



REPUBLIC OF KENYA



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**M'Ithirua v M'Thirua & 2 others (Environment & Land Case
57 of 2016) [2024] KEELC 1247 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1247 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 57 OF 2016**

CK NZILI, J

MARCH 6, 2024

BETWEEN

STANLEY M'ITHIRUA PLAINTIFF

AND

M'KIRIGUA M'THIRUA 1ST DEFENDANT

**DISTRICT LAND ADJUDICATION OFFICER, MERU CENTRAL 2ND
DEFENDANT**

ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. The claim by the plaintiff was commenced through a plaint dated 24.5.2016, in which he complained that the 1st defendant, as a trustee of the beneficiaries of his late father, unlawfully altered and registered as his land parcels numbers Timau/Settlement Scheme/73, measuring 46 acres situated in Kithithina Location Timau, No. 2716 at Kianjai and plot 104 Ngushishi contrary to the trusteeship.
2. The plaintiff averred that he has been cultivating Parcel No. 2716. He termed the alteration, transfer and registration by the 1st defendant over Parcel No. 2716 as illegal and fraudulent. He sought an injunction; declaration that the 1st defendant was a trustee for him and his brother; rectification of the land register over the parcels to reflect his names and that of his brother; a declaration for re-transfers of the three parcels of land in their favour and for registration of their respective shares.
3. The 1st defendant opposed the suit with a statement of defence dated 31.10.2016. He denied the alleged illegality or fraud. He was averred that no succession proceedings had been instituted for the estate of the deceased and that he was never a trustee for the plaintiff or his brother in the alleged parcels of land. On the contrary, the 1st defendant averred that there used to be two parcels of land, one of which the plaintiff sold, while the other portion it was a clan land which he successfully won an objection over,



long after his late mother had passed on. The 1st defendant averred that the plaintiff had no locus standi to bring the suit, whose cause of action was also time-barred.

4. The court record shows that Mr. Kimathi, a litigation counsel for the Hon. Attorney General, appeared in court on 21.11.2016 and 31.10.2017, and Mr. Kiongo, a litigation counsel, appeared for the 2nd – 4th defendants on 21.2.2018.
5. On 15.5.2018, Mr. Kimathi, for the 2nd – 4th defendants, sought and obtained leave to file a defence within 30 days before pre-trial directions on 15.5.2018. Further parties were granted 45 days to comply with Order 11 of the Civil Procedure Rules. On 10.12.2018, Mr. Kieti, a litigation counsel, appeared for the 2nd – 4th defendants and prayed for another 45 days to comply. As of 26.3.2019, when Miss Kungu appeared for the 2nd – 4th defendants, no defence had been filed. Further 45 days were given to the 2nd – 4th defendants to comply. None had been filed by 9.7.2019 and on 1.12.2021 when Mr. Kiongo and Mr. Kieti appeared for the 2nd – 4th defendants.
6. The court, nevertheless, on 1.12.2021, gave the 2nd – 4th defendants 14 days to file a defence. Again, none was filed by the time the suit proceeded for hearing. The matter was eventually listed for mention on 1.3.2022, when counsel for the plaintiff told the court that his client had passed on in February 2022. The court gave the counsel time to substitute the deceased plaintiff. Further, on 9.5.2023, the court directed the substitution be effected within 90 days in default the suit to stand dismissed for non-prosecution.
7. Come 18.9.2023, an application dated 19.8.2023 was filed to reinstate or revive the suit and for the substitution of David Mugambi Stanley and Anastacia Kananu in place of the late Stanley M'Ithiru, which was allowed by the court on 18.10.2023. Unfortunately, the plaintiff's counsel did not amend the plaint to reflect the changes. The suit was by consent of the party's advocates listed for a hearing on 30.11.2023.
8. PW 1 was one Stephen Mugambi. He adopted a witness statement dated 24.5.2016 as his evidence in chief. He said the 1st defendant was his uncle, who survived his late father alongside Bernard Sungura. PW 1 also testified that his late father acquired 45 acres of land at Kithithina location Timau as parcel No. 73, parcel No. 2716 Kianjai, and Plot No. 104 Ngushishi area, before he passed on in 1978. PW 1 said his uncle was left as a trustee of the suit parcels of land but altered the ownership and registered himself as the sole owner of Parcel No. 2716, despite an objection he had raised with the land adjudication officers.
9. PW 1 said he has been in occupation of Parcel No. 2716. He produced summons dated 7.7.1997, a letter dated 15.12.2004 as P. Exh No's (1) & (2), payment receipts dated 14.7.2006, 6.12.2007 and 6.12.2012 as P. Exh No. (3) & (4), letter dated 16.3.2012 as P. Exh (5) payment receipt dated 5.11.2013, P. Exh No. (6), letters dated 4.12.2013, 29.10.2014, 6.11.2014 from the 1st defendant as P. Exh No. (7) (a) & (9), letters dated 18.9.2015 & 24.9.2015 to the area chief as P. Exh No's. (10) & (11), caution dated 3.9.2015 as P. Exh No. (12) application to register caution dated 20.10.2015 as P. Exh No. (13), receipt dated 6.10.2015 as P. Exh No. (14), official searches dated 2.12.2015 and 19.1.2016 as P. Exh No's. (15) & (16), receipt dated 1.12.2015 and I.D. card as P. Exh No's. (17) & (18) respectively. He blamed his late uncle for the fraud and for chasing them away from Plot No. 73.
10. He further told the court that they were still tiling Plot No.104, now shared in three portions, despite frequent wrangling over its ownership. As for the Kianjai land, PW 1 said his uncle and cousins were still creating chaos over the ownership and use.



11. Jackson Kinoti Gachuhi testified as PW 2. He told the court that the initial plaintiff passed on in 2021, and thereafter, his brother PW 1 took over the case. He said his uncle, the 1st defendant, had refused to subdivide the three parcels in their favour, contrary to the wishes and directives of their late grandfather.
12. The 2nd – 4th defendants, as alluded to above, did not file any defence or tender evidence, despite Miss Maina litigation counsel for the Hon. Attorney General having taken the hearing date by consent. Miss Lenaola, for the 1st defendant, technically appeared at the start of the evidence of PW 1 on the morning of the hearing but disappeared along the way. The court had no option but to mark the defendants' case as closed.
13. The plaintiff relied on written submissions dated 18.1.2024 and isolated six issues for the court's determination. The plaintiff submitted that a relative cannot be excluded from inheriting family land by a sibling since all are entitled to equal distribution of their parent's estate under the [Law of Succession Act](#) (Cap 160). In this case, the 1st defendant, being a brother to the plaintiff and Bernard Sungura, proceeded to alienate himself from the land initially owned by the father, leaving out his brothers. Therefore, the plaintiff urged the court to order the rectification of the register in favour of the plaintiff and his brother Bernard Sungura in equal shares. Reliance was placed on Vivian Cherono vs Maria Chelagat Kerich (2014) eKLR.
14. The plaintiff submitted that the 1st defendant unlawfully and fraudulently transferred the suit premises to himself, leaving out his brothers. Going by the particulars pleaded and particularized; the plaintiff submitted that he has proved the allegations of fraud and illegality. Reliance was placed on Vijay Morjaria vs Nansingh Madhusingh Darbar & another (2000) eKLR.
15. The plaintiff submitted the law places the burden of proof on him to prove his case on a balance of probability under Section 107 of the [Evidence Act](#), and, in this case, since he has proved the existence of specific facts under Section 108 thereof, the burden had shifted to the defendant to counter his allegations which they did not do. Reliance was placed on Sections 109 & 112 of the [Evidence Act](#) and Raila Amollo Odinga & others vs IEBC & others (2017) eKLR.
16. The plaintiff submitted that the defendants failed to tender any evidence, and therefore, the court should make adverse inferences that if they had called any evidence, it would have been adverse to them. Additionally, the plaintiff submitted that pleadings cannot amount to evidence and can only be proved through evidence. In this instance, the defendants failed to call evidence to counter that of the plaintiff and sustain any defendants they had against the suit. Reliance was placed on CMC Aviation Ltd vs Crusair Ltd (1987) KLR 103, Kilonzo & another vs Stavroula Rousalis & 4 others (2022) eKLR, Kinyanjui Kamau vs George Kamau (2015) eKLR.
17. The plaintiff submitted that under Order 40 of the Civil Procedure Rules, he had proved the ingredients for the grant of a permanent injunction as set in Giella vs Cass Man Brown (1973) E.A 358 and in Mrao Ltd vs First American Bank (K) Ltd (2003) eKLR.
18. Regarding damages the plaintiff submitted damages are designed to restore the loss incurred by a party and place him in the position as he was before the event complained of occurred. In this case, the plaintiff submitted that he has proved an obligation existed which was breached by the defendants, causing him to incur damages to which he was entitled plus costs and interests. Reliance was placed on Robinson vs Herman (1848) 1 Exh 850, Photo Production Ltd vs Securicor Transport Ltd (1980) AC 827, Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1970) E.A 469 and R.J Varsani Enterprises Ltd vs Pentoville Holdings Ltd (2021) eKLR.
19. The issues calling for my determination are:-



- i. If the failure by the plaintiff to amend the plaint after an order for substitution was fatal to the suit.
 - ii. If the plaintiffs can sue and advance the claim.
 - iii. If the cause of action is statute-barred.
 - iv. If the plaintiffs have proved that the late M'Thirua Nkongo initially owned the suit premises.
 - v. If the 1st defendant was a trustee.
 - vi. If the 1st defendant breached the trusteeship to the detriment of the plaintiffs.
 - vii. If the plaintiffs proved any illegality or fraud in the manner the suit parcels were transferred and registered in the name of the 1st defendant by the 2nd - 4th defendants, contrary to any existing trust in his favour.
 - viii. If the plaintiffs are entitled to the reliefs sought.
20. It is on record that the court ordered the substitution of the initial plaintiff with David Mugambi Stanley and Anastacia Kananu on 18.10.2023. The plaint was not amended to reflect the changes and bring on board the persons included in the application dated 19.8.2023. The limited grant attached to the application had been issued to M'Kirigua M'Thirua and Anastacia Kananu to prosecute this suit. The two named parties in the limited grant were never brought on board by way of amendments. None of them was called to testify and produce the limited grant. PW 1 and PW 2 were not the persons issued with the mandate to advance the claim.
 21. Similarly, PW1 and PW2 failed to produce the limited grant as part of the evidence before this court. Once leave was granted for the plaintiff to be substituted, the law requires that the amended plaint ought to have been filed within 15 days. The amendment must have been in line with Order 8 Rule 7 (2) of the Civil Procedure Rules.
 22. A pleading is a genesis of a cause of action that the suit takes. Any pleadings and or documents relied upon by parties should be self-explanatory. The failure to file an amended plaint and include the bonafide plaintiffs was not a procedural technicality. In Cooperative Insurance of (K) Ltd vs Paem Agencies Co. Ltd (2014) eKLR, the court said the issue of underlining the amended parts in red was not a procedural technicality to be saved by Article 159 of *the Constitution* for it went to the root of the plaintiff's suit. The court said it would not look kindly at parties who do not adhere to and follow the laid down procedures and rules.
 23. In this suit, the introduced parties were not captured anywhere by way of an amended plaint. They did not verify it or file witness statements as new parties to the suit. Instead, PW 1 adopted the statement of the deceased as his evidence in chief. There was already a preliminary objection on the capacity to sue raised in the statement of defence by the 1st defendant, which this court, in a ruling dated 21.2.2018, had said needed to be ascertained through evidence at the main hearing.
 24. The claim by the initial plaintiff was based on the alleged trust. The nexus between PW 1, PW 2 and the persons named in the limited grant alluded to above as the ones allowed to substitute the deceased plaintiff is missing in this suit. The capacity to sue was vital in the plaintiff's suit. The plaintiff, though deceased, continued to appear in the written submissions filed by the plaintiff's counsel, yet it is clear from the court record that an order was made for the amendment and substitution.
 25. In Mary Wambui Njuguna vs William Ole Nabala & others (2018) eKLR, a party had been allowed to join a suit to substitute a deceased husband but turned around to challenge the joinder. The court said



- that where substitution is made at the instance of the plaintiff to introduce new parties the pleading must always be made to reflect the name of the legal representative. Order 24 Rule 2 of the Civil Procedure Rules relates to the abatement of a suit after a plaintiff has passed on.
26. In *Julian Adoyo Ongonga & another vs Francis Kiberenge Bondeva* (2016) eKLR, the court said locus standi was a cardinal principle in civil matters running to the heart of the suit even where a valid cause of action exists, and the impact of a party in a suit without locus was like a court without jurisdiction for it amounts to a nullity.
 27. In this suit the initial plaintiff was not only advancing his claim but also that of his brother based on family land initially belonging to their late father and taken away by their uncle contrary to the trusteeship. Therefore, the incoming plaintiffs needed to define their capacity to advance the suit and testify to the facts to show the basis of representing the interest of the initial plaintiff and his brother.
 28. In *William Muthee Muthoni vs Bank of Baroda* (2014) eKLR, the court said there were exceptions to the doctrine of privity of contract, including trust by which the appellant had contracted and held the property in trust for the witness. Silence and the failure to participate in the proceedings by the holders of the limited grant of letters of administration alluded to above meant that they had waived their rights to enforce any right to the estate of the deceased plaintiff. Any other party who testified without letters of administration, therefore, could not advance the claim. See *Serah Njeri Mwobi vs John Kimani Njoroge* (2013) eKLR. *Boniface Mutwiri Kungania vs Japhet Kirimi M'Rinkanya* (2022) eKLR.
 29. The next issue is whether the cause of action was time-barred. The plaintiff had pleaded that the suit land initially belonged to the late M'Ithirua Nkongo, who passed on in 1978. In all the exhibits produced by PW 1, the deceased was advancing the claim that the transfer of the suit parcels of land to the 1st defendant by the 2nd – 4th defendants was against the will of the family and his late father and further that it was effected without letters of administration.
 30. Exh No. 15 indicates that the 1st defendant acquired a title deed for L.R No. Timau/Settlement Scheme/73 in May 2006. P. Exh No. 2 shows that the dispute over Plot No. 104 Ngushishi Settlement Scheme was on 15.12.2004. P. Exh No. 1 shows the objection over Parcel No. 2716 Kianjai Adjudication Section was lodged by the plaintiff in 1997.
 31. The suit herein is based on illegality, fraud and breach of trust. A claim on breach of a fiduciary capacity is not shielded by a time bar under Sections 20(1) (a) & (b) of the Limitations of Actions Act. See *Stephen & 6 others vs Stephens & another* (1987) eKLR. As regards illegality and fraud, the applicable law is Sections 4 (1) (a) & (e), read together with Section 26 (c) of the *Limitation of Actions Act*. From the pleadings and exhibits produced by the plaintiff, it was known as of 1997, 2004 and 2006 the status of the suit parcels of land. The suit was filed in 2016.
 32. In *Gathoni vs Kenya Cooperative Creameries Ltd* (1982) KLR 104, Portar J.A said the law of limitation was intended to protect defendants against unreasonable delay in the bringing of suit against them, and the Act expects a plaintiff to exercise reasonable diligence and take reasonable steps in his interest. See also *Iga vs Makerere University* (1972) E.A. My finding thereof is that the plaintiff's claim based on fraud and illegality against the defendants was filed outside the statutory period from the date the plaintiff became aware of the alleged fraud or illegality.
 33. As to whether the plaintiff has proved breach of trust against the 1st defendant, it is trite law that trust is a question of fact that must be proved through the evidence as held in *Isaack Kiebia M'Inanga vs Isaaya Theuri M'Lintari & another* (2018) eKLR, *Muthuita vs Muthuita* (1982 – 1988) IKLR 42. Other than bringing a bundle of letters and correspondence showing that the deceased plaintiff had lodged



complaints with the 2nd – 4th defendants regarding irregular and illegal alteration of the records to replace the name of the late M'Thirua Nkongo with that of the 1st defendant, no material was produced to show that the plaintiff's deceased father had ever been a registered or recorded owner of the three parcels of land before he died in 1978.

34. The easiest thing for the plaintiff, PW 1 and PW 2 would have been to bring copies of records or proceedings from the land adjudication office or settlement scheme before 1978, showing that the late M'Thirua Nkongo was a one-time allottee, beneficiary or recorded owner of Parcel No. 2716 Kianjai Adjudication Section, Plot 104 Ngushishi Settlement Scheme and L.R No. Timau Settlement Scheme/73.
35. The court in Isaack M'Inanga vs M'Lintari (supra) cited with approval Kiarie vs Kinuthia & another (2012) eKLR that what was essential was the nature of the holding of the land and the intention of the parties to have the land benefit other members of the family whether or not they are in possession or actual occupation of the land. In this suit, the plaintiffs were unable to show the origins of the land parcels of land from the point of the late M'Thirua Nkongo to themselves and lead evidence that the registration in the name of the 1st defendant had not extinguished their ancestral or customary rights to the lands. See Kanyi vs Muthiora (1984) KLR 712, Njenga Chogera vs Maria Wanjira Kimani & 2 others (2005) eKLR, Juletabi African Adventure Ltd & another Christopher Michael Lockley (2017) eKLR and Henry Mwangi vs Charles Mwangi C.A 245 of 2004.
36. The failure to file a statement of defence by the 2nd – 4th defendants and the failure by the 1st defendant to testify did not absolve the plaintiffs from proving the case to the required standards. I find the case law of Raila Odinga & another vs IEBC & others (supra), CMC Aviation Ltd vs Crusair Ltd (supra), Kilonzo & another vs Stavroula Rousalis & others (supra) & Kinyanjui Kamau vs George Kamau (supra) cited by the plaintiff's counsel as inapplicable to this suit. See Gichinga Kibutha vs Caroline Nduku (2018) eKLR.
37. In the circumstances, I find the plaintiff's suit incompetent and lacking merits. It is dismissed with no order as to costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 6th DAY OF MARCH, 2024

In presence of

C.A Kananu

Mr. Kurauka for the plaintiff

Defendant

HON. C K NZILI

JUDGE

