



**Njiru v Diocese of Embu Registered Trustees (Environment & Land Case  
22B of 2021) [2024] KEELC 4470 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4470 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE 22B OF 2021**

**A KANIARU, J**

**MAY 23, 2024**

**BETWEEN**

**LEAH MURURI NJIRU ..... PLAINTIFF**

**AND**

**DIOCESE OF EMBU REGISTERED TRUSTEES ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff herein- Leah Mururi Njiru – filed this case here against the defendant – Diocese Of Embu Registered Trustees - vide a plaint dated 14.07.2020. In the plaint, she was claiming that the defendant had illegally placed a restriction on land parcel Evurore/Evurore/680, which land she said was registered in her name. She was seeking for an order that the restriction be removed.
2. The defendants in response to the said suit filed a defence and counterclaim on 15.08.2022. Their case was that the suit land originally belonged to the plaintiff's husband Njiru Ndekethi (deceased) who on diverse dates in the year 1975 and 1976 entered into a sale agreement with the defendants and sold a portion of the suit land to them at a consideration of Kshs. 2800 paid in instalments. That the deceased died without subdividing and transferring the suit portion, which was about 9 acres, to the defendants.
3. That the plaintiff filed succession proceedings in Siakago and totally disregarded the interest of the defendants who have been in actual occupation and use of the subject portion of 9 acres. That the restriction was placed to prohibit any dealings with the suit parcel and to protect it's purchaser's interest in the land. The defendant is asking the court to dismiss the plaintiff's suit, to allow the counterclaim and the plaintiff to be ordered to subdivide and transfer the suit land to it as well as costs of the counterclaim.
4. The matter was set down for hearing on 18.01.2022. The plaintiff testified as PW1. She said that the suit land is now in her name through succession proceedings but before it came to be so, it was in her husband's name – NJIRU NDEKETHI - who is now deceased. She adopted her witness statement



- and produced her documents in evidence as follows; an official search of the suit land, an unregistered mutation of the same land, and a demand letter to the defendants. She denied that her husband sold the suit land to the defendant or that he informed her of a sale. She also denied being aware of the existence of the sale agreements allegedly entered into between the deceased and the defendant.
5. She testified further that the suit land has a church bell tower belonging to the defendant but the same is not in use. It was her testimony that she did not know why the defendant stopped using the bell and that where the bell is, is part of her land where she grows cow peas. That her husband died in 1997 and that she started using the land before he died. She also testified that there are brick structures of a toilet that had been built on the land against her wishes and that the defendant took down the toilets doors and iron sheets. The toilet is not in use as she stopped them from using it.
  6. She also further said that the defendants had initially built a toilet in a different location near the road. That the toilet was demolished by the road construction company in the year 2019 and that's when the defendant built the one that is on her land. That she informed the defendants to remove the toilet on her land and engaged the surveyor who identified for each party their parcels of land since her land and where the church is built border each other. That they both put fences around their portions that had been identified and in her case, she planted both pigeon and cow peas. That the defendant built another toilet on their land. She testified that she did not have a title to the land as when she went to process it, she found a restriction on the land register. The plaintiff's case was closed at this point and the matter set down for defence hearing on 20.03.2023.
  7. The defendant called to the stand one witness, Fr. John Njeru Macharia, who testified as DW1. He testified that he was one of the trustees of Embu Catholic Diocese and in charge of the diocese lands office. He testified that Njiru Ndekethi entered into an agreement with an Italian Father serving the church known as Father Mario. Njiru Ndekethi sold a portion of the suit land to the defendant around the year 1975. That the Father was a missionary and by then they were under the Diocese of Meru. That the suit land borders that of the church. That the land sold was a portion of land parcel 680 and the were shown the land. That the church started using it and it became a playground for the church youth. That the defendant dug pit latrines there and constructed toilets. The church bell was also there.
  8. He testified further, the size of the land sold to the defendant was 9 acres in size and the defendant didn't get the title deed for the same because the seller died in 1997 before he could subdivide the land. That things were good until succession was done and the defendant was excluded from the list of beneficiaries. That since the seller died in 1997 up to 2018 when succession was done, there was still no problem. That in 2018 the church was still using the portion, the toilets were still there together with the church bell. That the plaintiff and her people started using the land by force sometime during the year 2020.
  9. He produced in evidence agreements for the sale of land parcel 680 dated 08.11.1976, 30.10.1975, 09.10.1975 as exhibits nos 2(a),(b) and (c) respectively, a letter to the Land Adjudication office dated 09.10.1975 as Exh 3, Grant of letters of administration as Exh 4, certificate of confirmation of grant as Exh 5, Demand letter Exh 6, current green card in respect of land parcel 680 as Exh 7. It was his testimony that he did not know whether Father Mario was alive and as for the witnesses that witnessed the sale, one is deceased while the other is alive but was unwilling to testify.
  10. It was agreed that the parties file written submissions. The plaintiff's submissions were filed on 13.12.2023. She began by giving a brief history of the case. Three issues were then identified for determination, one of them being whether there exists a valid sale agreement between the defendant and the deceased. It was submitted that the defendants claim was time barred under section 4(1) (a) of the *Limitation of Actions Act* which provides for the limitation period to bring claims founded on



- contract as six years. That the period within which the defendants ought to have brought their claim for purchase of the 9 acres was within six years and therefore their claim over the suit property is stale.
11. The cases of Martha Karwirwa Anthony v Barclays Bank of Kenya Ltd (2019) Eklr citing the case of Haron Onyancha v National Police Service Commission & Anor (2017) Eklr and Iga v Makerere University (1972) EA were cited to urge the court to strike the suit under the provisions of section 4(1) (a) of the *Limitation of Actions Act*. The court was also urged to find that there is no valid agreement between the defendant and the seller and that the defendants claim over the suit property had been caught up by time.
  12. The other issue identified for determination was whether the restriction ought to be removed. It was submitted that it had been demonstrated that the restriction placed on the suit land was made based on a contract raised out of time and the court ought to order that the same be removed. That the defendant in their submissions had deviated from their pleadings by submitting to the effect that their suit is based on adverse possession. That the court record would show that the defendant withdrew its originating summons filed in Embu ELC suit no. 32 of 2020 where they were seeking orders of adverse possession. Thus they remained with the counterclaim which is not framed as an adverse possession suit and does not ask this court for any adverse possession orders.
  13. It was submitted further that parties are bound by their pleadings and any evidence led that is not in line with their pleadings should not be considered by the court. It was urged that the court not be swayed in mind that the defendants made any pleadings in support of any claim for adverse possession. The case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd (2018) Eklr citing the case of Raila Amolo Odinga & Anor v IEBC & 2 others (2017) Eklr was referred to in support of the submissions.
  14. The other issue was who was to bear the costs of the suit and it was submitted that the same should be awarded to the plaintiff. Ultimately it was urged that the plaintiff had proven her case on a balance of probability and therefore her prayers as sought in the plaint ought to be allowed and the counterclaim dismissed.
  15. The defendant on the other hand filed its submissions on 03.04.2023. It also started by giving a brief introduction of the case. It submitted that its case is based on adverse possession and the uncontroverted sale agreements, acknowledgements, and other documents. That the plaintiff's evidence is substantially directed at discrediting the sale agreements and acknowledgements. That the plaintiff has not denied the defendants occupation of a portion of the suit land for more than 12 years until about the year 2020 when she kicked them out and fenced off the area. It was urged that the court finds and holds that the defendant has demonstrated its claim for adverse possession. The case of Nyaga Rungu v Stanley Nyaga Kuvuta (2020) Eklr was proffered for guidance.
  16. I have considered the pleadings as filed, the evidence tendered during hearing, and the written rival submissions.
  17. The plaintiff had initially filed the instant suit in the lower court in Siakago as MCL& E case no 36 of 2020 and the defendant entered appearance and filed a defence and counterclaim. The defendant had equally filed its suit in this court vide an originating summons, being ELC case no. 32 of 2020, seeking adverse possession over the subject land herein. The record shows that the parties agreed to have the two suits determined as one and the defendants chose to abandon the suit filed by way of originating summons and withdrew it on 03.11.2021. It was agreed that parties pursue the suit filed in Siakago which file was transferred to this court for determination and a new case number was issued.
  18. From the plaint, the plaintiff's claim was to have the restriction placed on land parcel Evurore/ Evurore/680 by the defendant removed. The defendant's case on the other hand as per the



counterclaim, was that it had put the restriction on the land because they were claiming a purchaser's interest on the same. Its entire suit was solely based on the sale agreements said to have been entered into between itself and the deceased. However, in its submissions the defendant seemed to depart from that as it seemed to imply that its suit was also based on adverse possession. The issue of adverse possession was not pleaded in the counterclaim. And unfortunately once the defendants withdrew their originating summons then that ideally meant that they also withdrew their case on adverse possession.

