



REPUBLIC OF KENYA



KENYA LAW
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**Chepsiror v Chemonges (Civil Appeal 66 of 2017)
[2022] KECA 478 (KLR) (11 March 2022) (Judgment)**

Neutral citation: [2022] KECA 478 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 66 OF 2017
F TUIYOTT, M NGUGI & PO KIAGE, JJA
MARCH 11, 2022**

BETWEEN

AARON KIBIWOT CHEPSIROR APPELLANT

AND

FLORENCE CHEMONGES RESPONDENT

(An appeal from the judgment & decree of the Environment & Land Court at Kitale (E. Obaga, J) delivered at Kitale on 7th November, 2016 in Environment & Land Case No. 14 of 2008)

JUDGMENT

JUDGMENT OF TUIYOTT, JA

- [1] The dispute giving rise to this Appeal involves two neighbours feuding over land.
- [2] Aron Kibiwo Chepsiror (Chepesiror or the appellant) is the registered owner of land known as Trans Nzoia/Mitoni Mbili Settlement Scheme/23(parcel 23) measuring 7.5 hectares or thereabouts. His neighbour, Florence Chemonges (Chemonges or the Respondent) is the registered owner of land known as Trans Nzoia/Mitoni Mbili Settlement Scheme 22(parcel 22). This parcel of land, on title, is 6.3 hectares. In a claim filed by the appellant before the High Court at Kitale (and later taken over and concluded by the Environment and Land Court(ELC)), the appellant complained that the respondent had encroached into part of his land and was in unlawful occupation of 2.722 hectares thereof. His plea to the court was that the respondent be declared a trespasser and for damages for unlawful occupation and loss of user. There was also a prayer for costs of the suit.
- [3] In defence, the respondent denied the unlawful occupation. She averred that it was in fact the appellant who had, in 2007, trespassed into her land, excised and unlawfully occupied 1 acre of it. Of significance is that the respondent pleaded that the appellant's claim was time-barred by statute. By way of counterclaim, the respondent sought an order of eviction against the appellant, and also costs.



[4] As a way of narrowing the scope of the dispute, the parties to the dispute, well advised I would think, entered a consent dated 26th May 2011 before the trial court directing the District Land Registrar and the Land Surveyor to visit the two suit properties to determine the disputed boundaries between the two parcels of land and to determine which of the two parcels encroached on the other, and by which acreage/size if any.

[5] On the basis of a report of the District Surveyor prepared after a visit to the properties, the trial Judge observed;

“Mr. Kiarie also took issue with the final findings of the Surveyor’s report. He argued that there was a mathematical error. According to the report, the defendant’s land is 9.53 hectares on the ground when it is supposed to be 6.3 hectares. On the other hand, the report found out that the plaintiff’s land is 4.97 hectares on the ground when it is supposed to be 7.5 hectares. What the Surveyor did was he got the difference between what the defendant has on the ground and what she is entitled to in the title and assumed the excess is what should be given to the plaintiff. What is over and above 6.3 hectares is 3.24 hectares which is about 8 acres.

However, if the report by the Surveyors is correct that the plaintiff has 4.97 hectares on the ground when he is supposed to have 7.5 hectares, then the shortfall on his land is 2.53 hectares which is about six acres.

What the defendant has could be more but if the Surveyor’s report is anything to go by, then, the short fall by the plaintiff should be only 2.53 hectares which is about six acres and not 3.24 hectares which is about 8 acres.

[6] None of the parties to this appeal question this finding and I take it that the respondent occupies part of land that is registered in the name of the appellant.

[7] Even having made the finding, the trial judge dismissed the appellant’s claim on the basis that it was statute barred. The court also dismissed the respondent’s counterclaim for lack of proof. Only the appellant is aggrieved by that decision and the grievance is limited to the finding against his claim.

[8] The memorandum of appeal dated 4th June, 2017 raises three grounds but which really all touch on one issue. The appellant impugns the trial Judge’s decision for having failed to find that, for purposes of the law of limitation, time could not run while title to parcel 23 was charged in favour of the Settlement Fund Trustees.

[9] In his submissions to this Court, the appellant argues that his claim is not over his parcel of land over (parcel 23) but rather over the respondent’s parcel 22. He argues that since the respondent obtained title over her parcel of land on 16th August 2010, time for purposes of the Limitation of Actions Act could not run while the land was held by the Settlement Fund Trustees. The decisions in *Wilfred Kegonye Babu vs Henry Mose Onuko [2019] eKLR* and *Kuria Kiarie & 2 Others vs Sammy Magera [2018] eKLR* were cited to the Court.

[10] For the respondent, counsel argued that by 1985 the appellant was aware that his land had a shortfall and he had 12 years within which to institute an action for recovery of the land. That period, it was submitted, ended in 1997 and the suit filed in 2008 was late.



[11] Section 7 of the Law of *Limitation of Actions Act* provides -

7. Actions to recover land 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.

[12] Section 41 of the same statute provides that the Act does not enable a person to acquire title to, or an easement over Government land or land otherwise enjoyed by the Government. It is by dint of that provision that our courts have consistently held that no claim can lie under the doctrine of adverse possession against land held by the Settlement Fund Trustees, a public corporation established under section 167(1) of the now repealed *Agriculture Act*. See for example the decision of this Court in *Kuria Kiarie* (supra).

[13] Whether this statutory provision assists the appellant in defeating the respondent's defence of limitation is the sole issue for this Court to determine. In doing so, this Court sits in first appeal over the decision of the ELC and I bear in mind the role of the Court in this regard expressed in *Selle & Another Vs Associated Motor Boat Co. Ltd & others (1968)EA 123* as follows;

“..... this court is not bound necessarily to accept the findings of fact by the court below. 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 allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”

[14] I must, however, start by calling out the appellant for shifting his case over time. When confronted at trial with the defence of statute bar, the appellant pleaded as follows: -

“The Plaintiff further state(sic) in reply to paragraph 5 of the defence that the same is not time barred as the property passed to him in 2005 after the settlement of the Settlement Fund Trustee Loan.”

In the submissions before this Court, the appellant pegs his fortunes on a date he proposes to have been when the Settlement Fund Trustees ceased to be the owner of land parcel 22 which is now registered in favour of the respondent. But this does not make sense and only serves to detract from the controversy. The appellant sought to recover the land allegedly unlawfully occupied by the respondent. That land was parcel 23 and not 22.

The respondent took up the defence that the claim was statute barred because it was brought outside 12 years after she had taken up possession. The true controversy therefore was when did the clock start to tick for purposes of section 7 of the Act for the recovery of the land occupied by the respondent, that land being parcel 23.

[15] Although the appellant's evidence was that he obtained title to parcel 23 before he had paid off the loan to the Settlement Fund Trustee, the certificate of search that he produced indicated that he was registered as absolute owner of this land parcel on 5th August 1987 and that as of 16th June 2011, when the search was conducted, there was no encumbrance registered against the title. And as the appellant



did not produce an extract of the title or other documentary evidence, he was unable to demonstrate when he paid off the loan to the Settlement Fund Trustee.

[16] The registration of ownership of parcel 23 was under the now repealed *Registered Land Act*. The effect of registration under section 27 of that statute is to vest in the registered person absolute ownership of the land. The provision reads;

27. Subject to this Act -

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

[17] It is therefore beyond peradventure that, if parcel No. 23 was previously public land, it ceased being so on 5th August 1987 when the appellant became the registered proprietor. For purposes of computation of the limitation period under statute, time started to run against the registered owner on this date as the respondent was already in possession of part of LR 23. As a consequence, the right to bring a claim for recovery of the land became extinguished on 4th August 1999. The suit for recovery filed in 2008 was hopelessly out of time. In the end the decision made by the trial court cannot be faulted.

[18] I would therefore dismiss the appeal with costs.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF MARCH, 2022.

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

JUDGMENT OF MUMBI NGUGI, JA

[1] I have had the advantage of reading in draft the judgment of my learned brother Tuiyott, J.A and I am in full agreement with his reasoning the conclusion he reaches, and the order he proposes.

[2] As Kiage, J.A also agrees, the appeal is dismissed with costs.

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MUMBI NGUGI

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[1] I have had the advantage of reading in draft the judgment of my learned brother Tuiyott, J.A and I am in full agreement with his reasoning the conclusion he reaches, and the order he proposes.

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JUDGE OF APPEAL

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SIGNED

DEPUTY REGISTRAR

