



REPUBLIC OF KENYA



**KENYA LAW**  
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**Owuor v Adar (Environment and Land Appeal E045 of 2022)  
[2024] KEELC 835 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 835 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E045 OF 2022  
E ASATI, J  
FEBRUARY 22, 2024**

**BETWEEN**

**JOANES DINGA OWUOR ..... APPELLANT**

**AND**

**JOHN MAX ADAR ..... RESPONDENT**

*(Being an appeal from the judgement of the Senior Principal Magistrate's court at Nyando, Honourable S.O. Temu – SPM on the 6th of October, 2022 in Nyando ELC Case No. 33 of 2019 – JOHN MAX ADWAR V JOANES DINGA OWUOR)*

**JUDGMENT**

1. A brief background of the appeal herein is that the Appellant, Joannes Dinga Owuor, was the Defendant in Nyando SPMC Land Case No.33 of 2019 (the suit) wherein he was sued by the Respondent herein. The subject matter of the suit was a parcel of land known as South West Nyakach/kadianga West/782 (the suit land). The Respondent claimed in the suit that he brought the suit in his capacity as personal representative and administrator of the estate of his late father Josiah Adwar Ojwang, deceased. He claimed that the deceased bought the suitland from one Samuel Ogonyo, also deceased and paid the entire purchase price to the Vendor who allowed the deceased enjoyment of the possession of the suit land but the Vendor died before transfer of the suit land in favour of the deceased. His complaint was that the appellant had intruded and possessed the suit land without due process and he therefore sought court intervention. He sought for an order of permanent injunction restraining the Appellant from dealing in any way with the suit land, an order of eviction of the Appellant from the suit land and costs of the suit.
2. The record of appeal shows that the appellant responded to the Respondent's claim vide the Notice of Preliminary Objection dated 20<sup>th</sup> February, 2020 and statement of defence dated 7<sup>th</sup> September, 2021. He denied the Respondent's claim and averred that he was the son of the registered owner of the suit land and had been living on the suit land since he was born and that any transactions between the



- deceased and any party is time-barred under the *Limitation of Actions Act*. That the entire suit was frivolous, bad in law, incompetent, fatally defective and an abuse of the process of the court and gave notice that he would raise a preliminary objection seeking for the suit to be struck out.
3. The record further shows that the suit was heard before the trial court which vide the judgement delivered on 6/10/2022 found that the Respondent had a better lawful claim over the suit land as a purchaser, that the Respondent had proved his case on a balance of probabilities and allowed his claim.
  4. Being aggrieved by the judgement, the appellant filed the present appeal vide the Memorandum of Appeal dated 1<sup>st</sup> December, 2022 and the Supplementary Record of Appeal dated 18<sup>th</sup> January, 2023 seeking for orders that the appeal be allowed, the judgement of the senior Principal Magistrate, Nyando (the Hon. S. O. Temu) delivered on 6<sup>th</sup> October 2022 in Nyando Pmc Elc No.33 Of 2019 John Max Adar Vs Joanes Dinga Owuor, be set aside and the Respondent's suit be dismissed with costs.
  5. The grounds of appeal are as contained in the Memorandum of Appeal are:
    - a. That the learned Magistrate erred in law in misdirecting himself making an erroneous finding that there was a binding sale agreement for the suit parcel when no such agreement existed.
    - b. The learned Magistrate thereafter erred in law, in failing to recognize that the Respondent's claim was time barred under the *Limitation of Actions Act*.
    - c. The learned Magistrate misdirected himself by proceeding with a suit which was sub judice when there was evidence that a previous suit between same parties and over the same matter was in existence at the time that the current suit was filed in contravention of Section 6 of the *Civil Procedure Act*.
    - d. The learned Magistrate misdirected himself by shallowly treating the issue of inheritance and levirate unions by stating that the later did not exist thus coming to a wrong finding to the detriment of the appellant.
    - e. The learned Magistrate erred in law by making a finding that the Appellant could not avail himself of the defence of Limitation of Actions because the Appellant had not obtained Letters of Administration nor filed a counter claim thus shifting the burden as if the Appellant was the Plaintiff in the matter.
    - f. The Trial Magistrate failed to record the evidence adduced, recorded totally different things adding his own evidence and delivered a judgement without notice. Thus giving the appearance of favouritism in a case where execution meant eviction of the Appellant who has been in occupation for over twenty years.
    - g. The learned Magistrate failed to analyse the evidence, make determination on the issues and give reasons for his findings contrary to a Magistrates' duty in delivering a judgement.
    - h. The learned Magistrate delivered a judgement granting prayers which were not asked for by the Respondent, granted his own relief and failed to give any reason known to law for his decision.
    - i. Consequently, the entire judgement is a recipe allowing for illegalities, is unreasonable oppressive and prejudicial to the Appellant, capricious and is thus a travesty of justice.
  6. Directions were taken by consent that the appeal be canvassed by way of written submissions pursuant to which written submissions dated 25<sup>th</sup> October 2023 were filed on behalf of the appellant by the firm of M. A. Ochanji-Opondo Advocates and written submissions of even date by the firm of Chemoiyai & Company Advocates for the Respondent.



7. The first ground of appeal is whether or not the learned Magistrate erred in misdirecting himself by making an erroneous finding that there was a binding agreement for the suit parcel when no such agreement existed. The Respondent had pleaded in paragraphs 3A, 4 and 5 of the amended plaint dated 28<sup>th</sup> July, 2021 that his father Josiah Adwar Ojwang, deceased, purchased land parcel number Kisumu/kadianga/782/west measuring 3.4 hectares from the late Samuel Ogonyo pursuant to a sale agreement dated 28<sup>th</sup> January, 1980. That his father paid the entire agreed sum of money to the seller who allowed his father, the deceased, to take possession thereof pending official transfer of the land.
8. The Respondent testified as PW1 and adopted the contents of his witness statement dated 28<sup>th</sup> July, 2021 as his evidence. In the witness statement, he had stated that his late father Josiah Adwar Ojwang purchased land No. Kisumu/kadianga/782/west from the late Samuel Ogonyo at a consideration of Kshs.2,400/= pursuant to a sale agreement dated 28<sup>th</sup> January, 1980 in the presence of witnesses. Among the documents he produced was exhibit 4. He stated that the document was for plot No.782, which was the plot in issue, that it had a stamp of West Nyakach, that it was dated 28<sup>th</sup> January, 1980 and that the document was signed by Samuel and Dadayo Ochuko and James Owino.
9. On cross-examination on exhibit 4, the Respondent stated;

“ the document is an agreement between my father and the vendor. It is a sale agreement. It was signed by Samuel the vendor. It was not signed by my father.”
10. The court considered the evidence and the sale agreement and found as follows;

“ As per the evidence before this court together with the documents filed, I do find that the Plaintiff has proved his case that he had purchased the subject parcel from the deceased and he had an agreement and consent documents for the same.”
11. The appellant faults the court for this finding on the grounds that the sale agreement did not exist. The appellant had denied vide his statement of defence dated 7<sup>th</sup> September, 2020 that the Respondent’s father Josiah Adwar Ojwang bought the suit land. In his evidence the appellant vide his witness statement dated 7<sup>th</sup> September, 2020 stated;

“ the alleged document dated 28<sup>th</sup> January, 1980 had never been shown to us before the filing of these suits and as far as I am concerned, it does not confirm/show evidence of sale of the land”.

The appellant further stated in the defence that if at all there was a transaction between his father and any other person in 1980, the same is time barred.
12. It has been submitted in this appeal on behalf of the appellant that the document was never translated into court language and was not executed by both parties and is therefore not an agreement within the meaning of Section 3(3) of the *Law of Contract Act*. That the Court over-looked the fact that the Respondent was not present when the document was signed and there was no witness called to testify that the document was signed by the late Samuel. That the document dated 28<sup>th</sup> January, 1980 is not a binding agreement capable of transferring an interest in land contrary to the trial court’s findings.
13. On behalf of the Respondent it was submitted that in establishing the existence of a valid contract for sale of land, the applicable law is Section 3 of *Law of Contract Act*, Cap 23 which provides that;

“No suit shall be brought upon a contract for disposition of an interest in land unless:



- a. The contract on which the suit is founded: -
  - i. is in writing,
  - ii. is signed by all the parties thereto and
- b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

Counsel submitted that based on the evidence adduced by the Respondent, agreement dated 28<sup>th</sup> January, 1980 meets the legal threshold for a valid sale agreement.

14. I have seen the document produced as exhibit 4. It is on page 38 of the record of appeal. It is neither in English nor Swahili language. There is no translation for it. Section 86(1) of the *Civil procedure Act* provides that the language of the High Court and of the Court of Appeal shall be English, and the language of subordinate courts shall be English or Swahili and under the current Section 23 of the *Environment and Land Court Act*, the language of the court is English. In *Sebastian Njage Maria v Nau Mungania Munyinyi & another* [2009] eKLR the court stated that “the language of this court is English as provided for in section 86 of the Civil Procedure Act. It follows, therefore, that any document to be used in proceedings in this court which is not in English language must be translated to that language”.
15. In *Mukoma Mwenze Benjamin t/a Ben La Concorde v Scardale Investments Limited & another* [2019] eKLR it was held that “The Plaintiff however failed to prove payment of the fine by the Central Bank of Congo. This is because the Plaintiff relied on a document that was written in French, to prove this claim. There being no translation of this document, provided to the Court, this Court cannot rely on such document.” and in the case *Pasatificio Lucio Garofalo SPA v Security & Fire Equipment Co & Another* (2001) eKLR considered affidavits sworn outside the Commonwealth and stated:
 

“...it follows that the affidavit in the instant case which was taken in Napoli, Italy, has to be proved by affidavit or otherwise to have been taken by a Notary Public in Italy and that the signature and seal of attestation affixed thereto was that of such Notary Public. There is no such proof here. It may very well be that the certificates in Italian and the other writing in Italian was meant to do that. However, as there was no translation of the same into English-which is the official language of the High Court-this Court cannot and will not know the position.”
16. The court is unable to understand the language in which the document is rendered. Translation of the same was mandatory.
17. The documents is not signed by all parties. It does not comply with the provisions of Section 3 of the *Law of Contract Act*. The consequence of non-translation and no-execution of the document by all the parties rendered the document invalid and of no probative value. The trial court therefore erred in relying on the document as the basis for allowing the Respondent’s claim.
18. The next grounds of appeal are grounds 2 and 5 which raise the issue of limitation of actions. It was submitted on behalf of the appellant that assuming that exhibit P.4 was a valid land sale agreement capable of enforcement, it was time barred hence not capable of being enforced under the provisions of the *Law of Contract Act*. That from the time of the purported sale to the time of filing suit, a period of 39 years had elapsed. That the Respondent confirmed that he knew that the appellant had lived on the suit parcel from the year 2000. Counsel further adopted the submissions and authorities adduced in the lower court.



19. And on behalf of the Respondent on the issue of limitation of actions, it was submitted that the trial Magistrate was rightful in his determination in finding that the appellant could not rely upon the defence of limitation of actions against the Respondent's claim as the appellant merely stated that he had acquired the disputed land as of right.
20. I have considered the evidence, record of appeal generally and the rival submissions. I find that the Respondent's claim to the suit land on the basis of a purchase had become time barred as at the time of filing suit because as a contract, enforcement ought to have been done within 6 years as provided under the *Limitation of Actions Act*.
21. The next ground is ground 4 of the appeal namely; that the trial Magistrate misdirected himself by treating shallowly the issue of inheritance and levirate unions by stating that the later did not exist thus coming to a wrong finding to detriment of the appellant.
- The appellant adopted his submissions in the lower court on this issue where he had relied on the case of *Estate of Gamaliel Otieno Onyingo (deceased)* [2018]eKLR.
- That the appellant as the only child of Samuel Ogonyo has got every right to the suit land.
22. On behalf of the Respondent it was submitted that as held in the case of *Jairo K. Otiato -vs- Samson Otieno* (1993) eKLR that customary law must be proved by evidence. That the appellant did not discharge the burden. Counsel relied on the provisions of Section 107, 108 and 109 of the *Evidence Act*.
23. It is however clear from the evidence that the appellant was the son of the deceased hence entitled to the suitland.
24. Having found that the Respondent did not prove that his father, the deceased, bought the suitland, this court finds that there was no basis for entry of judgement in favour of the Respondent by the trial court. The court finds that the appeal herein has merit and allows it as follows:-
- a. The judgement of the trial court in NYANDO SPMC ELC NO.33 OF 2019 dated 6th October, 2022 is hereby set aside and substituted with a judgement dismissing the suit with costs to the appellant.
  - b. Costs of the appeal are awarded to the appellant.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 22<sup>ND</sup> FEBRUARY, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Maureen: Court Assistant.

Mr. Opondo for the Appellant.



Chemoiyai for the Respondent.

