



REPUBLIC OF KENYA



**Omori v Onsongo (Environment and Land Appeal E012 of 2023)
[2024] KEELC 1023 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1023 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E012 OF 2023**

M SILA, J

FEBRUARY 28, 2024

BETWEEN

ROBERT OMBOGO OMORI APPELLANT

AND

MAUREEN MORAA ONSONGO RESPONDENT

*(Being an appeal against the decision of Hon. S.N. Abuya (Chief Magistrate)
delivered on 5 April 2023 in Kisii CMCC (ELC) No. 146 of 2019)*

JUDGMENT

1. The appellant, being aggrieved by the judgment of the Magistrate's Court has preferred an appeal to this court against the whole of the judgment.
2. The respondent commenced the suit before the lower court through a plaint filed on 28 October 2019. She pleaded that the appellant had unlawfully encroached into the land parcel West Kitutu/Bomatara/3176 which she averred belonged to her and had constructed a house. In her suit she wished to have an order of eviction of the appellant, costs of the suit and any other order the court deemed fit to grant.
3. The appellant appointed the law firm of M/s Ombachi & Company Advocates and filed defence. In it he pleaded that it was him who was the registered proprietor of the suit land in possession thereof. He averred that he purchased the suit land, and title was issued to him, and that if the respondent held any title, then she obtained registration unprocedurally, illegally, and fraudulently. He also pleaded that he would raise a preliminary objection to the effect that the suit is barred by the *Limitation of Actions Act*. He asked that the respondent's suit be dismissed with costs.
4. The matter suffered a couple of adjournments till 29 June 2022 when it proceeded. On that day, Mr. Ombachi, learned counsel for the appellant, stated that he was not ready to proceed as he had not received cooperation from the appellant. He wished to have two weeks to file his application to cease



- acting. The application for adjournment was opposed but, in the course, thereof, the appellant stated that it is okay if his counsel wished to withdraw and he will proceed on his own. The hearing thus proceeded with the appellant acting in person.
5. In her evidence, the respondent testified that the appellant demolished her house, built his own, and took possession of the land. She produced a title deed and a search to demonstrate that she owned the land. She testified that the appellant has lived on the land since the year 2007. She produced a letter from the Chief dated 25 January 2017 addressed to the appellant and asking him to vacate the land. She did testify that he was told to cultivate the land for 8 years then he vacates and he asked for 5 more months to harvest the maize but he never vacated. The appellant made a very brief cross-examination and I see that the appellant testified that the appellant came from Manga and that her father used to till the land. She did state that she saw him tilling the land when her father was alive though the year was not mentioned. In re-examination she stated that she was not related to the appellant. With that evidence, the respondent closed her case.
 6. In defence, the appellant testified that he used to sell shoes and in the course of his business the father of the plaintiff bought shoes from him. He subsequently communicated to the appellant that he was selling his land at Nyakoe for Kshs. 200,000/=. He testified that in November 1999 he gave him a deposit and they agreed that he would pay the balance of Kshs. 140,000/= in instalments. He testified that after he paid the final balance the plaintiff and her father shifted to Mwembe. He stated that the plaintiff's father processed the title deed and that they went to the Land Control Board at Mosoch. He testified that at this time the plaintiff's father was sick and he stayed with him and that he used to take him to Kisii Teaching and Referral Hospital daily for medication. He produced as his exhibits a document dated 2004 which is what he stated was the agreement with the late respondent's father, an application for consent, a letter of consent, and a title deed in his name. Under cross-examination, he inter alia testified that the plaintiff used to be sent by her father to pick money from him.
 7. DW – 2 was one Thomas Isando Omari. His evidence was that the appellant bought land from George Onsongo Ototi (the respondent's father) in July 2019. He stated that he paid him Kshs. 50,000/= on 5 March 2004 as the last instalment which he witnessed and that was the end of the transaction. Cross-examined he testified that George sold land to four people and the appellant was the last buyer.
 8. With that evidence the appellant closed his case. Parties were invited to file written submissions, which they did, and thereafter the matter was reserved for judgment.
 9. In her judgment, the trial Magistrate found that although the appellant had produced a title deed, she was not persuaded that it was a properly issued title deed. She particularly found that the Land Control Board (LCB) consent produced by the appellant showed that the transfer was from the plaintiff and not the plaintiff's father. She also found that the Land Registrar had cancelled the name of the appellant from the register and reinstated the name of the respondent (who was then a minor). She found that through a letter dated 25 January 2007 the Land Registrar had asked the appellant to surrender his title deed so that it may be cancelled as he had discovered that the plaintiff could not transfer the suit land as she was a minor. She found the appellant to be a trespasser and ordered him to give vacant possession in 90 days or be evicted. The respondent was also granted the costs of the suit.
 10. Aggrieved, the appellant has preferred this appeal through M/s G.M Nyambati & Company Advocates, raising the following grounds :-
 1. That the learned trial Magistrate erred in law and fact by failing to appreciate the law and evaluate the evidence placed before her before arriving at the impugned decision.



2. That the learned trial Magistrate erred in law and fact by failing to take into account the evidence tendered in court and the submissions brought before her before arriving at the impugned decision.
 3. That the learned trial Magistrate erred in law and fact by failing to appreciate the recent precedents on pleadings and determination of issues though not pleaded but emerging from the evidence as held in the Supreme Court of India case of *Akella Lalita v Sri Konda Hanumantha Rao (2022) Live Law (SC) 638*.
 4. That the learned trial Magistrate erred in law and fact by failing to appreciate that the appellant was a purchaser for value of the suit property West Kitutu/Bomatara/3176 from the trustee of the respondent.
 5. That the learned trial Magistrate erred in law and fact by failing to determine that the Land Registrar had no powers to cancel the registration of the appellant over the suit property.
 6. That the learned trial Magistrate erred in law and fact by failing to address herself on the principle of estoppel against the respondent over the claim filed in court.
11. The appellant seeks that the appeal be allowed and the judgment be set aside and substituted with an order that the respondent's suit is dismissed. He also seeks costs.
 12. The appeal was canvassed by way of written submissions and oral arguments. In his submissions, Mr. Nyambati, learned counsel for the appellant, urged that in upholding the title of the respondent, the trial court ought first to have been satisfied that the test in Section 26 of the [Land Registration Act](#) was met yet there was no pleading in respect of fraudulent acquisition of title but what the respondent pleaded was mere trespass. He submitted that the respondent did not bother to provide evidence to show how she came to be registered as proprietor of the suit property yet she was a minor. He submitted that since she was a minor it can only be assumed that her father was her nominee and that he exercised his nominee rights by selling the land to the appellant. He submitted that the appellant entered into a land sale agreement on 5 March 2004 and got title on 7 September 2006 and that the respondent only acquired title on 10 February 2014. He added that the Land Registrar had no power to cancel the title issued to the appellant and that though there were no pleadings to this effect the court needed to make a determination on it. In his oral submissions, Mr. Nyambati submitted that the claim was also time barred by the [Limitation of Actions Act](#). He submitted that the suit was filed in 2019 whereas the appellant had entered the suit land in 2006 when he was given title. He submitted that the issue of limitation was not addressed by the court yet it was pleaded in the defence. He submitted that the appellant had acquired prescriptive rights by adverse possession. He also emphasized that the Land Registrar had no power to cancel title.
 13. On his part, Mr. Magara, learned counsel for the respondent, urged that the suit land got registered in the name of the respondent in 2004 when she was still a minor and that a restriction had been registered to that effect. He submitted that the respondent was correct to only plead eviction for she was not aware of the appellant's unlawful registration. He submitted that the appellant was not a purchaser for value as his purported sale agreement did not meet the ingredients of a contract of sale of land. He pointed out that it omitted the land being sold or its acreage and the consideration. He submitted that the issue of trusteeship does not arise as the property was registered in the name of the respondent with a restriction on transactions pending her attainment of the age of maturity. He submitted that the appellant's title was cancelled after he failed to explain how he acquired it. He was of opinion that his client deserved the order of eviction. In his oral submissions, Mr. Magara averred that the issue of limitation was being raised as an afterthought and that adverse possession was neither raised before the



trial court or in the Memorandum of Appeal. He added that the appellant did not avail evidence to prove adverse possession. He submitted that the Land Registrar was empowered to cancel title.

14. I have considered all the above.
15. What emerged in the course of the trial before the lower court was that both appellant and the respondent had title deeds to the suit land and both asserted that it was their title deed which was the good title. It is correct that when the plaintiff filed her suit it was a simple case of trespass and there was no prayer for the cancellation of title deed of the appellant. The issue of the second title was raised by the appellant in his defence. I cannot fault the respondent for not making any pleadings regarding cancellation of the title of the appellant and restricting her case to one of trespass as she held title to the land. She also produced correspondences to show that the title of the appellant had been cancelled by the Land Registrar. I have seen from the register of the suit land, which is on record, that the title of the appellant was cancelled on 7 August 2006 by the Land Registrar. It would mean that when the respondent filed suit, she believed that there was only one title, her title, and I do not see the place of the argument that the respondent did not make pleadings for the cancellation of the title of the appellant. As far as she was concerned, his title was already cancelled by the action of the Land Registrar and what remained was to seek an order for the removal of the appellant from the suit land.
16. In the proprietorship section of the register, it is discernible that the suit land was first registered in the name of George Onsongo Odoti who appears to have been the respondent's father, on 30 August 2001. The second entry is the registration of the plaintiff as proprietor on 31 December 2004. The third entry, which is dated 7 March 2006, is a curious one for it states 'title deed surrendered'. I say curious because there was never any entry that a title deed was issued either to the first proprietor or to the plaintiff, as second proprietor, so that one may be surrendered. The fourth entry is dated 7 August 2006 and is registration of the appellant as proprietor and the fifth entry of even date shows that he was issued with a title deed. These entries numbers 2, 3, 4 and 5 are cancelled by the Land Registrar and there is an entry made on 4 October 2014 for issue of title which I believe is issue of title to the respondent. In the restrictions section of the register, there is entry of a restriction registered on 31 December 2004 stating as follows : 'Registered owner is a minor. No dealings with the title until registered owner is 18 years old.'
17. The issue of cancellation of the entries providing for the title of the appellant appears to have been a subject before the Land Registrar in the year 2007 or thereabouts. The ID card produced by the respondent shows that she was born in December 1993. Among the exhibits produced by the respondent were two letters written by the Land Registrar, Kisii. The first is dated 25 January 2007 written by J.O Oduor, Land Registrar, Kisii Central. That letter is addressed to the appellant and it more or less states that it has been discovered that he purportedly obtained a transfer of land from a minor who was incapable of transacting. That letter directed the appellant to surrender his title issued on 7 August 2006 within 14 days for cancellation. The letter further states that if there will be no surrender of the title the Land Registrar will dispense with its production and proceed to cancel the appellant's name from the register and reinstate the former owner Maurine Mora Onsongo (respondent). The second letter was again written by Mr. Oduor and is addressed to the appellant. In that letter the Land Registrar referred to his previous correspondence and observed that the appellant had failed to surrender his title deed for cancellation. He proceeded to write that he has dispensed with its production and has cancelled his name from his register and reinstated the name of the respondent (minor) as proprietor.
18. In his submissions, Mr. Nyambati raised issue that the Land Registrar had no power to cancel title. Well, if it was going to be the position of the appellant that his title was wrongly cancelled by the Land Registrar, then the appellant ought to have made pleadings for the rectification of the register



and to have the cancellation of his title set aside. He never did. He could also only pursue the issue of cancellation of his title against the Land Registrar who is the person who cancelled his name from the register but he never sued the Land Registrar. He cannot be heard to argue that the plaintiff's pleadings were faulty in that the same did not make pleadings for the cancellation of his title. As I have stated, the register already showed that his title had been cancelled, and if he thought that this was improper, it was for him to file suit or avail a defence and counterclaim seeking restoration of his title. The appellant cannot surely be heard to say that the respondent needed to make pleadings for the cancellation of his title. It was him to make pleadings to assert that his title was wrongfully cancelled and that he still held good title to the suit land.

19. The trial Magistrate in her judgment, did make findings regarding the manner in which the appellant obtained title, and it was her view that the appellant's title was not properly acquired. I cannot fault the trial court in this regard. The case of the appellant on the purchase of the suit land was pretty shaky. He had testified that he gave a deposit in November 1999 and that he paid the balance of Kshs. 140,000/= in instalments. He never produced any sale agreement which he claimed got lost. What he produced was a document that appears to be an acknowledgment of Kshs. 50,000/= dated 5 March 2004 and an acknowledgement dated 29 March 2004 for Kshs. 23,000/= of 2006. That document does not identify any particular land being sold or the price thereof. I am afraid that this cannot be considered to be an agreement for sale of the suit land. The other documents produced were an application for LCB consent purportedly signed by the respondent in 2006 and a Letter of Consent from Mosochi Land Control Board dated 28 August 2006. Now, it is clear that the respondent, who was hitherto the registered proprietor of the land, was aged about 13 years in 2006. She could not have capacity to enter into any transactions over the suit land, as she was a minor, and could not have capacity to seek consent from the LCB. The purported consent of the LCB cannot therefore help the appellant. In 2006, the suit land was registered in the name of the respondent and there was a restriction on registration of any dispositions given that she was a minor. I have not seen any entry lifting that restriction and I do not see how it can be argued that there was ever a genuine transfer of title from the respondent (then a minor) to the appellant.
20. In his submissions, Mr. Nyambati argued that the father of the respondent was a nominee and he could sell the land. Nowhere in the title was the plaintiff's father registered as trustee or nominee of the respondent. If ever he purported to sell the land, he had no capacity to do so, nor did he have any capacity to enter into any transactions over the suit land on behalf of the minor respondent. It was only the respondent who could transact upon attaining the age of majority which she attained in December 2011.
21. The manner in which the plaintiff acquired title was never in issue. Even in his own submissions before the trial court, the appellant admitted that the land was registered in the name of the plaintiff, and that he bought the land from her father when it was registered in her name. It is pointless to make any determination as to whether or not the Land Registrar had power to cancel the appellant's title, because whatever the case, this court cannot find that the appellant ever got properly registered as proprietor of the suit property. His title would still be cancelled by an order of this court for having been irregularly procured. I therefore see no reason, within the circumstances of this case, to delve into whether the cancellation of the title of the appellant by the Land Registrar was within the confines of the powers of the Land Registrar. I cannot also fault the trial court for not venturing into the question whether the Land Registrar had power to cancel title. It was never an issue that was brought up by any of the parties for her to determine, and as I have mentioned earlier, the Land Registrar was never made a party to the suit by the appellant, if he wished to pursue this line. There is no substance in the argument that the trial court needed to make a decision on this point.



22. I am unable to fault the trial court for finding that the appellant had demonstrated no good title to the suit land and for finding that the rightful proprietor of the suit land was the respondent.
23. The only other issue that was raised by the appellant in his defence was that the respondent's suit was time barred. Other than merely stating that the suit is barred by the *Limitation of Actions Act*, there was no elaboration in the defence as to why the appellant thought that the respondent's suit was time barred. One cannot tell whether he was alleging that the suit was time barred because he had held a title deed for more than 12 years or whether it was based on the claim that he had been in possession for a period of over 12 years. It was his duty to be clear in his pleadings as to why he was alleging that the suit was time barred. If it was an allegation of limitation based on possession, there was no pleading whatsoever that the appellant had been on the suit land from which date. There was also no pleading that the appellant had acquired title to the suit land by way of adverse possession. There was indeed no counterclaim for the cancellation of the title of the respondent in whichever way.
24. I have also carefully gone through the evidence of the defendant regarding his possession of the suit land. I have seen no evidence whatsoever regarding which date the appellant took possession of the land. All I have seen is evidence that the plaintiff's father died in the year 2008. The appellant never provided a date of entry and we cannot in those circumstances assume that he had clocked twelve years of continuous and uninterrupted possession to the time that this suit was filed. Where one seeks to plead limitation, it is his duty to provide a specific date or determinable period from which time begins to run in his favour. None was provided by the appellant and it was not for the trial court, or this court, to speculate on the exact time that he took possession of the suit land. The little evidence on record regarding possession of the land by the appellant actually came from the respondent. In her evidence, she did state that the respondent was in possession in the year 2007 but no particular date was given. In the letter dated 6 August 2016 from the Chief of Nyakoe Location, there is mention that the appellant was asked to vacate in 2008. Even assuming that the appellant was in possession in 2007, this suit was filed on 28 October 2019. It could very well be that his possession started in November or December 2007, in which case 12 years would not have been reached. Without any tangible evidence as to the exact date that he took possession, it cannot be said that the defence of limitation was ever available to the appellant, and if it was available, it cannot be said to have been discharged. Possession alone does not also qualify for one to obtain title through adverse possession for the other ingredients need to be proved. There was never any pleading on adverse possession and even then, the evidence presented was never sufficient for the court to make a determination in favour of the appellant for adverse possession.
25. Whichever way I look at the case, I see no fault in the conclusion reached by the trial court that the respondent deserved to be issued with the order of eviction as the appellant did not prove that he was in any way entitled to the suit land.
26. It is apparent that I see no merit in this appeal and it is hereby dismissed with costs.
27. The appellant had been given 90 days from the date of the judgment to give vacant possession. Those days are now long gone. I will order the appellant to give vacant possession within the next 14 days or else the order of eviction be extracted and be executed.
28. Judgment accordingly.

DATED AND DELIVERED THIS 28 DAY OF FEBRUARY 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII



Delivered in the presence of:

Mr. Magara for the respondent

No Appearance on the part of M/s G.M Nyambati & Company Advocates for the appellant

Court Assistant – David Ochieng

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