



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA NO. 80 OF 2019

PETER MATUMBI

(Suing as the legal representative of the estate of M'Rimberia Mwithiga – DECEASED).....APPELLANT

-VERSUS-

M'MUKURIA M'NGONJI aka KIUGU NGONJI.....RESPONDENT

JUDGMENT

A. INTRODUCTION AND BACKGROUND

1. This is an appeal against the ruling and order of **Hon. H. Ndungu (Chief Magistrate)** dated on 30th May, 2019 in *Meru CMCC No. 96 of 2018 – Peter Matumbi v M'Mukuria M'Ngoji a.k.a. Kiugu Ngonji*. By the said ruling, the trial court upheld the Respondent's preliminary objection dated 4th April, 2018 on limitation of actions and consequently dismissed the Appellant's suit with costs.

2. The material on record shows that by a plaint dated 2nd August, 2016, the Appellant pleaded that his late father **M'Rimbere M'Mwithiga (the deceased)** was the rightful owner of **Title No. Kiirua/Nkando/175 (the suit property)** which he acquired during the process of land adjudication. It was further pleaded that the deceased acquired it upon conclusion of **Minister's Land Appeal No. 258 of 1991** which had been lodged by the Respondent and which was determined in favour of the deceased on 24th November, 1994.

3. The Appellant further pleaded that in spite of the Respondent having lost in the appeal, he proceeded to have the suit property fraudulently registered in his name on 24th August, 2015 whereupon a title deed was issued to him on 31st August, 2015. The Appellant consequently prayed for a declaration that the Respondent had obtained the suit property fraudulently, illegally and unprocedurally; an order for cancellation of the Respondent's title and registration of the deceased as proprietor; an order of permanent injunction restraining the Respondent from interfering with his occupation and enjoyment of the suit property; and costs of the suit.

4. The material on record shows that by a defence dated 7th September 2016 the Respondent denied the Appellant's claim. The Respondent pleaded that he was the *bona fide* allottee of the suit property and that he was lawfully registered as proprietor thereof. He denied the allegations and particulars of fraud levelled against him by the Appellant. The Respondent contended that the Appellant was illegally occupying the suit property despite having been asked to vacate.

5. The Respondent further denied that the appeal to the Minister was determined in favor of the deceased. In the alternative, he pleaded that if the said appeal was ever determined in 1994 as alleged by the Appellant then the same was already time-barred hence the Minister's award could not be implemented.

6. By way of counter claim, the Respondent reiterated the contents of his defence that he was the rightful allottee and registered owner of the suit property which he claimed the Respondent was wrongfully occupying. He, therefore, sought a declaration that he was the lawful and *bona fide* owner of the suit property; a declaration that the Appellant's occupation of the suit property was illegal and unlawful; an eviction order against the Appellant; general damages for trespass and loss of user; and costs of the suit and counter claim.

7. The Appellant filed a reply to defence in which he joined issue with the Respondent on his defence. He denied that he was a trespasser on the suit property and that the suit was time-barred. The Appellant also filed a defence to counter claim in which he denied the counter claim in its entirety and put the Respondent to strict proof thereof. He, therefore, prayed for the defence and counter claim to be dismissed with costs.

8. By a notice of preliminary objection dated and filed on 4th April, 2018 the Respondent contended that the Appellant's suit was time barred under **Section 4 (1) (c) of the Limitation of Actions Act (Cap. 22)** since the Minister's decision in **Land Appeal Case No. 258 of**

1991 was delivered on 24th November, 1994. The Respondent contended that a period of over 22 years had lapsed prior to the filing of the proceedings hence the suit was incompetent and ought to be dismissed.

9. The said preliminary objection was canvassed through written submissions before the trial court sometime in 2019 and by a ruling dated and delivered on 30th May, 2019 the trial court upheld the Respondent's preliminary objection and dismissed the Appellant's suit with costs. The trial court was of the opinion that the Minister's decision pursuant to an appeal under **Section 29 (1) of the Land Adjudication Act (Cap. 284)** was an award within the meaning of **Section 4 of the Limitation of Actions Act (Cap. 22)** which ought to have been enforced before expiry of 6 years from the date of delivery. The trial court was, therefore, of the opinion that the Appellant's suit was time-barred since it had been filed 22 years after the accrual of the cause of action.

B. THE GROUNDS OF APPEAL

10. Being aggrieved by the said ruling and order, the Appellant filed a memorandum of appeal dated 19th June, 2019 raising the following 6 grounds of appeal:

(a) That the learned trial Magistrate erred by finding that the Appellant's cause of action was time erred, six years from 24th November, 1994, when the Minister rendered his decision in Minister's Appeal Case No 258 of 1991

*(b) That the learned trial Magistrate erred by holding that a successful party in a Minister's appeal under **Cap. 284 Laws of Kenya**, have a role in the implementation of the Minister's decision as per the provision of **Section 29 (2) and (3) of Cap. 284 Laws of Kenya**, despite there being no statutory provisions allowing the successful litigant to follow up the preparation of his title deed.*

(c) That the learned trial magistrate erred in law by ignoring the Appellant's submissions that the cause of action arose on 24th August, 2015 when a title deed was issued in the Respondent's name and as such the Appellant could not have sued before the cause of action arose.

*(d) That the learned trial magistrate erred in law by failing to find that **Section 4 (1) (c) of the Limitation of Actions (Cap. 22 Laws of Kenya)** is inapplicable in the circumstances of his case, since the award contemplated under **Section 4 (1) (c)** aforesaid is an award defined by **Section 2 (1) of the Limitation of Actions Act**, to be an award of an arbitrator for the purposes of the **Arbitration Act** or a foreign award within the meaning of the **Arbitration (Foreign Awards) Act**.*

*(e) That the learned trial magistrate erred by failing to find that **Cap. 284** has no time limits within which a decision by the Minister ought to be implemented by the implementing officers and bodies.*

(f) The learned trial Magistrate erred in law by striking out the Appellant's claim on the grounds not prescribed by statute.

11. As a result, the Appellant prayed for the following reliefs:

(a) That the appeal be allowed and the Appellant's suit be reinstated for hearing and determination.

(b) That upon reinstatement, the Appellant's suit be heard before any Magistrate other than Hon. M. Ndungu (Chief Magistrate)

(c) That the Appellant be awarded costs of the appeal.

C. DIRECTIONS ON SUBMISSIONS

12. When the appeal was listed for directions on 28th January, 2020, it was directed that it shall be canvassed through written submissions. The parties were granted 30 days each to file and exchange their written submissions. Later on 8th July, 2020 the Appellant sought and obtained leave to file supplementary submissions in the appeal. The record shows that the Appellant filed his original and supplementary submissions on 30th June, 2020 and 14th July, 2020 respectively whereas the Respondent filed his submissions on 4th June, 2020

D. THE ISSUES FOR DETERMINATION

13. Although the Appellant raised 6 grounds of appeal in his memorandum of appeal, the court is of the opinion that the appeal may effectively be determined on the basis of the following two issues:

(a) Whether the trial court erred in fact and in law in holding that the Appellant's suit was time-barred.

(b) Who shall bear costs of the appeal.

E. ANALYSIS AND DETERMINATION

(a) Whether the trial court erred in fact and in law in holding that the Appellant's suit was time-barred

14. The court has considered the submissions and material on record on this issue. It is apparent from the ruling of the trial court that it held that the Appellant's claim was time-barred under **the Limitation of Actions Act** because it was of the view that the Minister's decision on an

appeal under **Section 29 (1) of the Land Adjudication Act** was an “award” within the meaning of **Section 4 (1) (c) of the Limitation of Actions Act**.

15. **Section 4 (1) of the Limitation of Actions Act** states, *inter alia*, that:

“4 (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued:

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”

16. On the other hand, **Section 2** of the same Act defines an “award” as follows:

“ award “ means an award of an arbitrator for the purposes of the Arbitration Act or a foreign award within the meaning of the Arbitration (Foreign Awards) Act”

17. The court has noted from the ruling of the trial court that no reference was made to the definition of “award” at all. The trial court must have erroneously assumed that the decision of the Minister under **Section 29 of the Land Adjudication Act (Cap. 284)** was an award as contemplated in **Section 4(1)(c) of the Limitation of Actions Act**. There is no doubt from a reading of **Section 29 (1) of the Land Adjudication Act** that the Minister’s decision on appeal is not an award made under the **Arbitration Act or the Arbitration (Foreign Awards) Act**.

18. It is also apparent that the Minister’s decision on an appeal is not an award which can be registered, adopted or enforced under either of the Arbitration statutes referred to in **Section 4 (1) (c) of the Limitation of Actions Act**. In fact, **Section 29 (1) of Cap. 284** does not describe the decision as an award and neither the Appellant nor the Respondent is required to apply for enforcement of the decision of the Minister as the trial court suggested.

19. The relevant subsections of **Section 29 of the Land Adjudication Act** stipulate as follows:

“(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

(2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.

(3) When the appeals have been determined, the Director of Land Adjudication shall—

(a) alter the duplicate adjudication register to conform with the determinations; and

(b) certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.”

20. In its ruling, the trial court stated as follows in order to demonstrate an obligation on the part of the Appellant to “enforce” the Minister’s decision:

“In my view the Plaintiff was duty bound to move the necessary offices of the land registrar to alter the register. He could not hope the Minister’s decision would implement itself. The court takes judicial notice that even in court once judgment is given a party must take action to execute. The Plaintiff in this case remained indolent for decades and he is now statutorily time barred...”

21. The court, therefore, agrees with the Appellant’s submission that the trial court erred in law in holding that the Minister’s decision was an “award” and that the Appellant was duty bound to enforce it within 6 years from the date it was made. The court also concurs with the Appellant’s submission that the trial court erred in law in construing the Appellant’s claim as a suit for **enforcement** of an award and as a

result arrived at an erroneous decision.

22. The court is further of the opinion that the trial court erred in law in holding that the Appellant's cause of action accrued in 1994 when the Minister's decision was made. The deceased had absolutely no cause of action against the Respondent in 1994 simply because the decision was made in his favour. The statutory obligation to implement the Minister's decision lay with the Director of Land Adjudication and the Chief Land Registrar. There are no statutory timelines for implementation of the Minister's decision even though such decision should be implemented within a reasonable period. The material on record indicates that the Respondent was registered as proprietor of the suit property on 24th August, 2015 and issued with a title deed on 31st August, 2015. The court is thus of the opinion that the Appellant's cause of action could only have accrued on or after 24th August, 2015 when the Respondent acquired the suit property. There was no basis upon which the Appellant could have sued the Respondent prior to that date.

(b) Who shall bear costs of the appeal

23. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful party should not be awarded costs of appeal. Accordingly, the Appellant shall be awarded costs of the appeal.

G. CONCLUSION AND DISPOSAL

24. The upshot of the foregoing is that the court finds merit in the Appellant's appeal. Accordingly, the court makes the following orders for disposal thereof:

(a) The appeal be and is hereby allowed.

(b) That the ruling and order of the trial court dated 30th May, 2019 in Meru CMCC No 96 of 2018 – Peter Matumbi v M'Mukuria M'Ngoji aka Kiugu Ngonji are hereby set aside.

(c) The Appellant's suit before the trial court be and is hereby reinstated for trial and disposal before any Magistrate competent to try the suit other than Hon. H. Ndungu (Chief Magistrate).

(d) The Appellant is hereby awarded costs of the appeal.

25. It is so decided.

JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 16TH DAY OF JUNE 2021.

Y. M. ANGIMA

ELC JUDGE-MERU

JUDGMENT DELIVERED THROUGH EMAIL THIS 8TH DAY OF JULY, 2021.

L. N. MBUGUA

ELC JUDGE