



Kassim v Safi Mining Development Ltd (Environment & Land Case 217 of 2015) [2022] KEELC 3464 (KLR) (27 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3464 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 217 OF 2015**

NA MATHEKA, J

JULY 27, 2022

BETWEEN

HILALI MOHAMED KASSIM PLAINTIFF

AND

SAFI MINING DEVELOPMENT LTD DEFENDANT

JUDGMENT

1. The Plaintiff avers that by an order of the Special District Commissioner, Kwale in Land Appeal Case No. 558 of 1985 the plot of land known as Parcel No. 33 in Wasini Adjudication Section was wrongfully adjudicated as belonging to one Amina Juma Khamis. The Plaintiff being aggrieved by the said decision of the Special District Commissioner filed before this Honourable Court Miscellaneous Civil Case No. 66 of 1986 seeking orders for certiorari quashing the decision of the Special District Commissioner. The Plaintiff duly served the Defendant with the said application but the Defendant failed to enter appearance or file any papers on it in his behalf as required by law or at all and also failed to attend the hearing thereof in spite of being served. The said application was thereafter heard and determined in favour of the Plaintiff and the Plaintiff awarded the said parcel of land. Pursuant to the order of the court, the Plaintiff served the District Land Registrar, Kwale with a copy of the said order.
2. By a letter dated 19th January 1994 the District Land Registrar Kwale District informed the Plaintiff's advocates of his inability to effect the order on the grounds that the said parcel of land had been sold by Amina Juma Khamis to the Defendant on 14th February, 1991. The Plaintiff's Advocates thereafter wrote to the Deputy Registrar seeking ways of implementing the order of this Honourable court but in vain. The Plaintiff avers that in view of the order of this honourable court as stated in paragraph 6 hereof the transfer by the said Amina Juma Khamis of the said plot of land to the Defendant was illegal wrongful and made in bad faith with a view of defeating the judicial process. The Plaintiff further states that he is the rightful owner of the plot of land known as Parcel No. 33. The Plaintiff prays for judgement for;



1. A declaration that the alleged transfer of the said Parcel No. 33 to the defendant by Amina Juma Khamis was illegal and wrongful.
 2. An order requiring the District Land Registrar, Kwale District to rectify the title in respect of Parcel No. 33 by deleting the defendant's name and substituting it with the Plaintiffs name.
 3. Costs of this suit.
3. The Defendant avers that the adjudication by the Special District Commissioner, Kwale in land Appeal No. 558 of 1985 was legal and the same conferred upon Amina Juma Khamis a legitimate right of ownership over the plot known as Parcel No. 33 Wasini adjudication section. The Defendant avers that the Plaintiff comes to Court after a lapse of over fifteen (15) years for his remedy which clearly shows that the Plaintiff is guilty of laches and that the suit is overtaken by events. The Defendant states that it transferred the Parcel of Land known as Parcel No. 33 in Wasini as a bonafide owner for consideration in exercise of its freedom to dispose of its property pursuant to the adjudication of the Special District Commissioner. The Defendant avers that the Plaintiff is misconceived, incompetent and that it does not disclose any or any reasonable cause of action and that the Plaintiff's remedy does not lie against the Defendant and that the suit should be struck off.
4. This court has carefully considered the evidence and submissions therein. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24(a) of the [Land Registration Act](#) provides as follows:

Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

5. Section 26 (1) of the [Land Registration Act](#) states as follows:

The Certificate of Title issued by the Registrar upon registration ... 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... 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.”
6. The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
7. This court in considering this matter referred to the case of [Elijah Makeri Nyangw'ra -vs- Stephen Mungai Njuguna & Another](#) (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the [Land Registration Act](#) rendered himself as follows:-

-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to



which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

8. It is not in dispute that the Defendant is the proprietor of parcel of land No Kwale/Wasini Island/33. The Plaintiff testified that an order of the Special District Commissioner, Kwale in Land Appeal Case No. 558 of 1985 the plot of land known as Parcel No. 33 in Wasini Adjudication Section was wrongfully adjudicated as belonging to one Amina Juma Khamis. The Plaintiff being aggrieved by the said decision of the Special District Commissioner filed before this Honourable Court Miscellaneous Civil Case No. 66 of 1986 seeking orders for certiorari quashing the decision of the Special District Commissioner which ruled in his favour. He later discovered that the land had been sold to the Defendant hence he filed this suit to recover the same. The Defendant has raised the issue of Limitations of Actions in this matter and that the suit is time barred and this court will consider it first as it touches on a point of law. Section 4 of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya prescribes the limitation period for the institution of suits in regard to various causes of action. Actions founded on contract the limitation period is six years whereas in regard to actions founded on tort the limitation period is three years. The limitation period in regard to an action to recover land under Section 7 of the *Limitation of Actions Act* is twelve years. Section 7 of the 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 first accrued to some persons through whom he claims, to that person.”

9. Under the provisions of Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, an action for the recovery of land cannot be brought after the expiry of twelve years. In the instant case the Defendant’s title was issued on the 9th May 2001 and this suit was filed in court on 10th August 2000. The Plaintiff being aggrieved by the said decision of the Special District Commissioner filed before this Honourable Court Miscellaneous Civil Case No. 66 of 1986 seeking orders for certiorari quashing the decision of the Special District Commissioner which was ruled in his favour. This was in 1986 and this case was filed in 2000. This is a period of 14 years. The court also notes that the said order reversing the decision produced in court is not signed or dated.

10. In the case of *Gathoni vs Kenya Co-operative Creameries Ltd* (1982) KLR 104 Potter, JA stated the rationale of the Law of Limitation as follows;

The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

11. In the case of *Rawal vs Rawal* (1990) KLR 275 the court held 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 had lost evidence for his defence from being disturbed after a long lapse of time. See also the case of *Melita –vs- Shah* (1965) EA 321 cited with approval by Bosire, J in the above case.”

12. Under provisio (i) and (ii) of section 26 of the *Limitation of Actions Act* would be absolved of any wrong doing, they having not been a party to any fraudulent dealing affecting the property. The provisio to section 26 provides as follows;

Provided that this section



- i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made

13. I find that this suit is statute barred under the *Limitation of Actions Act* and no evidence of fraud has been adduced against the Defendant. Having found this there will be no need to go into the merits and demerits of this case. I order the suit struck out and dismissed with costs to the Defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF JULY 2022.

N.A. MATHEKA

JUDGE

