



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

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

JOHN GATUMU NYAGA.....1ST 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 2nd to 8th Defendants 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*.

6. The 1st Defendant's preliminary objection was determined vide a ruling dated 18th January 2018 whereby the court held that the Plaintiffs' suit was statute-barred under the **Limitation of Actions Act (Cap 22)**. The suit against the 1st Defendant was consequently struck out with costs.

7. By a notice of preliminary objection dated and filed on 22nd January 2018 the 2nd – 8th Defendants raised the following objections;

- a. That the Plaintiffs' suit is statute barred and offends the provisions of sections 4(1) and 7 of the Limitation of Actions Act (Cap 22 Laws of Kenya).
- b. That the Plaintiff's suit is *res judicata* and offends the mandatory provisions of section 7 of the Civil Procedure Act.
- c. That the Plaintiffs suit discloses no valid cause of action against the 2nd – 8th Defendants and the suit as filed ought to be struck out with costs.

8. The matter was fixed for hearing of the said preliminary objection on 13th March 2018 when only the advocates for the 2nd – 8th Defendants were present. The Plaintiffs' advocate did not attend court despite service. The 2nd – 8th Defendants opted to canvass the said preliminary objection through written submissions whereupon the matter was fixed for ruling on 18th October 2018.

9. The court has considered the said notice of preliminary objection against the material on record. The court has also considered the submissions filed on behalf of the 2nd – 8th Defendants. There were no submissions on record on behalf of the Plaintiff at the time of preparation of this ruling.

10. It would appear from the record that there has been a protracted legal battle between Muruga and Mugwe clans over ownership of the suit properties. The suit properties appear to have been subjected to the land adjudication process under the provisions of the **Land Adjudication Act**. The ensuing objections were handled by the relevant institutions under the said Act. The matter finally ended up with the Minister by way of appeal under **section 29 of the Land Adjudication Act**. The ownership of Muruga clan was affirmed by the Minister.

11. It would further appear from the record that representatives of Mugwe clan, on whose behalf the instant suit was filed, were not satisfied with the outcome of the adjudication process. The record shows that there were some suits, judicial review proceedings and appeals which

were prosecuted challenging the ownership of the suit properties by Muruga clan and or its members. All those proceedings appear to have failed to change the result of the adjudication process. It would also appear that the suit properties were first registered on 12th September 1997 upon conclusion of the appeal to the Minister.

12. The first objection relates to the statutory limitation period. There is no doubt that under **section 7 of the Limitation of Actions Act (Cap 22)** the limitation period for a claim for recovery of land is twelve (12) years from the date of the accrual of the cause of action. The court is, therefore, satisfied that the prescribed limitation period expired on or about 11th September 2009. The instant suit, having been filed on 4th July 2016, was clearly statute-barred.

13. The second objection relates to *res judicata*. It was submitted that the instant suit is *res judicata* on account of previous legal proceedings between representatives of the two clans i.e. Murugu and Mugwe. The court has seen some scanty material on record in relation to such previous proceedings. The Defendants did not provide copies of all the pleadings of the previous proceedings. They only provided copies of the rulings and judgements.

14. In those circumstances, the court is unable to determine if the matters directly and substantially in issue in the instant proceedings were also the same matters which were directly and substantially in issue in the previous proceedings. The court has also noted that none of those suits were heard and determined on the merits since they were struck out or dismissed in *limine*. The court is, therefore, unable to uphold the second preliminary objection.

15. The third objection is to the effect that there is no valid cause of action against the 2nd and 8th Defendants. To the extent that the suit is statute barred under the **Limitation of Actions Act**, the court agrees that there is no reasonable cause of action against the Defendants. The court also notes that no fraud or illegality has been pleaded or particularized against the 2nd – 8th Defendants. There is no reasonable prospect that their respective titles can be impeached at the trial.

16. The upshot of the foregoing is that the court finds merit in and upholds the first and 3rd objections in the notice of preliminary objection dated 22nd January 2018. The Plaintiffs' suit against the 2nd – 8th Defendants is consequently struck out with costs. For the avoidance of doubt, the 1st Defendant's counterclaim against the 4th Defendants still subsists.

17. It is so decided.

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

In the presence of Mr Okwaro for the 1st Defendant, Mr Ithiga for the 2nd – 8th Defendants and in the absence of the Plaintiffs.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

18.10.18