



REPUBLIC OF KENYA



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**Mwachiru v Abdalla & another (Environment and Land Appeal
E003 of 2023) [2024] KEELC 5427 (KLR) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5427 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E003 OF 2023
NA MATHEKA, J
JULY 23, 2024**

BETWEEN

SHEILA SADA MWACHIRU APPELLANT

AND

AISHA ABDALLA 1ST RESPONDENT

REAUBEN ATHMAN ALIAS DULLA 2ND RESPONDENT

JUDGMENT

1. The appellant herein being aggrieved by the entire judgment of Honourable J.B Kalo delivered on November 10, 2022 in CMELC 70 of 2018 hereby appeals to this Honourable Court on the following grounds inter alia;
 1. That the learned trial magistrate erred in law and fact in his failure to take into consideration the magnitude of the entire dispute and appreciate the evidence tendered thus selectively dealing with an issue not before him thereby reaching a wrong conclusion.
 2. That the learned trial magistrate erred in law and fact and misdirected himself in his failure to take into consideration the evidence brought by the appellant and thereby reaching a wrong conclusion that the dispute was for recovery of an interest in land and therefore erred in law in his finding that the suit was statutorily barred by section 17 of the *Limitations of Actions Act* (Cap 22) of the Laws of Kenya.
2. The appellant prays that;
 1. The appeal be allowed.
 2. That the judgement of the Honourable J.B Kalo Chief Magistrate delivered on November 10, 2023 be set aside.



3. Costs of the appeal.
 4. Any other relief deemed fit to grant by this Honourable Court.
3. The court has considered the appeal and the appellant submissions therein. The appellant had filed CMELC 70 OF 2018 seeking inter alia orders for a permanent injunction against the second respondent as well as vacant possession to be enforced against the second respondent. The plaintiff's case is that she entered into a sale agreement between herself and the 1st respondent on April 15, 2004 for purchase of Plot No. Epc. E199 and she constructed a structure but the 2nd respondent who is a son to the 1st respondent interfered with the quiet and peaceful possession of the appellant who demolished the said structure and erected his own permanent structure on the suit property. PW1, the appellant testified on oath that she bought the suit property from the 1st respondent for a consideration of Kenya Shillings Fifty Thousand (Kshs. 50,000) that her name was entered in a data base of land owners at Kwa Bulu pending allotment and registration of her proprietary interest. That the structure she had constructed on the land was destroyed and she made a report to the area chief and village elder and thereafter she reported to the police.
 4. PW2, Gladys Mwachiru testified that the plaintiff is her sister and that she escorted her sister to Bulu where they met an unnamed lady and negotiated the purchase price and she witnessed the payment of the consideration. She was able to identify the sale agreement and her signature on the agreement and was adamant that the appellant is the rightful owner. PW3 Jacob Ngongo was also a witness when the appellant purchased the suit property. He also stated that the appellant started survey of the suit property in 2014 and that he did not know the family of PW4. PW4, Kadise Ngala is a witness who testified that she lived at Kwa Bulu and that she knew the plaintiff and introduced her to the 1st respondent who is her friend. She stated that the 1st defendant had requested her to look for a buyer while the appellant had also requested her to look for land for sale. That she brought the appellant and the 1st respondent together and was also involved in the negotiations. She stated that PW3 and her siblings were present and that PW3 prepared the sale agreement and she put her finger prints as witness. In cross examination she stated that the 1st respondent was married but none of her family members were present when the sale agreement was executed.
 5. In support of the defence case, DW1 Reuben Athman testified that the suit property belonged to the 1st respondent and that he was not aware that the 1st respondent had entered into a sale agreement with the appellant. He further testified that he had obtained grant of letters of administration to defend the suit and that he had constructed a house on the suit property. He denied that the appellant had attempted to develop the suit property. On cross examination, he stated that he was born at Bulu and that his mother did not have any land except the suit property. That in 2004 he was 17 years and residing on the suit property and admitted that he was not aware of whether the 1st respondent had the right to sell the suit property without consulting him. He denied demanding money from the appellant but was aware that there was a committee at Kwa Bulu who had a database of all land owners in the area and the committee would normally resolve any dispute that arose at Kwa Bulu and that he resisted attempts to participate in solving the dispute at the committee. He also stated that he does not have title as there is a pending court case over plots at Kwa Bulu and further that the plaintiff declined to negotiate a settlement because of the instant trial court suit. DW2, Riziki Charo Kitsao a daughter of the 1st respondent and sister to the 2nd respondent testified that she was not aware of the sale agreement between the 1st respondent and the appellant and does not know the appellant. That she was 27 years old at the time of the sale agreement and that her parents never informed her of the same.



6. DW3, Fatuma Charo a daughter to the 1st respondent stated that she knew the appellant and that the 1st respondent was the owner of the suit property and she is not aware of any sale agreement between the appellant and the 1st respondent; that the 2nd respondent constructed a house on the suit property in 2019. In cross examination she stated that she would have been involved in the sale of the suit property and that the 1st respondent had set aside the suit property in favour of the 2nd respondent.
7. Both the appellant and the respondents filed their written submissions and the court pronounce itself vide the afore mentioned judgement and dismissed the entire suit for reason that the appellant was guilty of laches in filing the suit. The court held that under section 17 of the *Limitations of Actions Act*, more than 12 years had passed from the date of execution of the sale agreement dated April 15, 2004 as the trial suit was filed on November 5, 2018.
8. After careful and meticulous consideration of the pleadings and submissions, the issue for determination is whether the appellant was time bound by section 17 of the *Limitations of Actions Act*?
9. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another vs Associated Motor Boat Co. Ltd & Others* (1968) EA 123, this principle was 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..."
10. Similarly, Sir Kenneth O'Connor P, in *Peters vs Sunday Post Ltd* (1958) EA at p 429, stated;

" It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. But the jurisdiction "(to review the evidence)" should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."
11. That passage, was cited with approval by *Sotiros Shipping vs Sauviet Sobolt*, Times March 16, 1983 where it was held;

" It is uncertain whether, their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court, they should be ever mindful of the advantages enjoyed of trial judge who saw and heard the witnesses and were in an incomparably better position, than the Court of Appeal, to assess the significance of what was said, how it was said, and, equally important, what was not said." In my judgment, the finding of the High Court has not been shown to have been wrong on liability, and, although I have the misfortune to differ from my brethren, I would dismiss the appeal on that issue."
12. The trial suit was dismissed on a point of law and the facts were never analysed by the trial court. It is therefore only proper that the appeal will only be on that point of law. If the court engages itself in



analyzing the facts, it would be acting as the court of the first instance. The relevant section used in dismissing the trial suit was section 17 of the Limitations of Actions Act, Cap 22 which states as follows;

" Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished."

13. The relevant section prescribing the period for recovery of actions to land is section 7 of the Limitations of Actions Act, Cap 22 is 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 accrual of rights of action have been provided in section 3 and 4 of the Limitations of Actions Act, Cap 22. Section 3 states as follows:

" (3) References in this Act to a right of action to recover land include references to a right to enter into possession of the land, and references to the bringing of an action in respect of such a right of action include references to the making of such an entry."

While section 4 states as follows:

" (4) In Part III, references to a right of action include references to a cause of action and to a right to receive money secured by a mortgage or charge on any property or to recover proceeds of the sale of land, and to a right to receive a share or interest in the movable estate of a deceased person; and references to the date of the accrual of a right of action are—

- (a) in the case of an action for an account, references to the date on which the matter arose in respect of which an account is claimed;
- (b) in the case of an action upon a judgment, references to the date on which the judgment was delivered;
- (c) in the case of an action to recover arrears of rent or interest, or damages in respect thereof, references to the date on which the rent or interest became due."

15. In the case of *Mebta vs Shab* (1965) EA 321 where the court stated 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."



16. In *Gatboni 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."
17. In the case of *Iga vs Makerere University* (1972) EA, the Court had this to say on the Law of Limitation;
- "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."
18. This court cannot assume that the right of action started taking place as at the date of the agreement of sale as it is the evidence of DW2 and DW3 that construction began in 2019 and going by the letters written by the Chief and the OB report numbers, the appellant was dispossessed of the suit property sometime in 2018. The right of action could not have started accruing when the appellant was still in possession. Furthermore, the 2nd respondent and his witnesses claim to have been born in the homestead where the 1st respondent was the owner yet the appellant was able to allegedly build a *kibanda*.
19. Furthermore, Section 26 of the *Land Registration Act*, Cap 300 states that *prima facie* evidence of proof is a certificate of title and none of the parties had one including the previous owner who was the 1st respondent.
- Section 26 of the *Land Registration Act*, Cap 300 states as follows:
- "(1) 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—
- (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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."
20. None of the parties produced a certificate of title and therefore none of the parties are indefeasible owners of the suit property. However, the appellant had a right to have possession by virtue of the sale agreement she entered into with the 1st respondent, and this is assuming that the 1st respondent had good title to the suit property. The database relied on by the appellant only gives the plot numbers as Epc0 E038 or Epc0 E045 and in this suit Epc0 E199 which are not recognized units of registrations



under the land tenure. The land registrar who is the custodian of the land register was not summoned to give evidence to enable the court arrive in a decision as to whether the appellant had a right of action to recover land from the 1st respondent. The appellant claims that the land was surveyed but no titles had been issued while the 2nd respondent claimed that there is a dispute pending in court but the details of which were not elucidated.

21. In view of the above, the court allows the appeal to the extent of setting aside the judgment of Hon. B. Kalo delivered on 10th November and hereby order under Section 78 of the Civil Procedure Act, Cap 21 that the matter be heard afresh. No orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF JULY 2024.

N.A. MATHEKA

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

