



**Longu v Gitahi (Environment and Land Appeal E001 of 2021)  
[2024] KEELC 5880 (KLR) (20 August 2024) (Judgment)**

Neutral citation: [2024] KEELC 5880 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT AND LAND APPEAL E001 OF 2021**

**AK BOR, J**

**AUGUST 20, 2024**

**BETWEEN**

**SAMSON LOPAGAYE LONGU ..... APPELLANT**

**AND**

**EUNICE RW GITAHU ..... RESPONDENT**

**JUDGMENT**

1. The Appellant lodged this appeal against the finding of the trial court in the suit filed by the Respondent seeking a declaration that she was the lawful and registered owner of the land known as Marmanet/Melwa Block 1/2585 (Muhotetu) (the suit property) and an order of injunction to restrain the Appellants from interfering with her possession of the land.
2. The Respondent filed Nyahururu Chief Magistrates Court Civil Suit No. 237 of 2015 claiming that on diverse dates in October and November 2015, the Appellants entered her land and commenced cultivation without her consent thereby infringing her right to own and use her property. The Appellants filed a defence in which they averred that the Respondent's registration was subject to their overriding interest as persons who were in actual possession and occupation of the suit property prior to her registration as proprietor. They denied that they entered the suit land in 2015 and averred that they had been in actual possession, use and occupation of the suit property since 1983. Additionally, they averred that the Respondent's claim was statute- barred by virtue of Section 7 of the *Limitation of Actions Act* and urged the court to dismiss the suit.
3. The matter proceeded to hearing and in the judgment delivered by Hon. J. Wanjala, Chief Magistrate on 29/1/2020, the court declared the Respondent as the legal owner of the suit property and issued an injunction to restrain the Appellant from continuing to occupy or remaining on the suit property or otherwise denying the Respondent the peaceful occupation and use of her land.



4. Parties filed submissions on the appeal which the court has considered. The Appellant submitted that one of the defences they raised in the trial court was that the suit was barred by Section 7 of Limitations of Actions Act because the Appellants had been in occupation of the suit property for a period exceeding 12 years making them adverse possessors. That the right of an adverse possessors was an overriding interest protected by the repealed Registered [Land Act](#) and the [Land Registration Act](#) and relied on Section 28 of the repealed Registered [Land Act](#) which stipulated that the rights of a proprietor were held subject to the encumbrances, conditions and restrictions shown on the register as well as those declared by Section 30 as not requiring noting on the register. They referred to Section 30 (f) which gave one of the overriding interests as rights acquired or in the process of being acquired by virtue of any written law relating to the Limitations of Actions Act or by restrictions. They submitted that they based their defence on Section 30 of the repealed Registered [Land Act](#) which is replicated in Section 28 of the [Land Registration Act](#).
5. The Appellant submitted that they led evidence before the trial court which established that they were in actual possession of the suit property and that his grandfather and his father were buried on the land, as shown by the burial permit tendered in evidence. In addition, that he produced photographs evidencing the family stay on the suit property including a number of houses and full grown trees which could not have been planted in 2015 which is when the Respondent averred that they invaded her land. The Appellant relied on the evidence of the Respondent at the trial when she admitted that she had never been to the suit land to check the situation and that she used to lease it to third parties. He pointed out that the Respondent did not call her husband who dealt with the land as a witness nor did she call the lessees whom she leased the land to, to corroborate her story.
6. The Appellant relied on *Kanyi v Muthiora* (1984) KLR 712 where the court observed that the respondent had rights against the Appellant stemming from possession and occupation of part of the land, which amounted to overriding interest not required to be noted on the register and the appellant's proprietorship was subject to it. The Appellant maintained that they had an overriding interest over the suit property which the trial court should have protected.
7. The Appellant cited Section 4 of the Limitations of Actions Act which stipulates that an action founded on tort may not be brought after the end of three years from the date the cause of action accrued. He then argued that having acquired the title on 14/7/2006, the Respondent must have been aware of the Appellants' occupation as they had built houses, planted trees and cultivated the land openly. He added that possession or occupation of land was a question of fact and that he had provided sufficient proof of his long possession of the suit property.
8. The Appellant went on to argue that the Respondent ought to have instituted a suit for eviction within 3 years of 14/7/2006 when she acquired her title and that having failed to do so, she was barred from instituting a suit. Further, that having failed to bring the suit within 3 years, her cause of action became one for recovery of land and that the 12 years' limitation period does not start running when the title is acquired based on the finding in *Githu v Ndete* where the court observed that the mere change of ownership of land which was acquired by another under adverse possession did not interrupt such a person's adverse possession. The Appellant urged that he had adduced sufficient proof of his overriding interest over the suit land which entitled him to continue living on the suit property and concluded that the trial court was wrong in ordering their eviction from the suit property which would render his entire extended family homeless.
9. On her part, the Respondent submitted that she purchased shares in Muhotetu Farmers Company Limited and was allocated the suit property. Upon allocation of the land, she leased it to various persons. She maintained that the Appellant was not in occupation of the land at the time of allocation



- or in 2006 when the land was registered in the Respondent's name. Further, she submitted that prior to the invasion of the suit property by the Appellant she was leasing out the land to various parties who the Appellants and his family chased away in 2015. She adverted to the lease agreement which she tendered in evidence before the trial court.
10. The Respondent argued that although he Appellant claimed to have been born on the suit property in 1983, it was clear from the records that the suit land was first registered in 2005 and that when she was allocated the land in 2006 the Appellants were not on the land and therefore there was no overriding interest in favour of the Appellant. She referred to the typed proceedings of the trial and the Appellant's response during cross-examination, when he stated that they entered the land in 2015 and started staying there. According to the Respondent, this was a candid admission by the Appellant that they entered the land in 2015 and not earlier than that.
  11. The Respondent argued that the Appellant could not sustain a claim that he was on the suit land prior to 2005 because by then the land was not registered and was not in existence. She went on to deny that the Appellant and his grandfather could have been in occupation of the land prior to 2015 and added that the photographs produced showing trees were taken on another piece of land. She was emphatic that the burial permit produced by the Appellant did not bear any evidence that the person was buried on the suit property and that there were no graves on the land. She added that the houses constructed on the suit property were temporary structures and there was no evidence led to show that they were erected before 2015.
  12. Regarding the limitation period for trespass, the Respondent submitted that in her suit, she sought a declaration that she was the legal owner of the suit property and a mandatory injunction to restrain the Appellant from entering or remaining on the suit property. The land was initially registered in the name of Muhotetu Farmers Company Limited on 23/12/2005 and was transferred to her on 14/7/2006. She emphasized that the statutory period for the recovery of land under the *Limitation of Actions Act* was 12 years and that it was well within her right to file suit for recovery of the portion of land which the Appellant had encroached on.
  13. She reiterated that Section 4 of the Limitations Act was not applicable to these circumstances and that her claim was premised on Section 7 of the Act relating to recovery of land. She maintained that the Appellant entered the suit property in 2015, which is when she filed the suit before the Magistrates' Court hence her claim was not time barred. She went further to argue that even assuming that the Appellant entered the land earlier on, the cause of action could only have started running from 2005 when the land was registered in the name of Muhotetu Farmers Company Limited. She maintained that her right to recover her land had not been extinguished at the time she filed suit and that there was no overriding interest when the land was registered in her name.
  14. The issue for determination is whether the court should allow the appeal. Looking at the Memorandum of Appeal dated 25/1/2021, the three grounds of appeal are that the Learned Magistrate erred by, firstly, failing to find that the Appellant had an overriding interest over the suit property, secondly, by failing to find that the limitation period for trespass was three years and the Appellant had been in occupation for a period exceeding the limitation period, and lastly, that the decision the trial court arrived at was erroneous considering the weight of the evidence.
  15. Looking at the documents which the Respondent tendered in evidence, the title deed was issued in her name on 14/7/2006 for land measuring approximately 7.448 hectares. The demand letter issued by Njuguna Kamanga Advocate to the Appellant dated 8/10/2015 claimed that the addressees had on diverse dates entered into and trespassed onto their client's land without her authority and gone ahead



to cultivate a portion of the land and to erect illegal structures on the land thereby depriving the client of the use and occupation of her land.

16. The green card produced in evidence shows that the register for the land was opened on 23/12/2005 when Muhotetu Farmers Company Limited was registered as the owner. The Respondent produced an agreement dated 8/9/2006 vide which Victor Ndirangu Njogu gave some land to a Mr. Francis Githaiga Gachagu who paid Kshs. 14,000/= for land at Gatundia for a period of one year from September 2005 to September 2006 for seven acres @Kshs. 2,000/= per acre. Another undated handwritten agreement produced mentions renting land in year 2007 and a balance of Kshs. 10,000 which was to be paid in April 2007 by Victor Ndirangu Njogu. There is a handwritten acknowledgement of payment of Kshs. 10,000/= as the balance for 2007 signed by Victor Ndirangu and Francis Githaiga who was receiving it on behalf of Mrs. Gitahi.
17. The Appellant produced a burial permit Ndelemani Lenai Legwarungu showing that he was 89 years and died on 6/12/2009 with his usual residence indicated as Melwa Sub-location, Laikipia West. The permit authorized interment of the body on 11/12/2009 in Melwa Sub-location. The photographs which the Appellant tendered in evidence show homesteads with some people captured in a photograph as well as trees.
18. The typed proceedings show that when the Respondent gave evidence she told the court that the title over the suit property was given to her in 2006 and that she took possession and started digging it. She also stated that she was leasing it because she was far. She told the court that she leased the land to Murithi and Victor. She used to lease the land at Kshs. 2,000/= per year because the lessee was digging 11 acres. When the lessee made payment they would write down an agreement and she would send her husband's cousin to take the money for her because he was near and was also taking care of the farm. That in 2015, she leased the land but there were people who were staying on the land who chased away the person she had leased the land to. They prevented the lessee from using the land even though they were on the land without the permission. She confirmed that the land measured 18 acres and that she had not been using the land for a long time from 2010 because of the Appellants. She denied that the Appellant had been on the land since 1983 and added that when she got the land they were not on it.
19. On cross-examination, the Respondent told the court that from the beginning she used to lease out the land because she was far. She had not used the land personally but maintained that there was nobody on the land. When her husband was alive he was the one leasing out the land but when he died she was the one who was leasing it from 2005. She told the court that she was only leasing out 11 acres out of the 18 acres. She explained that the 7 acres that she was not leasing was being used by the Appellants to graze their cattle and goats. She conceded that those who were staying on the land were using the land and they chased away the person she had leased the land to and they started using the whole parcel of land.
20. She maintained that there were no big trees on the suit property and that it was only shrubs on the land. She expressed her desire to have the court visit the suit land because the photographs she was shown could have been taken somewhere else. She had not leased out the land since 2010 and explained that the Appellant chased away the person she was leasing the land to in 2010. She told the court that she had seen three houses on her land when she went there one and half years before. On re-examination, she stated that the Appellants chased away the last person she had leased the land to in 2015.
21. The Appellant gave evidence and stated that the 3<sup>rd</sup> defendant in the case was his father who had died. He told the court that the suit property was their home and it is where his extended family lived. He maintained that they had lived on the land since he was born in 1983 and that in 2015 there were 22 of them on the land but the family members had increased to around 25 when he testified. He denied



that the Respondent had been using the land or that any other person except his family had used the suit land. When he was cross-examined by the Respondent's advocate, he stated as follows:

“I don't know that the land was demarcated in 2006. What I know is that I was born on that land in 1983 and I have grown there. Not true that we entered the land in 2015. We entered the land in 2015 and started staying there. Our land is big I cannot know how many acres. Yes, I cultivate the land but there are sections of murrum. I ploughed 4 acres of the land. Others use the land as well”.

22. He went on to explain how they were using the land by cultivating it. He told the court that they did not chase away a person who used to plant tomatoes when they entered the land. From the excerpt of the proceedings reproduced above, it is difficult to tell with certainty that the Appellant conceded as the Respondent urged in her submissions that they entered the suit property in 2015. The Appellant stated that he was born on the suit land in 1983 and that they had been on the land since then.
23. Apart from stating that some other persons were taking care of the suit land and leasing it, the Respondent did not lead evidence to prove that she went to the suit land when she purchased it from the land buying company or at any time before 2015. The Respondent also told the trial court that she had not leased out the suit property since 2010 and explained that the Appellant chased away the person she was leasing the land to in 2010. This contradicts her evidence that the Appellant entered the land in 2015.
24. The Respondent's position is that she was registered as proprietor of the suit land on 14/7/2006 and that the land register was opened on 23/12/2005. She filed this suit on 11/11/2015. The handwritten agreement for the lease of the suit land which the Respondent tendered in evidence gives the period of lease as one year from September 2005 to September 2006, which means that the Respondent must have had possession of the land prior to being registered as its owner. The handwritten note indicates that it was seven acres leased. The Respondent stated in her evidence that the 7 acres that she was not leasing was being used by the Appellants to graze their cattle and goats.
25. The burial permit for Ndelemani Lenai Legwarungu showing that he died on 6/12/2009 authorized the interment of his body on 11/12/2009 in Melwa Sub-location. It is doubtful that the local administration in Melwa would have given the permit for his burial on the land in 2009 if he were not residing there. The Respondent merely denied that there were no graves on the land and that the houses in the photographs which the Appellant produced were for temporary structures. However temporary in nature those structures are, they would still serve as homes and provide shelter to the people living in them. The court is not persuaded that the Respondent and his family entered the suit land in 2015 as the Respondent contended. From the evidence given at the trial, the court is persuaded on a balance of probabilities that they settled on the land well before 2005.
26. The limitation period for trespass stipulated in Section 4 of the *Limitation of Actions Act* would not apply to the present suit. The dispute before the trial court related to recovery of the suit property registered in the Respondent's name and which the Appellant claimed to have occupied with his extended family since 1983. The court agrees with the Respondent that the applicable provisions under the *Limitation of Actions Act* would be Section 7 of the Act and not Section 4 which deals with trespass.
27. In essence, the Appellant was using adverse possession as a shield to defeat the Respondent's suit for the recovery of land and avert their eviction from the land. One of the overriding interests that need not appear on the register under Section 28 of the *Land Registration Act* is rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. At paragraph 7 of the defence dated 8/12/2015, the Appellant averred that the Respondent's claim



was statute barred by virtue of Section 7 of the *Limitation of Actions Act* and that it was suitable for dismissal. The section bars the bringing of an action by a person to recover land after the lapse of twelve years from the date on which the right of action accrued to the person or where it first accrued to some person through whom he claims, to that other person.

28. The Learned Magistrate erred in finding that the Appellants had not acquired any prescriptive rights over the suit property and that no overriding interests had been proved to have been created on the land prior to the Respondent being registered as its proprietor. The evidence led by the Appellant confirmed that they had been on the suit land for more than 12 years before the Respondent filed suit to recover the land. The Respondent's suit for recovery of the suit property was statute barred by the time she filed it.
29. The court allows the appeal and sets aside the judgment of the Learned Chief Magistrate delivered in Nyahururu CM ELC Case No. 141 of 2018. The Respondent's claim before the Learned Magistrate should have been dismissed with costs to the Appellant.

**DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF AUGUST 2024.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Ms. Eunice Ndegwa for the Appellant

Mr. Njuguna Kamanga for the Respondent

Court Assistant: Vanessa Muiruri

