



**Nyabola v Khagondi (Environment & Land Case 58 of 2014)
[2022] KEELC 4811 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4811 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 58 OF 2014
AA OMOLLO, J
SEPTEMBER 21, 2022**

BETWEEN

PATRICK NYABOLA PLAINTIFF

AND

CAROLINE AKINYI KHAGONDI DEFENDANT

JUDGMENT

1. The suit was commenced by a plaint dated March 17, 2014. The plaintiff pleaded that in 1986, he purchased 2.90 ha of land comprised in parcel No. Samia/Budongo/1684 from the defendants' father, one Eliya Khagondi Onyango – deceased. That the defendant's father was reluctant to transfer the sold piece necessitating the filing of Busia SRM CC No. 2 of 1990. The plaintiffs could not however execute the decree obtained in this suit because Khagondi Onyango – deceased fraudulently caused another sub-division of Samia/Budongo/1684 into 1789 & 1790 in place of the earlier sub-division which created numbers 1752 and 1753.
2. The plaintiff stated that the new sub-division indirectly nullified the court's judgment since there was now no title known as Samia/Budongo/1753. It is his case that the Defendant further sub-divided L.R No. 1789 and has now unlawfully sold part of the land to St. Mary's Bukiri School. The plaintiff contends that his share is comprised in the new title Samia/Budongo/2424 which measures 3.1ha.
3. Consequently, the plaintiff prays for judgment against the defendant for:
 - i. Injunction restraining the Defendant from dealing in any manner with land Parcel No. Samia/Budongo/2424 and in particular from sub-dividing, charging or disposing off the same till further Orders of this Court.
 - ii. An Order to rectify the Register to show the plaintiff's interest in land parcel No. Samia/Budongo/2424.



- iii. Costs of this suit.
4. The defendant filed her defence on 9/4/2014 and started by pleading that she was not privy to the sale transaction and she is not the administrator of the estate of her deceased father thus incapable of being sued. The defendant further stated that the claim is bad in law for:-
 - a. Being statutorily time barred.
 - b. Court lacks jurisdiction to enforce a decree from another suit.
 - c. The decree in Busia RMC No. 2 of 1990 is also time barred.
5. The defendant further pleaded that the plaintiff has never occupied or used any portion of L.R No. Samia/Budongo/2424 and he is not entitled to the reliefs claimed. She added that the suit is misconceived, incompetent and should be struck out or dismissed with costs.
6. The plaintiff in response to the defence reiterated the contents of the plaint that his suit is not statutorily time barred as the matter complained off took place in the year 2011. That the defendant got registered as owner of the suit parcel unlawfully and fraudulently hence the register should be rectified.
7. The plaintiff gave evidence on 16/2/2022 that he knew the defendant after suing her in the 1990 case. His evidence is that the defendant's father caused a surveyor to sub-divide L.R No. 1684 into 1752 and 1753 after their sale transaction. He produced a copy of the mutation form as Pex 1 and his share was given the number 1753. That when the defendant's father failed to effect the transfer, the plaintiff decided to file case No. 2 of 1990. He produced the judgment obtained in that case as Pex 2 and whose decree vested L.R No. 1753 to him. He avers that the deceased vendor frustrated him by again subdividing the land to L.R Nos 1789 and 1790.
8. PW1 continued that he lodged a caution on L.R No. 1789 which caution was removed pursuant to court order obtained in Busia Misc. Application No. 6 of 2011 which order according to him was a forgery. He started that case Misc. Appl. No. 6 of 2011 relates to *Beatrice Mayo Vs Joseph Mwangi*. That the portion of the land sold to the school is part of the land he had purchased. That the defendant ought to be restrained from disposing L.R No. Samia/Budongo/2424 until further orders of this court.
9. In cross-examination PW admitted he never had any sale agreement with the present defendant. That he purchased 6½ acres of land from the defendant's father but never took possession of the land. He wanted to be given the land he bought. He had not sent surveyors to confirm ground position of L.R No. 2424 but he knows it occupies the same ground position as L.R No. 1753. In re-examination, the witness said the new numbers 1752 and 1753 were not registered.
10. In her opening statement, the defendant said she heard of the plaintiff from her father. She adopted her witness statement dated 3/4/2014 where she stated that she is the registered owner of L.R No. Samia/Budongo/2424. She also said the plaintiff has never been in occupation of the suit land and has no interests over it. She urged the court to dismiss the claim.
11. In cross-examination, DW said her father died in 1992. She could not remember being sued in Case No. 2 of 1990. She only knew of this case and the one brought against her by Sylvester Okumu. She admitted that her father told her about selling land to the plaintiff. This marked the close of defendant's case.
12. Both parties filed their closing written submissions. Besides reiterating the evidence adduced, the plaintiff submitted that all the sub-divisions were done by the defendant after the death of her father despite being aware of the judgment in Bsa Civ. Case No. 2 of 1990. That this shows however motive



to defeat justice and removing the caution placed by the plaintiff irregularly. He urged the court to grant the orders prayed for.

13. The defendant raised six issues which they framed as arising for determination inter alia;
 - a. Whether the defendant has capacity to be sued.
 - b. Whether the plaintiff is entitled to specific performance.
 - c. Whether the claim is statutory time barred.
 - d. Whether other parties will be affected.
 - e. Whether the plaintiff has proved fraud.
 - f. Whether the plaintiff has proved his case.

14. The defence submits that she lacks capacity to be sued as the land was purchased from Eliya Khagondi in 1986, and no Land Control Board consent to transfer was obtained within the time stipulated in the law thus the transaction became void. That there is nothing to specifically transfer to the plaintiff. The defendant submitted further that both the claim to enforce the contract or the decree in case No. 2 of 1990 is statutorily time barred. That the plaintiff failed to prove any fraud on the part of the defendant. She stated that she is the absolute owner of the suit land as per the provisions of section 38 of *Land Registration Act*. Therefore no cause of action having been shown against her, the suit should be dismissed.

15. The question framed by the court for determination are three;
 - a. Whether the suit is time barred.
 - b. Whether or not the plaintiff has proved fraud against the defendant.
 - c. Whether or not the order for rectification of the register for L.R No. Samia/Budongo/2424 can be issued.
 - d. Who bears the costs of this suit.

16. The defendant pleaded and submitted that the plaintiff claim is statute barred just as his decree obtained in Busia RMCC No. 2 of 1990 is equally time barred. The plaintiff on his part submits that the cause of action arose in 2011 hence the same is not time barred. In the plaint, the plaintiff is seeking for rectification of the register for parcel No. Samia/Budongo/2424 to reflect the parcel of land he purchased. The rights sought to be enforced arose from a sale transaction between him and the Eliya Khagondi – deceased executed in 1986. The net effect of plaintiffs’ claim is specific performance pursuant to a contract of sale of a portion of land originally known as Samia/Budongo/1684. As at the year 2011 when the plaintiff alleges that the defendant undertook the illegal sub-division, his rights had not been registered.

17. In fact the plaintiff realized the evasiveness of the vendor as early as 1990 when he decided to sue them. The cause of action cannot be said to have arisen in 2011 when the plaintiff says that the decree he obtained could not be registered because the defendant’s father had caused L.R No. 1684 to be subdivided to create different numbers 1789 and 1790 instead of L.R Nos 1752 and 1753. The pleadings state clearly that his share was comprised in L.R No. 1789. So that if time is counted from when the plaintiff learnt of the creation of L.R No. 1789 after the judgment in Case No. 2 of 1990, then by



the time this suit was filed, over 20 years had lapsed. Section 4(a) of the Limitation Actions Act Cap 22 states thus;

- “4(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued-
- (a) actions founded on contract”.

18. The plaintiff has a decree obtained in Busia RMCC No. 2 of 1990 issued on 28/2/1990 and produced as Pex 2. According to the provisions of section 4(4) of the Limitation of Actions Act;

- “4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

19. In the case of M’ikiara M’Rinkanya & Ano vs Gilbert Kabeere M’Mbijiwe Civil Appeal No. 124 of 2003 (2007) eKLR;

- “From the above analysis, it is clear that a judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in section 7 of the Act. If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgment debtor acquires possessory title by adverse possession, which he can enforce in appropriate proceedings. So, quite apart from the authority of *Lougher v Donovan*, which we consider as still good law in this country, and the previous decisions of this Court, there is a statutory bar in section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of “action” in section 4(4) of the Act would be inconsistent with the law of adverse possession.”

20. The second issue is whether the sub-division creating L.R No. 2424 was fraudulent in light of the caution placed by the plaintiff in title No. 1789. Under the provisions of Order 2 of the Civil Procedure Rules, particulars of fraud must be brought out in the pleading of the party alleging the fraud. The plaintiff did not comply with this provision. The plaintiff accuse the defendant of fraud on two grounds; sub-dividing the land despite being aware of the judgment in BSA RMCC No. 2 of 1990 and secondly removing the caution irregularly. As concerns the first issue, the status of that judgment is settled by the provisions of section 4(4) Cap 22 of the Limitation of Actions Act. The judgment was delivered in February 1990 and the contested sub-division carried out in 2011 which is 21 years post the delivery date of the judgment. The defendant stated that she was not aware of this decree. The plaintiff did not produce any evidence that he served the decree upon this defendant so as to hold her responsible for non-compliance.

21. On how the caution was removed, the plaintiffs stated that when his counsel perused the court file, the parties in respect to the Misc. Application No. 6 of 2011 were Beatrice Mayo Vs Joseph Mwangi. However, his own Pex 7 and 8 are pleadings filed in respect of Misc. Case No. 6 of 2011 and the order, both of which show the parties were Caroline Adikinyi, Khagondi Vs Patrick Wafula, Patrick Bwire Nyabola & Sylvester Okumu. There was no other evidence to contradict that this order was relied on



by the Land Registrar to withdraw the caution placed on the title No. 1789. As the registered owner of parcel No. 1789, nothing stopped the defendant from exercising her rights over it including subdividing the same. The claim that the action for sub-division was fraudulent has not been supported by any evidence. I am guided by the decision of the Court of Appeal in *Ndolo Vs Ndolo* (2008) I KLR where the Court stated that;

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...” ... In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

22. Can this court order for rectification of the register for title No. 2424? Under section 80(1) of [Land Registration Act](#), provides thus;

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

23. The claim was premised on a contract of sale as the basis the plaintiff wants his interest included in the register of L.R No. 2424. The rights created by the sale has been determined by this court in the preceding paragraphs as time barred. The plaintiff stated in his evidence that he never took occupation of the sold portion due to the frustrations from the defendant’s father. The defendant also pleaded and stated that the plaintiff has never been in possession of any part of this land.

24. Since the plaintiff’s rights under statute were time barred, his rights under equity are also defeated by virtue of his non-possession of the suit title. No rights accrue to a purchaser not in possession as no relationship of trust can be derived. This court also notes that the plaintiff was really indolent. He got judgment in 1990, realizes his documents executed pursuant to the decree cannot be registered but all he does is to register a caution on the new title L.R No. 1789 and then goes to slumber. Equity aids the vigilant and not the indolent. Thus in the circumstances of this case, no basis has been laid to order for rectification of the register.

25. The upshot of the foregoing, I find the plaintiff’s case is not proved. The same is dismissed. Each party to meet their respective costs of the suit.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 21ST DAY OF SEPT. 2022.

A. OMOLLO

JUDGE

