



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL APPEAL NO. 140 OF 2010**

**CHRISTINE NDAKA MBITI.....1ST APPELLANT**

**W.O. MBITI.....2ND APPELLANT**

**VERSUS**

**JOSEPH KITHINJI M'ERING'O.....1ST RESPONDENT**

**PETER NKUBITU M'ERING'O.....2ND RESPONDENT**

*(Being an Appeal against the Judgment of Hon. Ndungu learned Senior Principal Magistrate,  
delivered on 11th August, 2010 vide Nanyuki S.P.C.C.C no.39 of 2005)*

**JUDGMENT**

This judgment is the outcome of the appeal against the judgment of Hon. Ndungu learned Senior Principal Magistrate, delivered on 11th August 2010 vide Nanyuki S.P.C.C.C no.39 of 2005. The facts of the case are that **Joseph Kithinji M'eringo** and **Peter Nkubitu M'eringo** (1st and 2nd Respondents) filed the Plaint dated 6th May 2005 and prayed for judgment against **Christine Ndeka Mbiti** and **W.O.Mbiti** the (1st and 2nd Appellant) in the following terms:

1. **An order of eviction from Land parcel no.2787/1289.**
2. **Damages for trespass**
3. **Mesne profits**
4. **Costs plus interest.**

The appellants resisted the suit by filing a defence. They also filed a counter-claim claiming for an order declaring the 1st Appellant as the real owner of the land. The learned Senior Principal Magistrate heard the case and on 11/08/2005 she entered judgment in favour of the Respondents and proceeded to issue orders of eviction against the Appellants. She also awarded the Respondents Kshs. 8,000 as mesne profits per month from the date of filing suit until vacant possession. That decision provoked this appeal. On appeal the appellants put forward the following grounds:

1. **The learned trial magistrate erred in law and in fact by failing to find that the court lacked jurisdiction to entertain the matter under section 59 of the Registered Land Acts CAP 300 of the Laws of Kenya and failed to consider the valuation Report that was tendered in evidence.**
2. **The learned trial Magistrate erred in law and in fact in arriving at a judgment that was against the weight of evidence.**
3. **The learned trial Magistrate erred in law and in fact for failure to find that the Respondents' claim or cause of action was statute barred under the Limitation of Actions Act CAP 22 of**

- the Laws of Kenya.
4. The learned trial Magistrate erred in law and in fact for failure to find that the Respondents' prayer for damages for trespass was statute barred under the Limitation of Actions Act CAP 22 of the Laws of Kenya.
  5. The learned trial Magistrate erred in law and in fact for failure to comprehend the law governing mesni profit and find that the Respondents' prayer for Mesni profits was not proved and should have been dismissed.
  6. The learned trial Magistrate erred in law and in fact by failing to find that the Limitation of Action Act CAP.22 Laws of Kenya applies to Land registered under Land Act Cap 280, Registration of Titles Act Cap, 281, the Land Titles Act Cap 282 and the Registered Land Act Cap.300.
  7. The learned trial Magistrate erred in law and in fact by failing to find that the Respondents' prayer for eviction was statute barred and was therefore not available for them.
  8. The learned trial Magistrate erred in law and in fact by failing to find that the Respondents' suit was fatally defective, incompetent and improperly filed and ought to have been dismissed.
  9. The learned trial Magistrate erred in law and in fact by failing to find that the Verifying Affidavit sworn by the two Respondents was ex-facie incompetent, fatally defective and inadmissible as a Verifying Affidavit.
  10. The learned trial Magistrate erred in law and in fact for failure to consider the material evidence advanced by the Defendants/Appellants including documentary evidence.
  11. The learned trial Magistrate erred in law and in fact by failing to dismiss the Respondents' suit on the ground that they had failed to prove their case to the required standards.
  12. The learned trial Magistrate erred in law and in fact in failing to consider and appreciate the Appellants' submissions on record.
  13. The learned trial Magistrate erred in law and in fact by misdirecting herself when she considered irrelevant factors and failing to take into account all relevant factors in awarding the judgment.
  14. The learned trial Magistrate erred in law and in fact by failing to follow the binding High Court and Court of Appeal decisions and judgments and thereby arrived at an erroneous judgment.
  15. The learned trial Magistrate erred in law and in fact for failure to properly evaluate the evidence and in particular.
    - a. She did not consider the period that the Defendants/Appellants had lived in the suit land.
    - b. She did not consider the valuation report tendered in evidence.
    - c. She did not consider the photographs produced by the Defendants/Appellants.
  16. The learned trial Magistrate erred in not holding and should have held:-
    - a. That the Plaintiffs/Respondents had not discharged the burden of establishing that they are entitled to the prayers sought in their plaint.
    - b. That where the probabilities are even, then the action ought to be dismissed.
    - c. That the Plaintiffs/Respondents prayer for eviction from the suit land was and is statute barred under Section 7 of the Limitation of Actions Act CAP. 22 of the Laws of Kenya.
    - d. That the Plaintiffs/Respondents' prayer for damages for the tort of trespass was and is statute barred under Section 4 (2) of the Limitation of Actions Act Cap 22 of the Laws of Kenya.

**e. That the court lacked jurisdiction to entertain the action since the value of the suit land exceeded twenty five thousand pounds which is equivalent to Kenya Shillings Five Hundred Thousand (Kshs.500,000) as per Sec.159 of the Registered Land Act Cap.300**

When the appeal came up for hearing learned counsels appearing in this appeal recorded a consent order to have the Appeal disposed of by written submissions. Though the appellants put forward a total of sixteen grounds in their Memorandum of Appeal, the same may be summarized to five main grounds. Before delving deeper into the substance of the appeal let me give a brief analysis and re-evaluation of the evidence presented before the trial court. The 1st Respondent produced a grant issued to him under Registration of Titles Act as the registered proprietor of L.R.no.2787/1289. He also gave details of the steps he took to acquire the aforesaid land from Simon Billy Nganga. He produced a sale agreement and evidence of payments and the transfer form. The 1st appellant in her evidence claimed that the suit land belonged to her. She produced a letter showing that the same had been allocated to one Mary Jelagat Mutai on 31/05/2001. She also produced evidence of acceptance and payment she did on 22nd November 2002. Let me now turn my attention to the substance of the appeal. The first ground is whether the trial court had jurisdiction to hear and determine the suit. The 1st appellant indicated that she bought the property in dispute from Mary Jelagat Mutai on 7th December, 1992 and the same was valued at Kshs. 2.9M as of 17th December, 2008. For this reason, the appellants have argued that the trial Magistrate did not have the pecuniary jurisdiction to hear and determine the case. The provisions of **Section 159** of the **Registered Land Act** was cited. The Respondents urged this court to find that the objection was raised too late in the proceedings. They also argued that the provisions of the Registered Land Act do not apply because the Respondents' title is issued pursuant to the Registration of Titles Act. I have critically examined the pleadings, the evidence and the rival submissions. It is not in dispute that the grant in dispute i.e plot no.2787/1289 was issued pursuant to the **Registration of Titles Act (Cap.281 of Laws of Kenya)**. In the counterclaim, the Appellants prayed for an order of declaration that the 1st Appellant was the rightful owner of the suit land vide their counterclaim. The Respondents aver they are the registered owners of the suit land as opposed to the Appellants. In her judgment, the learned Senior Principal Magistrate stated that the dispute was that revolving around double allocation by the government. She concluded that the Respondents' case is stranger because they have a title issued under the Registration of Titles Act. Under Section 2 of the Registration of Titles Act, the court is defined as the High Court. With respect, the Magistrate's court did not have jurisdiction to hear and determine the suit. I doubt whether the learned Senior Principal magistrate had the pecuniary jurisdiction to entertain the dispute. I am convinced the ground of jurisdiction is well founded.

The other serious ground raised and argued is whether the Respondent's suit is statutorily time-barred. The appellants are of the strong submission that the suit should be declared a statute barred and the Respondents could not recover the land. The appellants tendered evidence claiming to have brought the land on 7th December, 1992 and settled thereon up to date. It is also not in dispute that the Respondents filed their suit on 10th May 2005. There is no doubt that the cause of action in the Respondent's suit is recovery of land, general damages and mesne profits. There is no doubt also that under **Section 7** of the **Limitation of Actions Act** no action to recover land can be filed after the lapse of 12 years from the date right accused. It is also clear from the evidence on record that the Respondents purchased the land from previous allottee in 1996. The Respondents have stated in their evidence that they discovered in 2004 that the appellants encroached on their land. In cross-examination, the appellant stated that they constructed a small timber house on the suit land in 2001. In my considered opinion, I do not think there was cogent and sufficient evidence to establish this ground. The trial Magistrate cannot be faulted in the manner she dealt with that ground.

The third ground argued relates as to the question whether the suit was defective and incompetent in view of the accompanying verifying affidavit. It is the appellant's contention that since the verifying affidavit is sworn by two people it cannot be admitted in evidence hence the Plaint should have been treated as not verified. The respondents urged this court to overlook the objection because it was raised too late and in any case the same is not fatal. Having considered the rival submissions, it is not in doubt that the appellant filed a joint affidavit to verify their plaint. With respect, I agree with the appellant's that the issue should have been raised at the earliest opportunity so that the issue can be determined. The

requirement for the filing of a verifying affidavit is critical to plaintiffs. Where the competency verifying affidavits is questioned, the court has a wide discretion to give the offending party time to file a competent affidavit(s). The overriding objective of the court is to consider substantive justice of the case. However, I have re-looked at the offending affidavits and I do not think the law expressly bars parties deponing a joint affidavit. The objection is overlooked for the broad interest of just.

In the end, this appeal succeeds on a single ground that the trial Magistrate did not have jurisdiction to hear and determine the dispute. The appeal is allowed. The judgment and decree of the Senior Principal Magistrate court delivered on 11/08/2010 is set aside and is substituted with an order striking out the suit for being incompetently before the Senior Principal Magistrate's court with costs to the Defendants. This order also affects the counterclaim. The appellants to have costs of the appeal.

**Dated, Signed and delivered in open court this 21st day of February, 2014.**

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**J.K.SERGON**

**JUDGE**

**In the presence of:**

Mr. Ombongi holding brief for Mr. Bwononga for the Appellant

N/A for Respondent but with Notice