



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CIVIL APPEAL NO. 15 OF 2018

STEPHEN KIRIMI MUNYUA.....APPELLANT

VERSUS

**STEPHEN NKOROI M'IBARI (suing as the administrator of the estate of
IBARI RINTAUGU (deceased))..... RESPONDENT**

AND

DAVID KIRIMI JOSPHAT MBAE..... 1ST INTERESTED PARTY

JOSEPH GICHURU M'ITONGA.....2ND INTERESTED PARTY

BERNARD M'IMATHIU M'ITONGA.....3RD INTERESTED PARTY

JUDGMENT

(Being an appeal from the ruling and orders of the Honourable N.M Idagwa, RM dated 27.02.2015 in Nkubu PMCC No. 55 of 2013)

Background

This is an appeal from the ruling of the Hon. N.M Idagwa Resident Magistrate issued on 27th February, 2015 in PMCC No. 55 of 2013 (Nkubu).

That ruling arises from a notice of preliminary objection dated 30th June 2014. The said notice of preliminary objection reads as follows:

“Take Notice that the defendant shall raise a preliminary objection seeking to have the application dated 12/8/2013 and the entire suit struck out with costs for being time barred by operation of section 7 and 16 of the limitation of actions act, cap 22 and section 28 (h) of the registration Act, 2012”.

The preliminary objection came for hearing on 28/8/2014 and counsel for the defendant/appellant argued that the preliminary objection is based on section 7 and 16 of the Limitation of Actions Act and Provisions of section 28 (h) of the Land Registration Act, 2012.

The main grounds of the defendant/appellant in the notice of preliminary objection is that the boundaries to the suit lands cannot be fixed because the action of fixing of a boundary is subject to the limitation of 12 years from the date the survey was done and that since the fixing of the boundaries was not done within the limitation period the same cannot be done thereafter.

The defendant/appellant had argued before the learned magistrate that when the surveyor visited land parcel No. Abogeta/Upper Kithangari/83, he realized that that land had been encroached by parcel no. Abogeta/Upper Kithangari/505 before it was sub divided into parcels no. 1251 and 1253.

The defendant submitted that the sub-division of parcel no. 505 to the two parcels no. 1251 and 1253 were done on 2nd September 1997. The defendant/appellant submitted that the effect of that is to show that the encroachment was not recent but was done in 1997 and that the rights and interest which were in existence in 1997 were passed to the 4th defendant when he took over the land.

It is further submitted that the plaintiff slept on their rights only to wake up in 2013. The 4th defendant submitted that he was an innocent purchaser for value without notice. He was nowhere when sub-division was being carried out. It is also submitted that the right to recover

the encroached land has been defeated by affluxion of time.

The respondents opposed the preliminary objection stating that the same is incompetent for reasons that it is not based on pure points of law. It was submitted that the court should not be called upon to ascertain any facts either from the affidavits or elsewhere. The respondent further submitted that according to the appellant time should start running from 1997 but according to the respondent time starts to run from 2002.

He submitted that owing to the factual conflict as to when the time started running, that can only be resolved after a full hearing and not at an interlocutory stage. The respondent submitted that he is not seeking to recover land but for the fixing of boundaries which is a responsibility vested in the land Registrar under section 16 of the land registration Act. He submitted that there is no time limit for land registrar to fix boundaries.

SUBMISSIONS BY THE APPELLANT

The appellant through the firm of Mwenda Mwarania, Akwalu & Co. advocates submitted that the court is duty bound to investigate and make a determination on whether the suit is time barred before proceeding with the hearing of the same. He submitted that in the overall, the inevitable conclusion from the pleadings is that the issue of encroachment prior to 1997 is not disputed. What is in dispute is the effect of the respondent's ignorance of the same vis a vis the running of time for purposes of section 7 of cap 22. This he submitted, is purely an issue of law which can be determined by the court without calling evidence. The learned counsel further submitted that the original owner, John, had transferred all the 4 resultant parcels of land from the parent land parcel no. 505 and was left with none by the time the suit was filed. In conclusion, the appellant submitted that there is concurrence by both parties that there was encroachment with the issue being its implications in view of the law of limitation of actions act cap 22 laws of Kenya. The appellant cited the following cases in support of this appeal:

1. **Mehta vs Shah (1965) EALR 321**
2. **Mukisa Biscuits vs West End Distributors [1969] EA 696.**
3. **Section 7 of the limitation of actions act cap 22 Laws of Kenya.**

RESPONDENTS SUBMISSIONS

The respondent through the firm of Mwirigi Kaburu & Co. Advocates submitted that section 18 of the land Registration Act does not give any timelines within which a boundary ought to be fixed. He submitted that section 7 and 16 of the limitation of actions act does not apply to claims of fixing of boundaries. He relied on the following cases:

1. **Francis Kaguma Muhoi vs Regina Wamuyu Kanyi (2016) eKLR**
2. **Mary Wamuyu Mwangi vs Joseph Kahara Thinwa (2015) eKLR**

RE - EVALUATION AND DECISION

The main ground of this appeal is whether fixation of boundaries is subject to section 7 of the limitation of actions act. According to the appellant the encroachment of the respondent's land was done during the sub-division in 1997 and therefore the respondent is barred by section 7 of the limitation of actions act cap 22 law of Kenya.

According to the respondent, fixing of boundaries is guided by section 18 of the land registration act, 2012 which has no limit. In the case of **Francis Kaguma Muhoi vs Regina Wamuyu Kanyi (2016) eKLR** the learned judge Justice Munyao Sila held as follows:

"I therefore do not see how it could be argued that the respondent's rights over the land parcel no. 1440 are time barred.

In fact the quarrel of the respondent is that the appellant illegally sub divided this land to include that of the respondent. That quarrel only came to be after the purported subdivision which was done in the year 2008. It cannot be said that when the counter claim was lodged in the year 2009, the 12 years provided in section 7 of the limitation of actions act, for lodging a claim for recovery of land had lapsed. They had not neither can I buy the argument that there is limitation of time within which one ought to approach the land registrar for a determination of boundaries. Boundaries can be determined at any time".

I totally associate with the reasoning of the court in that decision to the effect that a claim for fixing of boundaries is not subject to the limitation of action act cap 22 laws of Kenya. A party seeking to establish boundaries under section 18 of the land registration act can do so anytime.

Having said that, I find this appeal lack merit and the same is hereby dismissed with costs to the respondent.

READ, DELIVERED AND SIGNED AT MERU IN THE OPEN COURT THIS 28TH DAY OF FEBRUARY, 2019

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E.C CHERONO - JUDGE

In the presence of:

1. Mr. Mwirigi for respondent
2. Mr. Muriira for appellant
3. Kananu – C/A