



**Chelimo & another v Bunei & another (Environment & Land Case
1 of 2022) [2023] KEELC 20667 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20667 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 1 OF 2022
A OMBWAYO, J
OCTOBER 12, 2023**

BETWEEN

ANN CHEPKOSKE CHELIMO 1ST APPELLANT

KOSKEI KIPLANGAT NAHASON 2ND APPELLANT

AND

JOSEPH BUNEI 1ST RESPONDENT

ROBERT BETT 2ND RESPONDENT

*(Being an appeal from the judgment/decree of Hon. D Mosee, Senior Resident
Magistrate delivered on 18th January 2022 in ELC CM No.115 of 2020)*

JUDGMENT

Introduction

1. Ann Chelimo Chepkoske and Koskei Kiplangat Nahason, the Administrator and administratrix respectively of the Estate of Jackson Kipkoskei Sang (deceased) (hereinafter referred to as the appellants) filed a suit in the lower court against Joseph Bunei and Robert Bett, (hereinafter referred to as the respondents) claiming vacant possession of Nakuru/Sururu/111 (hereinafter referred to as suit property) which had been allegedly illegally encroached upon by the respondents. Vide a judgment delivered on 18th January 2022, the suit was dismissed. The appellants now come to this court on appeal from the judgment of Hon D Mosse Senior Resident Magistrate delivered on the 18th January 2022 in ELC CM No 115 of 2020. The appeal is based on grounds:-

1. That the learned trial magistrate erred in law and in fact in finding that the respondent acquired the suit land by adverse possession when there was no prayer in the respondent's pleading for adverse possession thereby entering judgment against the appellant notwithstanding evidence on record to the country.



2. That the learned trial Magistrate erred in law and in fact in failing to consider and analyze the evidence led by the appellants thereby applying the wrong principles of law and arriving at an erroneous conclusion.
 3. That the learned trial magistrate failed to appreciate the totality of the evidence before her and the submissions made on behalf of the appellant.
2. The appellants pray that judgment, decree dated 18th January 2022 be set aside and that the respondents to bear the costs of the appeal.

The duty of a first Appellate court

3. It is now settled law that a first appellate court has a duty to re-evaluate the evidence before the trial court with the judgment and reach its own and independent judgment thus whether or not to allow the appeal. A first appellate court is required to subject the whole of the evidence to a new and full scrutiny and make conclusions bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. The appellate court as aforesaid has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is constitutional right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.
4. As held by justice Mativo as he then was in *Bwire v Wayo & Sailoki* (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) (24 January 2022) (Judgment), a first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust.⁴ The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion.
5. This section provides for Powers of appellate court as follows:-
 - (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
 - (a) to determine a case finally;
 - (b) to remand a case;
 - (c) to frame issues and refer them for trial;
 - (d) to take additional evidence or to require the evidence to be taken;
 - (e) to order a new trial.
 - (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.



6. This is a first appeal and therefore I have a duty to examine both matters of fact and matters of law arising in the lower court and subject the whole of evidence to a fresh and exhaustive scrutiny before drawing a conclusion from that analysis.

Re-Evaluation and Determination

7. I have considered the facts of the case and do find that there is no dispute that the suit property is still registered in the names of the deceased whose estate the appellants are the legal representatives. The 2nd appellant testified in the lower court that he did not know how the respondent took possession of the suit property in the year 2019. When he was being re-examined, he stated that he did not know why the respondents took possession of the land. He denied that the parcel of land was sold to the respondents. The 1st appellant on his part also denied that the land was sold to the respondents and corroborated the evidence of the 1st appellant that the respondents entered in 2019. The 1st respondent testified as DW1 and stated that he bought the land in 2003 and built in 2009 when the owner Jackson Kipkoskei Sang was alive. He denied having entered the land in 2019. According to DW1 the deceased gave them the parcel of land in exchange for work done. The 2nd respondent also testified as Dw2, that they were paid for the work done by being allocated the plots by the deceased. They have been in possession for 18 years.
8. The respondents called an independent witness Ishmael Kiprotich who testified as DW3. According to the witness, the respondents were given the plots by the late Jackson Kipkoskei Sang in the year 2002 and that the respondents constructed and lived on the same. The title deed was given to the respondent by the deceased in his presence.
9. The respondents further called DW4, the driver and personal assistant of the late Jackson Kipkoskei Sang of 15 years. He corroborates the respondents and DW3. This court finds that the appellants were not able to prove that respondent trespassed into the suit parcel of land as the respondents were given permission to enter the parcel of land and own them due to the work they had done for Jackson Kipkoskei Sang. The latter was paying the respondent for assisting him subdivide and sell his parcel of land in issue. It is worth noting that this land was sold to other people and not only the respondents and therefore it is proper to conclude that the deceased gave the respondent respective plots for services rendered in the subdivision and sale.
10. This court finds that at no time did the learned magistrate make a decision that the respondent were in adverse possession of the property and that the said issue did not arise in pleadings or during hearing and therefore it is un-procedural for the appellant to raise this issue on appeal as it will be unfair to the respondents as all parties are bound by their pleadings.
11. The Supreme Court of Kenya has made a decision in respect of determination of issues that are not in pleadings and not before the court. This was in the case of *Olive Mugenda v Wilfred Itolondo & 11 others* [2016] eKLR where Rawal DCJ and V-P; Ibrahim, Ojwang, Wanjala and Njoki, SCJJ held as follows:-

(47) “We are in agreement with Mr. Regeru, with respect, that the Appellate Court fell into error of both fact and law when it raised the issues of applicability of *the Constitution*, when such issues had neither been raised nor canvassed in the High Court or in the Court of Appeal. They were denied the opportunity to make a rebuttal on whether issues of Constitutional application existed in the matter.



- (48) All Courts must ensure that they maintain their role as independent and impartial adjudicators. This is the only proven way to ensure that they do not descend into the arena of conflict. They will inevitably descend into this tumultuous arena when they unilaterally frame new issues for determination, completely distinct from the issues pleaded and canvassed by the parties. This manifestly denies the relevant party the right of reply, and compromises the terms of Article 50 (1) of *the Constitution*. This is not to be allowed to happen.

The Supreme Court cited with approval the dictum of Lord Denning in *Jones v National Coal Board* [1957] 2 QB 55 that:

In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.”

12. The Supreme Court of Kenya took judicial notice that the Court of Appeal is bound under Section 3B of the *Appellate jurisdiction Act* to handle all matters that come before it, for the purposes of attaining a just determination of the dispute before it. This would as a matter of course entail the need to ensure that the principle of proportionality is adhered to, and that there exists a level playing ground for all parties. In the appeal before me, if I determined the issue of adverse possession in favour of the appellants I will be going against the principle of proportionality and unfair to the respondents because the issue did not crystalize in the lower court.

13. On merit of the appeal, the learned Magistrate found that the appellants claim was time barred having been filed more than 17 years after the cause of action accrued. In the case of *Edward Moonge Lengusuranga v James Lanaiyara & another* [2019] e KLR, it was held as follows;

Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the first Defendant having bought the suit land in the year 1999 (as per Paragraph 6 of the Plaintiff) and taken possession of the same, the Plaintiff herein could only seek to recover it from the 1st Defendants, but only if he did so within twelve years after the Sale Agreement.”

14. Section 7 of the *Limitation of Actions Act* provides as follows;

“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.”

15. The purpose of the Law of Limitation was stated in the case of *Mehra v Shah* [1965] E.A 321, as follows;

“The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”



16. In *Gatboni v Kenya Co-operative Creameries Ltd* [1982] KLR 104, the Court of Appeal held as follows;
- ...The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”
17. A suit barred by limitation is a claim barred by law, hence by operation of law, the Court cannot grant the relief sought. In the case of *Iga v Makerere University* [1972] EA, the Court had this to say on the Law of Limitation;
- “A Plaint which is barred by limitation is a Plaint barred by law. Reading these Provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the Court cannot grant the remedy or relief sought.”
18. I do agree with the learned magistrate that the suit that was filed on 5th July 2020 was statute barred as there is evidence on record that the respondent took possession in the year 2003 whereas Jackson K Sang died on 24th March 2012 without taking any action to evict the respondents. The respondents obtained letters of administration intestate but never pursued the suit property until on 6th July 2020 when they filed their case in the lower court approximately 17 years form the date of the accrual of the cause of action and exactly 5 years after the expiry of the time provided by law and therefore out of time.
19. I do not find merit in the appeal and the same is dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 12TH DAY OF OCTOBER 2023.

A. O. OMBWAYO

JUDGE

