



Chilumo v Johnson Mwangudza Mwatata c/o Soul Havest Ministries Bethsaida (Environment and Land Appeal E003 of 2023) [2024] KEELC 5739 (KLR) (23 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5739 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E003 OF 2023**

**EK MAKORI, J
JULY 23, 2024**

BETWEEN

CHIVATSI MUNGA CHILUMO APPELLANT

AND

**JOHNSON MWANGUDZA MWATATA C/O SOUL HAVEST MINISTRIES
BETHSAIDA RESPONDENT**

(Being an Appeal against the whole judgment delivered by Hon. J. M Kituku, Senior Principal Magistrate, on 12th July 2023 in ELC NO. E027 of 2021 at Kilifi - Johnson Mwangudza Mwatata C/o Saul Harvest Ministries Bethsaida v Chivatsi Munga Chilumo)

JUDGMENT

1. The Appellant’s appeal filed herein vide the Memorandum of Appeal dated 27 July 2022 raises 27 grounds of appeal, as contained on pages 2 to 10 of the Record of Appeal.
2. The Court invited parties to canvass the appeal through written submissions. The complied.
3. A meticulous perusal of the materials and submissions placed before me reveals that the issues I frame for the decision of the Court in this appeal are:
 - i. Whether the plaintiff’s suit at the Lower Court was time-barred.
 - ii. Was the defendant’s counterclaim in the Lower Court time-barred?
 - iii. Whether the respondent is the lawful owner of the one-acre portion of the suit property.
4. The role of the Appellate Court, as a fair and impartial entity, is to re-examine the evidence at trial and come up with its own conclusions while keeping in mind the findings of the trial Court. In the case



of *Selle & Another v Associated Motor Boat Co. Ltd & others* [1968] EA 123, these principles were enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”

5. The parties' pleadings in the Lower Court reveal that the cause of action revolved around a sale of land agreement dated 20 September 2001. This agreement was the genesis of the suit before the Lower Court, and the crux of the hearing and subsequent judgment is now impugned in this Court.
6. The plaintiff in the Lower Court testified as PWI and adopted the written statement dated 25th March 2021 as evidence in chief. He produced plaintiff exhibits 1 and 2. He said he was also a pastor in the plaintiff's church. On 20th September 2001, on behalf of the church, he entered a sale of land agreement for one (1) acre piece of land at a consideration of Kshs. 30,000/= He testified that the defendant in the Lower Court has been trespassing unto the said land, interfering with the quiet use and possession of the suit property. The defendant has failed to furnish the necessary completion documents to transfer the one(1) acre to the church's name.
7. The defendant testified that he is the registered owner of land parcel Kilifi/Roka/1827. In 2001, the plaintiff approached him and entered a sale of land agreement concerning four (4) acres at a consideration of Kshs 120,000/-. The plaintiff paid a deposit of Kshs. 30,000/—only and has never paid the remaining balance to date, despite several demands. Vacant possession was to have been handed upon deposit payment, and mutation and transfer were to happen upon completion of the purchase price.
8. In his analysis and determination, the Magistrate found that:

“It is not in dispute that the defendant is the registered owner of land parcel Kilifi/Roka/1827

On 20th September 2001, he entered into a sale of land agreement for four (4) acres to be hived from the suit property at a consideration of Kshs. 30,000/—per acre.

One acre was sold to the plaintiff Church, and three (3) acres were sold to one Josephat Ndumbu. No nexus has been laid between the two purchasers.

Upon execution of the agreement, the defendant received Kshs. 30,000/- and though it is not indicated whether it was in respect to the plaintiff's church or Josephat Ndubu's portion, from the evidence, it is the plaintiff who signed as the purchaser and appended the stamp of the church.

Clearly, therefore, the plaintiff church paid the whole purchase price of Kshs.30,000/- pursuant to the agreement.

Whether Joseph Nzombo has paid his three (3) acres is not what is before the Court.

In the circumstances of this case, since the defendant, in his own pleadings and evidence, has admitted he gave the plaintiff vacant possession, and the plaintiff proceeded to build a church, I find the plaintiff has proved his case on a balance of probabilities. I allow the plaint as prayed.



Consequently, the counter-claim is dismissed.

The defendant to pay costs for both the plaint and the counter-claim.”

