REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA NO. 12 OF 2020

DAVID NGUGI .....APPELLANT

VS

THE BOARD OF GOVERNORS,

KAMAHUHA HIGH SCHOOL .....RESPONDENT

(An Appeal from the judgement of the Honourable B Ochieng Acting Chief Magistrate in CMCC NO 200 of 2013 issued on the 27/2/2015)

JUDGMENT

1. The Appellant in the lower Court sued the Respondent and prayed for orders of vacation, removal of structures and buildings on LOC17/SABASABA/T.1229 and LOC17/SABASABA/T.231 (the suit lands), the following orders; payment of mesne profits for illegal occupation of the suit lands; alternatively, compensation for the annexture and occupation of the suit lands.

2. Whilst admitting that it has occupied the suit lands, the Respondent resisted the Appellants claim and contended that the suit lands were acquired for the expansion of the school from a number of 123 residents of the area who were compensated with alternative plots by the County Council of Muranga then and awarded equivalent portions from LOC17/KAMAHUHA/916. Further that it has been in continuous, uninterrupted and open occupation of the suit lands for a period of 27 years since 1986 and has constructed dormitories and other structures on the land. Interalia, the Respondent contended that the Appellants claim is time barred.

3. The suit was heard and the Court determined it in the following terms;

> "……The Plaintiff's suit is barred as 27 years have lapsed since the Defendant took possession of the plots. The Defendant school has been in on Adverse Possession for more than 12 years and is therefore entitled to the plots. The evidence by the defence show that affected plot owners were compensated by the County Council of Muranga with plots equivalent sizes in plot LOC17/KAMAHUHA /916 owned by the Council and therefore the Plaintiffs claim for compensation has no basis. He should pursue title for the new plots with the Council. His claim for mesne profits must also fail more so since he produced no evidence in support thereof. In the result it is my finding that the Plaintiff has failed to establish his claim against the Defendant on a balance of probabilities and consequently his claim is hereby dismissed with costs."

4. Being aggrieved by the judgment of the Hon Court the Appellant has preferred 14 grounds of Appeal which I have taken the liberty to summarize as follows; the Appellants submissions were not taken into consideration; documentary evidence was disregarded; the magistrate misdirected himself in holding that the Appellant did not proof his case, failed to hold that the possession was illegal; admitting extraneous evidence that the Appellant acquiesced to the illegal occupation of the lands.

5. The Appellant prays the judgement of the Court be set aside and the case be retried; that the Respondent vacates the suit land and in the alternative the Respondent compensates the Appellant at market value.

6. As to whether the suit was time barred the Appellant sub mitted that it is not certain when the Respondent entered the suit land. That he lived in Nairobi and it is only in 2012 when permanent buildings were put up by the school. Further that the suit cannot be time barred because there was consent by the 123 community owners of the lands, the Appellant included allowing the school to occupy the land but decries the delay in actualizing the exchange or compensation of the lands by the County Council. That since the agreement had no default clause time cannot be said to have started running.

7. Whether the Respondent has been in Adverse Possession, the Appellant submitted that the community agreed to hand over possession of their parcels to the Respondent and therefore adverse possession cannot be founded.

8. On the issue of compensation by Council, the Appellant submitted that he and the 122 other community land owners have not been compensated. Interalia that the parcel LOC17/KAMAHUHA /916 is still registered in the name of the County Council.

9. The Respondent submitted that the Appeal is incompetent before the Court for the following reasons; the Appellant obtained leave of the Court on the 12/10/16 but failed to file the Appeal until on 4/4/18, 18 months later. This renders the Appeal incompetent as it was filed inordinately late.; on the 7/5/18 the Appellant filed an amended Appeal without leave of the Court; the Appellant's Advocate on record have not complied with Order 9 Rule 9 of the Civil Procedure Rules, that is to say they did not seek leave of the Court to come on record nor obtained consent of the previous Advocate thereby the Appellants Counsel is not properly on record.

10. In the main, the Respondent submitted that the Hon Court considered and evaluated the evidence placed before it as seen on pages 49-53 of the Record of Appeal where the Court evaluated the evidence adduced, the exhibits produced, the applicable law and the written submissions of the parties.

11. The Appellant admitted during cross examination that the Respondent's buildings have been in existence for over 27 years.

12. As to whether the evidence of the Respondent was given undue weight, the Respondent submitted that the defence witnesses gave credible evidence which as not challenged by the Appellant.

13. In response to ground no 14 of the Record of Appeal, the Respondent submitted that no particulars of erroneous proceedings were disclosed in the Appeal. That no proper basis has been presented to the Court to warrant the retrial of the suit. It relied on the case of **Karmali Tar Mohammed & Anor Vs I H Lakhani & Company (1958) EA 567** where the Court stated that;

> "except on grounds of fraud or surprise the general rule is that an Appellate Court will not admit fresh evidence unless it was not available to the party seeking to use it at trial or that reasonable diligence would not have made it so available."

14. As to when the Plaintiffs cause of action arose the Respondent submitted that it is true the plaint does not state when the cause of action arose however during evidence the Appellant stated that the school fenced off the plot in 1984 when the Appellants father was alive. That he admitted in cross examination that the school had already put up the buildings in 1984 which was not removed and has been there since 30 years ago.

15. That the finding by the Magistrate that the suit was time barred was founded on uncontroverted evidence adduced during the hearing.

16. Having read evaluated and considered the Record of Appeal, the proceedings in the lower Court, the written submissions of the parties together with all the materials placed before me the key issues for determination are whether the suit was time barred; whether the magistrate misdirected himself to the evidence placed before him and reached a wrong decision; whether the Appeal is incompetent; who meets the cost of the Appeal.

17. There are facts that are not disputed. The Appellant is the registered owner of the suit lands as can be seen in the certificate of official searches as well as the copy of titles. It is disappointing that the Appellant produced ineligible copies of titles with the result that I cannot tell when they were registered. I will rely on the uncontroverted certificates of official searches which state that the Appellant became registered as owner in 1986 and the titles were issued in 2012.

18. It is not in dispute that 123 community owners, the Plaintiff included agreed to vacate their lands for the expansion of the school in 1984. According to the minutes of the County Council in a meeting held on the 2/12/86 it was resolved that each person whose T. Plot has been occupied by the school be compensated on equal basis from the public land namely parcel LOC17/KAMAHUHA /916 provided the Council will not be involved financially. On the 13/2/1991 the Council wrote to the school enclosing the names and the details of the land reference numbers of the 123 persons whose lands had been occupied by the school and who were to be compensated with equal sizes in parcel LOC17/KAMAHUHA /916.The suit lands are included in the list.

19. It is the Appellants case that the school has trespassed onto his parcels without any compensation and sought orders of eviction interalia.

20. The Appellants claim is premised in para 4 of the Plaint which contains the particulars of trespass which include trespassing without the knowledge and consent of the Appellant, constructing permanent houses and failing to vacate the suit land when demanded.

21. It is admitted by the Appellant that he inherited the suit lands from his father in early 1980s. That the school encroached on the suit lands in 1984 prompting his father to write a letter warning the school to desist from encroaching his land. The letter dated the 13/1/1984 addressed to the Secretary, Board of Governors stated as follows;

> "RE: EMANUEL MUCHOKI; PLOT NO LOC 17/SABASABA T. 231 and 229.
>
> That your school has unlawfully and without my client's authority moved onto and occupied his above two plots by constructing buildings thereon. It is constitutional and illegal for you to build on my clients said plots without his authority and/or consent."

22. The letter went ahead to warn of dire consequences such as filing suit if the school gave no explanation and proposed compensation within 10 days. It would appear that no response was elucidated by this letter.

23. During the trial the Appellant stated as follows;

> "the school entered into the plots in 1984 when my father was still alive, fenced off but we retook the land and removed their fence put up a new one…. That they eventually came back and started constructing buildings and I wrote to them in 2012."

24. In cross examination the Appellant answered that he could not remember exactly when it was but it was before 1984 when the school entered the land. In particular, the Appellant responded that the school had already put up the building by 1984 which has been in existence for 30 years.

25. Further he stated that he has been aware that the school was occupying part of his lands.

26. This evidence was supported by the evidence of DW1 who testified from the school records that the school has been in occupation of the lands for over 27 years and that it has constructed dormitories thereon. That 123 community land owners gave their lands for the expansion of the school in lieu of compensation by the County Council with equivalent land from its parcels LOC17/KAMAHUHA /916.

27. The evidence of DW1 was collaborated by the evidence of DW2 and DW3.

28. From the totality of the above, evidence agrees with the letter dated the13/1/1984 which shows that by 1984 the school was in occupation of the land and had constructed buildings thereon.

29. Though the Appellant was wishy washy in his plaint as to the date that the cause of action arose, going by the uncontroverted evidence, it clear that the school occupied the suit lands as early as 1984 if not before.

30. With that finding, I will now examine the Appellants cause of action which is illegal trespass as pleaded under para 4 of the plaint.

31. The Respondent admitted being in occupation of the suit land since 1986 and that the suit is time barred.

32. Trespass is the unauthorized entry of another land. Section 3 (1) of the Trespass Act, Cap 294 provides that:

> "Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

33. In the case of **Charles Ogejo Ochieng - v- Geoffrey Okumu, (1995) eKLR** the Court of Appeal held that trespass is an injury to a possessory right and therefore the proper plaintiff in an action for trespass to land is the person who has title to it or a person who is deemed to have been in possession at the time of trespass.

34. In the case of **Entick Vs Carrington (1765)** Lord Camden CJ had this to say: -

> "Our law holds the property of every man so sacred, that no man can set his foot upon his neighbor's close without his leave."

35. **Black's Law Dictionary, 9th Edition at page 1642** defines trespass as the unlawful act committed against the person or property of another.

36. Before delving into whether or not the Appellant proved trespass, I shall determine the issue of time bar. Trespass perse is an actionable tort. Section 4 (2) of the Limitation Act provides as follows;

> "An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date".

37. 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.

38. The Court has found that the school entered the suit lands in 1984 and therefore a claim of trespass ought to have been filed in 1987. Even if I take the proposition that the Appellant became the registered owner of the land in 1986, then he ought to have brought the action in 1989 at the very latest. Filing suit in 2012 is inordinately time barred.

39. In the case of **Bosire Ogero –Vs- Royal Media Services [2015] eKLR** the Court noted that: The law of Limitation of Actions is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting Defendants against unreasonable delay in the bringing of suits against them. The issue of limitation goes to the jurisdiction of Court to entertain claims and therefore if a matter is statute barred, the Court has no jurisdiction to entertain the same.

40. Even if a retrial could be allowed, the remedies could not be granted since the cause of action will be dead on arrival and no remedies can be obtained.

41. In the case of **Iga vs. Makerere University [1972] EA** it was held that:

> "A plaint which is barred by limitation is a plaint barred by law. The Court Uganda Court held the Limitation 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.

42. The land having been occupied by the school in 1984, the Appellant cannot seek to recover it over 3 decades later. This is in excess of 12 years stipulated in the statute.

43. In the end the Court finds that the Hon Magistrate applied the law properly and arrived at the correct decision.

44. Since time bar goes to the jurisdiction of a Court, I find no necessity to determine the other issues.

45. In the end the Appeal is not meritorious. It is dismissed with costs in favour of the Respondent.

46. **It is so ordered**.

DATED, SIGNED & DELIVERED THIS 28TH DAY OF JANUARY 2021

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Ms Macharia HB for Mbugua for the Appellant/Plaintiff

Defendant: Absent

Court Assistant: Kuiyaki