



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ELC CASE NO. 5 OF 2012

NGUNGA NGAHU.....PLAINTIFF

VERSUS

DAMARIS NJERI KAGIRI.....1ST DEFENDANT

ELIUS NJOROGE KANYINGI.....2ND DEFENDANT

TERESIA NYAMBURA KINUTHIA.....3RD DEFENDANT

LAND REGISTRAR NYERI.....4TH DEFENDANT

JUDGMENT

1. Vide a Plaint dated the 27th November 2012, the Plaintiff herein sought for the following orders;
 - i. The honorable court be pleased to order that LR No. Ndathi Settlement/ 519 revert to the Plaintiff and Title No. Ndathi Settlement/924 and 925 be cancelled and declared a nullity.
 - ii. That the honorable court be pleased to give any other alternative relief if (sic) may deem fit
 - iii. Costs of this suit.
2. In response to the said Plaint, the 2nd and 3rd Defendants herein filed their statement of Defence and Counterclaim on the 29th October 2013, wherein they denied the allegations contained in the Plaintiff's Plaint and sought for the following orders in their Counter-claim;
 - i. An order that the Plaintiff does grant vacant possession of Ndathi Settlement Scheme/924 to the 2nd Defendant and Ndathi Settlement Scheme/925 to the 3rd Defendant. Failure to which the Plaintiff be forcefully evicted from Ndathi Settlement Scheme/924 and Ndathi Settlement Scheme/925
 - ii. Costs of the suit.
3. The 1st Defendant subsequently filed her statement of defence on the 11th February 2014 also denying the Plaintiff's assertion in her plaint and thereby putting him to strict proof thereof.
4. There was no response from the 4th Defendant and neither was there a response to the 2nd and 3rd Defendants' defence and counterclaim.
5. Subsequently after both parties complied with the provisions of Order 11 of the Civil Procedure Rules, the matter was set down for hearing.

The Plaintiff's case

6. The Plaintiff testified as PW1 to the effect that he had recorded his statements on the 5th December 2012 and 30th October 2017 to which he sought to adopt as his evidence. He proceeded to testify that he had initially been a squatter in the forest wherein following orders in 1991 by the former President Moi (now deceased), all squatters had been allotted land, so as to move away from the forest, for which he had been allotted parcel of land No. 519 land which had been had now been taken away from him and sold.

7. He produced a document entitled RAGOTI "A" which was marked as PMFI 1 and which was an alleged list of all the allottees of land. The Plaintiff proceeded to testify that after they had been given the land they were supposed to pay Ksh. 220/= for a title but that at that time since he had no money, he was neither issued with the title deed nor shown the land.
8. That after a week he had got the money wherein he had gone to get the letter/title from the District Commissioner. He had however found the title missing and had been informed that somebody had picked it but nobody knew who had picked it.
9. That he had continued to pursue his title and after a while he had been asked to pay Kshs. 1750/=. That when he went to make the said payments, he discovered that Damaris, the 1st Defendant had paid the money. He then decided to look for her. His evidence was he only came to know the 1st Defendant after filing suit and that he did not know how she got the title.
10. That although the 1st Defendant's claim was that the District Commissioner had given the title to her, yet she had not been in the forest with them and neither and did the chief recognize her.
11. That the people who had been given land in "RAGOTI A" were squatters in the forest who all knew each other. That there was no revocation of his title.
12. His further evidence was that he had taken possession of the land in 1991 when the same had been given to them wherein he had ploughed it and planted trees then gone to look for a job as the trees were growing.
13. He produced the photographs showing the suit land and testified that 1st - 3rd photographs showed the trees that he had planted on the suit land. Trees which were still on the land. That the 4th- 6th photographs depicted the portion of land upon which he had cultivated maize and beans. He produced the photographs as Pf Exh 2 (a-f)
14. The Plaintiff went on to testify that when he was still using the land, and during the pendency of the suit, the 2nd Defendant, in the year 2013, in the company of the sub-chief had informed him that the land was his.
15. That it had been during that period, when he had cut down one of his trees to fence his land, that he had been arrested and charged before the Nyeri Chief Magistrates Court in CR No. 159/2013 on the 7th March 2013 for cutting down the tree. He produced the charge sheet as Pf exh 3.
16. That after the case had been finalized, he had been arrested a second time wherein the 2nd Defendant had cut down trees and fenced the land and also cut down the maize and potatoes he had planted and thereafter sprayed the crops with a chemical so that they could dry up.
17. His evidence was that the 1st Defendant had sold the suit land to both the 2nd and 3rd Defendants which land had subsequently been subdivided into two. That he had conducted a search on the land to which he produced the certificates for LR No. Ndathi Settlement/924 and 925 as Pf Exh 4 (a-b).
18. He also produced a copy of the green card to the original parcel of land No. 519 as PF Exh 5 and testified that he had not seen any surveyor who did the sub-division.
19. A letter from the Chief dated 6th December 2012 was also produced as Pf Exh 6 confirming that indeed the land was his.
20. The Plaintiff's testimony was that the Defendants had never used the land and that he did not know that they bought the same in the year 2002 because nobody had approached him to sell the same and he was still using it.
21. He sought for the court to assist him get back his land.
22. During his cross examination, the Plaintiff confirmed that he had been to the District Commissioner's office after one week in the year 1991 although he could not remember the exact date. That he could not take any action or sue because he did not know who had his title. That he knew they had changed his name in the year 2012 when he went to pay the money although he did not know when or who changed the name.
23. He also testified that the scheme had about 78 people from his village who had all been given land, people whom he knew. He stated that he had also been given plot No. Nyeri Ndathi 701 which had a title and upon which he resided.
24. He testified that when they were chased from the forest, their houses had been burnt down wherein his mother Tabitha Muthoni Ngahu's identity card had been burnt in the house. That that was how he got registered to plot No. 701 in her place. That her name however still appeared on the register in the settlement.
25. He also confirmed that in August 2014, he had been convicted and fined a sum of Kshs. 20,000/= for the theft of blue gum trees, which charge was not true as all that he had done was to cut down of one tree without a permit from the chief.
26. His testimony was that the 1st Defendant was a civil servant who had been employed at the District Commissioner's (DC's) office. He however had no evidence to the effect that when one was employed as a civil servant (s)he was not entitled to be allotted land.

27. He proceeded to testify that after the 2nd Defendant had destroyed his trees and crops, he had reported the matter at Tagwa Police Post wherein the Officer Commanding Station (OCS) had directed them to report the matter to Kiganjo. That he had done as directed but did not know what had transpired as the OCS took his phone number, went to the suit land but called only the 2nd Defendant wherein after they had asked him to produce the damaged crop which he did not have since they had been sprayed with pesticide. No action had been taken against the 2nd Defendant by the OCS and neither did he take further action.

28. He confirmed having sued neither the settlement officer nor the Land Registrar, but was firm that there had been fraud committed as he did not understand how somebody else's name had been written next to his yet the government had given him the land.

Defence case.

29. The 1st Defendant, Damaris Njeri Kagiri testified as DW1 to the effect that she recorded her statement on the 6th March 2017 which statement she wished to adopt as her evidence. That while she lived in Ihuwa in Tetu Location as a squatter, they had been informed by the area chief of Tetu, that the Government was giving out land and that they should go and see the Provincial Commissioner (PC) Mr. Musogo at his office. That indeed she had gone wherein she had been given a piece of paper and asked to go to the Land Registrar. She went and was issued with the title to the land parcel No. Ndathi Settlement Scheme 519 and was registered as its proprietor on 14th December 1991.

30. That she had then taken possession of the same wherein she had built a semi-permanent house made of cardboard since she had no building materials. Thereafter she had ploughed on the land for 10 years before she developed health issues and was advised to go to a warmer place.

31. That she had sought for somebody to buy the land, which measured 1 hectare, wherein she sold the same to Mr. Eliud Njoroge Kanyingi and Julius Muturi Mashua through a sale agreement of the 16th August 2002 and moved away. That thereafter, the two people had been issued with their respective titles deeds being No. 924 for Eliud Njoroge and No. 925 for Julius Muturi. She produced the title deed, the certificate of search and the agreement for sale as Df exh 1, 2 and 3.

32. Her testimony was that she got the land through lawful means and did not commit any fraud in the allocation of the land. That she did not know if there was anybody else who had been allotted with land No. 519 before her and that she had just heard the evidence by the Plaintiff in court.

