



REPUBLIC OF KENYA



**Omollo v Kisumu & another (Environment and Land Appeal 19 of 2022)
[2023] KEELC 20699 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20699 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 19 OF 2022
MN KULLOW, J
SEPTEMBER 29, 2023**

BETWEEN

JAMES ONYANGO OMOLLO APPELLANT

AND

RICHARD OCHIENG KISUMU 1ST RESPONDENT

GEORGE OBUYA OWUOR 2ND RESPONDENT

JUDGMENT

1. This Appeal emanates from the Judgment and Decree of Principal Magistrate Hon. R. K. Langat delivered on February 10, 2022 in Rongo ELC No. 20 of 2021, in favour of the Plaintiff. Aggrieved by the said Judgment, the appellant lodged the instant Appeal vide a Memorandum of Appeal dated July 25, 2022 and outlined the following grounds of Appeal as follows: -
 - i. The Learned Trial Magistrate erred in law and fact by accepting the evidence of the 1st respondent and the admission of such evidence without evaluation of the documents (if at all) presented to support his/their assertion whatsoever.
 - ii. The Learned Trial Magistrate erred in law and fact in finding and holding that the 1st respondent and the admission by the 2nd respondent had merit contrary to the averments contained in the documents presented to the Honourable court as evidence.
 - iii. The Learned Trial Magistrate misapprehended and/or misconceived the tenor, effect and consequences of the evidence tendered in court, thereby arrived at an erroneous and illegal decision.
 - iv. The Learned Trial Magistrate erred in law by granting the prayer for transfer of the said parcel of land against an obsolete, irregular and illegal documents.



- v. The judgment and/or decision of the Learned Trial Magistrate awarding the said parcel of land L.R. No. Kamagambo/ Kabuoro/ 3998 to the 1st respondent and admission of the claim by the 2nd respondent amounts to rectification of the register of the whole parcel of land. Consequently, the judgment herein should be impeached whatsoever.
 - vi. The Learned Trial Magistrate erred in fact and in law in not finding and holding that the respondents were non-suited against the appellant. Consequently, the judgment and/or decision of the Learned Trial Magistrate is irregular, unlawful and illegal.
 - vii. The Learned Trial Magistrate erred in law in failing to appreciate the substratum and/or crux of the 1st respondent's claim and the admission of the 2nd respondent thereby proceeded to grant the prayers sought in the suit without proper and concise evidence and documents.
 - viii. The Learned Trial Magistrate erred in law and in fact in finding and holding that the 1st respondent and the admission by the 2nd respondent was clear and uncontroverted whatsoever. This was contrary to the evidence adduced and documents supplied by them.
 - ix. The Learned Trial Magistrate erred in law by returning a verdict in favour of the 1st respondent and the admission by the 2nd respondent over a cause of action which accrued on 23rd day of November, 2010. Consequently, the Learned Trial Magistrate erred in not finding and holding that the 1st respondent's claim and the admission by the 2nd respondent was barred by the Limitation of actions act cap 22 Laws of Kenya.
 - x. The judgment and/or decision of the Learned Trial Magistrate is contradictory and self-defeating. Consequently, the judgment herein has occasioned a miscarriage of justice and thus ought to be set aside ex-debito justitiae.
 - xi. The decision by the Learned Trial Magistrate erred in fact and in law in failing to properly analyse, evaluate and consider, the totality of the evidence adduced by the appellant. Consequently, the trial court arrived at a passionate and biased conclusion contrary to the evidence on record.
 - xiii. The Learned Trial Magistrate failed to properly evaluate and/or analyse the tenor of the evidence tendered by the appellant. Consequently, the Leaned Trial Magistrate misapprehended the crux of the legal issues attendant to the matter before court.
2. Consequently, the appellant sought the following Orders: -
- a. The Appeal herein be allowed and the Judgment and Decree of the Trial Magistrate dated 10th day of February, 2022 vide Rongo ELC No. 20 of 2021 be set aside, reviewed, varied and/or quashed.
 - b. The honourable court be pleased to substitute therefore an Order dismissing the respondent's suit in the subordinate court vide Rongo ELC No. 20 of 2021.
 - c. Costs of this Appeal and costs incurred in the subordinate court be borne by the respondent.
3. A brief background to bring the Appeal into perspective is that; the plaintiff (now 1st respondent) instituted a suit vide a Plaint dated 29.04.2021 and Amended on 20.09.2021 against the defendant (now appellant) and the 2nd respondent; seeking an order for Specific Performance to compel the defendants to transfer a portion of the suit parcel L.R. No. Kamagambo/Kabuoro/3998 measuring 0.4Ha in favor of the Plaintiff and costs of the suit.



4. It was the plaintiff's claim that he purchased the said portion of the suit land measuring 0.4Ha from the defendants at a consideration price of Kshs. 450,000/= which sum was paid in full to the Defendants and he was thereafter put into possession and has remained in occupation thereof to date.
5. He further stated that during the Confirmation of Grant of Letters of Administration of the estate of the late Tom Mbuya Omollo (the defendants' father), he was recognized as a beneficiary and the share he purchased was accordingly apportioned to him. However, the defendants have failed, ignored and refused to transfer the said portion of the suit parcel to date hence the suit.
6. The 1st defendant/ appellant filed a Statement of Defence dated 08.6.2021; wherein he denied all the allegations raised in the Plaint. He averred that he had never entered into any contract of sale of the suit land with the plaintiff.
7. It was his claim that the suit land was still registered in the name of the deceased and the same could not be sold to the plaintiff as alleged before undertaking succession proceedings. In his witness statement, he dismissed the plaintiff as being an intermeddler with the estate of the deceased. He thus maintained that the plaintiff was not entitled to the orders sought and urged the court to dismiss the suit with costs.
8. The 2nd defendant/ respondent, acting in person entered Appearance and filed a Notice of Admission pursuant to Order 13 Rule 1; wholly admitting the plaintiff's claim.
9. The matter was heard and determined vide the judgment dated February 10, 2022; whose effect was to allow the Plaintiff's claim as prayed hence the instant Appeal.
10. On 15/6/2023 this court issued directions that the Appeal be canvassed by way of written submissions. However, despite being given sufficient time to file his submissions, by the time of writing this Judgment, no written submissions had been filed by the appellant or the respondents. Be as it may, I will proceed to render my decision as hereunder;

Analysis and Determination

11. I have critically looked at the Memorandum of Appeal and the Record of Appeal filed herein in totality and it is my considered view that the main issue arising for determination is whether this Court should interfere with the exercise of discretion by the trial court and set aside its judgment and decree. I will proceed to address the same on account of: -
 - a. Issue of limitation of actions
 - b. The evidence and testimony produced by the parties in the trial court and the Notice of Admission filed by the 2nd respondent.
 - c. Whether the appellant is entitled to the reliefs sought in the Memorandum of Appeal.
12. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. However, this mandate does not entail taking on board new issues which were never brought to the trial court's attention or matters that were not subject of the trial court's consideration. See the Court of Appeal decision in *Ol Pejeta Ranching Limited vs David Wanjau Muhoro* [2017] eKLR.
13. The appellant at ground 9 in the Memorandum of Appeal averred that the 1st respondent's cause of action accrued on 23/11/2010 and therefore the trial magistrate erred in finding in favour of the 1st respondent since his suit was barred by the *Limitation of actions Act*, Cap 22.



14. I have carefully looked at the appellant's Statement of Defence dated 08/06/2021 and his witness statement evenly dated and I do note that the doctrine of laches was not raised in his pleadings filed in the trial court. I have also keenly looked at the judgment of the trial court and I do note that the learned trial magistrate did not address the said issue of the suit being time barred by virtue of *limitation of actions act* in his consideration.
15. As stated in the *Ol Pejeta Ranching case* above; the mandate of this court sitting as an Appellate court does not entail taking on board new issues that were not subject of the trial court's consideration. It is trite law that parties are bound by their pleadings, the appellant did not raise the defence of limitation of action in his pleadings or in his testimony in court. He is therefore estopped from introducing the same at this stage. In view of the same, I find that ground 9 of Appeal fails and this court will disregard the said allegations.
16. It is the appellant's contention at grounds 1, 2, 3, 4, 8, 11 and 12 in the Memorandum of Appeal that the trial magistrate failed to evaluate, analyse and examine the documents tendered as evidence by the respondents, he also failed to consider the tenor, effects and the consequences of the said documents in arriving at his decision and thus erred in law and in fact. However, it is important to point out that despite raising the said allegations in the Memorandum of Appeal, the appellant did not file written submissions to clearly demonstrate the said allegations as outlined in further support of his case.
17. The Court of Appeal in *Selle v Associated Motor Boat Co.* [1968] EA 123) held as follows: -

“ this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
18. The main issue before the trial court was whether the 1st respondent was entitled to a portion of the suit parcel measuring 0.4Ha and whether the relief sought for specific performance would issue in the circumstances.
19. It is the 1st respondent's claim that he purchased a portion of the suit land measuring 0.4Ha from the 2nd respondent, the purchase price was paid in full and he thereafter took possession, he produced a copy of the sale agreement as Pexh.1 in support of the said claim. From a cursory look at the said sale agreement, it is clear that the 1st respondent was the purchaser while the 2nd respondent was the seller of the said portion of land. The issue of sale was further confirmed by the 2nd respondent through his Notice of Admission pursuant to Order 13 Rule 1 dated June 7, 2021; wherein he wholly admitted the Plaintiff's claim. Moreover, appellant also admitted that the 1st respondent purchased the said portion of the suit land in his testimony contained at Page 35 of the Record of Appeal.
20. By virtue of his purchaser's interest over the portion measuring 0.4Ha of the suit land, the 1st respondent avers that he was included in the list of beneficiaries during the confirmation of Grant of the appellant's father's estate. He produced a copy of the Certificate of Confirmation of Grant as Pexh. 4 in support of the said claims. He also produced bundle of photographs as Pexh. 5 as proof of his possession and occupation of the suit land.



21. I have re-evaluated the said documents as produced in the trial court and I note that the same reflects the 1st respondent's claim. Therefore, the trial magistrate to this end correctly analysed the evidence produced by the 1st respondent in support of his claim.
22. The appellant's claim on the other hand was that he neither sold the suit land to the 1st respondent nor was he a party in the contract of sale of land between the 1st and 2nd respondents over the said portion of land. He further dismissed the purchase claims by the 1st respondent and maintained that the land at the said time was registered in the name of their deceased father and the 1st respondent was therefore intermeddling with the unadministered estate of their deceased father.
23. However, during trial he was of the contrary view. At page 35 of the Record Appeal; while testifying, the appellant admitted to have sold the suit land to the 1st respondent and stated that he refused to transfer the same since he had not been paid the entire purchase price by the 1st respondent, who still owed him Kshs. 250,000/= . This in my view is a clear contradiction by the appellant and there is therefore no way of clearly ascertaining which is the actual and correct position. The only evidence he produced in support of his case was a copy of the title deed which was marked Dexh. 1.
24. Moreover, the appellant did not adduce any evidence to challenge the evidence adduced by the appellant or to demonstrate why the 1st respondent was not entitled to the reliefs sought. It is trite law that he who alleges must prove. Section 107(i) of the *Evidence Act* provides that: -

“Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
25. In view of the foregoing, I find that the appellant did not adduce any evidence in support of his claims to the required threshold to warrant the grant of the orders sought. I accordingly find that the learned trial magistrate exercised his discretion properly in allowing the plaintiff's claim and this court therefore finds no reason to interfere with the findings of the trial court. The analysis and findings were based on an assessment and evaluation of all the facts of the case and the evidence presented in support of the rival positions taken by the parties.

Conclusion

26. In conclusion, I accordingly find that the Appeal dated July 25, 2022 is not merited and is therefore dismissed with no orders as to costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 29TH DAY OF SEPTEMBER, 2023.

MOHAMMED N. KULLOW

JUDGE

In the presence of: -

..... for appellant

.....for respondent

Court Assistant- Tom Maurice/ Victor

