Maya Investments Limited v Mutuya Holdings Limited & 3 others (Civil Appeal 85 of 2019) [2025] KECA 629 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KECA 629 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 85 OF 2019

DK MUSINGA, F SICHALE & FA OCHIENG, JJA

APRIL 4, 2025

BETWEEN

MAYA INVESTMENTS LIMITED ..... APPELLANT

AND

MUTUYA HOLDINGS LIMITED ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

CHIEF REGISTRAR OF TITLES ..... 3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 4TH RESPONDENT

(Being an Appeal from the Ruling of the Environment and Land Court of Kenya at Nairobi (Obaga, J.) dated 26th November 2018) in Milimani ELC Case No. 443 of 2012)

JUDGMENT

1. Maya Investments Limited (the appellant herein), has preferred this appeal against the Ruling and Orders of Obaga, J dated 26th November 2018, in which the learned judge dismissed Milimani ELC Suit No. 443 of 2012 that had been filed by the appellant against the respondents for being statute barred.

2. A brief litigation history in this appeal is that vide an amended plaint dated 12th April 2018, the appellant filed suit against the respondents seeking, inter alia, an order of eviction against the 1st respondent from all that parcel of land known as L.R No. 9042/605 (hereinafter the suit property), and a further order directing the 1st respondent to demolish any temporary and/or permanent structures built on the suit property.

3. It was the appellant's case that it was the lawfully registered owner and proprietor as Grantee from the Government of Kenya of the suit property, and that the 1st respondent had without any colour of right

whatsoever, claimed and taken physical possession of the suit property and threatened to continue being in possession thereof, thereby violating, infringing and/or denying the appellant its right to absolute ownership, possession, enjoyment and use of the suit property to its detriment.

4. Before the suit could be heard on its merits or otherwise, the 1st respondent vide an application dated 29th January 2018, sought an order to strike out the suit on the ground that it was time barred.

5. It was the 1st respondent's contention that the cause of action in favour of the appellant arose on 15th August 1996, when the Commissioner of Lands informed the appellant that the Grant it held was erroneously given and the same was a nullity.

6. The 1st respondent thus contended that the appellant was seeking to recover the suit property from the 1st respondent, which suit was statute barred.

7. As stated above, on 26th November 2018, Obaga, J. allowed the 1st respondent's application dated 29th January 2018. He found the appellant's suit to be statute barred and struck it out, with costs to the 1st and 3rd respondents.

8. It is that ruling of 29th January, 2018 that has now precipitated the appeal that is before us vide a Notice of Appeal dated 7th December 2018 and a Memorandum of Appeal dated 4th March 2019 in which the appellant raised 9 grounds of appeal as follows:

> " a. The judge erred in law and fact by finding that the only issue for determination was whether the plaintiff's suit was time barred based on a letter dated 15th August 1996.
>
> b. The judge erred in law and fact by failing to find that the letter of 15th August 1996 had been superseded by the Commissioner of Lands letter dated 24th August 2011 that confirmed that the suit property was lawfully owned by the plaintiff.
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> c. The learned judge erred in law and in fact by holding that the 2nd respondent's letter dated 15th August 1996 could lawfully revoke a valid registration title issued to the plaintiff who had established the legality of acquisition.
>
> d. The judge erred in law and fact by failing to find that the Amended Plaint was filed with the consent of the parties and that the 2nd to 4th respondents never filed any Defence to the Amended Plaint.
>
> e. The judge erred in law and fact by failing to find that the failure by the 2nd to 4th defendants in responding to the material facts raised in the Amended Plaint at paragraphs 15, 16, 18 and in the reliefs amounted to an admission and failure to file any responses did not amount to a lawful traverse.
>
> f. The judge erred in law by striking out the Amended Plaint that raised triable issues and causes of action that should be ventilated at the trial.
>
> g. The judge erred when he misapplied the law of limitation by striking out the Amended Plaint which in effect amounted to disenfranchising the plaintiff's constitutional right to own property and the right to a fair trial.
>
> h. The judge erred in law by striking out the Amended Plaint when there was no lawful order cancelling the plaintiff's title to the suit property.

i. The learned judge erred in law by failing to address himself to the pleadings, evidence and submissions filed by the plaintiff."

9. When the matter came up for plenary hearing on 16th December 2024, Mr. Allen Gichuhi, Senior counsel, appeared for the appellant, whereas Mr. Kabaiku appeared for the 1st respondent. There was no appearance for the 2nd and 3rd respondents. Miss Njuguna appeared for the 4th respondent.

10. Mr. Gichuhi sought to rely on his written submissions and supplementary submissions dated 22nd July 2019 and 10th December 2024 respectively, whereas Mr. Kabaiku and Miss Njuguna relied on their written submissions dated 25th September 2019 and 27th September 2024 respectively, which they orally highlighted.

11. The appellant in its submissions sought to coalesce its grounds of appeal into 3 main grounds as follows:

"a. Whether the appellant's claim was statute barred?

b. Whether the court failed to consider the evidence proving that the appellant has a legal title to the suit property?

c. Whether the plaintiff's Amended Plaint raised triable issues for determination at the trial?"

12. Turning to the first issue, it was submitted that the learned judge erred in law when he found that the appellant's suit was statute barred by dint of section 7 of the *Limitation of Actions Act* (the Act), as the said section was limited to applications for adverse possession only and the suit in question was not one for recovery of land but a claim for trespass occasioned by the 1st respondent. Further, that an action for trespass to land was distinct from an action for recovery of land as envisaged in section 7 of the Act.

13. It was thus submitted that the 1st respondent's act of encroaching on the appellant's property amounted to a continuing trespass and was not time barred, as time in a continuing tort starts to run afresh every day that the act of trespass is committed. For this proposition, reliance was placed on the case of Isaack Ben Mulwa vs. Jonathan Mutunga Mweke [2016] eKLR.

14. It was further submitted that in any event, time starts running as against the registered owner of land from the date of actual trespass being the date that the 1st respondent encroached into the land and started carrying out construction works and not the date of receipt of the letter dated 15th August 1996 in which the Commissioner of Lands purported to nullify the appellant's title.

15. Regarding the issue as to whether the court failed to consider the evidence proving that the appellant had a legal title to the suit property, it was submitted, inter alia, that the Director of Surveys had by a letter dated 4th July 2011 confirmed to the Commissioner of Lands that FR No. 244/51 (Deed Plan Number 175175), the basis of the claim by the 1st respondent had been cancelled and replaced with FR No. 294/86 (Deed Plan Number 202824) which was the current Deed Plan for the suit property.

16. That, further, the Commissioner of Lands vide a letter dated 24th August 2011, had confirmed that the L.R No. 9042/605 I.R No. 68437 was duly registered in the appellant's name and that most importantly, the gist of the suit was a contestation on the validity of the title and that by striking out the suit, the judge made a fatal error in judgment by denying the appellant a fair hearing to prove that under Article 40 of *the Constitution* it held a valid title whilst that of the 1st respondent was invalid.

17. Lastly, it was submitted that the learned judge erred by confining himself to only one issue namely, whether the appellant's suit was time barred to the exclusion of other issues that had been raised by the appellant.

18. It was submitted that the judge erred by failing to consider several triable issues as set out in the Amended Plaint, inter alia; whether the 2nd respondent could revoke title without being directed by the court to do so; whether the 1st respondent was the rightful registered owner and/or proprietor of all that parcel of land known as L.R 9042/605; whether the 1st respondent's title was valid; whether failure by the 2nd to 4th defendants to respond to the material facts raised in the Amended Plaint and in the reliefs amounted to an admission and finally, whether the appellant was entitled to the various reliefs set out in the Amended Plaint.

19. In view of the foregoing, it was thus submitted that the appellant's right to a fair trial had been violated, noting that the suit was not time barred. Consequently, we were urged to allow the appeal as prayed.

20. On the other hand, it was submitted for the 1st respondent that the appellant's suit was time barred for reasons, inter alia, that the cause of action began to run in the year 1996 as the appellant was informed by the 3rd respondent vide a letter dated 15th August 1996, of a competing claim over the suit property and that it made no demand whatsoever or inquiry to the 3rd respondent, nor did it file a suit or raise any claim of a proprietary interest over the suit property.

21. It was thus submitted that the competing interest over the suit property was made known to the appellant on 15th August 1996, whereas the suit giving rise to this appeal was filed on 24th July 2012, when the cause of action had become statute barred, warranting it's striking out as it clearly offended section 7 of the Act.

22. It was submitted that even if the appellant was to succeed in establishing a case of trespass against the 1st respondent (which was denied), the same should have been commenced within three years from 15th August 1996 when the competing interest over the suit property was made known to the appellant, trespass being a tort that squarely falls under the *Limitation of Actions Act*.

23. It was therefore submitted that even the claim for trespass was still time barred and ought to be dismissed with costs, leave having not been obtained before the filing of the claim.

24. It was submitted that the amendment of the plaint by the appellant did not cure the suit from being statute barred as the amended plaint sought, inter alia, a declaration that title registered as Grant Number I.R 59731 and Deed Plan 175175 were null and void and a further order directing the 1st respondent to return the original titles thereof to the 2nd respondent for cancellation. It was thus submitted that the amendments did not affect the issue of the suit being statute barred.

25. It was further submitted that even if the appellant was to succeed in establishing a case against the 1st respondent (which was denied), the 1st respondent acquired and held an indefeasible title over the suit property, and that when the appellant applied to the Commissioner of Lands for allocation of the suit property on 26th January 1996, the suit property was not available for allocation as the land had already been acquired by the 1st respondent and a Grant issued in 1993.

26. Consequently, it was submitted that the appellant was undeserving of the orders sought and we were urged to dismiss the appeal with costs to the 1st respondent.

27. On the other hand, the 4th respondent, while associating itself with the submissions by the 1st respondent, submitted that the appellant had received a letter from the Commissioner of Lands on

15th August 1996 nullifying its title to the suit property, and that the appellant did not institute the suit for recovery of the same until 24th July 2012, a period of over 16 years.

28. It was thus submitted that the issue of limitation was grave and it warranted the trial Court to strike out the appellant's suit. For this proposition, reliance was placed on the case of Margaret Wairimu Magugu v Karura Investments Limited & 4 Others ELC Case No. 159 of 2017.

29. We have carefully considered the record, the grounds of appeal, the rival submissions by the parties, the cited authorities and the law. This being a first appeal, our duty as stipulated under rule 31 of the Rules of this Court is to re-evaluate and consider afresh the evidence tendered before the trial court and come to our own independent conclusion.

30. This duty was reiterated in Abok James Odera t/a A.J Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR where this Court pronounced itself as follows: -

31. Having carefully perused the record and the rival pleadings by the parties, it is evident that only one main issue arises for our determination namely; "whether or not the appellant's suit was time barred".

32. It is common ground that vide an Amended Plaint dated 12th April 2018, the appellant filed suit against the respondents herein seeking, inter alia, an order of eviction of the 1st respondent from the suit property and a further order directing the 1st respondent to demolish any temporary and/or permanent structures on the suit property.

33. The appellant further sought a permanent injunction restraining the 1st respondent, whether by itself, its employees, servants and/or agents or otherwise, howsoever interfering in any manner with the suit property.

34. Further and in the alternative, the appellant sought an order of indemnification against the 2nd and 3rd respondents, jointly and severally, for the market value of the suit property to be determined by a current valuation.

35. It is therefore evident that the appellant's suit was not based only on a claim for recovery of land as the learned judge seemed to suggest when he stated in his ruling:

> " In the documents filed by Maya Investments, the company admits receiving the letter dated 15th August 1996, which informed them that the grant they held was a nullity as there was already an existing grant in favour of Mutuya Holdings which was given in 1993. If Maya Investments wished to file a case for recovery of the suit property, they had 12 years within which to do so. They did not do so. The first attempt for recovery was in 2010. By this time twelve years had elapsed. This suit was filed in 2012 after expiry of the twelve year period granted."

36. In our considered view, the learned judge fell into error when he arrived at the conclusion that the appellant's suit was entirely hinged on a claim for recovery of land, and more so, relying on the letter dated 15th August 1996 from the Commissioner of Lands purportedly revoking the appellant's title as there was another letter dated 24th August 2011, again from the Commissioner of Lands confirming that the suit property was duly registered in the appellant's name.

37. In our view, the controversy regarding the issue as to who had a valid title could only have been resolved by allowing the matter to go to full hearing to allow the parties adduce evidence in respect of their respective positions.

38. From the pleadings on record, it is evident that the appellant's suit was based on a claim for continuous trespass where it had even sought punitive and exemplary damages. Additionally, it is evident that the learned judge did not take into account that there were other prayers sought in the Amended Plaint other than "a declaration that the appellant was the lawfully registered owner and/or proprietor of the suit property."

39. We are of course mindful of the fact that we cannot make definitive findings as to whether the appellant was able to prove his claim for trespass as that would be the primary role of the trial court which will be seized of the matter.

40. It is also not lost on us that the Grant held by the appellant in respect of the suit property had initially been allotted and registered in the name of the 1st respondent on 29th July 1993.

41. Subsequent to that, on 26th January 1996, the appellant was allotted the same suit property vide allotment letter reference number 149392 which was subsequently nullified by the then Commissioner of Lands on 15th August 1996. Again, vide a letter dated 24th August 2011; the Commissioner of Lands confirmed that the suit property was duly registered in the appellant's name.

42. In light of these contestations as to which party held a valid title, it is our considered opinion that it would only be fair to have the parties have their day in court and adduce evidence to advance their respective positions so that all the contested issues can be addressed once and for all. Clearly this was a deserving case that called for a full hearing.

43. In our view, we think we have said enough to demonstrate why the appellant's appeal is for allowing. Accordingly, we set aside the ruling and all the consequential orders issued by Obaga, J. on 26th November 2018. We further direct that this matter be remitted to the Environment and Land Court for full hearing and determination on a priority basis before any judge of the ELC other than Obaga, J.

44. The costs of this appeal shall abide the outcome of the main suit before the Environment and Land Court.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF APRIL, 2025.

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR