Kiingyo v Nekea & another (Environment and Land Appeal 45 of 2019) [2025] KEELC 827 (KLR) (25 February 2025) (Judgment)

Neutral citation: [2025] KEELC 827 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL 45 OF 2019

NA MATHEKA, J

FEBRUARY 25, 2025

BETWEEN

WAMBUA KIINGYO ..... APPELLANT

AND

NZOMO KIVUA NEKEA ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF MACHAKOS ..... 2ND RESPONDENT

JUDGMENT

1. The Appellant appeals to this Honourable Court against the entire Judgment of Senior Principal Magistrate Catherine A. Ocharo delivered and dated 27th August 2019 and not been satisfied by the said Judgment sets forth the following grounds of Appeal inter alia;

    1. The Senior Principal Magistrate erred in Law and in fact by holding that the suit was time barred when the suit was against the 1st Respondent who was sued in his Personal capacity and not as a Representative of his father who was the Plaintiff in HCC No. 990 of 1970 at Nairobi.

    2. The Senior Principal Magistrate erred in law and in fact by holding that no Sale Agreement was produced by the Appellant while there was a document that could have been constituted as a Sale Agreement.

    3. The Learned Senior Principal Magistrate erred in Law and in fact by holding that it was not clear what the Appellant did when the Judgment of Justice Amini was set aside and since that time it was the responsibility of the 1st Defendants father to have prosecuted the case until the time the said Defendant's father died and the suit subsequently abated for failure to prosecute the suit by the Personal Representative of the Deceased Plaintiff in the High Court Case No. 990 of 1970.

4. The learned Senior Principal Magistrate erred in Law and in fact by holding that the issues involving the plot No. 12 at Kola market were concluded by the Court while no case had been concluded since after the suit abated there was no binding Judgment on the issues that were outstanding unresolved.

5. The Learned Senior Principal Magistrate erred in Law and in fact by failing to hold that transfer done by the Late Kivuva Nekea to himself was based on a Judgment of Justice Sheikh Amin which was set aside by Justice Mwera and therefore the trial Magistrate simply allowed an illegality to stand.

6. The Learned Senior Principal Magistrate erred in Law and in fact by failing to note that the HCC No. 1988 of 1990 abated on 16/ 10/99 and the Appellant discovered that plot No. 12 Kola market was illegally transferred to the late Kivuva Nekea in 2014 while all along he knew the plot was in the name of the Appellant and another and therefore the suit was not time barred as at the time of discovering the fraud committed.

7. The Learned Senior Principal Magistrate erred in Law and in fact by failing to note the plot No. 12 was in the name of Appellant in 1974 after which the father of the 1st Respondent illegally transferred the plot to himself.

8. The Learned Senior Principal Magistrate erred in Law and in fact by failing to note that the 2nd Respondent did not file an Appearance or Defence in this suit hence what the Appellant's case was not challenged.

9. The Learned Senior Principal Magistrate erred in Law and in fact by deciding the case against the weight of the evidence.

2. The Appellant prays this Court to allow the Appeal with costs and set aside the lower Court Judgment and enter Judgment for the Appellant with costs.

3. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in Mbogo and another vs Shah (1968) EA 93 where it was held that;

> " I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do."

4. In the trial court, the respondent PWI, averred that his father Kivuva Nekea is the registered proprietor of Plot No. 12 Kola having purchased the same. He purchased the suit plot in 1970 and died in 1998. There was a judgement in HCCC 990 of 1970 which ordered the register to be rectified. He produced the sale agreement, letter from the County Council of Masaku and rent receipt payments to the Council. The respondent stated he is in occupation of the suit property with the consent of his family and urged the court to dismiss the claim as it was time-barred.

5. The Appellant admits that in 1985 Justice Sheikh Amin delivered the said judgement but the same was set aside by Justice Mwera in 1990 and the defendant was to file a defence. That the plaintiff never prosecuted the matter and died in 1998. The suit abated and is therefore nonexistent. He produced

rent receipts and letters from the County Council of Masaku dated 1973 and 1974 stating that the suit plot belonged to Wambua Kiingyo and Kyengo Muli.

6. Section 26 of the *Land Registration Act* states;

> " The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
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> (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
>
> (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

7. The respondent claimed the appellant's suit was statue-barred as provided by Section 7 of the *Limitation of Actions Act*, which states that;

> " 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."

8. The appellant opposed this and submitted that the issue in contention is that sometime in 1970, the Appellant and one Kyengo Muli (Deceased) purchased a shop and the suit property (Plot No.12) at Kola Market from the late Kyule Nzivu and Muia Ngonzi and were registered as legal owners of the suit property. From the date of allotment of the suit property to the Appellant and his late partner, the Appellant together with his late partner had been paying land rents to the then Masaku County Council. At the time of the purchase of the suit property, the late Kivuva Nekea; father to the 1st Respondent was a tenant in shop No.12 and despite being issued with notices to vacate the shop, Kivuva Nekea (Deceased) refused, ignored and/or neglected to vacate and instead instituted a suit at Nairobi being HCC NO. 990 OF 1970 claiming that Plot No. 12 had been sold to him by the late Kyule Nzivu and Muia Ngonzi. The suit proceeded exparte and a judgment was delivered by Justice Sheikh Amin on 24th July1985 in default of appearance. Upon learning of the exparte judgment and decree, the Appellant applied for the same to be set aside on the ground that he together with his late partner were not served with summons to enter appearance and/or pleadings. The Application and the Judgment of Justice Sheikh Amin was set aside by a ruling of Justice J. Mwera on 27th March 1990. When the Judgment of Justice Sheikh Amin was set aside, the parties were to move court to have the matter heard; however, the plaintiff never prosecuted his case even after the defendants entered appearance and filed their defence. Later, Kivuva Nekea died on 16/10/1998 and the suit was never prosecuted by his representatives and in accordance with the law, the suit abated as from 16/10/1998. While this was happening, the suit property was still in the records of the County Council of Masaku in the names of the Appellant and his late partner. Before passing on, the late Kivuva Nekea secretly proceeded to the 2nd Respondent with the judgment that was set aside to have the suit property transferred to his name.

9. That the 1st Respondent, the son to Kivuva Nekea with the knowledge that HCC No. 990 OF 1970 was set aside and the suit having not been heard afresh and without taking out Letters of Administration to represent his father's estate trespassed into the suit property in 2010 and has since refused, ignored

and or neglected to give up vacate possession despite demand notices issued upon the 1st Respondent to vacate the suit property and surrender vacate possession. That the Senior Principal Magistrate erred in law by holding that the suit was time barred yet, the 1st Respondent was sued in his personal capacity and not as a representative of his father who was a Plaintiff in HCC No.990 of 1970. The suit against the 1st Respondent was brought in the year 2015 which suit was for trespass and fraud.

10. This court has perused the court file and the facts are that the late Kivuva Nekea (father to the 1st Respondent) instituted a suit at Nairobi being HCC NO. 990 OF 1970 claiming that Plot No. 12 had been sold to him by the late Kyule Nzivu and Muia Ngonzi and a judgment was delivered by Justice Sheikh Amin on 24th July1985. The Judgment of Justice Sheikh Amin was set aside by a ruling of Justice J. Mwera on 27th March 1990 and parties where to have the matter heard afresh but this was never done.

11. In the case of Edward Moonge Lengusuranga vs James Lanaiyara & Another (2019) eKLR, it was held as follows;

> " Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the first Defendant having bought the suit land in the year 1999 (as per Paragraph 6 of the Plaint) and taken possession of the same, the Plaintiff herein could only seek to recover it from the 1st Defendants, but only if he did so within twelve years after the Sale Agreement."

12. In view of the undisputed facts in both the Plaint and the Defence, I find that the causes of action in respect of the suit plot arose in1985 and 1990.

13. Section 7 of the *Limitation of Actions Act* provides as follows;

> " 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."

14. The purpose of the Law of Limitation was stated in the case of Mehta vs Shah (1965) E.A 321, as follows;

> " The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case."

15. In the case of Gathoni vs Kenya Co-operative Creameries Ltd (1982) KLR 104, the Court of Appeal held as follows;

> " ...The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."

16. A suit barred by limitation is a claim barred by law, hence by operation of law, the Court cannot grant the relief sought. In the case of Iga vs Makerere University (1972) EA, the Court stated that;

> " A Plaint which is barred by limitation is a Plaint barred by law. Reading these Provisions together it seems clear that unless the Applicant in this case had put himself within the

limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the Court cannot grant the remedy or relief sought."

17. Section 7 of the *Limitation of Actions Act* provides that an action for recovery of land may not be brought after the lapse of 12 years from the date the right of action accrued to the Plaintiff. The appellant stated that he discovered the acts of trespass by the respondent in 2010 and fraud by the 1st respondent's father vide a search on 15th October 2014. The suit against the 1st Respondent was brought in the year 2015 which suit was for trespass and fraud. I disagree and find that the appellant was aware of the matter or fraud if any, from 1990 when Mwera J set aside the judgement. This suit was filed in 2019 about 29 years later. The 1st respondent is the son of Kivuva Nekea and hence a beneficial owner of the suit plot. It is also the appellant's evidence that the said suit plot has been in Kivuva Nekea's (now Deceased) and/or his family's possession since 1970 when they refused to vacate. I find that the suit in the trial court is statute barred. I find that the appellant did not present any evidence before the learned magistrate to challenge the respondent's title to the suit property within the confines of the law. I find no probable reason to disturb the judgement of the trial court and this appeal is dismissed with costs to the respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF FEBRUARY 2025.

N.A. MATHEKA

JUDGE