



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 201 OF 2018

DAVID MUTHI & 135 OTHERS.....PLAINTIFFS

VERSUS

KENYA ELECTRICITY GENERATING COMPANY LIMITED.....DEFENDANT

RULING

1. In the Notice of Motion dated 25th June, 2019 and filed on 28th June, 2019, the Defendant has prayed for the following orders:

- a) That the suit herein against the Defendant, be dismissed as it is statute barred by virtue of Section 7 of the Limitation of Actions Act Chapter 22 Laws of Kenya;*
- b) That in the alternative, the Plaintiff be struck out and the suit be dismissed with costs.*
- c) That the Plaintiffs do bear the costs of this suit and that of the Application;*
- d) That this Honourable Court be pleased to make such further and other orders as it deems just and fair in the circumstances.*

2. The Application is supported by the Affidavit of the Defendant's Property Manager who has deponed that with a view of enhancing its ability to discharge its duties and deliver the electric power within the Republic of Kenya, the Defendant took over the business of Tana River Development Company Limited.

3. According to the said Property Manager, having taken over the operations of Tana River Development Company Limited, the Defendant also took over the business of generating electric power carried out by Tana River Development Company Limited at Embu/Mavuria/1 (*Gitaru and Kamburu*) and Machakos/Yatta/1 (*Kindaruma*) and that parcel of land known as Machakos/Yatta/1 was registered in favour of the Defendant on 8th July, 1998.

4. Since the Defendant was registered as the owner of the suit property, it was submitted that there has been no challenge over the issuance of the said title; that the proceedings over the suit land are maintainable within twelve (12) years from the date when the cause of action accrued and that the new title that was issued on 29th November, 2005 only gave effect to the change in the Defendant's name as opposed to a new acquisition.

5. The Defendant's Property Manager deponed that in any event, the Plaintiffs seem to be litigating on matters that were previously subject of an adjudication process.

6. In his Replying Affidavit, the 52nd Plaintiff deponed that the Plaintiffs are the legal owners of the land in Kivaa area, of which they have Title Deeds and letters of allotment and that the Plaintiffs have been in occupation of the land being claimed by the Defendant, cultivated the same and build permanent and temporal structures.

7. According to the said 52nd Plaintiff, the Plaintiffs' right to property is protected by Article 40 of the Constitution and that under Section 26 of the Land Registration Act, their titles can only be challenged on the ground of fraud or misrepresentation to which it is proved they were parties.

8. It is the Plaintiffs' case that the Kivaa area was declared an adjudication section in 1996; that the boundaries for the said section were clearly defined on 2nd May, 1996 and that there is no time that the Defendant ever lodged an objection against them.

9. The 52nd Plaintiff finally deponed that the Defendant's title was issued on 29th November, 2005 and not in 1998; that they only realized that the Defendant had fraudulently taken a Title Deed for the suit property in September, 2017 and that none of the Plaintiffs was compensated when the suit land was acquired by the Defendant.

10. In her Supplementary Affidavit, the Defendant's Property Manager deponed that these proceedings were originated by a Plaintiff dated 17th October, 2018; that the Plaintiff makes reference to specific years when the alleged cause of action occurred and that even if the two dates are considered, this suit is still time barred.

11. The Plaintiffs advocate submitted that the assertion by the Defendant that it was issued with a Title Deed in the year 1998 is fake; that the Defendant was issued with a Title Deed on 29th November, 2005 and that the Defendant is threatening to evict the Plaintiffs.

12. The Plaintiffs advocate submitted that the Plaintiffs are the registered proprietors of the suit land; that the Plaintiffs have been issued with the Title Deeds for the suit land and that the Defendant never followed the laid down procedures before acquiring its Title Deed.

13. Counsel submitted that the Defendant's Title Deed was issued to the Defendant on 29th November, 2005; that the Plaintiffs only discovered in the year 2018 that a Title Deed had been issued to the Defendant and that the Defendant concealed that it had been issued with a Title Deed until the year 2018.

14. In his submissions, the Defendant's advocate submitted that the court has no jurisdiction to determine a matter filed outside the period prescribed by the Limitation of Actions Act; that the Plaintiffs claim arose between the years 2015 and 2016; that the claim in respect of defamation was filed beyond the period of limitation and that this suit is time barred.

15. Counsel submitted that the Plaintiffs seem not to have rebutted the evidence respecting the acquisition of the business and assets of Tana River Development Company Limited by the Defendant and that in its Ruling of 14th June, 2019, this court found that the Plaintiffs' suit was caught up by limitation.

16. The Defendant's counsel submitted that the Plaintiffs are litigating before this court on matters that were in issue before the adjudication bodies; that under the Land Adjudication Act, the issue of an overlap and boundaries is dealt with by the demarcation officer and that the Act provides the appeal process in respect to the decision of the demarcation officer. It was submitted that there is no filed consent from the Adjudication Officer to file this suit and that the failure to obtain the consent pursuant to section 30 of the Act is fatal.

17. This suit was commenced by 136 Plaintiffs vide a Plaintiff dated 17th October, 2018. The Plaintiffs described themselves as residents of Kivaa Location, Masinga Constituency, Machakos County. The Plaintiffs further averred as follows:

a) The Plaintiffs are and were at all material times the owners of the vast land in Kivaa location, along Seven Forks, Masinga Constituency, situated in Machakos County which was declared as an adjudication section in 1996 ("the suit property").

b) The Defendant wrongfully entered and took possession of portions of the suit Property and have thereafter, wrongfully remained in possession thereof and have thereby trespassed and continue to trespass thereon.

c) The land, occupied by the Plaintiffs have valid Title Deeds and those which do not have Title Deed have Allotment Numbers.

d) The Plaintiffs have lived on the suit property since time immemorial and have permanent developments including homes, social amenities like schools, churches, market places and water facilities.

e) In the year 2000 the plaintiffs and the defendants agreed that the boundaries on the disputed areas should remain temporary until the DC comes to arbitrate but to the Plaintiff's surprise, the defendant went ahead to secretly obtain a Title over the disputed area.

f) On 29th November, 2005, the Defendant fraudulently acquired a title over the Plaintiff's land completely disinheriting the Plaintiff's and rendering them landless.

18. The Plaintiffs' cause of action, according to the Defendant, is the acquisition of the title on 29th November, 2005 by the Defendant over their land. In the particulars of fraud, the Plaintiffs pleaded that the Defendant secretly acquired a Title Deed overlapping with the legally adjudicated areas; that it compulsorily acquired their land without compensation and that it acquired land which the Plaintiffs had already acquired.

19. The Plaintiffs are seeking for an order revoking the Title of land known as Machakos Yatta/1 issued to the Defendant; a declaration that they are entitled to exclusive and unimpeded right of possession and occupation of the suit property and an order of eviction of the Defendant from the suit land. In addition, the Plaintiffs are seeking for *mesne* profits and general damages for trespass.

20. The Defendant has sought for an order dismissing the suit because it is time barred. Although the Title Deed for parcel of land known as Machakos/Yatta/1(*the suit property*) annexed on the Defendant's Property Manager's Supporting Affidavit shows that it was issued to the Defendant on 29th November, 2005, the Defendant has argued that the initial Title Deed was issued to its predecessor, Kenya Power Company Limited, on 8th July, 1998. The Defendant has annexed a Certificate of Change of Name of Kenya Power Company Limited to Kenya Electricity Generating Company Limited dated 19th January, 1998.

21. Although the Defendant has annexed the copy of the Title Deed that was issued to Kenya Power Company Limited dated 8th July, 1998,

and the Certificate of Change of Name, the Plaintiff shows that the only Title Deed that the Plaintiffs were aware of as at the time of filing the Plaintiff is the one in the name of the Defendant issued on 29th November, 2005.

22. As correctly submitted by the Defendant's advocate, a claim for recovery of land is twelve (12) years from the date when the cause of action occurred. Section 7 (1) 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”

23. This Court, in the case of *Kahindi Ngala vs. Mtana Lewa [2014] eKLR*, gave the rationale for the law of limitation in respect to recovery of land as follows:

“49. If one is unwilling to pursue a cause of action within a reasonable period of time, then he cannot allege that the law is arbitrary just because it says he must assert his rights within a prescribed period. Indeed, the principal that pervades statutes of limitation is that limitation extinguishes the remedy, but not the right. This means that the legal right to own property is not defeated but only the right to lay a claim over the property is extinguished.”

24. In the Replying Affidavit, the Plaintiffs have deponed that the Kivaa area was declared an adjudication section and that in 1999, the Plaintiffs noted that the Defendant had encroached on their land, a move which they protested against.

25. According to the 52nd Plaintiff's Replying Affidavit, the Defendant was issued with a Title Deed on 29th November, 2005 and that they only realized that the Defendant had fraudulently been issued with a Title Deed in September, 2017. Section 26(a) and (c) 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 any person through whom he claims or his agent;
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.”

26. The primary pleading in this matter, is the Plaintiff. The Plaintiffs have averred that in the year 2000, the Defendant secretly acquired land in the disputed area, and that on 29th November, 2005, the Defendant was issued with a title over their land.

27. Although the Plaintiffs have averred in the Plaintiff that the Defendant was issued with the Title Deed over the suit property on 29th November, 2005, they did not specifically plead when they discovered about the said registration. That being so, I will take the Plaintiff's deposition in their Replying Affidavit that they only discovered about the existence of the Title Deed dated 29th November, 2005 in September, 2017 and not the same year the Title Deed was issued to the Defendant.

28. That being so, and in view of the provisions of section 26(a) and (c) of the Limitation of Actions Act, I find and hold that the Plaintiffs claim is not time barred.

29. The Defendant has also sought for the dismissal of the suit because the Plaintiffs did not seek the consent of the Land Adjudication Officer before commencing the suit. Section 30(1) of the Land Adjudication Act provides as follows:

“(1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.”

30. The Plaintiffs claim, as I understand it, is that in 1996, the Kivaa area was declared an adjudication section, where after some of the Plaintiffs were issued with Title Deeds while others were issued with letters of allotment. In the Plaintiff, the Plaintiffs have accused the Defendant for having obtained its Title Deed in respect to the suit land fraudulently. They want the court to cancel the Title Deed that was issued to the Defendant either in the year 2005, as per the Plaintiffs, or in 1998, as per the Defendant.

31. That being the case, it cannot be said that the suit property is land that is still undergoing the adjudication process contemplated under the

Land Adjudication Act. The suit land, by virtue of a Title Deed having been issued to the Defendant, falls outside the purview of the Land Adjudication Act, whose preamble states as follows:

“An Act of Parliament to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected with and purposes incidental thereto”

32. Therefore, to the extent that the Defendant is claiming that it has a Title Deed in respect to the suit land, the issue of the Plaintiffs obtaining the consent for the Land Adjudication Officer before commencing the suit for the cancellation of the Title Deed does not arise.

33. Indeed, the issue that the court will have to address at trial is if indeed the suit land was within an area that had been declared an adjudication section, and if so, how the Defendant obtained its Title Deed.

34. That being the case, I find the Defendant’s Application dated 25th June, 2019 to be unmeritorious. The Application dated 25th June, 2019 is therefore dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF MAY, 2020.

O.A. ANGOTE

JUDGE