



Gathathi & another v Maina (Suing as the Personal and Legal Representative of the Estate of Joseph Maina Matheri – Deceased) & another ([Suing as the Personal and Legal Representative of the Estate of Joseph Maina Matheri – Deceased]) (Environment and Land Appeal 114 of 2022) [2024] KEELC 692 (KLR) (13 February 2024) (Judgment)

Neutral citation: [2024] KEELC 692 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 114 OF 2022**

**BM EBOSO, J
FEBRUARY 13, 2024**

BETWEEN

**SAMUEL MBURU GATHATHI 1ST APPELLANT
RUIRU PEAK ACADEMY 2ND APPELLANT**

AND

**JOHN MATHERI MAINA 1ST RESPONDENT
GITHUNGURI CONSTITUENCY RANCHING COMPANY LIMITED 2ND
RESPONDENT**

**[SUING AS THE PERSONAL AND LEGAL REPRESENTATIVE OF THE
ESTATE OF JOSEPH MAINA MATHERI – DECEASED]**

***((Being an Appeal against the Judgment of the Hon J. A AGONDA, Principal
Magistrate, delivered on 9/11/2022 in Ruiru Principal Magistrate Court))***

JUDGMENT

Introduction

1. This appeal challenges the Judgment rendered on 9/11/2022 by Hon. J.A Agonda, Principal Magistrate, in Ruiru Senior Principal Magistrate Court MCL & E Case No 118 of 2020. The dispute in the suit revolved around the question of beneficial ownership of a parcel of land measuring ¼ of an acre, situated in a subdivision scheme that was owned by M/s Githunguri Constituency Ranching Company Limited within Ruiru Area. The 1st respondent was the plaintiff in the trial court and described the land simply as “all that plot previously denoted by Ballot No G86 issued by Githunguri Constituency Ranching Company Limited”. The two appellants were the 1st and 2nd defendants in



the trial court. They described the land as “Plot No 3206” and contended during trial that the land had been surveyed as “Ruiru/Ruiru West Block 1 [Githunguri]/3206. No evidence of registered title nor authenticated survey number was tendered. I will, in the circumstances, refer to the said piece of land simply as “the suit property”. Before I dispose the key issues that fall for determination in the appeal, I will outline a brief background to the appeal.

Background

2. Vide a plaint dated 9/10/2020, the 1st respondent, on behalf of the estate of the late Joseph Maina Matheri, initiated a suit in the trial court against the two appellants. The 1st respondent alleged that the suit property belonged to the late Joseph Maina Matheri. It was his case that the 2nd appellant had, without any colour of right or iota of justification or due process, invaded the suit property and had constructed a school on it. He sought: (i) a declaration that the estate was the bonafide owner of the suit property; (ii) a permanent injunction; (iii) an order of eviction; and (iv) an award of costs of the suit. It was the case of the 1st respondent that the late Matheri acquired the suit property from Githunguri Constituency Ranching Company Limited [referred to in this Judgment as “the Company”] through acquisition of Share Certificate No 3511, followed by balloting. He contended that the land was denoted by Ballot No PM/150 which was later changed to Ballot No G.86.
3. The two appellants filed a joint statement of defence dated 5/11/2020. They contested the claim and contended that the suit property was acquired from the company by the 1st appellant through acquisition of Share Certificate No 4368 issued on 26/3/1992 and Ballot No PM 150 which later became Ballot No G.86. They added that the 1st appellant subsequently sold the suit property to the 2nd appellant through a sale agreement dated 27/3/2006. It was their case that the company subsequently issued Share Certificate Number 1139 dated 31/3/2006 to the 2nd appellant and cleared the 2nd appellant to be registered as proprietor of the land. The two appellants added that the suit in the lower court was incompetent and totally defective on the grounds that: (i) the trial court lacked pecuniary jurisdiction to hear the dispute; and (ii) the cause of action was statute – barred under Section 7 of the *Limitation of Actions Act*.
4. Besides filing the joint statement of defence, the two appellants took out and served a third party notice dated 27/7/2021 on Githunguri Constituency Ranching Company Limited. The company in turn filed a thirdparty defence dated 1/11/2021 through M/s Kanyi Kiruchi & Company Advocates, the law firm that was already on record for the 1st respondent. The company contended that the signature on the documents held by the two appellants appeared to be that of a former director of the company, Francis Karianjah Njoroge, who had signed on the part reserved for the Chairman, hence usurping the powers of the Chairman. The company denied liability.
5. In addition to filing the joint defence, the two appellants filed a notice of preliminary objection, inviting the trial court to dismiss the suit on the grounds that it lacked pecuniary jurisdiction and that the claim was statute – barred. The trial court subsequently rendered a ruling on the preliminary objection in which it held that the two grounds of objection required proof through evidence, hence they could not be ventilated on the platform of a preliminary objection.
6. Upon conducting trial and upon receiving submissions, the trial court rendered the impugned Judgment in which it held that: (i) the 1st respondent was the legitimate owner of the suit property; (ii) the 1st appellant did not acquire a legal title to the suit property capable of transfer to the 2nd appellant; (iii) the appellants were to bear costs of the suit. The trial court did not, however, make any determination on the two issues relating to limitation of actions under Section 7 of the *Limitation of Actions Act* and the pecuniary jurisdiction of the trial court.



Appeal

7. Aggrieved by the Judgment of the trial court, the two appellants brought this appeal through a memorandum of appeal dated 5/12/2022. They advanced the following ten (10) verbatim grounds of appeal:
 1. The honourable trial magistrate erred in law and in fact in failing to determine the issue of limitation of actions raised by the defendants in their statement of defence.
 2. The honourable trial magistrate erred in law and in fact in failing to determine the issue of pecuniary jurisdiction which was raised by the defendants in their statement of defence.
 3. The honourable trial magistrate erred in law and in fact in failing to determine the real issue before her.
 4. The honourable trial magistrate erred in law and in fact in finding that the third party had produced an extract of the members' register yet the third party's witness had admitted there was no members' register produced in court.
 5. The honourable trial magistrate erred in law and in fact in failing to appreciate the complexities, controversies and intrigues surrounding Githunguri Constituency Ranching Scheme and appropriately caution herself over the same before rendering Judgment.
 6. The honourable trial magistrate erred in law and in fact in failing to make any determination and/or finding on the third party claim made by the defendants.
 7. The honourable trial magistrate erred in law and in fact in failing to address the role of the third party in the conveyance transaction between the defendants and finding no liability against the third party.
 8. The honourable trial magistrate erred in law and in applying wrong legal principles in determining the suit.
 9. The honourable trial magistrate misrepresented the facts and evidence and misinterpreted the law on the subject matter.
 10. The honourable trial magistrate erred in law and in fact in failing to consider the written submissions by the defendants.
8. The appellant urged this court to set aside the Judgment of the trial court and substitute it with an order dismissing the plaint dated 9/10/2020. They further urged the court to award them costs of the appeal.

Appellants' Submissions

9. The appeal was canvassed through written submissions dated 18/5/2023 and supplementary written submissions dated 20/7/2023, filed by M/s Mwaniki Gachoka & Co. Advocates. Counsel for the appellants identified the following as the three key issues that fell for determination in the appeal: (i) Whether the Learned Magistrate erred in failing to determine the issue of limitation of actions and pecuniary jurisdiction; (ii) Whether the 1st respondent provided sufficient evidence to prove its case; (iii) Whether the appellants had proved their third-party claim against the 2nd respondent; and (iv) Whether the appeal is merited.



10. On whether the Learned Magistrate erred in failing to determine the issue of limitation of actions and the pecuniary jurisdiction of the court, counsel submitted that the appellants had raised the issue of limitation of actions and the issue of pecuniary jurisdiction of the trial court in their joint statement of defence dated 5/11/2020. Counsel argued that despite the respondents having been aware of the alleged encroachment of the suit property in the year 2006, they did not initiate proceedings until 12/10/2020 when they filed the suit in the lower court. Counsel contended that the suit was statute-barred given that it had been filed 14 years after the cause of action arose.
11. Counsel added that the appellants, vide their bundle of documents dated 12/2/2021, produced a valuation report that indicated that the suit property was valued at Kshs 18,500,000, which was beyond the pecuniary jurisdiction of the Senior Principal Magistrate Court which was Kshs 15,000,000. Counsel submitted that the proceedings conducted in the trial court were a nullity and an exercise in futility given that it lacked pecuniary jurisdiction to entertain the suit. Counsel added that the Learned Magistrate erred in failing to determine the issue of jurisdiction, thereby occasioning a miscarriage of justice to the appellants.
12. On whether the 1st respondent provided sufficient evidence to prove his case, counsel submitted that the dispute in the trial court related to a piece of land in Githunguri Constituency Ranching Company, previously denoted by Ballot Number PM 150 and later converted to Ballot No G-86. Counsel added that the 1st respondent produced documents showing that they had been issued with a share certificate in the year 1991 and produced receipts evidencing payment of survey fees. Counsel added that the 1st appellant testified and produced documents to show that he acquired the suit property in the year 1992 from the 2nd respondent and was issued with Share Certificate Number 4368, in the year 2003. Counsel submitted that the 1st appellant produced receipts from the Department of Lands evidencing payment of stamp duty and registration fees. Counsel added that the 2nd appellant produced an agreement for sale dated 27/3/2016, share certificate number 1139, a clearance certificate dated 31/3/2006, and a copy of ballot number G-86, issued by the 2nd respondent.
13. Counsel submitted that, on the other hand, the 1st respondent produced a receipt issued by the 2nd respondent, a clearance certificate issued by the 2nd respondent in the year 2004, and a letter dated 30/5/2005 from the District Land Registrar which required the Commissioner of Lands to execute transfers for execution of listed properties with (Ruiru West Block I (Githunguri) 3206) being one of the listed properties.
14. Counsel argued that the Learned Magistrate erroneously observed in the impugned Judgment that the respondent's witness had corroborated his evidence by producing a members register, when in fact, during cross-examination, the 2nd respondent's witness confirmed that he had no register to produce in court and ascertain the person in whose name the suit property was registered. Counsel added that the 2nd respondent did not produce a members' register to prove its position. Counsel argued that the suit property was held by the 2nd respondent, adding that the members register was a critical document in establishing the rightful owner of the suit property. Counsel relied on the case of James Njoroge Gitau v Lucy Chepkurui Kimutai [2018] eKLR to support his submissions. Counsel argued that the trial court relied on non-existent documentation and arrived at a determination without any supporting documentation. Counsel added that the suit property had not been registered and there had not been any title issued to either of the parties claiming ownership of the land. Counsel added that the 1st respondent did not prove their case to the required standard, hence the suit ought to have been dismissed with costs.
15. On whether the appellants had proved their third-party claim against the 2nd respondent, counsel submitted that the Learned Magistrate erred in failing to make a determination on the issue. Counsel



added that the 2nd respondent's witness did not dispute the authenticity of the documentary evidence produced by the appellants which originated from their office. Counsel submitted that the appellants' claim for indemnity was on the basis of documentation and clearance certificates they had received from the 2nd respondent. Counsel added that the 2nd respondent's witness contended that the share certificate and the clearance letter were allegedly signed by the secretary who had no authority to sign on behalf of the chairman. Counsel argued that the internal management issues of the 2nd respondent did not afford the 2nd respondent a defence and urged the court to hold the 2nd respondent liable for the appellants' claim for indemnity.

16. On whether the appeal is merited, counsel submitted that the appeal was merited. Counsel added that the 2nd respondent accepted payment relating to the suit property from both the appellants and the 1st respondent but failed to produce evidence to ascertain the lawful owner of the suit property. Counsel argued that the appellants produced original ballot number G-86 which was confirmed by the 2nd respondent to have been converted from ballot number PM 150. In conclusion, counsel urged the court to set aside the impugned Judgment, allow the appeal, and award costs of the appeal to the appellants.

