



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CIVIL APPEAL NO.42 OF 2010**

**KAROLI OKELLO.....**  
**.....APPELLANT**

**VERSUS**

**JOSEPH ONGAYA ANZOFU..... RESPONDENT**

**JUDGMENT**

The Appellant filed suit against the Respondent seeking to have the Respondent evicted from a parcel of land registered as LR. No. South Teso/Apokor/1152 (hereinafter referred as the suit parcel of land). The Appellant further prayed for the Respondent to be restrained by permanent injunction from occupying the suit parcel of land. The Respondent filed a defence to the claim by the Appellant. The Respondent denied that the Appellant was entitled to the suit parcel of land. The Respondent averred that the Appellant had obtained the title of the suit parcel of land by fraud. He set out the particulars of fraud. The Respondent counterclaimed against the Appellant. In the counterclaim, the Respondent asked the court to have the names in the title of the suit parcel of land corrected from that of the Appellant to the Respondent. The Appellant filed a reply to the defence. He denied that the Respondent was entitled to the prayers sought in his counterclaim. He urged the court to dismiss the counterclaim with costs.

The case was heard by the subordinate court. It was a full hearing whereby both the Appellant and the Respondent called their respective witnesses in a bid to establish their respective cases. In its judgment, while observing that the Appellant had been properly registered as the owner of the suit parcel of land (after he had purchased the same from the Respondent) the court held that the Appellant's suit was time-barred under the provisions of the **Limitation of Action Act** since he had failed to assert his claim in respect of the suit parcel of land for a period of twenty-one (21) years and thirty (30) days since he was registered. The trial court therefore dismissed the Appellant's suit with costs and allowed the Respondent's counterclaim with costs. This judgment was delivered on 26<sup>th</sup> June 2009. The Appellant did not file his appeal within the requisite period.

The Appellant sought the leave of the court to file appeal out of time in a notice of motion filed on 14<sup>th</sup> June 2010. Counsel for the parties entered into a consent whereby the Appellant was allowed to lodge his appeal out of time. The consent was entered into on 29<sup>th</sup> June 2010. In the consent, the Appellant was allowed to file an appeal within fourteen (14) days of the date of the consent. It is not clear from the record whether that consent was adopted as the order of the court. Suffice for this court to state is that the said consent was filed in court on 22<sup>nd</sup> July 2010. Even if the court were to give the Appellant the benefit of doubt, he was required to have filed the appeal within fourteen (14) days of the 22<sup>nd</sup> July 2010. The Appellant did not file the appeal until 12<sup>th</sup> August 2010. It is therefore apparent that the Appellant lodged the appeal out of time without the leave of the court.

But for the complete record, this court will deal with another aspect of the appeal which will conclusively determine this appeal. In his memorandum of appeal, the Appellant challenged the decision of the court when it found that the Appellant's suit was barred by the provision of the **Limitation of Actions Act**. It was the Appellant's case that the trial court wrongly applied the Law in reaching that finding which was contrary to the evidence that was placed on record. In the submission made before this court by Mr. Manwari for the Appellant reiterated that the Appellant's suit had not been time-barred. Mr. Onsongo for the Respondent urged the court to uphold the decision of the trial court. In his view, the trial court correctly reached the finding that the Appellant's suit was barred by **Section 7** of the **Limitation of**

**Actions Act** which provides thus:

***“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.”***

This being a first appeal, it is the duty of this court to reconsider and to review the evidence adduced before the trial court after which the court is required to arrive at its own independent determination. In reaching its decision, this court is required to always put in mind the fact that it neither saw nor heard the witnesses as they testified and is required to make due allowance in that regard (See **Selle –Vs- Associated Motor Boat Co. Ltd [1968] E.A. 123**). In the present appeal, the issue for determination by this court is whether indeed the Appellant’s suit was barred by the provisions of the **Limitation of Actions Act**.

Certain facts are not in dispute in this case. It is not disputed that the Appellant purchased the suit parcel of land from the Respondent in an agreement which was signed on 11<sup>th</sup> April 1983. The Appellant and the Respondent went to the Land Control Board. Consent to the transaction was issued. The Respondent failed to execute the transfer documents in favour of the Appellant. The Appellant filed suit being Busia RMCCC No.75 of 1985 seeking specific performance of the agreement. The court found in favour of the Appellant. Judgment was entered in favour of the Appellant on 23<sup>rd</sup> September 1985. The Appellant was registered as the owner of the suit parcel of land on 22<sup>nd</sup> October 1985. From the evidence adduced, it was clear that the Appellant did not take actual possession of the suit parcel of land until the 20<sup>th</sup> November 2006 when he filed the present suit seeking the eviction of the Respondent. All this time, the Respondent had been in possession of the suit parcel of land. The trial court correctly observed that the Appellant had slept on his rights for a period of more than twenty-one (21) years and one (1) month. The suit was therefore filed hopelessly out of time. The Appellant cannot get possession of the land. The trial court was right in directing that the Respondent be registered as the owner of the suit parcel of land.

An issue that the trial court did not address was what happens to the sum that the Appellant paid to the Respondent for the purchase of the suit parcel of land. There was no dispute that the Appellant purchased the suit parcel of land. It would be unconscionable and a travesty of justice if the Respondent was to have the land and retain the money as well. Since the Respondent has been adamant that he does not want to surrender the land to the Appellant, this court in exercise of its inherent jurisdiction and constitutional jurisdiction under **Article 159(2)(a) & (e) of the Constitution**, hereby directs the Respondent to pay to the Appellant the current value of the land in compensation for the loss of land. The Respondent is ordered to pay to the Appellant the sum of Kshs.1,000,000/- within ninety (90) days of the delivery of this judgment or in default the Appellant shall be at liberty to execute for the said amount including attaching the suit parcel of land.

There shall be no order as to costs. Each party shall bear his costs. It is so ordered.

**L. KIMARU**

**JUDGE**

**DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 24<sup>TH</sup> DAY OF JULY, 2013.**

**F. TUIYOT**

**JUDGE**