



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**CIVIL APPEAL NO. 4 OF 2016**

**BEATRICE TILITEI.....1<sup>ST</sup> APPELLANT**

**LAZARUS KIMUIGE.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**WILLIAM KIBET CHIBOI.....RESPONDENT**

**JUDGEMENT**

This is a first appeal from the judgment and or decree of the Iten Resident Magistrate Hon. Nelly Chepchirchir Adalo delivered on 17<sup>th</sup> February 2016 vide SRMCC No. 14 of 2011. The appellants filed a Memorandum of Appeal dated 4<sup>th</sup> March 2016 whereby they listed 8 grounds of Appeal which in effect sought for the appeal to be allowed and the decree of the Resident Magistrate set aside and the same be substituted with an order dismissing the respondent's suit.

Directions were taken in this matter on 27/7/17 whereby it was agreed that the appeal be disposed of through written submissions. This was after the respondent's Notice of Motion dated 4/4/17 seeking to dismiss the appeal for want of prosecution was disposed of as having been overtaken by events.

A brief background of the appeal is that the respondent claimed to be the legal owner of land parcel No. E/MARAKWET/KESSUP "B"/800 measuring approximately 1.8Ha; and the appellants herein were the representatives of Nyawa Primary School who had allegedly illegally encroached onto the respondent's land and put up structures; teachers' quarters and also fenced the land without the respondent's consent in early 2011. The respondent filed a suit against the appellants on 14<sup>th</sup> November, 2011 before the Iten Resident Magistrate's court vide suit No 14 of 2011. It was claimed in the plaint that the appellants had forcefully entered into the respondent's 0.8 Hectares of land and annexed to the school thereby causing damage and loss to the respondent.

The respondent prayed for the following prayers in the lower court:

- 1) Order of eviction of the defendants from the 0.8Ha illegally annexed by the defendants.
- 2) An order of permanent injunction to restrain the defendants by themselves, their agents and /or their servants from interfering with the plaintiffs use and enjoyment of the parcel of land No. E/MARAKWET/KESSUP 'B'/800.
- 3) General and exemplary damages.
- 4) Costs of the suit.

5) Interests

6) Any other relief this honourable court deems just and fit to grant.

### **APPELLANT'S COUNSEL'S WRITTEN SUBMISSION**

Counsel for the Appellants filed written submissions in respect of the appeal and submitted that they would combine grounds 1, 4, 5 and 6 and argue grounds 2, 3, 7 and 8 separately and summarized the grounds into 4 issues namely:

1. Whether the suit before the Trial Magistrate was time-barred;
2. Whether the suit before the Trial Magistrate disclosed any cause of action against the appellants herein;
3. Whether the respondent proved his case before the trial Magistrate to the required standard;
1. 4. Whether the Trial Magistrate properly analyzed matters before her/whether her decision is well founded.

Counsel therefore submitted that this being a first appeal the primary role of the Appellate court is to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the trial Magistrate are to stand or not and give reasons either way.

Counsel cited the case of Kenya Ports Authority Vs Kuston (Kenya) Limited (2009)2EA 212 where the Court of Appeal held inter alia that:-

*“on a first appeal from the High Court, the Court of Appeal should 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 allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”.*

It was counsel's submission that on the issue as to whether the suit was time barred, that even though the appellants raised this issue before the trial Magistrate and in their amended defence and submission, the Trial Magistrate ignored this issue altogether. He stated that there were no reasons advanced for disregarding the issue that the suit was time-barred when evidence on record pointed towards such conclusion.

Counsel further submitted that the appellants having denied that they had anything to do with the suit land or that the school had encroached on the disputed parcel of land as pleaded by the respondent, contended that it was within their knowledge that the school had been in occupation of the said 0.8 Ha since early 1980s when the respondent's father donated the said parcel of land to the school. Accordingly, the appellants averred that in the circumstances the plaintiff's title over the said portion extinguished after lapse of 12 years.

The court was referred to page 125 of the record of appeal where the respondent testified that in 1972 his father was among the 15 families who donated land for setting up of a public school. He further stated that the school land was fenced in 1980s by a teacher called John Rono and that is when the trespass on his land occurred. When the respondent raised the issue of trespass in 1980s, a confrontation ensued and he therefore raised the issue with a Mr. Dominic Chesire who came after Rono was transferred but it was until 2011 when this dispute was filed in court claiming eviction from the 0.8 Ha.

Counsel also submitted that on cross-examination at page 128, the respondent confirmed that after donation of school land the boundaries were clearly marked and school land was clearly separated. Counsel further stated that the respondent confirmed that the school was started in 1975 and that he was a

committee member from 1975-1980 and at the time the boundary for the school had already been demarcated.

It was counsel's submission that the respondent's suit sought to recover the said 0.8 Ha of the suit land which the school had been using since 1975 in 2011 being a period of over 40 years. He submitted that the suit before the trial Magistrate was time barred and the respondent's interest in the suit land extinguished after 12 years. He relied on Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya bars any action to recover land after expiry of 12 years. It provides:

*'7. 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, if it first accrued to some person through whom he claims, to that person. '*

It was the appellant's argument that two critical components of this provision must be proved. Firstly, is this a suit for recovery of land or is it merely a boundary dispute? To determine this issue, counsel invited the court to look at the prayers in the amended plaint whereby the respondent sought orders of eviction and permanent injunction. It was the appellant's contention that the respondent intended to recover a portion of land measuring 0.8 Ha in occupation by the school. This admission per se means that the respondent's action was for recovery of land and cannot be treated as a mere boundary dispute. Counsel relied on the Court of Appeal decision in Esther Gachambi Mwangi -versus- Samuel Mwangi Mbiri (2013)eKLR,

Counsel further submitted that it is not in dispute that the school occupied the suit land in 1975 and that by the time this suit was instituted in 2011 a period of 12 years had lapsed. Further that even if the court were to assume that the school's claim of adverse possession against the respondent could only arise after his registration as proprietor of suit land counsel submitted that this claim would still fall within the purview of section 7 the respondent having been registered as proprietor of the suit land on 13/12/94 as per the title which was produced as exhibit No.3. Counsel urged the court to find that the suit was time barred.

### **Whether the suit before Trial Magistrate disclosed any cause of action against the Appellants**

On this ground of appeal, Counsel submitted that the appellants were sued in their capacity as the head teacher and committee chairman of Nyawa Primary School respectively therefore in conduct of the management, affairs and activities of the said school and no specific order was sought against Nyawa Primary School. Counsel also submitted that the respondent in his testimony confirmed that the Nyawa Primary School was the trespasser but not the appellants having stated that he had no claim against the appellants. He submitted that this evidence was buttressed by the testimony DW 1, DW 2 and DW 3 at pages 133-140 to the effect that the school had actually occupied and developed land donated by locals.

Mr. Odongo Counsel for the appellant therefore submitted that the respondent's case disclosed no cause of action against appellants as the evidence tendered did not support allegations in the pleadings. He stated that from the evidence on record it was conceded by all parties that Nyawa Primary School was established on parcels of land donated by the community way back in 1980s and its boundaries were delineated in 1980s. Counsel further submitted that the other question is whether the finding that since the appellants were sued in their official capacities represented the interest of Nyawa primary School and therefore orders could be made against the school. He stated that the trial magistrate's finding which hinged on the fact that the appellants were represented by State counsel and that 1<sup>st</sup> appellant had produced documents on behalf of the school hence could not argue that the school was not properly heard was erroneous.

Counsel cited the case of ASSOCIATED ELECTRICAL INDUSTRIES LTD – VS- WILLIAM OTIENO 2004 e KLR where Visram J (as he then was) summed up this issue of parties being bound by their pleadings in the following words:

*'Parties are bound by their pleadings. The Respondent here pleaded one thing, and sought to prove*

*another. In such a situation the Defendant/Appellant was highly prejudiced. It sought to defend the case against it as stated in the Plaintiff, and the case stated in the Plaintiff was never proved. The Respondent having found himself at variance made no application to amend the Plaintiff. The trial magistrate also noted the disparity between what was pleaded and still went ahead to enter Judgment, which was clearly wrong in law, Phipson on Evidence 13th Edition, at page 40 states: "In the absence of leave to amend, the parties are bound by their particulars, and the court cannot award more than those disclosed..."*

Counsel submitted that the respondent's rationale for suing the appellants was that the 1<sup>st</sup> appellant is the head teacher while the 2<sup>nd</sup> appellant is a former chairman of the School Management Committee. The issue is whether the respondent was right to sue the appellants herein for actions or omission wholly attributable to a primary school. Did their status as the head teacher and former chairman of the School Management Committee confer on the appellants the status of a school? How should a school sue or be sued? He further referred the court to sections 55, 56, 57, 58 and 59 of the Basic Education Act No. 14 of 2013 which establishes the School Management Committees and Board of Management as custodians of primary and secondary schools respectively. Mr. Odongo therefore submitted that it follows that only the Board of Management and School Management Committee can manage, supervise and run affairs of secondary and primary schools respectively and that only such bodies have the capacity to sue or be sued on behalf of the school.

Counsel therefore submitted that it was erroneous for the trial Magistrate to fail to find that appellants had no locus standi to be sued on behalf of Nyawa Primary School. He buttressed this with the case of Headmistress Menengai Primary School Another -versus- Jamila Anyona (2006) eKLR, where Kimaru J. held as follows:

*the issue for determination by this court is whether the respondent properly sued the appellants..... In any event, the respondent would not have sued the headmistress of Menengai Primary School because she had no capacity in law to be sued. Under Section 9 of the Education Act and the Education (School committees) Regulations made thereunder, it is only a school committee of a primary school which is mandated with authority of managing the said primary school. It is the school committee of the primary school which can sue and be sued. The headmistress of a primary school cannot therefore be sued in respect of any action that she undertakes in the school on behalf of the school..... In the circumstances of this case therefore, it is clear that the respondent sued the appellants wrongfully. The appellants lacked capacity to be sued on behalf of Menengai Primary School.*

Counsel further submitted that the trial magistrate erred in finding that since the appellants were represented by a State counsel orders could be given against Nyawa Primary even though it was not a party in the proceedings. He stated that the Office of Attorney General is established under Article 156 of the Constitution as the principal legal adviser to the Government. The Attorney General also represents national government in court. By extension, nothing stops the Attorney General from representing public servants sued in the course of their duty but only acting in good faith and therefore in the instant case, the appellants who were public officers under the then Education Act had every right to seek legal representation from the Attorney General.

It was Mr. Odongo's submission that this could not absolve the respondent's duty to enjoin the right parties in the case. The appellants raised objection on their enjoinder in the proceedings the respondent failed to initiate an amendment to reflect the correct position. He submitted that the appellants were protected by section 12 of the Government Proceedings Act Cap 40 and the suit against them ought to have been struck out ab initio. He also cited section 6(2) of the Office of Attorney General Act, 2012 which provides that:

*The Attorney-General shall, in discharging his functions under Article 156 of the Constitution have power to—*

*(a) with leave of the court or tribunal, appear at any stage of proceedings, appeal, execution or*

*any incidental proceedings before any court or tribunal;*

*(b) require any officer in the public service to furnish any information in relation to any matter which is the subject of legal inquiry;*

*(c) summon any officer in the public service to explain any matter which is the subject of litigation by or against the Government; and*

*(d) issue directions to any officer performing legal services functions in any Government Ministry.*

It was submitted by counsel for the appellant that when the appellants testified in this matter and when they furnished documentary evidence in their possession they were doing so in compliance with this provision and further cement their defence that they were not to blame for the respondent's alleged misfortunes. He stated that it was wrong for the trial magistrate to purport to find a nonparty liable and issue adverse orders against non-parties contrary to Articles 47 and 48 of the Constitution. He urged the court to find that the decision of the trial magistrate was indefensible, unconstitutional, null and void ab initio.

### **Whether the case before the Trial Magistrate was proved on the balance of probability**

On this limb of the appeal, Counsel submitted that the respondent did not prove the case on a balance of probabilities as the suit did not disclose a cause of action against the appellants. He stated that assuming that the suit disclosed a cause of action, it was incumbent upon the respondents to prove the case against the appellants which was not the case. Counsel cited section 107 of the Evidence Act Cap 80 Laws of Kenya which provides that:

1. *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. *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.*

Counsel submitted that the respondent having confirmed that the appellants were not the trespassers meant that the respondent had no claim against the appellants. He referred the court to page 153 where the trial magistrate noted that the survey report confirmed that the respondent's land had been encroached into by the school and there was no finding that the appellants herein had encroached onto the respondent's land. Counsel urged the court to find that it was illogical for the trial magistrate to conclude that respondent had proved its case against the appellants on the balance of probabilities when the evidence on record and reasoning of the trial magistrate pointed to the contrary.

Counsel further stated that there were questions that remained unanswered which he enumerated as follows:

- a) Why did the respondent accept title of a portion of land whose ground measurements did not tally with the measurements on the title?
- b) Why didn't the respondent raise his concerns in 1994 when the title was issued if at all he had followed all the procedures and due process before his title was issued?
- c) Why didn't the respondent raise his concerns over his title when he was a member of the School Management Committee?

Counsel submitted that the above questions confirm that the appellants' contention that the respondent is guilty of laches and intends to use the purported anomaly in his title to claim compensation from whoever he thinks he can wrestle. This contention was buttressed by the respondent's testimony in which he demonstrated his frustrations why his father who was one of the donors was not compensated by the government. It was counsel's submission the from the respondent's testimony, it was not clear whether

the respondent was claiming for a road access or eviction even though in his pleading the respondent sought for orders of eviction at page 130 of the record the respondent wants an access road opened.

### **Whether the Trial Magistrate properly analyzed matters before her**

On this point Counsel submitted that the trial magistrate misapplied salient principles of law to the detriment of the appellants especially the overriding objectives under sections IA, 1B and 3A of the Civil Procedure Act Cap 21 as well as Article 159 of the Constitution in total disregard of the facts before her. He stated that the trial magistrate concluded that from the facts presented before her, appellants were sued as a school and therefore proceeded to issue adverse orders against the school when the reality of the matter was that even in his pleadings the respondent did not plead that the appellants were sued on behalf of the school.

Counsel submitted that the case of **Nicholas Kiptoo Korir Salat -versus- Independent Electoral and Boundaries Commission 6 others (2013) eKLR** relied upon by the trial magistrate at page 151 was not relevant to the issues in contention as the Appellants did not challenge procedural aspects but substantive matters as issues of who is a party to the suit or who has locus to sue or be sued are substantive matters that cannot be wished away even through judicial innovation. What was in dispute was whether, the case as presented, the respondent had proved his case on balance of probabilities as against the appellants. Counsel finally submitted that the appeal has merits and should be allowed.

### **RESPONDENT'S WRITTEN SUBMISSIONS**

The respondent opposed the appeal and gave a background of the appeal that the respondent is the legal owner of the land E/MARAKWET/KESSUP "B"/800 measuring approximately 1.8Ha and that the appellants are the representatives of Nyawa Primary School who had illegally encroached into the respondent's land and have put up structures; teachers' quarters and also fenced his land without the respondent's consent in the early 2011.

The respondent stated he filed his suit on 14<sup>th</sup> November, 2011 before Iten Resident Magistrate case No 14 of 2011 after the school had forcefully entered into his 0.8 Hectares land. He further enumerated the prayers that he sought for in the lower court. And urged the court to uphold the judgement of the lower court and dismiss the appeal with costs.

The respondent tackled the grounds of the appeal one by one and stated that he had proved that he is the legal owner of the suit land E/MARAKWET/KESSUP 'B'/800 measuring approximately 1.8 Hectares by producing a copy the title deed. He stated that the school had encroached onto his land as they have no legal documentation to prove that they are legally the owners of the suit land as they claimed.

The respondent stated that the school had been given some portion of land by the respondent's father in the 1970's as a gift and the respondents' piece of land was not inclusive. He cited the case of **MALCOLM BELL VS DANIEL TOROITICH ARAP MOI AND ANOTHER 2012 eKLR**, which stated that a gift is given with the consent of the giver and donation is a gift and in appreciation of the gift. He stated that in this case the respondent had never consented to giving his land to the school.

On the ground that the suit was time barred the respondent stated that he has been using his land and enjoying it peacefully since 1972 until 1986 when his father donated a portion of his land to the school in 1975. He further stated that the school encroached on his parcel of land in early 2011 by fencing and building structures thereon without his consent, The respondent stated that the suit was not time barred as he has been in peaceful occupation of the land until 2011 when the school encroached.

On the ground whether the appellants were sued as the representative's contrary to the law, the respondent cited section 9 of the Education Act and the Education (school committees) regulation and stated that he properly sued the appellant through the headmistress who was part of the committee who run the school as the secretary of the school committee. The respondent also stated that the magistrate applied the principles of law correctly and the appeal should be dismissed with costs and the lower court

judgement be upheld.

### **Analysis and Determination**

This is an appeal against the judgement of Hon. Nelly Chepchirchir Adalo, Resident Magistrate Iten in SRMCC No. 14 of 2011 which was delivered on 17<sup>th</sup> March 2016. This appeal was filed on 4<sup>th</sup> March 2016 whereby the appellant listed 8 grounds of appeal. The respondent had filed an application dated 4<sup>th</sup> April 2017 seeking to dismiss the appeal for want of prosecution but the same was overtaken by events and was abandoned. On 27<sup>th</sup> July 2017 directions were taken and it was agreed that the appeal be canvassed by way of written submissions. Both parties filed their submissions and a judgement date given by the court.

The appellant combined grounds 1,4,5, &6 and argued them together and grounds 2,3,7 & 8 separately. Counsel summarized the said grounds into 4 issues as follows:

1. Whether the suit before the Trial Magistrate was time barred.
2. Whether the suit disclosed any cause of action against the appellant herein.
3. Whether the respondent proved his case before the trial Magistrate to the required standard.
4. Whether the trial Magistrate properly analyzed the matters and whether her decision was well founded.

I will now look at the issues raised by both the appellant and the respondent. From the above issues I will condense the same to three and analyze them hereunder. The first issue is as to whether the respondent's case in the lower court disclosed a cause of action against the appellant herein. If this is in the affirmative, whether the respondent proved his case on a balance of probabilities. Lastly, whether the suit was time barred. Issue as to whether the trial Magistrate properly analyzed the matters and whether the decision was well founded will be depend on the above issues.

I will start with the issue whether the respondent's case disclosed a cause of action against the appellant herein. It was the appellant's submission that they were sued in their capacity as head teacher and committee chairman of Nyawa primary school which was irregular. The Magistrate found that the fact that the appellants were represented by the State Counsel there was no prejudice and therefore they were properly sued. The appellants were sued as 1<sup>st</sup> and second defendants in their names. If someone was to look at the heading of the plaint without going to the body and the content, would they know that the appellants were sued in their capacity as representatives of Nyawa primary school? If the head teacher and the committee chairman was transferred how would the respondent enforce the judgement against the school?

It has been held in many cases that the body which can sue or be sued on matters affecting a public school is the Board of Management. Section 10(2) (2) of the Education Act cap 211 provides that :

*“the minister may, by order, declare a board of governors to be a body corporate under the name of the board of governors of the school or schools, and the board shall have perpetual succession and a common seal with power to hold both moveable and immovable property, and may in its corporate name sue and be sued.”*

Similarly in the case of ***Republic vs The Secretary to the Board of Governors, Musingu High School-Kakamega*** (2011)eKLR Lenaola J (as he then was) at paragraph 5 stated that “from the above it is obvious that the body lawfully capable of being sued on behalf of a school is the Board of Governors as a corporate entity and not one of its officials such as the secretary to the board. I also note specifically that the (Board of Governors) order. That order provides in Rule 10 as follows:

*“No governor shall be subject to any personal liability in respect of any matter or thing done or omitted or any contract entered into by or on behalf of the board which he is a governor or by or on behalf of any school or group of school administered by that board.”*

Further Section 9 of the Education Act and the Education (School committees) Regulation made thereunder provides that it is only a school committee of a primary school which is mandated with authority of managing the said primary school. See **Civil Appeal No 9 of 2001, The Headmistress Menengai Primary School vs. Jamila Anyona** where Kimaru J stated that

*“It is the school committee of the primary school which can sue or be sued. The headmistress of a primary school cannot therefore be sued in respect of any action that she undertakes in school on behalf of the school. Secondly, The Parents Teachers Association cannot be sued because it is not a body which is recognized in law. The education Act does not recognize the existence of a Parents’ Teachers’ Association. In the circumstances of this case therefore, it is clear the respondents sued the appellants wrongfully. The appellants lacked capacity to be sued on behalf of Menengai primary school. I therefore find merit on the ground of appeal by the appellants that they had been sued when they lacked capacity to be sued.”*

In **Kisumu ELC case no,225 of 2014, Evans Otiende Omollo vs School Committee Union Primary School and Another (2015)eKLR** Kibunja J. stated that *“the parties described as defendants herein do not exist as they are not legal entities under the Basic Education Act capable of being sued or to defend this suit. He further stated at paragraph 5 that “having found that the four named defendants are nonexistent as entities capable of being sued, the court finds that to allow the suit as filed to continue to further hearing would be an abuse of the courts’ process”*

Finally on this issue of capacity to be sued , Mativo J stated in the case of **J.N. and 5 others vs. Board of Management, St. G School Nairobi and Another(2017) eKLR** that *“my understanding of the law and the above provision is that the Board of management is a legal entity, capable of suing and being sued and the school Principal cannot be sued in her name or personal capacity for decisions made by the Board. There is nothing to show that she made the impugned decisions made by the board. There is nothing to show that she made the impugned decision in her capacity or acted outside her mandate to warrant personal liability:. the petition does not disclose a case against her in her personal capacity and it would be improper, unfair and unjust to drag her through these proceedings when the decision being challenged was arrived at by a legal entity.”*

Having considered the submissions of both parties and the relevant judicial authorities above, I find that the case did not disclose a cause of action against the appellants as they were sued in their personal capacities which was improper. The law and procedure are very clear on how to bring suits against public schools. If persons were to sue anybody who interacts with the school in one way or another then the Basic Education Act and regulations could have said so. The Act wanted to bring sanity, clarity and accountability on who to take responsibility in case of a wrong.

The court is aware of the provisions of Order 1 Rule 9 of the Civil Procedure Rules which states that a suit shall not be defeated by reason of the misjoinder or non-joinder of parties as the court is enjoined to deal with the matter in controversy as between the parties before it. I have dealt with this issue by asking how the enforcement of the judgement will be carried out if the wrong parties are sued. In this case the misjoinder and non- joinder goes to the heart of the suit therefore it cannot be wished away. The issue was raised in the defence and the respondent had an opportunity to rectify it but turned a blind eye. The issue of capacity to sue and be sued is key.

The other ground of appeal that Mr. Odongo counsel for the appellant raised is that the suit before the trial Magistrate was time barred. Looking at the record of Appeal I notice that the suit was filed in 2011. It is also not disputed that the respondent’s father donated some land in 1975 to Nyawa Primary School. The school has been in occupation since then. It was the respondent’s submissions that the school encroached on part of his land in 2011. Both the school and the respondent produced titles for their respective parcels of land.

Counsel for the appellant submitted that the court should be alive of the role of the first appellate court as was enunciated in the case of **Kenya Ports Authority v Kuston (Kenya)Ltd, (2009) 2 EA 212** in the following words;

*“This being a first appeal to this Court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect...”*

The court is alive to the fact that it did not have the opportunity to see or hear the witnesses. The court is left with the record of appeal as filed to reconsider, evaluate and draw conclusions. On the issue of limitation of actions, it was the respondent’s case that he had obtained his title in 1994 and that the school encroached on his land in 2011. He rightfully said that his father had donated the land to the school in 1975 but he suspected that the school was trying to encroach on his land in 1980. If we give the respondent the benefit of doubt, from 1980 to 2011 when he had issues or complaints on encroachment with the school amounts to 31 years. He did not see it fit to file the case for trespass by the school. The school had peaceful and uninterrupted occupation of the suit land until 2011 when the respondent saw it wise to file the suit. The issue was raised by the appellants in their defense but the trial Magistrate held that the respondent was the rightful owner hence the appellant had trespassed on the respondent’s 0.8 acres.

I agree with the appellant on their submission that the trial magistrate ignored the issue that they had raised in their defense that the suit was time barred. It is clear from the plaint that the suit was for recovery of land and not a boundary dispute. It is clear from the record that the boundaries between the appellant and respondent had been demarcated with trees and a fence. If the respondent wanted to sue for recovery of land then he should have filed this suit in 1992 having suspected that there was encroachment in 1980 as he stated. This cause of action became time barred from that time when the 12 years lapsed.

From the evidence on record it is clear that the respondent has not been in occupation of the disputed 0.8 acres of the suit land. Mere suspicion alone of encroachment without action does not count in this case. As stated above the respondent should have followed the suspicion with court action to beat the limitation of actions as provided for in law. From the authorities cited in respect of adverse possession above I find that the respondent’s claim of 0.8 acres was extinguished by the limitation period. The trial Magistrate erred in not finding that the suit was time barred.

In the case of **Francis Gitonga Macharia v. Muiruri Waithaka Civil Appeal No 110 of 1997** the Court of Appeal stated that the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the respondent. In this case the respondent stated that he was registered as proprietor of the disputed land in 1994 which means the limitation period started running then. If the respondent relied on the issue of registration then he should have filed this suit in 2006.

The respondent also claimed that the school had encroached on 0.8 acres of his land. What is the meaning of encroachment? Is the synonym of encroachment trespass? What is the limitation period under section 4 (2) of the Limitation of Actions Act? The section states that actions founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. Trespass is a tort and as such if the respondent relied on this then he should have brought his claim within the limitation period.

Upon re -evaluation of the evidence adduced before the trial Magistrate, it is clear that the respondent’s suit was time barred and that the appellants were sued in a wrong capacity. The upshot is that the appeal filed by the appellants is hereby allowed. The judgement and decree of the Magistrate’s Court entered on 17<sup>th</sup> February 2016 in favour of the respondent is hereby set aside and substituted by a judgement of this court dismissing the respondent’s suit with costs.

Dated and delivered at Eldoret on this 14<sup>th</sup> day of December, 2017.

**M.A ODENY**

**JUDGE**

Read in open court in the presence of the Respondent and Mr. Odongo for the Appellant.

Mr. Koech – Court Assistant.