



REPUBLIC OF KENYA



**King'oo v Mang'ara (Environment and Land Appeal 1 of 2020)
[2022] KEELC 3210 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3210 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 1 OF 2020**

BM EBOSO, J

MAY 19, 2022

BETWEEN

JOSEPH MWANGI KING'OO APPELLANT

AND

ELIJAH MERU MANG'ARA RESPONDENT

(Being an Appeal arising from the Judgment and Decree of the Chief Magistrate Court at Thika by Hon A. M Maina, Senior Principal Magistrate, delivered on 9/10/2018 in Civil Case No 744 of 2009.)

JUDGMENT

Background

1. This appeal arose from the Judgement of Hon A. M Maina, Senior Principal Magistrate, delivered on 9/10/2018 in Thika Chief Magistrate Court Civil Case No 744 of 2009. The learned trial magistrate allowed the respondent's claim against the appellant. Before I delve into the merits of the appeal, I will give a brief background of the appeal.
2. On 24/8/2009, the respondent filed a suit at Thika Chief Magistrate Court vide a plaint dated 24/8/2009 seeking, among other reliefs, an order that the appellant does surrender his one third share in Plot Number A5, within Chomo Market, Thika; and that his name replaces that of the appellant in the ownership records relating to the said Plot. His case was that, through a sale agreement dated 6/10/1992, he purchased Plot No A5 (the suit property) from the appellant for a consideration of Kshs 100,000, which he paid to the appellant in full. He contended that the appellant had, without any colour of right, instructed the Town Clerk of "Thika Town Council" not to recognize him as a tenant in common in respect of the said Plot and had alleged that he (the appellant) was the rightful owner of the one third share of the suit property.



3. The appellant filed a statement of defence dated 23/9/2009 in which he admitted selling to the respondent the said Plot but contended that the respondent only paid Kshs 80,000 leaving a balance of Kshs 20,000 which he had never paid. He denied instructing the Town Clerk not to recognize the respondent as a tenant-in-common in respect of the suit property. He contended that the respondent had no right of ownership over the suit property for the reason that he breached the sale agreement by not paying the balance of the purchase price as agreed. He contended that the respondent's suit was misconceived, bad in law, and an abuse of the process of the court. He urged the court to dismiss the respondent's claim.
4. Viva voce evidence was taken before the trial magistrate and parties filed written submissions. The trial magistrate subsequently rendered a Judgment on 9/10/2018. The trial magistrate found that the respondent had proved his case to the required standard against the appellant. It was the learned trial magistrate's finding that the cause of action in the suit arose when the appellant attempted to sell the suit property to a third party. The trial magistrate further found that the respondent paid to the appellant the full agreed purchase price of Kshs 100,000. Further, the trial magistrate found that as a result of the sale, the respondent was designated as a beneficiary of a one third share of the Plot in the succession cause relating to the appellant's father who was the previous owner of the Plot. The trial court granted the respondent the reliefs sought.
5. Aggrieved by the Judgement of the trial court, the appellant brought this appeal through a memorandum of appeal dated 14/1/2020. He advanced the following three verbatim grounds of appeal.
 - 1) That the learned Senior Principal Magistrate erred in law and in fact by failing to appreciate that the suit was based on a contract and therefore time-barred thereby arriving at a wrong finding.
 - 2) That the learned trial magistrate erred in law and in fact by arriving at an erroneous conclusion that the respondent had proved his case when there was no evidence to support the findings.
 - 3) That the learned trial magistrate erred in law and in fact by failing to appreciate the provisions of the law and more so Section 4 (1) of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya thereby arriving at a wrong finding.
6. The appeal was canvassed through written submissions dated 27/10/2021. The appellant identified the following as the two issues falling for determination in the appeal: (i) Whether the respondent proved his case on a balance of probability; and (ii) Whether the respondent's suit was time-barred.
7. Counsel for the appellant cited Section 107(1) of the *Evidence Act* and submitted that relevant consideration should be given to the evidence before the trial court in relation to the accrual of the cause of action. Counsel contended that the only relevant evidence adduced by the respondent in relation to the cause of action was his advocate's letter to the Town Clerk of Thika Municipality seeking to support the fact that the appellant had intention to sell the suit property, thus giving him a cause of action in the matter. Counsel contended that the evidence before the trial court was "insufficient and incomplete" to enable the court arrive at the decision it made. Counsel contended that the respondent had failed to prove his case on a balance of probability. On whether the respondent's suit was time-barred, counsel cited Section 4(1) of the *Limitation of Actions Act* and submitted that the respondent's suit was time-barred because it "was based on an agreement dated 6th October 1992". Counsel contended that a court of law cannot entertain a claim which is time-barred. Counsel urged the court to allow the appeal.



8. The respondent opposed the appeal through written submissions dated 1/12/2021, filed through the firm of Karanja Kangiri & Co Advocates. Counsel for the respondent identified the following as the two issues falling for determination in the appeal: (i) Whether the full purchase price was paid; and (ii) Whether the suit was time-barred. Counsel submitted that the respondent paid the agreed purchase price in full, contending that the sum of Kshs 60,000 was paid as evidenced by plaintiff exhibit number 5 while the sum of Kshs 20,000 was evidence by plaintiff exhibit number 6. Counsel contended that the balance was paid in instalments as supported by the evidence before court.
9. On whether the suit was time-barred, counsel submitted that the cause of action arose in 2009 when the appellant attempted to sell the suit property to a third party, hence the suit was initiated within time. Counsel urged the court to dismiss the appeal.

Analysis and Determination

10. I have considered the entire record of appeal and the original record of the trial court. I have also considered the grounds of appeal together with the rival submissions. Further, I have considered the relevant legal frameworks and jurisprudence. Ground number 1 and ground number 3 raise the issue as to whether the trial magistrate erred in finding that the respondent's suit was not time-barred under the *Limitation of Actions Act*. Ground number 2 raises the issue of whether the trial magistrate erred in finding that the respondent had proved his case to the required standard. I will make brief sequential analysis and pronounce myself on the two issues in the above order.
11. This is a first appeal. The principles upon which a first appellate court exercises jurisdiction are well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Kesbar Shiani* (2013)eKLR as follows:-

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.

The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority v Kustron [Kenya] Limited* 2000 2EA 212.”
12. Ground numbers 1 and 3 raise the issue as to whether the respondent's suit was statute-barred. There was common ground that parties entered into a land sale agreement on 6/10/1992. The appellant's case was that he was paid Kshs 80,000 out of the agreed purchase price of Kshs 100,000. The respondent's case was that he paid the entire purchase price to the appellant. Evidence was tendered before the trial court demonstrating that subsequent to the sale of the suit property to the respondent by the appellant, the appellant, together with his siblings, procured a certificate of confirmation of grant in the succession cause relating to their late father's estate [the late Kamau Njoroge alias Kingoo Njoroge]. Pursuant to the said certificate of confirmation of grant, the succession court vested one third of the suit property in the respondent. From the evidence before the trial court, there was no challenge against the respondent's title to one third of the plot which had already vested in the respondent until 2009



when the appellant attempted to dispose the respondent's share of the property. That, in my view, is when the cause of action accrued. Consequently, my finding on the first issue is that the trial magistrate did not err in finding that the respondent's suit was not time-barred.

13. I do not agree with the appellant's counsel's contention that the cause of action accrued in 1992. One third of the suit property vested in the respondent effective from 10/11/1995 when the certificate of confirmation of grant was issued. There was no cause of action to warrant litigation prior to 2009. The cause of action accrued when the appellant attempted to dispose the suit property in 2009. The respondent promptly initiated a suit to protect his interest which had already vested. I do not, in the circumstances, find merit in ground numbers 1 and 3 of the grounds of appeal.
14. Counsel for the appellant contended that the evidence before the trial court was "insufficient and incomplete" to enable the court arrive at the decision it made. I have looked at the evidence placed before the court. Besides the sale agreement dated 6/10/1992 and the certificate of confirmation of grant which vested one third of the suit property in the respondent, there was documentary evidence demonstrating that in addition to the sum of Kshs 80,000 which the appellant acknowledged in his pleadings, the appellant had formally acknowledged receipt of Kshs 11,000 on 31/10/1992; Kshs 8000; and Kshs 5,000 on 26/1/1993. The respondent explained that the additional sum of Kshs 4000 was to cover outgoings relating to the suit property.
15. The totality of the foregoing is that the trial magistrate did not err in finding that the respondent had proved his case to the required standard.
16. In the end, the appeal herein is dismissed for lack of merit. The appellant will bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 19TH DAY OF MAY 2022

B M EBOSO

JUDGE

In the Presence of: -

Ms Wambui Ngugi for the Appellant

Ms Mugo holding brief for Mr Karanja Kangiri for the Respondent

Court Assistant: Ms Lucy Muthoni

