

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**  
**ENVIRONMENT AND LAND COURT APPEAL NO. E028 OF**  
**2024**

**SUSAN BOKE MWITA.....**

**.....APPELLANT**

**VERSUS**

**KERIOBA**

**NYANCHWARI.....RESPONDENT**

***(Being an Appeal from the Judgment and Decree of Hon.  
M. Obiero (SPM) delivered in Kehancha PMELC Case No.  
E008 of 2022)***

**JUDGEMENT**

**1.** By way of Complaint dated 28<sup>th</sup> October 2022, the Appellant sought the following orders in the trial court;

**1) Permanent injunction restraining the defendant from trespassing to parcel land no. BUKIRA/BWISABOKA/7322.**

**2) Costs of this suit and interest thereon at court rates.**

**3) Any other and further relief thereon which this honourable court may deem fit to grant in the circumstances.**

- 2.** In the plaint, the plaintiff pleaded that he was the registered sole Proprietor of this parcel of land known as BUKIRA/BWISABOKA/7322 and in the year 1997 the defendant entered into a sale agreement with her late husband for a portion of land measuring (6) six full plots, at a cost of twelve (12) herds of cattle wherein the defendant paid only (3) three herds of cattle and to date he had not paid the remaining herds of cattle, as per the agreement. Further, that since the demise of her husband, she has been severally requesting the defendant to clear the remaining balance of herds of cattle up to date all in vain. She stated that she filed the succession of her husband's estate she was issued with a title deed reflecting her name as the owner.
- 3.** The defendant/respondent filed a statement of defence dated 7<sup>th</sup> December 2022. He denied the contents of the plaint. He averred that he purchased a portion of 6 hectares of the suit land in the year 1997 from the plaintiff's late husband who put him in physical occupation of the land. He prayed that the suit be dismissed.
- 4.** The matter then proceeded for hearing.

**5. PW1** was **Susan Boke** who adopted her witness statement as evidence in chief. She stated that BUKIRA/BWISABOKA/7322, measuring approximately 9.25 Ha, was registered in her name with the title having been issued on 01/02/2018. She produced it as evidence and added that the defendant was ploughing her land. That her husband sold him the land but he did not pay the full purchase price and that she wanted him evicted. Further, she asked him to pay and he failed so she had him arrested. When he was released, the Village Elder followed up on her behalf but he still refused to pay. She urged that he bought around 2 acres of the land but was now farming 8 acres illegally. The consideration for the 2 acres was 12 heads of cattle. He paid only 3 cows. Nine (9) cows was the balance. She prayed the court allow her claim.

**6.** During cross examination, she stated that the Defendant started living on her land when her husband was alive. That her husband sold him the land and never evicted him. She did not produce any evidence that her husband sold the land. That the Defendant failed to complete payment hence he was illegally on the land.

**7.** PW2 was **Isaiah Koroso** who adopted his witness statement as evidence in chief. Further, he stated that the defendant was claiming the land. During cross examination, he stated that at the time of the alleged agreement, he was aged about 12 years. He did not see the agreement. When shown the agreement dated 13/03/1998 between Jeremiah Mwita David Koroso and John Kerioba Nchuma Jeremiah, he stated that it showed that Jeremiah sold 6 Ha. He saw that three (3) cows were paid and the balance was Kshs. 25,000/= . He stated that his uncle was claiming nine (9) cows. He also stated that the acknowledgement dated 13/03/2004 showed that one cow was paid on that day and there were two cows remaining, to be paid upon the Purchaser being given the title deed.

**8.** The defendant testified as DW1. It was his testimony that he bought land from Jeremiah Daudi Mwita Koroso, now deceased, in the year 1996 and they wrote an agreement at Kerario Marwa's office. That he bought six (6) Ha. The purchase price was 12 cows. He urged that he paid 10 cows and that the balance of 2 cows was to be paid after the transfer. He produced the agreement as evidence and stated

further that Koroso died before transferring the land to him. His wife transferred the land to her name after his death, and the agreement was very clear on what he bought. He denied trespassing onto the Plaintiff's land. He stated that he was ready to pay the remaining two cows to complete the transaction. He urged that the land was BUKIRA/BWISABOKA/32 and it changed to number 7323 after subdivision.

**9.** During cross examination, he stated that he bought a portion of the suit land from Jeremiah Daudi Koroso. The land belonged to his father who was alive at that time. He had given him his portion. They entered into a sale agreement but did not involve a Surveyor. Koroso measured the land and planted sisal on the boundary. He urged that the purchase price was 12 cows. There were witnesses to the transaction who were Samuel and Elijah. That his witnesses were Jorem and Susan. He could see the agreement but could not see the witnesses.

**10.** The witness stated that they did not state the value of the cows in the agreement and he could see Kshs. 65,000/= in his statement. He denied paying Koroso Kshs. 40,000/= and

further, stated that they did not go to the Land Control Board.

**11.** The court dismissed the Plaintiff's case.

**12.** Being dissatisfied with the judgement and decree, the Appellant instituted the present appeal vide an Amended Memorandum of Appeal dated 6<sup>th</sup> February 2024. The appeal is premised on the following grounds;

**1)The learned trial Magistrate erred in fact and law by not comprehending the Appellant/Plaintiff's pleadings in the lower court, Kehancha SPMC ELC NO.008 of 2022.**

**2)The learned Trial Magistrate erred in fact and law by failing to consider the plaintiff's evidence that the Defendant /Respondent was a trespasser and still is a continuing trespasser into her parcel of land known as LR NO. BUKIRA/BWISABOKA/7322.**

**3)The trial magistrate erred in fact and law, by failing to consider the Appellant/Plaintiff's evidence and exhibits carefully, more particularly, title deed and official search produced by her in court.**

- 4)The Trial court erred in fact and law by not recognizing that the Plaintiff/Appellant is the absolute registered of all that parcel of land known as LR NO. LR NO. BUKIRA/BWISABOKA/7322, hence the Respondent and her agents or relatives are trespassers on it.**
- 5)The Trial Magistrate erred in fact and law by not comprehending that the exhibits produced by the defendant/Respondent in the lower court were not related to the plaintiff/Appellant's claim in any whatsoever.**
- 6)The Trial Magistrate erred in fact and law that the Plaintiff/Appellant's land known as LR No. BUKIRA/BWISABOKA/7322 was not a sub-division of BUKIRA/BWISABOKA/7133-7135 and not BUKIRA/BWISABOKA/32.**
- 7)The Trial court erred in fact and law by admitting and recognizing an agreement dated 13<sup>th</sup> day of march, 1998 in respect of BUKIRA/BWISABOKA/7322.**

**8) The Trial Magistrate erred in fact and law by failing to note the agreement dated 13<sup>th</sup> day of March, 1998, was between Jeremiah Mwita Koroso and John Kerioba Muchuma, but not between Jeremiah Mwita Daudi Koroso and the Respondent.**

**9) The Trial Magistrate erred in fact and law by not declaring the agreement made between the Appellant's husband and the Respondent was null and void and advise the Respondent to follow the right procedure, if need be, to acquire or demand his right from the Appellant by the way of legal redress.**

**10) This is made and filed in good faith which ought to be admitted by this Honourable Court a there are high chances to succeed and here are triable issues.**

**13.** The parties filed submissions on the appeal.

### **Appellants' Submissions**

**14.** Learned counsel for the Appellant opened his submissions on the issues for determination by citing the provisions of Sections 24 and 26(1) of the Land registration Act.

Additionally, he cited the case of Willy Kipsongok Morogo vs Albert K. Morogo (2017) eKLR. Counsel urged that ownership of property or land is proved by way of Title deed and certificate of official search. The Appellant claimed before the Trial Magistrate that she is the absolute registered proprietor of the suit land and produced the title deed and certificate of official search which confirmed her allegation.

**15.** On the issue of trespass, counsel cited Section 3 of the Trespass Act and urged that from the evidence in the Trial magistrate court, it was revealed the Respondent and the plaintiff's deceased husband entered into a sale agreement dated 13<sup>th</sup> March, 1998, in respect of the suit land which was registered in the name of the father of the plaintiff's deceased husband. That this land is not related in any way with the plaintiff's parcel of land herein, LR NO. BUKIRA/BWISABOKA/7322.

**16.** Learned counsel reproduced the sequence of events leading up to the filing of the suit and urged that a contract of sale is only valid after completing or paying the full consideration of the property or land. Hence, the respondent's allegation that he bought land from the

plaintiff's deceased husband without paying full consideration is immaterial. The Respondent testified that he paid ten cows and the two cows have not been paid to date. However, as per the agreement produced as his evidence, states that he paid only 7 cows and there was or is a balance of five (5) cows to date. This implies that the contract is null and void as per the law of Limitation of Actions Act, sections 4, 37 and 38.

**17.** Learned counsel posited that the Respondent did not obtain letter of consent from the land control board for purposes of subdividing the suit land and hence, he has no title. He maintained that the Respondent is a trespasser in the Appellant's land as he is there without her consent. Further, that due to the lack of land control board consent, the trial court c agreement alleged herein above was null and void due to noncompliance with the Land control board Act, provisions and the contract Act.

**18.** He submitted further that since the Respondent failed to demonstrate the purchase of the 10 Acres he occupies in the Appellant's land and has not paid the full consideration as confirmed by him since 1998 and has no consent to

occupy it, he stands to be evicted. He maintained that the trial magistrate erred in law by failing to declare the Respondent a trespasser and eventually issue an eviction order against him as the agreement.

**19.** He cited Section 107 of the Evidence Act, Cap 80 and urged that the respondent did not provide proof of the allegation that the Appellant's land LR NO. BUKIRA / BW1SABOKA/ 7322 was a subdivision of LR NO. BUKIRA / BWISABOKA/ 32. Further, that the alleged agreement with the deceased husband of the Appellant had abated upon his demise, lack of obtaining the land control board consent within the stipulated period and was null and void due to the law of limitation of Actions Act. Further, that he had a lee way of obtaining his alleged property if any purchased by way of legal redress since the vendor's wife, Appellant, had obtained the letters of Administration of the Deceased's Estate. Counsel prayed that the appeal be allowed with costs.

### **Respondents' Submissions**

**20.** On his part, learned counsel for the Respondent urged that the defendants' reliance on the written sale agreement

between the Respondent and the Appellant's late husband was correct and consistent with Section 97 & 98 of the Evidence Act. (Cap. 80), which prohibits oral evidence from contradicting the terms of a written contract. Further, that the agreement expressly records a purchase of six (6) hectares from LR No. BUKIRA/BWISABOKA/32. This was signed by both parties and witnessed, giving it full probative value under Section 3(3) of the Law of Contract Act (Cap. 23).

**21.** He urged that the Appellant's bare allegation of "two acres" is unsupported by any documentary proof and the trial court was therefore correct in holding that the Respondent purchased 6 hectares. He cited the holding of the Court of Appeal held in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR and urged that the law is settled that written agreements speak for themselves and their contents cannot be altered by oral testimony, as per Section 97 and 98 of the Evidence Act (Cap. 80).

**22.** He added that the Court should note that in her own testimony in cross examination of the lower court record, the

Appellant admitted that “I have not produced any agreement to prove my late husband sold to the Respondent the two acres only.” Such an admission discredits her current claim of “two acres” and confirms that her position is an afterthought intended to mislead this Honourable Court.

**23.** On the Alleged Trespass counsel submitted that the burden of proof rested on the Appellant under Sections 107-109 of the Evidence Act to prove unlawful entry or occupation. The trial court found correctly that the Appellant failed to: a) Produce a surveyor’s report demarcating boundaries; b) Show the Respondent exceeded the purchased six (6) hectares; c) Rebut the Respondent’s evidence of continuous and uninterrupted possession since 1996. Counsel stated that mere allegations without measurement evidence do not meet the standard of proof. Further, that in **Mbira v Gachuhi [2002] 1EALR 137**, the court held that trespass requires “proof of encroachment on another’s land without consent” a burden the Appellant utterly failed to discharge. That the Appellant’s contradictory testimony in cross-examination is telling she never measured the land the Respondent occupies, but believes it is more

than what he bought. This admission exposes her claim as speculative, baseless, and maliciously intended to dispossess the Respondent.

**24.** On the Sale Agreement dated 13<sup>th</sup> March 1998 counsel urged that the Appellant's attack on the validity of the agreement is legally hollow. The document was executed by her late husband and relates directly to LR No. BUKIRA/BWISABOKA/32, the parent title before subdivision into LR No. BUKIRA/BWISABOKA/7322. This aligns with the principle in **Wanjiru Gikonyo v Jane Njeri Gikonyo [2016] eKLR**, where the court upheld agreements tied to a parent title despite subsequent subdivisions. Counsel urged that the Appellant provided no expert evidence to dispute the document's authenticity. Instead, she relied on vague denials a tactic the Court of Appeal has repeatedly condemned as insufficient to dislodge valid contractual instruments.

**25.** Counsel cited **Selle & Another v Associated Motor Boat Co. Ltd [1968] EA 123** on Appellate interference with factual findings, urging that it is limited to instances of no evidence, misapprehension, or plain error. He stated that the

trial magistrate's decision was a reasoned judgment, anchored in credible evidence and prayed the court dismiss the appeal with costs.

### **Analysis and Determination**

**26.** Before delving into the issue for determination, I must first state the duty of this court as an appellate court. The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of **Gitobu Imanyara & 2 others Vs Attorney General [2016] eKLR**. It was held as follows;

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”**

**27.** In **Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** the Court held as follows;

**“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”**

- 28.** The germane issues that arise for determination are;
- i) Whether the trial court erred in dismissing the Appellants’ suit**
  - ii) Whether the appellants suit was time barred**

**29.** I note that the trial courts’ decision was premised on the failure to prove trespass as pleaded in the plaint. He who alleges must prove, this position is succinctly captured in Sections 107, 109 and 112 of the Evidence Act. Section 107 provides as follows:

**“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

**30.** Sections 109 and 112 of the same Act states as follows:

**“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**

**112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”**

**31.** In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in **Mumbi M'Nabea vs David M. Wachira [2016] eKLR** stated as follows:

**“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more**

**probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.”**

**32.** The position was re-affirmed by the Court of Appeal in **Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited - Civil Appeal No. 101 of 2000 [2005] 1 EA 280** where it was held that:

**“Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”**

**33.** I have considered the evidence on record vis-a-vis the plaintiff and indeed, the appellant, despite founding her claim on trespass, did not produce any evidence of the trespass or occupation of a larger portion of the land than the subject of the sale agreement. She testified that the respondent bought 8 acres of land yet the sale agreement clearly indicated that

it was 6 hectares. In that regard, I am in total agreement with the decision of the trial court in that respect.

**34.** However, I note that there are some issues that arose from the nature of the dispute that were not addressed by the trial court. The sale agreement between the respondent and the appellants' deceased husband, required the respondent to pay Kshs. 40,000/- converted to 12 cows as the purchase price. In any event, in terms of the law, since a party can only sue for breach of an agreement within six years of entry of the same, the agreement between the parties herein could only be valid or be capable of being performed for only for six years from the time it was entered into. From the evidence of the parties the Defendant and the Appellant's husband entered into the agreement of sale in 1996 (as per the Defendant) or 13/03/1998. That means that a suit could only have been validly instituted in 2002 or by 13/03/2004. From either of these two years mentioned, it is clear that the Defendant was on the land, after the end of the six years of the agreement, without the permission of the Plaintiff or her husband, that is to say, pursuant to the

agreement. As shall be clearly found below, recovery of the land could only be before the lapse of the twelve years.

**35.** The deposit was to be 7 cows and upon the transfer being effected, he would pay the balance of 5 cows. Unfortunately, in the year 2001, the appellants' husband died before transferring the portion he had purchased to the respondent. At that point in time, the respondent's occupation of the land was permissive as there was a term of the sale agreement pending. The provisions of Section 4 of the Limitation of Actions Act come into play at this juncture.

**36.** Section 4 of the Limitation of Actions Act provides as follows;

**4(1) the following actions may not be brought after the end period of six years from the date on which the cause of action arose -**

**a) Actions founded on contract.**

**37.** The import of this provision is that six years after the agreement, the respondents' occupation of the land ceased to be permissive. At that point in time, the appellants' recourse lay in a claim for specific performance and after six years, the time for any such action to be taken had run out.

Consequently, time for an action to recover the land began to run as at the year 2004 (see paragraph 34 above), to wit; when the occupation ceased to be permissive.

**38.** Section 7 of the Limitation of Actions Act provides;

**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, it is first accrued to some person through whom he claims to that person.**

**39.** It follows that the appellants' claim to the title was extinguished by the effluxion of time. That being the case, the claim for trespass could not stand. That for injunction too could not. In any event the claim for injunction was intended to recover land whose occupation by the Plaintiff and her deceased husband had ceased and the land occupied without their permission by the Defendant for many years, beyond the twelve year limitation period. The suit for this indirect recovery of land was time barred. Consequently, the Appellant could not claim successfully that the respondent was a trespasser and could be prohibited from continuing thereon by way of injunction.

**40.** The upshot of the foregoing, is that the Appeal lacks merit.

It is dismissed. Since the Respondent had initially not paid the balance of the cows pending the completion of the agreement which ultimately failed, it would be unjust to order the Appellant to pay the Respondent costs of the appeal. Each party shall bear own costs.

**41.** Orders accordingly.

**JUDGMENT Dated, SIGNED and DELIVERED virtually via  
the Teams Platform 29<sup>th</sup> day of January 2026**

**HON. DR. IUR NYAGAKA  
JUDGE**

**From 10: 45, in the presence of,**

Muniko for Respondent

Mr. Okemwa for the Appellant