33. That the people she had sold the land to had used it for 11 years before the Plaintiff filed the case and that it was not true that she was a civil servant. That during her investigations on the person who had filed the suit against her, she had discovered that the Plaintiff had been issued with land in the same area being land No. Ndathi Settlement 701. She marked the Green card to Ndathi Settlement Scheme No. 701 as DMFI 4. She also testified that she had not been charged with any criminal offence in relation to how she had obtained title to land parcel No. 519.

34. In cross examination, the 1st Defendant confirmed that she was born in Kimende in Kiambu and married in Nyeri in Tetu by Joseph Mathenge in Ihuwa wherein they lived in Ihuwa where her husband was born.

35. That the land was given to the people who were from the forest and the landless people to which she was one of the landless persons within Ihuwa. That she had applied for the land at P.C's Office by word of mouth wherein she had been issued with the allotment letter on 14th December 1991. Thereafter she had sold the land to her co-accuseds and surrendered the allotment letter to the Land Register.

36. She confirmed that she had never been a government employee but had always been a farmer and that she did not know that the land belonged to the Settlement Fund Trustee. That she had signed the register at the Land Registrar's office after having taken the title deed. That she only knew of a list that had been used to call them out at the time she had been given a title and not any other list.

37. She also confirmed to having got onto the land on the 16th December 1991 wherein she had cleared some tress and had started ploughing and had planted Irish potatoes and cabbages for 10 years. That the Plaintiff had never used the land. That her co-defendants had then used the land for 11 years from the year 2002 to date but that she did not know when they started ploughing the land because she had already sold the land to them. She also confirmed that she had not planted any trees thereon but that the land had trees. That in the year 2013 she had been informed by her co-defendants that the Plaintiff had been sued for forceful detainer.

38. The 2nd Defendant, Eliud Njoroge Kanyingi testified as DW2 to the effect that Ndathi Settlement Scheme/924 was his land wherein he had jointly bought it with Julius Muturi in the year 2002. That at the time it was land parcel No. 519 wherein they had sub-divided it into two resulting to Ndathi Settlement Scheme/924 and Ndathi Settlement Scheme/925, wherein he was given his title.

39. That when they had conducted a search at the Land Registry, parcel No. 519 had been registered to the 1st Defendant Damaris. He produced his national identity card as Df Exh 5, Certification of search dated 15th October 2013 to land parcel No. 519 in the name of Damaris as Df Exh 6, the Sale agreement dated 16th August 2002 as Df Exh 3 and Title deed to parcel No. 924 as Df Exh 7.

40. His further evidence was that he did not get his title deed fraudulently and that he had entered on the land before they had completed payment wherein he had started ploughing the land during the election time in the year 2002, and had planted maize. The 1st Defendant had removed the trees on the land but that there were tree trunks which trunks then sprouted into trees. He testified that he had been on the land since the year 2002 and had come to know the Plaintiff when he got onto the land in the year 2013 to which he (Defendant) had complained to the chief and the Plaintiff had been summoned.

41. That initially, the Plaintiff had tried to plough on the land at which time the DW2 was in Sudan, wherein his cousin had reported the

matter to the Chief who wrote to the Plaintiff via a letter dated 16th December 2012, which he produced as Df exh 8, asking all parties concerned to maintain the status quo until the dispute was resolved.

42. That upon his return in the year 2013, everybody had taken their respective documents concerning the suit land to the Chief, wherein the Chief had directed that the Plaintiff be sued for cutting trees. That he was sued vide a Cr. Case 121/2013(sic) for forceful entry on the 29th November 2012 and 6th March 2013 and cutting trees. There was also a second count of stealing on the 4th March 2013. The Plaintiff had been fined, as per the judgment dated the 27th August 2014 herein produced as Df exh 9. His evidence was that prior to the 29th November 2012, the Plaintiff had not entered onto the land

43. He testified that he did not know if there was anybody else who had been issued with title to plot No. 924 land upon which he was currently in occupation. That in the year 2016, when he had tried building on the land, the Plaintiff and his children had attacked him and therefore his presence on the land was not peaceful. He sought that the court issues an injunction against the Plaintiff from trespassing on his land.

44. He also confirmed that at the time this suit was filed in the year 2012, the Plaintiff was not on the land and he had not known him, but had come to know him in the pendency of the criminal case of the year 2013.

45. In cross examination the 2nd Defendant confirmed that there were both blue gum and indigenous trees on the ground which trees were part of the forest and had sprouted from the tree trunks. He also confirmed that he lived in Nairobi and had never stayed on the suit land.

46. Teresia Nyambura Kinuthia, the 3rd Defendant testified as DW3 to the effect that the parcel of land No. 925 which she had inherited from her late husband Mr. Julius Muturi through Thika Succession Cause No. 342 of 2008 was now registered in her name.

47. She produced the certificate of confirmation of grant as Df Exh 10 and proceeded to testify that she had lived with her late husband Julius for 1 ½ years upon which time he had informed her that he had bought land with his cousin Eliud Kanyingi (Dw2) wherein they had subdivided it.

48. She produced her identity card as Df Exh 11, title deed to land parcel No. 925 in her husband's name as Df Exh 12 and a subsequent copy of title deed to land parcel No. 925 in her name, as Df Exh 13 and testified that she knew where the land was and that when they took possession of the same, although they did not live there, they had planted maize for 1 year and nobody had laid any claim on the same. That they did not obtain the land through fraud.

49. At the close of the defence case by consent, parties agreed to file their written submissions but by the time I write this judgment, only the Defendants had complied.

50. After the summarizing the evidence on record, the Defendants framed their issues for determination as follows:

- i. Whether the Plaintiff is the owner of the original parcel of land No. Ndathi Settlement Scheme 519 resulting into titles No. Ndathi Settlement Scheme 924 and No. Ndathi Settlement Scheme 925.
- ii. Whether there was any fraudulent transfer and/or registration of the parcel of land No. Ndathi Settlement Scheme 924 and No. Ndathi Settlement Scheme 925 to warrant the revision of the same to the Plaintiff.
- iii. Whether the Plaintiff is the owner of the original parcel of land No. Ndathi Settlement Scheme 519 resulting into titles No. Ndathi Settlement Scheme 924 and No. Ndathi Settlement Scheme 925.

51. On the first issue for determination the Defendants' submission was that the Plaintiff's evidence that he was granted parcel of land No. Ndathi Settlement Scheme 519 to settle by the Ministry of Lands and Settlement department in the ongoing settlement of forest squatters was not supported by any documentary or corroborative evidence and therefore this evidence remained just the Plaintiff's word. That the Plaintiff's attempt to assert his claim by introducing 'RAGATI A', a list of names of the people who had been resettled from the forest which list that was marked for identification, did not bear fruit as he had failed to call the maker to verify its contents. That on cross examination, the Plaintiff had introduced a new interests to his narrative by claiming that the parcel of land was actually his mother's land. To this effect, it was the Defendants' submission that the Plaintiff had failed to discharge the burden of proof to the required standard.

52. That in the alternative the Defendants brought forward proof that they were the legal proprietors of the subject suit land herein by providing proof that the 1st Defendant had applied for the suit land wherein she had been allotted parcel No 519 and had subsequently been issued with a title deed to parcel No. Ndathi Settlement Scheme 519. Subsequently the original parcel of land had been subdivided into two portions resulting into titles No. Ndathi Settlement Scheme 924 and No. Ndathi Settlement Scheme 925 which were registered to the 2nd and 3rd Defendants respectively as evidenced by the titles herein produced.

53. It was the Defendants' submissions that the aforementioned titles confirmed absolute ownership of the suit land with all rights and privileges appurtenant thereto to the Defendants, as was provided for under the provisions of Section 24 of the Land Registration Act.

54. The Defendants' submission on the point of determination as to whether there was any fraudulent transfer and/or the registration of the parcels of land No. Ndathi Settlement Scheme 924 and No. Ndathi Settlement Scheme 925 was that although the Plaintiff had pleaded fraud in his plaint, he did not bring forth any scintilla of evidence of the allegation of fraud and as such, the allegation of fraud was not proved to the required standard as was held in the case of **Gladys Wanjiru Ngacha vs Theresa Chepsaat & 4 Others [2013] eKLR**.

55. The Defendants thus urged that the Plaintiff's suit be dismissed with costs and their counter claim to be allowed with costs.

Determination.

56. I have duly considered the evidence adduced before court by all the parties herein. I find the suit herein being a contest between the Plaintiff, and the Defendants over the original land parcel No. Ndathi Settlement Scheme 519 which was subsequently subdivided into two giving rise to No. Ndathi Settlement Scheme 924 and No. Ndathi Settlement Scheme 925.

57. The Plaintiff's case was that initially he had been a squatter in the forest wherein following orders by the former President Moi (deceased) in 1991, all squatters had been allotted land, so as to move away from the forest. That thereafter, he had been allotted parcel No. 519 land which had then been fraudulently taken away from him by the 1st Defendant who had subsequently sub-divided it and sold it to the 2nd and 3rd Defendants herein.

58. In support of his case, the Plaintiff produced Pf Exh 2 (a-f) which were photographs showing the suit land and the trees that he had planted thereon, Pf exh 3, the charge sheet for which he had been charged on the 7th March 2013 before the Nyeri Chief Magistrates Court in CR No. 159/2013 with the offence of Forcible entry. He had also produced search certificates for LR No. Ndathi Settlement/924 and 925 as Pf Exh 4 (a-b) and a copy of the green card to the original parcel of land No. 519 as PF Exh 5. Finally he had produced as Pf Exh 6, a letter from the Chief dated 6th December 2012 where the chief and asked parties to present their documents to the suit land and to maintain the status quo.

59. The Plaintiff thus sought for orders that LR No. Ndathi Settlement/519 revert to him and the subsequent titles No. Ndathi Settlement/924 and 925 be declared a nullity and cancelled. He also sought for any other alternative relief that the Court may deem fit to grant.

60. The Defendants' case on the other hand was that pursuant to receiving information from the Chief of Tetu that the government was giving out land, the 1st Defendant had gone to see the Provincial Commissioner (PC) wherein she had been allotted Ndathi Settlement Scheme 519 which was subsequently registered to her and she had been issued with a title deed on the 14th December 1991.

61. That she had later sold the land to the 2nd Defendant and Mr. Julius Muturi the 3rd Defendant's husband both who had subdivided the same into two thus giving rise to No. Ndathi Settlement/924 and 925. That upon the death of Mr. Julius Muturi, the 3rd Defendant had inherited Ndathi Settlement/925 through Thika Succession Cause No. 342 of 2008. Ndathi Settlement/925 was subsequently registered in her name.

62. The 2nd and 3rd Defendants' counterclaim to the Plaintiff's suit was for the Plaintiff to give vacant possession of Ndathi Settlement Scheme/924 to the 2nd Defendant and Ndathi Settlement Scheme/925 to the 3rd Defendant failure to which he be forcefully evicted from Ndathi Settlement Scheme/924 and Ndathi Settlement Scheme/925.

63. In support of their case the Defendants had produced a copy of the title to the original parcel No. Ndathi Settlement Scheme/519 having been issued on 14th December 1991, the sale agreement of 16th August 2002 to Mr. Eliud Njoroge Kanyingi and Julius Muturi Mashua as Df exh 1, 2 and 3, a certificate of search dated 15th October 2013 to land parcel No. 519 in the name of 1st Defendant as Df Exh 6, Title deed to parcel No. 924 as Df Exh 7 in the name of the 2nd Defendant, certificate of confirmation of grant to the 3rd Defendant as Df Exh 10, title deed to land parcel No. 925 in the name of the deceased Julius Muturi Mashua as Df Exh 12, and copy of title deed to land parcel No. 925 in the name of the 3rd Defendant as Df Exh 13.

64. I find the issues that arise for determination as follows:

- i. Whether the titles held by the 1st Defendant was obtained through fraud.
- ii. Whether the Plaintiff's suit was statutorily time barred by virtue of the provisions of Section 7 of the Limitations of Actions Act.
- iii. Whether the 2nd and 3rd Defendants are entitled to reliefs sought in their counterclaim.
- iv. Who is liable to pay costs of the suit

65. It was **held in the case of Republic vs Senior Registrar of Titles Ex-parte Brookside Court Limited (2012) eKLR**, that statutorily, the sanctity of title to land is assured and protected under **Section 24, 25 and 26 of the Land Registration Act 2012** produced as herein under';

66. Section 24 stipulates as follows:

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or

expressed agreements, liabilities or incidents of the lease.

67. Section 25 of the act provides:

(1) The rights of a proprietor, whether acquired on 1st registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

68. Section 26 is to the effect that:

Certificate of title to be held as conclusive evidence of proprietorship

(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.

69. The Plaintiff's claim is founded on the fact that the 1st Defendant's title to the original suit land being No. Ndathi Settlement Scheme/519 was acquired illegally, and fraudulently and therefore it alongside the subsequent titles being Ndathi Settlement Scheme/924 and 925 were null and void and ought to be cancelled. Having pleaded fraud and illegality on the part of the 1st Defendant in the manner in which the title to the suit land had been obtained, the onus was on the Plaintiff to prove those allegations. Fraud is a serious matter which must be proved to the required standard. In **R.G Patel vs Lalji Makanji 1957 E.A 314**, the Court of Appeal held 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”.

70. In the case of **Arthi Highway Developers Ltd vs West End Buthery Ltd & Others [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”.

71. In this case, I find no evidence either orally or documentary that was produced to support the Plaintiff's allegations of fraud. No evidence was adduced as to how the 1st Defendant was engaged in *fraud* in the acquisition of title to land parcel No. Ndathi Settlement Scheme/519. There was further no evidence from the Registrar of Lands office to testify on how the 1st Defendant was a party to the said acquisition, and further no evidence was adduced that the Plaintiff had even reported the case of fraud to the police and that investigations had subsequently been conducted. Apart from making general allegations of fraud, the same was not remotely proved, and the same remained just allegations.

72. Indeed a look at the green card to the original parcel of land No. Ndathi Settlement Scheme/519 herein produced as PF Exh 5, the same was clear that before it had been registered to the 1st Defendant, the suit land had been registered to the Government of Kenya who were made party to the suit but who did not prosecute the matter herein, and therefore the onus was on the Plaintiff to prove his case against the 4th Defendant and not the 1st Defendant. On this limb, the Plaintiff's suit fails.

73. On the second issue as to whether the Plaintiff's suit was statutorily time barred by virtue of Section 7 of the Limitations of Actions Act, it is evident from the evidence adduced herein that the 1st Defendant was registered as proprietor of the original parcel of land No. Ndathi Settlement Scheme/519 on the 14th December 1991 wherein the present suit was filed on the 27th November 2012 which was 21 years later. The cause of action against the 1st Defendant therefore arose on 14th December 1991.

74. Section 26 of the Limitation of Actions Act provides as follows;

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:

75. From the Plaintiff's pleadings and evidence it is clear that he had discovered the fraud in the year 1991. Section 4(2) of the Limitation of Actions Act provides that an action founded on tort may not be brought after three years. Time therefore started running in 1991 and the period of three years ended in 1994. These proceedings were filed in the year 2012 which period was beyond the 3 years from the date the cause of action arose.

76. Section 7 of the Limitation of Actions Act provides as follows:

“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

77. By dint of the provisions of Section 7 of the Act, an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the Plaintiff ought to have sought to recover the land from the 1st Defendant within twelve years from the date on which the right of action accrued to him.

78. There is no doubt that the period of about twenty one years had lapsed from the date on which the right of action accrued to the date when this suit was filed. No leave for extension of time to file the suit outside the twelve year period has been exhibited before this court.

79. In the case of **Bosire Ongero vs Royal Media Services [2015] eKLR** the court held that the issue of limitation went to the jurisdiction of the court to entertain claims and therefore if a matter was statute barred, the court had no jurisdiction to entertain the same.

80. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

81. Clearly, this Court lacks jurisdiction in the Plaintiff's suit and the matter is at its end.

82. The 2nd and 3rd Defendants filed a counterclaim to the Plaintiff's suit which counterclaim, *from both the oral and documentary evidence adduced in Court, I find has been proved to the required standards by the Defendants on the legality of how they had acquired the title to parcel No Ndathi Settlement Scheme /519 which was subsequently subdivided into titles being Ndathi Settlement Scheme/924 and 925.*

83. Putting all the matters herein aforesaid into consideration, I find that the Plaintiff has not proved his case on a balance of probability and I proceed to dismiss the same with costs. On the other hand I find in favour of the 2nd and 3rd Defendants in their counterclaim and proceed to make the following orders:

- i. The Plaintiff shall voluntarily give vacant possession of Ndathi Settlement Scheme/924 to the 2nd Defendant and Ndathi Settlement Scheme/925 to the 3rd Defendant within the next 60 days from the date of this judgment and be permanently restrained from being on the suit land.
- ii. In default the 2nd and 3rd Defendants to take the liberty to initiate eviction of the Plaintiff from Ndathi Settlement Scheme/924 and Ndathi Settlement Scheme/925 as laid down in the law.
- iii. The Plaintiff shall pay the cost of the suit and counterclaim.

It is so ordered.

DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 8TH DAY OF APRIL 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE