



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC APPEAL NO 3 OF 2017

OL KALAOU WEST FARMERS

CO-OPERATIVE SOCIETIES LTD.....APPELLANT

VERSUS

DAVID KIBUE KINYANJUI.....RESPONDENT

(Being an appeal against the Judgment of the Honorable Resident Magistrate's Court of Kenya at

Nyahururu (Hon C. K. Obara) dated, signed and delivered on the 26th October 2011 in Nyahururu PMCC 116 of 2004)

IN

IN THE PRINCIPAL MAGISTRATE'S COURT AT NYAHURURU

CIVIL CASE NO. 116 OF 2004

DAVID KIBUE KINYANJUI.....PLAINTIFF

VERSUS

OL KALAOU WEST FARMERS

CO-OPERATIVE SOCIETIES LTD.....DEFENDANT

JUDGEMENT

1. Pursuant to a ruling delivered by this court on the 18th day of April 2018 re-instating this appeal after the same had been dismissed for want of prosecution vide an order made on 22nd June 2017, what is before me for determination on Appeal is a matter which was partly heard by Resident Magistrates Hon H. M. Nyaberi and Hon C. K. Obara in the Senior Principal Magistrate's Court at Nyahururu, in Civil Case No. 116 of 2004 where the learned trial Magistrate, Hon C. K. Obara, upon taking part of the evidence of both parties, delivered his judgment on the 26th October 2011 where he entered Judgment in favour of the Respondent in terms of prayers (a) and (b) of his plaint, with costs and interest from the date of Judgment. There was a 60 days stay of execution.

2. The Appellant herein, being dissatisfied with the said judgment filed the present Appeal. The grounds raised in its Memorandum of Appeal include:

i. The learned trial Magistrate fell into grave error of law and fact by failing to appreciate that the Respondent's suit was statutorily time barred.

ii. The learned trial Magistrate erred in law and in fact by misreading and misinterpreting the evidence of the PW2 and PW3 and therefore finding in favour of the Respondent.

iii. The learned trial Magistrate erred in both law and in fact by putting grant reliance on exhibit No 9 and disregarding exhibit No 10 in clear departure of the position taken by the office concerned pertaining to the said exhibits.

iv. The learned trial Magistrate erred in both law and in fact by failing to appreciate that plot no Nyandarua/Olkalou West 879 was

first registered in the names of the Settlement Fund Trustees (SFT) before it was transmitted to the Appellants thus wrongly finding error on the part of the Appellant.

v. The learned Trial Magistrate erred in law and in fact by failing to appreciate that by the Respondent failing to join the Director of Surveyors, the Chief Land Registrar and the Settlement Fund Trustees in his suit it rendered the same fatally defective and of no effect

vi. The learned Trial Magistrate erred in both law and fact by concluding that the Respondent's title No Nyandarua/Olkalou West/142 measured 36.5 acres when there was no information to such effect until the same was formally registered.

vii. The learned Trial Magistrate erred in both law and fact by making a finding to the effect that the Appellants had encroached on the Respondent's land when there was no ground report to the same effect.

viii. The learned trial Magistrate erred in both law and in fact by making a determination to the effect that the appellant illegally and unlawfully excised a portion of land from the respondents Title No Nyandarua/Olkalou West/142 when there was absolutely no iota of evidence to support the same.

ix. The Learned trial Magistrate failed to appreciate that the Appellant is a public entity and merely held title No Nyandarua/Olkalou West/879 in perpetuity for the benefit of future generations and posterity.

x. The Learned trial Magistrate failed to appreciate that the evidence of PW2 and PW3 supported the cause for the Appellant to retaining Title No. Nyandarua/Olkalou West/879 and not the case for the Respondent

xi. The judgment of the Learned trial Magistrate was not in consonance with the law and caused a massive miscarriage of justice.

3. The Appellant thus sought ;

i. That the instant appeal be allowed with costs by setting aside the judgment of the lower court aforesaid and in its place dismiss the Respondent's suit in the lower court also with costs.

4. The Appeal was disposed of by way of written submissions wherein the Appellant filed their submissions on the 3rd September 2018 while the Respondent filed his submissions on the 19th October 2018.

The Appellant's submission.

5. The Appellant's case as per their written submission thereof is to the effect that the present matter was instituted vide a suit filed on the 20th day of April 2004 by the Plaintiff/Respondent herein wherein he had sought for orders that.

i. A declaration that the Defendant is a trespasser on a portion of the Plaintiff's land which is included in land Reference Number Nyandarua/Olkalou West/879, and an order of eviction of the Defendant from the said portion.

ii. An order for rectification of Title for Nyandarua/Olkalou West/879 in so far as includes a portion of one (1) acre from L.R Nyandarua/Olkalou West/142 so as to exclude the portion of one (1) acre alienated from the Plaintiff's land and a mandatory injunction restraining the Defendant, its servants, agents, employees or otherwise howsoever from encroaching, interfering with or in any other manner dealing with L.R Nyandarua/Olkalou West/142, and the portion of the plaintiff's land illegally included in L.R. Nyandarua/Olkalou West/879.

iii. Kshs. 33,000/= being the value of cut trees together with interest thereon at Courts rate

iv. Costs and Interest

6. That the Appellant/Defendant had filed their defence to the said Plaintiff, denying the Respondent/Plaintiff's claim, wherein after a full trial, the learned Magistrate had granted the orders sought for by the Respondent/Plaintiff in his plaint.

7. Being aggrieved by the entire decision the Appellant/Defendant filed this Appeal citing amongst others that the under the provisions of Section 76(1)(2) of the Co-operative Societies Act, the learned Magistrate had no jurisdiction to hear and or entertain the suit before him/her hence the entire trial proceedings , judgment and decree were nullities.

8. That the law did not preclude a party from raising the issue of the court's jurisdiction at any stage of the proceedings thus they were entitled to raise it in their Appeal. That failure to raise the said issue in the trial court cannot be construed to mean that the court had jurisdiction where it actually did not have as per the provisions of the statute.

9. That indeed the Respondent/Plaintiff herein was a member of the Appellant/Defendant society and as such the trial court had no jurisdiction to entertain, take proceedings and deliver judgment in a suit concerning a dispute between a member of a co-operative society and the society. Reliance was placed on Section 76 of the Co-operative Societies Act as well as a myriad of decided cases including:

i. Adero & Another vs Ulinzi Sacco Society Ltd [2002]1 KLR 577

ii. Kisii HCCC No. 24 of 2008

Margaret Auma Juma vs Rongo Dairy Farmers Co-operative Society Ltd.

iii. Nairobi H.C.C.C No 1267 of 1999

Dishon Gogo & 6 others – vs- Brigadier John Serem & 10 Others

iv. Machakos H.C.C.C. No 224 of 200

Daniel Kaloki Kioko & Another –vs- Willy Muasya Kioko

v. Machakos H.C.C. No 80 of 2003

Gerald Wambua Makau –vs- Lukenya Ranching & Farming

Co-operative society Ltd & Another

vi. Machakos H.C. Civil Appeal No 168 of 2009

Universal Traders Sacco –vs- Margaret Mwikali Mbithi

vii. Kisii H.C.C. NO 8 OF 2008

Wakenya Pamoja Sacco Society Lrd – vs- Stephen Obamba

viii. Nairobi H.C. E.L.C. No 587 of 2010

Chege Kabita –vs- Kariobangi Housing Settlement Co-operative Society

ix. Nairobi H.C. E.L.C. No 144 of 2011

Kagaa Farmers' Co-operative Society –vs- Ndungu Ngethe & 6 Others

10. The Appellant, while relying on the case of **Nairobi Court of Appeal, Civil Appeal No 310 of 1997, Kabitao Karanja –vs- Attorney General**, further faulted the trial learned Magistrate, for ordering for the rectification of the register as indicted in the decree, when (s)he did not have jurisdiction to do so.

11. They thus submitted that based on the above captioned Authorities, the Appeal ought to be allowed and the judgment and decree of the lower court set aside and/or quashed with orders of substituting the said judgment with an order that the subordinate suit be struck out with costs to the Defendant both in the lower court case and this Appeal.

Respondent's Submission.

12. The Respondent's submission was to the effect that the dispute herein was premised on the ownership of a portion of one (1) acre of land that was illegally excised from his land LR No. Nyandarua/Ol Kalou West/142 measuring 36.5 hectares, and while combined with other portions of land allegedly excised from adjacent parcel of land being LR No. Nyandarua/Ol Kalou West/228 and LR No. Nyandarua/Ol Kalou West/141, resulted into the formation of LR No. Nyandarua/Ol Kalou West/879.

13. The Respondent herein framed his issues for determination and proceeded to submit on them as follows;

Jurisdiction of the Trial Court.

14. It was the Respondent's submission that jurisdiction was a bridge a court had to cross before hearing and deciding on a matter. To this effect thereof the trial Magistrate's court had jurisdiction to handle the matter in question, a matter in which the Respondent had sought for a declaration that Appellant was a trespasser on a portion of the Respondent's land which was included in land Reference Number Nyandarua/Olkalou West/879, and an order of eviction of the Appellant from the said portion.

15. The Respondent had also sought for an order for rectification of Title for Nyandarua/Olkalou West/879 in so far as the included portion of one (1) acre from L.R Nyandarua/Olkalou West/142 so as to exclude the portion of one (1) acre alienated from the Respondent's land, and a mandatory injunction restraining the Appellant, its servants, agents, employees or otherwise howsoever from encroaching, interfering with or in any other manner dealing with L.R Nyandarua/Olkalou West/142, and the portion of the Respondent's land illegally included in L.R. Nyandarua/Olkalou West/879. Further he had prayed for costs of Kshs. 33,000/= being the value of cut trees together with interest thereon at Courts rate.

16. That the Respondent's claim, apart from touching on the issue of the division of, or the determination of the boundaries, occupation and

trespass to a portion of his land, extended to a claim of a liquidated sum of Ksh 33,000/- being the value of the trees and further, based on the said value of his claim, the trial court's jurisdiction was provided for under Section 159 of the Registered Land Act Cap 300 (now repealed) which provided that;

Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act.

17. As opposed to either Section 3 (1) of the repealed Land Disputes Tribunal which provided for:

(1) Subject to this Act, all cases of a civil nature involving a dispute as to—

(a) the division of, or the determination of boundaries to land, including land held in common;

(b) a claim to occupy or work land; or (c) trespass to land, shall be heard and determined by a Tribunal established under section 4.

18. On the other hand, Section 76 of the Co-operative Societies Act provided that;

If any dispute concerning the business of a co-operative society arises—

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or

(c) between the society and any other co-operative society, it shall be referred to the Tribunal.

(2) A dispute for the purpose of this section shall include—

(a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or

(b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;

(c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.

19. That there was no dispute that the Respondent was a member of the Appellant, however the nature of his claim was not one that was envisaged under Section 76(2) of the Co-operative Societies Act herein above, thus it did not fall within the jurisdiction of the Co-operative Tribunal.

20. That the Co-operative Societies Act was an Act of parliament that related to the constitution, registration and regulation of the co-operative societies and for purposes incidental thereto whereas the permeable of the Registered Land Act (now repealed) under which the Respondents' title deed for LR No. L.R. Nyandarua/Olkalou West/142 was registered, was an Act of parliament that sought to make the further and better provision for the registration of the title to land and for regulation of dealings in land so registered, as well as for the purposes connected therewith.

Whether the Respondent's suit was statutorily time barred.

21. The Respondent's submission was that he was allotted Plot 142 Ol Kalou West Scheme by the settlement Fund Trustee in 1964 but became the registered proprietor on the 22nd May 1992. While relying on the decided case of **Cheruiyot vs Bartiony [1988] eKLR**, the Respondent further submitted that absolute ownership was vested on him by virtue of the registration on the 22nd May 1992 wherein he had allowed members of the Appellant to use a semi-permanent house on the disputed portion of his land for convenience of collecting and weighing of the member's milk. That the said use was permissible until the year 2000 when members of the appellant started fencing a portion of his land where the said house stood, while claiming ownership. In the process they cut down the trees that he had planted valued at Ksh 33,000/= Thus this was the year when the cause of action hence accrued and/or was discovered.

22. That under Section 7 of the Limitation and Actions Act, an action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued, which right of action is prescribed under Section 9 of the Act.

23. That the disposition of the suit portion of land occurred in the year 1988 when the Settlement Fund Trustee was allegedly registered as proprietor of LR Nyandarua/Ol Kalou West/879 on the 16th June 1998 when it was un-procedurally and illegally transferred and registered to the Appellant on the 10th September 1998 without consent or knowledge of the Respondent.

24. That the right of action accrued in the year 2000 when the said fraud and /or mistake became known to the Respondent, as provided for under Section 26 of the Limitation of Actions Act. That either way if time was computed from the year 1998 or 2000, twelve years had not

lapsed as the suit was filed on the 30th April 2004 meaning that it was not statutorily time barred.

Evidence presented before the trial court.

25. That the Respondent produced his letter of allotment dated the 19th August 1964 for plot No. 142 Ol Kalou West Scheme. Wherein he had taken possession. He had testified that after the payment of the necessary dues, in the year 1992, he was given a discharge of the charge wherein on the 22nd May 1992, he was registered as the proprietor and issued with a title deed to parcel No. Nyandarua/Ol Kalou West/142 comprising 36.5 hectares, which was conclusive prove of ownership as envisaged under section 23 of the Registration of Titles Act (now repealed).

26. That the purported registration on the 16th June 1998 over No. Nyandarua/Ol Kalou West/879 and transfer thereafter to the Appellant who was registered on the 10th September 1998 thereby incorporating a portion of one acre belonging to the Respondent, was an affront to private property rights which are guaranteed under Article 40 and 64 of the Constitution.

27. The Settlement Fund Trustee ceased to hold any interest over the said land after the registration of the Respondent as the proprietor of parcel No. Nyandarua/Ol Kalou West/142 and thus had no right or authority to excise a portion of his land thereafter.

28. That the changes made in the Registry Index Map produced as Pf exh 9 were done un-procedurally and in contravention of Section 19 of the Registered Land Act (now repealed) the Respondent having not sub-divided his land parcel No. Nyandarua/Ol Kalou West/142.

29. The Respondent demonstrated that the excision of one acre from his land was illegal to the effect that there was no application made to the Land Control Board for either transfer or sub-division, there was no letter of consent issued, he did not sign any transfer forms for sale or surrendering the suit land nor did he sign any mutation form. Further, that he had not been issued with any notice during the sub-division, registration and changing of the RIM (Registry Index Map) actions which had reduced his land from 36.5 hectares to 35.6 hectares.

30. That parcel No. Nyandarua/Ol Kalou West/879 was created to dispose and defeat the Respondent's proprietary rights over his portion of land.

31. That by the Respondent allowing members of the Appellant to occupy and use portion of his land, they were only licensees who by virtue of Section 100 of the Registered Land Act, (now repealed) had no registrable interest thereon.

Analysis and determination:

32. I have anxiously considered the record, the judgment of the trial Magistrate's Court, the submissions by learned counsel, the authorities cited on behalf of the respective parties and the law. Conscious of my duty as the first appellate Court in this matter, I shall 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*).

33. The basis of the Appellant's claim according to the submissions herein is that pursuant to the provisions of Section 76 of the Co-operative Societies Act, the trial Magistrate had no jurisdiction to preside over the suit which concerned a dispute between a member of the Co-operative Society and the society (the Appellant herein).

34. That further, the trial Magistrate and rendered judgment, in essence, ordering for the rectification of the register as indicated in the decree without jurisdiction.

35. The Appellant had further faulted the trial Magistrate for trying a matter that was statutorily time barred.

36. In contest, the Respondent is adamant that from the evidence adduced in court, it is clear that he was allotted the suit land by the Settlement Fund Trustee on the 19th August 1964 and registered as the proprietor of No. Nyandarua/Ol Kalou West/142 on the 22nd May 1992.

37. That subsequently, the Appellant had illegally excised one (1) acre of land from this parcel of land in 1998 wherein, in combination with other neighboring parcels of land which it had also excised, it had formed LR No. Nyandarua/Ol Kalou West/879 which was then registered into its name on the 10th September 1998.

38. Considering the evidence adduced in the trial court, I find the issues for determination as being;

- i. Whether the trial court had jurisdiction to try the matter before it.
- ii. Whether the Respondent was the registered proprietor of land Parcel No. Nyandarua/Ol Kalou West/142.
- iii. Whether one (1) acre of land was excised from No. Nyandarua/Ol Kalou West/142 to form No. Nyandarua/Ol Kalou West/879.
- iv. Whether the matter was statutorily time barred.

39. On the first issue, as to whether the trial court had the jurisdiction to hear and determine a matter on the dispute between the parties and /or rectification of the lands register, I find that under Section 159 of the Registered Land Act (now repealed) the same states as follows;

Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act. ”

40. This position was reinforced by the court of Appeal's decision in the case of **Law Society of Kenya Nairobi Branch vs Malindi Law Society & 6 others [2017] eKLR** wherein it was decided that;

Devolution, access to services and access to justice, among others, are critical pillars of our constitutional architecture. Article 6(3) of the Constitution demands reasonable access to services. Article 48 demands that the state “shall ensure access to justice for all persons.” Access to justice has many facets. One facet is the geographical location of the courts and proximity of the courts to the people intended to be served by the courts. There are undoubtedly more magistrates' courts in Kenya than there are specialized courts or even High Court stations for that matter. The close proximity of magistrates' courts to the people ensures efficiency and access to justice at reasonable cost. It would be illogical and unreasonable to prohibit magistrates' courts from determining land and employment disputes, when it is undeniable that their reach to the citizenry is much wider than that of the specialized courts. Public interest, in our view, would be better served by increasing the number of courts with the capability of resolving such disputes.

It is in the spirit of these constitutional demands that Parliament is clothed with the power, under Article 23, to enact legislation conferring original jurisdiction to subordinate courts in appropriate cases to hear and determine applications regarding protection and enforcement of the Bill of Rights, notwithstanding that the High Court, under the same provision, has jurisdiction over similar matters. Had the framers of the Constitution intended to restrict the power of Parliament to enact legislation conferring jurisdiction on magistrates courts with respect to disputes relating to employment and labour relations and the environment and the use and occupation of, and title to land, it would have done so in express terms in the same way that the High Court is expressly barred, under Article 165(5), from exercising jurisdiction in respect of matters “falling within the jurisdiction of the courts contemplated in Article 162(2).”

41. In essence thereof the trial Magistrate had the jurisdiction to try the suit before it. The provision envisaged under Section 159 of the Registered Land Act (now repealed) being distinguishable with the provision envisaged under section 76 of the Co-operative Societies Act

42. In the case of **Paul Mutua Mutwiwa v. Kimeu Kyumba and 2 others Machakos HCCC No. 438 of 2012** it was held:-

“...The provisions of Section 76 of the Cooperative Societies Act, No.12 of 1997 do not contemplate the Cooperative Tribunal to determine the ownership of land even if the dispute is between members, present, past, deceased and even if it was, the same has been superseded by the enactment of article 162(2) (b) of the Constitution and the creation of the Environment and Land Court. Thus this court has jurisdiction to entertain this matter and the preliminary objection is dismissed.”

43. Indeed there is no evidence before me that points to the fact that the dispute herein concerned *“the business of a Co-operative Society”* (emphasis mine). The authorities cited herein by the Appellant in support of this argument are distinguishable to the present case.

44. In **Toratio Nyang'au & 4 Others v. Lietego FCS Limited (2011) e KLR Maraga J.**, (as he then was) observed:-

In its effort to resolve the matter the Tribunal attempted to define the term “dispute”. That is where, in my view, it started erring. The operative word in that section is “business”. So the Tribunal should have determined whether or not the dispute before it concerned the “business” of the respondent society.

The Cooperative Societies Act does not define the term “business”. But we know that cooperative societies are business organizations owned and operated by a group of individuals for their own mutual benefit. Although we are not told what the respondent was established to do, I am, however, certain that resolving its land disputes with third parties whether or not they are its members cannot have been one of the businesses of the respondent society. In the circumstances the land ownership dispute in this case did not fall within the purview of Section 76 of the Societies Act and the Tribunal had, therefore, no jurisdiction to entertain the matter.

Even if I am wrong in my understanding of Section 76 of the Cooperative Societies Act I am certain that as the land in this case is registered under the Registered Land Act, Cap 300, it is clear from Section 159 thereof that the Tribunal had no jurisdiction to try the matter...”

45. On the second issue for determination, Section 27 of the **Registered Land Act** provides as follows:

(a) *The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto*

(b) *the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.*

46. The provision of section 27 of the repealed **Registered Land Act have been reproduced in section 24(a) and 25(1)** of the Land Registration Act No. 3 of 2012 which outlines the interests and rights of a registered proprietor as follows;

Interest conferred by registration

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

47. The law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the Land Registration Act provides as follows:

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

48. From the evidence on record as well as the submissions submitted by counsel for the Respondent herein, there is no doubt that the Respondent was allotted plot No 142 through a letter of Allotment, from the Settlement Fund Trustee, dated the 19th August 1964, wherein on the 22nd May 1992, he was registered as the proprietor of No. Nyandarua/Ol Kalou West/142 measuring 36.5 hectares. The acreage having been confirmed by the Plaintiff's witnesses PW 2 and PW3 as well as Exhibit 3 and 6.

49. Through the issuance of the title, the Respondent had thus acquired absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

50. On the issues as to whether one (1) acre of land was excised from No. Nyandarua/Ol Kalou West/142 by No. Nyandarua/Ol Kalou West/879, the evidence on record, more so from Pw 3 Chege Mutura, the District surveyor, was to the effect that Olkalou West Scheme Registry Index map sheet No. 4, which he produced as Pf exh 9, was an original registered document which was published in 1956 and which showed the position of plots 141 and 142. That there was no other plot along the common boundary

51. However vide a second Olkalou West Scheme Registry Index map sheet No. 4 which was published in the year 1986, the same showed an amendment No. 6, which took place on the 23rd May 2000 and which amendment affected land parcels No. 141, 142 and 228 to the effect that a new plot was introduced as plot No. 879. He produced the second RIM as Pf Exh 10.

52. He further testified that the effect of the introduction of the new plot No 897 was that it had reduced the acreages of plots 141, 142 and 288, but of concern in this case, plot No. 142 had been reduced from an acreage of 36.35 hectares to 35.36 hectares.

53. That there was no letter authorizing the said amendment and that by the time the said change was made, the owner of plot 142, the Respondent herein had already obtained title to his parcel of land.

54. I find that unlike the Appellant herein, the Respondent holds a good title to the suit property measuring 36.35 hectares, the root of the same having been traceable. The court has seen the letters dated 11th August 1964 calling the Respondent for an interview produced herein as Pf Exh 1, a letter of allotment dated 19th August 1964 and its annexures produced as Pf Exh 2 (a-c), copy of the title deed produced as Pf exh 3, a green card in the name of the Appellant wherein they were registered as the proprietor to parcel No. 879 on the 10th October 1998, produced as Pf exh 5, as well as the green card for plot No. 142 produced as Pf exh 6 registered to the Respondent.

55. In the case of **Joseph N. K. Arap Ngok...Vs...Justice Moiwo Ole Keiuwa & 4 Others, Civil Appl. NO.60 of 1996**, the Court of Appeal held that:-

“It is trite that such title to landed property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to the provisions of the Act under which the property is held.”

56. Following the above argument it therefore goes without saying that the Appellant failed to satisfy the court the root of their title. There was no evidence laid to elaborate on how parcel No. 879 was created, the same not having been included in the original map.

57. Evidence on record is that when parcel No. 879 was created, the Respondent's acreage of land had reduced by 1 (one) acre, these facts point irresistibly to the fact that the one acre in parcel No. 879 must have been excised for the Respondent's parcel of land alongside the other neighboring parcels of land.

58. There being evidence to the effect that the excision of one (1) acre of land from the Respondents parcel of land No. Nyandarua/Ol Kalou West/142 to create parcel No. Nyandarua/Ol Kalou West/879 was done un-procedurally, it therefore follows that the title of the Appellant was obtained illegally and un-procedurally *and/or through a corrupt scheme* hence it is liable to be impeached.

59. It will be seen from the provisions of Section 26(1) of the Land Registration Act above, that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme.

60. The import of Section 26 of the Land Registration Act was considered in the case of ***Elijah Makeri Nyangwra _vs- Stephen Mungai Njuguna & Another [2013]*** eKLR where Munyao J, answered the question as to whether title is impeachable under section 26 (1) (b) of the said Act as follows;

'First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.'

61. On the last issue as to whether the matter before the trial court was statutorily time barred, the provisions of Section 7 of the Limitation 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.

62. The sequence of the evidence on record is to the effect that on the 19th August 1964, the Respondent herein was allotted the parcel of land Plot No. 142 by the Settlement Fund Trustee. Subsequently he was registered as the proprietor of No. Nyandarua/Ol Kalou West/142 on the 22nd May 1992. He had then allowed members of the Appellant to use a semi-permanent house on the disputed portion of his land for convenience of collecting and weighing of the member's milk.

63. Pursuant to the Respondents permission to members of the Appellant to use the old house for their activities, they had illegally excised a portion of one (1) acre from the Respondent's land, where the house was situate, thus forming plot No 879, wherein on the 16th June 1998, they had registered themselves as proprietors of the resultant parcel of land No. Nyandarua/Ol Kalou West/879.

64. That in the year 2000, members of the Appellant started fencing this portion of the Respondent's land where the house stood, claiming ownership. In the process they cut down the trees planted by the Respondent valued at Ksh 33,000/=

65. Section 9(1) of the Limitation of Actions Act provides as follows:

Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance.

66. I find that the cause of action hence accrued and/or was discovered in the year 2000 wherein the Respondent filed suit on the 20th day of April 2004 time within which the statutory period of 12 years had not elapsed.

67. The upshot of this matter is that the decision of the trial court was right in principle and correct in law to which I uphold it together with the orders issued therein. This Appeal lacks merit and is herein dismissed with costs to the Respondent.

Dated and delivered at Nyahururu this 13th day of February 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE