



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MURANG'A

ELC NO. 305 OF 2017

DANIEL GITHIORA GATUHA1ST PLAINTIFF

WANJIKU THEGERA2ND PLAINTIFF

DANIEL MUTHEE MWANGI.....3RD PLAINTIFF

VS

JOE KARANJA NJOROGE 1ST DEFENDANT

MURANG'A DISTRICT LAND REGISTRAR....2ND DEFENDANT

MURANG'A DISTRICT LAND SURVEYOR3RD DEFENDANT

KAGAA FARMERS COOP SOCIETY LTD.....4TH DEFENDANT

JUDGEMENT

The Pleadings

1. Vide a plaint filed on 15/3/17 and amended on the 9/8/19 the Plaintiffs sued the Defendants for orders as follows:

a. The Court be and is hereby pleased to issue a declaration that the Plaintiffs and the Claimants herein are the registered owners of the parcels of land with registration numbers as shown against their respective names in the Authority to Act are the true owners of the said parcels of land.

b. The Court do issue an order of permanent injunction restraining the Defendants either by themselves, their agents, servants and/or employees from interfering in any way with the Plaintiffs and the Claimants ownership and occupation of their respective parcels of land.

c. An order compelling the 2nd and 4th Defendants to cancel and revoke all the title deeds issued upon the illegal consolidation of L.R. MAKUYU/KIMORORI/BLOCK-111/3795, 3797, 3798, 3799 and 3800 into one title No. MAKUYU/KIMORORI/BLOCK-111/3932 and the subsequent subdivisions thereof.

d. The Court do issue a declaration that the purported consolidation of L.R MAKUYU/KIMORORI/BLOCK-111/3795, 3797, 3798, 3799 and 3800 to form one title namely MAKUYU/KIMORORI/BLOCK-111/3932 is illegal and a nullity.

e. The Court do issue a declaration that the subsequent subdivision of land reference numbers MAKUYU/KIMORORI/BLOCK-111/3794 and 3796 into ¼ acre plots is illegal and a nullity and any titles issued thereof be cancelled and/or revoked.

f. General and Exemplary damages.

g. Costs of the suit

h. Interest on (f) and (g) above.

2. It is the Plaintiffs have filed this case on their own behalf and that of 34 claimants listed in the authority to act dated and filed the 15/3/17.
3. The Plaintiffs aver that they, the claimants and the 1st Defendant were members of the 4th Defendant who as at 1988 was the registered owner of the following parcel numbers; MAKUYU/KIMORORI/BLOCK 111/3794, 3795,3796, 3797 3798, 3799 and 3800.
4. They posit that in 1998/99 the 4th Defendant subdivided parcel numbers 3794, 3795, 3796, 3797, 3798 and part of 3799 into 254 ½ acre plots and allocated members, the Plaintiffs included. Upon the completion of subdivision and allocation, the Plaintiffs were issued with titles for their respective plots and commenced developing them. Some titles were issued in Thika (51) and others in Muranga (71) Land Registries as the lands spread over both districts, then.
5. That in 2012 they discovered that the 1st and 4th Defendants in collusion with the 2nd and 3rd Defendants had consolidated parcel No.s MAKUYU/KIMORORI/BLOCK 111/3795, 3797 3798, 2799 and 3800 into parcel 3932 notwithstanding that these parcels had been subdivided into smaller plots in 1998/99. The new parcel No. MAKUYU/KIMORORI/BLOCK 111/3932 was subdivided into 34 plots of various sizes, some of which were allocated to the members of the 4th Defendant and some were sold to third parties. The 4th Defendant retained a portion measuring 80.31 Has. That they also discovered that parcel Nos MAKUYU/KIMORORI/BLOCK 111/3794 and 3796 had been subdivide into 1/4 plots.
6. That with the above scenario obtaining at the Muranga Land Registry, their titles issued at Thika Land Registry could not be registered at the Muranga Land Registry despite a letter from the Commissioner of Lands issued on the 17/9/12 directing that all the mutations, unsigned title deeds, green cards and original mother titles for parcels MAKUYU/KIMORORI/BLOCK 111/3794-3798 and 3800 be submitted to the Land Registrar in Muranga processing and issuance of titles to members of the 4th Defendant.
7. The Plaintiffs have pleaded particulars of fraud and illegality by the Defendants at para 15 sub paras i-ix of the plaint.
8. The 1st Defendant denied the Plaintiffs claim vide a statement of defence filed on the 1/11/2017. He contended that no subdivision was undertaken by the 4th Defendant in 1998/99 and that if any existed it is illegal and unprocedural. He stated that it is illegal to issue titles for land situate in Murang'a from Thika Land Registry. That he is the bonafide Chairman of the 4th Defendant having been elected in 1999 todate. That the Society consolidated several parcels of land and subdivided them into ¼ plots and allocated members and sold some to thirds parties. He faulted the Plaintiffs for not enjoining the owners of the resultant subdivisions int his suit.
9. The 2nd and 3rd Defendants denied any collusion, fraud and or illegality in the consolidation, subdivision and issuance of the titles and aver that the subdivision, consolidation and titles were issued with due diligence and as per the law. They denied any wrong doing. That if found on the wrong they would call for indemnity from the 1st and 4th Defendants under Order 1 Rule 24 of the Civil Procedure Rules.
10. The 4th Defendant having been enjoined to the suit on the 9/8/2019 caused an appointment of Advocates in the name of J K Gachie & Co Advocates on the 28/10/19 but did not file any statement of defence.