1st and 2nd Respondents' Written Submissions

17. The two respondents filed written submissions dated 12/7/2023 through M/s Kanyi Kiruchi & Co Advocates. Counsel identified the following as the five issues that fell for determination in the appeal: (i) Whether the trial court erred in determining the dispute without jurisdiction as to limitation of action and pecuniary jurisdiction; (ii) Whether Plot G 86 was formerly PM 150; (iii) Who between the appellant and the 1st respondent held Ballot PM 150; (iv) Whether the appeal is merited; and (v) What order should be made in relation to costs.
18. On whether the trial court erred in determining the dispute without jurisdiction in relation to limitation of action and pecuniary jurisdiction, counsel submitted that the trial court elaborately dealt with the issue vide its ruling delivered on 28/5/2021. Counsel added that the cause of action in the suit arose when the appellants gained entry and started building a dormitory on the land. Counsel added that the 2nd appellant and the respondents stated on oath that the construction of the dormitory on the suit plot began sometime between the years 2015 and 2016.
19. On whether Plot -86 was formerly PM 150, counsel submitted that the parties to the appeal were in agreement that the suit property was Plot PM 150 at the time of balloting by shareholders of the 2nd respondent. Counsel added that the 1st respondent's deceased father balloted for plot number PM 150 which was later converted to G86. Counsel further submitted that the fact that the receipt dated 18/9/2003 produced by the appellants identified the suit property as Plot PM 150 while the clearance certificate also produced by the appellants identified the suit property as G.86 was an indication that the two plot numbers referred to the same property. He added that the issue had also been dealt with by the Board of Directors of the 2nd respondent.
20. On who between the appellant and the 1st respondent held or still holds original ballot number PM 150, counsel submitted that the 1st respondent's deceased father held ballot PM 150 which the parties to the suit confirmed to be the original ballot when it was produced in court. Counsel submitted that the said ballot was later changed to ballot G 86. Counsel questioned how the 1st appellant acquired ballot G 86 given that the original ballot PM 150 was still in the custody of the 1st respondent.
21. On whether the appeal is merited, counsel submitted that the appellants' documents were tainted with illegality and fraud while the 1st respondent's documents proved his case. Counsel contended that the appellant purported to have bought the suit property from the 2nd respondent directly but could not



explain why his share certificate number 4368 dated 26/3/1992 was a transfer from share certificate number 3281. Counsel further submitted that despite the appellant admitting that he had never owned plot number PM 150, he could not explain how he acquired ballot G-86 yet the original ballot PM 150 was held by the 1st respondent. Counsel added that the clearance certificate produced by the appellants was undated but signed by the former director of the 2nd respondent, one Francis Karanja Njoroge, who had many pending criminal cases and had even been convicted in some. Counsel argued that the respondents proved their case on a balance of probabilities.

22. On costs, counsel relied on the principle that costs follow the event. He urged the court to dismiss the appeal with costs.

Analysis and Determination

23. I have considered the record of appeal; the grounds of appeal; the parties' respective submissions; and the relevant legal frameworks and jurisprudence. The appellants advanced ten (10) grounds of appeal in the memorandum of appeal dated 5/12/2022. They subsequently filed written submissions in which they condensed the ten grounds of appeal into the following three issues which they invited the court to determine: (i) Whether the Learned Magistrate erred in failing to determine the issues of limitation of actions and pecuniary jurisdiction; (ii) Whether the 1st respondent provided sufficient evidence to prove his case; and (iii) Whether the appellants proved their third party claim against the 2nd respondent. I will dispose the three issues sequentially in the above order.

24. Did the trial court err in failing to determine the issue of limitation of actions? The appellants contend that the trial court committed a serious error by failing to determine the issue of limitation of actions. They argue that they raised the issue in the joint defence and during trial. A look at the record of appeal reveals that the appellants pleaded at paragraph 13 (b) of the joint defence that the suit by the 1st respondent was statute-barred under Section 7 of the *Limitation of Actions Act*, hence incompetent.

25. It does also emerge from the testimony of PW1 during cross-examination and re-examination that the issue featured prominently during trial. PW1's verbatim evidence during cross-examination reads as follows:

“We knew since 2006 that a person had encroached on the land and a case was pending in Githunguri”

26. PW1's testimony during re-examination reads as follows:

“The letter dated was written to directors of Githunguri Ranching Ltd. We knew the intruder had entered in the land in 2006. My wife had gone to till the land and 1st defendant chased her away”.

27. Further, among the exhibits produced and relied on by the 1st respondent during trial was a letter dated 11/4/2006 from M/s Karago S. N & Company Advocates addressed to the Directors of Githungiri Constituency Ranching Company Limited. The letter reads as follows:

“Under instructions from our client above named, we write to address you as immediately following:

Our clients is a member of your company vide ballot Number PM 150 facts whereof are well within your ken.

However, lately he noted someone who had encroached his plot and upon enquiries, he realized that somebody else had been allocated the same plot under ballot number G86 and



he has no knowledge how this happened. The conclusion herein is that he has been deprived of his right.

Our instructions are hereby to demand which we hereby do that you do revoke the said illegal ballot number within the next seven (7) days from the date hereof failure to which we have instructions to sue you for the necessary remedy holding you liable as to costs and other incidentals arising therefrom without further recourse to you whatsoever”

28. The 1st respondent also produced and relied on the 1st appellant’s lawyer’s letter dated 22/4/2006 which was a response to the letter dated 11/04/2006. The letter dated 22/04/2006 was written by M/s Wakahu Mbugua & Company Advocates and reads as follows:

“We refer to the above matter and your letter dated 11th instant addressed to Ruiru Peak Academy. We have been retained by Mr. Gathathi to write and notify you that he is the one who sold the plot in issue to Ruiru Peak Academy. He was then a bonafide owner of the said plot before selling it to Ruiru Peak Academy. This can be confirmed with Githunguri Ranching Company offices who are in custody of the register of shareholders and owners of plots. In view of the matter raised herein above and instant records of ownership, we do advise Ruiru Peak Academy vide a copy of this letter not to vacate the plot as demanded. We further notify Githunguri Constituency Ranching Company Ltd.”

29. The above evidence clearly establish that the cause of action in the suit accrued in April 2006 or prior to that. Further a perusal of the pleadings and the record of the trial court establish that the question of limitation was a key element of the defence of the two appellants.
30. A perusal of the impugned Judgment reveals that the trial court did not make any pronouncement on the issue of limitation of actions. In my view, this was a grave error. I say so because the issue of limitation of actions and the competence of the suit in the trial court was a central issue that had been pleaded and canvassed by the appellants. The appellants invited the trial court to determine it. The issue touched and defined the jurisdiction of the trial court to entertain the dispute. It defined the validity of the 1st respondent’s suit. The trial court was therefore obligated to determine the issue in its Judgment.
31. My evaluation of the issue is that, Hon. C.A. Otieno – Omondi properly directed herself in the preceding ruling dated 28/05/2021 when she disallowed the preliminary objection as the platform on which to ventilate the issue. It was therefore incumbent upon the subsequent trial magistrate to consider and determine the issue on the basis of the evidence that had been placed before the trial court in the course of trial.
32. An evaluation of the evidence which is quoted above in extenso reveals that the cause of action in the dispute which was before the trial court arose in April 2006. Under Section 7 of the *Limitation of Actions Act*, the late Matheri had 12 years from April 2006 within which to ventilate his claim in a court of law. He chose not to initiate appropriate court proceedings during his life time. He eventually died in July 2014 without initiating a suit to recover the land. His estate stayed for a further period of six years without initiating recovery proceedings in a court of law. By the time they initiated the suit giving rise to this appeal in 2020, the claim was already statute-barred under Section 7 of the Limitations of Actions Act. Put differently, the cause of action having accrued in April 2006, the 12 year limitation period lapsed in April 2018. The claim that was lodged in October 2020 was clearly statute-barred. Consequently, the trial court had no jurisdiction to make the award that it made in relation to the stale claim.



33. On the issue of pecuniary jurisdiction of the trial court, the Court has examined the record of the trial court. The appellants tendered nine exhibits. The nine exhibits are itemized in the List and Bundle of Documents dated 5/11/2020. The valuation report was not one of the nine exhibits that were produced. Although the valuation report had been exhibited as an annexure to an earlier affidavit, neither the affidavit nor the valuation report was produced during trial. Consequently, the contention that the trial court lacked pecuniary jurisdiction was not proved.
34. On the question as to whether the 1st respondent proved the estate's claim, my brief pronouncement on that issue is that, the estate had no valid claim to prove because its claim was statute-barred.
35. On whether the appellants proved their claim for indemnity against the third part, my pronouncement on the issue is that in the absence of a valid claim by the 1st respondent, who was the primary claimant, it would be an academic exercise to make a pronouncement on the issue of indemnification.
36. On costs, it is clear that the major error leading to this appeal was committed by the trial court. Consequently, parties will bear their respective costs of the appeal. The estate of the late Matheri will bear costs of the suit in the lower court because they initiated a claim that was statute-barred/stale.

Disposal Orders

37. In the end, this appeal succeeds and is allowed in the following terms:
 - a. The Judgment of the trial court in Ruiru SPMC MCL&E Case No 118 of 2020 rendered on 9/11/2022 is set aside and is substituted with an order dismissing the suit for being statute-barred under Section 7 of the *Limitation of Actions Act*.
 - b. The 1st respondent shall bear costs of the suit in the trial court.
 - c. Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 13TH DAY OF FEBRUARY 2024

B M EBOSO

JUDGE

In the presence of: -

Ms Nkatha for the Appellants

No appearance for the Respondents

Court Assistant: Hinga

