



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO. 90 OF 2007**

**GRACE NGAUTANI M'MUGWIKA (suing as an administratrix of the estate of JUSTUS  
RUGWARU alias M'MUGWIKA M'MUGAINE).....PLAINTIFF  
JOSES MUGAMBI JUSTUS.....APPLICANT**

***VERSUS***

**JASON THURANIRA.....1<sup>ST</sup> DEFENDANT  
PS MINISTRY OF LANDS AND SETTLEMENT.....2<sup>ND</sup> DEFENDANT  
DIRECTOR OF LAND ADJUDICATION  
AND SETTLEMENT.....3<sup>RD</sup> DEFENDANT  
THE MINISTER FOR LANDS AND SETTLEMENT.....4<sup>TH</sup> DEFENDANT  
HON. ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The initial plaintiff one GRACE NGAUTANI J.M MUGWIKA filed this suit on 23.8.2007 claiming that a parcel of land known as L.R No. Kiirua/Nkando/510 measuring 34.32 acres (the suit land) belonged to her deceased husband one Justus Rugwaru alias M'Mugwika M'Mugane who died on 11.5.1993. The plaintiff avers that 1<sup>st</sup> defendant fraudulently claimed this land through the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants and the particulars of such fraud are set out in paragraph 8 of the plaint. The plaintiff therefore sought the following orders:

***(a) "An order declaring that the plaintiff's late husband was and is the lawful owner of parcel of land No. Kiirua/Nkando/510 and order the requisite land registrar to be rectified.***

***(b) A permanent injunction against the 1<sup>st</sup> defendant, his agents or servants from alienating, interfering, encroaching or otherwise tampering or occupying parcel of land No. Kiirua/Nkando/510.***

***(c)Costs and interests".***

2. The first defendant filed a statement of defence on 19.10.2007 where he denies plaintiff's claim. He contends that he is the owner of the suit parcel. He also avers that the claim is time barred.

3. The 2<sup>nd</sup> – 5<sup>th</sup> defendants did not file any pleading although their advocate were present in court during the lifespan of the suit (i.e. on 3.11.2015, 11.2.2019, 15.5.2019).

4. On 31.7.2017, counsel for plaintiff informed the court that plaintiff had died on 22.12.2015. The suit was therefore marked as abated. However, an application for revival of the suit was thereafter made and a ruling in favour of plaintiff was delivered on 27.3.2019 whereby one Joses Mugambi Justus was substituted in place of his mother Grace Ngautani. During the trial only plaintiff and 1<sup>st</sup> defendant testified.

**Plaintiff's case**

5. PW1, Joses Mugambi Justus testified and he also adopted as his evidence, his statement dated 8.5.2015 and that of his mother dated 18.6.2014. He also produced the documents in his list dated 18.6.2014 (items 1-5) as his exhibits 1-5, and those in his list dated 8.5.2019 (items 1-3) as his exhibits 1-3 respectively.

6. Plaintiff's case is that the suit land was originally allocated to Grace Ngautani in 1969 but was transferred to her husband during the demarcation and registration. Grace had also built a temporary house, planted trees and fenced the place. However, in year 2007, Grace discovered that 1<sup>st</sup> defendant had caused the suit land to be transferred to himself, after he colluded with the staff at ministry of lands.

7. PW 1 contends that the adjudication record shows that his father Justus Rugwaru was the registered owner of the land but such records were later cancelled without registration and that there was no case on objection to justify the cancellation.

8. During cross examination PW1 stated that the suit land is occupied by some people who were given the land by the 1<sup>st</sup> defendant. He further stated that they had used the land as from 1970's to 1980's and that they left the suit land no. 510 from around 20-30 years ago. He also added that when his parents died they were buried on the land of his grandfather which is at Giaki. The suit land is at Nkando which is past Kiirua.

9. In the submissions of the plaintiff, it was contended that 1<sup>st</sup> defendant unlawfully and illegally alienated the suit land to himself through fraud and he also sold the same during the subsistence of the suit.

#### **Case for 1<sup>st</sup> defendant**

10. DW 1 is the 1<sup>st</sup> defendant one Jason Thurania. He adopted as his evidence, his statement recorded on 7.4.2016. He also produced as exhibits the documents in his list of 24.11.2015 (item 1-6). He avers that he is the one who has always been on the suit land since 1972. The land never had a dispute until 1993 when some land committee members wanted to defraud him so he lodged a complaint. He claims that he has never seen the family of the plaintiff.

11. DW 1 further stated that he sold a part of the land, 13 acres to Moses Murira and 6 acres to Joseph Kieya and he remained with 15.32 acres. He avers that he stays on the suit land where he has installed water and he has constructed a dam.

12. In cross examination, DW 1 stated that plaintiffs exhibit 6 bears the name of Justus Rugwaru which name was cancelled to put the name of Thurania. He contends that the lands officials must have done the cancellation lawfully.

13. It was submitted for 1<sup>st</sup> defendant that DW 1 is the one who was allocated the suit land. It is further submitted that the claim is time barred and no explanation at all has been advanced as to why their claim was not asserted in good time. On this point, defendant has relied on the case of **Gathoni vs Kenya Cooperative Creameries Ltd, (1982) KLR 104** and case of **Haron Onyancha vs National Police Service Commission & another (2017) eKLR.**

#### **DETERMINATION**

14. The issue for determination is who owns the suit land, whether this court has jurisdiction to determine the claim as well as whether plaintiff's claim is time barred.

#### **Ownership & Jurisdiction**

15. I will deal with the ownership and jurisdiction issue at the same time. From the documents availed by both litigants, the suit land came to be through the adjudication process. The two main statutes which deal with adjudication process are the Land Consolidation Act (cap 283) and the Land Adjudication Act (cap 284). The consent which the plaintiff obtained from the land adjudication offices is titled "Land Adjudication Act cap 284/283, while the copy of adjudication record availed in plaintiff's list of 8.5.2019 bears the title "Land Consolidation Act" with the word Consolidation being cancelled. The documents availed by defence indicate that there was an appeal to the minister case no. 15 of 1993.

16. **Section 26 (1) (2) (3) of the Land Consolidation Act** provides that;

*"Any person named in or affected by the Adjudication Register who considers such Register to be inaccurate or incomplete in any respect, or who is aggrieved by the allocation of land as entered in the Adjudication Register, may, within sixty days of the date upon which the notice mentioned in section 25 of this Act is published at the office of the Regional Government Agent within whose district the adjudication area to which such Register relates is situated (and such date shall be endorsed upon the said notice), inform the Adjudication Officer, stating the grounds of his objection, and the Adjudication Officer shall consider the matter with the Committee and may dismiss the objection, or, if he thinks the objection to be valid, order the Committee to take such action as may be necessary to rectify the matter and for this purpose the Committee may exercise all or any of the powers conferred by section 21 of this Act. (2) If the Adjudication Officer considers that such rectification would incur unreasonable expense, delay or inconvenience, he may award such compensation in lieu of rectification as he may deem appropriate. (3) No appeal shall lie against any decision by the Adjudication Officer to dismiss an objection or order rectification or to award compensation in lieu of rectification, as the case may be, but the Minister or any person to whom compensation has been awarded and who is dissatisfied with the amount awarded by the Adjudication Officer may apply to a subordinate court held by a Resident Magistrate for its revision in such manner as may be prescribed."*

17. Thus under the Land Consolidation Act, the dispute resolution mechanisms comes to an end at the stage of objection proceedings under

Section 26 of the aforementioned Act.

**18. Section 29 of the Land Adjudication Act** provides that:

*“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.*”

19. From the above provision of law, the dispute resolution mechanism under the Land Adjudication Act comes to an end at the stage of the appeal to the minister.

20. In so far as this dispute is concerned, it appears that an appeal was lodged and determined by the minister. It then follows that the legal regime under which the dispute fell must have been the **Land Adjudication Act**.

21. The documents availed by 1<sup>st</sup> defendant are not very clear, but I am able to discern that the appeal was in favour of the 1<sup>st</sup> defendant. This must have been what occasioned the Director of land Adjudication and Settlement to write his letter of 24.7.2003 asking the District Land Adjudication and settlement officer to cancel their records in line with the minister’s appeal no. 15 of 1993, Kiirua Nkando p/no 510. It therefore follows that the cancellations of the adjudication record were in line with the dispute resolution mechanisms provided under the Land Adjudication Act. The 1<sup>st</sup> defendant is therefore the lawful owner of the suit land.

22. In **Abdallah Mangi Mohamed Vs Lazarus & 5 others (2012) EKLR** the Learned Judge Mr. Justice Murithi stated;

*“Where there is a dispute as to the applicant’s entitlement to property and where there exists a statutory mechanism for the resolution of the dispute, the statutory procedure should be utilized in the determination of the applicants claim to the property.”*

23. In **Seven Seas Technologies Limited v Eric Chege [2014]eKLR** the Court relied on the passage in **Words and Phrases Legally defined – Volume 3: I – N** where it states at page 113 the following about jurisdiction:-

*“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”*

24. In the present case, the dispute was dealt with by the minister whose decision is final. This court has no jurisdiction to vary or set aside the aforementioned decision in the appeal to the minister. The Courts jurisdiction to entertain the suit as filed has not been established.

25. It is also not lost to this court that 1<sup>st</sup> defendant is the one who has been in control and occupation of the suit property. PW 1 has stated that they left the suit land about 20-30 years ago which means that at least by 1999, the family of the plaintiff was not on that land. However, PW1 has not given the circumstances which led the family to leave the land? PW 1 also states that his parents were not buried on the suit land. Plaintiff’s father died in 1993. If indeed plaintiff’s family had been on the suit land, how comes the alleged owner, Justus Rugwaru was not buried there? The upshot of this analysis is that there is no evidence to indicate that plaintiff’s family ever occupied the suit land.

### **Limitation**

**26. 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.”*

27. The final point at which the suit land accrued to the Defendant was vide the determination of the minister on 18th May 1995. This suit was filed on 23rd August 2007, three months after the lapse of the statutory 12 years threshold encompassed in Section 7 of the Limitation of Actions Act. The plaintiff never sought leave to file the suit out of time. The institution of the plaintiff’s claim was therefore statute barred.

### **Conclusion**

28. All in all, I find that plaintiff has not proved his claim on a balance of probabilities. Plaintiff’s case is hereby dismissed with costs to 1<sup>st</sup> defendant.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 19<sup>TH</sup> FEBRUARY, 2020 IN THE PRESENCE OF:-**

C/A: Kananu

Thangicia holding brief for Gikunda A. for plaintiff

Ogoti for 1<sup>st</sup> defendant

Plaintiff

Defendant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**