Njenga v Mugo & 3 others (Civil Appeal 145 of 2018)
[2023] KECA 18 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KECA 18 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 145 OF 2018

F SICHALE, FA OCHIENG & LA ACHODE, JJA

JANUARY 26, 2023

BETWEEN

PETER KIMANI NJENGA ..... APPELLANT

AND

MUGO KAMABUNI MUGO ..... 1ST RESPONDENT

MARY NJERI KABUKI ..... 2ND RESPONDENT

PAUL MUGANE KABUKI ..... 3RD RESPONDENT

DISTRICT LAND REGISTRAR LAIKIPIA ..... 4TH RESPONDENT

(An Appeal from the Ruling of the Environment and Land Court at Nyahururu (M.C. Oundo, J.) dated 26th June, 2018 in ELC Case No. 261 of 2017)

JUDGMENT

1. Before us is an appeal arising out of the ruling in Nyahururu ELC case No 261 of 2017. The respondents had filed a preliminary object against a suit filed by the appellant urging the trial court to dismiss the suit as it offended section 7 of the *Limitation of Actions Act*. The learned Judge after hearing both parties ruled that the court lacked jurisdiction since the suit was time barred under the *Limitation of Actions Act*.

2. The appellant being dissatisfied with the ruling of the trial court has preferred this appeal seeking to alter the trial court's decision. The appellant raises five grounds of appeal which we reproduce verbatim as herein under:

    i. The learned Judge erred in law, and in fact by allowing the defendants' objection without considering that time started running from the date of ruling of the tribunal;

ii. The learned Judge erred in law and in fact that this being a land matter, *Limitation of Actions Act* stipulates that a suit has to be filed within 12 years and not 3 years;

iii. The learned trial judge erred in law and fact by not considering that time started running after the appellant filed this matter with the tribunal;

iv. The learned Judge erred in law and facts by not considering the plaintiff's reply to the objection;

v. That the appellant was not given a chance to mitigate."

3. Consequently, the appellant seeks this Court's intervention for two prayers, namely, the ruling of the trial court be set aside and stay of execution be granted in Nyahururu ELC No 261 of 2017 and the matter proceed to full hearing, and second, that the appellant be awarded the costs of this appeal and of the trial before the Environment and Land Court.

4. Before we delve into the submissions by parties, perhaps it is prudent that we highlight the historical background of this matter since the timelines will be of importance in rendering our decision. The genesis of this matter is in 1983, when the appellant allegedly entered into a contract with one Francis Weru Gichobu for the purchase of the disputed piece of land. In 1998, the Mr Francis Weru Gichobu signed transfer documents in favour of the appellant. During all this time, the title to the disputed land was registered in names of Laikipia West Farmers Co. Ltd, where Francis Weru was a member. In 1992, the title to the disputed parcel was registered in the names of the 1st respondent. In 1993, the 1st respondent sold the disputed parcel of land to the estate currently administered by 2nd and 3rd respondents.

5. Fast forward to 2007, when the appellant filed a case with the Laikipia West, Rumuruti Division Land Disputes Tribunal seeking to recover the disputed land. The tribunal ruled in favour of the appellant. In 2009, the 2nd and 3rd respondents filed a Judicial Review Application at the Nakuru High Court where the court quashed the decision of the Land Disputes Tribunal for want of jurisdiction. Subsequently, the appellant filed Nakuru ELC No 274 of 2016 which was transferred to Nyahururu and was serialized as Nyahururu ELC No 261 of 2017. This is the file under which the appeal arises from.

6. Back to the proceedings before this court. This matter was canvassed by way of written submissions. The appellant's submissions were received in the registry on October 7, 2021. The appellant submitted that there were two different parcels of land in question in this matter. He referred the Court to parcels number Marmanent/North Rumuruti Block 2/1889 which he alleged to have purchased for value from Laikipia West Farmers Co Ltd member No 11759.

7. It is his submissions that the said parcel is different from that which should be owned by the respondents which is Marmanent/North Rumuruti Block 2/1890 which he alleged to have purchased for value from Laikipia West Farmers Co Ltd member no 11758. He also submits that the alleged fraud originated from a letter by the Chairman of the Laikipia West Farmers Co Ltd and the subsequent transfer of title by the Registrar of Lands. It is his further submission that his view herein is also supported by the findings of the Laikipia District Officer who, upon perusing the available documents, found the land to be his.