9. One of the issues raised in the Lower Court is the Limitation of Actions. The appellant argued that the respondents' suit was time-barred.
10. According to the appellant, the sale agreement was entered on 20th September 2001. It had an express term and condition to be construed and interpreted as it was couched, but the learned trial Magistrate erred by imposing terms in the agreement that were contrary to the parties' terms and conditions. The appellant argues that the trial Magistrate's interpretation of the agreement led to a judgment that was not in line with the actual terms and conditions of the agreement.
11. The appellant further states it was an express term and condition of the said agreement that the plaintiff would purchase four (4) acres of land - Kilifi/ Roka/1827 at the cost of Kenya shilling one hundred and twenty thousand (Kshs. 120,000/=) and pay a deposit of thirty thousand (Kshs. 30, 000/-), but the plaintiffs refused to pay the balance of the purchase price and perform their obligation under sale contract, and the said agreement become null and void
12. The appellant submits that the learned trial Magistrate erred in law and fact by misinterpreting the pleadings. The Magistrate stated that “in the circumstances of this case and since the defendant in his own pleadings and evidence has admitted he gave the plaintiffs vacant possession and the plaintiffs proceeded to build a church, I find the plaintiff has proved his case on a balance of probabilities.” This is contrary to the appellant's defence, which was that it was an express term of the said agreement that the plaintiff would pay a deposit of Kshs 30,000/= and pay the purchase price balance to the defendant on giving vacant possession of the suit property.
13. The appellant states that when the respondent filed the suit on the 25th day of March 2021, there were no structures on the ground. When they started temporarily putting up structures and bringing materials to construct a church, an application under a certificate dated the 8th day of June 2021 was filed, and an order was issued on the 17th day of June 2021, stopping the construction.
14. The appellant then believes that the agreement dated the 20th day of September 2001 has been repudiated, and land recovery cannot be made based on the agreement aforesaid. The appellant cites several authorities in this regard – *Monata Matiko Chonchorio v John Marwa Chabaro* [2021] eKLR, which held that if a plaintiff's suit is time-barred and the counter-claim is based on the suit is also time-barred. There can be no suit to determine. A similar view in *Richard Toroitich v Mike K Lelmet & 3 others* [2014] eKLR, where the Court invoked section 4(1) of the *Limitation of Actions Act* and confirmed that the plaintiff's suit was time-barred. See also *Rwawal v Rawal* [1990] KLR 275 on the object of limitation enactment, which is to prevent a plaintiff from prosecuting stale claims on one hand and, on the other hand, protect a defendant after he had lost evidence for his defence from being disturbed after the lapse of time.
15. On the issue of limitation of actions, the respondent, on the other hand, submits that the terms of the contract were clear that the respondent, who was in the care of Soul Harvest Ministries Bethsaida, entered into an agreement with the appellant for one (1) acre of land. The respondent paid Kshs. 30,000/- for the said one-acre portion, as was in the agreement, took possession of the parcel of land and built the church—the payment of Kshs. 30,000/- has not been disputed by the appellant. Ownership of that one-acre portion of land is legally vested in the respondent by that sale agreement. The terms of the agreement bind parties; the case of *Pius Kimaiyo Langat v Cooperative Bank of Kenya Limited* [2017] eKLR is cited where the court held that it is not the business of Courts to rewrite contracts between parties. The terms of their contract bind them unless coercion, fraud, or undue influence are



pleaded and proved. The respondent avers that the terms in the agreement were clear: Soul Harvest Ministries-Bethsaida were apportioned one acre, which they paid for in full and took possession. Based on the preceding, the respondent is the bona fide purchaser who took possession of the suit property from the date of the agreement and is, therefore, the lawful owner of that one-acre portion sitting on Plot No. 1827. The respondent has been in possession since 2001 to the time of instituting the suit in 2021. An apparent perusal of the sale Agreement will show that the respondent bought the parcel of land, and the appellant's actions of trespassing, intimidating, harassing, and threatening the respondents and the congregation are illegal.

16. Was the respondent's suit time-barred? The appellant argues that this suit originated from the Sale Agreement dated 20th September 2001, and hence, it is opined by the appellant that the suit was time-barred. However, in the suit, the respondent believes that the suit or the cause of action originated from the acts of trespass by the appellant unto a parcel of land that had been handed over possession to the church. The respondent had long paid for the land and had taken possession, as was captured throughout the proceedings during the trial in the Lower Court.
17. Respondent avers - it is trite law that when one seeks an order from a Court to be declared the lawful owner of a property, he or she has to show proof of ownership. In this case, the sale agreement was only used as proof presented before the trial Court to show that the respondent had legally acquired the property that they were in possession of at the time of the trial and that the appellant's act of trespass was illegal.
18. The Lower Court did not discuss whether the claim or the counterclaim was time-barred. The defendant raised this issue in paragraph 8 of the defence:

“The defendant avers and maintains that the plaintiff has no claim at all and the same is statute-barred and should be dismissed with costs.”
19. The appellant reiterated the same position in the submissions in the Lower Court and this appeal.
20. Having reviewed the records and submissions, I can say that the sale agreement dated the 20th day of September 2001 is significant. It is written in Kiswahili, and the terms are as follows:

“mapatano haya ya uuzaji wa shamba ni baina ya Bw. Chivasi Munga Chilumo... anayejulikana kama muuzaji, na Bishop Joseph Ndumbu (3 acres) na kanisa la Soul Harvest Ministries Bethsaida (1 acre) wanaojulikana kama wanunuzi.

Kwa makubariano haya yanayoshuhudiwa muuzaji amekubali kuuza sehemu ya ardhi yenye eneo la ekari nne(4) kwa shilingi mia moja na ishirini elfu(120,000/-), yaani Sh. 30,000/- kwa kila ekari moja.

Ardhi ya muuzaji iko katika ploti... ya Roka... Location ndani ya Tezo/Roka Settlement Scheme Wilaya ya Kilifi.

Muuzaji leo alihamishakatika umilikaji wake sehemu hiyo ya shamba iliyotajwa kwa wanunuzi tarehe hii ya leo.

Muuzaji leo hii amepokea Ksh. 30,000/- shilingi elfu thelathini pekee.

Ushahidiumeshuhudiwa na watu wafuatao.

1. FurahaNyambu
2. RobertKahindi



3. Sarah Mwangudza
4. Moses Kazungu
- Sahihi ya Muuzaji
- Sahihi za Wanunuzi
- Pastor Johnson Mwangudza
- (Rubber stamp for Hosana Harvest Temple Roka).”

21. What I can see next is that apart from the Kshs 30,000/—paid to the vendor during the execution of the agreement, Kshs.10,000/—was paid to the vendor on 2nd March and 11th April 2002, in two equal installments, being malipo ya ekari tatu. Among the witnesses was Pastor J. Mwangudza, who represented the Church.
22. The record suggests that no other monies were paid towards the completion of the purchase of the balance - ‘ekari tatu’ (three) acres.
23. It will seem things went unto a lull until this suit was originated.
24. The Appellant sought in the Lower Court, among other prayers, completion documents for the church's one acre (1) of land and a permanent injunction to restrain the defendants from trespassing on the said one acre (1) of land.
25. In finding for the plaintiff, the trial Court correctly observed that the appellant had received Kshs. 30,000/- for one acre of land, which he inferred was paid by the church since Johnson Mwangudza signed and appended his signature and rubber stamp for the church. But the Magistrate doubted whether the said monies were for the one (1) acre portion or the other third party named in the agreement, one Joseph Ndumbu. This is what the Magistrate said:

“Upon execution of the agreement, the defendant received Kshs. 30,000/- and though it is not indicated whether it was in respect to the plaintiff church or Josephat Ndubu’s portion, from the evidence, it is the plaintiff who signed as the purchaser and appended the stamp of the church.”
26. That doubt still lingers to this day. Was the Kshs 30,000/—paid for one (1) acre for the church? Or was it part payment for the whole four (4) acres? The answer is that, based on the evidence placed before the Magistrate, one could not have arrived at the conclusion he did that it was for the church. In my humble view, the agreement is couched as the part payment was an installment for the four (4) acres. And what is also clear is that one (1) acre was going for Kshs. 30,000/-
27. As correctly submitted by the parties- it is not the work of the Court to rewrite contracts for parties – see Pius Kimaiyo Langat v Cooperative Bank of Kenya Limited [2017] eKLR, where the Court held:

“We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contract between parties. They are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
28. From the literal interpretation of the agreement, as I have stated, it is clear that Kshs. 30,000/—was for one (1) acre—no clause in the agreement assigned that the church or Joseph Ndumbu paid money. The agreement was for the sale of all four (4) acres at a consideration of Kshs. 120 000/- .This can also be



garnered from the further installments made on the 2nd of March and 11th of April 2002, and witnessed by Pastor Johnson Mwangudza representing the church as he did in the initial deposit payment.

29. In the proceedings before the Lower Court, the other purchaser, described in the agreement as Bishop Joseph Ndumbu, never signed the deal nor paid any money. It is not explained how he pranced into the agreement when the appellant was dealing with Pastor Johnson Mwangudza for the church. But the church purchased all four (4) acres the Pastor signed for.
30. At the Lower Court, it was not clear whether the church occupied one (1) acre of the suit property only or the entire four (4) acres, which is why the trial Court enjoined the plaintiffs from further construction in its orders issued on the 17th day of June 2021.
31. The bedrock of the suit in the Lower Court was the agreement entered in 2001. And if one were to interpret in the literal sense as I have done, the sale of land involved four (4) acres. The total purchase price was Kshs. 120,000/- an acre went for Kshs. 30,000/ a further payment was made of two equal installments of Kshs 10,000/ on the 2nd of March and 11th of April 2002, respectively. No other payments were ever made after that, and no steps were taken by the parties to complete the said agreement for the last 22 years. I see no clause on the deal on the completion date. Since it is a sale of land agreement and the land was agricultural, consent should have been obtained from the relevant Land Control Board. This then became a void contract.
32. Whether we are dealing with a contract, six years lapsed in 2008. Whether it is the recovery of land, time was up in 2014, and the claim before the Magistrate was time-barred. As correctly submitted, a time-barred claim cannot be resuscitated in whatever form; see *Monata Matiko Chonchorio v John Marwa Chabaro*[2021]eKLR, where this Court (Kullow J.) held:

“Jurisdiction of a court is conferred by a Statute or *the constitution*, and there is no doubt that the issue limitation of time goes to the root of the jurisdiction of a court. The law speaks for itself, thus, an appeal, whether successful or not, cannot be used to confer jurisdiction to a court where there was none.

17. In the case of *Gathoni –vs- Kenya co-operative Cremires Ltd* (1982) KLR 104 Potter, JA stated the rationale of the Law of Limitation as follows:

“The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

18. Further, In *Anaclet Kalia Musau v Attorney General & 2 Others* [2020] eKLR, Civil Appeal 111 of 2017, the Court of Appeal in determining a jurisdictional issue which was never raised by the parties to the suit stated as follows:

“The solitary issue in this appeal is, whether the suit before the High Court was statutorily time barred. To demonstrate that time limitation is a jurisdictional question and that if a matter is statute-barred a court has no jurisdiction to entertain it, we cite the decision of the Supreme Court in the case of *Nasra Ibrahim Ibren V. Independent Electoral and Boundaries Commission & 2 others, Supreme Court Petition No. 19 of 2018*, where that court stressed the



fact that jurisdiction is everything and that a court may even raise a jurisdictional issue suo motu. It said:

“40 A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 stated thus:

“25. What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...” (Emphasis supplied)

We fortify that view by quoting yet another passage from the East African Court of Appeal in the matter of Iga V. Makerere University (1972) E. A 62, where it was stated that;

“The limitation 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..... The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, and no grounds of exemption are shown in the plaint, the plaint must be rejected.” (Our emphasis). The learned Judge in this appeal, no doubt, did not err when she determined whether, by operation of the law, she had to down tools for want of jurisdiction.”

33. Arising from the preceding, the claim brought by the plaintiff before the Magistrate was time-barred. The same goes for the claim by the defendant in the counter-claim – what is good for the goose is also good for the gander.
34. On the issue of who owns the one (1) acre of land, as already stated, the title to the whole of the suit property is registered in the appellant’s name. As demonstrated, the sale of the four (4) acres never materialized because the respondent did not pay the purchase price in full as demanded by the agreement. I already ruled that the Statute of Limitations extinguished the respondent’s claim and that of the defendant in the counterclaim.
35. Having found so, the appeal herein succeeds partially to the extent of dismissing both the plaintiff’s claim and the defendant’s counterclaim in the Lower Court, with each party bearing its own costs in this appeal and the proceedings in the Lower Court.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 23RD DAY OF JULY 2024.

E. K. MAKORI



JUDGE

In the Presence of:

Mr. Mangaro for the Appellant.

Ms. Amina, for the respondent

Happy: Court Assistant

