limitation of Actions Act* is not only moot but is also res-judicata. That by opting not to appeal against the said ruling, the appellants abandoned their right of appeal and were satisfied with the same and are thus estopped from raising the issue. The 1st and 2nd respondents urged the court to dismiss the appeal with costs.

Analysis And Determination

16. This court has considered the pleadings, the record of appeal, grounds of appeal, the evidence adduced and the submissions made together with the authorities relied upon. It is trite that this court does have power to examine and evaluate the evidence and findings of fact of the trial court in order to determine whether the conclusion reached on the evidence should stand. In *Selle Vs Associated Motor Board Co.* (1968) E.A 123, the Court of Appeal expressed itself as follows-;

“... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect...”

17. In *Jabane Vs Olenja* (1986) KLR 664, the Court of Appeal added as follows-;

“I accept this proposition, so far as it goes, and this court does have power examine and re-evaluate the evidence and findings of fact of the trial court in order to determine whether the conclusion reached on the evidence should stand... More recently, this court has held that it will not likely differ from the findings of fact of a trial judge who had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no



evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did...”

18. The issues that call for my consideration are-;
 - i. Whether the 1st and 2nd respondents’ suit was caught up by laches, offended Section 7 of the [Limitation of Actions Act](#) and an afterthought.
 - ii. Whether the 1st respondent’s letter of allotment was elevated above certificate of title issued to the appellants.
 - iii. Who was the rightful owner of the suit land.
19. Regarding the first issue, the appellants submitted that the 1st and 2nd respondents’ suit offended the doctrine of laches and argued that the learned magistrate never considered the issue, though raised. On their part, the 1st and 2nd respondents submitted that the appellants raised a notice of preliminary objection on the issue and the trial court heard the parties and dismissed the objection by a ruling dated 30th January, 2019. That the appellants opted not to appeal against the said ruling and therefore the same is res judicata and the appellants are estopped from raising the issue of limitation in this appeal.
20. This court has perused the court record. The appellants filed a notice of preliminary objection dated 24th November, 2018 seeking to have the suit dismissed on the ground that the court had no jurisdiction to determine the matter by dint of Section 7 of the [Limitation of Actions Act](#). Pursuant to directions given by the trial court, the said objection was heard by way of written submissions. In its ruling dated 30th January, 2019, the learned trial magistrate, Hon. S.ABUYA, SPM stated inter alia as follows-;

“ ... Whereas I agree with the 1st defendant’s counsel that any suit for recovery of land ought to be filed within 12 years as provided by Section 7 of the [Limitation of Actions Act](#), Section 26 of the same Act provides that where fraud, mistake or ignorance of material facts is pleaded time will run from the moment such a litigant discovered the fraud or mistake. In the present case the 2nd plaintiff pleaded that he discovered the fraud on 20/8/18 and he reported at DCI Meru. Therefore, I find the 12 years start to run from 20/8/18 when the plaintiff discovered the fraud and the suit is not time barred having been filed on 22/10/2018 when 12 years had not elapsed from 20/8/18 which is the date when the plaintiff discovered the fraud...”
21. From the record, it is apparent that the appellants did not appeal against the said ruling of 30th January, 2019. In this regard, I am in agreement with the 1st and 2nd respondents’ counsel’s submission that by opting not to appeal against the said ruling, the appellants were deemed to have been satisfied with the same and are therefore estopped from raising the issue in this appeal since the same is re judicata.
22. The other issue relates to the position of a letter of allotment in which the 1st and 2nd respondents based on their claim vis a vis the certificate of title held by the appellants. In other words, who was the rightful owner of the suit property.
23. The 1st and 2nd respondents’ case was that the 1st respondent was the allottee of the property known as Meru Municipality Block II/201 which she later sold to the 2nd respondent on 6th June 2017. That when the 2nd respondent went to take possession, he found another person in possession. That other person turned out to be the appellants who held a certificate of lease for the same plot but renamed Meru Municipality Block II/ 804, which was issued on 16th February, 2000.
24. The evidence on record show that the letter of allotment issued to the 1st respondent is dated 7th June 1991. The 1st respondent however, did not take possession or develop the plot. She also did not obtain



title for the plot. However, the 1st and 2nd respondents produced receipts showing that they had paid for the certificate of lease, survey, rates, stamp duty and standing premium. The said payments were made on 3rd January 1996.

25. From the material on record, it is clear that a resurvey was done and in the map No. 338/180 parcel No. Meru Municipality Block II/201 was resurveyed and issued with a new number 804. The surveyor who testified as P.W1 could not confirm if the 1st respondent (or 2nd respondent) as the owner of parcel No. Meru Municipality Block II/201 was notified about the resurvey that was done. Whereas the appellants have challenged the allotment of parcel No. 201 on the grounds that the conditions for acceptance were not fulfilled by the 1st and 2nd respondents, the documents on record indicate that the offer to the 1st respondent was never cancelled and indeed the late payment of the requisite fees were acknowledged. In my view, and as rightly found by the trial court, by accepting the late payment, the County Government of Meru and its predecessor, the defunct Meru Municipal Council and the Commissioner of Lands waived the limitation period of 30 days and ought to have notified the 1st and 2nd respondents of any changes in the form of resurvey. Indeed, the County Government of Meru gave consent to change the ownership of the plot No. Meru Municipality Block II/201 from the 1st respondent to the 2nd respondent. As rightly found by the trial court, the net effect of the said consent is that the County Government of Meru was acknowledging that the plot was still available physically on the ground and in the records, otherwise they would have declined to grant the consent.
26. The appellants seem to suggest that a certificate of title is absolute and indefeasible. However, Section 26 (1) of the [Land Registration Act](#) provides as follows-;

“The certificate of title issued by the registrar, upon a registration, or to a purchaser of land upon a transfer or transmission of the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

27. In this case, a certificate of lease for title No. Meru Municipality Block II/804 in the name of the appellants was produced before the trial court. The same was issued on 16th February, 2000. The appellants evidence was that they acquired the said plot from Abongira Motor Garage & Davis Mwenda on 15th September, 1995 and was transferred to them on 17th June 1999 and have been in possession and occupation having developed the same.

In this case, the appellants did not produce any sale agreement to support the alleged transaction between them and Abongira Motor Garage & Davis Mwenda. Further, the appellants did not produce any documents in support of the ownership before registration and the process culminating in the issuance of title for plot No. 804. The appellants also did not produce any documents to show payment of rates, rent and other charges, including minutes supporting the alleged allocation to the alleged original owners or a consent for the subsequent transfer to the appellants. Indeed, I have not seen any letter of allotment in favor of the said Abongira Motor Garage & Davis Mwenda who were not even called as witnesses. The appellants are only basing their title on a resurvey which was not only a subject



of investigation, but for which the 1st and 2nd respondents were not even notified. I am in agreement with the trial court's finding that the resurvey process which led to the change of plot No. 201 to 804 was not supported by any official documents and also done without any authority and notification to the affected parties, especially the 1st respondent.

28. In the case of Dr. Joseph M.K Arap Ngok Vs Justice Moiwo Ole Kuiuwa & another Civil application No.60 of 1997 (UR), it was held-;

“It is trite that such title to lauded property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.”

29. In the instant case, I find that no reason was given why the 1st respondent's property known as Meru Municipality Block II/201 was resurveyed and the number changed to Meru Municipality Block II/804. In any case, every survey must have supporting documents and must be authorized. From the material on record, the only inference that can be made is that the resurvey and change of number of the suit plot was unprocedural and illegal and the only purpose was to deprive the 1st and 2nd respondents' their land parcel No. Meru Municipality block II/201.

30. The Supreme court of Kenya in the case of Dina Management Limited Vs County Government of Mombasa & others (2023) KESC 30 (KLR) held-;

“As held by the Court of appeal in Munyu Maina Vs Hiram Gathiha Maina civil appeal No. 239 of 2009 [2013] eKLR, where the registered proprietors root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”

31. In this case, it is my considered view that the appellants did not go the extra mile that is required of them and no evidence was led to them to support their acquisition of the suit property which was already given to the 1st respondent who in turn sold it to the 2nd respondent.

32. In totality, my evaluation of the evidence and the applicable law to the facts of this case shows that the learned trial magistrate arrived at the right decision and I find no reason to upset the finding of the trial court.

33. In the result, I find no merit in the appellant's appeal and I dismiss it with costs to the 1st and 2nd respondents.

34. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF NOVEMBER, 2023.

C.K YANO

JUDGE

IN The Presence Of

Court Assistant – V.Kiragu/Lena M

Mutembei for 1st and 2nd respondents

Mwirigi Batista for appellants



No appearance for A.G for 3rd and 4th respondents

C.K YANO

JUDGE

