

1. The learned Magistrate erred in law by concluding that the Appellant's suit was statute barred and that it should have been brought on or before 31st December, 1999 all while ignoring the fact that the Title to the suit property was issued to the deceased on 20th March, 2007 thus the Plaintiff could not register his interests on the property before then as no documentation existed save for a sale agreement made in Kamba between the Appellant and the deceased. That further, the Plaintiff was claiming a portion of the said property measuring approximately 52 by 55 meters hived off from all that piece of property known as Kalama/Muumandu/468 ("the Suit Property") sold to him by the deceased in 1981 through instalments utilized to pay for the deceased's son school fees.
2. The learned Magistrate erred in law and in fact by failing to recognize the fact that the Appellant was the deceased's nephew and as such, there was no dispute that arose as to the ownership of the portion of the suit property until the year 2018 when the Appellant, through Succession Cause 157 of 2018 filed in Machakos, cited amongst others, the late Stephen Manza to take out Letters of Administration whereby he could finally register his interests as a beneficiary in the Estate of the late deceased. That upon being cited, the late Stephen Manza. (Who was later on substituted by the Defendant, filed Succession Cause 201 of 2018 but failed to recognize the

Plaintiff's interest in the property hence when the dispute as to the ownership arose.

3. The learned Magistrate erred in law and in fact by failing to acknowledge that strictly speaking, the cause of action arose in 2018 when the Defendant refused to acknowledge the Plaintiff's interest in the suit property despite having the full knowledge of the facts. This fact was confirmed by the Defendant who indicated, during cross examination, that he was notified in the year 2017 when a meeting was held where the area chief and the witnesses to the agreement were present, that he was informed that a portion of the suit property had been sold to the Plaintiff by the deceased.
4. The learned Magistrate erred in law and in fact by stating and finding that the Plaintiff did not apply to recover a portion of the suit property under adverse possession and in doing so, blatantly ignored the fact that even while alive before his death in 2009, the deceased had granted the Plaintiff the right to possess and utilize the portion of the suit property herein defined, a fact that was confirmed by the Defendant who indicated to the court that prior to his death, the deceased had never uprooted the Plaintiff from the property. The Appellant's occupation of the said portion was known to the deceased (and his family) from 20th April, 1981 when the parties entered into the sale agreement. In essence, the learned Magistrate failed to acknowledge the fact that there was no need to claim for adverse

possession over the property as there was a well-established ownership structure brought about by the purchase of the portion of the suit property referred to.

5. The learned Magistrate erred in law failing to consider the evidence of a total of 5 witnesses, all of whom confirmed that the portion of the suit property herein referred to was indeed sold to the Plaintiff by the deceased and instead, chose to rely on a technicality in dismissing the Plaintiff's suit which could only be concluded was not decided on merit and in doing so condemned the Appellant unheard thereby breaching the rules of natural justice.
6. The learned Magistrate erred in law and in fact in exercising his discretion by misdirecting himself and not considering the Claim of the Appellant and considering matters and/or facts which he should not have considered and/or by failing to take into consideration matters and/or facts which he should have taken into consideration and in doing so arriving at a wrong decision.
7. The learned Magistrate misdirected himself on issues of law and fact and therefore arrived at a wrong finding.
8. The decision of the learned Magistrate contravened the weight of evidence adduced before the Court.

The Appellant pray that;

- a) This Appeal be allowed and the entire Judgment of the learned Magistrate be set aside.
- b) That the Appellant's suit be allowed as prayed.
- c) In the alternative to prayers a and b, that leave be granted to the Appellant to file the suit out of time and that the same be decided on merit.
- d) The costs of the Appeal be borne by the Respondent.

This court has considered the evidence and the submissions therein. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in *Mbogo and another vs Shah* (1968) EA 93 where it was held that;

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do.”

The Respondent raised a preliminary issue that the Appellant did not attach the decree and the absence of this crucial document is fatal as it is a jurisdictional issue. Regarding the alleged defect in the Record of Appeal, the Appellant does not dispute the claim that the same is missing therefrom. Contents of the Record of Appeal are provided for under Order 42 Rule 13 (4) of the Civil Procedure Rules 2010 thus;

“... Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say;-

- a) the memorandum of appeal;*
- b) the pleadings;*
- c) the notes of the trial magistrate made at the hearing;*
- d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;*
- e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;*
- f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.”*

Superior Courts have on numerous occasions addressed situations such as obtain herein where the Record of Appeal is incomplete. The Supreme Court in Law

Society of Kenya vs Centre for Human Rights and Democracy & Others
(Petition No. 14 of 2013) (2014) KESC 29 (KLR) held;

“[38]The Petition of Appeal on the other hand is a statement of grievance, an appeal cause against the judgment of a lower Court. The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it.

[39] If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine ‘the appeal’ on the basis of these two, such an appeal would be incomplete and hence d. incompetent. Indeed, this is the gist of Rule 33 (1) of the Supreme Court Rules.”

Be that as it may and pursuant to Order 42 Rule 13(4) of the Civil Procedure Rules 2010 a Court may dispense with some documents being part of the Record and in this case I find that the lower court’s certified Judgment is sufficient among essential contents of a Record of Appeal and absence of the decree is not fatal.

The Appeal is based on the fact that the trial court concluded that the Appellant’s suit was statute barred and that it should have been brought on or before 31st December, 1999 all while ignoring the fact that the Title to the suit property was issued to the deceased on 20th March, 2007 thus the Plaintiff could not register

his interests on the property before then as no documentation existed save for a sale agreement made in Kamba between the Appellant and the deceased. That further, the Plaintiff was claiming a portion of the said property measuring approximately 52 by 55 meters hived off from all that piece of property known as Kalama/Muumandu/468 sold to him by the deceased in 1981 through instalments utilized to pay for the deceased's son school fees.

That trial court found it had no jurisdiction even though there was no claim for adverse possession over the property as there was a well-established ownership structure brought about by the purchase of the portion of the suit property referred to.

The Respondent submitted that the Appellant claims to have bought the suit land from the Respondent's father in 1981, and that he completed payment in the year 1987. That the land had no title and it was only issued in 2006 to the Respondent's father who passed away in 2013. That this suit was brought to court in 2021 following the Respondent's alleged refusal to recognize the Appellant's interest during the succession proceedings. That the suit is time barred as it was filed more than 34 years after the alleged completion of payment of the purchase price.

I have taken the liberty to peruse the said judgement in great detail together with the documents produced in the trial court. The Plaintiff admits entering into a sale agreement on or about 20th April 1981 with the late Isaac Musyimi Kamau for the sale of a portion of the property measuring approximately 52 by 55

meters from the inherited property which at that time was not subdivided. He admits making the final payment in 1987. It was not until 2007 when the title of the property was issued to the late Isaac Musyimi who was unwell and passed away in 2009. The Appellant was in possession all through living peacefully until the year 2018 when the Appellant in Miscellaneous Succession Cause 157 of 2018 filed a citation cause against the beneficiaries of the Estate of the Late Isaac Musyimi. That the Late Stephen Manza Musyimi took out letters of administration in 2018 but the Appellant's interest was not recorded. He raised an objection which was dismissed and he was advised to seek his rights in another forum hence filing the suit in the lower court on the 8th October 2021. Given the circumstances I find that even though the sale agreement was entered in 1981 and final payment of purchase price in 1987, there has been an ongoing ownership dispute with the Plaintiff and the estate of the deceased from 2013. It was only in 2018 when the court stated that the forum for redress lay elsewhere. The law on limitation of actions in respect of fraud stipulates under Section 26 of the Limitation of Actions Act as follows:

“Where, in the case of an action for which a period of limitation is prescribed, either-

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or*
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or*

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”

Be that as it may, from the facts of this case it is clear that the cause of action started on the 2018 when the Respondent was left out of the succession cause and his interest not considered by the administrators of the deceased. I find that it was only in 2018 when the Appellant could have found out that his interests were not going to be considered. I find that the suit in the trial court was filed in 2021 and the cause of action arose in 2018 hence the limitation period had not lapsed. Throughout the intervening period the Appellant was in occupation.

On the issue of jurisdiction, this matter was brought by way of a plaint and find that there is no claim for adverse possession and is a claim of ownership based on a sale agreement. I find therefore that the issue of jurisdiction does not arise.

I find that the learned Magistrate erred in law by dismissing the matter on a technicality and the same should be decided on merit. For those reasons, I find that the Appeal is merited and I grant the following orders;

1. That the Judgment dated the 21st August 2023 is set aside and all the orders forthwith.
2. This matter is remitted back to the trial court for the same to be heard de novo by a court of competent jurisdiction other than Hon C.N. Ondieki.
3. Costs of this Appeal and the matter in the trial court to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY
OF NOVEMBER 2025.**

N.A. MATHEKA

JUDGE

ORIGINAL