19. The best thing would have been to amend the counterclaim and bring on board the issue of adverse possession if the same was still up for determination. It is trite law that parties are bound by their pleadings as pointed out by the plaintiffs in their submissions. So what was left for this court to determine were the issues raised in the plaint as well as the defence and counterclaim which were:

- a. Whether the defendants were entitled to orders directing the plaintiff to sub-divide and transfer the portion of 9 acres out of Evurore/Evurore/680
- b. Whether the plaintiff was entitled to have the restriction placed on Evurore/Evurore/680 removed.

20. The defendant claimed that it purchased the land from the plaintiff's husband who is now deceased through sale agreements entered into between them in the years 1975-1976. It produced in evidence the copies of the said agreements whose enforceability was challenged by the plaintiff on the ground that they were time barred under section 4 (1) of the *Limitation of Actions Act*. The section provides as follows;

“The following actions may not be brought after the end of six years from the date on which the cause of action accrued:

- a. Actions founded on contract.
- b. ....”

21. It is clear from the above that suits based on contract, and in this case the sale agreement for the sale of the land, ought to be brought within six years. The defendant's suit is based on sale agreements which are obviously time barred, having been made in the year 1975 and 1976 – about 49 years ago. Normally a party will seek leave to file their claim out of time before filing a suit of this nature. But I doubt if it would have made a difference since time can't be extended in matters based on contract. The defendant's case is therefore hopelessly out of time and my hands are tied by the law on the issue of time. I am therefore inclined to find that the defendant's suit is stale and incurable and cannot be entertained by this court. This means that the counterclaim fails.

22. For further guidance on the above, please see the case of Michael Benhardt Otieno v National Cereals & Produce Board (2017) eKLR as cited in Dennis Nyandu v Francis Aburi Oyaro [2021] eKLR where the court observed as follows:

“As regards the applicability of section 4(1) it is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done, namely an action that is brought in contract six years after the cause of action. ..In light of these clear provisions it should be unacceptable to imply as the learned judge of the superior court did that the wording of section 4(1) of the *Limitation of Actions Act* suggests a discretion can be invoked”



Further in the case of *Gathoni v Kenya Cooperative Creameries Ltd* (1982) KLR 104 also cited thereon the court observed that:-

“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 intended plaintiff to exercise reasonable diligence and take reasonable steps in his own interest”

23. Still further in *Iga vs. Makerere University* [1972] EA it was held that:-

“A plaint which is barred by limitation is a plaint barred by law. A reading of the provisions of Section 3 and 4 of the Limitations Act Cap 70 together with Order 7 Rule 6 of the Civil Procedure Rules of Uganda which has same provisions with the Limitation of Actions of Kenya seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief.”

24. The other issue for determination is whether the plaintiff is entitled to have the restriction removed. The provisions of law with regards to restrictions are to be found in the *Land Registration Act*, specifically Section 76, 77 and 78 which provides;

76. Restrictions.

- (1) For the purposes of compulsory acquisition the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order prohibiting or restricting dealings with any particular land, lease or charge.
- (2) A restriction may be expressed to endure—
  - (a) for a particular period;
  - (b) until the occurrence of a particular event; or
  - (c) until a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.
- (2A) A restriction shall be registered in the register and may prohibit or restrict either all dealings in the land or only those dealings which do not comply with specified conditions.
- (3) The Registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.

77. Notice and effect of restriction.

- (1) The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction.



- (2) An instrument that is inconsistent with a restriction shall not be registered while the restriction is still registered except by order of the court or of the Registrar.

78. Removal and variation of restrictions.

- (1) The Registrar may, at anytime and on application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction.
- (2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.

25. From the above provisions of law, it is clear that the Land Registrar is the one who registers a Restriction. It is also evident that restrictions are not supposed to endure indefinitely on a title and that the Registrar on his own motion or on application by an interested party, or the court on notice to the Registrar may order a restriction to be removed. In this case the Restriction is said to have been registered "by the Diocese of Embu as per sale agreement through Njeru Ithiga & Company advocates". Having found that the sale agreements as presented are unenforceable, then this court finds no legal reason for the restriction to continue being there.

26. The upshot of the foregoing is that I dismiss the defendants counterclaim for being time - barred and allow the plaintiff's suit to have the restriction placed against land parcel Evurore/Evurore/680 removed by the Land Registrar, Mbeere Lands Registry.

27. Given the circumstances of this case, I will direct that each party shall bear their own costs of the suit.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 23<sup>RD</sup> DAY OF MAY, 2024.**

In the presence of plaintiff, Githinji Ithinga for Njeru Ithiga for defendant, Ali for Ndolo K for plaintiff.

Court Assistant - Leadys

**A. KANIARU**

**JUDGE – ELC, EMBU**

**23.5.2023**

