Masee v Birgen (Environment and Land Appeal E028 of 2022)
[2023] KEELC 21014 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21014 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND APPEAL E028 OF 2022

EO OBAGA, J

OCTOBER 26, 2023

BETWEEN

PAULO MALAKWEN MASEE ..... APPELLANT

AND

HENRY CHEPSIROR BIRGEN ..... RESPONDENT

(n appeal from the Ruling of Hon. B. Kiptoo Senior Resident Magistrate dated 2/9/2022 in Eldoret Chief Magistrate's Court E & L Case No. E033 of 2022))

JUDGMENT

Introduction and Background;

1. The appellant is a brother in-law of the respondent. the respondent is married to the appellant's sister. In or around 1971 the appellant's brother Alfred Kiplel Masee went to her sister's home at Kaiboi in order to assist her to plough using oxen. He took along with him one bull from their family.

2. While Alfred Kiplel Masee was staying at Kaiboi, a catholic priest approached the respondent's family with a proposal to exchange the appellant's family land with another one so that the Catholic Church could put up a school on the respondent's family land. When the respondent went to view the land which was to be exchanged, he did not like it as it was rocky and not suitable for ploughing and cultivation. He opted to be paid money which he used to purchase land at Kitale.

3. The family of the appellant and the respondent's family agreed to jointly purchase land. The appellant's brother was asked to sell the bull which was at therespondent's family. He went and sold the bull for Kshs 60/= which he gave to the respondent's father who went and bought 20 acres at Tapsagoi Settlement Scheme after he added 60/= to the one given by the appellant's family.

4. In 1973, the appellant's brother was asked to go and build at the Tapsagoi Settlement Scheme land. He did so and even married while there. He stayed for four years after which the area village elder came to

him and asked him to vacate from the land. He village elder told him that the Respondent's brother called Kiptanui had written to him a letter in which he had asked that the village elder asks him to vacate the land.

5. The appellant's brother went back to their home at Kapsisiywa in Nandi County. He informed the family that he had been chased away. Theappellant went to Kitale to see therespondent. The appellant told the respondent that the reason why his brother was chased away from the Tapsagoi land was because the appellant's brother Kiptanui had sold the land to one Kipkunet. The appellant and the respondent agreed that the appellant was to occupy the Kitale land which was 16 acres and the respondent was to occupy ten acres at Tapsagoi Scheme so that Kiptanui could not sell the land again. The appellant and the respondent's family managed to refund the money paid by Kipkunet.

6. Theappellant stayed at the Kitale land for 8 years. When occupants of Kibomet area started getting titles, the appellant requested the respondent toallow him process the title in his name. The respondent refused. The appellant complained to the area chief who listened to the dispute and told him that he should pursue the land at Tapsagoi Scheme and not the Kitale land. This was in 1986. The appellant left Kitale and went back home in Nandi. It is not until 2021 when he revisited the dispute by having elders to resolve the same. The appellant was not happy with the manner in which the dispute was handled. This is how he came to file the suit which was struck out and which is the subject of this appeal.

The Appeal;

7. The appellant filed a memorandum of appeal in which he raised the following grounds;

    1. The learned trial magistrate erred in law and fact in failing to find that the appellant had sworn a Replying affidavit annexing a letter from the chief indicating the when the case comments between the parties.

    2. The learned trial magistrate erred in law and fact in failing to put into consideration the submissions filed by the appellant to arrive at the ruling.

    3. The learned trial magistrate erred in law and fact in not giving the rational for striking the appellant plaint based on both side facts adduced before the court.

    4. The learned trial magistrate erred in law and fact for arriving at the ruling without looking at the appellant replying affidavit or indicate in the ruling how it couldn't salvage the case.

    5. The learned trial magistrate erred in law and fact in giving a ruling that is not balance on evidence given looked on one side only.

8. This Appeal was disposed of by way of written submissions. The appellant filed his submissions on 29/8/2023. The respondents filed his submissions on 22/9/2023. I have considered the submissions by the parties herein. My duty as the first appellate court is to reconsider the evidence, evaluate it and reach my own conclusion. The duty of a first appellate court was captured in the case of *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR as follows: -

> " An appeal to this court from a trial by the high court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard witnesses and should make due allowance in this respect."

Analysis and determination;

9. I have gone through the documents in the record of appeal as well as the proceedings before the lower court and the impugned ruling. The first issue for determination is when the cause of action arose. The second issue is whether the suit before the lower court was statute barred. The third is whether the trial magistrate considered the submissions before him.

10. According to the documents filed in the lower court file as well as the record of appeal, the appellant's brother was asked to go and build a house on the suit property in 1973. He went and put up a house where he stayed for four years after which he was chased away. The cause of action therefore arose in or around 1977 or 1978.

11. There was no suit filed between 1977 or 1978 until one was filed in February, 2022. The dispute which arose in 1986 between the appellant and the respondent was over the Kitale Property which belonged to the respondent. The appellant had only been allowed by his brother in-law to stay on the land but not as his own land. In the appellant's own statement, he stated that he had asked the respondent to go and stay on 10 acres of the suit property so that the respondent's brother who had sold it could not do so again.

12. The appellant had tried to lay a claim to the Kitale property in 1986 and he was rightly advised that his interest if any lay in the suit property at Tapsagoi. This is how he sought the assistance of elders to resolve the dispute in vain. As at this time his suit had been barred by statute.

13. The trial magistrate considered the submissions before him. There is no way he could have gone round the period of limitation to salvage the appellant's suit as he is being accused in paragraph 4 of the memorandum of appeal.

14. Section 7 of the *Limitation of Actions Act* provides as follows:-

> " An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

15. The appellant sat on his rights for over 45 years. This is a long period of time. The purpose of limitation period was well captured in the case of *Mehta v Shah* (1965) EA 321 where it was stated as follows:-

> " The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case."

16. It was further held in the case of *Gathoni v Kenya Co-Operative Creameries Ltd* (1982) KLR 104 as follows: -

> " ...the Law of Limitation of Actions is intended to protect defendant against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."

Disposition;

17. From the above analysis the appellant's appeal has no merit. the same is hereby dismissed with costs to the respondent.

DATED, SIGNED and DELIVERED at ELDORET on this 26th day of OCTOBER, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

M/s Kimeli for Respondent.

Mr. Rugut for Appellant.

Court Assistant –Laban

E. O. OBAGA

JUDGE

26TH OCTOBER, 2023