



REPUBLIC OF KENYA



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**Njau v Ngong Butchers Cooperative Society Ltd (Environment and Land Appeal E026 of 2021) [2023] KEELC 22449 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22449 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL E026 OF 2021  
LC KOMINGOI, J  
DECEMBER 20, 2023**

**BETWEEN**

**ESTHER WAMBUI NJAU ..... APPELLANT**

**AND**

**NGONG BUTCHERS COOPERATIVE SOCIETY LTD ..... RESPONDENT**

*(Being an Appeal from the judgement of the Hon. Senior Principal Magistrate Hon. P. Achieng in Ngong ELC No. 21 of 2020 delivered on 19th August 2021)*

**JUDGMENT**

1. In her Judgement delivered on 19<sup>th</sup> August 2021 Hon. P. Achieng (SPM) held;

“The cause of action therefore arose in the year 2001. The Plaintiff filed the present suit on 11<sup>th</sup> March 2014 at Milimani Law Court, after the lapse of 12 years. The present suit is therefore barred and the court cannot therefore go into its merits. I therefore proceed to strike out the plaintiff’s suit with costs to the Defendant.”
2. The appellant aggrieved by the said Judgement delivered on 19<sup>th</sup> August 2021 in Ngong ELC No. 21 of 2020 filed a Memorandum of Appeal dated 7<sup>th</sup> September 2021. The Appeal seeks the setting aside of the judgement and the Appellant’s prayers allowed on grounds that:
  1. The Honourable trial magistrate erred in law and in fact by failing to find that the Appellant acquired proprietary interests in the suit property, Land Reference No. 23124/10 when she made full payment of the sale price to the Respondent and she was given and took over possession, use and occupation of the property in 1997.



2. The Honourable trial magistrate erred in law and in fact by failing to find that the Appellant fulfilled all her obligations as a purchaser and therefore merited the suit property Land Reference No. 23124/10 to be transferred to her by the Respondent.
3. The Honourable trial magistrate erred in law and in fact by failing to find that the registration of property in the name of the Appellant did not happen due to the fault of the Respondent.
4. The Honourable trial magistrate erred in law and in fact by failing to find that the Plaintiff's suit is time barred without considering the fact that the grant of title to the property in the name of the Respondent was registered on 27<sup>th</sup> February 2007, from which date the Respondent had the ability to transfer the property to the Appellant and when the cause of action arose after the Respondent declined to do so when advised by its advocates O.T. Ngwiri & Company Advocates.
5. The Honourable trial magistrate erred in law and in deciding the case on technicality and failing to consider and uphold the wider interests of substantive justice.
6. The Honourable trial magistrate erred in law and in fact by failing to write a judgement that contains all elements of a judgement as provided in law.
7. The Honourable trial magistrate erred in law and in fact by failing to uphold the evidence and submissions of the Appellant.
8. The Honourable trial magistrate erred in law and in fact in basing her finding on a preliminary point of law that had been raised, canvassed and decided upon by the ELC court at Kajiado.

3. The Appeal was canvassed by way of written submissions.

### **The Appellant's submissions**

4. In the submissions dated 21<sup>st</sup> August 2023, counsel submitted that the suit at the lower court which was dismissed on grounds that it was time barred was res judicata as stipulated under Section 7 of the *Civil Procedure Act* because the same issue had been determined by Justice C. Ochieng in the ruling dated 18<sup>th</sup> September 2019. Counsel submitted that the said decision was binding because it had neither been appealed against nor set aside and the lower court had no jurisdiction making a determination on it as was held in *Kennedy Mokuva Ongiri vs John Nyasende Mosioma & Florence Nyamoita Nyasende*, "... A decision of the court, unless set aside or quashed in a manner provided for by the law, must be accepted as incontrovertibly correct..."
5. Counsel also submitted that the Appellant had proved her case on a balance of probability that she had registrable proprietary interests over the suit property having purchased it in 1997 and had been in possession all through and the Respondent had unjustifiably refused to transfer it to the Appellant. Counsel submitted that the Respondent created a constructive trust and had been holding the land in trust for the Appellant citing *Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri* (2014) eKLR. As such court should grant the prayers sought by the Appellant at the lower court.



## The Respondent's submissions

6. In the submissions dated 11<sup>th</sup> October 2023, counsel submitted that the suit was time barred and the court lacked jurisdiction to determine it because it was filed seventeen years after the cause of action contrary to Section 7 of the Limitation of Actions Act citing In Re estate of Elisba Otieno Odera Ex parte Daniel Ochieng Odera [2016] eKLR and Margaret Wairimu Magugu vs Karura Investment Ltd & 4 others [2019] eKLR.
7. On whether the issue of limitation of time was res judicata, counsel submitted that the issue of limitation was not determined by Ochieng J. since she ruled that the issue of limitation should be determined after hearing the parties in full trial and the suit was then transferred to Ngong Law Courts. Counsel also pointed out that the Record of Appeal was incomplete and should be struck out because the fulling ruling delivered by Justice Christine Ochieng on 18<sup>th</sup> September 2019 was missing.
8. Whether the Appellant proved the alleged purchase of the suit property, counsel submitted that it was trite law that sale of land ought to be by way of a written sale agreement as per Section 3 of the Law of Contract Act and Section 44 of the Land Registration Act. But in this particular case, the Appellant had indicated that the sale was through a verbal agreement with the Respondent on 3<sup>rd</sup> December 1997. Therefore, the said sale was unenforceable as was held in Patrick Tarzan Matu & Another vs Nassim Shariff Abdulla & 2 others [2009] eKLR. Therefore, the Appeal should be dismissed and the Respondent be allowed to enjoy the fruits of its judgement.

## Analysis and Determination

9. I have considered the grounds of the appeal, the rival submissions and the authorities cited. The issues for determination are:
  - i. Whether the trial Court erred in dismissing the Appellant's suit;
  - ii. Whether the Appeal is merited and orders sought should be granted.
  - iii. Who should bear costs of the Appeal?
10. This being the first appeal the court is duty bound to relook at the evidence at the trial court and come up with its own determination as was held by the Court of Appeal in Peter Kamau Njau v Emmanuel Charo Tinga [2016] eKLR:

Our duty in this appeal, being a first appeal is to analyze afresh and re-evaluate the evidence presented in the trial court in order to arrive at our own independent conclusion. See Selle v Associated Motor Boat Co. (1968) EA 123.
11. The appellant's case vide the Complaint dated 9<sup>th</sup> March 2014 filed at Milimani High Court which was transferred to ELC Kajiado and later transferred to Ngong being ELC No. 21 of 2020 is that on or about 3<sup>rd</sup> December 1997, the Plaintiff purchased property LR No. 23124/10 located in Ongata Rongai for a consideration of Kshs. 400,000 from the Defendant. The Defendant released the original title to the suit property and the Plaintiff has been in possession and occupation of the suit property since then and had been remitting all statutory payments. However, the Defendant has continuously refused to effect transfer of the suit property in her name and she thus sought for an order of transfer of the suit property.
12. The Respondent denied the allegation indicating that there was never a sale agreement between the Appellant and the Respondent and the alleged transaction was invalid because it was not sanctioned by



the members. The Respondent also denied ever receiving payment for the suit property and deponed that if the Appellant was in possession of the suit property, she was there unlawfully. It urged that the suit be dismissed for being statute barred and bad in law.

13. The Learned Trial Magistrate in the Judgement dated 19<sup>th</sup> August 2021 dismissed the suit for being time barred. She stated thus;

“I have seen the ruling delivered by Hon. Lady Justice Christine Ochieng at ELC Kajado before this suit was transferred to this court dated 18<sup>th</sup> September 2019. The same related to a preliminary objection raised by the Defendant to the effect that the present suit was time barred pursuant to Section 4(1)(a) of the *Limitation of Actions Act*. The court did not make a determination on the said issue and stated considering the circumstances of the case that it can be dealt with at the judgement stage. I will therefore consider the said issue first.

...

In the instant case it is the Plaintiff's contention that she entered into the sale agreement with the Defendant on 3<sup>rd</sup> December 1997. The Plaintiff has filed among her list of documents correspondence from the Defendant requiring payment of survey/title processing fee. There is a letter dated 30<sup>th</sup> April 1998 addressed to O. T. Ngwiri & Co. Advocates requiring them to collect the amount of Kshs. 10,000 for the said purpose from several people including the Plaintiff herein. There is a similar one dated 12<sup>th</sup> July 1999 asking for payment of Kshs. 35,000. The Plaintiff states that she paid Kshs. 35,000 to the firm of Obadia Thiong'o Ngwiri & Co. Advocates for valuation and survey of the said property on 19<sup>th</sup> June 2001. Since then, no further action had been taken by the Defendant in ensuring that the land is transferred to the Plaintiff.

The cause of action therefore arose in the year 2001. The Plaintiff filed the present suit on 11<sup>th</sup> March 2014 at Milimani Law Court, after the lapse of 12 years. The present suit is therefore time barred and the court cannot therefore go into its merits. I therefore proceed to strike out the Plaintiff's suit with costs to the Defendant.”

14. I will start by determining whether the trial court erred in dismissing the suit on grounds that it was time barred. From the judgement (excerpt above), the Learned trial magistrate found that the cause of action arose in the year 2001 which is the year that the Appellant paid the requisite fees for transfer of the suit property. However, scrutiny of the evidence contained within the Record of Appeal reveals a pivotal letter dated 2<sup>nd</sup> November 2007, authored by O.T. Ngwiri & Co. Advocates and addressed to the Respondent. This letter explicitly sought the execution of transfer documents on the grounds that the process had changed since 1997 and the documents executed then could not be registered. The Appellant claims that this letter went unanswered and the Respondent had since refused and/or failed to effect the transfer.
15. The issue in contention is in determining when precisely the cause of action accrued. Was it in 2001 upon the Appellant's payment of the transfer fees or in 2007 subsequent to the advocates' directive to the Respondent regarding the execution of transfer forms? This delineation stands as the pivotal issue requiring careful scrutiny and determination in this appeal.
16. Section 7 of the *Limitation of Actions Act* provides: “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.”



17. This court wishes to respectfully vary from the lower court's findings. From the record of appeal and the evidence put forth, this court finds that prior to 2007, the Appellant expected the land to be transferred to her since the issue was being handled by the Respondent's advocate. It was until 2007 when the Respondent refused to execute the transfer documents that the action accrued. The suit having been filed on 11<sup>th</sup> March 2014 means that the action for recovery of land against the Respondent had thus not been statutorily barred by Section 7 of the *Limitation of Actions Act*.
18. I have taken into consideration Article 50 of *the Constitution* together with the foregoing observations I find that it is in the interest of justice that the Judgement dated 19<sup>th</sup> August 2021 be set aside.
19. I find merit in this appeal and same is allowed.
20. I hereby grant the following orders;
  - a. The Judgement and decree of the Hon. P. Achieng SPM delivered on 19<sup>th</sup> August 2021 in SPMCC ELC No. 21 of 2020 is hereby set aside.
  - b. That the matter do proceed by way of retrial before another Magistrate other than Hon. P.Achieng (SPM).
  - c. That costs of this Appeal be borne by the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 20<sup>TH</sup> DAY OF DECEMBER 2023.**

**L. KOMINGOI**

**JUDGE.**

**IN THE PRESENCE OF:**

Ms. Chelangat for the Appellant.

Mr. Andrew Wanyoike for the Respondent.

Court Assistant - Mutisya