8. The appellant also submits that the judgments of the High Court at Nakuru and Nyahururu did not give due consideration to section 3(3) of the *Land Disputes Tribunal Act* and the current *Environment and Land Court Act* which gave the Tribunal the mandate to hear and determine the dispute. He submits that the decision of the Tribunal ought to have been upheld by the High Court. He also challenged the High Court's application of section 26 of the *Limitation of Actions Act* arguing that the

same could only have applied as from the time when he learnt of the fraud and not when the fraud was committed. It is the appellant's plea that his appeal be allowed, the cost be provided for and the judgment of the High Court be set aside.

9. Counsel for the respondent filed submissions dated September 21, 2022.

Counsel set off by reiterating their reliance on the submissions filed before the Environment and Land Court in this matter. Further, and in addition to that, counsel placed reliance on *Alfred Mutuku Muindi v Rift Valley Railways Ltd* (2015) eKLR and *United India Assurance Co Ltd & 2 others v East African Underwriters (K) Ltd* (1985) eKLR to submit that the decision appealed against herein is one subject of a discretionary power of the ELC Court and that this Court should not interfere with the decision unless the conditions for such interference are met. Counsel submitted that the appellant has not established the existence of such conditions to warrant interference with the decision of the learned Judge of the ELC. It is counsel's submission that the learned Judge did not misdirect himself, or misapprehend facts but instead the learned Judge rightly took into consideration all the relevant and material factors in the case.

10. With regards to the appellant's assertion that the learned Judge failed to consider that the time with respect to limitation of time started running after the ruling of the Tribunal, the respondent submits that the learned Judge indeed took that into consideration. Counsel also argues that even if time were to run from the date when then tribunal delivered its ruling, the time would have lapsed in 2010. Therefore, the matter filed in 2016 would still be time barred. Counsel also submitted that time started running in 1993 when the appellant got hint of the alleged fraud. He further submits that the appellant ought to have resorted to section 27 of the *Limitation of Actions Act* to seek extension of time. To this end, counsel referred the Court to the decisions in *Alba Petroleum Ltd v Total Marketing (K) Ltd* [2019] eKLR.

11. Regarding the applicability of section 7 of the *Limitation of Actions Act*, counsel submitted that this was a matter involving allegations of fraud and therefore the said section was inapplicable. Counsel further argued that even if the said section was to be called into action, still the appellant was restricted to 12 years as from 1993, thus still rendering him time barred, the suit filed in 2016. On whether the appellant's response was taken into consideration, counsel submitted that the learned Judge took into consideration the submissions by the appellant in reaching his/her decision which appears at page 12 to 16 of the impugned decision. Counsel ended by urging this Court to dismiss this appeal with costs to the 2nd and 3rd respondents.

12. This appeal is before us as a first appellate court and our mandate herein is pursuant to rule 29(1) of the *Court of Appeal Rules, 2022*. In essence, we are required to independently reappraise the evidence and draw our own conclusions. We refer to the threshold set by the predecessor of this Court in *Peters v Sunday Post Limited* [1958] EA 424, stating that:

> "Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

13. We have carefully considered the record of appeal, the written and oral submissions, the authorities cited and the law. The main issue for determination is whether the suit lodged by the appellant in Nakuru ELC 261 of 2017 was time barred.

14. The learned Judge in the ruling to the preliminary objection raised by the respondents found that the trial court lacked jurisdiction since the suit was commenced outside the time prescribed under section 7 of the *Limitation of Actions Act*.

15. Further, it was the finding of the trial court that time started running on September 2, 1993 and therefore under section 4(2) of the *Limitation of Actions Act*, the time would have lapsed on September 2, 1996.

16. This Court has previously underscored the import of limitation of time for bringing actions in the case of *Gathoni v Kenya Co-operative Creameries Ltd* [1982] eKLR. The Court stated as follows:

> " The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done."

17. We are in agreement with the submissions by the 2nd and 3rd respondents which reflect the position as enunciated in the cases of *Alfred Mutuku Muindi v Rift Valley Railways Ltd* [2015] eKLR and *United India Assurance Co Ltd & 2 others v East African Underwriters (K) Ltd* [1985] eKLR. The issue herein was indeed one touching on jurisdiction of the trial court and was therefore a matter in which the learned Judge had to exercise his discretion. Therefore, in addressing this issue, we will consider whether the learned Judge misdirected himself or acted on matters that ought not to have been taken into consideration whether or not he failed to take into consideration some material factors.

18. What is a cause of action? This is a critical question that goes to the root of determining the time when time starts running. In *Attorney General & another v Andrew Maina Githinji & another* [2016] eKLR, this Court defined a cause of action in the judgment of Waki, JA As follows:

> " 8. A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint."

That definition was given by Pearson, J in the case of *Drummond Jackson v Britain Medical Association* [1970] 2 WLR 688 at pg 616. In an earlier case, *Read v Brown* [1889], 22 QBD 128, Lord Esher, MR had defined it as:-

> " Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court".

Lord Diplock, for his part in *Letang v Cooper* [1964] 2 All ER 929 at 934 rendered the following definition:-

> " A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.""

19. We adopt the definition above. We add that, simply put, a cause of action can be equated to actions of a defendant, based on facts which give rise to the plaintiff's complaints, which a court can act upon and render a remedy. For a court to identify the cause of action, the pleadings, (more so the plaint), is always the primary document. It reveals what cause of action exists in a claim lodged in court. In this case, the appellant has argued that the cause of action herein was one for recovery of land and not a tort

per se. This is basically the basis of the second ground of appeal as indicated in the memorandum of appeal. The 2nd and 3rd respondents on the other hand hold the view that this is a suit based on fraud and hence section 4(2) of the *Limitation of Actions Act* was applicable.

20. In the plaint dated July 4, 2016, the cause of action is fraud which was particularized as against all the defendants. Pursuant to section 7 and 13 of the *Limitation of Actions Act*:

> " C – Actions to Recover Land and Rent
>
> 7. Actions to recover land
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> 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.
>
> 13. Right of action not to accrue or continue unless adverse possession
>
> (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land. (Emphasis ours)"

21. We do not agree with the appellant's view that section 7 of the Act was applicable. A reading of section 13 of the *Limitation of Actions Act* clearly restricts the applicability of section 7 of the Act. As submitted by counsel for the respondent, the applicable section in the instant matter would be section 4(2) of the *Limitation of Actions Act* which provides that

> "An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued."

22. We therefore find no impropriety on the part of the learned Judge of the ELC in finding that the cause of action herein was that to which section 4(2) of the *Limitation of Actions Act* was applicable. The appellant's case was not one of adverse possession but one based on fraud.

23. Having said so, it therefore follows that the period within which the appellant ought to have put in motion his cause of action was 3 years as provided for under section 4(2) of the *Limitation of Actions Act*. The next question however is when the time started running. In answering this question, section 26 of the *Limitation of Actions Act* is relevant. The said section provides as follows:

> "
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> " 26. 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 his agent; 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 the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made." (Emphasis ours)

24. From the provisions of section 26, it is apparent that the time for limitation is set in motion at the time when an aggrieved party has discovered the fraud or mistake or when it is deemed that he ought to have reasonably and diligently discovered the fraud or mistake. Another notable condition set by section 26 is that the section is not applicable in situations where there is a bona fide purchaser for value of the land and who at the time of purchase, was not a party to or was not aware of the fraud.

25. From the record before us, it cannot be sufficiently established whether the case by the 2nd and 3rd respondents in the trial court established facts within which the court would invoke the exception under section 26 of the *Limitation of Actions Act*. That being the case, the benefit of such a doubt accrue to the appellant. It is therefore our view that section 26 is applicable to the appellant's case.

26. Bearing in mind the applicability of section 26 in mind, the next question is when did the appellant discover the existence of the cause of action in this case? The appellant's case is that he bought the suit land reference number Marmanet/North Rumuruti Block 2/287 (Ndurumo) in 1983 from one Mr Francis Weru Gichibu. In 1988, Francis Weru Gichibu executed transfer documents with respect to the said property in his favour even though the titles were yet to be issued. He later discovered that the sometime in 1992, the 1st respondent fraudulently acquired the property and later sold it to Josephat Kabuki Mwangi whose estate is now administered by the 2nd and 3rd respondents.

27. From the pleadings and the witness statements, it is not clear when the appellant came to learn of the alleged fraud. However, from the chronology of events and documents attached by the plaintiff, it would appear that his first complaint on this matter was before the District Officer which led to the letter by the District Officer at page 43 of the record of appeal. This is also acknowledged in the submissions by the appellant at paragraph 22. Even with that, the exact date is not certain, as the said letter is not dated.

28. Based on the foregoing, we are at crossroads in understanding how the learned Judge ascertained that the appellant discovered the fraud in 1993.

The learned Judge in reaching this conclusion relied on paragraph 10 of the plaint. However, in our view, the said paragraph sets out the particulars of when the land was transferred as opposed to when the appellant knew of the fraud. Based on the foregoing, we are only left with one option, to refer to the complaint before the Tribunal as the time when the appellant discovered the fraud; and that is 2007.

29. The other issue would then be whether time started running in 2007 when the matter was lodged with the Tribunal or, as submitted by the appellant, in 2016 when the Environment and Land Court quashed the decision of the Tribunal. In this regard, section 26 of the *Limitation of Actions Act* provides

that the time starts to run at the moment when the plaintiff (herein the appellant) has discovered fraud. It is our finding that the alleged fraud was discovered in 2007 and therefore that is the date when the time started running.

30. We do not agree with the appellant's view that time started running after the Judicial Review Application by the respondents was allowed. The judgment of the Judicial Review application is appealable in our jurisdiction. Failure to appeal against a judgment does not stop time from running. Failure on the part of the appellant to pursue his right of appeal in the Judicial Review matter did not in any way confer upon him special treatment, which could bar time from running. No appeal was preferred and therefore the matter rested at that.

31. This Court has on numerous times reiterated the fact that proceedings premised on a process which was a nullity were null and void. The decision of this court in *Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspaper Service* [2019] eKLR made that legal position clear. In that case, the Court cited with approval the pronouncement in the locus classicus case of Macfoy v United Africa Co Ltd [1961] 3 All ER, 1169 thus:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse..." (Emphasis ours)

32. Having stated that, we reiterate that since the time started running in 2007, the Appellant ought to have filed his suit by 2010. The suit filed in 2016 is therefore time barred. We therefore find no fault on the part of the learned Judge of the ELC in exercising his discretion as he did.

33. Finally, as submitted by the respondents, the appellant had an avenue available to him under section 27 of the *Limitation of Actions Act* to make an application for extension of time prior to filing his suit. We wish to reiterate that procedure is the hand maiden of the law. The import of provisions such as section 27 and the need to invoke and comply with them is to ensure that the judicial service is sieved and rendered to the most deserving. The judicial sieve works through these procedures to assess and take note of deserving cases. The judicial sieve must not be rendered redundant at the feet of indolence. Equity aids the vigilant, not the indolent. Article 159 of the *Constitution* cannot revive a claim that was dead on arrival.

34. In the result, we find that this appeal is devoid of merit and is for dismissal.

35. The final issue is with regards to who bears the costs of this appeal. The trial court made an award for costs in favour of the respondents. No reasons have been advanced before us and we also see no reason to interfere with the exercise of that discretion by the trial court. With regards to this appeal, we are seized of the jurisdiction to exercise our discretion with regards to costs. The ordinary rule in civil litigation and appeals is that costs are at the discretion of the court but most preferably, they should follow the event.

36. To deviate from this rule, there must be in existence special circumstances to warrant deviation. In this appeal, we do not see any special circumstances to warrant our deviation from the general rule as regards to costs. In the circumstances, we award the costs of this appeal to the 2nd and 3rd respondents. The 1st and 4th respondents did not take part in this appeal and will not benefit from the award of costs.

37. The upshot of the foregoing is that the appeal is without merit and is hereby dismissed. The appellant to pay the costs of this appeal, to the 2nd and 3rd respondents.

38. It is so ordered

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JANUARY, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR