



**Nyamatura v Nath & 3 others (Petition 26 of 2011)
[2023] KEELC 21176 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21176 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
PETITION 26 OF 2011
M SILA, J
NOVEMBER 2, 2023**

BETWEEN

JOSEPH OBAE NYAMATURA PETITIONER

AND

RUTHVAAL RAJWAL NATH 1ST RESPONDENT

AJIWA SHAMJI COMPANY LIMITED 2ND RESPONDENT

THE LAND REGISTRAR – KISII 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

(Petitioner filing suit claiming that he purchased land from a third party and obtained title then thereafter purchased an additional parcel of land to which he never obtained title; petitioner claiming that the title he holds is of less acreage than what he purchased and further that the 2nd respondent is holding title to part of the land that was sold to him; petitioner further claiming that the respondents changed the number in his title and returned to him a new title with less acreage; no cause of action against the respondents in so far as the claim relates to land that was sold to him by a third party as the petitioner ought to direct the claim to the alleged seller; no evidence of any change of the title so as to reflect less acreage; in any event suit time barred as it was filed more than 30 years since the petitioner received his title; suit dismissed with costs)

1. This suit was commenced by way of a petition filed on 29 April 2011. I must say that the petition is not easy to comprehend on what the cause of action is and its drafting is quite poor. What is clear is that the petitioner pleads to be the owner of the land parcel West Kitutu/Bogeka/1515 having purchased the same from one Mzee Ogaro Nyandwaro. He pleads that he approached Mzee Nyandwaro who sold him another portion measuring 70 X 150 feet from the land parcel West Kitutu/Bogeka/1514. He contends that the 1st and 2nd respondents also purchased a portion of the parcel No. 1514 adjacent



to him. From there, the petition is rather convoluted. There is mention of the petitioner becoming registered as owner of the parcel No. 1730 and the 1st and 2nd respondent owner of the parcel No. 1731 and insinuation by the petitioner that the respondents alienated his land. In the petition, the petitioner seeks the following orders which I copy verbatim :-

- a. A declaration that the alienation of the petitioner's parcel of land number West Kitutu/Bogeka/1515 and unlawful reallocation of the petitioner's land number to a new number West Kitutu/Bogeka/1730 and subsequent alienation of a portion of land measuring 70ft by 150ft was unconstitutional and infringed on the petitioners proprietary rights as enshrined under Article 40 of the *constitution* an order thereof that the title to the subject parcel of land be restituted to the petitioner herein.
 - b. Cost of the Petition herein and interest at court rates.
 - c. Any other remedy this Honourable court may deem fit to grant in the interest of justice.
2. The 2nd respondent opposed the petition through a replying affidavit sworn by its director, Jamaludin S.A Rajwani. He deposed that the 2nd respondent has never purchased land from the alleged Mzee Nyandwaro. He denied the allegation that the 2nd respondent alienated the petitioner's land. He deposed that the 2nd respondent has never had the parcel No. 1731 allocated to it jointly with the petitioner. He averred that the 2nd respondent is a stranger to the allegations in the petition. He added that the petition is incompetent and misconceived.
 3. The 3rd respondent, the Land Registrar, also swore a replying affidavit. He deposed that the land parcel No. 1515 originated from a subdivision of the parcel No. 1089 which was subdivided into two, being parcels No. 1514 and 1515. He deposed that the petitioner got registered as proprietor of the parcel No. 1515 and was issued with a title deed on 12 February 1979 and that title is still registered in his names. He deposed that parcel No. 1514 remained in name of Mzee Nyandwaro and it measures 5.7 Ha. He proceeded to elaborate that parcel No. 1514 was subsequently subdivided and gave rise to the parcels No. 1730 and 1731. The parcel No. 1731 was transferred to Lutafal Jiwa Nathoo Rajwani on 15 April 1988 and later transferred to Ajiwa Shamji limited who are the current proprietors. He deposed that the parcel No. 1515 has never been in name of the 1st and 2nd respondents. He added that the transfer in favour of the 1st and 2nd respondents were made from a different parcel number and there was no fraud by the Land Registrar. He closed by stating that the petitioner is not being honest and is misleading the court by saying that the Land Registrar unlawfully transferred his land to the 1st respondent.
 4. The suit against the 1st respondent was withdrawn.
 5. It is with the above pleadings that the matter proceeded for hearing.
 6. PW-1 was the petitioner. He first testified before Mutungi J, on 17 February 2016. He testified that Mzee Nyandwaro owned the parcel No. 1089 measuring 6 Ha. That he purchased from him 0.6 Ha leaving a balance of 5.4 Ha. This 0.6 Ha, he alleged, became the parcel No. 1515. He proceeded to state that he subsequently bought a second portion on 24 April 1982 measuring 70 X 150 feet from the parcel No. 1514 and that its boundary was marked. He claimed to be in use of all the land that he purchased, i.e 0.6 Ha and 70 X 150 feet. He wished to produce the sale agreement that he had with Mzee Nyandwaro but there was objection to it and an adjournment was granted to enable the petitioner consider his position. Mutungi J was thereafter transferred and the matter taken over by Onyango J. The petitioner testified afresh before Onyango J, on 21 April 2021. He reiterated that he first purchased land measuring 0.6 Ha from Mzee Nyandwaro but now claimed that the second portion he purchased measured 0.5 Ha. The first sale was in 1975 and the second sale in 1982. He stated that the vendor died before he could transfer to him the second portion. He testified that he



- took possession and constructed two semi-permanent houses. He averred that the 2nd respondent is his neighbor who has excavated stones on his land and now wants to dispossess him. He prayed that he be issued with a title deed to this second portion that he bought. He stated that he does not know who has title to it.
7. Cross-examined, he testified that his case relates to land to which he has no title to. He reiterated that he purchased the land from Mzee Nyandwaro. He claimed to have noted the fraud in 2003 though he admitted presenting a letter dated 3 July 1997 (being a letter from the District Surveyor's office relating to the dispute herein). He stated that the 2nd defendant's land is next to his and it is not fenced and there is a quarry in it. He averred that he is in exclusive possession of his land and has even fenced it. He testified that the 1st and 2nd respondents have not encroached on his land and there is no dispute that the land belongs to him. He stated that he has peacefully been living on his land since 1982. He did not know if the 2nd respondent has transferred her land to herself. Re-examined, he now testified that the title of his second portion is with the 1st respondent and affirmed that it measured 0.5 Ha as he had testified in Chief. He added that the 2nd respondent bought the land from the 1st respondent. He testified that he only has a title to 0.6 Ha. He stated that the 2nd respondent came to his land with the Chief and a surveyor in 2011 and that the surveyor moved the beacons.
 8. PW-2 was Alexander Oira Ogaki. He identified himself as a son of Mzee Nyandwaro. He stated that his father sold to the petitioner some land. He otherwise relied on a witness statement. I have gone through it. In it, he states that his father is deceased. He recalled that Mzee Nyandwaro sold to the petitioner land and payment was made. That the petitioner took over occupation and is on the land to date. He added that Mzee Nyandwaro also sold land to the 1st respondent who later sold it to the 2nd respondent. He confirmed that the 2nd respondent did not buy land directly from Mzee Nyandwaro. He stated that the petitioner's land is the parcel No. 1515 and alleged that the 2nd respondent interfered with the petitioner's title and changed the petitioner's parcel number 1515 to No. 1730. He further alleged that the petitioner complained after which the title was returned to the original number 1515 but with acreage reduced from 0.6 Ha to 0.38 Ha.
 9. Cross-examined, he testified that his father sold land to the 1st respondent but could not tell from which parcel of land. He affirmed that the 1st respondent got registered as owner of the parcel No. 1731 and his father remained with the parcel No. 1730. He stated that both parcels No. 1730 and 1731 came from the parcel No. 1514. He testified that the parcels No. 1514 and 1515 were never surveyed. He was referred to what the petitioner stated was the sale agreement between himself and his father which is dated 24 April 1982. He acknowledged that the size of land is not indicated, only outlining that part of parcel No. 1514 is sold. He testified that his father did not transfer the land in that agreement to the petitioner. Challenged to give proof that the 2nd respondent changed the parcel No. 1515 to 1730, he admitted that he has no evidence to support this. He also admitted to not having any evidence that the acreage was reduced from 0.6 Ha to 0.38 Ha. He admitted to not having any evidence that the parcel No. 1515 was ever 0.6 Ha. He admitted that it was parcel No. 1514 which was subdivided into the parcels No. 1730 and 1731. He could see that the mutation form shows the parcel No. 1731 to be 1.8 Ha which is the same acreage in the title. He testified that he was present when beacons were put on the land and no issue arose and nowhere did a surveyor say that the land of the 2nd respondent is more than 1.8 Ha. He stated that the land that the petitioner is claiming will be within the beaconed land of the 2nd respondent.
 10. With the above evidence, the petitioner closed his case.
 11. The respondents closed their cases without calling any evidence.



12. I invited counsel to file written submissions which they did and I have taken the same into consideration.
13. Despite the rather jumbled up pleadings of the petitioner, what I am able to decipher is that the petitioner alleges that he purchased some land from Mzee Nyandwaro, which land falls within the parcel No. 1731, whose title is with the 2nd respondent. The evidence shows that Mzee Nyandwaro owned the land parcel West Kitutu/Bogeka/1089 which measured 6.0 Ha. He divided this land into the parcels No. West Kitutu/Bogeka/1514 and 1515. Mzee Nyandwaro retained the parcel No. 1514 and transferred the parcel No. 1515 to the petitioner. The petitioner obtained title to this parcel No. 1515 on 12 February 1979 and the title shows that this land measures 0.38 Ha. As to the parcel No. 1514, the evidence shows that it was later subdivided into the parcels No. 1730 and 1731 respectively measuring 3.9 Ha and 1.8 Ha. It would mean that the parcel No. 1514 was 5.7Ha or thereabouts. The petitioner produced the mutation forms which confirm this position. The parcel No. 1730 is said to have remained in name of Mzee Nyandwaro and the parcel No. 1731 was transferred to the 1st respondent. The 1st respondent subsequently transferred it to the 2nd respondent.
14. It is of course the contention of the petitioner that he first purchased land measuring 0.6 Ha from Mzee Nyandwaro then a further 70 X 150 feet in 1982. I have seen the documents he has produced and it would appear that Mzee Nyandwaro, when he was subdividing his land parcel West Kitutu/Bogeka/1089, wished to subdivide it into two portions, respectively measuring 5.4 Ha and 0.6 Ha. However, what emerges is that the petitioner got a title measuring 0.38 Ha and not 0.6 Ha. I am unable to fathom why the petitioner got land measuring 0.38 Ha and not 0.6 Ha but the petitioner does not appear to have raised any issue when he got his title deed on 12 February 1979. If he had any issue, that was the time to raise it and he ought to have raised it with Mzee Nyandwaro who is the one who sold to him the land. As at 1979 when he got his title to 0.38 Ha, the 1st and 2nd respondents were nowhere in the picture. The fact is that the petitioner allowed Mzee Nyandwaro to keep land measuring 5.7 Ha or thereabouts which is what comprised the parcel No. 1514. Mzee Nyandwaro subdivided it in 1988 to bring forth the parcels No. 1730 and 1731, and I have already pointed out their acreages, i.e 3.9 Ha and 1.8 Ha. The 1st respondent got his title on 5 April 1988.
15. Part of the contention of the petitioner is that his title was changed from title No. 1515 to No. 1730. That assertion is backed up by zero evidence. The evidence produced is stark, that the petitioner has always had a title deed for the parcel No. 1515 from 1979. There is nothing presented that shows any change of title number 1515 to 1730, then reverting back to 1515 with reduced acreage. There is in fact nothing to suggest that the acreage of 0.38 Ha noted in the title of the petitioner to the parcel West Kitutu/Bogeka/1515 has ever been altered. It was issued as a title measuring 0.38 Ha and that is what it reads to date.
16. Now, if indeed the petitioner purchased any additional land from Mzee Nyandwaro in 1982, whether measuring 70 X 150 feet or 0.5 Ha (it was never clear what was bought for even the agreement relied upon by the petitioner shows no acreage), from the parcel No. 1514, and the petitioner wished to have this land transferred to him, the person he ought to have sued is Mzee Nyandwaro. I wonder why the petitioner is suing the respondents as he never purchased land from them. The respondents merely purchased some land measuring 1.8 Ha from Mzee Nyandwaro and they got title to it. As I have mentioned, but it is worth repeating, there is no evidence to suggest that this parcel West Kitutu/Bogeka/ 1731 owned by the 1st and 2nd respondents ever had its acreage altered to read more acreage than the subdivision proposed. The acreage is exactly as that shown in the mutation form produced by the petitioner himself. I find absolutely nothing wrong with the title of the 1st and 2nd respondents to this parcel West Kitutu/Bogeka/1731. If any person shortchanged the petitioner, then it would be



Mzee Nyandwaro, and not the respondents, and it is from that quarter that he ought to direct his grievances.

17. The petitioner appeared to suggest that he is occupying land that falls within the parcel No. 1731 but he brought zero evidence to demonstrate what exactly he occupies. He brought no surveyor's report to show what land he occupies and what it measures. But if his case is that he is in occupation of the parcel No. 1731 and he thus deserves title thereto, by dint of such occupation, then what he ought to have filed was a suit for adverse possession which is not the case here. He has filed a petition alleging fraud and I see absolutely no shred of evidence that the respondents participated in any fraud. Neither is there any fraud in the transfer of the land parcel No. 1731 to the 2nd respondent.
18. The petitioner has not demonstrated to me that he has any worthy cause, but even if he had, and I am categorical that he has no such good case, his suit is hopelessly time barred. The title of the 1st and 2nd respondents was issued in 1988. This suit was filed in 2011, which is 23 years later. Such case is time barred by dint of Section 7 of the [Limitation of Actions Act](#), Cap 22, Laws of Kenya, which provides as follows :-

7. Actions to recover land

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.

19. It will be seen that the law prescribes for a limitation period of 12 years for any claim over land. Thus, in so far as the petitioner contends that he got less land than the 0.6 Ha that he alleges to have first purchased, his claim is time barred, since he got his title deed in 1979. He is deemed to be aware that his title read 0.38 Ha from the year 1979 when he collected it and this suit was filed in 2011, which is 32 years later. I am aware that Section 26 of the [Limitation of Actions Act](#) does extend the limitation period where the claim is inter alia based on fraud, so that time will start running from the time that the fraud was discovered. It states as follows :-

26. Extension of limitation period in case of fraud or mistake

Where, in the case of an action for which a period of limitation is prescribed, either—

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

- (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.



20. However, the above provision cannot help the petitioner herein since he is deemed to have been aware of the size indicated in the title deed from the date that he collected it, which is 12 February 1979. In so far as the claim is over the title No. 1731, the same is also caught up by time since I have evidence that as early as the year 1997, the petitioner was complaining about the same issue herein. This is apparent from the letter dated 23 July 1997 written by the District Surveyor. That letter elaborates that the petitioner had gone to the office of the District Surveyor to complain about the land parcels West Kitutu/Bogeka/1515 and 1731, which is more or less the same complaint in this case. The petitioner was thus very much alive to his issues at the latest in the year 1997. This suit was filed on 29 April 2011 which is more than thirteen years later, thus time barred by dint of Section 7 of the Limitation of Actions Act.
21. It doesn't help that the petitioner commenced this suit by way of petition and not plaint. He cannot escape, in the circumstances of this case, the strictures of time outlined in statute. He was aware of the dispute and filed nothing until the limitation period expired. I do not see any reason to benefit the petitioner merely because he has opted to commence suit by way of petition. In fact, for all intents and purposes, the issues herein could well have been addressed in an ordinary suit, and the petitioner cannot try to evade limitation by disguising his dispute as a constitutional petition, which it clearly is not.
22. For the above reasons, I proceed to dismiss this petition with costs to the respondents.
23. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 2ND DAY OF NOVEMBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

In the presence of: -

Mr. Sagwe for the petitioner

Ms. Kebungo instructed by M/S Nyamurongi & Co. for the 2nd respondent

Mr. Ndiritu, State Counsel, for the 3rd & 4th respondents

Court Assistant – Mr. Lawrence Chomba

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