



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 87 OF 2017

PHYLIS KATOTI MAINGI

- PLAINTIFF/APPLICANT

VS

MWANA WIKIO CO-OPERATIVE SOCIETY - DEFENDANT/RESPONDENT

RULING

1. The Plaintiff commenced action by way of Plaint filed on 2/11/2016. Together with the Plaint, the Plaintiff also filed a Notice of Motion of even date. The Plaintiff sought an order of compensation by the Defendant with land equivalent to 7.5 acres lawfully taken from the Plaintiff's land by Kenya Power Limited Company way-leave line.
2. The Notice of Motion sought interlocutory orders restraining the Defendant from subdividing, alienating, selling and/or transferring with LR No. 305, the mother title to MITUBIRI/NANGA BLOCK 1/16 (MWANA WIKIO). The Notice of Motion is supported by the grounds itemized therein. The Plaintiff anchored her Notice of Motion on her supporting affidavit filed on 2/11/2016. The Defendant responded by filing their Replying Affidavit dated 29/11/2016 together with annexures in support of its cause. On 19/12/2016 the Defendant filed its defence and alongside it filed a Preliminary Objection on the premise that the Plaintiff's suit is hopelessly time barred alleged cause of action having taken place more than 34 years ago. It is this Preliminary Objection that is the subject of this ruling.
3. The Plaintiff is the administrator of the estate of Maingi Munyangi (deceased). The deceased was a member of the Defendant Society. It is alleged that the Defendant owned LR No 305 out of which 35 members were allocated land through balloting in 1982. The deceased together with the other 34 members were allotted through balloting 5 acres each. In 1989 the deceased obtained a title LR NO MITUBIRI/NANGA BLOCK 1/16 (MWANA WIKIO) measuring 6.536 Ha or approximately 15 acres in his name.
4. That the alleged parcel was encumbered by a KPLC way-leave for a 66kv High voltage electricity line which utilized 7.5 acres out of 15 acres. A surveyor's report dated 24/8/2010 has been annexed. On realizing that the powerline had taken up more than 7.5 acres, the Plaintiff did write to the Defendant on 28/6/2011 demanding compensation in terms of land equivalent to 7.5 acres the size of the land taken by the way leave.
5. The Plaintiff sought the Interlocutory injunction against the Defendant not to subdivide, alienate, sell or transfer the LR No. 305, the mother title until the Plaintiff is compensated with land equivalent to 7.5 acres.
6. In its Replying Affidavit, the Defendant admitted that the deceased (applicant's husband) was its member and was indeed allocated 15 acres of land in 1982 and issued with a title LR NO

MITUBIRI/NANGA BLOCK 1/16 in 1989. That the 35 members of the Defendant were casual workers who were gifted land by their then employer, Mutubiri Coffee Company Limited who owned the land initially.

7. That the way leave cut across the entire estate involving all the other 34 members parcels. That LR No. 305 was subdivided and allocated fully to the members of the Defendant Society and there is not a single parcel remaining. Notwithstanding the Defendant pleaded that the suit is time barred as the cause of action arose 36 years from the date of allotment in 1982.

8. The other objection by the Defendant is that the suit herein was filed out of time and no leave of the Court was sought and obtained, leaving the application bad in law and an abuse of the process and should be dismissed.

9. The learned counsel of the Plaintiff Mr. Muturi Njoroge in opposing the Preliminary Objection submitted that the cause of action in this matter arose 6 years when the Defendant started subdividing the remainder of LR No 305 but failed to compensate the Plaintiff with additional 7.5 acres of land in *lieu* of the way leave to meet the Plaintiffs full entitlement of 15 acres. He averred that it is not true that the cause of action arose 34 years ago. He submitted that when the Defendant failed to compensate the Plaintiff in 2011 at the time of the final subdivision of the mother title L.R No 305. That the Plaintiff filed a claim at the Cooperative Tribunal Case No 352 of 2011 to pursue her claim. On 15/4/16, the tribunal ruled that the matter be referred to ELC Court and on 2/11/16 this suit was filed. That, according to the Plaintiff time running when the further subdivision of LR No. 305 was finalized in in 2011.

10. The learned Counsel for the Defendant submitted that the way-leave on the suit land was granted by Mitubiri Coffee Company Limited, the original owners of the suit land in 1958 before the land was gifted to the Defendants' 35 members. That since 1982/1989 when the applicant's husband balloted for the plot and obtained title respectively he never raised any objection. He contends that the cause of action arose on 22/7/82 at the balloting. That the claim of the plaintiff is therefore time barred. The Defendant relied on the case of **Benjamin Wachira vs. Public Service Commission & Anor 2014 (eKLR)** and **John Muranja Mahinda vs. Virginia Nyambura Ndiba & Anor 2014 (eKLR)** to support its position. That the Plaintiff slept on her rights and that section 7 of Limitation of Actions Act Cap 22 has defeated that right since 34 years has expired. That the Plaintiff ought to have sought leave to file this case and therefore should be dismissed.

11. Section 7 of the Limitations of Actions Act Cap 22 states as follow; -

“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”.

It is the Defendants case that the notice of Preliminary Objection shows that the suit is time barred and are in contravention of the above section.

12. It is not in dispute that the LR NO MITUBIRI/NANGA BLOCK 1/16 belonged to the Applicant's husband (deceased) having been allocated by balloting in 1982 and obtained a title in 1989. It is the Defendant's submission that the cause of action arose on 1982, 34 years ago. The Plaintiff position is that the cause of action arose in 2011 when the Defendant was carrying out further subdivisions on plot 305 belonging to the Defendant. Quoting the Defendants Replying Affidavit dated 29/11/16, on Para 9, the Plaintiff states that the subdivisions were approved by the Thika District Surveyor on 25/5/15. I have examined the said mutation form and noted that it does not refer to LR No. 305 but to LR No 761 as stated in the Plaintiffs pleadings. This title in my view is different from the mother title LR No 305 and no foundation has been laid to give the nexus between the mother original title on the one hand and L.R No 761 and the suit property on the other.

13. The law on Preliminary Objection is settled. Preliminary Objection is defined in **Mukisa Biscuit Manufacturing Company Limited vs. West End Distributors (1969) E.A 696** that a Preliminary

Objection if raised in limine must be in the nature of a demurrer. It must be a pure point of law to be argued on assumption that all facts pleaded by the other side is correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.

14. An evaluation of the case before me is that the mother title LR No 305 belonged to the Mutubiri Coffee Company Limited which granted a way-leave to the Kenya Power Company Limited in 1958. The details of the way leave agreements were not furnished to the Court to be able to appreciate the terms of the same suffice to state that the Way leave is presumed to be in perpetuity. The Mutubiri Coffee Company Limited gifted the said land to the defendant Cooperative Society for distribution to its 35 former employees where each one of them was to be and were allotted 15 acres each. In 1982, the Plaintiffs husband balloted and got his 15 acres comprised in LR NO MITUBIRI/NANGA BLOCK 1/16. He acquired title in 1989. The Plaintiff succeeded her husband's estate. It is deemed that KPLC right of way leave was intact and subsequent land owners including the plaintiff and her husband acquiesced to that right. The right of a wayleave is an overriding interest in land as specifically provided for under section 28 of the Land Registration Act. She therefore took the land with the encumbrance present. The merits of this will be dealt with in the trial.

15. I understand the Plaintiffs case to be that the suit land is intact only the KPLC power lines overpass 7.5 acres of the land. The whole of 15 acres is still under her ownership. She does not state when this came to her knowledge or when she discovered it. She did commission a surveyor (see report dated 24/8/2010) to assess the suit land. In other words, she contends that 7.5 acres of her land is encumbered with the KPLC way-leave and wants the defendant to compensate her with equivalent land. As stated earlier she is still the owner of the entire suit land. It has not been disposed from her.

16. As stated above a Preliminary objection succeeds only and purely if it is on a point of law. The Plaintiffs claim against the defendant is for compensation with land. There are a number of matters that on the face of it requires the Court to inquire such as whether her claim is based on limitation of time and if yes, to arrive at a decision it must be shown that time started running from point A to B; whether the plaintiffs claim is on recovery of land or compensation with land? If recovery of land, then which land did time started running so as to found a basis for time bar?.

17. On the basis of the above it is obvious that the Preliminary objection fails and the same is dismissed with costs to the applicant.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 28TH DAY OF SEPTEMBER 2017.

J.G. KEMEI

JUDGE