



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC CASE NO. 204 OF 2015

(FORMERLY E.L.C. KERUGOYA 114 OF 2013)

IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA

AND

IN THE MATTER OF THE PARCELS OF AND TITLE NOS. NTHAWA/RIANDU 130,1291, 1376, 1377, 1396, 1397, 1398, 1399, 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1407, 1409, 1410, 1428, 1429, 1443, 1450, 3332, 3333, 1468, 3799, 3800, 3707, 3708, 3709, 3710 & 3711

FREDRICK KIURA NYAGA

WAWERU MUGO RIMUNYA.....PLAINTIFFS/APPLICANTS

ERNEST MUGO KIVUTI

VERSUS

JUSTINO NJUE M'MBUCHI.....1ST INTERESTED PARTY/RESPONDENT

ISAAC MUCHAI NJERU.....2ND INTERESTED PARTY/RESPONDENT

CHRISTOPHER MATU WANGANGA.....3RD INTERESTED PARTY/RESPONDENT

JOHN NJERU KANYARIRI.....4TH INTERESTED PARTY/RESPONDENT

NJUE KUBUTA.....5TH INTERESTED PARTY/RESPONDENT

JONAH KUBUTA.....6TH INTERESTED PARTY/RESPONDENT

NYAGA KATHIERI.....7TH INTERESTED PARTY/RESPONDENT

FREDRICK NJERU JAPHAT.....8TH INTERESTED PARTY/RESPONDENT

NYAGA IRERI.....9TH INTERESTED PARTY/RESPONDENT

NJERU MIKE EDWARDS.....10TH INTERESTED PARTY/RESPONDENT

MAINA WAIRIMU.....11TH INTERESTED PARTY/RESPONDENT

FRANCIS NJERU KARANI.....12TH INTERESTED PARTY/RESPONDENT

KAMAU CHARLES RUMITO.....13TH INTERESTED PARTY/RESPONDENT

ROBERT MOFFAT MWANGI.....14TH INTERESTED PARTY/RESPONDENT
FRANCIS THATHI JONAH.....15TH INTERESTED PARTY/RESPONDENT
JOE KATHUNGU.....16TH INTERESTED PARTY/RESPONDENT
CYRUS MUTHIKE KIRONJI.....17TH INTERESTED PARTY/RESPONDENT
NJERI KIHORIA.....18TH INTERESTED PARTY/RESPONDENT
PAUL MITHIKA JOMAH.....19TH INTERESTED PARTY/RESPONDENT
SAMMY NAMU GATUMU.....20TH INTERESTED PARTY/RESPONDENT
ELIAS MURITHI GATUMU.....21ST INTERESTED PARTY/RESPONDENT
STEPHEN MWANIKI NJUE.....22ND INTERESTED PARTY/RESPONDENT
JOYCE WAWIRA NJERU.....23RD INTERESTED PARTY/RESPONDENT
NAZARENO VINCENT NYAGA KARUIRU.....24TH INTERESTED PARTY/RESPONDENT
JONAH KUBUTA.....25TH INTERESTED PARTY/RESPONDENT

JUDGEMENT

A. Introduction

1. By an originating summons dated 7th June 2011 brought under **Order 37 Rules 8, 15 & 18 of the Civil Procedure Rules, Sections 1A & 3A of the Civil Procedure Act (Cap. 21) and all other enabling provisions of the law**, the Applicants who were officials of Marigu clan sought the following orders against the Respondents:

- a. That this honourable court be pleased to order the cancellation of all the registered proprietors of the titles the subject of this application namely Title Nos. Nthawa/Riandu 130,1291, 1376, 1377, 1396, 1397, 1398, 1399, 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1407, 1409, 1410, 1428, 1429, 1443, 1450, 3332, 3333, 1468, 3799, 3800, 3707, 3708, 3709, 3710 & 3711.
- b. That this honourable court be pleased to authorize/order the distribution of the said parcels of land among the members of Marigu clan as had been decreed on 9th July 1993 in Embu SPMCC No. 70 of 1984 which decree to date stands as valid.
- c. That the costs of this application be provided for and be borne by the Respondents.

B. The Applicants' Case

2. The said application was based upon the following grounds as set out on the face of the originating summons, that is;

- a. The persons (respondents/interested parties) were so registered in the named parcels unlawfully, illegally and/or fraudulently since on 9th July 1993 The Hon. Mrs. L. Gitare SPM decreed the parcels subject hereto be shared/distributed among the members of Marigu clan.
- b. The said decree of 9th July 1993 in Embu Civil Case No. 70 of 1984 was not challenged in way or at all and as a decree of the court the same ought to be enforced hence this suit.
- c. A register of the houses/members Marigu clan is filed herewith assigned out by the chairman, secretary & treasurer of the clan who are also the applicants herein.
- d. The land described in the mentioned/named Title Nos. is still subsisting on the ground as it were as land is not a movable property.
- e. This honourable court is seized of the jurisdiction to hear and determine this matter.

3. The said summons was supported by the affidavit sworn by the 1st Applicant on 7th June 2011. He stated that he was the chairman of Marigu clan and that he had the authority of the 2nd and 3rd Applicants as secretary and treasurer of the clan to swear the affidavit on their behalf. The affidavit emphasized that the suit was for enforcement of the decree passed by Hon. Lucy Gitari in *Embu SPMCC No. 70 of 1984*. It was contended in paragraph 4 thereof that the said decree had never been challenged or set aside hence it should be enforced. There

was, however, no allegation in the supporting affidavit attributing any fraud or illegality on the part of the Respondents.

C. The Respondents' Response

4. The record shows that the Respondents were served through substituted service by advertising the summons in the Daily Nation newspaper with leave of the court on 21st November 2011. The 9th Respondent filed a replying affidavit sworn on 12th May 2015 in answer to the originating summons. He stated that he was a member of Marigu clan and that he had been in occupation of *Title No. Nthawa/Riandu/1398* which was later on subdivided into 3332 & 3333 since 1958 and that he was issued with a Title thereto in 1980. He further stated that he was not party to *Embu SPMCC No. 70 of 1984* in which the decree sought to be executed was passed hence he was never accorded an opportunity of being heard. He further stated that the Applicants' decree dated 9th July 1993 was time barred under the **Limitation of Action Act (Cap. 22)** and that the Applicants ought to have applied for execution in the earlier suit of 1984 instead of filing a fresh suit. He consequently urged the court to dismiss the suit with costs.

5. The 10th Respondent filed a replying affidavit sworn on 2nd February 2012 in answer to the originating summons. He stated that he bought *Title Nos. Nthawa/Riandu/1401, 1404, 1405, 1406 and 1407* for valuable consideration from the previous owners in 1999 after which he took possession thereof and developed them. He contended that at the time of purchase there were no cautions, restrictions, prohibitions or other encumbrances in the land register to alert him of the existence of the decree in *Embu SPMCC No. 70 of 1984*. In nutshell, he contended that he was an innocent purchaser for value without notice hence the Applicants had no legitimate claim against him.

6. The 15th Respondent filed a replying affidavit sworn on 15th February 2012 in opposition to the summons. He stated that he inherited *Title Nos. Nthawa/Riandu/3706, 3607, 3708, 3709 and 3711* from his late father Jonah Kubuta through succession proceedings. He further stated that he subdivided and transferred the said parcels to innocent third parties since nobody else had laid a claim upon them. He further stated that he was unaware of the 1984 suit and that his late father who was the 1st Defendant in that suit died in 1988 whereas the judgement was passed on 9th July 1993, about 5 years after his death. The court has noted that the Applicants did not file any further affidavit to controvert or rebut any of those allegations by the 15th Respondent.

7. The 16th Respondent filed a replying affidavit sworn on 20th December 2011 in response to the summons. He stated that he bought *Title No. Nthawa/Riandu/1428* for valuable consideration in 2001 from one Paul Mithika Jonah who was the registered proprietor at the material time. He further stated that the time of purchase he relied upon the entries in the land register which did not reveal any restriction, caution, prohibition or other encumbrance against the said parcel. He contended that he was unaware of the decree passed in the earlier suit hence he was an innocent purchaser for value without notice. He consequently asked the court to dismiss the suit with costs.

8. The 24th Interested Party, Nazareno Vincent Nyaga, filed a replying affidavit sworn on 3rd February 2012 in response to the summons. He contended that he was not the registered proprietor of *Title No. Nthawa/Riandu/3332* hence he did not understand why he had been sued. He, therefore, asked the court to dismiss the suit against him with costs.

9. There is no indication on record of the rest of the Respondents having entered an appearance to the summons despite service. They did not participate at the hearing of the suit either.

D. The summary of evidence at the trial

10. When the suit came up for trial, the Applicants called one witness and closed their case. The witness who testified was Mugo Nyaga (PW1) who described himself as the current chairman of Marigu clan. The previous chairman, Fredrick Kiura, was said to be deceased. He adopted his witness statement dated 22nd July 2019 as his sworn testimony. He also relied upon the affidavits filed by the previous clan chairman as part of his evidence. He produced the documents in the Applicants' list of documents as exhibits. The thrust of his evidence was that Marigu clan had a decree dated 9th July 1993 in its favour hence the Respondents' titles should be cancelled to pave way for its execution. However, he did not tender any evidence of fraud or illegality on the part of the Respondents.

11. The 9th Respondent, Nyaga Ireri, testified on his own behalf as the sole witness. He adopted his replying affidavit sworn on 12th May 2015 and his witness statement dated 22nd July 2019 as his evidence in chief. The gist of his defence was that he was rightfully given parcel No. 1398 as a member of Marigu clan and that he was not party to the previous suit of 1984 even though he was registered as proprietor way back in 1978. He stated that he had extensively developed the said parcel on which he had settled with his family. He further considered the summons to be statute barred since the decree sought to be executed was about 18 years old at the time of filing suit.

12. The 10th Respondent testified at the trial on his own behalf. He adopted the contents of his replying affidavit and witness statement as his evidence in chief. The gist of his evidence was he was an innocent purchaser for value without notice of the 5 parcels of land in question. He maintained that the five parcels he bought were not encumbered in the land register hence he had no notice of any prior claims by the Applicants. He further stated that he was not aware of the previous proceedings and that he was not involved in any fraud or illegality in the acquisition of the parcels in question.

13. The 16th Respondent testified on his own behalf as the sole witness. His evidence was to the same effect as the contents of his replying affidavit sworn on 20th December 2011 and his witness statement. The gist of his evidence was that he was a *bona fide* purchaser for value without notice of any prior claims. He stated that he was not party to the earlier case of 1984 and that the relevant decree was not noted in the land register.

E. Directions on filing of written submissions:

14. Upon conclusion of the hearing on 18th November 2019 the Applicants were given 30 days within which to file and serve their written submission whereas the Respondents were given 30 days upon the lapse of the Applicants' period to file theirs. The record shows that the firm of Kinyua Muriithi & Co. Advocates filed submissions on behalf of the 9th Respondent on 18th December 2019 whereas the firm of Njeru Ithiga & Co. Advocates filed submissions on behalf of the 10th, 15th, 16th & 24th Respondents on 10th January 2020. However, the Applicants' submissions were not on record by the time of preparation of the judgement.

F. Issues for determination:

15. The court has considered the pleadings, affidavits and evidence on record in this matter. The court is of the opinion that the following issues arise for determination in this suit:

- a. Whether the Applicants have made out a case for the grant of the orders sought in the summons.
- b. Whether the decree sought to be executed is time barred under Section 4 (4) of the Limitation of Actions Act (Cap. 22).
- c. Whether the summons would be time-barred if it were treated as a distinct suit for recovery of the suit properties under Section 7 of the said Act.
- d. Who shall bear costs of the suit.

G. Analysis of issues and determinations

16. The court has considered the pleadings, evidence and submissions on record on the 1st issue. The Applicants sought cancellation of titles to the suit properties supposedly because they were acquired unlawfully, illegally and fraudulently as per the grounds set out on the face of the summons. No particulars of the alleged illegality and fraud were given. Neither the supporting affidavit nor witness statements gave any particulars of fraud or illegality. Moreover, those allegations of fraud or illegality were not demonstrated by the Applicants at the trial hereof.

17. It is trite law that where allegations of fraud or illegality are pleaded, they must be pleaded with specificity. All the necessary particulars must be set out in the pleadings. They must also be specifically proved at the trial. In the case of **Vijay Morjaria V Nansing M. Darbar & Another [2000] eKLR**, it was held, *inter alia*, that:

“It is well established that fraud must be specifically pleaded and that particulars of fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that those acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”.

18. As to the burden of proof in such cases, it was held in the case of **Evans Otieno Nyakwana Vs Cleophas Bwana Ongaro [2015] eKLR** that:

“In this case, it is the Respondent who filed the defence and counterclaim and alleged that the document relied upon by the Plaintiff was a forgery. It was therefore incumbent upon him to prove this fact by marshalling the necessary evidence to support his case. The burden of proof to prove fraud lay upon the Respondent. As regards the standard of proof, I would do no better than quote Central Bank of Kenya Ltd Vs Trust Bank Ltd and 4 Others Nai Civil Appeal No. 215 of 1996 (UR) where the Court of Appeal, in considering the standard of proof required where fraud is alleged, stated that;

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of *prima facie* proof was much heavier on the Appellant in this case than in an ordinary civil case”.

19. The court has considered the entire evidence tendered by PW1 at the trial hereof. All he did was to assert that Marigu clan had a decree in their favour dated 9th July 1993. That the said decree had not been challenged or set aside hence the titles to the suit properties should be cancelled to pave way for execution thereof. It is apparent from the documents on record that the said decree was not expeditiously registered against the various titles to the suit properties. Apart from the two Respondents who were parties to suit of 1984, there was no evidence to demonstrate that the rest of the Respondents were made aware of the said decree dated 9th July 1993. When PW1 was questioned on the allegations of impropriety during cross-examination by Mr. Ithiga Advocate for the 10th, 15th, 16th & 24th Respondents PW1 stated as follows:

“I do not know how the Respondents acquired the suit properties ...”

20. The circumstances under which a title of a proprietor of land or lease can be cancelled are set out in **Section 26(1) of the Land Registration Act, 2012** as follows:

“(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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.” (emphasis added)

21. The court is thus far from satisfied that the Applicants have demonstrated any of the grounds set out in **Section 26 (1)** of the said **Act** for impeachment of title. There was no evidence to demonstrate that the Respondents were privy to any fraud, misrepresentation or any act or omission which would vitiate their titles. There was equally no evidence to demonstrate that the impugned titles were obtained illegally, unprocedurally or through some corrupt scheme. Accordingly, the court finds that the Applicants have not made out a case for cancellation of titles as prayed in the summons.

22. The 2nd issue relates to execution of the decree dated 9th July 1993 which the Applicants contended was still **valid** and enforceable. The 9th Respondent contended that the said decree was already statute barred hence could not be the subject of execution or enforcement proceedings. The court has considered the entire material on record on the issue of limitation. The 9th Respondent contended that the suit were statute barred both under **Section 4 (4)** and **Section 7** of the **Limitation of Actions Act**.

23. The court is of the opinion that the Applicants’ summons was clearly an action for enforcement of the decree dated 9th July 1993. That is what the Applicants loudly proclaimed in their summons. That is what they stated in their affidavits. And that is the evidence which was tendered at the trial by PW1 on their behalf. The second order sought in the summons made it clear that the Applicants wanted to be allowed to distribute the suit properties amongst members of Marigu clan as per the decree dated 9th July 1993. The second ground in the summons stated as follows:

“b) The said decree of 9th July 1993 in Embu Civil Case No. 70 of 1984 was not challenged in any way or at all and as a Decree of the court the same ought to be enforced hence this suit.”

24. **Section 4(4)** of the **Limitation of Actions Act** stipulates as follows:

“(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

25. It is common ground that the date the decree was passed in the 1984 case was 9th July 1993. It is not in dispute that the instant suit was filed on 7th June 2011 after passage of over 17 years from the date of the decree. The trial court did not specify a future date for delivery of the suit properties or distribution in the decree. The court takes the view that time started running from the date of the decree hence it became statute barred upon expiry of 12 years from the date it was passed. The court has noted that the decree was issued or extracted on 14th September 2005, that is, more than 12 years later. It was already time barred by then and time could not start running afresh for another 12 years from the date of its extraction.

26. In the case of **Willis Onditi Odhiambo Vs Gateway Insurance Co. Ltd [2014] eKLR** the Appellant had applied for extension of time within which to execute a decree which was more than 12 years old. The High Court had initially granted such leave under **Section 27** of the **Limitation of Actions Act** but set it aside afterwards upon review. When the Appellant challenged the setting aside orders the Court of Appeal held as follows:

“... The section clearly does not give jurisdiction to the court to extend time for filing suit in cases involving execution of decrees. In the matter before us, it matters not that the original suit was founded on the tort of negligence and damages claimed were in respect of personal injuries as a result of the tort of negligence. Here, the extension was sought to enforce a judgment and/or decree. Time within which to lodge such action cannot be extended under the provisions of *Section 27* of the *Limitation of Actions Act*. Accordingly, H.K. Chemitei, J. had no jurisdiction to extend time as he purportedly did on 17th October, 2011. We are therefore not at all surprised that the learned Judge reviewed that order by setting it aside on 14th November, 2011 ...”

27. The court is aware that when this matter went before the Court of Appeal in **Nyeri Civil Appeal No. 32 of 2014 Fredrick Kiura Nyaga & 2 Others V Justino Njue M’Mbuci & 24 Others** the Applicants contended that it was a suit for recovery of land hence it was **Section 7** and not **Section 4(4)** of the **Act** which applied. It was further contended that the statutory period of 12 years had not lapsed by the time the summons was filed on 7th June 2011. The Court of Appeal was of the opinion that the issue of limitation could only be determined upon a full hearing of the suit and examination of the entire evidence by the trial court, and not as preliminary objection. The determination of that issue was therefore left to the trial court hence the 3rd issue for determination in this suit.

28. If the Appellants’ contention is that their suit is not for enforcement of the decree but a fresh suit for recovery of the suit properties, then the provisions of **Section 7** of the said **Act** would apply to them. Incidentally, the statutory period under **Section 7** of the **Act** is also 12 years from the accrual of the cause of action. The court must therefore consider and determine the date on which the cause of action accrued and

whether the Applicants were prevented from filing the suit on account of fraud on the part of the Respondents or for other sufficient cause.

29. It is evident from the material on record that the suit properties which the Applicants were claiming in the summons were the same or substantially the same properties they were claiming in *Embu SPMCC No. 70 of 1984*. What may have happened between 1993 and 2011 was probably sub-division and transfer of some of them. The suit properties were said to belong to Marigu clan and that why in both the earlier suit and the instant suit the Applicants were seeking to have the same distributed amongst members of Marigu clan.

30. The court is thus of the opinion that the cause of action for recovery of the suit properties accrued at the very earliest in 1984 when *Embu SPMCC No. 70 of 1984* was filed for recovery of those properties which were said to belong to Marigu clan. At the very latest, the cause of action may have accrued on 9th July 1993 when their entitlement to the suit properties crystallized by the passing of the decree by the Magistrates' court. Whichever way one looks at it, the Applicants' cause of action had already expired by the time the instant summons was filed on 7th June 2011.

31. The court has noted from the judgement of the Court of Appeal in **Nyeri Civil Appeal No. 32 of 2014 Fredrick Kiura Nyaga & 2 Others V Justino Njue M'Mbuchi & 24 Others** that the Applicants herein contended that where allegations of fraud were made in a pleading then time does not run for purposes of limitation of actions. Since that issue was left for the decision of the trial court, this court shall determine whether or not the Applicants' case falls within the exclusions set out in **Part III of the Limitation of Actions Act (Cap. 22)**. The said part provides for extension of the period of limitation in cases of disability; acknowledgement and part payment; fraud and mistake and ignorance of material facts.

32. The Applicants did not plead or contend that they were under any disability or that they suffered from any mistake or ignorance of material facts. It was also not alleged that the Respondents had acknowledged their claim. The only issue for consideration is whether there was fraud orchestrated by the Respondents and whether such fraud was concealed by them until after the expiry of the limitation period.

33. **Section 26 of the Limitation of Actions Act** stipulates that:

“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.” (emphasis added)

34. As indicated in the earlier part of judgement, the Applicants did not demonstrate any fraud on the part of the Respondents as required by law. No particulars of fraud were tendered or proved by the Applicants. In fact, the evidence of PW1 was to the effect that he did not know how and under what circumstances the Respondents were registered as proprietors of the suit properties. Moreover, there was no evidence to demonstrate that those Respondents who were purchasers for valuable consideration knew or had reason to believe that any fraud or illegality had been committed.

35. The court has also noted that the Applicants did not in their affidavits, documents or oral evidence demonstrate at what point in time they discovered the alleged fraud and that the same could not, with due diligence, have been discovered within the limitation period. There was also no evidence to demonstrate that any of the Respondents had concealed the alleged fraud until after the limitation period had expired.

36. The court is thus of the opinion that whether one looks at the summons as an action for enforcement of a decree or as a separate action for recovery of the suit properties, the suit is clearly time barred both under **Sections 4 (4) and Section 7 of the Limitation of Actions Act (Cap. 22)**. The court also finds and holds that the Applicants have failed to demonstrate that their suit falls within the exceptions set out in **Part III** of the said **Act** for extension of the limitation period on account of fraud.

37. Before concluding the judgement, the court would like to address an issue which was raised by PW1 at the trail hereof. PW1 contended that the Applicants were prevented from executing the decree dated 9th July 1993 by a certain certain letter. He did not, however, produce the said letter or give information on its origin, authority and effect. The court notes that there was no such allegation in the Applicants' summons, affidavits in support thereof, or the witness statements filed in the suit. The court is not persuaded that the alleged letter or any other means of obstruction to execution could stop time from running under the **Limitation of Actions Act (Cap. 22)**.

38. The court is of the opinion that if the Applicants had any challenges or difficulties in execution of the decree dated 9th July 1993, such issues could have been effectively dealt with by the court executing the decree under **Section 34** of the **Civil Procedure Act** and the relevant provisions of the **Civil Procedure Rules**. The solution to whatever challenges the Applicants may have faced would not lie in filing a fresh suit before the superior court but in invoking the relevant provisions of the **Civil Procedure Act** and the **Civil Procedure Rules** to enable them to proceed with execution.

39. The court is also not persuaded by the Applicants' contention that the Magistrates' court had no jurisdiction to cancel titles which were claimed to have been illegally or fraudulently obtained. No authority was cited to support such a proposition of law. So far as this court is aware, Magistrates courts have jurisdiction to entertain and conclusively resolve all land disputes subject to the statutory limitations on pecuniary jurisdiction and other special limitations such as those set out in **Section 38** of the **Limitation of Actions Act** on adverse possession. The court also finds the Applicants' said contention to be self-defeatist. It is clear from the decree in *SPMCC No. 70 of 1984* that the Applicants were seeking an order for transfer of the suit properties to themselves with an alternative prayer for "rectification of the registers of the above parcels of land by deleting the names of the Defendants and inserting that of the Plaintiff." It goes without saying that when such a rectification takes place, it results in the cancellation of the title of the registered proprietor and the registration of a new person as proprietor.

40. The 4th issue for determination is on costs of the suit. Although costs of an action 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)**. As such a successful litigant should ordinarily be awarded costs of an action or proceeding unless, for good reason, the court directs otherwise. See **Hussein Janmohammed & Sons Ltd V Twentsche Overseas Trading Co. Ltd [1967 EA] 287**. Owing to the peculiar circumstances of this case, however, the court is of the opinion that each party should bear his own costs.

H. Conclusion and disposal orders:

41. In summary, the court makes the following holdings on the issues for determination:

- a. The Applicants have not made out a case for cancellation of the Respondents' titles since they have failed to demonstrate any fraud or illegality in their acquisition to the required standard.
- b. The decree sought to be executed dated 9th July 1993 in Embu CPMCC No. 70 of 1984 is statute-barred under Section 4 (4) of the Limitations of Actions Act (Cap. 22).
- c. If the originating summons were to be treated as a distinct suit for recovery of the suit properties the claim would still be time-barred under Section 7 of the Limitation of Actions Act (Cap. 22).
- d. The order on costs which commends itself to the court is that each party shall bear his own costs.

42. The upshot of the foregoing is that the court finds no merit in the Applicants' originating summons dated 7th June 2011. Accordingly, the same is hereby dismissed in its entirety. Each party shall bear his own costs of the suit.

43. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED at EMBU this 20TH DAY of FEBRUARY, 2020.

In the presence of Ms. Makokha holding brief for Mr. Wambugu Kariuki for the Plaintiffs, Ms. Muriuki holding brief for Mr. Ithiga for the 10th, 15th, 16th & 24th Respondents and holding brief for Mr. Kinyua Muriithi for the 9th Respondent, Ms. Chege for the Applicant and in the absence of the rest of the Respondents.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

20.02.2020