Parkike v Philip (Environment and Land Appeal 1 of 2024)
[2024] KEELC 6434 (KLR) (Environment and Land) (3 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6434 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ENVIRONMENT AND LAND

ENVIRONMENT AND LAND APPEAL 1 OF 2024

MC OUNDO, J

OCTOBER 3, 2024

BETWEEN

RIPO OLE PARKIKE ..... APPELLANT

AND

MARGARET KANINI PHILIP ..... RESPONDENT

(Being an Appeal from the Judgement and Decree delivered by Y.M. Barasa, Principal Magistrate dated 12th November, 2023 Naivasha Chief Magistrate's Court ELC Case No. E076 of 2021)

JUDGMENT

1. What is before me for determination on Appeal is a matter which was heard and determined by Hon. Y.M Barasa, Principal Magistrate upon considering the evidence of both parties, vide his Judgment dated November 2, 2023 the learned Magistrate, had held that the Plaintiff had proved her claim on a balance of probability as required while the Defendant had failed to prove his counterclaim on a balance of probability and had dismissed it. Subsequently, he had issued a Permanent Injunction restraining the Defendant from interfering with the suit premises L.R Naivasha/Moi Ndabi/407 and awarded the Plaintiff costs both in the main suit and the counterclaim plus interests at court's rates.

2. The Appellant, being dissatisfied with the Judgement and Decree of the trial Magistrate has now filed the present Appeal based on the following grounds in his Memorandum of Appeal:

    i. That the learned trial Magistrate erred in law and in fact in holding that the Plaintiff was the rightful owner of the suit land despite the Defendant providing substantial evidence that he was the initial allottee of the suit land.

    ii. That the learned trial Magistrate erred in law and in fact in allowing the Plaintiff's suit without considering the Defendant's Defence and Counterclaim.

iii. That the learned trial Magistrate erred in law and in fact in dismissing the Defendant's counterclaim despite the Defendant proving adverse possession.

iv. That the learned trial Magistrate erred in law and in fact in holding that the Defendant's occupation of the suit land was punctuated by interruptions yet the Defendant occupied the suit land for over twelve years uninterrupted.

v. That the learned trial Magistrate erred in law and in facts in dismissing the Defendant's counterclaim while he did not have jurisdiction to determine a claim of adverse possession.

vi. That the learned trial Magistrate erred in law and in fact in holding that the court was not provided with any proof to support the particulars of fraud despite the Defendant pleading to the same and providing sufficient proof.

vii. That the learned trial Magistrate erred in law and in fact in failing to consider the evidence tendered by the Defendant.

viii. That the learned trial Magistrate erred in law and in fact in disregarding the evidence and submissions by the Defendant.

ix. That the learned trial Magistrate erred in law and in fact in issuing an injunction order against the Defendant.

x. That the learned trial Magistrate erred in law and in fact in awarding the Plaintiff costs.

3. The Appellant thus sought that the instant Appeal be allowed and the judgement of the lower court delivered on 2nd November 2023, be set aside and substituted by an order dismissing the Respondent's case.

4. The Appeal was admitted on 24th April 2024 and directions issued for the same to be disposed of by way of written submissions.

Appellant's submission

5. The Appellant hinged his written submissions dated 12th May, 2024, on the decided case of Ramji Ratna & Compay Limited v Wood Products (Kenya) Limited [2007] eKLR to submit that this being a first Appeal, the court was under an obligation to examine and re-evaluate the evidence on record afresh, assess it and make its conclusion.

6. On ground 1 of Appeal, the Appellant submitted that on or about the 22nd December, 1994, he had been allocated the suit land herein known as plot No. 692/683 Moi Ndabi Settlement Scheme now Naivasha/Moi Ndabi/407 through a presidential order issued on 30th September 1994 by the then President of the Republic of Kenya. That thereafter, he took occupation of the suit land and had been in quiet and peaceful occupation until he was interrupted by the Respondent herein. That further, his letter of allotment had never been withdrawn or cancelled and that he had fulfilled all the conditions as had been stipulated in the allotment letter to wit; planting trees, building a house and engaging in farming.

7. He placed reliance the cases of Republic v City Council of Nairobi & 3 Others [2014] eKLR, Rukaya Ali Mohamed v David Gikonyo Nambachia & another Kisumu HCCA. 9/2004 and Ali Gadaffi & Another v Francis Muhia Mutunga & 2 others [2017] to submit that the court and superior courts had held severally that the allocation of land through allotment letter was a valid way to convey proprietary interests to the allottee as long as the conditions for allotment were met. That subsequently, the

Appellant having taken possession of the suit land pursuant to the allocation and having fulfilled all the requirements set out in the allotment letter, he had become entitled to the suit land by law and the suit land was no longer available for re-allocation and the Respondent or the purported seller, one Martha Nyaboke could purport to have been issued with an allotment letter for the suit land. That in any event, the trial court had not received any evidence showing how the Respondent had acquired legal ownership of the suit land or how the allotment letter previously issued to the Appellant had been cancelled.

8. It was thus his submission that the trial court had erred in law in holding that the Respondent was the rightful owner of the suit land while disregarding the fact that the Appellant had been the initial allottee. That the court had also disregarded the authenticity of the allotment letter held by the Appellant. That further, the trial Magistrate erred in relying on a Sale Agreement produced by the Respondent on a claim that she had purchased the suit land while at the same time there had been an allotment letter dated 4th May, 2012 allegedly issued to her whereas it is trite that a buyer of any parcel of land could not be issued with an allotment letter.

9. That in any case, if the court was questioning the allotment letter held by the Appellant, it ought to have further inquired how the Appellant had acquired and occupied the suit land since the year 1994. He reiterated that since his letter of allotment had never been recalled or cancelled, then the one that was purportedly held by the alleged seller, one Martha Nyaboke and the Respondent herein were an illegality the Appellant having acquired the proprietary interest in the suit land as the initial allottee.

10. On Grounds 2, 3, 4 and 5, the Appellant submitted that his counterclaim in the trial court had been premised on adverse possession having been allotted the suit land in the year 1994 wherein he had taken immediate occupation, cleared the bushes therein and converted it into arable land in addition to fulfilling the conditions that had been stipulated in the letter of allotment. That he had since been in occupation of the suit land until the year 2012 when the Respondent made her first attempt to trespass into the same after he had been in peaceful, actual and continuous occupation of the same for over 18 years.

11. He placed reliance on the provisions of sections 7, 13, 17 and 38 of the *Limitation of Actions Act* as well as on the decisions in the cases of Mtana Lewa v Kahindi Ngala Mwangandi [2005] eKLR, Celine Muthoni Githinji v Safiya Binti Swalleh & 8 others [2018] eKLR, Kasuve v Mwaani Investments Limited & 4 Others 1KLR 184 and Wambugu v Njuguna [1983] KLR 172 to reiterate that he had been allotted the suit land on 22nd December, 1994 wherein he had taken occupation of the same and had been in actual possession for a period of over 12 years, a fact which the Respondent had failed to address.

12. That the Respondent had only relied on the letter of allotment issued on 4th May 2012 without either revealing the identity of the previous owner or contesting the Appellant's possession of the same. It was thus his submission that the trial Magistrate had erred both in law and fact by holding that the Appellant's occupation of the suit land had been interrupted by the Respondent. That by the time the Respondent began making claims over the land the year 2015, he had been in occupation of the same continuously from the year 1994 which period had exceeded the 12 years thus he had already acquired title to the suit land by adverse possession.

13. On ground 5 of the Appeal, it was the Appellants' submission that the trial Magistrate did not have the power to handle the Respondent's claim of adverse possession as the trial court was not clothed with such jurisdiction. He placed reliance on the provisions of section 37 of the *Limitation of Actions Act* and Sections 13 and 26 of the *Environment and Land Court Act* to submit that there had not been a gazette notice clothing the Magistrate's court with the jurisdiction to handle adverse possession claims.

14. With regard to ground 6 of the Appeal, he submitted that the Appellant had in his Statement of Defence and counterclaim pleaded fraud on the part of the Respondent to the effect that the Respondent had obtained a title deed to the suit property despite the same having been allotted to the Appellant. That whereas a title deed was a prima facie proof of land ownership, such proprietorship could be disputed if the title was obtained fraudulently. Reliance was placed on the provisions of Section 26 of the *Land Registration Act* and the decided case of Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others [2015] eKLR. He reiterated that he was the initial allottee whose letter of allotment had not been cancelled thus the subsequent issuance of the allotment letter and registration of the Respondent as the proprietor had been done illegally and fraudulently.

15. That whilst the Appellant had pleaded and testified on various elements of fraud during the hearing, the trial court had disregarded the said evidence hence arriving at a wrong conclusion. That had the trial court duly considered the Appellant's pleadings, evidence and submission, it could have arrived at a proper conclusion that the Appellant was the rightful owner of the suit property. That further, the trial court ought not to have issued an injunction against the Appellant or condemned him to pay costs hence he prayed that the instant Appeal be allowed and the decision of the trial court be set aside.

Respondent's Submissions.

16. In response to the Appellant's Appeal and in opposition thereto, the Respondent vide his written submissions dated 9th June, 2024, submitted that the suit land had a title deed in the name of the Respondent which title had been obtained way back in the year 2016. That the Appellant who did not have the title deed to the suit land had only been brandishing the vague historical documents that had been issued by a Provincial Commissioner in the year 1994 which he was referring to as allotment letters.

17. That these supposed letters were not allotment letters in the conventional sense but generalized communication by a person who had been devoid of the capacity to alienate government land. That in any event, the said documents had numbers that were different from the numbers that were used by the Department of Settlement to formulate a discharge of charge that had been eventually used to prepare the title deed to the suit land No. Naivasha/Moi Ndabi/407. That interestingly, the Appellant had two different land numbers that had purportedly been amalgamated to form the suit land hence there needed be a professional from either the department of settlement or lands to have been called as a witness to clarify the pivotal nexus.

18. That on her part, the Respondent had produced a title deed that was uncontroverted while explaining how she had bought her interest from the previous allottee, paid the full government premium on allotment and obtained her own allotment letter like any original allottee whereupon she had got a discharge of charge which she had used to process her own title deed. That subsequently, anyone disputing the legality of the process needed to sue the department of settlement or lands as parties to answer for their actions.

19. That whereas an allotment letter was a recognized document in the titling process, it was not a blanket offer as it was adorned with conditions and timelines which the allottee needed to abide with before obtaining a discharge of charge. It was thus her submission that the Appellant herein had never obtained an allotment letter and if he had, then he did not accept the terms therein to enable him apply for a discharge of charge since he had not produced in court any evidence of the same. That whilst allotment letters ordinarily had an acceptance period of 90 days, the Appellant could still not possibly be having the luxury of accepting the same now from the year 1994. That he was time barred hence his claim should be subjected to *Limitation of Actions Act*.

20. His submission was that the Appellant's grounds 2, 3, 4 and 5 which were based on adverse possession were an afterthought. That they were not anchored in the pleadings neither was evidence led in court to prove that the Appellant had at least 12 uninterrupted years of physical possession of the suit land. That on the other hand, the Respondent had physically possessed the suit land for several years before processing her title in the year 2016 wherein he had continued to physically possess the same such that when the said possession had been briefly interrupted, she had reported the interruption to the police. That there was no record where the Appellant had reported case of trespass on the suit land. Instead he had been injuncted by the lower court from trespassing on the same which decision was never appealed. That it was inconceivable how the Appellant who had reported that there had been trespass over his land wanted to benefit from the doctrine of adverse possession without proving continuous uninterrupted possession.

21. That the Respondent had the title deed to the suit land and therefore it was incumbent upon the party seeking to impugn the same to bring forth all relevant evidence to prove so. That the finding of the trial court had been sound after a thorough scrutiny of the physical documents and considering the demeanor of the witnesses. Reliance was placed on the Court of Appeal decision in the case of Philemon L. Wambia v Gaitano Lusitsa Mukofu & Others [2019] eKLR and Kaseve Welfare Society v Harp Housing Limited [2020] eKLR.

22. That the Respondent had been in possession of the title deed to the suit premises since the year 2016 whereas the Appellant had no title and the document he held was not even an allotment letter and therefore the court would be have to consider the weight of an allotment letter versus a title deed. Reliance was placed on persuasive holding in the Environment and Land Court sitting at Machakos in ELC No.64 of 2020 Kaseve Welfare Society vs Harp Housing Limited where Justice O.A. Angote in a similar situation relied on the wisdom of the authority in the case of Marcus Mutua Muhivi & Another vs PhilpTonui & Another (2012) eKLR.

23. That in the instant case, it has not been shown that the Respondent was fraudulent and/or if there was fraud, why the other party to the alleged fraud (that is the Lands Department) were not in court.

24. He also placed reliance in the decided case of Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane,suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Abshir & 3 others [2021] eKLR to submit that where the proposed allottee of the land had failed to abide by the conditions contained in the letter of offer within a specific time, then the allotment letter became null and void. That the instant Appeal was unmeritorious and ought to be dismissed with costs.

Determination.

25. I have considered the record of Appeal, the holding by the trial Magistrate,

    the written submissions by learned Counsel and the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the decision Appealed against, assess, it and make my own conclusions. See the case in Selle vs. Associated Motor Boat Co. Ltd. [1968] EA 123.

26. According to the proceedings herein, the Respondent herein instituted suit against the Appellant herein in CMCELC No. E076 of 2021 vide a Plaint dated 15th October 2021 wherein she had sought for an order of injunction against the Appellant stopping him, himself his agents and or servants from entering, trespassing, encroaching or in any other manner whatsoever entering in the suit premises known as No. Naivasha/Moi Ndabi/407. The Respondent had also sought for costs of the suit.

27. Subsequent to the filing of the suit, the Appellant filed their Defence and Counterclaim seeking for the Respondent's suit to be dismissed with costs and judgment be entered for the counterclaim for:

a. A declaration that the Defendant is the beneficial owner of all that parcel of land known as Plot number 692/693 Moi Ndabi settlement scheme, now Naivasha /Moi Ndabi/407.

b. In the alternative, a declaration that the Plaintiffs title to all parcel of land known as plot number 692/693 Moi Ndabi settlement scheme, now Naivasha/Moi Ndabi/407 has been extinguished by operation of Sections 7, 13 and 17 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya and that the Defendant has acquired it by adverse possession.

c. In the alternative, an order compelling the Plaintiff to transfer all that parcel of land known as plot number 692/693 Moi Ndabi settlement scheme, now Naivasha /Moi Ndabi/407 to the Defendant forthwith.

d. A permanent injunction restraining the Plaintiff whether by herself, her employees, servants, agents, or otherwise howsoever from entering, occupying, charging, carrying on any development or dealing with all that parcel of land known as plot number 692/693 Moi Ndabi settlement scheme, now Naivasha/Moi Ndabi/407 in any manner prejudicial to the interests of the Plaintiff.

e. Costs of this suit with interest untill payment in full.

f. Any other relief that the Honourable court may deem fit to grant.

28. Subsequent to the filing of an application dated 19th October 2021 seeking for interim orders of injunction, vide a ruling dated the 2nd December 2021, the court had this to say:

> " Both parties are staking claim of the suit parcel. It is also not clear who is in occupation of the land. In the premises I do find that the matter should be decided on a balance of convenience which tilts in favour of maintain status qua.(sic) I hereby make an order that the status quo prevailing on the land to maintain until the suit is heard and determined. Costs shall be in the cause."

29. The case was then slated for hearing wherein the Respondent testified as PW1 to the effect that she wished to adopt her witness statement as her evidence in chief and to produce the documents filed. In cross examination, the Respondent had stated that she had bought the suit land in 2012 from one Martha Nyaboke who had been the allotee and this was after she had done due diligence. That she had been in occupation of the same where she had been ploughing and planting up until such a time that her employees had been chased away.

30. That she had gone with the said Martha to the Land Board wherein subsequently Martha's allotment had been canceled and she had been issued with a letter of offer. That at the time, Martha had been in occupation of the land which was approximately (2) two hectares, was neither developed nor did it have any structures. That she was not aware of any dispute pleaded in the suit land other than the one filed in court.

31. Her witness PW2 one Samwel Muitori Kimanga also adopted his statement and testified that the Plaintiff had leased the suit land to him as its owner wherein he had been paying her money.

32. In cross examination he had confirmed that although he had orally leased the suit land from the Plaintiff, she had never shown him any documents of ownership to the same and that he had cultivated the land for the first time in the year 2014.

33. The Plaintiff had closed its case wherein Appellant who testified as the Defendant also adopted his statement and list of documents filed as evidence wherein he proceeded to state in cross examination that the documents produced by the Plaintiff were not certified.

34. That he had not reported the Plaintiff's fraudulent activity to the police and that Moi Ndabibi was a public land. That whereas the Plaintiff had not been allotted the land he in turn had fulfilled all the requirements when he had been allotted the land vide a presidential Decree of 1994. That he neither had the title or the discharge of charge. That is parcel of land was number 692/693 having been divided into two.

35. He confirmed to having been charged with a criminal offence relating to the suit land. That having taken possession of the land, he had carried out some developments therein but subsequently the Plaintiff had demolished his house and although he had reported the matter, the Plaintiff had not been charged.

36. In re-examination, he had reiterated that he had been allotted the land in 1994 and had been issued with an allotment letter. That he came to know the Plaintiff in 2013, and that she did not acquire the title genuinely. That he had been charged with the criminal offence for having threatened Plaintiff's workers.

37. Dw2 one Jacinta Ole Kinoko also adopted her statement as her evidence in chief wherein on cross examination she had testified that the Defendant had allowed her to graze on the suit land which had been allocated to him in 1996 by the then President Moi. That she was illiterate and did not know the acreage of both plots No. 692 and 693. That she had built a temporal structure on the suit land which structure had been demolished and she moved from the suit land in 1997. That she was unaware of any documents held by the Defendant or of any criminal charges against him. That she had never met the Plaintiff. The Defendant thus closed its case.

38. I have considered the Plaintiffs statement recorded on the 15th October 2021 in which she had stated that she had acquired the suit property being No. Naivasha/Moi Ndabi/407 years ago wherein she had subsequently obtained its title on 6th July 2016. That she had been cultivating on the suit land until the year 2020 wherein her employees alerted her that someone had stopped them from accessing the land. She had made inquiries and discovered that it had been the Defendant who had stopped her employees from accessing the land wherein she had made a report at Kongoni Police Station for which the Defendant had been charged with a criminal offense in Naivasha Cr. Case No. 242/2020. That the Defendant did not have any valid documents to the suit land.

39. I have considered the list of documents herein filed on 15th October 2021 and relied upon by the Plaintiff to wit;

    i. A copy of the title deed to No. Naivasha/Moi Ndabi/407 issued on 6th July 2016.

    ii. A charge sheet wherein the Defendant was charged with the offense of Forceful Detainer c/s 91 of the penal code, and an Ob No. 21/20/03/2020.

40. I have also looked at the Defendant's witness statement recorded on the 14th April 2022, wherein he had stated that on the 22nd December 1994, via an executive order issued by the then president on 30th September 1994, he had been allocated a parcel of land known as 692/693 Moi Ndabi settlement scheme now Naivasha/Moi Ndabi/407 measuring approximately five acres wherein he had taken immediate possession.

41. That he had converted the suit land into arable land by clearing the bushes therein. Sometime in 2018 the Plaintiff had fraudulently obtained title to the suit land based on which the Director of Public Prosecution had questioned the legitimacy of her documents by letters dated 27th May 2020 and 15th June 2020.

42. That subsequently he had acquired the suit land through adverse possession that the Plaintiff had never been in possession of the same save in 2020, when she attempted to take possession with no success.

