



**Thuo & another (Suing as personal representative & administrators of the Estate of the Late Aphaxard Thuo Mugwe alias Alphaxard Thuu Mugwe) v Pentecostal Evangelistic Fellowship of Kenya & 3 others (Civil Appeal 188 of 2018) [2023] KECA 1063 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1063 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 188 OF 2018  
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA  
SEPTEMBER 22, 2023**

**BETWEEN**

**JULIUS MACHARIA THUO ..... 1<sup>ST</sup> APPELLANT**

**NANCY WANGUI MUGWE ..... 2<sup>ND</sup> APPELLANT**

**SUING AS PERSONAL REPRESENTATIVE & ADMINISTRATORS OF THE  
ESTATE OF THE LATE APHAXARD THUO MUGWE ALIAS ALPHAXARD  
THUU MUGWE**

**AND**

**PENTECOSTAL EVANGELISTIC FELLOWSHIP OF KENYA 1<sup>ST</sup> RESPONDENT**

**GRACE NYOKABI THUO ..... 2<sup>ND</sup> RESPONDENT**

**SAMUEL MBUTHIA KAMAU ..... 3<sup>RD</sup> RESPONDENT**

**THE LAND REGISTRAR MURANGA DISTRICT ..... 4<sup>TH</sup> RESPONDENT**

*(Being an Appeal from the decree and Judgment of the Environment and Land Court of Kenya at Murang'a, (J.G. Kemei, J.) dated 31st July 2018 in ELC Case No. 385 of 2017)*

**JUDGMENT**

1. The background of this appeal is as follows. The deceased Aphaxard Thuo Mugwe alias Alphaxard Thuu Mugwe died intestate on 9<sup>th</sup> September 1991. He was the registered proprietor of Loc. 5/ Githunguri/19, Makuyu/Kimorori/Block III/906 and Makuyu/Kimorori/ Block III/2236. During his life, he had two wives and 14 children. One of the wives was Sophia Wanjiku Thuo who was the mother of the 2<sup>nd</sup> respondent Grace Nyokabi Thuo. Sophia Wanjiku Thuo constituted the second



house. The 1<sup>st</sup> appellant Julius Macharia Thuo was from the first house. His late brother left a wife, Nancy Wangui Mugwe, who is the 2<sup>nd</sup> appellant.

2. Sophia Wanjiku Thuo died in 2008. Following the death of the deceased (her late husband) she got herself registered on 14<sup>th</sup> November 1996 as the proprietor of Makuyu/Kimorori/Block III/2236 which she transferred to the 2<sup>nd</sup> respondent on 9<sup>th</sup> April 2008. The 2<sup>nd</sup> respondent sold it to the 3<sup>rd</sup> respondent Samwel Mbutia Kamau. Sophia Wanjiku Thuo similarly got parcel Loc. 5/Githunguri/19 transferred to herself on 6<sup>th</sup> September 1995 after the deceased died. On 14<sup>th</sup> November 1996 land parcel Makuyu/Kimorori/Block III/906 was inexplicably transferred to the 1<sup>st</sup> respondent from the deceased.
3. The appellants are the administrators of the estate of the deceased. They sued the respondents before the Land and Environment Court (ELC) at Murang'a seeking to recover these parcels from the respondents whom they claimed had fraudulently become registered in respect thereof; that the parcels were the properties of the deceased and that, without there having been any succession proceedings, had been moved as indicated in the foregoing. A declaration was sought that any transfers and/or registrations following the deceased's death were fraudulent, null and void. An order of eviction was sought in respect of each parcel, and also an order of permanent injunction.
4. The 1<sup>st</sup> and 4<sup>th</sup> respondents (the 4<sup>th</sup> respondent being the Land Registrar Murang'a District) did not defend the cause. The 2<sup>nd</sup> respondent's defence was that land parcel Makuyu/ Kimorori/Block III/2236 had been lawfully transferred to her by her late mother, and that she had lawfully sold the same to the 3<sup>rd</sup> respondent. Her case was that following the death of the deceased her mother had lawfully inherited the parcels. The 3<sup>rd</sup> respondent's defence was that he was the bonafide purchaser of this parcel for valuable consideration and without notice; that he had conducted a search at the Lands Registry and confirmed that the parcel belonged to the 2<sup>nd</sup> respondent; and that the title had no encumbrances.
5. The record shows that the 1<sup>st</sup> appellant testified on his behalf and on behalf of the 2<sup>nd</sup> appellant. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents each testified to defend the cause. Counsel for these parties filed written submissions. On 31<sup>st</sup> July 2018 the learned Judge (J.G. Kemei, J.) returned a verdict dismissing the claim on the basis that, under section 7 of the *Limitation of Actions Act*, the suit was statute-barred. The finding was based on what the learned Judge said was the defence by the 3<sup>rd</sup> respondent. This is what the learned Judge stated:

“ 5. The 3<sup>rd</sup> Defendant in his defence further separately stated that the Plaintiff's claim is barred by *Limitation of Actions Act* because the actions complained of by the Plaintiffs occurred in the years 1995 and 1996.”

6. The appellants were aggrieved by the judgment and decree and appealed to this Court on the following grounds:-

- “ 1. The Learned Judge erred in law and fact in the interpretation of the defence of limitation of time.
2. The Learned Judge erred in law and fact in finding that the claim by the appellants was time barred.
3. The Learned Judge erred in law and in fact in the interpretation of facts in the suit, framing of the issues for determination and failing to make a determination on all of the framed issues.



4. The Learned Judge misdirected herself in law and fact by not paying regard to the correct principles of law in entering the judgment against the appellant.
5. The Learned Judge erred in law and fact in failing to find that the defendants obtained the titles illegally.”

They sought that the ELC’s decision be overturned and that the judgment be entered in their favour, together with costs.

7. Our jurisdiction as the first appellate court has been stated and restated in the various decisions of this Court. Those decisions include *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123; *Peters v Sunday Post* [1958] EA 424; *Kamau v Mungai & Another* [2006] IKLR 150; and *Kenya Ports Authority v Kuston (Kenya) Limited* [2009]2EA. 212. We are entitled to reconsider the evidence that was tendered before the ELC, evaluate it and draw our own conclusions, while bearing in mind that the learned Judge had the advantage of seeing and hearing the witnesses who appeared before her. We do not have that advantage. We can only interfere with the findings of the trial court if they were based on no evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings that she did.
8. When Mr. Njiraini, learned counsel for the appellants appeared before us to highlight his written submissions, his major concerns were that the learned Judge had dismissed the suit on basis of the issue of limitation which the respondents had neither pleaded nor addressed the court on; that the appellants’ cause had been dismissed on an issue they had not been invited to address the court on; that the parties and the court were bound by the pleadings, and that they were not allowed to depart from the same. The decision of this Court in *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others* [2014]eKLR was cited to us.
9. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents were represented by counsel who did not attend the hearing, and did not file written submissions. The 1<sup>st</sup> and 4<sup>th</sup> respondents did not respond to the appeal.
10. We reproduce paragraphs 12 to 19 of the judgment of the ELC as follows:-

“

“12. The court has read and considered the pleadings, the evidence given by parties and the submissions filed. The parties did not submit any issues for determination. Nevertheless, from the proceedings and pleadings of the parties the following issues would fall for determination, namely:-

- a. whether the claim of the plaintiffs is barred by limitations of Actions Act.
  - b. Whether the titles issued to the defendants are void and ought to be cancelled.
  - c. whether the 3<sup>rd</sup> defendant is a bonafide purchaser for value without notice.
  - d. Costs.
13. Incidentally the finding in issue No. 1 above may be effectively dispose of the suit herein. I say so because a challenge based on limitation goes to Jurisdiction of the Court to deal with the claim of the plaintiffs. The court will proceed to



deal with issue No. 1 and depending on the finding may proceed to determine the rest of the issues.

A. Whether the claim of the plaintiffs is barred by limitation of actions.

14. The plaintiffs as administrators of the estate of their late father, namely Aphaxard Thuo Mugwe are in law claiming ownership of the suit land under their late father. Limitation having been placed in the defence of the plaintiffs' suit calls upon the court to determine the date of the cause of action. Such date would properly be the date when the suit lands were registered in the name of another person from the plaintiffs' late father. It is the date that effectively the administration of the estate of the plaintiffs' father and any person including the plaintiffs were affected adversely by such action. The court has itemized in para 6 the dates on which each of the suit lands were registered in the name of another person than the plaintiffs' late father as follows:

- a. On 6/9/95 Sophia Wanjiku Thuo was registered as owner of Loc.5/Githunguri/19.
- b. On 14/11/96 Sophia Wanjiku Thuo was registered as owner of Makuyu/ Kimorori/Block3/2236.
- c. On 14/11/96 Pentecostal Evangelistic Fellowship of Kenya was registered as owner Makuyu/Kimorori/ Block III/906.

15. The section 7 of the *Limitation of Actions Act* in so far is relevant to the plaintiffs claim states as follows:

“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.”

