



**Chumo v Korir & another (Environment and Land Appeal
E002 of 2022) [2024] KEELC 3877 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3877 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL E002 OF 2022**

MC OUNDO, J

MAY 16, 2024

BETWEEN

SAMARI CHELANGAT CHUMO APPELLANT

AND

JOSEPH KIPKIRUI KORIR 1ST RESPONDENT

CHARLES KORIR 2ND RESPONDENT

*(Being an Appeal from the Ruling and Order of the Honourable L. Kiniale, PM in
Bomet PM's Environment and Land Case No. E18 of 2021 delivered on 4th April, 2022)*

JUDGMENT

1. Before me for determination on Appeal is a matter which was heard and determined by Hon. L. Kiniale, Principle Magistrate vide his Ruling dated 4th April, 2022 in Bomet Principle Magistrate's Court Environment and Land Case No. E18 of 2021 where the learned Magistrate, upon considering the evidence of both parties, ruled that the Plaintiff's suit was fatally defective ab initio, upheld the Defendants' Preliminary Objection, struck out and dismissed the Plaintiff's suit with costs to the Defendants.
2. The Plaintiff/Appellant, being dissatisfied with the Ruling of the trial Magistrate has now filed the present Appeal based on the following grounds in the Memorandum of Appeal:
 - i. That the learned trial Magistrate erred in law and in fact in failing to appreciate that having found that the Appellant lacked capacity to institute the impugned suit on behalf of the estate of Bitu Arap Chumo (Deceased) without a Grant of Letters of Administration, the impugned suit was rendered incompetent and thus only liable to be struck out.
 - ii. That the learned trial Magistrate erred in law and in fact in finding that the Plaintiff's claim which was premised on adverse possession was time-barred whereas in the circumstances,



limitation of time would strictly speaking be construed to run only against the registered owners of the subject suit parcels of land noting that the Applicant and other dependants of the said Bitu Arap Chumo (Deceased) were still in possession of the suit land known as L.R No. Kericho/Kongotik/445.

- iii. That the learned trial Magistrate erred in law and in failing to appreciate that granted the impugned suit had been lodged by a person lacking capacity, the same was incompetent and the court could not proceed to interrogate and make findings on its merits.
 - iv. That the learned trial Magistrate erred in law and in fact in failing to appreciate that the instant suit was only liable to be struck out for being incompetent as opposed to being dismissed as if the same was heard and determined on its merit.
3. The Appellant thus sought that the court sets aside the said Ruling and Order and thereafter make any further orders as may be just and expedient, with costs.
 4. The Appeal, was admitted on 29th June, 2023 and directions issued for the same to be disposed of by way of written submissions.

Appellant's submission

5. The Appellant framed her issues for determination as follows; -
 - i. Whether the Appellant's suit ought to have been struck out as opposed to being dismissed.
 - ii. Whether the Learned Trial Magistrate erred in finding that the Appellant's suit was time-barred in spite of the fact that it was premised on adverse possession.
6. On the first issue for determination, the Appellant reiterated that the Appeal herein had been precipitated by the Ruling that had been delivered by the Learned Trial Magistrate in Bomet Principle Magistrates Court Environment and Land Case No. E18 of 2021 wherein she had inter-alia upheld the Preliminary Objection that had been premised on the assertion that the Appellant lacked capacity to institute the matter before court. The Trial Magistrate had then proceeded to strike out and dismiss the suit on ground that not only was the suit time-barred, but that it had also been instituted by a person who lacked capacity to represent the estate of Bitu Arap Chumo (Deceased).
7. The Appellant contended that trial Magistrate having found that the Appellant lacked capacity to institute the impugned suit on behalf of the estate of Bitu Arap Chumo (Deceased) without a Grant of Letters of Administration; the suit had been rendered incompetent thus liable to be struck out. That subsequently, the Learned Trial Magistrate had erred in law and fact in failing to appreciate that granted the impugned suit had been lodged by a person lacking capacity, the same had been incompetent hence the court should not have proceeded to interrogate and make findings on its merits.
8. That in the circumstances, the order that had commended itself was that the suit had only been liable to be struck out for being incompetent as opposed to being dismissed as if the same had been heard and determined on its merits.
9. On the second issue for determination, it was the Appellant's submissions that her claim having been premised on adverse possession, limitation of time would be construed to run against the registered owners of the suit parcels of land considering that the Appellant and other dependants of the deceased Bitu Arap Chumo were still in possession of the suit parcel of land known as Kericho/Kongotik/445. She placed her reliance in the decided case of Benjamin Kamau Murma & Others v Gladys Njeri, C A No. 213 of 1996.



10. She thus prayed that the Ruling and Order of the court issued in Bomet Principal Magistrate Court Environment and Land Case No. E18 of 2021, be set aside and replaced with a finding that the Plaintiff's case in the said matter be struck out for being incompetent as opposed to being dismissed.

Respondents' submissions

11. In response to the Appellant's Appeal and in opposition thereto, the Respondents framed two issues for determination as follows;
 - i. Whether the Learned Trial Magistrate properly exercised his discretion by striking out the suit in Bomet Principal Magistrates Court Environment and Land Case No. 18 of 2021.
 - ii. Who should bear the costs of the suit.
12. On the first issue for determination, the Respondent submitted that the Appellant's suit had been dismissed by dint of a Preliminary Objection that had been raised by the Respondent's Counsel on grounds that the Appellant did not have locus standi to bring the suit against the Respondents on behalf of the estate of Bitu Arap Chumo (Deceased), that the Appellant was in violation of Section 7 of the *Limitation of Actions Act* as the suit was time barred and that there had been no certified extract of the title to the land which was in contravention of Order 37 Rule 7 of the Civil Procedure Rules.
13. That the learned trial Magistrate had reasoned that the Appellant had mainly based her claim on an agreement between her late husband and the Respondents' father. That she had made a mistake by bringing the suit in her own capacity as the Plaintiff instead of bringing the same as a personal representative of the deceased, which was in violation of Section 82 (1) of the *Law of Succession Act*. That the Appellant's failure to obtain a Grant of Letters of Administration to her late husband's estate had automatically denied her the capacity to file a suit on behalf of her deceased husband. Reliance was placed in a combination of decisions in the case of *Isaya Masira Momanyi v Daniel Omwoyo, Kisii Environment and Land Case No. 167 of 2016* and *Nolparakwo Olotuno Kartom & Another v Manwa Olotimo Kartom & Another, Narok Environment and Land Court ELC No. 31 of 2020* to submit that the trial Magistrate had properly exercised his discretion by striking out the Applicant's suit for lack of locus standi.
14. The Respondents placed reliance on the provisions of Section 7 of the Limitation of Action Act as well as a combination of decisions in the decided case of *Edward Moonge Lengusuranga v James Lunaiyara & Another [2019] eKLR*, *Metha v Shah [1968] E.A 321*, *Gathoni v Kenya Co-operative Creameries Ltd [1982] KLR 104* and *Iga v Makerere University [1972] EA* to submit that a suit barred by limitation was a claim barred by operation of law. That the Appellant's suit was bad in law and nothing could remedy it thus it did not deserve any particular consideration. That the Appellant had been overly negligent in the prosecution of her claim for adverse possession thus she could not be heard to plead for mercy and indulgence. That equity aided the vigilant and not the indolent thus affirming the Learned trial Magistrate's the decision to strike out the Appellant's suit.
15. That the law was clear that in order to confirm the status of a land in adverse possession scenario, a certified extract would be sufficient to confirm the same. That the Appellant herein had relied on an official search instead of a certified extract of the title to the land in question. Reliance was placed on the provisions of Order 37 Rule 7 of the Civil Procedure Rules, Section 7 of the *Limitation of Actions Act* and the decided case in *Wesley Kipyegon Bor & 8 Others v Richard Pares & 3 Others [2020] eKLR* to submit that the learned trial Magistrate had properly exercised his discretion by striking out the Applicant's fatally defective suit.



16. Regarding the costs of the suit, the Respondents hinged their reliance on the provisions of Section 27 of the *Civil Procedure Act* and the decided case in R v Rosemary Wairimu Munene, Ex-Parte Applicant, Ihururu Dairy Farmers Co-operative Society Limited to submit that in the instant case, the Appellant Appeal could not succeed and as such the said Appellant should be condemned to pay costs of the suit for troubling the Respondents in defending the instant Appeal. They urged the court to dismiss the Appeal with costs to the Respondents.

Determination

17. I have considered the record of Appeal, the judgment by the trial Magistrate, the written submissions by learned Counsel as well as the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the same, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial Magistrate, of seeing and hearing the witnesses as they testified. (See *Seascapes Ltd v. Development Finance Company of Kenya Ltd* [2009] KLR, 384). I also remind myself that this Court will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. (See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982-88] 1 KAR 278).
18. According to the proceedings herein, the Appellant herein instituted suit against the Respondent vide an Originating Summons dated the 7th June 2021 which was amended on 26th June 2021 in which she had sought to be entitled to a portion of land measuring 2.3 acres to be excised out of parcel No. Kericho/Kongotik/445 by virtue of the adverse possession having been in occupation for a period of over 58 years.
19. In response to the Originating Summons, the Respondents raised a Preliminary Objection dated 7th March 2022 on grounds that the Appellant lacked the locus standi to file the suit against them on behalf of the estate of Bitu Arap Chumo (Deceased), that secondly the suit was defective there having been no extract of the certificate of title annexed and third that the suit was time barred and in violation of Section 7 of the *Limitation of Actions Act*.
20. The matter was heard on the Notice of Preliminary Objection on the 14th March 2022 wherein vide a ruling delivered on 4th April 2022, the learned trial Magistrate ruled that the Appellant had brought suit in her own capacity yet the claim related to land that was bought by her late husband Bitu Arap Chumo wherein she had not taken out the letters of administration. The learned trial Magistrate then rightly proceeded to strike out the suit.
21. There ought to have been the end of the story but despite having found that the suit had been lodged by a person who lacked the locus standi, the learned trial Magistrate, despite warning herself of the dangers of getting into the merits of the suit, had nonetheless proceeded to interrogate the said merits wherein she had not only struck out the suit but had also dismissed the same with costs to the Respondents.
22. The matter for determination herein is whether the Learned Trial Magistrate erred in law and fact in dismissing the Appellant's suit.
23. In *Alfred Njau & Others v City Council of Nairobi* [1982-88] 1 KAR 229 the Court of Appeal gave meaning to the term locus-standi by stating:

“.....to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”



24. The Court of Appeal has authoritatively delivered itself on the issue of locus standi in case of Trouistik Union International & Another v Jane Mbeyu & Another (2008) IKLR (G&F) 730 where it was held that;

“To determine who may agitate by suit any cause of action vested in the deceased at the time of his death, one must turn to section 82 (a) of the *law of succession Act*. That section confers that power on personal representatives and on them alone”

25. The issue on locus standi is a primary point of law almost similar to that of jurisdiction and since the Appellant lacked the capacity to sue on behalf of her deceased husband’s estate, it rendered her suit incompetent. Indeed the Court of Appeal authoritatively delivered itself on the issue of locus standi in Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another (1982-99) 1 KAR and Morjaria v Abdalla [1984] KLR 490 to the effect that Locus standi was a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue or be sued would render the suit incompetent.

26. The issue of locus standi being a point of law which went to the root of the suit herein, its absence therefore rendered the suit fatally defective. With this in mind, I find and hold that the learned trial Magistrate having found that impugned suit had been lodged by a person lacking capacity, and since as it is trite that lack of locus standi was akin to lack of jurisdiction, she ought to have struck out the suit, downed her tools and made no further step.

27. By proceeding to interrogate the merits of the case despite her preliminary finding, I find that the learned trial Magistrate erred in law and fact. I thus allow the Appeal and set aside the order dismissing the Appellant’s suit as pronounced in the ruling dated the 4th April 2022, and instead substitute the dismissal order with an order striking out the Appellant’s suit.

28. The Appellant shall have the costs of this Appeal.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 16TH DAY OF MAY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

