



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO.10 OF 2017

MULI KYOVE.....PLAINTIFF

VERSUS

RUTH NZIOKA.....DEFENDANT

J U D G M E N T

1. Muli Kyove, the Plaintiff herein, is the registered owner of land parcel number Kathonzweni/Thavu/597. He says that he bought the said parcel of land in 1967 from one Nzioka Lonzi who is now deceased. Nzioka Lonzi was the husband of the Defendant herein. That upon purchase of the said land from the late Lonzi, the Plaintiff was shown his portion of land which he proceeded to plant sisal plants along its boundaries. That he was sick during the demarcation exercise whereupon the Defendant's husband reduced what the Plaintiff was entitled to. That he (plaintiff) ended up losing 4 acres which he now claims.

2. By his plaint dated 16th February, 2017 and filed in Court on even date, the Plaintiff prays for judgment against the Defendant for:-

- a) A permanent injunction against the defendant, her servants against and/or undertaking any developments of my portion which is well known to me and which portion the defendant's husband demarcated as his part of his land.**
- b) An order that the defendant give back my portion which is to be hived from parcel Kathonzweni/Thavu/596.**
- c) Cost and interest of this suit.**
- d) Any other relief that this Honourable Court may deem fit and just to grant.**

3. The Plaintiff's claim is denied by the Defendant in her defence dated 10th March, 2017 filed in court on 03rd May, 2017. In paragraphs 4 and 6 of her defence, the Defendant has averred that the Plaintiff's suit is bad in law and the same ought to be struck out for being incompetent. She has also pleaded the defence of limitation of action. She has also averred that she is not the administrator of the estate of the late Nzioka Lonzi and that she is wrongfully sued.

4. Hearing of the Plaintiff's suit commenced on the 10th July, 2018. The plaintiff adopted his undated witness statement filed in court on the 16th February, 2017 as his evidence in chief. He produced three documents that are in his list of documents dated 16th February, 2017 and filed in court on even date as P.Exhibit Nos.1, 2 and 3 respectively. The Plaintiff further identified the surveyor's report dated 30th April, 2018 as P.Exhibit No.4.

5. The Plaintiff's evidence in cross-examination was that his two witnesses to the sale agreement are now deceased. He revealed that it was his daughter by the name of Rose whom he sent to take his identity card to the surveyors during the demarcation exercise. He however said that he would not call her as a witness. He said that he fell sick in or about 1982. He added that he remained sick for about 3 years. He agreed that between 1985 and 2017, there is a difference of 32 years.

6. Gabriel Maingi (PW1) in his evidence in chief told the court that he is a holder of diploma in land surveying from the Technical University of Kenya and works as a land surveyor at Makueni County headquarters. That he was summoned by the court to establish the encroachment between land parcels number Kathonzweni/Thavu/596 and Kathonzweni/Thavu/597. That he went to the scene while in the company of a colleague, one Seda Nyagol. That they used map diagram number 2 and found the encroachment as shown in the autocard diagram attached to the report dated 30th April, 2018 and signed by Nyagol which report he produced as P.Exhibit No.4.

7. The witness told the court that their findings were that land parcel number Kathonzweni/Thavu/596 had encroached into Kathonzweni/Thavu/597 by 0.302 hectares. Of importance to note is that one (1) hectare is equivalent to 2.471 acres. So 0.302 hectares is equivalent to 0.746242 acres. The witness went on to say that part D on the diagram is the encroachment while part C was the land claim as shown to them by the Plaintiff. He pointed out that this Part C is not in the map and that he and his colleague could not be able to determine

who the owner of the said part C was.

8. On being cross-examined by Mr. Wasolo for the Defendant, Maingi (PW1) said that the unclaimed part C is on the map and that it belonged to land parcel number 596. Maingi (PW1) in actual effect contradicted himself. He went on to say in his evidence in cross-examination that what the Plaintiff is claiming is not reflected in the preliminary index diagram (PID). That according to the records, the encroachment was minute.

9. On the other hand, the Defendant adopted her statement dated 24th October, 2017 as her evidence in chief. She produced a title deed and a certificate of official search as D.Exhibit Nos.1(a) and (b) respectively. According to her, the title deed shows her deceased husband as the owner of the land in question. She produced the deceased's burial permit as D.Exhibit No.2. She denied having ever encroached onto the Plaintiff's land.

10. In her evidence in cross-examination by the Plaintiff, the Defendant told the court that she did not witness any sale agreement between him and her late husband. She denied that she and her late husband participated in uprooting and burning of sisal plants along their common boundary with the Defendant.

11. The Defendant called William Mutunga Mutavi (DW1) as her sole witness. Mutunga (DW1) adopted his statement dated 24th October, 2017 as his evidence in chief. In short his evidence was that he did not witness the sale agreement (P.Exhibit No.1) in respect of Kathonzweni/Thavu/596, an issue he maintained in his evidence in cross-examination.

12. Both parties filed their submissions. The Plaintiff urged the court to find merit in his suit and grant the orders that he has sought in his plaint. On the other hand, the Defendant's Counsel submitted that a period of about 30 years has lapsed from the date of the sale agreement that the plaintiff relies on. The Counsel pointed out no leave to file the suit outside the 12 year period provided for under **Section 7 of the Law of Limitations Act (chapter 22 of the Laws of Kenya)** was ever made. Thus, the Counsel submitted, the claim is statute barred.

13. The above mentioned **Section 7 of the Limitation of Actions Act** provides as follows:-

“Actions to recover land;

An action may not be brought by any person to recover land after 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.”

The Counsel cited the case of **Peter Kimani Njega vs. Mugo Kamabuni Mugo & 3 others [2018] eKLR** where M. C. Oundo J held:-

“Section 7 of the Limitation of Actions Act provides:

“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.”

“Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the Plaintiff having brought the suit land in the year 1983 (as per paragraph 6 of his plaint) and thereby claiming ownership in the same, he could seek to recover it from the 2nd and 3rd Defendants, but only if he did so within twelve years after he accrued the suit land.”

There is no doubt that the period of about thirty three years have lapsed from the date of the sale agreement to the date this suit was filed. No leave for extension of time to file the suit outside the twelve year period has been exhibited before this court. There Plaintiff needed to commence his claim within the time prescribed under Section 7 of the Limitation of Actions Act. It follows therefore that by the time the Plaintiff filed this suit, the claim was statute barred.”

The Counsel further cited the case of **Bosire Ongero vs. Royal Media Services [2015] eKLR** where the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and, therefore, if a matter is statute barred, the court has no jurisdiction to entertain it. To buttress his submissions, the Counsel cited the case of **Owners of Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd [1989] KLR 1** where Nyarangi, JA held as follows:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

14. From the evidence on record and the submissions filed, I am of the view that the issues for determination are:-

a) Whether or not the Plaintiff is entitled to the four acres of land that he is claiming from the Defendant.

b) Whether or not the Plaintiff's claim is statute barred.

c) Whether or not the Plaintiff has a cause of action against the defendant.

15. I will address the three issues together. From the evidence on record, the Plaintiff says that he bought land from the late Lonzi in 1967. He did not indicate the acreage of the land that was the subject of sale. He however says that he was shown his portion of the land and proceeded to plant sisal plants along its boundaries. That during the demarcation exercise that took place in or around 1985, he was sick and therefore sent his daughter to witness the demarcation that took place. In my view, that was the perfect time for the Plaintiff to establish the acreage of his land. He did not call his daughter to shed light on what transpired when the demarcation exercise took place. His claim that four of his acres were taken away by Lonzi is not backed by the evidence of Gabriel Maingi (PW1). The Plaintiff's witness told the court that he and his colleague Seda Nyagol, established the extent of the encroachment to be 0.302 hectares. As earlier on observed in my judgment, one (1) hectare is equivalent to 2.471 acres. Therefore 0.302 hectares is equivalent to 0.746242 acres. This is hardly an acre. Gabriel (PW1) in his evidence in cross-examination told the court that what the Plaintiff was claiming was not in the preliminary index diagram. In the absence of cadastral maps, the size of an area of the land is an approximation and this is why the title deed produced by the Plaintiff as P.Exhibit No.1 shows that the approximate area of his land parcel number Kathonzweni/Thavu/597 is 5.2. In short, the claim that the Plaintiff is now raising over 30 years after the demarcation could have been handled during the adjudication and demarcation of the section where his land falls. I, therefore, hold that he is not entitled to 4 acres that he claims.

18. Further it is clear that under Section 7 of the Limitation of Actions Act, Chapter, 22 of the Laws of Kenya, the Plaintiff ought to have brought his claim within 12 years from 1985 when the alleged cause of action arose. Suffice it to say, his claim is statute barred.

17. It is not lost on me that the Defendant is not the legal administrator of the estate of her husband and as such, the Plaintiff ought not to have sued her without following the due process of the law.

18. The upshot of the foregoing is that the Plaintiff has no cause of action against the Defendant. Arising from the above, I hereby proceed to dismiss the Plaintiff's claim with costs to the Defendant.

Signed, dated and delivered at Makueni this 18th day of June, 2019.

MBOGO C. G.,

JUDGE.

In the presence of:-

The Plaintiff

No appearance for the Defendants even though they had notice dated 16/05/19

Ms. C. Nzioka – Court Assistant

MBOGO C. G. (JUDGE),

18/06/2019.