Case Number:	Environment and Land Appeal 15 of 2020
Date Delivered:	17 Dec 2021
Case Class:	Civil
Court:	Environment and Land Court at Kisumu
Case Action:	Judgment
Judge:	Antony Ombwayo
Citation:	Alice Adhiambo Ochieng & another v Enos Odhiambo Agaya & another [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELCA CASE NO.15 OF 2020

ALICE ADHIAMBO OCHIENG.....1ST APPELLANT

ROSE AKOTH ATIENO.....2ND APPELLANT

VERSUS

ENOS ODHIAMBO AGAYA.....1ST RESPONDENT

RIHCHARD AGAYA BONGO.....2ND RESPONDENT

(Being an Appeal against the whole of the Judgment delivered

on the 13th day of February 2020 by Hon. P. Olengo, SPM in the

Senior Principal Magistrate's Court at Nyando ELC Case No. 95 of 2018)

JUDGEMENT

Alice Adhiambo Ochieng and Rose Akoth Atieno (hereinafter referred to as the Appellants) have come to this court against Enos Odhiambo Agaya and Richard Agaya Bongo in an appeal against the whole of the Judgment delivered on 15/2/2020 by Hon. P. Olengo SPM in the Senior Magistrates Court at Nyando ELC case no. 95 of 2018. The Appellants have appealed on the grounds that:-

1. The learned magistrate erred in law and/or in fact in failing to make a finding whether the appellants had proved their case against the respondents.

2. The learned magistrate erred in law and/or in fact in paying little, if any, regard to the evidence adduced by, and submissions of, the appellants.

3. The learned magistrate erred in law and/or in fact in refusing to grant the orders sought by the appellants.

4. The learned magistrate erred in law and/or in escaping his jurisdiction as the Environment and Land Court and instead becoming a legal adviser for the respondents.

5. The learned magistrate erred in law and/or in finding that the respondents put up a good defence to the appellants' suit.

The appellants seek orders that the appeal be allowed and the Judgment of the Learned Magistrate and decree extracted be overturned and or set aside. Moreover, that the costs of this appeal and the trial court be borne by the respondents.

The appellants case in the lower court was that on or around 16/5/2018, the appellants were duly registered, through transmission, as the joint proprietors of land parcel number Kisumu/Katho/1875, measuring approximately 1.9 hectares and located in Kabuto Village, Kotieno Sub-location, Nyando Sub- County in Kisumu County (hereinafter referred to as the suit property). The current value of the suit property is approximately Kshs. 1,000,000/-. The immediate previous registered joint proprietors of the suit property were the late Ocheing Asugo and Lusi asugo. They were duly registered as such on or around 27/10/2008.

The said late Ochieng Asugo and Lusi Asugo were the 1st plaintiff's husband and step-mother in law respectively. Further, the said late Ocheing Asugo and Lusi Asugo were the 2nd plaintiff's step-brother in law and mother in law respectively.

The appellants claimed that from on or around 2015 to date, the 1st respondent, without any colour of right and/or legal basis, intentionally trespassed on the suit property including but not limited to erecting a home, and living, thereon. However, many efforts by the appellants or their agents to get the 1st respondent to vacate the suit property and stop any further acts of trespass have been futile.

The 2nd respondent has also unlawfully trespassed on the suit property including but not limited to tiling the suit property. However, the 2nd respondent has failed or refused or neglected to stop his said acts of trespass despite many requests made to him by the appellants or their agents. The said trespass on the suit property by the respondents, jointly and/or severally, have threatened or breached or stifled or frustrated or extinguished the respondents' redress from the Court.

In the lower court the appellants prayed for an order of permanent injunction prohibiting the 1st respondent and 2nd respondent, personally and/or their heirs or agents or anybody whatsoever described acting on their behalf, from whatsoever trespassing on or prejudicing the plaintiffs' proprietary rights in land parcel number KISUMU/KATHO/1875 and an order that the 1st respondent personally and/or his heirs or agents or anybody whatsoever described acting through him, do demolish and remove the structures the 1st respondent or his heirs have erected on, and do vacate, the appellants' land parcel number KISUMU/KATHO/1875 within 90 days of the order of this Honourable Court, and if 1st respondent defaults to do so the Officer Commanding Ahero Police Station do supervise the immediate eviction of the 1st respondents from the appellants' land parcel KISUMU/KATHO/1875.

The Respondents filed a joint written statement of defence stating that they entered into a sale agreement in respect of all the parcel of land known as Kisumu/Katho/1875 with the original owner one Salina Lucy Asugo in the year 1978. That the consideration thereof were herds of cattle which the said SALINA used to pay dowry for her sons Peter Asugo (deceased) and one Emmanuel Oliech. That pursuant to the said agreement, Richard Agaya, the 2nd respondent herein took possession and occupation of the aforesaid land in the year 2000.

That the said Richard Agaya gave a portion of the suit parcel of land to his son Enos Odhiambo, the 1st defendant herein as inheritance and the said Enos Odhiambo has subsequently developed his portion and put up a home on the said parcel of land.

That Salina Lucy Asugo (now deceased) estate has yet to be administered or no one has since taken out letters of Administration. That the registration of Ochieng Asugo and Lusi Asugo as the proprietors of all that parcel of land known as Kisumu/Katho/1875 was procured by fraud.

The respondents stated that they had lived on the suit parcel of land uninterrupted since birth todate. The 2nd Respondent stated that he acquired the suit land through a valid contract of sale and he is a stranger to the rights claimed by the appellants.

When the matter came up for hearing PW 1 Alice Odhaimbo Ochieng, the 1st appellant stated that on or about 16/5/2018, they were duly registered, through transmission, as the joint proprietors of a parcel of land known as KISUMU/KATHO/1875, measuring approximately 1.9 hectares and located in Kabuto village, Kotieno Sub-Location, Nyando Sub-County in Kisumu County (hereinafter referred to as the suit property). The current value of the suit property is approximately Kshs. 1,000,000.

The immediate previous registered joint proprietors of the suit property were the late Ocheing Asugo and Lusi Asugo, who were duly registered as such on or around 27/10/2008. The said the late Ocheing Asugo and Lusi Asugo were her husband and step-mother in law respectively.

From on or around 2015 to date, the 1st defendant, without any colour of right and/or legal basis, intentionally trespassed on the suit property including but not limited to erecting a home, and living, thereon. However, many efforts by the plaintiffs or their agents to get the 1st respondent to vacate the suit property and stop any further acts of trespass have been futile.

The 2nd respondent has also unlawfully trespassed on the suit property including but not limited to tiling the suit property. However, the 2nd respondent has failed or refused or neglected to stop his said acts of trespass despite many requests made to him by the plaintiffs or agents of the appellants.

PW2, Rose Akelo Atieno reiterated the evidence of the PW1.

PW3 testified that he borders the land in question and that Alice and Rose are the owners of the land.

PW4, relied on the statement and on cross-examinations he testified that he has known the parties since childhood and that the 2nd Respondent has been tilling the land and his sons put up a home on the land.

PW5, Joshua Buto relied on his statements which was adopted as evidence in chief and stated that the land belongs to the appellants but the 1st Respondent went and built a house on the land and the 2nd Respondent cultivated on the land.

The 1st respondent on his part relied on his statement which was adopted as evidence in chief. The 1st respondent testified as DW1 and the gist of his evidence was that he bought the land from one Salina Lucy Asugo by giving 3 heads of cattle. On cross examination, he states that the agreement is in writing. He purchased a portion of the land. His son has stayed on the land for 19 years.

The 2nd Respondent testified as DW2 and adopted the witness statement as evidence in chief. He states that his father gave him the land and he constructed a house in the year 2000.

On cross examination by counsel for appellants he reiterated that he has been on the land since the year 2000. He has a brother called Gache who is older and has been on the land since the year 1998. DW3, Joshua Otieno Anyumba from Katho relied on his statement which was adopted as evidence in chief and reiterated that he was born in 1959 and found the 2nd respondent tilling the land. He made his home in 1996 and found them tilling the land. In 2000, Enos put up a home on the land in dispute.

Upon hearing the case and going through evidence on record, the learned Magistrate concluded that there was no evidence that the appellants got the land through transmission after a succession cause. The respondents might not have known of the existence of a succession cause and that they could lay claim thereon. The Learned Magistrate ordered the respondents to file an application for revocation of grant issued in Nyando Succession cause No. 35/2017 where their rights to the said land will be determined.

This being a first appeal, the court has a duty to reconsider and evaluate the facts and law herein. This duty was well stated in ***Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123*** in the following terms:

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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. 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 based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

The Court of Appeal for East Africa took the same position in ***Peters v Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor stated as follows:

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. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that 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. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt v Thomas (1), [1947] A.C. 484.

"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 classes of case 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."

From these cases, the appropriate standard of review to be established can be stated in three complementary principles:

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

ii. That 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 it; and

iii. That 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.

I do agree with the appellant that the Learned Magistrate erred in law and fact in failing to appreciate the facts and law. To begin with, the available facts were sufficient to demonstrate that the appellants' claim was time barred because 12 years had already lapsed from the time the respondents took possession of the land to the time the appellants came to court. It is on record from the evidence of PW2, PW3, PW4 and PW5 that the 2nd Respondent had been tilling the land whereas the 1st respondent built a home in 2000.

DW3, Joshua Otieno Anyumba who was born in 1959 gave evidence as a neighbour that he made his home in 1996 and found the respondents tilling the land. In 2000, the 2nd respondent put up a home on the land in dispute.

Under the provisions of section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya, an action for the recovery of land cannot be brought after the expiry of twelve years. The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them.

Section 7 of the Limitation of Action Act cap 22 laws of Kenya states that:

"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."

The appellants claim to the suit land was commenced more than 12 years after they took possession a very crucial fact the trial court did not consider in making its decision. Had the learned magistrate considered this fact he could have dismissed the suit. The upshot of the above is that the Learned Magistrate erred in failing to make a decision in the case. This court has the power to consider and re-evaluate the evidence on record and come up with its own decision.

I do find that the lower court ought to have dismissed the suit as it was time barred. I do allow the appeal and dismiss the suit in the lower court for having been barred by statute. Each party to bear own costs both in the lower court and this court. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 17TH DAY OF DECEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE