

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCLA NO. E007 OF 2024

MARIKO MAISIBA NDUKO APPELLANT

VERSUS

PRISCAH KEMUNTO MARIARIA 1ST RESPONDENT

EDWARD MARIARIA 2ND RESPONDENT

JUDGMENT

(Being an appeal against the judgment of Hon. P.K Mutai, Principal Magistrate, delivered on 23 January 2023 in the case Kisii CMCC/ELC No. 100 of 2021)

1. The appellant is aggrieved by the judgment delivered against him in the suit Kisii CMCC/ELC No. 100 of 2021 and has preferred this appeal. The said suit was commenced by the appellant through a plaint filed on 3 September 2021. In the plaint, the appellant pleaded to be the registered proprietor of the land parcel Wanjare/Bomorenda/738 measuring approximately 0.6 Ha. He averred that he purchased the suit land from one Nduko Getate in 1989 for the consideration of Kshs. 10,000/= and the seller transferred to him the suit land in 1991. He pleaded that the respondents leased the suit land but his requests to have them vacate did not bear fruit. In the suit, he asked for orders of eviction, permanent injunction and costs.
2. The respondents filed defence wherein they pleaded that one Joseph Mariaria Momanyi, the husband of the 1st respondent, together with one Bonareri Okioma, bought part of the suit land from Nduko Getate which led to the suit Kisii CMCC No. 487 of 2001, Joseph Mariaria & Another vs Mariko Maisiba Nduko. They pleaded that in that suit the appellant was ordered to retransfer the suit land and have it subdivided among the claimants in that

case. They contended that the appellant obtained title when there was an order against the same and obtained title against the order to have the suit land retransferred back to the original owner and the purchasers. They further pleaded that apart from the suit Kisii CMCC No. 487 of 2001 there was also another previous suit i.e Kisii CMCC No. 279 of 2000. They asked that the suit be dismissed.

3. The appellant filed a reply to defence wherein he reiterated that he obtained title in 1991 as a bona fide purchaser for value. He pleaded that he is a stranger to any suit that ordered him to retransfer the land and have it subdivided to the respondents and denied obtaining title against any court order.
4. At the hearing, the appellant asserted that he is the registered owner of the suit land and that he got title after buying it from Nduko Getate. He produced a copy of the title deed showing that he obtained title on 28 August 1991. He also produced the plaint in the suit *Kisii CMCC No. 279 of 2000, Mariko Maisiba Nduko vs Joseph Mariaria Momanyi and Bonareri Okioma*, and a decree dated 24 September 2008 in the suit *Kisii CMCC No. 487 of 2001, Joseph Mariaria Momanyi, Bonareri Okioma and Nduko Getate vs Mariko Maisiba Nduko*. Cross-examined, he testified that he was not aware of any case where he had been sued by Nduko Getate and was never served with any court order. He acknowledged filing a case in 2000 but claimed not to be aware of its conclusion. With that evidence the appellant closed his case.
5. DW – 1 was the 1st respondent. She testified that the 2nd respondent is her son. In her witness statement, she averred that the suit land was bought by her late husband, Joseph Mariaria Momanyi and one Bonarei Okioma, from Nduko Getate. She averred that Nduko Getate found that the appellant had caused the suit land to be transferred to himself without his consent. She averred that her husband, Bonarei Okioma, and Nduko Getate, filed the suit

Kisii CMCC No. 487 of 2001 against the appellant and judgment was entered in their favour. She stated that her husband was in the process of executing the decree but became sick and eventually passed on. In court, she repeated the claim that the suit land was purchased by her husband from Nduko Getate and that she has been living on it ever since. She produced proceedings in the suit *Kisii CMCC No. 279 of 2000 Mariko Maisiba Nduko vs Joseph Mariaria Momanyi and Bonareri Okioma*, and decree dated 28 May 2004 in the suit *Kisii CMCC No. 487 of 2001* (supra) together with an unregistered transfer form dated 8 July 2004 purportedly executed by the Executive Officer, Kisii Law Courts. Also produced were the certificates of death of Nduko Getate and Joseph Mariaria Momanyi showing that they died on 29 August 2005 and 17 March 2018 respectively. Cross-examined, she testified that her husband died in 2018 but so far no succession has been filed. She stated that she has not constructed a house on the suit land though she cultivates it. Her late husband had two wives and they both live in Suneka. With that evidence the respondents closed their case.

6. It will be noted from the above that both appellant and respondents produced decrees albeit of different dates in respect of the case *Kisii CMCC No. 487 of 2001*. It will be recalled that in that suit the plaintiffs were Joseph Mariaria Momanyi, Bonareri Okioma, and Nduko Getate with the defendant being Mariko Maisiba Nduko (the appellant herein). The decree of the respondents, dated 28 May 2004 showed that judgment in that suit was delivered on 21 January 2003 by Hon. Loise Komingoi, Resident Magistrate, and that in the judgment the defendant (appellant herein) was ordered to retransfer 0.6 Ha of the suit land to the 3rd plaintiff (Nduko Getate) then subdivide it to the 1st and 2nd plaintiffs in that suit (Joseph Mariaria Momanyi and Bonareri Okioma). The appellant was also restrained by way of a permanent injunction. The appellant's decree dated 24 September 2008 shows that the

suit filed by Joseph Mariaria Momanyi, Bonareri Okioma, and Nduko Getate against the appellant, was dismissed with costs.

7. In his judgment, the trial Magistrate did affirm that the register shows the appellant as the registered proprietor, having obtained title on 28 August 1991. He further acknowledged that there were two decrees produced in respect of the case *Kisii CMCC No. 487 of 2001*. In his opinion, it was not clear what exactly transpired in the said case as the parties did not produce the proceedings and he wondered if judgment was set aside. He proceeded to hold as follows :

“Considering the two orders produced and lack of proceedings, it is not clear what were the end results in that civil suit. It was incumbent upon the plaintiff to produce the entire proceedings. Whoever alleges must prove. That is cardinal rule in evidence. The case against the defendants was not proved on the balance of probability and it is consequently dismissed with costs to the defendants.”

8. Aggrieved, the appellant has now preferred this appeal on the following grounds (slightly paraphrased for brevity) :
 1. *The learned trial magistrate erred in law and fact in dismissing his case without properly evaluating the evidence.*
 2. *The learned trial magistrate erred in law and in fact in dismissing the case without taking into account the appellant’s decree in the suit Kisii CMCC No. 482 of 2001.*
 3. *The learned trial magistrate erred in law and in fact in dismissing the appellant’s case without taking into account that the respondents’ orders were of persons who failed to execute orders which had abated.*
 4. *The learned trial magistrate erred in law and fact in dismissing the appellant’s case by shifting the burden of proof to the appellant.*
 5. *The learned trial magistrate erred in law and in fact in failing to consider that the respondents were trespassers.*
 6. *The learned trial magistrate erred in awarding costs to the respondents.*

The appellant seeks the judgment to be set aside and it be substituted with orders allowing the prayers in the plaint with costs.

9. The appeal was argued through written submissions and I have taken into account the submissions filed by both Mr. Anyona for the appellant, and Mr. Moracha for the respondent.
10. It is discernible that the appellant's case was that he was the registered proprietor and he wished to have the respondents evicted and permanently restrained from the suit land. He of course produced his title issued on 28 August 1991. The defence of the respondents was that the suit land was purchased by Joseph Mariaria (husband of the 1st respondent and father of the 2nd respondent) and Bonareri Okioma, from the original owner one Nduko Getate. They claimed that the two purchasers and Nduko Getate filed suit against the appellant to have the title of the appellant cancelled. This is the suit *Kisii CMCC No. 487 of 2001*. They placed heavy reliance on a decree dated 28 May 2004 which showed that the plaintiffs in that suit succeeded against the appellant and that the appellant was ordered to transfer the suit land to Mr. Mariaria and Bonareri Okioma.
11. In his judgment, the trial magistrate was unable to reconcile the two disparate decrees produced by the parties. He was of the view that it was incumbent upon the appellant to produce the entire proceedings and it would appear that it was in view thereof that he proceeded to dismiss the case of the appellant.
12. I would have thought that at the hearing of this appeal, both counsel would seriously address me on the two different decrees, but I have seen very little in their submissions on this point. The proceedings relating to the suit *Kisii CMCC No. 487 of 2001* were of course were not produced by either party. However, can it be contended that the burden of producing the proceedings

was only on the appellant and that because he did not avail the proceedings then his suit ought to have been dismissed ? I am not persuaded.

13. None of the parties in their evidence before the trial court claimed that the decree produced by the other was a fake decree. Indeed, in her evidence, the 1st respondent did not at all mention the decree produced by the appellant nor did she cast aspersions against it. In light of the fact that no party claimed that the other's decree was fake, I will conclude that both are genuine decrees, in which case the one to be upheld is the latter decree, for the previous decree relied upon by the respondents could as well have been set aside. If the contention of the respondents was that their earlier decree was the correct decree then it was really their burden to produce the proceedings to demonstrate that fact. The appellant could not be vilified for not producing the proceedings as he was the one in possession of the latter dated decree.

14. In any event, even if we are to assume that the earlier decree dated 28 May 2004 is the proper decree, that still would not help the respondents. This is because the decree would go stale after 12 years pursuant to Section 12 of the Limitation of Actions Act, Cap 22, Laws of Kenya, which provides that :

(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

15. The decree relied upon by the respondents was in respect of a purported judgment delivered on 21 January 2003. If indeed this judgment still subsisted, then it went stale on 21 January 2015. This suit was filed on 3 September 2021 and the respondents could thus not claim any benefit pursuant to that judgment. Even if we are to take it that the unregistered

transfer dated 8 July 2004 was a step towards execution of the judgment, 12 years of it would expire on 8 July 2004, and any further step to execute that decree would be time barred. At the time that the suit was filed, the appellant is the one who was the registered proprietor of the suit land and the one vested with all rights appurtenant thereto.

16. There was also mention of another previous suit, i.e *Kisii CMCC No. 279 of 2000* and the respondents produced the proceedings thereof. From the little that I see, I observe that it was a case by the appellant against Joseph Mariaria Momanyi and Bonareri Okioma. That suit was dismissed for non-attendance on 9 January 2001. I do not see how that dismissal helps the respondents for the parties in that case were different and no rights were after all determined given that the suit was dismissed for non-attendance. Whatever the case, the parties thereof were different and the respondents cannot use the case as a shield for a case of trespass against them.

17. From the above discourse, it will be seen that I am persuaded that the appellant had a good case for eviction against the respondents and also deserved to have the order that they be permanently restrained from the suit land. I therefore proceed to set aside the judgment of the trial court. I substitute it with judgment in favour of the appellant as prayed in the plaint. The appellant will also have the costs of this appeal together with the costs in the lower court.

18. Judgment accordingly.

DATED AND DELIVERED THIS 14 DAY OF OCTOBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Anyona for the appellant

Mr. Moracha for the respondents

Court Assistant – Michael Oyuko