



**Kasibwa v Binayo (Suing as the administrator of the Estate of  
Esther Tam Binayo (Deceased) (Environment and Land Appeal  
E006 of 2022) [2023] KEELC 16190 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16190 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT AND LAND APPEAL E006 OF 2022**

**E ASATI, J**

**MARCH 9, 2023**

**BETWEEN**

**ROSE KASIBWA ..... APPELLANT**

**AND**

**FRANCIS BINAYO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF  
ESTHER TAM BINAYO (DECEASED) ..... RESPONDENT**

*(Being an appeal from the Judgement of hon. M Ochieng P.M delivered  
on 17th June 2022 in Hamisi PMC E&L Case No. 18 OF 2020)*

**JUDGMENT**

**Introduction.**

1. The Appellant was the Defendant in Hamisi PMC E & L Case No. 18 of 2020 wherein she had been sued by the Respondent vide the Complaint dated 18<sup>th</sup> August 2020 for;
  - a. An order of injunction restraining the Defendant his servants and/or agents from cultivating, constructing or dealing in whatsoever in the land parcel number Nyang'ori/Banja/628
  - b. Costs of the suit
  - c. Any other relief the Honourable court may deem fit and just to grant.
2. The Respondent's case was that he is the Administrator of the estate of one Esther Tam Binayo deceased who was the registered owner of land parcel known as Nyang'ori/Banja/628 (the suit land herein) and that the appellant had unlawfully trespassed onto the suit land and he sought the court's intervention to restrain the appellant.



3. The Appellant vide her defence dated 30<sup>th</sup> September 2020 denied the Respondent's claim and stated that she is entitled to a portion measuring 3 acres of the suit land which her husband bought from one Fredrick Binayo who was the registered owner and that she was going to file a suit on adverse possession against the plaintiff (Respondent herein)
4. The court heard the case and delivered its Judgement on 17<sup>th</sup> June 2022 allowing the Respondents claim as prayed in the plaint.
5. Aggrieved by the Judgment, the Appellant vide the memorandum of Appeal dated 29<sup>th</sup> June 2022 preferred the Appeal herein seeking for; -
  - a. an order setting aside the Principal Magistrate's Court Judgement delivered on 17/6/2022.
  - b. a declaration and a finding that he Appellant is entitled to her three (3) acres of land together with her deceased husband.
  - c. an order that costs of the Appeal be borne by the Respondent.

### **Submission**

6. The Appeal was argued by way of written submissions. The Appellant filed written submissions dated 7<sup>th</sup> December 2022 through the firm of Nandwa & Co. Advocates acting for her. Counsel formulated 5 issues for determination namely; -
  - a. Whether the ownership of the suit land is absolute.
  - b. Whether there was a valid sale of land agreement for the purchase of a portion of parcel number Nyang'ori/Banja/628
  - c. Whether the appellant is entitled to 3 acres of parcel No Nyang'ori/Banja/628
  - d. Whether there is a presumption of trust between the Appellant and the deceased husband (Jomo Kasibwa Omungu) in relation to the suit property and
  - e. Whether the Respondent herein can initiate a suit for recovery of the 3 acres sold from parcel Number Nyang'ori/Banja/628 without consent of his co-administrator and without title in his name.
7. Relying on Section 26 of the [Land Registration Act](#), No. 3 of 2012, Counsel submitted that the deceased, Fredrick Binayo did not hold title to the suit land in absolute ownership as he held 3 acres thereof in trust for the Appellant herein which portion the deceased had sold to the appellant's late husband one Jomo Kasibwa Omwangu. That upon the death of the said Jomo Kasibwa Omwangu, the Appellant took control of the 3 acres piece of land uninterruptedly with the full knowledge of the Respondent. Relying on Section 28 of the [Land Registration Act](#) and the case of Arthi Highway Developers Ltd vs West End Butchers Limited and 6 others (2015) eKLR Counsel submitted that the current registered owner of the suit land one Esther Tam Binayo (deceased) holds the 3 acres portion of the suit land in trust for the Appellant.
8. On whether there was a valid land sale agreement for the purchase of a portion of the suit land, Counsel cited Section 3(3) of the [Law of Contract Act](#) and submitted that it is not in dispute that both parties to the agreement had capacity to enter into the agreement. That payment of the purchase price for the 3 acres was made in full. Relying on the case of Schon Noorani vs Damji Ramji Patel & 2 others (2006) eKLR where it was held that a contract for sale of land comes into force only after its execution, counsel submitted that there was a valid sale of land agreement for the purchase of portion of the suit land.



