



REPUBLIC OF KENYA



**Mapesa v Amakobe (Environment and Land Appeal E013 of 2023)
[2025] KEELC 4794 (KLR) (25 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4794 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E013 OF 2023**

**A NYUKURI, J
JUNE 25, 2025**

BETWEEN

THOMAS KHAMALA AKHURA MAPESA PLAINTIFF

AND

RONDE GILBERT ESHITEMI AMAKOBE DEFENDANT

*(An appeal challenging the judgment of Hon. Dolphina Alego (SPM)
in Kakamega CMCC No. 934 of 2018 delivered on 12th June, 2023)*

JUDGMENT

1. This appeal was filed by Thomas Khamala Akhura Mapesa challenging the judgment of Hon. Dolphina Alego (SPM) in Kakamega CMCC No. 934 of 2018 delivered on 12th June, 2023. In the impugned judgment, the learned trial magistrate allowed the plaintiff's claim thereof, granting eviction orders against the defendant in regard to parcel No. Butso/5026.

Background

2. By a plaint dated 27th June 2018 the plaintiff averred that she was the registered proprietor of the parcel of land known as Butso/5026 (suit property) which he purchased from one John Musungu Maresa in 2003. He stated that the parties agreed that the vendor was to move his family from the suit property and give the plaintiff vacant possession thereof, which he did including moving his mother. That however the defendant who is a brother to the vendor John Musungu Maresa, in 2012, without any right, trespassed on the suit property, brought back his mother on the plaintiff's parcel. The plaintiff sought the following orders;
 - a. An eviction order against the defendant, his family, servants, agents or any other person claiming on his behalf from and thereafter, a permanent injunction restraining them



from trespassing, ploughing, encroaching whatsoever on land parcel LR No. Butsotso/Shibeye/5026.

- b. Costs of this suit.
 - c. Interest on (b) above.
3. In a defence dated 12th July 2018, the defendant denied the plaintiff's claim and stated that he is the "occupant/administrator of Butsotso/Shibeye/5026 after the subdivision from a number of buyers".
 4. The matter was heard by oral testimony. The plaintiff presented two witnesses while the defence presented three witnesses.

Plaintiff's evidence

5. PW1 was Ronde Gilbert Eshitemi Amakobe, who adopted his witness statement dated 27th June 2018 and produced documents filed. His testimony was that he purchased parcel No. Butsotso/Shibeye/5026 from one John Musungu Mapesa in 2003 and was registered as proprietor thereof on 14th September 2017. That parties to the sale transaction agreed that the vendor was to move his family from the suit property. That the defendant forcefully entered the suit property in 2012 and built a house thereon, after having sold all his land and remained landless. He maintained that the defendant was unlawfully occupying part of the suit property without his consent and was using violence to keep the plaintiff away from his land.
6. On cross-examination, he stated that the defendant was John Musungu's brother. That the land the defendant bought from them was 4965 and that he never signed any document at the Chief. In re-examination he stated that he bought land from the same family twice, the first purchase being from Nalwayo's land which is not disputed and that the second purchase was in regard to the suit property.
7. PW2 was John Musungu Moresa. He adopted his witness statement dated 27th June 2018 as his Evidence in chief. He stated that he sold the suit property to the plaintiff and moved his mother to Kabras. That the defendant is his brother and was allocated his land from their father's estate. That the defendant sold all his land and became landless. That the defendant forcibly entered the plaintiff's land put up structures and is occupying the same illegally.
8. On cross-examination, he stated that he had never had any dispute with the defendant in regard to land. That he sold the suit property to the plaintiff and was not there during any of the meetings. That he buried his mother in 2018 on the plaintiff's land and the plaintiff never objected as the two of them agreed to the same. That marked the close of the plaintiff's case.

Defendant's evidence

9. DW1 was Thomas Khamala Akhura Mapesa the defendant. He confirmed that he lived on parcel Butsotso/Shibeye/5026. That he buried his mother and father on that land and that 8 members of his family are buried on that land. That the suit land has been his home since 1986. He produced agreements and mutations.
10. In cross-examination, he stated that he did not participate in the sale agreement between PW1 and PW2 and that he had been given parcel No. 4963 in 2011. That his mother gave him land and he got parcel No. 4963 and that the land was sold without his knowledge.
11. DW2 was Josephat Omeha. He stated that on 9th June 2011, they decided that the defendant should remain on the land where his parents were buried being parcel No. 5026 and that the Chief and village elder were present.



12. DW3 was Evelyn Omukanya. She stated that she had lived on the suit property since she got married to the defendant in 1999 and that they have 7 children. She stated that the plaintiff bought the suit land from PW2.
13. On cross-examination, she stated that PW2 was her brother-in-law and that she does not know the registration number of the parcel sold to the plaintiff. Further that she could not remember the parcel which her husband was given. That every son was given land by her father-in-law and they got titles in 2017. That marked the close of the defence case.
14. On considering the pleadings, evidence and submissions, the trial court allowed the plaintiff's claim on the basis that the plaintiff had demonstrated lawful ownership as per the search and title deed and that PW2 confirmed selling the suit property to the plaintiff. The trial court further found that the documents presented by the defendant are related to graves on the suit property and not ownership thereof.
15. Aggrieved with the judgment of the trial court, the appellant (the defendant in the lower court) appealed against the same vide Memorandum of Appeal dated 8th August, 2023 citing the following 9 grounds;
 - a. That the learned trial magistrate erred in law and fact in failing to appreciate the proper effect and purposes of the evidence and in arriving at a decision which is not supported by or is against the weight of evidence on record.
 - b. That the learned trial magistrate erred in law and fact in failing to appreciate that the appellant having stayed on the suit land known as Butsotso/Shibeye/5026 all along and having provided a survey report in his defence and interference of the same amounted to a miscarriage or justice.
 - c. That the learned trial magistrate erred in law and fact by making a finding that the suit land Butsotso/Shibeye/5026 was the property of the respondent when it was clear from evidence on record that the same was in actual possession and use by the applicant as per the evidence on record since 1962.
 - d. That the learned trial magistrate erred in law and fact in failing to recognize and properly direct her mind to the gaps and lacunas in the evidence tendered in support of the respondent's case.
 - e. That the learned trial magistrate erred in law and fact in failing to find that the appellant was entitled to the suit property being that inheritance from his deceased father and the actions of the respondent was unconstitutional as it also amounts to affecting the rights of the appellant as to ownership of property.
 - f. That the learned trial magistrate erred in law and fact in making a finding and that purported titles by the respondent was genuine by the commission of lands when the same was doubtful and constituted proprietary rights to the respondent when it was not.
 - g. That the learned trial magistrate erred in law and fact by believing when the respondent misled the court that the appellant sold his land without disclosing the title registered number sold.
 - h. That the learned trial magistrate erred in law and fact in all circumstances of the matters failed to achieve the objective, function and purpose of the court and to do justice as regards the suit that is before her and accordingly erred in law by making orders that she did.
 - i. That the learned trial magistrate erred in law and fact in failing in presiding over a matter she had no jurisdiction and her decision was therefore biased and without basis.



16. The appellant sought for orders that the judgment and decision of the trial court be set aside and the appeal be allowed with costs.
17. The appeal was disposed by way of written submissions. On record are submissions filed by the appellant dated 12th June 2024 and those filed by the respondent dated 2nd December 2024.

Appellant's Submissions

18. Counsel for the appellant submitted that although the respondent alleged to have purchased the suit property, he did not produce any agreement and that the appellant presented evidence that the family had agreed for him to occupy the suit property as per the agreement dated 12th June 2012. According to counsel, PW2 by transferring the suit property to the respondent well aware of the appellant's interest therein, amounted to a corrupt scheme hence the title was tainted.
19. Counsel relied on the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 128 and submitted that the duty of the first appellate court is obligated to scrutinize the evidence afresh and make independent findings bearing in mind that it did not see or hear witnesses at trial.
20. Reliance was also placed on the case of *Elijah Makeri Nyangwara v Stephen Muigai Njuguna & Another* [2013] eKLR for the argument that the respondent was aware of the dispute between the family members but went ahead to purchase the suit property and that he is therefore not a bona fide purchaser. Counsel argued that the surveyors report and mutation dated 5th September 2017 showed that the matter had been mediated upon.
21. On whether an eviction order in favour of the respondent was justified, counsel argued that the appellant having entered the suit property in 2012 and the respondent having obtained title in 2017, it was clear that the respondent obtained title when the appellant was already in possession thereof hence section 152 of the *Land Act* is not applicable. Counsel cited the case of *Winsley Barasa v Immaculate Awino Abongo* [2017] eKLR to buttress their argument.
22. Regarding costs, counsel submitted that the respondent should bear costs of this appeal and referred to the case of *Orix Oil (kenya) Limited v Paul Kaburu & 2 Others* [2014] eKLR for the proposition that costs follow the event.

Respondent's submissions

23. Counsel for the respondent submitted that the appellant filed this appeal on 9th August 2023 against the judgment delivered on 12th June 2023 and that in view of provisions of Section 79G of the *Civil Procedure Act*, the appeal herein was filed out of time without leave of court. Counsel argued that the appeal herein was time bared and ought to be dismissed.
24. On who owned the suit property, counsel submitted that the respondent who had presented title having obtained ownership through purchase and the appellant having confirmed occupation without title, the respondent had proved ownership. Counsel also argued that the appellant did not demonstrate that title was unlawfully procured. Counsel sought for the dismissal of the appeal.

Analysis and determination

25. The court has carefully considered the appeal, submissions and the entire record. The issues that arise for the court's determination are;
 - a. Whether this appeal is fatally incompetent for having been filed out of time without leave of court.



- b. Whether the trial court was wrong in concluding that the respondent proved his claim on the required standard.
26. Section 79G of the *Civil Procedure Act* provides that an appeal from the subordinate court ought to be filed in 30 days from the date of the decision and where there is delay, an appeal may be admitted out of time where a good and sufficient cause is shown. The said section provides as follows;

Time for filing appeals from subordinate courts

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

27. In the instant case, the Memorandum of appeal was filed on 9th August 2023, while the judgment appealed against was delivered on 12th June 2023. That is a period of 58 days. No leave of court for filing the appeal out of time was demonstrated by the appellant even after having been served with the respondent's submissions on 24th February 2025. Section 79G of the *Civil Procedure Act* is couched in mandatory terms in so far as the 30-day period for filing appeal is concerned. Hence the court has no discretion to hear an appeal filed out of time without leave of court. An appeal filed out of time without leave of court is fatally incompetent and its fate is an order for striking it out, as the court has no jurisdiction to determine an incompetent appeal.
28. In the premises, this appeal having been filed out of time without leave of court, is hereby found to be incurably incompetent and the same is hereby struck out with costs to the respondent.
29. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 25TH DAY OF JUNE, 2025.

A. NYUKURI

JUDGE

In the presence of;

Mr. Thomas Khamala Akhura Mapesa the Appellant in person

Ms. Masakhwe for the Respondent

Court Assistant: M. Nguyai

