



THE SUPREME COURT OF KENYA

ZEHRABANU JANMOHAMMED (SC) (Suing as the Executrix of the Estate of the Late H.E DANIEL TOROITICH ARAP MOI) & ANOTHER VS. NATHANIEL K. LAGAT & 4 OTHERS

SC PETITION NO. 17 (E021) OF 2022 AS CONSOLIDATED WITH PETITION NO. 24 (E027) OF 2022

DATE OF JUDGMENT: 2ND AUGUST, 2024

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Orders: The Court allows the appeal, overturns the Court of Appeal Judgment dated 22nd July, 2022, and orders each party to bear its costs.

Background

Sometime in 1965, N. K. Lagat and Partners acquired a parcel of land known as L.R. No. 10492 (Grant I.R No. 17542 /1), measuring 3236 acres from Jacobus Hendrick Engelbretch. The partnership comprised of Nathaniel Kiptalam arap Lagat, Thomas Kipkosgei arap Yator, Noah Kipngeny arap Chelugui, Cherwon arap Maritim and William Kimngeny arap Leting. In 1976, L.R. No. 10492 was subdivided into six portions. Five portions were distributed among the five partners while the 6th portion was transferred to Huruma Company Limited. From this subdivision, it was urged that Eldoret Municipality/Block 15/10 was assigned to the Late Noah Chelugui. Subsequently, Eldoret Municipality/Block 15/10 was further subdivided into many parcels. One such parcel is Eldoret Municipality/Block 15/239 situate in Uasin Gishu District measuring 53 acres (hereinafter the ***Suit Property***).

At the Environment and Land Court (ELC), Susan Cherubet Chelugui and David K. Chelugui, suing as the administrators of the Estate of the late Noah Chelugui (*the 2nd respondents*), filed suit against H.E Daniel Toroitich Arap Moi, later substituted by Zehrabanu Janmohammed as the executrix of his Estate (*1st appellant*); and Rai Plywood (K) Ltd (*2nd appellant*). The *2nd respondents* claimed that the *1st appellant* acquired the suit property illegally, without consideration passing to Noah Chelugui, and in turn sold it to the *2nd appellant*. Consequently, they sought various declarations, orders and damages for violation of their rights to property, including restitution of the suit property and in the alternative, its current market value. The trial court held that the acquisition of the suit property was arbitrary and unconstitutional, and ordered the appellants to pay the *2nd respondents* compensation of Kshs. 1,060,000/=.

On first appeal by the appellants and Nathaniel K. Lagat (*the 1st respondent*), the Court of Appeal affirmed the ELC and upheld its award. The court dismissed the appeal on grounds that the Limitation of Actions Act does not apply to violations of rights and freedoms guaranteed under the Constitution and that the protection under Article 40 of the current Constitution applies retrospectively. Furthermore, the court dismissed the *1st respondent's* appeal for reasons that the

case was filed late in the day, and he had failed to prefer an appeal against the ruling of the trial court declining to join him as an interested party to the proceedings.

In the appeal before the Supreme Court, the Court framed the following issues for determination:

1. *Whether this Court has jurisdiction to determine the Appeal;*
2. *Whether Article 40 of the Constitution applies retrospectively;*
3. *Whether the 2nd respondents ought to have moved the Environment and Land Court by way of a Civil Suit as opposed to a Constitutional Petition;*
4. *Whether a constitutional claim of violation of property rights under Article 40 of the Constitution, is subject to limitation under Article 24 thereof, and Section 7 of the Limitation of Actions Act;*
5. *Whether the Court of Appeal erred in not considering and re-evaluating the evidence on record;*
6. *Whether Noah Chelugui was the title holder of both L.R 10492 and the Suit Property herein;*
7. *Whether the 1st and 2nd appellants acquired valid title to the suit property;*
8. *Whether the Court of Appeal disregarded its own finding in a different case but which was relevant to this appeal; and*
9. *Reliefs, if any, available to the parties.*

Upon consideration, the Supreme Court has allowed the appeal for the following reasons:

1. **Issue 1:** The Supreme Court is seized with jurisdiction to determine the appeal as of right under Article 163(4)(a) of the Constitution.
2. **Issue 2:**
 - i. The principle established in this Court's decision in ***Samuel Kamau Macharia v. Kenya Commercial Bank***; SC Application No. 2 of 2011; [2012] eKLR is that the language of a Constitutional provision may be used to determine whether it applies retrospectively;
 - ii. The application of the above principle in other decisions of the Court indicates that Article 40 of the Constitution has ingredients of retrospectivity embedded in it;
 - iii. In any event, the provisions of Article 40 embody a right that was protected under Section 75 of the repealed Constitution.
3. **Issue 3:**
 - i. The issue whether the 2nd respondents elevated an ordinary land claim to a Constitutional petition was not raised and canvassed before the superior courts below, hence the Court declines to address it on its merits;
 - ii. In any case, even if it was raised before the trial court, it would not have necessarily disposed of the proceedings with finality.
4. **Issue 4:**
 - i. In accordance with the Court's decision in ***Monica Wangu Wamwere & 5 Others v. The Attorney General***; SC Petition Nos, 26, 34 & 35 of 2019 (Consolidated) [2023] KESC 3 (KLR), as a general principle, petitions founded on fundamental rights and freedoms are not subject to limitation of actions; but are to be applied on a case by case basis, taking into account factors such as the nature of the right, the time taken to ventilate the alleged violation, and whether the claimant may be riding on a mischief;
 - ii. When applied to the facts of this case, having been filed over 30 years after the cause of action arose, the appellate court made a fundamental omission by failing

to consider the fact of delay with no explanation, in determining whether the limitation period was applicable.

5. **Issue 5:**

- i. On a first appeal, unless the appeal is on a point of law, the Court of Appeal is duty bound where circumstances require, to consider and re-evaluate the evidence on record before arriving at a determination.

6. **Issue 6:**

- i. From an in-depth appreciation of the evidence on record, the Court finds that there is no evidence on record to prove that the mother title to the suit property excised from L.R. No.10492, namely, Eldoret Municipality/Block 15/10 was assigned to Noah Chelugui;
- ii. On the contrary, it is demonstrated that Eldoret Municipality Block 15/10 was registered in the Government of Kenya as an absolute title, and subsequently subdivided into parcel nos. 237, 238 and 239 (*suit property*);
- iii. On the basis of the aforementioned evidence, the conclusion by the superior courts below that the 2nd respondents were rightful proprietors of the suit property deserving protection under Article 40 of the Constitution is unsubstantiated.

7. **Issue 7:**

- i. Flowing from issue (6) above which traces the genesis of the property, there is nothing on record to suggest that the appellants acquired the suit property fraudulently or irregularly;
- ii. Consequently, from the evidence tendered on behalf of the 2nd respondent, there was no basis to fault the validity of the appellants' title to the suit property.

8. **Issue 8:**

- i. The Court of Appeal case of ***Chief Land Registrar & 4 Others v. Nathan Tirop Koech & 4 Others***; Civil Appeal No. 51 of 2016; [2018] eKLR was relevant and applicable to the present consolidated appeal;
- ii. The ratio in the referenced case is that third parties, including the 1st appellant herein, acquired good title to their portions pursuant to the subdivision and re-subdivision of L.R No. 10492, and the subsequent transfers of the sub-plots.

9. **Issue 9:** Consolidated appeal allowed and each party ordered to bear its own costs.

Accordingly, the Supreme Court grants the following orders:

- i. The consolidated appeal is hereby allowed;***
- ii. The Judgment of the Court of Appeal dated 22nd July, 2022 is hereby overturned; and***
- iii. Each Party shall bear its own Costs.***

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