



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELCA NO. 1 OF 2019

COUNTY GOVERNMENT OF LAIKIPIA.....APPELLANT

VERSUS

JAMES KIMANI MBURU.....1st RESPONDENT

JOHN KAHWAI KABUCHO.....2nd RESPONDENT

BONIFACE MUGO WAIKWA.....3rd RESPONDENT

HON. JOSEPH MAINA KIGURO4th RESPONDENT

(Being an Appeal against the ruling and Order of Hon. J Wanjala (Ms) CM delivered in court on 23rd January 2019 in)

JUDGEMENT

1. What is before me for determination on Appeal is a matter in which a Preliminary Objection was heard by *Hon. J Wanjala (Ms) Chief Magistrate in Nyahururu Chief Magistrate's Court ELC Case No. 374 of 2018* where the Learned Trial Magistrate, upon considering the Preliminary Objection dated the 19th November 2018 raised by the Appellant dismissed the said applications on the 23rd January 2019

2. The Appellant being dissatisfied with the ruling of the Trial Magistrate, filed the present Appeal being vide their Memorandum of Appeal dated the 5th February 2019 raising the following grounds;

- i. That the Learned Magistrate erred in law and in fact in not upholding the Preliminary Objection.
- ii. That the Learned Magistrate erred in law and in fact in not appreciating the requirements of Section 7 of the Limitation of Actions Act (cap 21) (sic) in arriving at her decision.
- iii. That the Learned Magistrate erred in law and in fact in failing to appreciate that the Plaintiff's right of action accrued more than 12 years previously.
- iv. That the Learned Magistrate erred in law and in fact in not appreciating that the Plaintiffs are statute barred from bringing an action to recover the suit lands after the end of 12 years from the date on which the respective rights of action accrued to them.
- v. That the Learned Magistrate erred in law and in fact in holding that the Plaintiffs' a right of action accrued in November 2018.
- vi. That the Learned Magistrate erred in law and in fact in failing to appreciate the clear concession by the Plaintiffs on the face of the pleadings and statements that the Plaintiffs have never been able to utilize the suit lands since ostensibly acquiring them more than 12 years previously.
- vii. That the Learned Magistrate erred in law and in fact in failing to appreciate the admission by the Plaintiffs on the face of the pleadings and statements and the suit lands have been operating public 'mitumba' or second hand clothes markets and stalls.
- viii. That the Learned Magistrate erred in law and in fact in not striking out the statute barred the suit.

3. The Appellant thus sought for orders that:

- i. That this Appeal be allowed.

ii. The decision of the Chief Magistrate dismissing the Appellant's Preliminary Objection be a substituted with an order upholding the Preliminary Objection.

iii. The Appellant be awarded costs of this Appeal and of the proceedings before the Subordinate Court.

4. The Appeal was admitted for hearing on the 20th January 2020 wherein directions were taken to the effect that it shall be disposed by way of written submissions to which I shall hereby address as follows;

Appellant's Submission.

5. The Appellants' submission was that upon being served with interlocutory orders which had been secured by the 1st-3rd Respondents herein, in a matter that had been filed in the Chief Magistrates' Court and upon perusal of the 1st-3rd Respondents' Application dated the 5th November 2018 and the supporting documents therein, the Appellants discovered that the suit was time barred and therefore restraining orders could not be issued. This is because the Respondents had deponed that although they had been issued the suit parcel of land by the Commissioner of Land in the year 1991 they could not utilize the same due to disruption by the Appellant and the 4th Respondent.

6. That via a Preliminary Objection dated the 19th November 2018, the Appellant had sought that the Application and Suit be declared time barred pursuant to the provisions of Section 7 of the Limitation of Actions Act.

7. The matter had been canvassed by way of written submissions wherein vide a ruling delivered on the 23rd January 2019, the two Applications on the Preliminary Objection and contempt of Court orders filed by the Respondents, respectively had been dismissed.

8. The Appellants framed their issues for determination as follows:

i. Whether the Learned Magistrate erred in law and in fact in not appreciating the requirements of Section 7 of the Limitation of Actions Act (Cap 22)

ii. The Learned Magistrate erred in failing to appreciate that the 12 year limitation period commenced in 1991 when the Respondents' claim they acquired the property in issue and became statute barred in 2003

iii. Whether the Appellant is entitled to cost of the Application.

9. On the first issue for determination, it was the Appellant's submission that the right of action for the 1st-3rd Respondents accrued in the years 1991, 1992 and 1997 which was more than 12 years within which the law requires that an action to land should be brought.

10. That from the 1st-3rd Respondents pleadings it was clear that since they bought the land, they had never been able to utilize it because of interference by the Appellant. That the suit land have been public markets since early 1990's. The Appellants submitted that the cause of action therefore accrued immediately or before the Respondents acquired title to the suit land. There was no indication of any fresh cause of action that may have arisen within the statutory period to warrant the suit brought by the Respondents. The Appellant relied on the decided case in **Haron Onyancha vs National Police Service Commission & Another [2017] eKLR** where the 2nd Defendant further relied on the Case of **Gathoni vs Kenya Co-operative Creameries Ltd [1982] KLR 104**, **Chevron (k) Ltd vs Harrison Charo Wa Shutu [2016] eKLR** and **Maweu vs Kiu Ranching & Farming Co-operative Society Ltd [1985] KLR 430** to submit that the Appellants were aware that the suit lands were occupied and being used for 'mitumba' business even before they bought and/or were allocated the same. The cause of action therefore arose at the time the Appellants acquired title to the land and/or when they were allocated the suit land. The Respondents did not do their due diligence at the time of the purchase of the property by inspecting the same to ensure that the land was not occupied by squatters or was that it was one with a dispute.

11. Basing their submissions on the case of **Nelson Machoka Keraro vs Land Registrar Kisii & 3 Others [2019] eKLR**, the Appellants submitted that by the time the 1st-3rd Respondent bought the suit land, the title had been extinguished as the property they were claiming had already been occupied by 'mitumba' business. They failed to institute a claim immediately and waited for more than 21 years later to do so.

12. In regard to the issue of costs, the Appellant submitted that it was generally the acceptable principle, custom and practice that costs follow the cause and therefore the Court to find in their favour and accord them costs.

Respondents' submission.

13. The Respondents' opposed the Appeal by submitting that the Preliminary Objection raised matters of evidence which was to be ascertained by the Court, and matters on facts which were hotly contested by the parties.

14. That the averment by which the Appellant relied on to the effect that the Respondents had had been allocated the suit land by the Commissioner of Land in the year 1991 was just but one of the averments in the Plaintiff's pleadings filed in the trial Court. That in her ruling, the trial Magistrate had considered the Plaintiff's case and pleadings, holistically before finding that the suit was not time barred.

15. That the Certificate of Urgency dated the 5th November 2018 had clearly stated that the matter was urgent because the Appellants were demolishing the semi-permanent structures erected on the suit property with the sole intention of forcefully evicting the Respondents and allocating the land to new owners.

16. The learned Magistrate was right in holding that the said acts were recent acts which provoked the filing of the suit under a certificate of urgency, thereby dismissing the Preliminary Objection. The facts and date or time when the cause of action arose was hotly contested, the reason why the matter calls for a full trial.

17. The Respondents placed their reliance on the notorious case in **Mukisa Biscuits [1969] EA 696** to urge the Court to find that the Preliminary Objection was not based on pure points of law as the facts were in dispute.

18. That even assuming for moment that the acts complained of were initiated in the year 1991, the Respondents' submission was that trespass complained of by the 1st -3rd Respondent was what was known as continued trespass where a new cause of action arose from day to day as long as the trespass continued. That the 'mitumba' business persons who had not sought to be enjoined in the suit had been authorized by Appellants in a continuing trespass and as long as the business owners were in occupation at the time of filing the suit, the suit was not time barred. Reliance was placed in the case of **Eliud Njoroge Gachiri vs Stephen Kamau Nganga [2018] eKLR**.

19. The Respondents sought that the Appeal be dismissed with costs.

Determination.

20. I have considered the record, the ruling by the Trial Magistrate, the written submissions by Counsel for both parties as well as the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the Trial Magistrate, of seeing and hearing the witnesses as they testified. (*See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384*). I also remind myself that this Court will not normally interfere with a finding of fact by the Trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. (*See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278*).

21. I have considered the fact that the present Appeal has been filed after the trial Magistrate dismissed the Appellants' Preliminary Objection to the effect that the Respondents' suit was statutory time barred by virtue of the provisions of Section 7 of the Limitation of Actions Act.

22. The summation of the Appellants Preliminary Objection is that this matter involves a claim for the recovery of land which was time barred since it was brought after 12 years from the date on which the right of action accrued to them. That the Respondents cause of action arose in the years beginning 1991-1997 when the Appellants trespassed on their suit land. That the Respondents waited for more than 21 years to file their suit for recovery of land which suit was time barred by dint of the provisions of Section 7 of the Limitation of Actions Act.

23. Section 7 of the Limitation of Actions Act provides:

"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"

24. The Respondent's case on the other hand is that the cause of action arose on November 2018 immediately before the filing of the present suit and therefore it was not time barred. Further that the Appellants' trespass was continuous.

25. I have considered the 1st Respondent's statement dated the 5th November 2018 wherein he stated as follows;

'...In the year 1997 my fatherpurchased the said piece of land from.....who was the original allottee....

I took immediate possession of the land upon acquisition.....

Defendants have been collecting revenue from my plot

The defendants have now started demolishing the semi-permanent...'

26. I have also considered the 2nd Respondent's statement dated the 5th November 2018 wherein he has stated as follows;

'I have been in actual possession of the plot and I am in the process of acquiring a lease certificate. The Defendants have been collecting revenue from my plot....

No order has been served upon myself seeking to evict me...'

27. Further I have also considered the 3rd Respondent's statement also recorded on the 5th November 2018 wherein he stated as follow;

'...I was allocated the plotby the Commissioner of Lands in 1991 and was issued with a certificate of lease after paying the requisite fees.....'

I took immediate possession of the said plot but have been unable to utilize it due to the disruption of by the defendant

28. The Respondents have further argued that the Appellants' actions of trespass have been recent and continuous.

29. The said background and the law in mind, I find the issue for determination as follows:

i. *Whether the suit for trespass is statute barred according to Section 7 of the Limitation of Actions Act*

ii. *Whether the Preliminary Objection raised is sustainable*

30. On the first issue for determination, the Appellant/Defendant has averred that the suit is time barred as it contravenes the provisions of Section 7 of the Limitations of Actions Act. On the other hand it is the Respondents/Plaintiffs' contention that the suit is based on the act of trespass and that the said trespass is a continuous act and therefore not time barred.

31. Trespass has been defined by the **10th Edition of Black's Law Dictionary** as;

"an unlawful act committed against the person or property of another; especially wrongful entry on another's real property."

32. **In the case in John Kiragu Kimani vs Rural Electrification Authority [2018] eKLR the Court in defining trespass relied on Clark & Lindsell on Torts, 18th Edition on page 923** which defines trespass as;

'Any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason'

33. In the present case the Respondents have pleaded a continuous trespass by the acts of the Appellants. The question that the Court should ask itself is whether the said trespass affects the Limitation of action and/or when time starts running from the time that the trespass occurred?

34. The **Black Law Dictionary has defined a continuous trespass as;**

"A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property".

35. **Clerk and Lindsell on Torts 16th Edition Paragraph 23-01** has also defined a continuing trespass as follows;

"Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues".

36. From the pleadings herein annexed as well as the submitted submissions, it is clear that the Respondents have alleged that the Appellant continues to commit fresh acts of trespass every time that they continue being in the suit land. The time therefore begins to run afresh as long as the Appellant continues to be in occupation of the suit property and Limitations of Actions Act cannot be upheld in this instance.

37. In the case of **Gladys Koskey v Benjamin Mutai [2017] eKLR the Court held as follows;**

*"On the first issue, the suit is founded on trespass which is a tort. Under Section 4 of the Limitation of Actions Act, an action founded on a tort must be instituted within three years. However, as the Plaintiff indicates, the trespass is continuous and the Limitation of Actions Act does not come into play. This is supported by the case of **Nguruman Limited V Shompole Group Ranch & 3 Others Civil Appeal No 73 of 2004 reported in 2007 KLR**. Citing Clerk and Lindsell on Torts 16th Edition, paragraphs 23-01 the Court of Appeal stated that:*

Every continuance of a trespass is a fresh trespass in respect of which a new cause of action arises from day to day as the trespass continues"

38. **On the second issue for determination, I find that in the case of Oraro vs- Mbaja (2005) KLR 141**, after quoting the statement of Law, JA. in the **Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696 case (supra)** the Court went on to state that: -

A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....

39. Having found that **every continuance of a trespass is a fresh trespass in respect of which a new cause of action arises from day to day as the trespass continues and that the Limitation of Actions Act does not come into play**, I hereby find that Preliminary Objection raised is unsustainable, I uphold the finding of the trial Court and proceed to dismiss this Appeal with costs to the Respondents.

40. *The matter shall proceed for hearing and determination in the Chief Magistrates' Court as earlier scheduled.*

Dated and delivered at Nyahururu this 17th day of June 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE