



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. E024 OF 2021

JOHN RIUNGU M'MUTEA1ST PLAINTIFF

FRANCIS MUTUGI NDATHO 2ND PLAINTIFF

JOHN MURIUNGI KAMANJA 3RD PLAINTIFF

JULIUS MUTWARUCHIU NDATHO4TH PLAINTIFF

CATHERINE AYUB NGOCHI 5TH PLAINTIFF

PETER GICHUNGE (Suing on their own behalf and on behalf of seventy eight others (78) other members of Gampogo Clan) 6TH PLAINTIFF

VERSUS

GLADYS NJERI WARUIRU 1ST DEFENDANT

STEPHEN MUTUMA KIANGURA 2ND DEFENDANT

THE LAND REGISTRAR, MERU3RD DEFENDANT

RULING

1. The 1st and 2nd defendants by a preliminary objection dated 30.8.2021 urge the court to find the suit herein time barred by dint of **Section 4 (2) of the Limitation of Actions Act Cap 22 and Section (3) (1) of the Public Authorities Limitation Cap 39 Laws of Kenya** and that secondly, it was improperly before the court for non-exhaustion of the internal dispute mechanisms as set out in both the **Land Consolidation Act and Land Adjudication Act Cap 283 and 284** respectively.

2. The parties except the 3rd respondent have buttressed their rival positions through written submissions dated 15.12.2021 and 1.12.2021 respectively.

3. The 1st and 2nd defendants submit the plaintiffs' claim related to the acquisition and registration of **Parcel No. Kiachuri "A"/611**. In their view, time started running from 9.9.2005, hence by filing the suit on 12.8.2021, the same was already time barred. Reliance was placed on **Francis Munyiri Kamau –vs- Margaret Nyawira & 2 Others [2008] eKLR.**

4. It was submitted the plaintiffs' claim if any came under the judicial review in line with **Sections 26 and 29 of Cap 284**. Reliance was placed on **Kiroket Ole Punyua –vs- Umash Ole Mwanik & 2 Others [2021] eKLR and Republic –vs- Land Adjudication Office Tururung Adjudication Section Elgoyo Marakwet & Another Exparte Biyaa Clan [2021] eKLR.**

5. Lastly, it was submitted the prayers sought could not be issued by this court since the awarding of land out of an adjudication process was not the preserve of the court.

6. On their part, the plaintiffs submitted the preliminary objection filed offended the criteria of what amounted to a preliminary objection as per the parameters set in **Mukhisa Biscuits Manufacturing Ltd –vs- Wes End Distributors Ltd [1969] E.A 697 and Justus Tureti Obara –**

vs- Peter Koipetai Nengiso [2014] eKLR.

7. The court was urged to find it had jurisdiction to hear the matter on merits and not on technicalities as provided under **Article 162 (2) of the Constitution and Section 13 of the Environment and Land Court Act 2011.**
8. The plaintiffs' claim was set out in the plaint dated 28.7.2021 accompanied by a list of witnesses, witness statements and list of documents.
9. Briefly, the plaintiffs brought the suit on their behalf and on behalf of the members of Gampogo clan who have been occupants of **L.R Kiamuri A/611** under adjudication which land the deceased is alleged to have bought and colluded with land adjudication officers to forcefully expel or evict the plaintiffs. The plaintiffs lodged claims which led to a decree by the court on 19.10.2006 but the same was overturned in **High Court Meru Miscellaneous Civil Application No. 180 of 2006** which suit abated.
10. They now raise the issues that the registration of the deceased was out of fraud, collusion and hence pray for the invalidation of the title(s), declaration that the land belonged to them as a clan, rectification of the grant and retransfer to their names.
11. By a defence dated 30.8.2021, the defendants denied the contents of the plaint, averred that they lawfully acquired the land, stated the plaintiffs had always known about the cause of action since 2005 when they filed **Meru Central District LDT No. 90 of 2005**, the suit was time barred and that they should have exhausted the laid down internal dispute mechanisms under the law.
12. In a reply to defence dated 13.9.2021, the plaintiffs maintained that the acquisition of the suit land was tainted with fraud and illegalities since the consolidation was not sensible, conscious, there was no compensation, arbitration board was not involved, inhabitants and or clan member rights and interests were not factored in through Record of Existing Rights and followed by an Adjudication Register and that they discovered the mistake or fraud which had been concealed hence time had not started running until the discovery and lastly that due to the fraud and mistake and contravention of the adjudication laws, this court had requisite jurisdiction to determine the matter.
13. What amounts to a preliminary objection has been a subject to courts pronouncement starting with the holding in Mukhisa Biscuits (supra) defining as a pure point of law argued on the assumption that all the facts as pleaded by the other side are correct and that it cannot be so where facts have to be ascertained or if what is sought is the exercise of judicial discretion.
14. In **Aviation & Allied Workers Union Kenya –vs- kenay Airways Ltd & 3 Others [2015] eKLR**, the Supreme Court of Kenya held for there to be a pure question of law and the court must be satisfied that there was no proper contest as to the facts.
15. Looking at the pleadings by both sides in this matter, what is set out by the plaintiffs as pleaded as facts is denied by the 1st and 2nd defendants.
16. The 3rd defendant who is in my view bears the biggest burden has not filed any defence at all to the allegations against it by the plaintiffs which touch on the community/clan/group rights to own land, displacement of the community/clan/group during the adjudication process, investigations on historical injustices during the adjudication process and undue influence, collusion, fraud and illegalities during the adjudication process.
17. Further, the 1st and 2nd defendants plead there has been non-exhaustion of the adjudication process. None of the defendants have pleaded the stage at which the process has reached. Strangely, one of the listed documents by the plaintiffs was a search of the suit property dated 6.4.2021 where the indication by the 3rd defendant is that **LDT Case No. 90 of 2005** was still pending. After the coming into force of the **Environment and Land Court Act**, Land Disputes Tribunal matters were to be brought before this court since the **Land Dispute Tribunal Act 1990** was repealed.
18. In my considered view, the facts in this matter are contested and parties have taken divergent views over them. It cannot therefore be assumed that what the plaintiffs have pleaded is admitted by the defendants and particularly pertinent issues such as:-(a) the cause or causes of action, (b) when the cause of action arose, (c) the locus standi of the plaintiffs. (d) if they belong to the community/clan or group and lastly when the historical injustices arose.
19. The context of community rights and historical injustices took a new dimension after the promulgation of **2010 Constitution** and the coming into force of the **National Land Commission, Community Land Act, Land Act 2012 and the Land Registration Act 2012.**
20. Similarly, the law applicable to the plaintiffs' claim and the defence raised by the defendants are both issues of fact and issues of law which are not agreed upon in this suit since the **Limitation of Actions Act, Public Limitation of Actions Act, the Land Adjudication Act and Land Consolidation Act Cap 22, 39 Cap 283 and 284 as per Article 262 as read together with Schedule 6 Rule 7 of the Constitution** must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.
21. The upshot is the notice of preliminary objection dated 21.1.2020 is hereby dismissed with costs. Leave is granted for the 3rd defendant to file a defence within 21 days from the date hereof.
22. Parties to comply with **Order 11 within 45** days from the date hereof.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 23RD

DAY OF MARCH, 2022

In presence of:

Makura for plaintiffs – present

Kieti for Kimathi for 1st and 2nd defendants

Kieti for 3rd defendant – present

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE