Nabuobwa v Wekesa (Suing as the Legal Administrator of the Estate of Sebastian Wekesa Milimo) (Environment and Land Appeal E005 of 2022) [2024] KEELC 13393 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13393 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT AND LAND APPEAL E005 OF 2022

BN OLAO, J

NOVEMBER 21, 2024

BETWEEN

AGNES NABUOBWA ..... APPELLANT

AND

TOBIAS NYONGESA WEKESA (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF SEBASTIAN WEKESA MILIMO) ..... RESPONDENT

(Being an appeal from the Judgment of P. K. KULECHO Senior Resident Magistrate Busia delivered on 16th March 2022 in BUSIA CMC ELC CASE NO E072 of 2021)

JUDGMENT

1. Tobias Nyongesa Wekesa (the Respondent herein and suing as the Legal Representative of the Estate of Sebastian Wekesa Milimo) first approached the Chief Magistrates Court Busia by a plaint dated 4th June 2021 and later amended on 11th June 2021. He sought against Agnes Nabuobwa (the Appellant herein) judgment as follows with respect to the land parcel No North Teso/Aboloi/258 (the suit land):

    a. Eviction and a permanent injunction restraining the Appellant whether by herself, her agents, workers and/or servants from occupying and/or burying the remains of her husband Alfred Barasa on the land parcel No North Teso/Aboloi/258.

    b. Alternatively for the recession of the contract and/or an award of 1 acre to the Appellant equivalent to the amount paid in the sale contract.

2. The basis of the Respondent's claim was that at all material time, he was the beneficial and/or equitable owner of the suit land which was registered in the name of his late father Sebastian Wekesa Milimo while the Appellant was a mere licencee and occupant of a portion thereof following the completion of the purchase price vide a sale agreement dated 9th March 1990 which the Appellant and her husband

had breached. It was pleaded that the purchase price was Kshs.10,000 for a portion of the suit land measuring 350 feet on 190 feet (1.53 acres) of which only Kshs.3,000 had been paid leaving a balance of Kshs.7,000. The Respondent therefore pleaded illegality and fraud on the part of the Appellant.

3. The Appellant filed an amended statement of defence in which she pleaded inter alia, that her late husband Alfred Barasa purchased a portion of the suit land from the Respondent's father in 1980, took possession thereof and has remained on the same for 40 years. She denied that there was any default and added that the purchase price was paid in full and that the purchased land was 350 by 190 steps and not 350 by 190 feet as alleged by the Respondent. The Appellant pleaded further that the Respondent's suit was statute barred, defective, malicious, scandalous and does not disclose any cause of action.

4. The suit was heard by Hon. P. Y. Kulecho Senior Resident Magistrate who, in a judgment delivered on 16th March 2022, found in favour of the Respondent. The trial Magistrate accordingly entered judgment for the Respondent as follows:

    1. A declaration that the Defendant (Appellant) is only entitled to 315 paces by 171 paces at the suit land.

    2. An order directing the County Surveyor and the County Land Registrar to visit the suit land for purposes of carving out the said portion out of the entire suit land which cost is to be jointly shared by the parties hereto.

    3. Should the Defendant (Appellant) be found to have trespassed onto a portion outside their 315 by 171 paces, then they should voluntarily vacate therefrom within 30 days from the date of the survey exercise, in default thereof, an order of eviction and permanent injunction restraining the Defendant (Appellant) herself, her workers, agents and/or servants from occupying any portion outside their above stated excision.

    4. The Court declined to issue any order as to costs.

5. The Appellant, aggrieved by that judgment, has now moved to this Court vide her memorandum of appeal dated 12th April 2022. The following six (6) grounds of appeal have been raised in seeking this Court to set aside the said judgment:

    1. That the learned Magistrate erred in law and fact by granting prayers which had not been sought in the plaint thereby going outside the scope of her mandate in relation to the dispute which was before her and the issues for determination between the parties.

    2. The learned Magistrate erred in law and fact when she failed to consider the pleadings as filed by the parties and went beyond the pleadings thereby making a decision that the Appellant had not been given an opportunity to defend or give evidence on.

    3. The learned Magistrate erred in law and fact and failed to evaluate the evidence on record properly thereby arrived at the wrong conclusion which is prejudicial to the Appellant and has occasioned injustice.

    4. The learned Magistrate erred in law and fact when she failed to appreciate that the plaintiff (Respondent) did not prove his case on the balance of convenience hence the whole suit had failed as against the Defendant (Appellant).

    5. The learned Magistrate erred in law and fact when she considered irrelevant facts and failed to consider the relevant facts before her thereby reaching a wrong conclusion and failing to appreciate that the suit was time barred.

6. The learned Magistrate erred in law and fact when she failed to appreciate that the plaintiff (Respondent) had no legal right to the suit premises capable of being enforced having benefited from the proceeds of the suit premises.

The Appellant therefore sought the following orders:

1. This appeal be allowed.
2. That the judgement of the Lower Court be set aside by dismissing the plaintiff's (Respondent's) case with costs.
3. That the Respondent be ordered to pay the costs of this appeal and costs of the Lower Court.
4. Any other alternative relief this Court may deem fit to grant.

6. The appeal has been canvassed by way of submissions. The same have been filed by Mr Odera instructed by the firm of Odera Were & Company Advocates for the Appellant and by Mr Omeri instructed by the firm of Omeri & Associates Advocates for the Respondent.

7. I have considered the record of appeal and the submissions by counsel.

8. This is a first appeal and this Court has a duty to re-evaluate the evidence which was before the trial Court and reach it's own independent conclusion. In the case of Okeno -V- R 1972 E.A. 32, the then East Africa Court of Appeal set out that duty by saying:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya V. R.1957 E. A. 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala -V- R. 1957 E.A. 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see Peters -v- Sunday Post 1958 E.A. 424."

A first appellate Court is, ordinarily, the final Court of fact and therefore the Appellant is entitled to an exhaustive, fair and independent consideration of the evidence. It has to re-consider the law as well as the facts and address itself on all the issues which were before the trial Court and make it's decision on those issues. See also Selle & Another -v- Associated Motor Boat Company Ltd & Another 1968 E.a. 123, Kiruga -v- Kiruga & Another 1988 Klr 348 And Also Abok James Odera T/a Odera & Associates -v- John Patrick Machira & Company Advocates 2013 eKLR.

9. In Peters -v- Sunday Post (supra) it was held that:

> " Whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusions of the trial Judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate Court will not hesitate to so decide."

10. I have identified the issues of limitation to be crucial in the determination of this appeal.

11. In paragraph 3B of the amended plaint, the Respondent pleaded thus:

3B: "The plaintiff avers that the defendant is a mere licencee occupant of the said portion of the suit land and pending the completion of the purchase price vide a sale agreement dated 9th March 1996 of which she and the husband defaulted or breached."

In her defence to that pleading, the Appellant pleaded in paragraph 8(A) of the amended defence thus:

8(A): "That further to the preceding paragraph and without prejudice to the foregoing the defendant states that the suit filed herein is statute barred in any event, the plaintiff is estopped from denying the fact that the defendant's husband purchased the sit premises and paid for it in full."

Although in his amended plaint the Respondent had pleaded that the sale agreement with respect to the suit land between his father Sebastian Wekesa Milimo and the Appellant's husband Afred Wekesa was executed on 9th March 1990, the copy of the sale agreement produced as part of the documentary evidence herein shows that it was infact executed on 9th March 1980. Indeed that was well captured by the trial Magistrate at page 9 of her judgment wherein she said:

> "In support of their position, the plaintiff adduced in evidence PEXH-3 the initial sale agreement dated 9th March 1980."

It is common ground that the Appellant and her family took occupation and possession of the suit land in 1980. Indeed following a consent recorded on 14th June 2021, the Appellant was allowed to inter the remains of her late husband on a portion of the suit land.

12. In the impugned judgment, the trial Magistrate addressed the issue of Limitation as follows at pages 6 and 7:

> "The defendant contends that the agreement the subject of the suit property having been executed in 1980 the plaintiff's suit is time barred as any rights the plaintiff may have had over the said property is extinguished by operation of law. The Court has considered the said submission seriously and although it agrees with the defence that the suit has been brought about 40 years from the material date, the Court nonetheless finds that the defence of adverse possession is not available to the defence. The Courts have held often times that Adverse possession is a shield, not a sword. In other words, a party who asserts that they have acquired a right by way of adverse possession should raise the same as a cause of action by way of either a plaint or counter-claim and not wait to raise the same as a defence."

The trial Magistrate then ended her findings on the issue of Limitation as follows at page 8:

> "The Court therefore finds that although the argument that the suit is time barred is plausible, the suit is sustained to the extend that the defendant did not raise the said issue in their pleadings and for reasons explained above." Emphasis mine.

On the issue of Limitation, counsel for the Appellant has submitted as follows at paragraphs 40, 41, 42 and 43 of his submissions:

40: "It is our submission that issue of Limitation being a point of law could be raised at any time or at any stage in the proceedings and reliance is placed in the case of Edwards Ochieng -v- Dan Okumu 2022 eKLR where the Court clearly stated that a party does not have to plead provision of law in the pleadings."

41: "There is no dispute that the agreement was signed in 1980 and the defendants took occupation in the same year hence at the time the suit was being filed in

the lower Court a total of about 41 years had lapsed and as such the case was statute barred."

42: "Section 7 of the *Limitation of Actions Act* cap 22 Laws of Kenya clearly states as follows:

'Actions to recover land

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."

43: "Your Lordship it is apparent that the suit before the lower Court was statute barred as per the provisions of section 7 of *Limitation of Actions Act* and the learned Magistrate could not ignore the same being that it is a provision of the statute which could be relied upon at any state and the Court could also take judicial notice of the same."

13. The Respondent's counsel did not make any direct reference to the issue of Limitation in his submissions. Indeed, counsel for the Respondent only picked out the following as the issues for determination in this appeal. These are;

1. Whether the Respondent herein has proved his case on a balance of probability.
2. Whether the Respondent demonstrated a prima facie case.

This being a case where the trial Court was considering the final remedies available to the parties, the issue of a prima facie case is clearly misplaced. The nearest that the Respondent's counsel came in addressing the issue of Limitation is where the following submission was made towards the end:

> " In the circumstances, it is our submission that the trial Magistrate gave a fair decision with regards to the land sale agreement and since the same agreement is not in contention, it is therefore trite that the same be upheld and the award of 315 paces by 171 paces arising out of the land parcel L.R North-teso/Aboloi/258 be deemed adequate."

As already stated above, it is not in dispute that the Appellant and her family took possession and went into occupation of the suit land in 1980 following the execution of the sale agreement on the 9th March 1980. It is clear from the provisions of Section 7 of the *Limitation of Actions Act* that no suit for a claim to land can be filed after the end of 12 years from the date when the cause of action arose. This suit was first filed on 4th June 2021 before being amended on 28th September 2021. By 4th June 2021 when this suit was first filed, the Appellant and her family had been in occupation of the suit land for 41 years well in excess of 12 years provided for in law within which a party can seek to evict another from the land in dispute. The purpose of the Law of Limitation was set out in the case of Mehta -v- Shah 1965 E.A 321 as follows:

> " The object of any limitation enactment is to prevent a plaintiff from prosecuting state 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." Emphasis mine.

In the case of Gathoni -v- Kenya Co-operative Creameries Ltd 1982 KLR 104, it was held by K. D. Potter J.A that:

> "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 steps in his own interest."

And in IGA -V- Makerere University 1972 E.A. 65 the then East African Court of Appeal addressed the same issue as follows:

> "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." Emphasis mine.

14. While addressing the issue of limitation under Section 7 of the Limitation of Action Act, the trial Magistrate found that although the defence of limitation was "plausible", she nonetheless decided to sustain the suit because the Appellant "did not raise the said issue in their pleadings." That finding was not factually correct because in her amended defence, the Appellant had specifically pleaded in paragraph *8*(A) "that the suit filed herein is statute barred." An issue of limitation, in any event, is a jurisdictional issue which can be raised by the Court on it's own motion (suo moto) – and a determination made thereon – Anaclet Kalia Musau -v- Attorney General & Others C.a. Civil Appeal No 111 of 2017 [2020 eKLR]. The trial Magistrate therefore erred both in law and in fact by failing to find that the Respondent's suit was statute barred.

15. The trial Magistrate at pages 6 and 7 of the impugned judgment quoted above also waded into the issue of adverse possession and stated that although it was correct that the suit had been filed after 40 years, the Appellant could not raise the defence of adverse possession because "the Courts have held often times that adverse possession is a shield not a sword." No authority was cited for that proposition. However, the Appellant had only pleaded that the Respondent's suit was barred by the statute of limitation. At no time did the Appellant plead adverse possession and neither was that issue raised by the parties in their respective cases. The trial Magistrate therefore erred by addressing the same in the impugned judgment.

16. The up-shot of all the above is that the Respondent's suit was clearly statute barred by the statute of Limitation specifically Section 7 of the *Limitation of Actions Act*. The trial Magistrate erred both in law and in fact by failing to up-hold the Appellant's defence in that regard and proceeding to find in favour of the Respondent and make the orders which she did. This appeal must therefore be allowed on that ground alone.

17. On the issue of costs, the trial Magistrate made no orders as to costs and gave no reason for that. The law under Section 27 of the *Civil Procedure Act* is that costs follow the event unless the Court, "for good reason otherwise order." Given the circumstances of this case, I am not persuaded to interfere with the trial magistrate's decision on the issue of costs.

18. Having considered this appeal together with the record and submissions by counsel, I make the following disposal orders:

    1 The appeal is allowed.

2. The Judgment of the trial Magistrate delivered on 16th March 2022 is set aside and substituted by an order dismissing the Respondent's suit.

3. The parties shall bear their respective costs both here and in the Court below.

JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 21ST DAY OF NOVEMBER 2024.

BOAZ N. OLAO

JUDGE

21ST NOVEMBER 2024

Right of Appeal