



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

ELC APPEAL CASE NO. E002 OF 2021

PATRICK KIRIMI M'NGANABU.....APPELLANT

VERSUS

NJERU MUCHAI.....RESPONDENT

(Being an appeal from the judgement and decree of the Honourable S.M. Nyaga SRM in Marimanti e & l case no.17 of 2019 delivered on 16th day of February, 2021)

JUDGEMENT

INTRODUCTION

1. The appellant PATRICK KIRIMI M'NGANABU filed this appeal against the judgement of Hon.S.M. Nyaga, Senior Resident Magistrate delivered and dated, 16th day of February,2021 in Marimanti CM ELC CASE No.17 of 2019 and set out 11 grounds of appeal.
2. The respondent also filed a memorandum of cross appeal and raised one ground of appeal.
3. The Appellant had sued the Respondent seeking the following orders.
 - i. An order of permanent injunction to restrain the defendant his agents, servants and/or anybody else acting under his instructions from interfering, utilizing, trespassing or in any other way dealing with the parcel of land LR NO, THARAKA/NKONDI B/56.
 - ii. An order of eviction to evict the defendant from parcel of land LR No. THARAKA/NKONDI B/56 under the supervision of police officers from the nearest police station.
 - iii. General damages for trespass, and
 - iv. Cost of the suit and interest.
4. The Appellant instituted the suit in his capacity as the legal administrator of the estate of M'Nganabu M'Muthanga (deceased) and averred that the deceased who was the appellant's father has always been the registered owner of land parcel No.Tharaka/Nkondi 'B'/56 MEASURING 17 acres. It was pleaded that during the lifetime of the deceased there arose a dispute as to the ownership of the suit parcel of land. The Appellant averred that he filed an objection with the Adjudication office who ruled that the Respondent was only entitled to one (1) acre out of the said parcel of land. The Appellant's case was that despite the said ruling, the Respondent refused to vacate the said property and continued to utilize what he did not acquire rightfully, hence denying the real beneficiaries of the land.
5. In his defense the Respondent denied the Appellant's claim. The Respondent stated that although the suit property was registered in the name of the Appellant, such registration was irregular, unprocedural and illegal ab initio. The Respondent pleaded that he was in the suit property with the authority of the public who are the owners of the property.
6. In his further Amended Defence and counterclaim, the Respondent pleaded that although the suit property was registered in the name of the late M'Nganabu M'Muthanga (deceased), the deceased never lived on the suit property and that the Respondent is the one who has been living and was in occupation of the property since 1978 to date. The Respondent's case was that the appellants' claim over the suit property has been extinguished by dint of section 7 of the Limitation of Actions Act Cap 22 and that the Respondent had acquired right to the suit property by way of adverse possession. That sometime in 1996, the Land Disputes Tribunal made a decision that the suit property belonged to the Appellant, but that decision was also time barred by virtue of Section 4(4) of the Limitation of Actions Act since no action was brought before the expiry of 12 years from 1996.The Respondent maintained that he has been living uninterrupted and without authority on the suit property since 1978. The Respondent sought for a declaration that he has acquired title over the suit property by way of adverse possession and an order directing the Land Registrar to cancel the appellant's title and issue a fresh title to the Respondent.

7. After hearing evidence from both the Appellant and the Respondent the subordinate court dismissed both the Appellants suit and the Respondent's counterclaim. The trial court found that the suit land was public land and referred the matter to the attention of the National Land Commission to look into historical injustice, if any, and for the benefit of the public as envisaged under the Constitution of Kenya, 2010.

8. The Appellant was dissatisfied with the said decision and filed the present appeal on the following grounds:

- i. The learned trial magistrate erred in law and fact by finding that the suit was time barred when the appellant/plaintiff filed suit seeking eviction orders against the defendant/respondent from the suit land].
- ii. The learned trial magistrate erred in law and fact in that he failed to find that the High court in Meru Succession Cause No.262 of 2015 had dealt with the parcel of land THARAKA/NKONDI B/56 hence the lower court had no jurisdiction to find that the plaintiff/appellant was only an administrator of the estate of the registered owner.
- iii. The Learned Trial Magistrate erred in Law by failing to find that the appellant did prove his case before the court the respondent having to establish the benchmarks in support of his case for adverse possession.
- iv. The magistrate erred in law and fact in that the deceased did not own the suit land despite having been allocated the same and had a title Deed for the land.
- v. The Learned Trial Magistrate erred in Law and fact by finding that the court had a constitutional mandate to find that the land was public land when the issue was not before the court for trial.
- vi. The learned Trial Magistrate further erred in Law and fact in that he found that the suit land was public land when there was no such evidence before the court to support the finding.
- vii. The Learned Trial Magistrate erred in law and fact in that he issued the orders which were not prayed for by the parties.
- viii. The Learned Trial Magistrate erred in Law and fact in that he dealt with the issues of the National Land Commission yet the issue was not before the court for determination and he erred by referring the matter to the National Commission.
- ix. The Learned Trial Magistrate erred in Law and fact in that he failed to find that the respondent is a trespasser on the suit land he ought to be evicted from the suit land
- x. The Learned Trial Magistrate erred in Law and fact that he failed to consider the appellant's submission and the judicial authorities thereof which were relevant to the case.
- xi. That the decision of the trial magistrate is against the weight of evidence and is bad in law.

9. The Appellant prayed that this court allows the appeal herein and the judgement and decree in Marimanti ELC Case No.17 of 2019 be set aside and the orders prayed for by the appellant be awarded as prayed and the costs of this appeal and the lower court be borne by the Respondent.

10. On his part, the Respondent filed a memorandum of cross Appeal seeking to have the said decision varied or reversed to the extent and in the manner on the ground that the trial magistrate erred in Law in dismissing the respondent's counter claim for adverse possession having found that the Appellant's claim was time barred by virtue of section 7 of the Limitation of Actions ACT, Cap 22 Laws of Kenya. The Respondent seeks for orders that the appellant's appeal be dismissed the respondent's counterclaim in the trial court be allowed and the appellant to pay the costs of the cross appeal.

Submissions

11. The appeal was canvassed by way of written submissions which were duly filed by both parties. The Appellant submitted that the mere fact that the respondent had allegedly been in possession of the suit land as a trespasser for a long time was not enough to make the Limitation of Actions Act operative.

12. That assumption of possession for a long time does not in itself make an Act come into operation against a registered owner of the land. It was submitted that the Act is operative only where there has been exclusive possession for the statutory period by the person seeking protection by the statute. The Appellant submitted that the respondent has not been having "exclusive" possession of the suit land adding that his possession was marred by interruptions from the appellant.

13. The Appellant further submitted that the lower court was bound by the decision of the High court in Meru Succession Cause No.262 of 2015 which dealt with succession over the suit parcel of land. It was the Appellant's submission that the lower court's findings that the appellant herein was only an administrator of the estate of the deceased was erroneous, the respondent having failed to file an objection in the succession matter. The Appellant submitted that he had proved that the suit land was part of the estate of his deceased father, and faulted the trial court for ignoring the evidence that was presented before it, including a title deed that was exhibited.

14. The Appellant further submitted that the subordinate court did not have any constitutional mandate to make a finding on an issue that was not pleaded and issue orders that were not prayed for. Relying on the case of Anthony Francis Wareham and others vs Kenya Post

Office savings Bank CA 5 & 48 OF 2002 which was quoted with approval in the case of John Kamunya & another -vs- John Nginyi Muchiri & 3 others Nakuru C.A No. 123 of 2007, Chalicha FCA Ltd -vs- Odhiambo & 9 others (1987) KLR 182, and Galaxy paints Co. Ltd -vs- Falcon Guards Ltd EALR (2000) 2 EA 385, the Appellant submitted that the lower court erred in Law in making determination on its own issues and making orders that did not flow from the pleadings by referring the matter to the National Land Commission. The appellant urged the court to find that trespass had been proved. The Appellant further urged the court to dismiss the respondent's cross appeal, set aside the judgement and decree of the subordinate court and rule in favour of the appellant.

15. On his part, the respondent submitted that the court should exercise its jurisdiction and make its own independent decision. That in exercising its jurisdiction, the court should uphold part of the judgement that decided that the appellant's suit which was filed after the respondent had been in possession and occupation of the suit property for a period of over 12 years was barred by the Law of Limitation of Actions Act. The respondent cited section 7 of the Law of Limitation of Actions Act and relied on the case of Haron Onyancha-V-National Police Commission & another (2017) eKLR, Iga v Makerere University (1972) E.A 65 and submitted that the lower court correctly dismissed the appellant's case for being time barred pursuant to the provisions of the Limitation of Actions Act cap 22 Laws of Kenya. The Respondent further submitted that the appellant filed the suit in the trial court as an administrator of the estate of his late father and the suit was to recover the suit property which was adversely occupied and possessed by the respondent. The respondent submitted that the probate and administration court did not deal with the issue of adverse possession but only dealt with the collection and preservation of the deceased estate. That the appellant filed suit in the Environment and land court because this is the only court that has the jurisdiction to deal with the occupation and ownership of land. The respondent relied on the case of Phyllis Wanjiru Kamau v Wilson Gichuhi Gachagwe & 2 others (2019) eKLR. The respondent further submitted that the court should find and hold that the suit property is public land which requires investigations in accordance with section 14 of the National Land Commission Act. The respondent submitted that he is a trespasser who has occupied the suit property for a period of more than the statutory period of 12 years and the court ought to decide that the respondent has acquired title to it by way of adverse possession. The respondent therefore urged the court to dismiss the appellant's appeal and allow the respondent's cross-appeal with costs.

ANALYSIS & DETERMINATION

16. I have perused and considered the record of appeal, the supplementary record of appeal, the grounds of appeal and the cross appeal and the submissions by the parties.

This being a first appeal I am conscious of the courts' duty and obligation to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusions reached by the learned magistrate were justified on the basis of the evidence presented and the Law.

The issues for determination as I can deduce from the grounds of appeal and the cross appeal are:

- i. Whether the Probate and Administration court in Meru dealt with the issue of Possession and occupation of the suit property therefore denying the trial court the jurisdiction to deal with the suit property.
- ii. Whether the trial court erred in holding that the Appellant's suit in the subordinate court was extinguished by virtue of section 7 of the Limitation of Actions Act cap 22 Laws of Kenya.
- iii. Whether the trial court erred in Law and fact by finding the suit property is public land.
- iv. Whether the learned trial magistrate erred in Law and fact in issuing orders which were not prayed for by the parties and which did not form part of pleadings
- v. Whether the decision of the learned trial magistrate was against the weight of the evidence and the Law.

17. With regard to the first issue, the Appellant has submitted that the subordinate court was bound by the decision of the High court in Meru Succession Cause No.262 of 2015 which dealt with the succession over the estate of the Appellant's late father, including the suit property L.R No. THARAKA/NKONDI B/56. The Respondent submitted that the probate court did not deal with the issue of possession. It should be noted that the probate and administration court has two distinct jurisdictions. In the Estate of Alice Mumbua Mutua (deceased) (2017) eKLR, Musyoka J rightly stated that ***"The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries and distribution of the assets."***

18. The Appellant filed the suit in the trial court as the administrator of his late father's estate and the suit was for recovery of the suit property which was occupied by the respondent. In Phyllis Wanjiru Kamau -v- Wilson Gichuhi Gachagwe & 2 others (2019) eKLR the court held as follows: "From the foregoing analysis it is clear that claims may be made in respect of the estate of a deceased person by person who are not necessarily the heirs of that estate. Jurisdiction to deal with such claims of ownership lies with the Environment and Land court. The assertions by the 2nd and 3rd defendants that this court has no mandate to deal with the matter when there is ongoing succession dispute is unfounded. From the foregoing analysis, it is clear that the assertions by the 1st and 2nd defendant that a claim of adverse possession cannot be made in respect of estate of a deceased person does not hold."

19. Section 26(3) & (4) of the Environment and Land Court provides that the Chief Justice may, by notice in the Gazette appoint certain magistrates to preside over cases involving environment and land matters of any area of the country, and subject to Article 169(2) of the Constitution, the magistrate appointed shall have jurisdiction and power to handle matters alia, matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set in the Magistrate's Courts Act. The court that heard the case in the lower court was duly gazetted as provided hence had the necessary power to deal with the matter. I am therefore not persuaded that the trial court did not have the requisite jurisdiction to deal with the matter for the simple reason that the suit property was also the subject of a succession cause in a probate and administration court. In any event, the probate court had not dealt with the issue of occupation and possession.

20. The second issue for determination is whether the trial court erred in holding that the Appellants suit was extinguished by virtue of the provisions of section 7 of the Limitation of Actions Act. The Appellant filed the suit in the subordinate court on 31st October 2019 claiming ownership of the suit property. The Respondent's case was that he entered the suit property in 1978 without the consent of the appellant and has been living and working on the suit property ever since. From 1978 to 2019 when the appellant filed the suit to recover the suit property the respondent had already occupied the suit property for a period of about 40 years. The evidence on record indicate that the appellant obtained title to the suit property in 2006. The respondent therefore had occupied the suit property for a further uninterrupted period of 13 years which is beyond the limitation period of 12 years.

21. 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.”

22. In the case of **Bosire Ogero v Royal Media Services (2015) eKLR**, it was held that

“The Law of Limitation of actions is intended to bar the plaintiff from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in bringing of suits against them. The issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of Limitation is not raised by a party to the proceedings since it is a jurisdiction issue, the court cannot entertain a suit which it has no jurisdiction.”

23. In the case of **M' IKIARA M'RINKANYA & Another v Gilbert Kabeere M'Mbijiwe**, civil Appeal 124 of 2003 (2003(2007) eKLR, it was held;

...from the above analysis, it is clear that a judgement for possession of land should be enforced before the expiry of 12 years limitation period stipulated in section 7 of the Act.”

24. Further, in the case of **Haron Onyancha v National police Service Commission & another** 2017 eKLR, Mutungi J quoted the case **OF IGA V Makerere University (1972) EA 65** Where Mustafa J.A where it was held as follows:

“A plaint which is barred by limitation is a plaint barred by law. Reading these provisions together it seems clear to me that unless the appellant 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 appellant was clearly out of time, and despite the opportunity afforded him by the judge he did not show what grounds of exemption, he relied on, presumably because none existed. The limitation Act reject his claim. The limitation 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.”

25. Clearly, the suit by the appellant was time barred for having been instituted after the expiry of 12 years whether the court considered 1978 when it is alleged the deceased owner took possession or even 2006 when a title was issued. This reason alone was enough to render the appellants suit nugatory. It follows therefore that when the appellant instituted the action after the expiration of 12 years period the proprietor's title had been extinguished by operation of the Law. The trial court therefore held correctly in dismissing the appellant's case for being time barred by Limitation of Action Act, and that decision is upheld.

26. The next issue for determination is whether the learned trial magistrate erred in Law and fact by finding that the suit property is, public land. The record shows that the respondent together with his two witnesses informed the trial court how the suit property was used by the appellant's deceased father as public land for demonstration on farming by the government. This is clearly captured in the Respondent's replying affidavit sworn on 13th November, 2019. There is also documentary evidence showing that the area chief and area member of parliament complained to the National Land commission regarding the suit property.

27. As already stated, the Appellant brought the suit as an administrator of the estate of his deceased father who was the registered owner of the suit land. From the material on record, it is not denied that the deceased was an agricultural officer in the area where the suit land lies and would use the land for work related activities, in particular as a demonstration farm. It is therefore apparent that the suit land was public land and it is not clear how the same was converted into private land. It is my finding that the learned trial magistrate was in order to declare the suit land public land to safeguard public interest. Whereas this issue was not pleaded, Article 159 (1) of the constitution states that in exercising judicial authority, the courts and tribunals shall be guided by sub article (d) where the purpose and principles of the Constitution shall be protected and promoted. The learned magistrate cannot therefore be faulted for stating that the court had a constitutional mandate to safeguard public interest, especially when it detected that the suit land could be public land.

28. The next issue is whether the learned trial magistrate erred in issuing orders that were not prayed for by the parties and did not form part of the pleadings. The entrenchment of the article 159 principle of substantive justice is testimony of the greater moment that our justice system regards the due administration of justice without over reliance on the format or process prescribed for its delivery. The constitutional principle is an upgrading of previous statutory underpinning by statute under section 1A,1B and 3A of the Civil Procedure Act and the Judicature Act section 3(2) in terms that the High Court, the Court of Appeal and all subordinate courts shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay. In Article 159, the makers of the Constitution of Kenya 2010 expressly provided for the supremacy of the principle of substantial justice over provisions on procedure whether these appears in statute or rules made thereunder. In the instant case, the trial magistrate went out of his way in the interest of justice by declaring that suit land was public land. The court was being duly guided by Chapter 5 of the Constitution of Kenya 2010. It was suspect how land that was being used for demonstration on farming was allocated to a public officer who was not a resident in the area and who from the evidence on record was entrusted to use the Land for official purposes. In my view, the learned magistrate should not have closed his eyes on

what was otherwise an illegality, hence his decision in this respect was proper in the circumstances.

29. The last issue for consideration is whether the decision of the learned trial magistrate was against the weight of the evidence and the Law. In this case, both the Appellant and respondent were claiming the suit land. The appellant claim was as a legal administrator of the estate of his father, While the respondent claim was for adverse possession. The weight of evidence presented to court was obvious that both the appellant and the respondent did not own the suit land since it was public land. On the other limb the claim for the land by the adverse possessor fails due to the statute of limitation of time being time barred and a claim for adverse possession cannot lie against the government. In essence the trial magistrate decided the case on the weight of evidence brought before him. I find that there is no merit in this appeal and the cross appeal. The same are dismissed. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT CHUKA THIS 25TH DAY OF OCTOBER, 2021 IN THE PRESENCE OF:

C/A: NDEGWA

M/S. KIJARU H/B FOR KIOGORA FOR APPELLANT

MWITI FOR RESPONDENT

C. K. YANO,

JUDGE.