



**Sikengei v Wandiemba (Environment and Land Appeal E032 of 2022)  
[2023] KEELC 19269 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19269 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E032 OF 2022  
EC CHERONO, J  
JULY 28, 2023**

**BETWEEN**

**JOSEPH JUMANNE SIKENGEI ..... APPELLANT**

**AND**

**SOLO MONOO WANDIEMA ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. C.M Wattimah, Senior Resident Magistrate delivered on 23rd November, 2022 in Sirisi SPM-ELC NO. 07 of 2021)*

**JUDGMENT**

1. The Appellant, Joseph Jumanne Sikengei was sued by the Respondent, Solomon Monoo Wandiemba before the Principal Magistrates Court at Sirisia SPM-ELC No. 07 of 2021 for inter-alia an injunction order and a declaration that an agreement entered on 24/4/2003 is null and void. The appellant had filed defence and counter-claim to the plaintiff/Respondent's claim. After the case was heard inter-par-te, the trial Magistrate pronounced herself on 23/11/2022 by allowing the plaintiff/respondent's claim/suit and dismissed the appellant/defendant's counter-claim. The defendant was aggrieved by the decision of the trial Magistrate and preferred the present appeal on the following grounds;
  - i. That the learned Magistrate erred in fact and in law in failing to appreciate that the plaintiff's claim was barred by limitation of time.
  - ii. That the learned Magistrate erred in fact and in law in failing to appreciate that the Appellant has been using the land for a period of over 12 years openly, peacefully, continuously and uninterrupted.
  - iii. That the learned Magistrate erred in fact and in law in failing to appreciate that the Respondent had been dispossessed of the land for a period of over 12 years.



- iv. That the learned Magistrate erred in fact and in law in failing to appreciate that the plaintiff's claim for non-payment of the balance of the purchase price was barred by limitation of Action and could not be an issue forming the cause of action.
- v. That the learned Magistrate erred in fact and in law in failing to appreciate the evidence tendered by all the witnesses and the import and purport thereof and arrived at a conclusion not supported by evidence.
- vi. That the learned Magistrate erred in fact and in law in failing to apply the relevant law to the evidence tendered by the parties thus, arriving at a finding that is not only against the law but the evidence of the parties too.

### **Appellant's Submissions**

2. The appellant through the firm of M/s Anwar & Co. Advocates submitted on all the six grounds of appeal as follows;

#### **i. Of whether the learned Magistrate erred in fact and in law in failing to appreciate that the plaintiff's claim was barred by limitation of time.**

3. On this issue, the learned counsel answered in the affirmative and submitted that a cursory look at the Plaintiff will indicate that the Plaintiff/Respondent's claim is anchored on an agreement made on 24<sup>th</sup> April 2003 where he sold land to the appellant and which as per the Amended Plaintiff, was never paid for fully by the Appellant and thus, the Respondent wanted to have the said agreement declared null and void and the basis for the injunctive relief sought. He further submitted that at 24 line 5 of the extract of the record of appeal, the Respondent was instructive in his evidence that he sold land to the appellant in 2003 wherein he was partly paid for the same land and a balance was never paid to date and thus the basis for his claim as per page 24 line 12 to 17.
4. The learned counsel submitted that Section 4(1) (a) of the *Limitation of Actions Act* is instructive that actions founded on contract cannot be brought after 6 years from the date in which the cause of action accrued. He argued that the agreement herein was made in 2003 and thus, the cause of action accrued from 2003 and by 2009, the Respondent's claim ought to have failed for being barred in law and referred to the case of *Maersk Kenya Limited v Murabu Chaka Tsuma (2017) eKLR*. In conclusion, counsel submitted that since the agreement the subject of the dispute was done in 2003 and the suit herein filed in 2021, a period of 18 years had passed and thus, by all standards the plaintiff's claim was caught up by limitation of action.

#### **ii. Of whether the learned Magistrate erred in fact and in law in failing to appreciate that the Appellant has been using the land for a period of over 12 years openly, peacefully, continuously and uninterrupted.**

5. On this limb, the learned counsel submitted that having established that the parties herein entered into a sale agreement in 2003 and going by the evidence of Respondent herein found at page 24 line 7 that he gave possession of the land to the Appellant who used it and as per his evidence during cross-examination found at page 25 line 13, the Appellant herein entered the land and used it from 2006-2007 which by implication means that by the time the Respondent filed the suit herein in 2021, a period of 12 years had lapsed and thus, as per section 7 of the *Limitation of Actions Act*, the Respondent was barred from instituting the instant suit seeking to take possession and or recover the land from the Appellant herein. He referred to the case of *Dickson Ngige Ngugi v Consolidated Bank Ltd (Formerly Jimba Credit Corporation Limited & Another (2020) KLR*.



6. He submitted that having demonstrated that the Appellant took possession of the land in 2007-2007 as per the evidence of the Respondent, by the time he was filing the claim in the Subordinate Court, a period of over 14 years had passed and urged this Court to hold and find that the learned Magistrate erred in fact and in law in failing to appreciate that the Appellant has been using the land for a period of over 12 years openly, peacefully, continuously and uninterrupted.

**iii. Of whether the learned Magistrate erred in fact and in law for failing to appreciate that the Respondent had been dispossessed of the land for a period of over 12 years.**

7. The counsel for the Appellant submitted that as per evidence of the Respondent during cross-examination at page 25 line 13, the Appellant herein entered the land and used it from 2006-2007 and to the time of filing the suit herein, a period of over 14 years had passed and the implication is that the Appellant had dispossessed the Respondent from possession of the land for a period of 14 years and thus, the Appellant could thus not be enjoined from using the land as a period of over 12 years had passed since the Appellant became in possession of the land and thus, the Respondent's claim was statute barred and caught up by *limitation of Actions Act* and it was thus erroneous for the learned Magistrate to enjoin the Appellant from using the land that he had been in possession of for over 12 years.

**iv. Of whether the learned Magistrate erred in fact and in law in failing to appreciate that the Plaintiff's claim for non-payment of the balance of the purchase price was barred by *limitation of Actions Act* and could not be an issue forming the cause of action.**

8. The counsel for the Appellant submitted that a read through the Amended Plaint (page 86-87) is instructive that the Respondent's claim was anchored on non-payment of the balance of the purchase price of an agreement that was entered in 2003 which by implication means that the Respondent's claim anchored on vitiating an agreement made in 2003, over 18 years later and that being the case, the claim was caught up by limitation of time and the court could not order for the performance and or non-performance of the contract as it did not have jurisdiction to entertain the same and that it was thus erroneous for the Court to enjoin the Appellant based on non-payment of the entire consideration and further, it was erroneous for the Court to order for the refund of the monies paid to the Respondent and to allow the Respondent's claim. He cited the case of; Kilimanjaro Company Limited v Kenya Union of Commercial Food and Allied Workers (2019) eKLR.

**V. Of whether the learned Magistrate erred in fact and in law in failing to appreciate the evidence tendered by all the witnesses and the import and purport thereof and arrive at a conclusion not supported by evidence.**

9. The Appellant's Counsel submitted that the learned Magistrate disregarded the evidence of the Respondent that he had sold the land to the Appellant in 2003, that the Appellant took possession of the land immediately and further, failed to consider the evidence of the Respondent and his witnesses that he took possession of the land immediately after purchase and that they have been using the land from 2007. He submitted that the above evidence if considered could have shown the Magistrate that the claim by the plaintiff was statute barred and thus the court could not hear and determine the matter.



**Vi. Of whether the learned Magistrate erred in fact and in law in failing to apply the relevant law to the evidence tendered by the parties thus, arriving at a finding that is not only against the law but the evidence of the parties too.**

10. On this issue, the counsel for the Appellant submitted that the learned Magistrate erred in fact and in law in failing to apply the relevant law to the evidence tendered by the parties thus, arriving at a finding that is not only against the law but the evidence of the parties too.

**Respondent's Submissions.**

11. The Respondent through the Firm of M/s J.w Sichangi & Company Advocates submitted on the following 4 issues; whether the sale agreement dated 24/4/2003 is null and void; Whether the Appellant is entitled to ownership of the suit land under the doctrine of adverse possession; whether the trial court came to the right conclusion by allowing the Respondent's suit and dismissing the Respondent's counter-claim; who should pay costs.

**Analysis And Determination**

12. I have considered the extract of the record of appeal and the submission by the Advocates for both the Appellant and the Respondent as well as the relevant law. The brief background of this appeal is that the Respondent sued the Appellant in the former suit being SIRISIA SPM-ELC NO. 07 of 2021 over the sale of land agreement entered on 24/4/2003. In a Complaint dated 9/4/2021 and Amended on 22/6/2021, the Respondent averred that under the said agreement, the portion of land being sold was measuring 2 acres to be excised from the Respondent's mother parcel NO. N.MALAKISI/W.SASURI/3590. The purchase price was agreed at KSHS. 160,000/= Upon execution of the sale agreement, a down payment of Kshs. 120,000/= was paid leaving a balance of KSHS. 40,000/= According to the Respondent, the sale agreement became null and void as no consent of land control Board was obtained as required and further that the same was breached by non-payment of the balance.
13. The Appellant filed defence and counter-claim dated 18<sup>th</sup> February 2022. At paragraph 4 and 5 of the defence and counter-claim, the Appellant averred as follows;
4. "The defendant avers that he purchased the 2 acres parcel of land, now the suit land on behalf of Hon. Justice Gideon Mbitio as he then was and the said parcel was immediately handed to Julius Kapkota Mbitio being a trustee thereto"
5. "The Defendant avers that since its purchase, the land has been in peaceful, continuous, and uninterrupted possession of Julius Kapkota Mbitio as a trustee."
14. Mr. Sichangi Advocate in his submissions described the averments by the appellant as strange and I totally agree. Be that as it may, I have considered the counter-claim by the appellant which is basically anchored on the doctrine of Adverse possession. In Kisumu Civil Appeal NO. 27 of 2013 Samuel Kihamba v Mary Mbaisi (2015) eKLR, the Court of Appeal held;

"Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi or intention to have the land."



15. It is not in dispute that the Appellant was put in possession of the suit property after execution of the sale agreement between him and the Respondent dated 24/4/2003. Having taken possession of the suit property by consent or permission of the land owner pursuant to a sale agreement, the Appellant is estopped from claiming for adverse possession. The Appellant's remedy is either seek for specific performance or an equitable remedy of constructive trust if he can show that he has performed his part of the bargain. Considering the evidence adduced before the trial court as shown in the extract of the record, it is clear that the Appellant only paid a down payment of Kshs.120,000/= leaving an outstanding balance of KSHS.40,000/= .He did not prove that he paid the outstanding balance and therefore, equity cannot come to his aid.
16. The appellant through his Advocate submitted that the sale agreement which gave rise to the cause of action in the trial court and also the subject of this appeal was an agreement made in 2003 and that the plaintiff's claim ought to have failed for being time barred.
17. It is clear from the extract of this appeal that the Appellant did not comply with the terms of the sale Agreement entered into between the parties in the year 2003 by failing to pay the outstanding balance of KSHS. 40,000/= It is trite that where a party fails to comply with the terms and conditions of a contract, the contract becomes voidable at the instance of the opposite party. The said sale agreement entered between the parties in 2003 in my view became null and void after the appellant failed to comply with the terms therein by paying the balance of the purchase price and obtain consent to transfer from the concerned land control Board. The Appellant cannot seek to benefit from a null and void agreement in which he failed to comply with the terms and conditions thereof. For avoidance of doubt, the Authorities cited by the Advocate for the Appellant are irrelevant and distinguishable.
18. The upshot of my findings is that this Appeal is without merit and the same is hereby dismissed with costs.

**READ, DELIVERED AND SIGNED IN THE OPEN COURT/VIRTUALLY THIS 28<sup>TH</sup> DAY OF JULY, 2023.**

**HON.E.C CHERONO**

**ELC JUDGE**

**In the presence of;**

1. Mr. Anwar for the Appellant
2. Respondent/Advocate-absent
- 3 M/s Joy C/A-present

