



**Nyangweso v Okiya & 2 others (Environment and Land Appeal E034 of 2022) [2023] KEELC 22307 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22307 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E034 OF 2022  
DO OHUNGO, J  
DECEMBER 19, 2023**

**BETWEEN**

**FESTUS MATENDE NYANGWESO ..... APPELLANT**

**AND**

**MOSES ARUNGA OKIYA ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, KAKAMEGA COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY SURVEYOR, KAKAMEGA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of the Senior Principal Magistrate's Court at Butere (Hon. B Ojoo, Senior Principal Magistrate) delivered on 26th July 2022 in Butere MCELC No. 37 of 2020)*

**JUDGMENT**

1. Litigation leading to this appeal commenced in the Subordinate Court on 16<sup>th</sup> December 2020 when the appellant filed plaint dated 11<sup>th</sup> December 2020. He later replaced it with amended plaint dated 14<sup>th</sup> September 2021. He averred in the amended plaint that Festus Nyangweso Musungu who was his father and who passed away on 19<sup>th</sup> January 2018 was the registered proprietor of the parcel of land known as Marama/Shiraha/188. That Festus Nyangweso Musungu (deceased) sold two acres of Marama/Shiraha/188 to the first respondent and that upon subdivision of Marama/Shiraha/188, the first respondent became the registered proprietor of the parcel of land known as Marama/Shiraha/891 (suit property) which measured more than the two acres that he had purchased. He added that the land was “surveyed wrongly” with the result that the first respondent acquired more land than the two acres that he had purchased.



2. The appellant therefore prayed for judgment against the respondents jointly and severally for an order that the second and third respondents resurvey the suit property to curve out two acres for the first respondent and the remainder be handed over to the deceased's family.
3. The first respondent filed an amended defence dated 25<sup>th</sup> October 2021 in which he averred that he purchased the suit property in 1979 and that a title deed was issued to him in 1984 during the lifetime of the deceased. He added that he occupied the suit property upon purchase and remained thereon uninterruptedly until the time of filing his amended defence. He averred that the appellant's suit was contrary to the *Limitation of Actions Act* and prayed for its dismissal with costs. He also counterclaimed for an order that the appellant should not encroach on the suit property.
4. Upon hearing the matter, the Subordinate Court (Hon. B Ojoo, Senior Principal Magistrate) delivered judgment on 26<sup>th</sup> July 2022 wherein she dismissed the appellant's suit, granted an injunction restraining the appellant together with his servants, agents and assigns from interfering with the first respondent's peaceful enjoyment of the suit property and awarded the first respondent costs.
5. Dissatisfied with the judgment, the appellant filed this appeal on 23<sup>rd</sup> August 2022 through Memorandum of Appeal dated 22<sup>nd</sup> July 2022. He listed 19 grounds of appeal which boil down to two global grounds: that the trial court erred in finding his suit was statute barred and in finding that he had not proved his case.
6. The appeal was canvassed through written submissions. The appellant argued that his cause of action was based on continuous trespass and that the issue of limitation did not therefore arise. He relied on the case of *John Nduba v Director of Surveys & another* [2022] eKLR and further argued that his case was about survey. That a resurvey could be done under Section 23 of the *Survey Act* with a view to correcting a mutual mistake so as to uphold the intention of the parties since the first respondent confirmed that he purchased 2 acres. The appellant further relied on the cases of *Albert Bundi M'ikiugu v Augustine Murithi M'ngaruthi* [2009] eKLR and *Judith Achieng Omondo v June Nyaingo Hossei & another; Francis Macharia (Third Party)* [2021] eKLR and contended that the trial court could not allocate the first respondent more than the 2 acres that he purchased. He therefore urged the court to allow the appeal.
7. In reply, the first respondent contended that the deceased having sold the suit property to him in 1979 and he having obtained title in 1984, he took possession and farmed the suit property until the deceased passed away in 2018. Relying on the case of *Monata Matiko Chonchorio v John Marwa Chabaro* [2021] eKLR, he argued the suit was barred pursuant to Section 7 of the *Limitation of Actions Act*. He further contended that the authorities that the appellant cited are distinguishable and urged the court to dismiss the appeal.
8. The appellant filed submissions in reply in which he argued that since the first respondent did not deny that he purchased 2 acres, it was equitable to have the title rectified. He relied on *Sebastian Njage Maria v Nau Mungania Munyinyi & another* [2009] eKLR and argued that to the extent the first respondent admits that he only purchased 2 acres, there was continuous trespass in respect of land over and above the 2 acres hence limitation did not apply.
9. Although evidence of service upon the second and third respondents of mention notice and directions in this appeal was availed, the said respondents did not participate in the hearing of the appeal.
10. This being a first appeal, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that it is the responsibility of this court to rule on



the material on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See [Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates](#) [2013] eKLR.

11. I have considered the entire record and the parties' submissions. The issues that arise for determination are whether the appellant's suit was barred pursuant to Section 7 of the [Limitation of Actions Act](#) and whether the reliefs sought by the parties were available.

12. 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.

13. The objects of statutes of limitation were discussed by the Court of Appeal in [The German School Society & another v Ohany & another](#) (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) thus:

The statutes of limitations are enacted as a matter of public policy to fix a limit within which an action must be brought, or the obligation is presumed to have been paid, and is intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof. The underlying purpose of statutes of limitation is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution.

14. A perusal of the appellant's amended plaint shows that his case was that the suit property measured more than the two acres which the first respondent purchased. The prayers in the amended plaint include an order that the second and third respondents resurvey the suit property to carve out two acres for the first respondent and the remainder be handed over to the deceased's family. Simply put, he sued for recovery of land that was outside the two acres. The resurvey which he sought was meant to help him identify the extra land to be recovered. His arguments that his cause of action was based on continuing trespass is not supported by his amended plaint.

15. There is no dispute that the first respondent purchased the suit property in 1979, that a title deed was issued to him on 1<sup>st</sup> February 1984 and that he took possession of the suit property in 1979 and remained in possession and use thereof up to the time the suit in the Subordinate Court was filed 41 years later on 16<sup>th</sup> December 2020. A perusal of the certificate of search that was produced by the appellant shows that the first respondent became registered proprietor on 24<sup>th</sup> November 1980.

16. Among the documents that the appellant filed in court included a Limited Grant Ad Litem issued to him on 14<sup>th</sup> December 2020 in respect of the deceased's estate. The deceased passed away on 19<sup>th</sup> January 2018. Going by the date of registration, the right of action for recovery of the extra land accrued to the deceased on 24<sup>th</sup> November 1980. His claim became statute barred from 25<sup>th</sup> November 1992. The learned trial magistrate did not err in finding that the claim was statute barred. It follows therefore that the appellant was not entitled to the reliefs that he sought.

17. As noted above, there is no dispute that the first respondent is the registered proprietor the suit property. The registration clothes him with the rights, privileges, and benefits under Section 24 of the [Land Registration Act](#). Further, Section 26 of the [Act](#) obligates the court to accept his certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. There was no challenge to the first respondent's title beyond the failed attempt to have it resurveyed. There is thus no valid reason why the first respondent should not be allowed to fully



enjoy the suit property as he sought through his counterclaim. He was entitled to the relief that the trial court granted him.

18. In view of the foregoing discourse, I find no merit in this appeal. Consequently, I dismiss the appeal with costs to the first respondent. I do not award any costs to the second and third respondents since they did not participate in the hearing of the appeal.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 19<sup>TH</sup> DAY OF DECEMBER 2023.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

The Appellant present in person

The First Respondent present in person

No appearance for the Second and Third Respondents

Court Assistant: E. Juma

