



**Chepkwony & 2 others v Mwaura & 3 others (Environment & Land Case  
952 of 2014) [2023] KEELC 624 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 624 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 952 OF 2014  
EK WABWOTO, J  
FEBRUARY 9, 2023**

**BETWEEN**

**MOSES KIMUTAI ARAP CHEPKWONY ..... 1<sup>ST</sup> PLAINTIFF  
FRANCIS MUTHINI MUTISO ..... 2<sup>ND</sup> PLAINTIFF  
FREDDIE J. B. KARUA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**ROBERT MWAURA ..... 1<sup>ST</sup> DEFENDANT  
JORNAH MWAURA KABANE ..... 2<sup>ND</sup> DEFENDANT  
RICHARD MWANGI MWENJI T/A MALIMUNGU JUA KALI ASSOCIATION  
AND ALL OTHER UNKNOWN PERSONS RESIDING ON L.R. NO 209/11570,  
L.R. 209/13231 AND L.R. NO 209/13232 ..... 3<sup>RD</sup> DEFENDANT  
GATHERA SELF HELP GROUP ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs filed an amended plaint dated 15<sup>th</sup> September 2015 wherein they sought for the following orders against the Defendants: -
  - a) A permanent order to restrain the Defendants by themselves, their servants or agents otherwise howsoever from alienating, occupying or continuing occupation of the land being Land Reference Number 209/11570, Land Reference Number 209/13231 and Land Reference Number 209/13232.
  - b) An eviction order against the Defendants from the Land Reference Number 209/11570, Land Reference Number 209/13231 and Land Reference Number 209/13232.



- c) General damages for trespass.
- d) Costs of this suit.
- e) Further or any other relief deem fit to grant by this Honourable Court.

2. The suit was contested by the 4<sup>th</sup> Defendant who filed a statement of defence dated March 23, 2022.

### **Plaintiffs' case**

- 3. The Plaintiff's case was that the 1<sup>st</sup> Plaintiff was at all material times the registered owner of all that parcel of land known as Land Reference Number 209/11570, Dandora Light Industrial Area- Nairobi, while the 2<sup>nd</sup> Plaintiff was the registered owner of all that parcel of land known as Land Reference Number 209/13231, Dandora Light Industrial Area Nairobi and Grant No. I.R. 71504 allocated by the government of Kenya for a term of 99 years from the 1<sup>st</sup> day of November 1995 situated along Kangudo Road within the City of Nairobi while the 3<sup>rd</sup> Plaintiff was the registered owner of all that parcel of land known as Land Reference Number 209/13232 Dandora Light Industrial Area- Nairobi and Grant No. I.R. 71505 allocated by the Government of Kenya for a term of 99 years from the 1<sup>st</sup> day of November 1995 situated along Kangudo Road within the City of Nairobi.
- 4. It was averred that on various dates in the year 2000 the Defendant wrongfully and unlawfully entered and or trespassed on the aforesaid parcels and sub-divided into several plots and occupied the same without the permission and consent of the Plaintiff and are still continuing with the occupation of the land. The particulars of the Defendant's wrongful occupation was pleaded at paragraph 7 of the Amended Plaintiff.
- 5. During the hearing of the suit, the 2<sup>nd</sup> Plaintiff Francis Mutiso testified as the sole Plaintiff's witness. He adopted his written statements dated July 17, 2014 and July 27, 2016 as part of his evidence in chief. He also relied on the Plaintiff's bundle of documents dated July 27, 2016 which was produced in support of the Plaintiff's case.
- 6. He stated that the Defendant had illegally trespassed into their property and had even undertaken construction work despite the existence of a court order.
- 7. It was also his testimony that the Defendants had filed a separate suit H.C.C.C No. 523 of 2001 which was struck out.
- 8. On cross-examination by Counsel for the 4<sup>th</sup> Defendant, he stated that he did not know how the Defendant had trespassed onto the properties. He also stated that they invaded the Land in the year 2000 and he doesn't know whether they are still there to date.
- 9. On further cross-examination, he also stated that he knows the officials of Malimungu Jua Kali Association and that their initial suit was dismissed in 2006.
- 10. He also stated on cross-examination that the Plaintiffs delayed filing the suit because they took time to prepare their case before it was filed. He also stated that he last visited the property sometimes back and he saw that it had more than 40 houses.
- 11. While still being cross-examined, he stated that the Plaintiffs had only been in the suit property for about one month before the Defendants invaded the land.
- 12. On re-examination by his Counsel, he stated that he has title to the land and the same has never been sold to any person.



13. He also stated that the issue had been reported to the then District Officer and Police who gave them some assistance where Robert Mwaura was arrested.

#### **The case of the 4<sup>th</sup> Defendant.**

14. The 4<sup>th</sup> Defendant filed a statement of defence dated March 23, 2022. He denied the contents of the averments made in the plaint.
15. The 4<sup>th</sup> Defendant also contested the Plaintiffs suit on the ground that the same was time barred.
16. During the hearing of the suit, the 4<sup>th</sup> Defendant testified as the sole defence witness. He relied on his witness statement dated March 23, 2022 which was adopted as his evidence in chief.
17. On cross-examination, he stated that he is the chairman of the 4<sup>th</sup> Defendant a position which he has held for about 7 years.
18. He also stated that the group has 7 members and they are yet to get title documents in respect to the land.
19. He also stated that they were allocated the land in 1990 by the City Council and they have been in occupation ever since. He further stated that they did their construction in 1991 and they have been living there ever since.
20. On re-examination, he stated that he is not in occupation of the Plaintiff's property and they have no interest on it. He stated that they sought to be joined to the matter on the information received to the effect that they had occupied the Plaintiff's property but that was not the position.

#### **The Plaintiff's submissions.**

21. Upon the close of the parties respective cases, the Plaintiff's filed their written submission through M/ S Hayanga & Co. Advocates.
22. In their written submissions five issues were outlined for consideration by the court. These included the following: -
  - i. Whether the Plaintiffs are the registered owners of the suit property.
  - ii. Whether the defendants should be permanently restrained from further occupation and alienation of the suit properties.
  - iii. Should an eviction order be issued against the 4<sup>th</sup> Defendant and all other persons occupying the suit properties?
  - iv. Whether the Plaintiff are entitled to the reliefs sought in the plaint.
  - v. Who should bear the costs of the suit.
23. Citing the case of *Harrison Kiambutbi Wanjiru & Another v District Land, Registrar Nairobi & 3 others* [2022] eKLR and the provision of section 24 of the Registered *Land Act* 2012, the Plaintiffs submitted that they had produced their title deeds as evidence in support of their claim.
24. It was also submitted that the 4<sup>th</sup> Defendant and other Defendants had not challenged their title deeds during the hearing of their case.
25. On the second issue, the Plaintiff submitted that they were entitled to the orders of permanent injunction restraining the Defendants from further occupation and alienation of the suit properties.



The case of *Manfred Walter Schift v Dubai Bank Limited & 2 others* [2014] eKLR, *Nguruman Limited v Jan Bonde Nielson & 2 others* CA No 77 of 2012 and *Nation Media Group & 2 others v John Harun Mwan* [2014] eKLR were cited in support.

26. It was further submitted that the Plaintiffs were entitled to damages for trespass and were also keen on taking up possession of the suit properties. The court was urged to allow the suit as prayed by the Plaintiff's herein with costs.

**The 4<sup>th</sup> Defendant's submissions.**

27. The further defendant filed its written submissions dated July 28, 2022 through M/S Nelko Misati & Co. Advocates.
28. In the said submissions, Counsel outlined two issues for consideration by the court: -
- i. Whether the suit is time barred under section 4(2) and section 7 of the *Limitation of Actions Act* cap 22 of the Laws of Kenya.
  - ii. Whether the Plaintiffs have established a cause of action against the 4<sup>th</sup> Defendant.
29. Counsel submitted on the first issue that the Plaintiffs filed the suit in the year 2014 and they had stated at paragraph six (6) of the amended plaint that the cause of action arose in the year 2000. According to the 4<sup>th</sup> Defendant, this fact was categorically corroborated by the testimony of the Plaintiff adduced during the hearing. This meant that the suit was filed 14 years after the alleged wrongful and unlawful entry and/ or trespass on the suit property.
30. It was further submitted that trespass is a trust. Hence therefore the suit had been filed contrary to section 4(2) and section 7 of the *Limitation of Actions Act* cap 22 of the Laws of Kenya.
31. On the second issue, it was submitted that the Plaintiffs had failed to establish a cause of action against the 4<sup>th</sup> Defendant and all the other defendants.
32. The 4<sup>th</sup> Defendant argued that the Plaintiffs' witness had completely failed to provide any evidence of the alleged wrongful and unlawful occupation of the suit properties.
33. It was also submitted that the Plaintiffs had sued unknown persons whose identity was unknown. The court was urged to dismiss the suit with costs.

**Issues for determination.**

34. Having considered the pleadings of the parties, evidence adduced during the trial and the submissions filed by the Plaintiff and the 4<sup>th</sup> Defendant, the following two key issues arise for determination by this court: -
- i. Whether the Plaintiffs suit is time barred.
  - ii. If the answer to (i) above is in the affirmative, what orders should issue and if the answer to the above is in the negative whether the Plaintiffs have proved their case to the required standard to warrant the grant of the reliefs sought.



## Determination.

35. In respect to the *Limitation of Actions Act*, the 4<sup>th</sup> Defendant pleaded and submitted that should the Plaintiffs suit is time barred having been filed outside the stipulated period.
36. It was contended that the Plaintiff filed the suit herein in the year 2014 and that paragraph six (6) of the amended plaint states that the cause of action in this case arose in the year 2000 and that this was corroborated by the testimony of the Plaintiff during trial. The 4<sup>th</sup> Defendant argued that this meant the suit was filed 14 years after the alleged wrongful and unlawful entry to the suit property.
37. Section 7 of the *Limitation of Actions Act* stipulates thus: ‘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.’ These provisions require a suit for a claim to land to be instituted not later than twelve years after the accrual of the cause of action.
38. The purpose of the Law of Limitation was stated in the case of *Mehta v Shah* [1965] E.A 321, as follows;
- “The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”
39. In *Gattoni v Kenya Co-operative Creameries Ltd* [1982] KLR 104, the Court of Appeal held as follows;
- “...The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest”
40. A suit barred by limitation is a claim barred by law, hence by operation of law, the Court cannot grant the relief sought. In the case of *Iga v Makerere University* [1972] EA, the Court had this to say on the Law of Limitation;
- “A Plaint which is barred by limitation is a Plaint barred by law. Reading these Provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The Limitations 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 sought.”
41. Section 7 of the *Limitation of Actions Act* provides that an action for recovery of land may not be brought after the lapse of 12 years from the date the right of action accrued to the Plaintiff.
42. In respect to the Plaintiffs’ contention, regarding the aspects of trespass, the 4<sup>th</sup> Defendant argued that trespass is an action founded on tort and based on section 4 (2) of the Limitations of Actions Act, the same ought to have been filed before the end of three years from the occurrence of the cause of action. Therefore, in regard, the Plaintiffs having pleaded at paragraph 6 of their Plaint that the Defendants trespassed onto their properties on various dates in the year 2000, it is evident that the suit was filed out of time.



43. Having found out that the suit was time barred, I need not pronounce myself on other issues herein. In conclusion, this court arrives at the inevitable conclusion that the Plaintiffs suit is time barred and the same is hereby dismissed with costs to the 4<sup>th</sup> Defendant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023.**

**E.K. WABWOTO**

**JUDGE**

**In the presence of:**

**Ms. Ooga for the Plaintiff.**

**Mr. Misati for the 4<sup>th</sup> Defendant.**

**N/A for 1<sup>st</sup> and 2<sup>nd</sup> Defendant.**

**Caroline Nafuna – Court Assistant.**

**E.K. WABWOTO**

**JUDGE**

