



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 47 OF 2016

JOHN GATUMU NYAGA1ST
PLAINTIFF

STEPHEN MURITHI.....2ND
PLAINTIFF

JULIUS MURIUKI RUJI.....3RD
PLAINTIFF

LINCON NDARU NGURU.....4TH
PLAINTIFF

PAUL MUCHIRI NYAGA.....5TH
PLAINTIFF

SELASIO NJERU MURIUKI.....6TH
PLAINTIFF

BONIFACE NJERU RUJI.....7TH
PLAINTIFF

MICHEAL NJERU KIURA.....8TH
PLAINTIFF

PETER KARIUKI NYAGA.....9TH
PLAINTIFF

JAMES GICHONI.....10TH
PLAINTIFF

EMILIO NJERU NGURU.....11TH
PLAINTIFF

VERSUS

BONIFACE NJUKI RUNGI.....1ST
DEFENDANT

NJIRU NJOKA NDEGWA.....2ND

DEFENDANT

SAMUEL MUTINI JOEL.....3RD

DEFENDANT

PETER MUNYI NDAVA.....4TH

DEFENDANT

COSMUS MURIITHI NDAVA.....5TH

DEFENDANT

NDAVA MUCHUNGU.....6TH DEFENDANT

SALESIO MURITHI NGUU.....7TH DEFENDANT

FELISTER NGITHI GICONI.....8TH DEFENDANT

RULING

1. By an amended plaint dated 29th August 2016 and filed on 30th August 2016 the Plaintiffs sought the following reliefs against the Defendants;

a. A mandatory injunction compelling the Defendants to deliver their titles to the Land Registrar for cancellation.

b. In the alternative, an order that the Registrar of the High Court be empowered to execute all documents and papers necessary for the effectual cancellation of the Defendants' titles to Embu/Mavuria/1117, Embu/Mavuria/1118 and Embu/Mavuria/1119.

c. Declaration that Embu/Mavuria/1117, Embu/Mavuria/1118 and Embu/Mavuria/1119 belong to the Mugwe clan.

d. An eviction order to compel persons illegally in occupation of the suit property to vacate.

e. An order to the Officer Commanding Station (OCS), Embu to enforce prayer (a) and (d) above.

f. Costs of the suit.

g. Interest on (a) and (b) above at court rates.

h. Any other relief that the Honourable Court may deem fit to grant.

2. It was pleaded that the Plaintiffs were suing on their own behalf and on behalf of Mugwe clan seeking recovery of Title Nos *EMBU/MAVURIA/1117, 1118* and *1119* (hereinafter known as parcel Nos *1117, 1118* and *1119* respectively) which land they said was initially issued to the clan in 1969. It was further pleaded that the entire clan land was under parcel No. *1119* but that parcel Nos *1117* and *1118* were illegally excised from parcel No. *1119* thereby creating the three parcel numbers. The Plaintiffs also pleaded that parcel No. *1118* had been subdivided into 18 parcels some of which were transferred to the *4th – 8th* Defendants.

3. The *1st* Defendant filed an amended defence on *21st* June 2017 denying all the material allegations by the Plaintiffs. The *1st* Defendant averred that he was the registered proprietor of parcel No. *1117* and that he held a valid title thereto. It was denied that the said parcel was part of Mugwe clan land. It was pleaded that by the time he bought it, the process of land adjudication and demarcation had long been

completed.

4. The 1st Defendant further pleaded that the Plaintiff's suit was statute barred under the **Limitation of Actions Act (Cap 22)** hence the Plaintiffs had no cause of action against him. The 1st Defendant pleaded in paragraph 8A of the amended defence that he would raise the plea of limitation as a preliminary objection at the hearing of the suit.

5. The 1st Defendant further pleaded that the 4th Plaintiff had unlawfully entered and occupied one acre out of his parcel No. 1117 in consequence of which he raised a counterclaim against him for an eviction order, a permanent injunction and costs.

6. The 2nd to 8th Defendants also filed a joint statement of defence denying the Plaintiffs' claim. It was pleaded that their respective titles were issued procedurally and that the Plaintiffs had no valid cause of action against them. It was further pleaded that the Defendants shall raise a preliminary objection to the suit on the basis that it was *res judicata*.

7. When this matter came up on 10th July 2017 for the hearing of the Plaintiffs' application for injunction dated 25th November 2016, it was agreed that the 1st Defendant's preliminary objection shall be disposed of first. It was further agreed that the said preliminary objection shall be disposed of through written submissions. The 1st Defendant filed his written submissions on 21st September 2017 whereas the Plaintiffs filed theirs on 9th November 2017. The 2nd – 8th Defendants do not appear to have filed any submissions.

8. The 1st Defendant's counsel submitted that the Plaintiffs' suit should be struck out for being filed out of time and for not disclosing a cause of action against the 1st Defendant. It was submitted that parcel No. 1117 was first registered on 12th September 1997 in the name of one Nyaga Mumano who later sold and transferred it to the 1st Defendant on 25th September 2013. It was further submitted that if the Plaintiffs lost their land about 20 years ago, they ought to have moved the court for recovery thereof within 12 years from the date of the accrual of the cause of action.

9. It was, therefore, the 1st Defendant's case that the suit was filed in contravention of **section 7 of the Limitation of Actions Act (Cap 22)**. The said section provides that;

“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 other person through whom he claims, to that person.”

10. The 1st Defendant further submitted that the Plaintiffs had failed to demonstrate that Mugwe clan was indeed allocated the property in dispute, including parcel Nos 1118 and 1119. It was submitted that the Plaintiffs had not exhibited any allocation or title documents hence their claim was baseless and unsubstantiated. The court was urged to strike out the suit.

11. In response to the preliminary objection, the Plaintiffs' counsel submitted that the Plaintiffs had not sat on their rights since 1969 but had taken various steps since 1975 to vindicate their rights. It was submitted, from the bar, that the Plaintiffs had been pursuing the matter for the past 30 years personally until they appointed advocates in 2016.

12. It was further submitted on behalf of the Plaintiff that if the suit was filed out of time, then this court had jurisdiction to grant leave to file suit out of time. It was submitted that the Plaintiffs were laymen who deserved to be heard in the interest of justice.

13. The Plaintiffs further relied on **Articles 40, 48, 50 (1) and 159 (2) of the Constitution of Kenya 2010; sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21), and section 8 of the Community Land Act. Article 40 of the Constitution** guarantees and protects the right to property; **Article 48** guarantees

access to justice; **Article 50 (1)** guarantees a right to fair hearing whereas **Article 159 (2)** prescribes various principles for the exercise of judicial authority. Section 8 of the Community Land Act is not relevant for purposes of the preliminary objection.

14. The Plaintiffs relied upon the case of ***Aviation Cargo Support Ltd Vs St Marks Freight Services Ltd NBI Civil Application No. Nai 98 of 2013 [2014] eKLR*** in urging the court to grant an extension of time to file suit out of time. It was submitted that the court has a discretion to grant leave to file suit out of time to ensure that justice is done.

15. It was finally submitted on behalf of the Plaintiffs that the preliminary objection raised by the 1st Defendant was merely a tactic employed for the purpose of escaping legal liability in this suit. The Plaintiffs, therefore, urged the court to dismiss the preliminary objection and to allow the suit to proceed to full hearing.

16. The nature of a preliminary objection was succinctly described by the court in ***Mukisa Biscuits Manufacturing Co Vs West End Distributors Ltd [1969] E.A 696*** as follows;

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

17. It was also affirmed in the said case that a preliminary objection cannot be raised where any fact has to be ascertained or investigated or when what is sought is the exercise of judicial discretion.

18. Applying the above test to the instant case, the court is satisfied that the 1st Defendant’s plea of limitation is a preliminary objection within the contemplation of the law and shall be considered as such. However, the plea that there is no cause of action disclosed against the 1st Defendant is not strictly a preliminary objection. This is because the 1st Defendant has submitted that the Plaintiffs had failed to demonstrate or substantiate that the properties in dispute were part of clan land. These are matters which would require investigation of facts. Evidence would have to be tendered to either prove or disprove the allegation. If, however, the 1st Defendant had submitted that because the Plaintiffs’ suit was statute barred there was no cause of action against him that may well have constituted a preliminary objection.

19. The court will, therefore, proceed to examine the plea of limitation. The limitation period as set out in ***section 7 of the Limitation of Actions Act (Cap 22)*** (hereinafter referred to as “the Act”) has already been quoted hereinbefore. An action for recovery of land must be instituted within a period of 12 years from the date of accrual of the cause of action.

20. It must be remembered that the provisions of ***section 7*** are subject to the provisions of part III of the Act which provides for extension of the limitation period in case of disability, fraud and ignorance of material facts. The material provisions of ***section 26*** of the Act provide that;

“Where, in the case of an action for which a period of limitation is prescribed, either –

a) The action is based upon the fraud of the Defendant or his agent, or of any person through whom he claims; or

b) The right of action is concealed by the fraud of any such person as aforesaid; or

c) The action is for relief from the consequences of a mistake,

The period of limitation does not begin to run until the Plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it.”

21. The provisions of **section 22** of the Act are also relevant because they provide for extension of the limitation period in case of disability. It provides in material parts that;

“If, on the date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under disability, the action may be brought at any time before the end of six years from the date when the person ceases to be under disability or dies whichever event first occurs, notwithstanding that the prescribed period of limitation has expired.”

22. The court has considered the Plaintiffs’ amended plaint herein. The court has noted that none of the matters contained in part III of the Act were pleaded. It was not pleaded that the Plaintiffs or Mugwe clan were under any disability in the past and no particulars of disability were pleaded. No fraud, mistake or ignorance of material facts was pleaded hence no particulars thereof were given. Simply put, the provisions of part III of the said Act were not invoked.

23. A perusal of the amended plaint reveals that the Plaintiffs are impliedly relying upon ignorance of material facts. It was pleaded in paragraph 7 of the amended plaint that on 9th June 2016, the Plaintiffs conducted a search at the Land Registry and “discovered” that the land in dispute was registered in the names of the 1st, 2nd and 3rd Defendants. The impression sought to be created was that the Plaintiffs or Mugwe clan were unaware prior to 2016 that the suit properties had long been registered in the names of other persons.

24. If the clan was given the land in dispute in 1969, why would the clan members conduct a search to ascertain its ownership 47 years later? What had prevented them from doing so all along? The answers to these and other questions are to be found in the submissions by the Plaintiffs’ counsel. It was submitted that the Plaintiffs were not as indolent as suggested by the 1st Defendant. It was submitted that the Plaintiffs had been following up on the matter since 1975 and had been pursuing it relentlessly for 3 decades. They only engaged an advocate in 2016 to take their quest for justice to a judicial forum. If that be the case, then the Plaintiffs and their clan knew all along what had been going on or, with due diligence, could have ascertained the status of ownership before expiry of the limitation period.

25. The court is satisfied that any cause of action in favour of the Plaintiffs or the clan on whose behalf they have sued in relation to parcel No. 1117 accrued at least by 12th September 1997 when the said property was registered in the name of Nyaga Mumano. The prescribed limitation period therefore lapsed on or about 11th September 2009.

26. The Plaintiffs submitted that this court has jurisdiction and discretion to grant leave for filing of the suit out of time. The Plaintiffs relied on the case of **Aviation Cargo Transport Support Ltd Vs St Mark Freight Services Ltd** (supra) in this regard. The court has examined that authority and noted that it relates to an application for extension of time to file and serve a record of appeal out of time in an intended appeal. It has nothing to do with an application for extension of time to file a suit out of time under the Act. It should be borne in mind that there is no formal application before me for extension of time. There is a specific procedure provided for under the Act which has not been invoked by the Plaintiffs. Be that as it may, it is doubtful if such application would see the light of day in view of the Court of Appeal decision in **Mary Osundwa Vs Nzoia Sugar Company Ltd Kisumu Civil Appeal No. 244 of 2000 (2002) eKLR** cited by the counsel for the 1st Defendant. The Court of Appeal affirmed that the law does not provide for extension of time in claims other than those specified in section 27 of the Limitation of Actions Act. Accordingly, the Court of Appeal held that Osiemo J (as then was) had no jurisdiction to grant an extension of time in a case of breach of contract.

27. The court is not satisfied that any of the provisions of the Constitution of Kenya and the Civil Procedure Act would entitle this court to sustain a suit which is clearly statute barred. In my view, the question of limitation of actions is not merely a technical or procedural issue but a matter of substantive law. Once a right of action has been extinguished by operation of a written law, it cannot be revived under the principle of overriding objective of the court. The right of access to justice, the right to own

property and the right to a fair hearing must relate to claims which are not statute barred.

28. The upshot of the foregoing is that the 1st Defendant's preliminary objection on limitation of actions is found meritorious and the same is hereby allowed. Consequently, the Plaintiff's suit as against the 1st Defendant is struck out with costs. The 1st Defendant's counterclaim against the 4th Defendant shall, however, be heard and determined in the normal manner. The Plaintiff's suit against the 2nd – 8th Defendants still remains until challenged in an appropriate manner.

29. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **18th day** of **JANUARY, 2018**.

In the presence of Mr Okwaro for the 1st Defendant, Ms Muriuki holding brief for Mr. Ithiga for the 2nd – 8th Defendants and in the absence of the Plaintiff.

Court clerk Leadys.

Y.M. ANGIMA

JUDGE

18.01.18