The evidence

11. The Plaintiffs called two witnesses. PW1 – Daniel Githiora Gatuha testified that he was a member and former Chairman of the Society. That he was testifying on his behalf and that of co-Plaintiffs and claimants. He adopted his statement dated 15/3/17.
12. That in 1988 the 4th Defendant acquired parcel Nos. MAKUYU/KIMORORI/BLOCK 111/3794, 3795, 3796, 3797, 3798, 3799 and 3800 for purposes of distribution and allocation to its members. In 1998/99 the Society resolved to subdivide the parcels into 254 ½ acre plots. Some of the lands fell within Thika and others in Muranga Districts, then. That it was agreed that the subdivision process would be done at Thika in liaison with the Muranga Registry. That the mother titles for Parcels MAKUYU/KIMORORI/BLOCK 111/3794-3798 & 3800 were then surrendered to Thika Land registry which registered 51 resultant titles which were issued to its members by the Society. That he was part of the members who got titles. He was allocated two plots – parcel Nos. MAKUYU/KIMORORI/BLOCK 111/ 4125 and 4113. Title for parcel 4125 was issued by Murang'a Land Registry.
13. That the titles of the Plaintiffs emanated from the subdivisions of parcels MAKUYU/KIMORORI/BLOCK 111/3794-99& 3799.
14. That in 2012 the subdivision process was moved to Murang'a land registry on direction of the Commissioner of Lands. That earlier some of the resultant titles were registered in Muranga while others at Thika Land Registries. He gave an example of Wanjiku Thegera the 2nd Plaintiff who was issued title parcel No 4144 from Thika.
15. That they learned through a search carried out on the 15/10/2012 at the Muranga Lands office revealed that the mother titles in respect to parcels MAKUYU/KIMORORI/BLOCK 111/3795, 3797,3798, 3799 and 3800 that had been previously subdivided had been combined in 2007 under the chairmanship of the 1st Defendant to create parcel 3932. He averred that the combination illegal as the mother titles had been subdivided and not authorised by members some of whom had been issued with titles by this time. That the titles held by the Plaintiffs are valid.
16. That they sought the intervention of the Land Registrar Murang'a who advised them to seek legal redress in Court.
17. He testified that they settled on the lands for a period of 2 years or so (1998-2000) before being removed from the said lands in 1999. That the land is now occupied by persons who were allocated from the subdivision of parcel MAKUYU/KIMORORI/BLOCK 111/3932.

18. In cross examination the witness informed the Court that he did not produce any minutes authorizing the subdivisions of parcels MAKUYU/KIMORORI/BLOCK 111/ 3797,3796, 3797, 3798, 3799 and 3800 and mutations were with the Surveyor who would produce them in evidence.

19. PW2 – Cephas Kamande Mwaura testified that he was the surveyor and Director of Geotop Kenya Limited contracted by the 4th Defendant to carry out the survey of the suit lands; MAKUYU/KIMORORI/BLOCK 111/3794-97 in 1998. In 1999 he was added parcel Nos. MAKUYU/KIMORORI/BLOCK 111/3798-3800. He received the original titles, minutes authorizing subdivision and consent of the Land Control Board (Thika dated the 17/12/98) from the 4th Defendant for the purposes of carrying out the exercise. That it was noted that some of the parcels fell within both Thika and Muranga Land registries and after a consultative meeting between the 4th Defendant, Thika and Murang'a Land Registrars and surveyors, it was agreed that the consent to subdivide would be obtained from the Thika Land Control Board. That it was further agreed that the subdivision would be done in Thika Land Registry who would liaise with their counterparts in Muranga to provide or reserve the title numbers from Muranga for those parcels that fell within the jurisdiction of Muranga. He informed the Court that he was not aware if the two land registries were authorised to carry out the subdivisions and registration of the titles in the manner that they did.

20. That together with Geomatics Services Surveyors, they completed the subdivisions of parcels No.s MAKUYU/KIMORORI/BLOCK 111/3794-98 and the survey was registered. That vide their letter dated the 13/2/1999, he surrendered the original mother titles of the above parcels to Thika Registry to facilitate the registration of the new subtitles. He gave an example of parcel 4031 whose title was registered in 1999 the title registered on the 8/10/12 at Murang'a.

21. That in the year 2000 he learnt of the intentions of the new officials of the 4th Defendant to consolidate and subdivide the mother titles despite the previous successful subdivision and he wrote a letter dated the 14/9/2000 to the District Land Board Kakuzi asking the board to decline consent to the transaction to avoid double allocation. That he did not receive any response.

22. That a number of titles were processed in Thika Land Registry but the process was halted in 2012 when the Commissioner of lands directed that the process be moved to Muranga Registry. That all the documents processed in Thika were surrendered to Muranga for issuance of titles in 2012. That this was after the reorganization of the districts whereupon the suit lands were now within Murang'a district.

23. That some titles continued to be issued by the Muranga registry based on the subdivisions in Thika but in October 2012 it was discovered that the 4th Defendant had consolidated its various parcels into parcel MAKUYU/KIMORORI/BLOCK 111/3932 in 2007 which parcel was further subdivided and subplots allocated to other members and non-members. Further that some of the title numbers that had been reserved in Murang'a and used for the registration of subtitles in Thika land registry had been utilized to register the new subdivisions created out of parcel MAKUYU/KIMORORI/BLOCK 111/ 3932 within the same land.

24. He wondered how the consolidation was done at Muranga in 2007 while the mother titles had been surrendered on 13/2/1999 to Thika Land Registry and the titles for MAKUYU/KIMORORI/BLOCK 111/3798 and 3799 were still in his custody since 1998. He produced the originals of the said two in Court for noting. He questioned how the 4th Defendant combined the titles in absence of the original titles. He was not aware whether provisional titles were obtained. He further stated that the officials who carried out the combination of the titles in 2007 had been voted out in 2005 but had refused to vacate office. He however conceded in cross examination that the titles registered in 2007 takes precedence over titles registered and issued in 2012.

25. That the mutation forms for parcels MAKUYU/KIMORORI/BLOCK 111/3794 (22 plots); 3795 (14 plots and 3797 (94 plots) were registered at the Thika Land registry. He informed the Court that these mutations were transferred to Muranga land registry on the 17/9/12 for processing.

26. DW1 – Joe Karanja Njoroge testified for himself and the 4th Defendant. He stated that he has been the Chairman of the 4th Defendant since 1999 to date. That the 4th Defendant owned several plots to wit; parcel numbers MAKUYU/KIMORORI/BLOCK 111/3794 -3800. That titles Nos. MAKUYU/KIMORORI/BLOCK 111/ 3795, 3796 3798 and 3799 were consolidated for purposes of subdivision and allocation to members under his chairmanship. Asked whether he produced the resolutions and Land Control Board consents for the consolidation, he answered in the negative. He informed the Court that he consulted the Land Registrar orally with respect to the consolidation. He stated that he had no documentary evidence to support any consultation or approvals by the Land Registrar. That he could not tell whether or not the 4th Defendant paid for consolidation and whether there were any receipts to support any payments. He however admitted that the 4th Defendant failed to comply with the conditions issued by Makuyu Town council with respect to subdivision of parcel MAKUYU/KIMORORI/BLOCK 111/3932.

27. That he obtained the consent of the Makuyu Land Board for the subdivision of parcel MAKUYU/KIMORORI/BLOCK 111/3932 into 34 plots measuring various sizes. That to facilitate subdivision he surrendered the original title for parcel 3932 to the Land Registrar Murang'a. That the subdivision and resultant titles were registered in Murang'a. He explained that the allocation was to go to the members listed in the letter dated the 18/2/2013 who had missed plots in the earlier allocation. That the 4th Defendant still holds land measuring 80.35 ha to date.

28. He explained that the only genuine subdivisions are the ones carried out by the 4th Defendant in 2007/2008 and that the alleged subdivisions at Thika could not be authenticated. He argued that the Thika subdivisions carried out in 1999 were numbered as parcels 4000 and above while at that time the numbering in Muranga registry had not reached No 4000. For example, parcel MAKUYU/KIMORORI/BLOCK 111/3932 was registered in 2007 while the ones of 1999 were given numbers in excess of 4000 and above. He concluded that the Plaintiff's titles are not genuine.

29. Further the witness explained that the official surveyor for the 4th Defendant was M/s Olweny Associates Surveyors of Nakuru. He had no knowledge of a surveyor by the name Cephas Kamande. That the titles held by the Plaintiffs did not emanate from the 4th Defendant.

30. Next to take the witness stand was the Land Registrar, Murang'a namely Alice Gisemba as DW2. she relied on her witness statement dated the 29/10/19 and produced the list of documents dated the 3/10/19.

31. She testified that before she came to Court she retrieved all the files for parcel Numbers MAKUYU/KIMORORI/BLOCK 111/3795-3800 & 3932 for perusal.

32. That on the 1/11/2010 the District Land Registrar Thika forwarded a letter dated the 13/9/2020 and 10/7/2020 from the Chief Land Registrar directing that the green cards for parcel 3796 and 3797 be forwarded to Murang'a.

33. That mutation forms dated the 22/3/2007 and lodged by the 4th Defendant for parcel Nos MAKUYU/KIMORORI/BLOCK 111/ 3795, 3797 3798 3799 and 3800 were combined to create 3932 measuring 90.23 ha. The title for MAKUYU/KIMORORI/BLOCK 111/3932 was issued to the 4th Defendant on the 24/4/2007. This title was subdivided vide the mutations dated the 7/11/2012 to create parcel No. s MAKUYU/KIMORORI/BLOCK 111/4624 -4654 and the register for MAKUYU/KIMORORI/BLOCK 111/ 3932 was closed on the 22/1/2013.

34. She stated that the combination, subdivision and subsequent transfer of the parcels were based on the documents presented by the 4th Defendant to the 2nd and 3rd Defendants who exercised diligence.

35. The witness stated that the Plaintiffs are not the owners of the titles they purport to hold as there are other third parties that hold titles registered with the same numbers like those of the Plaintiffs. That the registered persons of the lands are not parties in the case. That the Plaintiff's titles are not in the records of Muranga Land Registry. That her registry does not recognize the titles held by the Plaintiffs as genuine as they do not emanate from her office.

36. She however clarified that the parcels of land in her list of documents do not show that they yielded from parcel 3932 or the resultant subtitles of MAKUYU/KIMORORI/BLOCK 111/3932.

37. She stated that the original titles for parcels MAKUYU/KIMORORI/BLOCK 111/3797, 3798, 3795 3799 and 3800 are missing at the Lands Registry.

The written submissions

38. I have read and considered the written submissions by all the parties.

39. The parties have framed 4 issues for determination as follows;

- a. Whether the subdivisions carried out in 1998/99 were lawful and should be upheld; have the Plaintiffs proved fraud and illegality as alleged.
- b. Whether the Land Registrar Thika had the jurisdiction to issue titles for land under the territorial jurisdiction of Muranga.
- c. If yes, whether the Plaintiffs are the rightful owners of the titles listed in the authority to act.
- d. Whether the consolidation of parcels MAKUYU/KIMORORI/BLOCK 111/3795, 3797, 3798, 3799 and 3800 to create 3932 should be revoked on account of illegality.
- e. Whether the subsequent title No 3932 is a nullity and should be revoked and whether the resultant titles issued therefrom should be cancelled /revoked.

The determination

40. Having read and considered the Pleadings, the evidence, the written submissions and all the materials placed before me in this suit, there is one issue that has arisen and which needs to be disposed off before I delve into the issues as framed by the parties or issues to be framed by the Court.

41. The issue is whether the claim of the Plaintiffs is barred by statute.

42. Section 7 of the Limitations of Actions Act provide 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”.

43. The Plaintiffs led evidence in Court and through their pleadings that they were allocated land by the 4th Defendants in 1998/99. PW1 informed the Court that upon allocation/baloting they took possession of the lands and settled developing and cultivating the said lands until about 1999/2000 when they were removed from the said lands and new people were allocated. By their own evidence they testified that todate they are not in occupation of the said lands.

44. I have perused the copies of titles presented in Court as evidence by the Plaintiffs and it is true that after the successful subdivision of parcel Nos. MAKUYU/KIMORORI/BLOCK 111/ 3794, 3795, 3797 and 3799, their titles were registered and green cards opened in Muranga Registry in 1999. The said titles were issued in the year 2012.

45. This evidence has not been controverted by the Defendants save to state that the process of subdivision was irregular.

46. In the Plaint the Plaintiffs have sought inter alia orders for a declaration that they are registered proprietors of the suit lands; restraint orders against the Defendants from interfering with their quiet enjoyment of their lands; revocation and cancellation of subdivisions and resultant titles from parcel 3932 and General and Exemplary damages.

47. The gist of the Plaintiffs prayers is a claim for recovery of land.

48. The event of allocation and registration of the suit lands in their names and their attendant occupation and removal took place 1999. The suit was filed in 2017, 18 years later.

49. Going by the edict of Section 7 of the Limitations of Actions Act 12 years within which one can recover land expired in the 2011. This suit therefore ought to have been filed on or before the year 2011.

50. Going by Section 4 of the Limitations of Actions Act an action based on fraud should be brought to Court within 3 years. The PW1 led evidence that they discovered in 2012 that the mother titles had been combined and new titles issued on top of their titles thus depriving them of the right to title. If that be so then 3 years expired in 2015 when they ought to have filed the suit.

51. Pursuant to Section 27 and 28 of the Limitations of Actions Act, no leave for extension of time to file suit was sought and obtained on or before filing this suit.

52. Case law is abound on the effect of limitation on the jurisdiction of the Court where a suit is barred by statute.

53. In the **IGA –vs- Makerere University [1972] E.A 65** where Mustafa, J.A held as follows: -

“A plaint which is barred by limitation is a plaint “barred by law”. Reading these provisions together it seems clear to me that unless the appellant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the Court “shall reject” his claim. The appellant was clearly out of time, and despite the opportunity afforded him by the Judge he did not show what grounds of exemption he relied on, presumably because none existed. The Limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for, and when a suit is time barred, the Court cannot grant the remedy or relief sought.”

54. Law, Ag. V. P in the same case inter alia stated thus: -

“...The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, the plaint must be rejected.”

55. In the case of **Gathoni –vs- Kenya Co-operative Creameries Ltd, [1982] KLR 104** the Court of Appeal while dismissing an Appeal arising from an application for extension of time to bring a suit after the period of limitation had expired which the High Court had rejected Potter, J. A stated thus: -

“...The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.”

56. Further in the case of **Mehta –vs- Shah [1965] E.A 321**, Grabbie J.A in his judgment stated as follows: -

“The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”

57. From the above unbridled limitation goes to the root of the jurisdiction of the Court to entertain a suit.

58. In summation the irresistible conclusion is that the suit is not validly before the Court. I hereby strike it out without the necessity of drawing issues by the Court or considering those framed by the Parties in the suit.

59. The suit is struck out. The Defendants shall have the cost of the suit.

60. It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 10TH DAY OF DECEMBER 2020

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Waiganjo HB for Kangethe for the 1st – 3rd Plaintiffs

Ms Njuguna HB for Ms Mwirichia for the 1st Defendant

Kendi HB for Mwihaki for the 2nd & 3rd Defendants

Ms Njuguna HB Ms Mwirichia for the 4th Defendant

Court Assistant; Njeri & Kuiyaki