**Chepkwany (Wrongly Sued as Naomi Wangari Munene) & 4 others v Kariuki & 4 others (Environment and Land Appeal E007 of 2023) [2024] KEELC 6131 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6131 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA**

**ENVIRONMENT AND LAND APPEAL E007 OF 2023**

**YM ANGIMA, J**

**SEPTEMBER 19, 2024**

**BETWEEN**

**NAOMI WAMBUI CHEPKWANY (WRONGLY SUED AS NAOMI WANGARI MUNENE) ..... 1ST APPELLANT**

**DAVID MWANGI KIMONDO ..... 2ND APPELLANT**

**ELIZABETH WARIGIA KIMANI ..... 3RD APPELLANT**

**RHODA WANJUGU KIAMA (WRONGLY SUED AS RHODA NJERI KIAMA) ..... 4TH APPELLANT**

**SAMUEL KARIUKI GITARI ..... 5TH APPELLANT**

**AND**

**CYRUS MAINA KARIUKI ..... 1ST RESPONDENT**

**PENELOPE CAROL WAMBUI MAINA ..... 2ND RESPONDENT**

**DAVID HARRISON KARIUKI MAINA ..... 3RD RESPONDENT**

**EDWARD ELLAM MINJU MAINA ..... 4TH RESPONDENT**

**JACKSON GICHUKI MAINA ..... 5TH RESPONDENT**

***((Being an appeal against the judgment and decree of Hon. C. Obulutsa (CM) dated 16.03.2023 in Nyahururu CM ELC No. E021 of 2021)***

## JUDGMENT

### A. Introduction

1. This is an appeal against the judgment and decree of Hon. C. Obulutsa (CM) dated 16.03.2023 in Nyahururu CM ELC E021 of 2021 – Cyrus Maina Kariuki & 4 Others -vs- Naomi Wangari Munene & 4 Others. By the said judgment, the trial court allowed the Respondents' suit against the Appellants as prayed in the plaint together with costs of the suit.

### B. Background

2. The record shows that vide a plaint dated 16.03.2021 the Respondents sued the Appellants seeking the following reliefs:

    a. A permanent order of injunction do issue restraining the Defendants either by themselves, their agents, servants or anybody claiming either under them or in their names from in any manner whatsoever interfering with the subject parcels of land.

    b. An eviction order do issue against the Defendants herein and all their agents, servants and anybody else whatsoever either claiming in or by their name from the Plaintiffs' parcels of land, land reference Nyandarua/Pesi/590, Nyandarua/Pesi/591, Nyandarua/Pesi/592, Nyandarua Pesi/598, Nyandarua/Pesi/599, Nyandarua/Pesi/603 and Ny6andarua/Pesi/604.

    c. Costs of the suit and interest.

    d. Any other or further relief that this Honourable Court may deem fit and just to grant.

3. The 1st Respondent pleaded that at all material times he was the registered owner of Title No. Nyandarua/Pesi/78 (Parcel 78) which he subdivided into several parcels and thereafter transferred some of the parcels to the 2nd – 5th Respondents who were his children. The resultant sub-divisions which were transferred to the 2nd – 5th Respondents were Nyandarua/Pesi/590, 591, 592, 598, 599, 603 and 604 (the suit properties).

4. It was the Respondents' pleading that they enjoyed quiet occupation of the suit properties until 2019 when the Appellants invaded the suit properties and constructed structures on some of them without their knowledge, consent or authority. It was the Respondents' case that the Appellants' said actions were illegal and fraudulent. The Respondents further pleaded that despite issuance of a demand and notice of intention to sue the Appellants had failed to vacate the suit properties thereby rendering the suit necessary.

5. By a joint statement of defence dated 01.11.2021 the Appellants denied the Respondents' claim in its entirety. They pleaded that they had purchased the suit properties for valuable consideration around the year 2005. They pleaded that they had been in occupation of the suit properties since 2005 with the knowledge of the Respondents and that the 1st Respondent had fraudulently transferred the suit properties to the rest of the Respondents in 2015 in breach of the relevant sale agreements.

6. The Appellants further pleaded that the Respondents' suit was time barred under the *Limitation of Actions Act* (Cap. 22) and that they intended to institute a claim for adverse possession of the suit properties before the Environment and Land Court. As such, the Appellants contended that they were legally in possession of the suit properties hence they prayed for dismissal of the Respondents' suit with costs.

**C. Trial Court's Decision**

7. The record shows that upon a full hearing of the suit, the trial court found for the Respondents. The court found that the Respondents were the registered owners of the suit properties and that there was no evidence that the 1st Respondent had sold or transferred the suit properties to them. The court further held that in the absence of a power of attorney donated to an agent, the 1st Respondent's cousin could not legally deal with the suit properties on behalf of the 1st Respondent.

8. It was also the trial court's finding and holding that the Respondents' suit was not time-barred under the *Limitation of Actions Act* (Cap.22) because the action was based on fraud and that the Respondents had only discovered the Appellants' fraud in 2019. As a result, the trial court entered judgment for the Respondents as prayed in the plaint and awarded them costs of the suit.

**D. Grounds of Appeal**

9. Being aggrieved by the said judgment, the Appellants filed a memorandum of appeal dated 13.04.2023 raising the following grounds:

    a. That the learned trial magistrate erred in law and in fact in finding that the dates when the Defendants now Appellants took possession of their portions of land is unknown contrary to the documentary evidence produced as exhibits.

    b. That the learned trial magistrate erred in law and in fact in finding that the Plaintiffs now Respondents were in possession of the suit properties prior to the year 2019 contrary to the evidence contained in the sale agreements produced as defense exhibits.

    c. That the learned trial magistrate erred in law and in fact in finding that the Plaintiffs' suit was not statutorily time barred.

    d. That the learned trial magistrate erred in law and in fact in dismissing the Appellants' defence based on the doctrine of adverse possession contrary to the overwhelming evidence on record.

    e. That the learned trial magistrate erred in law and in fact in failing to find that the Plaintiff's title deeds were subject to the Defendants' overriding interest as persons in possession at the time of their issuance.

    f. That the learned trial magistrate erred in law and in fact in finding that the Appellants failed to prove that they had purchased the suit land from the 1st Respondent through his authorized agent one Justus Nderitu.

    g. That the learned trial magistrate erred in law and in fact in finding that the Appellants were trespassers liable for eviction and in ordering that they be evicted notwithstanding the undisputed fact that they had been in possession of the suit land for over 12 years.

    h. That the learned trial magistrate erred in law and in fact in failing to hold that the suit was fatally defective as the Appellants were sued through the wrong names.

10. As a result, the Appellants sought the following reliefs in the appeal:

    a. That the appeal be allowed and the judgment of the trial court set aside.

    b. That the Respondents' suit before the trial court be dismissed with costs.

    c. That the Appellants be awarded costs of the appeal.

**VIE. Directions on Submissions**

11. When the appeal was listed for directions it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellants filed submissions dated 03.07.2024 whereas the Respondents' submissions were dated 09.07.2024.

**F. Issues for Determination**

12. Although the Appellants raised 8 grounds in their memorandum of appeal, the court is of the view that they may be summarized as follows:

    a. Whether the trial court erred in law and fact in holding that the Appellants had failed to prove a valid purchase of the suit properties.

    b. Whether the trial court erred in law in holding that the Respondents' suit was not time-barred.

    c. Whether the trial court erred in law and fact in allowing the Respondents' suit.

    d. Who shall bear costs of the appeal.

**G. Applicable Legal Principles**

13. This court as a first appellate court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of Selle & Another –vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123 at page126 as follows:

> " ...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 that 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 on the demeanor of a witness is inconsistent with the evidence in the case generally."

14. Similarly, in the case of Peters –vs- Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows:

> " ...it is 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 had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion..."

15. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in Watt –vs- Thomas [1947] A.C. 424 at page 429 – 430 as follows:

> " My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use

English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

16. In the case of Kapsiran Clan -vs- Kasagur Clan [2018] eKLR Obwayo J summarized the applicable principles as follows:

    a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

    c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

**H. Analysis and Determination**

**a. Whether the trial court erred in law and fact in holding that the Appellants had failed to prove a valid purchase of the suit properties**

17. The court has considered the material and submissions on record on this issue. The trial court concluded that there was no evidence of a valid purchase primarily because the agent (DW1) who had sold the suit properties on behalf of the 1st Respondent did not produce a power of attorney or other written authority from the then registered owner (PW1). The copy of the handwritten letter of authority was not admitted in evidence because DW1 had failed to produce the original thereof.

18. The material on record shows that PW1 and DW1 were cousins and that DW1 was an assistant chief at the material time. The evidence of DW1 at the trial was to the effect that he had a handwritten letter of authority from PW1 to sell the suit properties on his behalf and to undertake all necessary transactions to facilitate their transfer to the purchasers. It was his evidence that upon receipt of the purchase he would either remit it to the PW1 or his wife. He produced one copy of a bankers' cheque dated 19.08.2005 for Kshs.270,000/= in the name of Rose N. Maina who was said to be the wife of the PW1.

19. On his part, PW1 denied having authorized his cousin (DW1) to sell and transact on his behalf. He also denied having received the purchase price for the suit properties. However, he did not deny that Rose

N. Maina was his wife and that she was known to DW1. He (PW1) confirmed that Rose had received payment from different purchasers to whom he had sold part of his land. During re-examination, however, PW1 conceded that he had given a letter of authority but not a power of attorney to DW1.

20. There was no indication that the 1st respondent ever reported the alleged fraud on the part of his cousin either to administrative or law enforcement agencies for having sold the suit properties without his knowledge and consent. There is no indication on record to show that any action, whether or civil or criminal, was ever taken against DW1 for purporting to sell the suit properties on behalf of PW1.

21. The material on record shows that some of the Appellants lodged cautions against the suit properties upon discovering that the 1st Respondent had transferred them to his children. There is no indication to show that the 1st Respondent ever applied for removal of the cautions. There is even no indication that he sought removal of the cautions in the suit before the trial court. The court is of the view that the trial court did not correctly evaluate the evidence on record as a whole while holding that DW1 had no authority from the 1st Respondent to sell the suit properties. The court believes the evidence of DW1 that he was given written authority to deal with Parcel 78. Although it may have been desirable for DW1 to obtain a power of attorney, he could not be equated with a fraudster who was simply grabbing his cousin's property without his knowledge or consent. If DW1 had failed to remit the entire purchase price from the Appellants then that could only have given rise to civil debt due from DW1 to PW1 and not a ground for repudiating the sale transactions.

22. The court is thus of the view that there was sufficient evidence on record to demonstrate on a balance of probabilities that DW1 had the authority of the 1st Respondent to deal with the suit properties on his behalf even though it was not in the form of a power of attorney. The court, therefore, finds and holds that the trial court erred in law and fact in holding that there was no evidence of a valid purchase of the suit properties by the Appellants' and that they were merely trespassers on the suit properties.

**b. Whether the trial court erred in law and fact in holding that the Respondents' suit was not time barred**

23. The court has considered the material and submissions on record on this issue. The Respondents fully supported the trial court's decision that the suit was not time barred because the claim was based upon fraud and that the Respondents had only discovered the alleged fraud in 2019 or thereabouts. The Appellants on their part were of a contrary opinion.

24. Section 7 of the *Limitation of Actions Act* (Cap.22) states 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."

25. On the other hand Section 26 of the said Act stipulates that:

> " Where, in the case of an action for which a period of limitation is prescribed, either:
>
> a. the action is based upon the fraud of the Defendant or his agent, or of any person through whom he claims or his agent; or
>
> b. the right of action is concealed by the fraud of any such person as aforesaid; or
>
> c. the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which:

i. in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

j. in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

26. The court has perused the Respondents' claim before the trial court. Their claim was quite straightforward. Their claim was that they were the registered owners of the suit properties but the Appellants had without any colour of right invaded the suit properties and occupied the same. It was not based on the fraud of the Appellants. Even though the Respondents had mentioned fraud in paragraph 8 of the plaint no particulars of fraud were pleaded.

27. The court is thus of the opinion that the trial court erred in law in invoking Section 26 of the *Limitation of Actions Act* when the Respondents' claim for recovery of the suit property was not based upon any fraud on the part of the Appellants or concealment of fraud. The applicable section to the claim was essentially Section 7 of the said Act.

28. A consideration of the material on record shows that at all material times the 1st Respondent was the registered owner of Parcel 78. He later caused the same to be sub-divided into several portions including the suit properties which he transferred to his children in 2015. The record shows that the land register for Parcel 78 was opened on 06.07.1989 whereas the 1st Respondent was registered as proprietor on 18.07.1995.

29. The material on record further shows that upon sub-division of Parcel 78 the land registers for the suit properties were opened on 07.10.2003. The suit properties were transferred to the 2nd to 5th Respondents in 2015. The court is of the opinion that the transfers and change of ownership in 2015 did not stop time from running under the *Limitation of Actions Act*. The evidence before the trial court showed that the Appellants took possession of the suit properties in 2005 or thereabouts upon purchase even though not all of them constructed houses thereon at that time. There is evidence on record to demonstrate that the suit properties were developed by the Appellants with visible developments.

30. The court does not believe as true the Respondents' evidence that the Appellants only entered the suit properties in 2019 because there is evidence demonstrating earlier occupation and developments by most of the Appellants including DW1 who had sold the properties to them on behalf of the 1st Respondent. The court takes the view that time for purposes of the Limitation of Action started running in 2005 and by the time the Respondents filed their suit in 2021 about 16 years had lapsed. The right of action in this case first accrued to the 1st Respondent who was the registered owner in 2005 and continued running until 2021 when he and his co-Respondents filed suit. The Respondents' suit was thus clearly time-barred by the time the plaint was filed on 18.03.2021.

31. The expiry of the limitation period under Section 7 of the *Limitation of Actions Act* was thus a complete answer to the Respondents' claim for recovery of the suit property and it was not even necessary for the

trial court to consider the doctrine of adverse possession. The Appellants had simply pleaded limitation of actions as a defence to the action and there was no counterclaim for adverse possession. In fact, they had expressly indicated in their joint defence that they intended to file a separate claim for adverse possession before the Environment and Land Court. The court is thus of the opinion that the trial court erred in law in finding and holding that the Respondents' suit was not statute-barred.

**d. Whether the trial court erred in law and fact in allowing the Respondents' suit**

32. The court has already found and held that the trial court erred in law and fact in holding that there was no evidence of a valid purchase of the suit properties by the Appellants. The court has also found and held that the trial court erred in law in holding that the Respondents' suit was not time-barred under Section 7 of the *Limitation of Actions Act* (Cap.22). The court is thus of the view that the trial court erred in law and fact in allowing the Respondents' claim.

**a. Who shall bear costs of the appeal**

33. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the Appellants shall be awarded costs of the appeal.

**I. Conclusion and Disposal Orders**

34. The upshot of the foregoing is that the court finds merit in the Appellants' appeal. As a consequence, the court makes the following orders for disposal thereof:

    a. The appeal be and is hereby allowed.

    b. The judgment of the trial court in Nyahururu CM ELC No. E021 of 2021 dated 16.03.2023 be and is hereby set aside and an order is hereby made dismissing the Respondents' suit with costs.

    c. The Appellants are hereby awarded costs of the appeal.

    It is so decided.

**JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED IN THE PRESENCE OF THE PARTIES THIS 19TH DAY OF SEPTEMBER, 2024.**

**In the presence of:**

Mr. Gakenia Gacheru holding brief for Mr. Waichungo for the Appellant

Ms. Njoki Mureithi for the Respondent

C/A - Carol

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**Y. M. ANGIMA**

**JUDGE**