43. In his evidence, the Defendant relied on his list of documents dated the 14th April 2022 to wit;

    i. Letter of offer dated 22nd December 1994

    ii. A copy of an allocation register.

    iii. A copy of a letter dated 14th May 2019

    iv. The bundle of documents

    v. A letter dated 27th May 2020

    vi. A letter dated 15th June 2021

44. Having considered the evidence adduced before the trial court on the fact that both parties herein lay claim to the suit land, based on different documentation being an allotment letter and a title deed, the issues that clearly come out for determination are as follows;

    i. Whether the learned trial Magistrate erred in law and in fact in holding that the Plaintiff was the rightful owner of the suit land.

    ii. Whether the learned trial Magistrate erred in law and in fact in holding that there was no proof to support the particulars of fraud.

    iii. Whether the learned trial Magistrate erred in law and in fact in dismissing the Defendant's counterclaim of adverse possession.

45. An allotment letter as has been held by the courts time and again, do not confer ownership to land, but is just a letter of offer. Indeed a person holding an allotment letter has to proof that they have met the conditions stipulated therein to wit, paying the stand premium, rent, conveyancing fees, registration fees, stamp duty, survey fees, approval and planning fees as stated in the letter. Indeed it could therefore not be said that the Appellant herein had proprietary interest to the plot of land merely because he had in his possession a letter of allotment.

46. Indeed the procedure for issuance of a certificate of lease arising from a letter of allotment was espoused in the case of Ali Mohamed Dagane (granted Power of Attorney by Abdullahi Muhumed Dagane,suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Abshir & 3 others [2021] eKLR (Persuasive) it had been held as follows:

> " Having evaluated in detail the necessary steps to be followed, it is emergent that a litigant basing their interest in land on the foundation of an allotment letter must provide the following proof: First, the allotment letter from the Commissioner of Lands; Secondly, and attached to the allotment letter, a part development plan; Thirdly, proof that they complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent were paid, within the specified timeline. (Emphasis mine) It would also help a

litigant's case, although this may not be mandatory based on the stage of the transaction, to have a certified beacon certificate."

47. In Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others 182/1992 (Nyeri); and in *Joseph Arap Ng'ok –vs- Justice Moijo Ole Keiwua NAI Civil Application No. 60 of 1997* the Court of Appeal observed as follows:

> "It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document (my emphasis) pursuant to provisions in the Act under which the property is held."

48. In the present case although the Appellant alleged to have been allotted the suit parcel of land, no letter of allotment had been produced in evidence as proof that it had been issued by the Commissioner of Lands, no part development plan had been adduced in evidence and thirdly, no proof that he had complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent had been paid within the specified timeline had been adduced in evidence which means that the land if at all had been allocated to the Appellant was now available for re-allocation.

49. This line of argument lacks merit and is therefore rejected.

50. The Appellant questioned the Respondent's title to the suit land stating that the same had been acquired fraudulently.

51. In R.G Patel vs Lalji Makanji 1957 E.A 314, the Court of Appeal stated as follows:

> "Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required".

52. In the case of *Arthi Highway Developers Ltd vs West End Buthery Ltd & Others C.A Civil Appeal No. 246 of 2013* (2015 eKLR), the Court of Appeal cited the following passage from Bullen & Leake precedents pleadings 13th edition at Page 427:

> "The statement of the claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of ..... It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved ..... General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice".

53. The Appellant having distinctively pleaded particulars of fraud, as against the Respondent, the next step was for him to prove those allegations to the required standard. The said allegations I find have been proved by the mere fact that during the trial the Respondent neither produced in evidence any Letter of Allotment from the Commissioner of land, document of proof of acceptance by payment of the sum prescribed in its alleged letter of Allotment, payment receipt, Surveyors Letter or Letter or any document whatsoever explaining how the suit land had been allotted to its previous allotee one Martha Nyaboke who had then obtained title and had therefore been capable of transferring the land to the Respondent through a sale agreement which was also not produced in evidence.

54. Section 26(1) of the *Land Registration Act* provides:-

(1) The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.

55. It will be seen from the above provisions that title to land is protected, but the protection can be removed and title impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme.

56. Indeed as was held by the Court of Appeal in Munyu Maina vs. Hiram Gathiha Maina Civil Appeal No. 239 of 2009 [2013] eKLR:

> "Where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register"

57. The Respondent having failed to discharge its burden of proving that the root of the acquisition of her title to the suit land was legal, formal and free from any encumbrance, I find her registration to LR Naivasha/Moi Ndabi/407 was irregularly obtained.

58. This line of argument is herein allowed.

59. The Appellant pleaded the doctrine of adverse possession in his defence and counterclaim to the effect that pursuant to an executive order issued by the then president on 30th September 1994 he had been allocated the parcel of land then known as 692/693 Moi Ndabi settlement scheme now Naivasha/Moi Ndabi/407 measuring approximately five acres, that he had taken immediate possession of the same wherein he had converted the suit land into arable land by clearing the bushes therein. That sometime in 2018, the Respondent had fraudulently obtained title to the suit land wherein she had then lay claim to it and save in 2020, when she attempted to take possession with no success, he had now acquired the same by virtue of the doctrine of adverse possession.

60. Section 37 of the *Limitation of Actions Act* provides that:

> Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in Section 37, to land or easement or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land."

61. The elaborate procedure of moving the Court is provided for in Order 37 Rule 7 of the Civil Procedure Rules as follows:

i. An application under Section 38 of the *Limitation of Actions Act* shall be made by Originating Summons.

ii. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

62. Order 37 Rule 7(2) of the Civil Procedure Rules makes it mandatory that the extract of the register, or green card, be annexed to the Originating Summons and/or counterclaim in this case for a good reason because the same shows the history of the land in question as there could be entities against whom time cannot run for purposes of acquiring land by Adverse Possession which entries need to be excluded from the computation of time for example where land is still registered under the Settlement Fund Trustee, it cannot be computed for purposes of an accumulating time for a claim of adverse possession.

63. In the case of Johana Kipkurui Rotich vs. Charles Kiagi [2019] eKLR the court held as follows:

> It is clear from the above that one needs to annex the extract of the title. This provision of the law is not superfluous, for there are categories of land where time for Adverse Possession will not start running. Among these is land under the Government, which is covered under Section 41 of the *Limitation of Actions Act*."

64. In the case before me, having found that the suit land herein had not been registered to any of the parties herein, as they had failed to adduce evidence of its mutation from the allotment stage to a level where either of them could claim ownership, and further based on the foregoing provisions of the law and case law that a claim for Adverse Possession shall only be sustained against the proprietor of the suit land (see Court of Appeal's holding in Peter Kamau Njau v Emmanuel Charo Tinga [2016] eKLR) and its predecessors only upon the claimant annexing the registerable document to the suit land, I find that the Appellant's claim on adverse possession cannot stand. The failure to adduce an extract of the title, or any other document of title, in relation to the suit parcel of land, to show who the past or the current registered proprietor is/are as required by the rules, makes it difficult to know who the registered owner of the land claimed by the Appellant is, and this court cannot therefore tell whether or not the Appellant is disentitled to benefit from the running of time on the said title. Parties shall be held liable on their pleadings. This line of argument, I find, therefore lacks merit and is dismissed.

65. In the end, I find that the Appellant's Appeal is dismissed save for para 6 of his Memorandum of Appeal wherein I find that the learned trial Magistrate erred in law and in fact in holding that the court had not been provided with any proof to support the particulars of fraud. In this regard thereof, having found that the Respondent's title to the suit land had been obtained irregularly, pursuant to the authority given to the court by virtue of the provisions of Section 80 of the *Land Registration Act*, which gives the Court the power to order for rectification of the Register. In this respect the trial court judgment dated 2nd November 2023 be set aside and replaced with the following order;

i. The Land Registrar shall within 30 days of delivery this judgment rectify the register to land parcel No. Naivasha/Moi Ndabi/407 by cancelling from therein the name Margaret Kanini Philip being the Respondent's name.

ii. Each party shall bear its cost.

It is ordered.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 3RD DAY OF OCTOBER 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE