



REPUBLIC OF KENYA



**Onyango v Makiri (Environment and Land Appeal 17 of 2022)  
[2022] KEELC 13278 (KLR) (4 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13278 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL 17 OF 2022  
GMA ONGONDO, J  
OCTOBER 4, 2022  
[FORMERLY MIGORI ELC APPEAL NO 12 OF 2021]**

**BETWEEN**

**CHARLES OTIENO ONYANGO ..... APPELLANT**

**AND**

**SAMORA MACHEL MAKIRI ..... RESPONDENT**

*(Being an appeal from the entire Ruling of Hon Mrs Ochieng, Principal Magistrate delivered on the 16th March 2021 in Ndhiwa Principal Magistrate's Court Environment and Land Case No 40 of 2019)*

**JUDGMENT**

1. On March 16, 2021, the trial court (Honourable Mrs Mary A Ochieng, PM) delivered a ruling on a preliminary objection dated July 16, 2020 where the learned trial magistrate reasoned that the preliminary objection failed. Therefore, she dismissed the same with costs. The appellant was aggrieved thereby hence, precipitating the present appeal.
2. The appellant, Charles Otieno Onyango through the firm of Aluoch Odera and Nyauke Advocates, originated the appeal by way a memorandum of appeal dated March 16, 2021 and filed herein on May 7, 2021 anchored on the four grounds namely;
  - a) The learned trial magistrate failed to appreciate the import of section 4 and 7 of the *Limitation of Actions Act* CAP 22 of the laws of Kenya especially based on the materials, evidence and pleadings.
  - b) The learned honorable magistrate failed to appreciate the import of section 7 of the *Land Act* No 6 of 2012.



- c) The learned honourable magistrate failed to appreciate the fact that the respondent did not have the capacity to file the suit in the question with the meaning of the [Law of Succession Act](#).
  - d) The learned trial magistrate thus misdirected herself on several matters of law.
3. On that score, the appellant has sought the following orders;
    - a) The objections in the preliminary subordinate court be allowed.
    - b) The respondent case in the court below be dismissed with costs.
    - c) The costs of this appeal be provided for in favour of the appellant.
  4. Originally, the appeal was filed at Migori Environment and Land Court but with effect from January 20, 2022, it was transferred to this court for hearing and determination.
  5. The appeal was heard by way of written submissions pursuant to the directions of this court made on October 28, 2021 upon hearing counsel for the respective parties.
  6. So, learned counsel for the appellant filed submissions dated July 14, 2022 on July 15, 2022. counsel framed two issues for determination namely whether sections 4 and 7 of the [Limitations Actions Act](#) is applicable in this case and whether section 7 of the [Land Act](#), 2016 (2012) affects the alleged contract between the parties herein. In discussing the said issues, it was submitted that the cause of action arose on December 13, 1985 and that the respondent's right to action extinguished after the lapse of the prescribed time. Counsel urged this court to uphold the appeal and award costs in the subordinate court and this appeal to the appellant.
  7. On the other hand, the respondent through the firm of Owade and Company Advocates, filed his submissions dated July 25, 2022 on even date. Counsel identified two issues for determination; the trial court properly appreciated the import of sections 4 and 7 of the [Limitation of Actions Act](#) and that the trial court did not err in law and in facts in arriving at a finding that it had jurisdiction over the suit. Counsel analysed the issues and submitted that the cause of action was a recurring one hence, urged this court to dismiss the appeal for being devoid and bereft of merit. To fortify the submissions, reference was made to, *inter alia*, article 159(2)(d) of the [Constitution](#) of Kenya, 2010, [Halsbury's Laws of England, 3<sup>rd</sup> Edition Volume 30](#) at page 38 and the case of *D T Dobie and Company (Kenya) Ltd-vs-Muchina* (1982) eKLR.
  8. This is the first appeal from the trial court in the case. Thus, this court is bound to revisit the evidence on record, evaluate the same and reach it's own conclusion. Nonetheless, this court appreciates that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they are based on no evidence at all, or on a misapprehension of the same, or the court is shown demonstrably to have acted on wrong principles in reaching the findings; see [Kamau-vs-Mungai and another](#) (2006) 1 KLR 150.
  9. In that regard, the issues for determination arise out of the grounds of appeal and are compressed to whether;
    - a) The respondent had capacity to lodge the suit,
    - b) The trial court failed to appreciate the import of section 7 of the [Land Act](#), 2016 (2012) and sections 4 and 7 of the [Limitation of Actions Act](#) (Cap 22),
    - c) This appeal is meritorious.



10. In respect of the first issue, by a plaint (Multi Track) dated November 18, 2019, the respondent who was the plaintiff before the trial court, sued the appellant who was the defendant thereof for;
  - a) An order compelling the defendant to transfer the purchased piece of land to the plaintiff failing which the Executive Officer Ndhiwa Law Courts to do so.
  - b) An order of permanent injunction restraining the defendant, agent, servant and/or employee from interfering with the suit land herein.
  - c) Refund of the purchase price at the current market value.
  - d) General damages for breach of contract.
  - e) Costs of the suit.
11. The appellant denied the respondent's claim in his statement of defence dated February 5<sup>th</sup>, 2020 filed in court on February 13, 2020. Moreover, on July 29, 2020 the appellant filed a preliminary objection dated July 16, 2020, based on the grounds infra;
  - a) The suit herein is time barred and as such had been filed contrary to the provisions of section 4 and 7 of the *Limitation of Actions Act* Cap 22, Laws of Kenya.
  - b) The suit herein offends the provisions of section 7 of the *Land Act* no 6 of 2012.
  - c) The honourable court lacks jurisdiction to determine and grant the reliefs sought.
  - d) The suit is an abuse of the court process.
  - e) The suit is therefore incompetent, fatally defective and does not lie and it ought to be struck out or dismissed with costs.
12. A limited grant of letters of Administration *Ad Litem* was issued on November 29, 2019 to the respondent in regard to the estate of Joshua Makiri (Deceased-1 herein) in Homa Bay Chief Magistrate's court *Ad Litem* Cause No. 49 of 2019. The same together with a certificate of death of the said deceased, accompany the plaint dated November 18, 2019 in the suit.
13. This court is conscious of the meaning of the term "Legal representative" as provided for under section 2 of *Civil Procedure Act* Chapter 21 Laws of Kenya; see also *Trouistik Union International and another vs-Jane Mbeyu and another* (1993) eKLR.
14. It is important to note that one Simon Makiri (Deceased-2 herein), the respondent's grandfather and Caleb Otieno Makiri allegedly took possession of the suit land (infra) after the death of deceased-2 and custody of the respondent who had not attained age of majority respectively as discerned at paragraphs 5 and 7 of the plaint. However, there is nothing in the suit documents to reveal that the respondent was the legal representative of deceased-2 and that the suit was mounted through Next of Friend as stated in *Trouistik case (supra)* and order 32 of the *Civil Procedure Rules*, 2010.
15. In the foregone, the respondent had no capacity to originate the suit before the trial court. Therefore, the suit was incompetent as raised at grounds (d) and (e) of the preliminary objection.
16. As regards the second issue, the property in dispute in this appeal is land reference number Kanyamwa/Kochieng/Komungu/Kakaeta/1282 measuring approximately seven decimal two sic hectares (7.26 Ha) in area (The suit land herein). The same is a sub division of land reference number Kanyamwa/Kochieng/Komungu/Kakaeta/92 measuring approximately Eight decimal six hectares (8.6 Ha) in area



(The original land) as disclosed in the documents including green card, proceedings and judgment accompanying the plaint.

17. Further, there is a certificate of confirmation of grant dated October 2, 2018 issued to the respondent for Onyango Ouso (deceased -3 herein), a mutation and a sketch, among other documents, contained in the appellant/ defendant's further list of documents dated July 16, 2020 and annexed to the preliminary objection. The mutation form attached thereto discern the original land and its subdivisions as stated in paragraph 15 hereinabove.
18. Plainly, deceased 2 raised an objection and judgment was delivered on March 10, 2000 in Homa Bay SRM Succession Cause No 100 of 1998 in his favour against the estate of deceased-3. This related to the original land and that court ordered transfer of the same to deceased-1 accordingly.
19. Interestingly, same order of transfer of the suit land which emanated from the original land and other related orders, were sought in the plaint before the trial court. I bear in mind the judgment in the said succession cause, the suit before the trial court, sections 4, 7, 17 and 18 of the Limitations of Actions Act (Cap 22), section 7 of the *Land Act* (*supra*) and section 7 of the *Civil Procedure Act* Chapter 2 Laws of Kenya.
20. It is abundantly clear that the suit was statute barred and the trial court was devoid of jurisdiction over it. This is fundamental and article 159 (2) (d) (*supra*) is not a panacea in the circumstances. So, the preliminary objection was tenable and I am of considered view that the trial court's ruling on it was faulty at law.
21. Accordingly, I find this appeal meritorious. I would allow the same and grant orders 1, 2 and 3 sought in memorandum of appeal and as set out in paragraph 3 (a) (b) and (c) hereinabove.
22. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 4<sup>TH</sup> DAY OF OCTOBER, 2022.

GMA ONG'ONDO

JUDGE

PRESENT:

1. Ms Odera, learned counsel for the appellant
2. Ms Odhiambo holding brief for Mr Owade, learned counsel for the respondent
3. Angela and Fiona, court assistants

