



**Waweru v Kimuge (Environment & Land Case 133 of 2012)
[2019] KEELC 5108 (KLR) (2 April 2019) (Judgment)**

Susan Wanjiru Waweru v Musa Kimengich Kimuge [2019] eKLR

Neutral citation: [2019] KEELC 5108 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 133 OF 2012**

M SILA, J

APRIL 2, 2019

BETWEEN

SUSAN WANJIRU WAWERU PLAINTIFF

AND

MUSA KIMENGICH KIMUGE DEFENDANT

JUDGMENT

(Suit by plaintiff seeking title to land that she has been in possession of for over 12 years; defendant's title obtained about 14 years to the filing of the suit; plaintiff aware of defendant's title immediately he got it in 1997; suit filed on 2012, defendant raising a defence that plaintiff's suit is time barred; no explicit provision in the [limitation of Actions Act](#) for a suit for cancellation of title; limitation period to be construed as the same period for seeking possession which is 12 years; plaintiff's suit not being one for adverse possession, plaintiff's suit time barred and is dismissed).

Part A : Introduction and Pleadings

1. This suit was commenced through a plaint which was filed on 10 December 2012. In the plaint, the plaintiff has pleaded that she is the owner of the land parcel Dundori/Muguathi Block 2/403 (hereinafter referred to as "the suit land") by virtue of being a member of Kalenjin Enterprises (a land buying company) since the year 1980. She has averred that she was shown the land, occupied and developed it, and has been cultivating it since the year 1980 without any interference from anybody. She has pleaded that around the year 2012, she went to collect her title only to discover that the same has been issued to the defendant. It is her case that the defendant's title is unlawful for the defendant took title to land that he did not own; misled land officials about the actual shareholder for the plot; and presented to the lands office a false register. In the suit, the plaintiff has asked for an order that the suit land belongs to her and cancellation of the title of the defendant.



2. The defendant filed defence vide which he pleaded that he is the lawful proprietor of the suit land. He averred that he purchased shares in Kalenjin Enterprises and became a member, and by virtue of his membership, he was allotted the plot No. 403 which is the suit land. He pleaded that he paid the full purchase price and the property registered as Dundori Mugwathi Block 2/403 and he was issued with title to it which he has held since 1997. He has argued that his title has not been challenged since 1997, 15 years to the filing of this suit.

Part B: Evidence of the Parties

3. In her evidence, the plaintiff testified that she purchased the suit land from one Rebecca Koskei through a sale agreement written on 8 September 1980. The purchase price was Kshs. 17,100/= which she paid in full. The parties also executed a share transfer document on the same day. She was then given a share certificate and a shareholder's card. After the purchase, a surveyor came and showed her land which was identified as Plot No. 403. She started following up on the issuance of title and in the meantime, she took possession of the land, built a house, planted trees and started cultivating it. It is later that she realized that title had been issued to somebody else and she placed a caution on the land. She reported the matter to the company and also to the Land Disputes Tribunal. At the company, she found a notice issued by the company that the company would cancel some titles. The name of the defendant was in the notice against the Plot No. 403. She did mention that she built her house in the year 2005.
4. Cross-examined, she stated that their agreement shows that she purchased 2 acres of land and the list of allottees that she had showed 2 acres of land. The title is however of 1 ½ acres and she explained that this is what the surveyor carved out. She stated that the old number for the plot in dispute was 380 and the new number 403. She could also pick out the name of Rebecca from the list she provided, where she was listed as having a plot with an old number 327 and a new number 328.
5. PW-2 was one Daniel Maina Kirugui. He stated that he is a member of Kalenjin Enterprises. He had 50 shares and was first given 2 acres to cultivate before the farm was formally subdivided. After subdivision his shares were worth 1.2 Ha (about 3 acres). In the year 1997, they got disturbed about how the company was being run and they went to court to compel an election. He was then elected a director and secretary in the same year, 1997. He mentioned that he served as an official from 1998 to 2008 first as Assistant Secretary and then Secretary, two years thereafter. After getting into directorship, they realized that there was a problem with issuance of titles. A register had been prepared in the year 1984 and delivered to the Land Registrar but they were not happy with it. They went to the Land Registrar and asked him to certify the original register which was done and they started using it for issuance of titles. This register was certified on 19 March 2007 and he stated that the original is with the Lands Registrar. He stated that his own plot had an old number 196 and a new number 178 and he could identify it in the register although the name noted therein was of Rosemary Wangoi Maina, who is his wife. He testified that for the land in dispute, the old number is 380 and the new number is 403, and that it is the plaintiff who is noted as the owner. He testified that to prove ownership, a member needed to have a share certificate bearing their name, and at the back would be two stamps, one stamp to certify the certificate and the other showing the old and new numbers of the plot. He stated that the plaintiff could not have been issued with title without these documents. He testified that he knows the defendant and he is not a member of Kalenjin Enterprises. He could not see his name in the register that he had. A register asserted by the defendant to be genuine by the defendant was put to him and he refuted it claiming that it is a false register. He stated that it is these other registers that have caused confusion in the issuance of titles. He stated that the genuine owner of the plot is the plaintiff. They discovered that there were people holding title deeds which are not theirs and they wrote a notice asking



- them to return their titles or they would cancel them. The defendant was among those listed and he stated that despite writing to him, he did not respond. He testified further that the genuine list was prepared on 6 September 1984 by the directors and surveyor and that it was this list which was used to issue titles.
6. Cross-examined, he stated that the original shareholder card was in the name of Rebecca Chepkoske Kole, and her name was crossed out, and that of the plaintiff entered as she had sold her share to the plaintiff. He explained that this card does not show the plot but is used to attend meetings. That is also how the plaintiff ended up in the register that he had. He explained that from the year 1975, the company stopped issuing shares, so one had to buy from an existing share holder. He was cross-examined on the register and he acknowledged that the name of Rebecca is in the register, and it shows that she has the old plot number 328 with new plot number 327, measuring 1.2 Ha. He could also see the name of the plaintiff against plot No. 403 (old number 380) with an area of 0.6 Ha. His evidence was that these two plots, No. 327 and 403, are not related. He agreed that the plot being sold was not indicated in the sale agreement but explained that one could sell some shares and remain with others. It was probable that Rebecca had more shares and she may have sold some and retained some. He offered that Rebecca may have been entitled to land measuring 1.8 Ha but surrendered 0.6 through the sale to the plaintiff.
 7. With the above evidence, the plaintiff closed her case.
 8. DW-1 was the defendant and he testified that he purchased the suit land from one Kibet Tiptibano as shares. He paid Kshs. 50/= for survey on 30 January 1997 and he was issued with a survey receipt. He got a clearance certificate dated 29 August 1997 and was later issued with a title deed.
 9. Cross-examined, he could not avail a sale agreement with Mr. Tiptibano, and what he had was a sale agreement with one Kipsige arap Rono. He was not clear whether Mr. Tiptibano gave him his share certificate or not, although he ended up saying that he did not give it to him, but he only gave him a receipt which he did not have. At the time of sale, Mr. Tiptibano did not take him to the ground as the land had not yet been distributed to members. He mentioned that he was later issued with a share certificate in his name and a shareholder's card but he did not come with them to court. He stated that it was the survey receipt which was considered most important when being shown the ground. He could not recall when he was shown the ground but he could not occupy it as the plaintiff was in possession. The receipt was issued in the name of Mr. Tiptibano and not in his name. He explained that it is the person who was the member who was identified in the receipt. There is a plot number at the back of the receipt and he stated that this was written on 29 August 1997 by the (District Officer) D.O which is the day that he was given the land. He testified that the Kalenjin Enterprises land had issues and the Government sent the D.O to vet and verify the rightful owners and that is how he got his title. He got a note from the D.O which enabled him get title to the land. He agreed that his name was not on the register produced by the plaintiff. Re-examined, he stated that Mr. Tiptibano was a brother to Kipsigei Rono.
 10. DW-2 was Elijah Kiplagat Kipkemei Chelaite a director of Kalenjin Enterprises. He testified that for one to own land he needed to purchase shares in the company. For one to be allotted land, he needed to have a share certificate, shareholder's card, and also pay survey fees, which at the back bore the plot number. The survey receipt also showed the name and number in the original company register. He stated that the company has 4,413 shareholders and he had the original register. In the register that he had, he identified the name of Musa Kimengich Kimuge, the defendant, with 1 ½ acres of land. He claimed that the register produced by the plaintiff's witness was fraudulent. He testified that the register relied on by the plaintiff was prepared in the year 1984/85 and deposited with the Land Registry and titles issued on the strength of it despite it not being genuine. He testified that the company had an



employee by the name of Henry Chepkoigat whose role was to enter names in the company register. He claimed that Mr. Chepkoigat, after entering the names, printed other share certificates, more than 2000 of them, in the name of the company, and he mixed these with the other good certificates, which were then all signed by the Directors while they were blank. Shareholders were called to collect their share certificates and he insisted that they surrender their receipts. He then collected these original receipts and opened an office where he sold these receipts to unsuspecting people, mostly from the Kikuyu community, and issued them with a share certificate from these surrendered receipts. He then called for survey of the land, but when the land was being allocated, the company found many non genuine persons getting land. This was reported to the President who formed a Task Force comprised of District Officers (D.Os) and 45 elders from the company in the year 1985. They made a report which he had. The report pointed out the genuine and non-genuine persons. Those who were noted not to be genuine were given notice to vacate by 31 March 1989 but they did not leave. In the year 1997, the parcels of land that were illegally occupied were distributed to members and among the beneficiaries was the defendant. He testified that the plaintiff is not among their 4,413 members, and even Rebecca Chepkoskei is not their member, and he claimed that she was illegally given land. He mentioned that Mr. Chepkoigat was arrested and charged with fraud and he later died. He also claimed that PW-2 was never a director of the company as he was not a member.

11. Cross-examined, he stated that he was appointed Director of the company in the year 2001 and there before he served as a Committee member. He agreed that a member of the company needs to have a share certificate and a shareholder's card although to him the most important documents was the survey receipt. He stated that 25 shares entitled one to land measuring 1 ½ acres and one needed to pay Kshs. 50/= for this acreage as survey fees. He agreed that the company's Articles of Association do not provide for a Task Force although they requested for one. He explained the differences between the register that he produced and that relied upon by the plaintiff. His register had only one number for each member but the plaintiff's register had an old and new number. He identified the name of Mr. Tiptibano in the Task Force report but the same did not show the plot number that he was to get. I questioned him on the Notice to surrender titles (Plaintiff's exhibit No. 6) but he said he had no knowledge of it.
12. With the above evidence, the defendant closed his case.

Part C : Submissions of Counsel

13. I invited counsel to submit and they filed written submissions. I have taken these into account in arriving at my decision. In his submissions, Mr. Ikua, learned counsel for the plaintiff, inter alia submitted that the defendant did not produce any share certificate, either in his own name, or that of the seller, and pointed out that all he had was the survey receipt. He submitted that the Task Force was a Committee that was created outside the companies Memorandum and Articles of Association and thus the acts of the Committee are null and void. He submitted that the register produced by Mr. Chelaite cannot be relied on as it is full of cancellations and has no stamp to show that it was handed over to the District Land Registrar for use to issue titles. He submitted that his client has been on the land since the year 1980 which is over 38 years now. He submitted that the defendant has admitted to never being in occupation and has never sued the plaintiff for being in possession since getting title in the year 1997.
14. For the defendant, Mr. Andama, learned counsel, submitted inter alia that the claim is statute barred having been instituted 15 years after the defendant obtained title. He relied on Section 7 of the *Limitation of Actions Act*. He submitted that the defendant is the first registered owner and his registration is indefeasible. He also thought that on the facts the plaintiff had failed to prove entitlement



to the suit land. He relied on two authorities, the case of Peter Kimani Njenga vs Mugo Kamabunii Mugo & Another (Nyahururu ELC No. 261 of 2017) (2018) eKLR, Bosire Ogero vs Royal Media Services (2015)eKLR and Beatrice Wambui Kiarie & Others vs Tabitha Wanjiku Nganga & Others (2018)eKLR.

Part D : Analysis and Determination

15. In a nutshell the plaintiff in this case avers that she is the rightful proprietor of the suit property. She traces her proprietorship from the person that she purchased the land from, one Rebecca Chepkoske Kole, who is said to have held shares with Kalenjin Enterprises which she sold to the plaintiff. The plaintiff contends that these shares were converted into land and the said land is the suit land. She thus believes that the defendant acquired title to it through fraud. The defendant on the other hand also insists that he is the rightful owner of the suit land. He traces his root from Kipkoech Tibtibano who was an original member of Kalenjin Enterprises. His name was thus entered in the register of the company and he was issued with title. He has however not taken possession of the suit land since he got title on 4 September 1997. I also note that in this case, he has no counterclaim, but he has stated in his defence that his title has never been challenged from 1997 to 21 February 2013 when this suit was filed, a period in excess of 14 years.
16. It will be recalled that in his submissions, counsel for the defendant submitted inter alia that the plaintiff's suit is time barred, and I was pointed to Section 7 of the *Limitation of Actions Act*. I think before I delve deeply into the issues in the case, I need to first examine whether the plaintiff's suit is time barred as claimed by the defendant.
17. Section 7 of the *Limitation of Actions Act*, provides as follows :-
 7. 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.
18. When you read Section 7, you get the impression that the said section only provides for a limitation period to recover possession of land and not title to land. This is buttressed by Section 9 which is drawn as follows :-
 9.
 - (1) Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or the discontinuance.
19. These Sections, strictly interpreted, imply a position where there is a person holding title to land, and he has been dispossessed, or there is a person in possession of his land. Such person, has 12 years to bring an action to recover possession of his land from the time his action accrued, and his action accrues, at the time he is dispossessed, or the time that the trespasser takes possession of his land. It will be seen that such person is not interested in filing an action for title to the land, because he already has title, but what he does not have is possession of the land.
20. The plaintiff in this case does not want possession of the land, for she already has it, but what she now wants is title to the land, which would then protect her continued possession of the land. I have not seen anywhere in the *Limitation of Actions Act*, where there is a limitation period prescribed for a person to bring an action for recovery of title to the land. I have not been able to find an explicit provision in the *Limitation of Actions Act*, which would support the defendant's position that the plaintiff had 12



years, as prescribed in Section 7 of the [Limitation of Actions Act](#), to bring an action seeking title to the land, which is precisely what the plaintiff is asking for in this case.

21. That said, I would import that the limitation period for recovery of title to land is still 12 years, in as much as there is no explicit provision in the [Limitation of Actions Act](#), prescribing for this. My importation comes from Section 17 of the same statute, which is drawn as follows:-
 17. Subject to section 18, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.
22. It does appear from the reading of Section 17 above, that you cannot separate title with possession of the land as the two go together. From Section 17 the title of the proprietor will be extinguished if he does not bring an action to recover land (in this instance, an action to recover possession of land). It means therefore that his title remains alive, for upto 12 years, as against a person in possession of the land. I think by implication, a person who wants to challenge this title, must by analogy have a maximum of 12 years to do so, because after that, the right of action, is now different because it is based on possession, in excess of 12 years. Before the lapse of 12 years, the person in possession has no right of action based only on his possession, but again, his right here being limited to suing over the title to the land. Having not sued for title to the land within 12 years, his right over the land is now based on his possession of the land only. In other words, after 12 years, he cannot now sue the defendant over his title claiming that it was procured wrongly or by way of fraud, unless he can fit himself within Section 26 of the [Limitation of Actions Act](#), which provides for an extension to the limitation period where the fraud or mistake complained of was concealed from the plaintiff. After 12 years (without the benefit of Section 26) his claim must be barred by limitation and he can now only sue for the title on the basis of possession of it.
23. That said, I am in a bit of a unique situation, because given the fact that the defendant has not brought a claim for recovery of the land to which he has title to, within 12 years, then on the face of it, by dint Section 17 of the [Limitation of Actions Act](#), his title is effectively extinguished. But I do not think that the court should use Section 17 of the [Limitation of Actions Act](#), if the person who it favours, has not attempted to plead it in his pleadings, and essentially give notice to the title holder that he will face a defence of Section 17 of the [Limitation of Actions Act](#). I think it would be wrong for the Court to make an order that a person's title has been extinguished by dint of Section 17, if the said person has not been put on notice that Section 17 would be used against him, so that he may have something to say about it. If the court proceeds to use Section 17 against a title holder, without him first having been put on notice, then essentially, the title holder will be condemned unheard which would be a breach of natural justice, specifically the right to be heard, and this would be unfair to the title holder. Section 17 can be used by a person in possession as a shield to a suit for possession by the plaintiff, and as a sword to support a claim for adverse possession under Section 38 of the [Limitation of Actions Act](#).
24. In the instance of this case, the plaintiff has not invoked either Section 17 or Section 38 of the [Limitation of Actions Act](#). I will have to agree with the submissions of counsel for the defendant, that the plaintiff's claim, which is a claim for cancellation of title of the defendant, based on issues such as fraud, and not based on the plaintiff's long possession of it beyond 12 years, is therefore time barred. It does seem to me, at face value, without determining the issue for that is not before me, that the plaintiff may have had a good claim for title to the suit land by way of adverse possession, but what is before me is not a case of adverse possession, but a case for title to the land based on the argument that the defendant obtained it wrongfully. I do not know why the plaintiff chose this path and not the path of adverse possession which may have been an easier claim to prove. I am not going to say much about this because as I have mentioned, that is not the case before me. If I delve too much into it, I



will be prejudicing the defendant, who was never informed that he would have to face a case of adverse possession, but a case of fraudulent title to the land.

25. My holding on the plaintiff's claim for title to the suit land which has been held by the defendant for over 12 years without the plaintiff presenting any claim for it within that period, is time barred. The plaintiff cannot also benefit from an extension on the basis of Section 26 because she was aware that the plaintiff had title in the same year 1997 not the year 2012 as she claimed in her plaint. She herself mentioned that she applied to put a caveat in the register of the land, and I have seen that these documents were processed in the year 1997. She could not have been processing a caveat if she did not know of the defendant's title. On expiry of 12 years after the defendant obtained title (or the time that the plaintiff became aware that the defendant had title which is still 1997) the plaintiff could not sue for title to the land, without having a claim for extinguishing of the defendant's title under Section 17 of the *Limitation of Actions Act*, and/or under Section 38 of the *Limitation of Actions Act*, essentially a claim for adverse possession. I have no option but to dismiss the plaintiff's suit for being time barred. Given that position, I find it unnecessary to delve into the issues presented by the plaintiff in this case, for I have already held that the plaintiff's claim is time barred. Doing so, will be mere academic exercise.
26. What then should happen to the position of the plaintiff and defendant? I note that the defendant had no counterclaim for possession of the land, and given that he had not brought any claim for possession of the land, within 12 years as prescribed by Section 17 of the *Limitation of Actions Act*, I cannot order the plaintiff, within these proceedings, to give vacant possession to the defendant.
27. In other words, within these proceedings, I can neither make any order in favour of, or against, the plaintiff or defendant over rights in relation to the suit land. The parties will need to assess their positions and bring to court appropriate pleadings through which the court can properly pronounce itself.
28. Owing to the above reasons the plaintiff's suit is dismissed. The defendant shall have the costs of the suit.
29. Judgment accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAKURU THIS 2ND DAY OF APRIL 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

No appearance on the part of M/s Ikua Mwangi & Co. Advocates for the plaintiff.

No appearance on the part of M/s Kiplenge & Kurgat advocates for the defendant.

Court Assistant: Nelima Janepher

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