9. On whether the Appellant is entitled to 3 acres of the suit land, Counsel relied on Section 24 (a) of the [Land Registration Act](#) and the case of Willy Kimutai Kitilit vs Michael Kibet (2018) eKLR and submitted that an overriding interest had been created in favour of the purchaser and hence the appellant is entitled to ownership of the 3 acres portion.
10. On whether there is a presumption of trust between the appellant and her deceased's husband (Jomo Kasibwa Omwangu) on the one hand and the deceased owner of the suit land in relation to the suit property, Counsel relied on the case of L.N vs. M.M (2013) eKLR and Arumba Vs Mbega & Another(1988) KLR 121 to submit that there is a presumption of a trust between the Appellant and the Respondent in relation to the suit land.
11. And finally on, whether the Respondent can initiate a suit for recovery of the 3 acres without consent of the co-administrator and without title in his name, Counsel cited Section 7 of the [Limitation of Actions Act](#) cap 22 Laws of Kenya and submitted that a period in excess of 25 years had elapsed and the action is time barred. Counsel prayed that the decision of the trial court be overturned and costs be awarded to the Appellant.
12. Written submission dated 6<sup>th</sup> February 2023 were filed on behalf of the Respondent by the firm of Mukabi & Co Advocates acting for him. Counsel submitted that the Respondent was entitled to an order of injunction against the Appellant. Counsel relied on the case of Kenleb Cons. Ltd vs. New Gatitu Service Station Ltd. (1990) eKLR and Estate of Yusuf Mohammed (deceased) Mombasa HC P & A No. 434 of 1995 and section 83 of the [Law of Succession Act](#). Counsel submitted that the Appellant was a stranger to the estate of the deceased. That the Appellant had not used the suit land for 30 years peacefully or continuously because actions had been taken culminating in the filing of the suit seeking an injunction to restrain the Appellant from interfering with the suit land
13. Relying on the case of Mtana Lewa vs Kahindi Ngala Mwangadi (2015) eKLR, counsel submitted that the Appellant has not acquired adverse possession as envisaged in law. That the Appellant is an intermeddler in the estate of the deceased. That the Appellant has no right on the suit parcel as she has never taken any step to assert the rights she now claims. Counsel further submitted that the land sale agreement produced in court as exhibit D exb 1 (c) was only signed by the husband of the Appellant and not by the seller. That it is trite law that a contract upon which a suit can be founded be signed by all the parties and the signatures be attested to by a witness. For this submission counsel relied on Section 44(1) of the [Land Registration Act](#) and the case of Mumias Sugar Co. Ltd vs Freight Forwarders (K) Ltd Nairobi(2005) eKLR . He submitted further that non-compliance with Section 3(3) of the [Law of contract Act](#) makes the contract void. That the Appellant did not obtain consent of the Land Control Board and relying on the case of Nelson Gichinji et al vs Munene Irangi and Mucheru vrs Mucheu ( 2002) 2 EA 456 and section 6 (1) of the [Land Control Act](#) counsel submitted that the transaction was void for lack of the consent of the Land Control Board. Relying on Section 8(1) of the [Land Control Act](#) and section 4 of the [Limitation of Actions Act](#), Counsel submitted that the action is time barred because consent of the Land Control Board was not obtained within the six (6) months statutory period, and the suit was filed after the expiry of the limitation period. That there were no transfer forms signed by the registered owner for the transfer of the disputed portion of land.
14. On ground 5 and 6 of the Appeal counsel submitted that the Appellant never filed any objection in succession proceedings in respect of the estate of the deceased. That there was no evidence before the trial court to rebut the certificate of confirmation of grant produced. That the sole purpose why the Respondent filed the suit was to preserve the estate of the deceased. Counsel prayed the court to uphold the decision of the trial court and dismiss the appeal with costs to the Respondent.



## Issues for determination

15. The Memorandum of Appeal dated 29th June 2022 raises a total of six (6) grounds of Appeal these grounds in my assessment revolve around 2 issues which I identify as the issues for determination in this Appeal namely;
  - i. Whether or not the Respondent's suit in the trial court was time barred.
  - ii. Whether or not, the trial court's decision was supported by the evidence adduced.
  - iii. Who pays the costs of the Appeal?

## Analysis and Determination

16. This is a first appeal and as such this court will reanalyze and reconsider the evidence placed before the trial court in order to make its own findings and conclusions and thereby establish whether the trial court erred.
17. The evidence placed before the trial court by the appellants comprised her own testimony and that of 2 witnesses that she called and the exhibits she produced. The appellant testified as DW1. She stated that together with her husband she bought a portion measuring 3 acres of the suit land which measures 15 acres. That the land was bought from Fredrick Binayo and Esther Tam Binayo in the year 1989 and that she has been using the land since then. That she has planted tea and trees and also cultivates thereon. That an unknown person fenced the land, destroyed trees and prevented her from harvesting the tea.
18. DW2 Esnas Binayo testified that she is one of the children of Fredrick Binayo and Esther Tam Binayo both of whom are deceased. That both parents lived on the suit land. That in the year 1989 the parents agreed to sell a portion of land measuring 3 acres out of the suit land to Jomo Kisibwa Omwangu, now deceased who was the husband of the Defendant. That before the land was sold, all the family members including the Plaintiff were informed. That she knows that the purchase price was paid in full. That there is a succession cause namely; Kakamega H. C SUCC Cause No. 731 of 2007 pending confirmation of grant. That the appellant and her family were cultivating on the land and had planted trees. That she was a co-administrator of her mother's estate together with the Respondent. That the appellant should be given the 3 acres. That she was not in agreement that the appellant should be evicted since she has been on the land since the year 1989. That their parents told them that that was the appellants portion
19. DW3 George Lihanda testified vide his witness statement dated 13/4/2021 that he was a witness in the transaction involving sale of land through agreement between Fredrick Binayo and Esther Tam Binayo as vendors to Jomo Kasibwa Omwangu for land parcel No Nyangori/Banja/628. That he was present on 19<sup>th</sup> April 1992 and witnessed the parties sign the agreement. That it was for sale of 3 acres of the suit land. That he also signed the agreement as a witness. That it is the Respondent who has fenced the land. That the Respondent has agents who have been keeping the land intact. That the Respondent has not been to the suit land for the past 32 years.
20. The appellant produced land sale agreement as exhibits 1 (a), 1(b) and 1(c) Land control Board documents as exhibit 2, original green card in respect of the suit land as exhibit 3 and certificate of official search dated 1/9/1989 as exhibit 4.
21. The evidence placed before the trial court by the Respondent was his own testimony. He testified that he works in the scientific and medical fields in Europe and North America and currently stays in Germany. That his mother Esther Tam Binayo died on 3<sup>rd</sup> July 1997 leaving behind 2 daughters



and himself as the only beneficiaries to her estate. That the deceased owned the suit land among other properties and that the same should devolve to her rightful heirs. That the Defendant (appellant herein) who is a stranger to the said estate has constructed a house on the land without express or implied permission from him or any of the beneficiaries. That the defendant is staying on the suit land without his consent or knowledge. That the Defendant should be evicted. That the Defendant has been staying on the property for 30 years. That the Defendant planted the tea and trees. That one of his sisters was his co-administrator in respect of the estate of the deceased. That his parents never filed any case against the Defendant. That in the year 2020, the court issued an order for the Defendant to leave the land but she has not left. That he is not aware of any sale agreement for the suit land. That he did not seek authority of Esnas who is his co-administrator so as to file the suit since she is unreliable. That he opted to file the suit as the son of the deceased. He produced exhibits namely: certificate of official search as exhibit 1, Grant of Letters of Administration to the Estate of Esther Tam Binayo as exhibit 2, bundle of 3 photographs as exhibit 3 and report to chief as exhibit 4.

22. After hearing this evidence, the court found in favour of the Respondent and entered judgement for an order of injunction against the Defendant her servants and/or agents from cultivating or dealing in land parcel Nyangori/Banja/628. The court also awarded costs of the suit to the Respondent.

23. The first issue for determination is whether or not the Respondent's suit in the lower court was time-barred.

It was not disputed that the appellant had been on the suit land for a period of over 30 years. The appellant pleaded and testified that she had been on the land since 1989. That she had planted tea, trees and cultivated the land. The Respondent similarly admitted that the appellant had been on the land for 30 years, constructed a house and lives thereon without the permission of the Respondent. The Respondent's claim was a claim for recovery of the land from the appellant who according to the Respondent was a trespasser. Under section 7 of the *Limitation of Actions Act* "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."

The green card produced as exhibit shows that the suit land was transmitted in favour of Esther Tam Binayo on 26/8/1994 after she succeeded the estate of her husband Fredrick Binayo who was the first registered owner of the land. The Respondent filed the suit on 20/8/2020 on behalf of the estate of Esther Tam Binayo. This was obviously after the expiry of the 12 years period provided in section 7.

24. The second issue is whether the trial court's decision was supported by the evidence. The green card produced by the appellant demonstrated that the suit land originally belonged to one Fredrick Binayo. The land sale agreements produced show that the said Fredrick Binayo did sell a portion of the suit land measuring 3 acres to the appellant's husband. The documents produced as appellant's exhibit 2 show that the sale transaction was subjected to the land Control Board for consent for subdivision so as to carve out the sold portion of land. Although the process of subdivision and transfer was not completed the appellant and her husband took possession of the suit land soon after the purchase. There is no evidence that either the seller or his successor one Esther Tam Binayo in their lifetime ever interfered with the appellant's occupation of the sold portion of suit land. The exhibits produced by the Respondent confirm that the suit land was registered in the name of Esther Tam Binayo to be transmitted to DW2 and Dorcas Omene Binayo as beneficiaries and that the Administrators of the Estate of Esther Tam Binayo are the Respondent herein and DW2. The photographs confirm that there are tea bushes and trees grown on the suit land. My assessment of the totality of the evidence placed before court is that the same did not support the Respondent's claim based on the tort of trespass. I therefore find that the judgement was against the weight of the evidence.



25. In this appeal the appellant has prayed that a declaration be made that she is entitled to the 3 acres of land together with her deceased husband. Although the appellant pleaded in her defence that she had had peaceful and continuous possession of the suit land for a period exceeding 30 years, she did not file a counter claim. She only stated that she was going to file a separate suit on adverse possession to be handled contemporaneously with the suit. However, no such claim or suit was filed. Parties are bound by their pleadings and as such there is no basis for awarding a relief not prayed for in the pleadings.
26. The upshot is that the appeal is allowed. The Judgement dated 17<sup>th</sup> June 2022 is set aside and substituted with a judgement dismissing the Respondent's case. Costs of the suit and of this appeal are awarded to the Appellant.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 9<sup>TH</sup> DAY OF MARCH, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Ajevi- Court Assistant.

Maruja -For the Appellant.

No appearance for the Respondent.

