



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC 87 OF 2017

FRANCISCA WANZA NTHENGE.....1ST PLAINTIFF

TABITHA SYOMBUA MAINGI.....2ND PLAINTIFF

VS

MWANA WIKIO COOPERATIVE SOCIETY.....DEFENDANT

JUDGMENT

1. On the 2/11/16 Phylis Katoti Maingi filed suit against the Defendant seeking orders that the Defendant compensates her with land measuring 7.5 acres taken by Kenya Power Limited Company(KPLC) wayleave that runs along the suit land Parcel No MITUBIRI/NANGA BLOCK 1/16 (Mwanawikio).
2. It was her case that the Defendant in 1982 wrongly allocated her late husband Maingi Munyangi 15 acres which land was encumbered with a way leave that covers 7.5 acres.
3. Phylis Katoti Maingi died on the 24/8/2017 and with leave of the Court granted on 31/7/2019 she was substituted with her two daughters namely Francisca Wanza Nthenge and Tabitha Syombua Maingi, the current Plaintiffs.
4. The Defendant while opposing the suit admitted that indeed Maingi was one of its 35 members who were allocated 15 acres each by the society upon ballot in 1982. That Maingi owned the suit land. The Defendant contended that the suit is time barred the cause of action having arisen in 1982, 34 years ago. Further that the Plaintiffs are estopped from claiming any compensation with respect to a wayleave that was granted in 1952 to KPLC by the former owners of the original land, parcel 305 namely Mitubiri Coffee Co Limited in 1952. More importantly the Defendant contended that all the land owned by the Defendant was allocated to its members in 1982 and there is no land available to compensate the Plaintiffs.
5. The Plaintiffs evidence was led by PW1- Tabitha Syombua Maingi who informed the Court that she and her co-Plaintiff are the daughters of Phylis and Maingi Munyangi, deceased. That both are the legal administrators of the estate of their mother Phylis Katoti. That her father's estate was administered by her mother as the legal administrator. That her father was allocated land in 1982 which had a KPLC power line running across and it is in 1989 that the said way leave became a concern to them. That out of her father's 15 acres, 7.5 acres are covered by the wayleave which should be compensated by the Defendant.
6. The witness testified that she represents the estate of her father although she failed to produce the letter of grant of administration in that regard. In cross examination she admitted that she is the legal administrator of her late mother. That the title of the 15 acres remains in the name of Maingi todate. She produced a copy of the title for the suit land issued on the 13/3/1989.
7. She stated that her father sold portions of the land to 21 persons listed in the confirmation of grant dated the 17/2/2009. That amongst the beneficiaries listed in the said grant are the Plaintiffs, Elizabeth Munini Maingi and her deceased mother with respect to 1.25 acres each. That out of the 15 acres only about 4 acres remained with the dependents of Maingi. The rest of the land was sold by Maingi in his lifetime to 17 named purchasers who are in occupation of their portions. That the purchasers acquired the land with the knowledge of the power line wayleave which is evidence on the land. That the said purchasers are not parties to the suit.
8. PW2- Julius Macharia Chege testified and stated that he was engaged by Phylis Katoto on the 23/8/2010 to establish the acreage occupied by the wayleave. That the area under wayleave is 7.5 acres taking into consideration the standard 20 meters on each side of the power line. That the wayleave is a 40 metre wayleave. On cross examination he stated that he got the wayleave area by means of deduction but not through measuring by scales.

9. The Defence case was led by Peter Ndungu Muiruri who introduced himself as the Chairman of the Defendant Company since 2009. That the Defendant allocated 15 acres of land through balloting to 35 members in 1982. Maingi got parcel MITUBIRI/NANGA BLOCK 1/16. He explained that the Defendant has no land available for compensation to anybody let alone the Plaintiffs. He explained that during balloting members who were dissatisfied with their lands for many reasons including being on hilly grounds were asked to return them for reallocation. That there is no evidence to show that Maingi ever complained of the power line. He explained that the power line has been there since 1950s. That the Defendant acquired the land subject to the wayleave. That there are other land owners/members whose lands are traversed by the same wayleave and have not raised any complaint.

10. The Plaintiffs in brief submissions submitted that the Defendant had knowledge of the presence of the power line wayleave and ought to have compensated the Plaintiffs before allocating them land that was encumbered. That the suit land ought not have been allocated because of the encumbrance.

11. The Defendant submitted that the suit is time barred. That the Plaintiffs were aware as early as 1989 of the wayleave and only filed suit at the Cooperative Tribunal in 2011, a period of over 22 years.

12. That the suit land was registered in the name of the late Maingi in 1989 and upon his death his wife was appointed a legal administrator. The confirmed grant shows that the suit land was awarded/subdivided into 21 portions. Upon the death of Phylis Katoti the Plaintiffs became the legal administrators of her estate. That they did not represent the estate of their father and cannot purport to sue on behalf of their father.

13. As to whether the Defendant should compensate the Plaintiffs the Defendant submitted that it is impracticable to compensate the Plaintiffs with land for several reasons; first the Plaintiffs are estopped from any claim of compensation 40 years later; the land was acquired in 1982 and are deemed to have acquiesced to the presence of the wayleave; the Defendant has no land available to compensate given that all the lands were balloted for allocation to all the members.

14. The key issues for determination are; whether the Plaintiffs are suited; is the claim time barred? Are the Plaintiffs entitled to any land? who meets the costs of the suit?

15. It is not in dispute that Maingi was allocated parcel 16 measuring 6.536 ha or approx. 16 acres as showed by the title issued on the 13/3/89. The certificate of confirmation issued on the 17/2/2009 shows that this parcel devolved to 21 persons among them his three daughters and his wife Phylis. Other than Phylis and the current Plaintiffs none of the person said to have purchased the land from Maingi are parties to this suit. The Plaintiffs failed to enjoin the 18 persons who have interests on the resultant subdivisions of the suit land and who are likely to be affected by the orders of this Court without being afforded the right to be heard.

16. The long and shot of it is that the suit land no longer exists. The same has been subdivided into 21 portions and devolve to 21 persons. The Plaintiffs cannot therefore lay a claim on account of the resultant suit lands even if the same existed because some portions now are in the hands of third parties. They therefore lack the locus standi to claim on the suit land.

17. The purpose of substitution is to step into the shoe of the late litigant where the action survives. The initial claim was brought by the administrator of the late proprietor. This being a land matter the cause of action survived the deceased Plaintiff. What is key is that the proprietor was not the Plaintiff since a dead person cannot file claim thus the bringing of this suit by his administrator. That the litigation was already commenced and the procedure in civil litigation was to substitute the Plaintiff within the meaning of Section 2 of the Civil Procedure Act and Order 24 as read together with Section 82 and /or Law of Succession Act and /or Section 54 and the 5th Schedule of the Act .The law is that the estate of the deceased devolves to his legal representative or a person appointed to administer his estate .The Plaintiff perhaps ought to have taken out letters adlitem in the estate of the father if there remained any issue to be settled in that estate. From the evidence on record the father's estate had been fully succeeded.

18. Are the Plaintiffs then suited in this suit? The starting point is that the estate of their father was succeeded fully. The mother got 1.25 acres of the suit land. They were substituted in the suit on behalf of their mother Phylis Katoti who owned 1.25 acres of land. From the surveyor's report produced by PW2 no evidence was a tendered to show where the 1.25 acre portion of Ms Katoti is and whether the same was encumbered by the power wayleave. PW1 admitted under intense cross examination that she does not represent the estate of her late father who owned the suit land, parcel 16 which as at now is nonexistent. Despite the Plaintiffs holding 1.25 acres each, they have not advanced any claim over the same. They cannot claim under the father's title except that of their mother which is 1.25 acres.

19. It is admitted in the pleadings that the power way leave was installed with the consent of Mitubiri Coffee Co Limited the previous owner of parcel 304 out of which the Defendant's land was excised. The way leave was established in 1958. At the time of balloting in 1982 the members were well aware of the existence of the same, Maingi included. Evidence was led that he did not raise any issue with the wayleave despite the opportunity accorded to members to do so if they were dissatisfied with the balloted land. Having acquiesced for many years of the status and character of his land, Maingi and his legal representatives and the people who acquired title under him cannot turn around and raise the issue 40 years later. They are estopped from doing so.

20. It is to be noted that a wayleave is a right of way which is an overriding interest that runs with the land. Although parties did not present evidence of registration of the wayleave, the parties were in agreement that there exists a power line and a wayleave as far back as 1958. This evidence was collaborated by the Surveyor; vide the letter dated the 13/7/1999 Kenya Power Lighting and Company Limited, the beneficiary of the right of way confirmed that the right of way was consented by the previous owner of L.R 305 in 1958. That being the case the Plaintiffs case is standing on weak sand because the land is deemed to have been sold with the overriding interest which need not be noted on the register as is seen in section 28 (C) of the Land Registration Act.

21. This is a claim for land by way of compensation for the land over which the wayleave overlays. Section 7 of the Limitations 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.”

22. PW1 stated in evidence that they became concerned about the wayleave in 1989 but only filed suit in 2011 at the tribunal and later in 2016 in this Court. This is a period of over 40 years. Going by the provision of the law cited above the suit is therefore time barred.

23. DW1 informed the Court that the Defendant has no land to compensate having allocated all the land to its members in 1982. From the evidence on record the right of way was placed by the previous owners in favour of KPLC and a claim for compensation from the Defendant is bound to fail.

24. It is not in dispute that the wayleave was secured in 1958. Section 32 of the Limitations of Actions Act Chapter 22 provides for the manner by which easements may be acquired as regards period of limitation where the property has been enjoyed as an easement;

(1) Where –

(a) the access and use of light or air to and for any building have been enjoyed with the building as an easement; or

(b)

(c) any other easement has been enjoyed, peaceably and openly as of right, and without interruption, for twenty years, the right to such access and use of light or air, or to such way or watercourse or use of water, or to such other easement, is absolute and indefeasible.

(2) The said period of twenty years is a period (whether commencing before or after the commencement of this Act) ending within the two years immediately preceding the institution of the action in which the claim to which the period relates is contested”.

25. In the case of **Kamau Vs Kamau (1984) eKLR** the Court of Appeal stated as follows;

“Where any way or watercourse or the use of any water has been enjoyed as an easement peaceably and openly as of right, and without interruption, for twenty years, the right of such way or watercourse is absolute and indefeasible according to the written law on the limitation of actions.

26. It is trite that limitation goes to the root of the jurisdiction of the Court. In the case of **Bosire Ogero -Vs- Royal Media Services [2015] eKLR**, the Court noted that ...The issue of limitation goes to the jurisdiction of Court to entertain claims and therefore if a matter is statute barred, the Court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the Court cannot entertain a suit which it has no jurisdiction over.

27. Further in the case of **Pauline Wanjiru Thuo -Vs David Mutegi Njuru CA 2778 of 1998** and the case of **Dhanesvar -Vs-. Mehta vs Manilal M. Shah (1965) EA 321**, the Court was categorical that the effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.

28. In the upshot the Plaintiffs case fails. It is dismissed with costs to the Defendant.

29. **It is so ordered.**

DELIVERED, DATED AND SIGNED ONLINE THIS 26TH DAY OF NOVEMBER 2020.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Muturi for the 1st and 2nd Plaintiff but left before delivery of Judgment

Maranga for the Defendant

Njeri, Court Assistant