Considering the suit lands separately Limitations of Actions would affect the plaintiffs on the date shown item-wise below:-

- a. No. Loc.5/Githunguri/19 registered in the name of Sophia Wanjiku Thuo on 6/9/95.
- b. No. Makuyu/Kimorori/Block III/2236 registered in the name of Wanjiku Thuo Sophia on 14/11/96.
- c. No. Makuyu/Kimorori/Block III/906 registered in the name of the 1<sup>st</sup> defendant on 14/11/96

Limitation date would then be 12 years after the dates shown above of registration that is to say the year 2008, 2007 and 2007 respectively.

16. Going by the analysis above therefore the claim by the plaintiffs became stale in the years 2008, 2007 & 2007 respectively by the reason of the suit having been filed on 3/4/13.



17. In view of the conclusion in para 13 above it is, therefore, not necessary to continue with analysis and finding on the remainder of the issues set out for determination.
  18. The Court finds that the plaintiffs' claim is defeated by reason of Limitation of Actions Act and is hereby dismissed.
  19. The parties shall bear their own costs of the suit.”
11. We have considered the judgment, the respective pleadings of the parties and their written submissions. The 2<sup>nd</sup> respondent raised the issue of the claim being statutorily barred in the written submissions dated 29<sup>th</sup> November 2017. Her plea was that the transfers in question could not be challenged on account of limitation. According to the appellants, the issue of limitation of time could not arise as the claim was based on the Law of Succession Act (the Act); that since the deceased's property had not been obtained pursuant to the Act, the titles were illegal and fraudulent. The 3<sup>rd</sup> respondent had not raised the issue in the submissions. The issue had not been raised in the defence by either the 2<sup>nd</sup> or the 3<sup>rd</sup> respondent. The Court did not invite the appellants to address it on the issue before the suit was dismissed. One cannot say that the appellants had led evidence to cover the issue.
  12. In Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others (*Supra*), in the Supreme Court decision in Raila Amollo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others [2017]eKLR, in Malawi Supreme Court of Appeal in *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3, and in many other decisions, it has been held that, parties are bound by their pleadings, and that any evidence that any of the parties will call that does not support the pleadings, or is at variance with the pleadings, goes to no issue and must be disregarded. The court itself is also bound by the pleadings by the parties as they are themselves. The court can only determine an issue which the parties themselves have raised. Where the court makes a decision on a claim not made or raised by or against a party, that is a decision that has been made without hearing the party and the party will have been denied a fair hearing. The party will have been denied justice.
  13. We considered that in the written submissions by the appellants' learned counsel filed before the ELC, the following issues were listed for determination:-
    - “ 1. Does the plaintiff have locus standi to bring this suit?
    2. Who was the original owner of the suit lands?
    3. Could the suit lands ownership right lawfully pass from the deceased to any of the defendants?
    4. Was any transfer of the suit lands void?
    5. What orders should the Court make?
    6. Who should bear the costs of the suit?”
  14. In the written submissions by the defence, the 3<sup>rd</sup> respondent indicated the issue for determination to be:
    - “ 1) Whether the 3<sup>rd</sup> Respondent is a bona fide purchaser of the suit property for value and without notice.”



15. This Court in *Avenue Car Hire & Another v Slipha Wanjiru Mutbegu*, Civil Appeal No. 302 of 1997 held that no judgment can be based on written submissions and that such a judgment is a nullity since written submissions is not a mode of receiving evidence as set out under Order 17 rule 2 of the *Civil Procedure Rules* (now Order 18 rule 2 of the *Civil Procedure Rules*). It is trite that submissions shall not raise or address any new issues or grounds or points, including points of law, not contained in the pleadings filed before the court. If that is the case, then the 2<sup>nd</sup> respondent ought not to have raised the issue of limitation in the written submissions when she had not pleaded it in her defence, and when no other party to the claim had raised the issue. In the same breath, the trial court erred when it dismissed the appellants' suit on the basis that it was statute-barred when the issue had not been pleaded and evidence given thereon. For this reason, the judgment delivered on 31<sup>st</sup> July 2018 was a nullity.
16. We reiterate that the appellants and the 3<sup>rd</sup> respondent had set out the issues they wanted the Court to determine. The court was bound by those issues and was required to determine them. The issue of limitation was not one of the issues.
17. The result is that, we allow the appeal and set aside the judgment of the ELC dated 31<sup>st</sup> July 2018.
18. Since the issues for determination as framed by the appellants, the issue framed by the 3<sup>rd</sup> respondent, and the rest of the issues in the 2<sup>nd</sup> respondent's submissions did not receive consideration and a determination made thereon, we make an order remitting this matter to the ELC at Murang'a to be heard and determined by another Judge.
19. We direct that the costs of the appeal be borne by the respondents.

**DATED AND DELIVERED AT NYERI THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

**A. O. MUCHELULE**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

