



Cooperative Bank of Kenya v Isil & another (Environment and Land Appeal 1 of 2022) [2023] KEELC 17043 (KLR) (26 April 2023) (Judgment)

Neutral citation: [2023] KEELC 17043 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL 1 OF 2022**

FO NYAGAKA, J

APRIL 26, 2023

BETWEEN

THE COOPERATIVE BANK OF KENYA APPELLANT

AND

TITUS ALFRED OMUDANG ISIL 1ST RESPONDENT

BERNARD KORIR NDIWA 2ND RESPONDENT

(Being an Appeal arising out of the ruling and order of Hon. S.N. Makila (Principal Magistrate) in Kitale Chief Magistrate's Court ELC Case No. 122 of 2021 delivered on 8th December 2021)

JUDGMENT

Introduction

1. The Appellant was the 2nd Defendant in Kitale CMELC No. 122 of 2021. The 1st Respondent was the Plaintiff therein. The 1st Respondent filed an Application dated 07/09/2021 that sought injunctive relief barring the sale of the suit land, namely, Kitale Municipality/Block 15/Koitogos/1832.
2. The Application was opposed by the Appellant herein. It filed a Replying Affidavit sworn on 17/09/2021 on the same day together with a Notice of Preliminary Objection dated 17/09/2021 seeking to strike out the suit in its entirety. The grounds in support of were that the court lacked jurisdiction to hear and determine the matter by dint of Section 38 (1) of the *Limitation of Actions Act*. As such, the suit was an abuse of the process of the court.
3. The trial court heard and determined the Application and Notice of Preliminary Objection simultaneously. In its ruling of 08/12/2021, the trial court found that the Preliminary Objection lacked merit and was dismissed. It also found that the 1st Respondent's Application was with merit. It was thus allowed.



The Appeal

4. The Appellant is dissatisfied with these findings. It filed a Memorandum of Appeal dated 07/01/2022 on 14/01/2022. It impugned the findings on several grounds. These were that the Appellant accused the trial court of erroneously concluding that it was vested with jurisdiction to hear and determine the suit. It argued that the 1st Respondent had failed to establish a prima facie case based on the fact that he admitted that the suit land was encumbered by way of a charge registered in favor of the Appellant. Additionally, the 1st Respondent was not an innocent purchaser as he was aware of the existing charge. It lamented that the trial court improperly denied its right to exercise its statutory power of sale against the 2nd Respondent without justifiable cause. Ultimately, it impugned the trial court's decision as misdirected, failed to consider its submissions and was erroneously decided.
5. The Appellant prayed that the Appeal be allowed by setting aside the ruling and instead dismiss the Application dated 07/09/2021. It further prayed for costs of the Appeal and the Application.

Hearing of The Appeal

6. The Appeal was heard on the basis of the parties' rival written submissions. The Appellant filed its submissions dated 02/12/2022 on 06/12/2022. Highlighting Section 9 of the Magistrate's Court Act, the Appellant argued that the said provision excludes Magistrate Courts from determining matters touching on adverse possession. Since jurisdiction is expressly provided in statute, the Appellant submitted that it could not be inferred as the intention by Parliament when enacting the said provision. It maintained that since the High Court is vested with jurisdiction as set out in Section 38 (1) of the *Limitation of Actions Act*, a hypothesis can be drawn from Article 162 (2) of the *constitution* as read together with Section 13 of the *Environment and Land Court Act* to conclude that matters touching on adverse possession are at the preserve of the Environment and Land Court. Flowing from this, the Appellant urged this court to dismiss the order since the trial court lacked jurisdiction ab initio.
7. On whether the grant of injunction was merited, the Appellant submitted that the 1st Respondent was not deserving of the orders since he had failed to establish a prima facie case for the following reasons: Firstly, he could not claim adverse possession owing to the subsistence of a charge. Secondly, the 1st Respondent had not established the elements constituent to adverse possession. In any event, his rights were defeated by the encumbrance in favor of the Appellant. Thirdly, the Appellant condemned the 1st Respondent for not exercising due diligence. As such, he had only himself to blame for his misfortune.
8. The Appellant continued that the 1st Respondent was not deserving of injunctive relief since he had not demonstrated that he would suffer irreparable harm if the Appellant was restrained from exercising its statutory power of sale. In any event, the Appellant as a body corporate was not a juristic man of straw.
9. Finally, the Appellant argued that injunctive relief was baseless as the balance of convenience did not tilt towards the 1st Respondent's favor. Conversely, the Appellant continued to suffer inconvenience for being denied its right to recover.
10. The 1st Respondent's submissions dated 16/01/2023 were filed on 30/01/2023. Citing Section 26 of the *Environment and Land Court Act* as read with Section 9(a) of the *Magistrate's Court Act*, he submitted that the trial court, duly gazetted, had the requisite pecuniary jurisdiction to hear and determine the subject matter. He added that the substance of adverse possession was not sui generis as to be preserved only for determination before the Environment and Land Court.
11. On whether the grant of injunction was merited, the 1st Respondent submitted that he had fulfilled the three (3) part test for grant of the said order. That he had demonstrated a prima facie case by



establishing that he had been in occupation of the suit land since 2008 after execution of the sale agreement between the Respondents herein. Furthermore, the Appellant was intent on selling the property having advertised the same inviting prospective buyers. Had the property been sold, he continued, the same would have undeniably defeated his right to claim as pleaded since the property would have passed on to the hands of a third party. He continued that he was an innocent purchaser for value. His claim as such could not be wished away on the strength of the legal charge over the property; which he was always aware of.

12. Finally, the 1st Respondent argued that the Appeal was incompetent and illegal since the Appellant failed to seek leave first to file the present Appeal. He lauded the decision of the trial court in totality urging this court to uphold the same by dismissing the Appeal with costs.

Analysis And Determination

13. I have considered the Appeal, examined the parties' rival written submissions and analyzed the relevant law, the proceedings at trial and the impugned decision.
14. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. For this holding the parties are invited to refer to the guidance in the authorities of *Sumaria & Another v Allied Industrial Ltd* [2007] 2KLR and *Selle & Another v Associated Motor Boat Co. Ltd. & Others* [1968] EA, 123.
15. This court postulates that the following issues that fall for determination will determine the present Appeal, and will determine them sequentially as brought out.

(a) Whether the Trial Magistrate Court was vested with jurisdiction concerning adverse possession claims

16. The court in *Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & Another* [2020] eKLR had this to say on jurisdiction of magistrate courts to hear and determine disputes on adverse possession:

“The upshot of the provisions at Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the *Magistrates' Courts Act*, 2015 is that magistrates who are duly gazetted and have the requisite pecuniary jurisdiction have jurisdiction and power to handle cases involving occupation of and title to land. Claims in the nature of adverse possession involve title to land since the claimant ultimately seeks an order that he be registered as the proprietor of the land. ...In view of the foregoing discourse, there are ample reasons based on the express provisions of Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the *Magistrates' Courts Act*, 2015, the principles of interpretation of the *constitution* as well as the principles of the *constitution* such as devolution, access to services and access to justice for all persons, to find as I hereby do, that so long as presided over by a magistrate who is duly gazetted under Section 26 (3) of the *Environment and Land Court Act*, 2011 and who has the requisite pecuniary jurisdiction, magistrates' courts have jurisdiction and power to handle cases involving claims of adverse possession.”

17. I see no reason to hold otherwise than my brother judge did in the above case. It cannot be gainsaid that under Section 38 (1) of the *Limitation of Actions Act*, the High Court is cited as the court vested with jurisdiction to hear and determine matters in the nature of adverse possession. Looking at that



provision in isolation, all suits in the nature of adverse possession must be filed before the High Court irrespective of Article 162 (2) (b) enacted following the success of the 2010 plebiscite Constitution. But reading the earlier provision to the exclusion of the *constitution* and the enabling statute that actualizes the constitutional provisions would be wrong. Thus, in keeping with the holistic interpretation of the law, Sections 2 and 4 define and establish the Environment and Land Court (ELC) respectively. Section 2 clarifies that the ELC is the Court contemplated under Article 162(2)(b) above. Section 13 of the Act gives the jurisdiction of the ELC and it clearly stipulates that it handles all disputes in accordance with Article 162(2)(b) of the *constitution*. And by virtue of Section 31(1) of the ELC Act, this Court was clothed with jurisdiction to handle all matters relating to the environment and land, save for the part-heard ones in other courts and subject to those being transferred to it as would be directed by the Chief Justice or the Chief Registrar, from the time the Act commenced. Thence, other new matters in the area would be filed before this Court, and the subordinate ones which would be gazetted for that purposes as long as they had the requisite pecuniary jurisdiction.

18. Indeed, as rightly stated by the Appellant, this court is a creature of statute. As seen above, it is donated with powers to hear and determine all land and environment matters within the Republic. Similarly so, certain magistrates, as gazetted, have jurisdiction to deal with land matters so long as they squarely fall within the limits of their pecuniary jurisdiction.
19. I do not think the intention of Parliament was to exclusively place jurisdiction of this Court alone to hear and determine adverse possession claims disdaining the rationale behind the import of pecuniary jurisdiction as to render the same otiose. Adverse possession claims are not in my view in their nature so specialized as to demand dedicated jurisdiction.
20. While Section 38 (1) of the *Limitation of Actions Act* describes that the High Court is vested with jurisdiction to hear and determine adverse possession claims, it must be borne in mind that the said Act is for the most part not in conformity with the developments arising from the 2010 Constitution. It is for this reason that the court must extrapolate that, from a reading of Section 7 (1) to the Sixth Schedule of the *constitution* and as explained in paragraph 17 above, it must have been the intention of the drafters to grant jurisdiction to the Court hearing and determining matters on land and environment.
21. The apprehension that this Court would have been overwhelmed with matters environment and land thereby defeating the purpose of its very creation which was to expedite determinations of disputes brought before it was apparent. Thus, in giving it unlimited original jurisdiction, except in criminal matters, Parliament in its wisdom informed that it was necessary to donate such jurisdiction to magistrate courts so long as they fell within their pecuniary jurisdiction. It is for this reason that at Section 26 (3) and (4) of the *Environment and Land Court Act*, the Chief Justice is empowered to gazette and appoint magistrates to preside over land matters including matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates Courts Act.
22. In consonance with the above, Section 9 (a) of the *Magistrate's Court Act* donates powers to such gazetted magistrates to hear and determine inter alia, claims relating to environment and land generally.
23. It is not disputed that in the present case, the trial magistrate who handled it is duly gazetted to hear and determine environment and land matters within the limitations of her pecuniary jurisdiction. The present dispute is within the pecuniary limits of the trial Court. This is also not disputed by any party. Taking cue from that, this Court finds that the trial magistrate was and is properly vested with jurisdiction on the subject matter.
24. Furthermore, this Court imports the trial magistrate's analysis where she observed that the procedure for commencing claims on adverse possession is dictated by Order 37 of the *Civil Procedure Rules*. At



Rule 7, 16, 17 and 18, such proceedings are prosecuted before a judge. However, that definition of a judge is by dint of Section 2 of the *Civil Procedure Act* to mean the presiding officer of a court, and by the same Section, “court” means the High Court or a subordinate court, acting in the exercise of its civil jurisdiction”. Indeed, a presiding officer includes a magistrate. I see no reason why the parties did not want to interpret the provision holistically.

25. Therefore, drawing from the above exposition, this court concludes that the trial court rightly concluded that it was vested with jurisdiction to hear and determine the subject matter. Consequently, the Appeal against that decision on the jurisdiction of the trial Court lacks merit and is for dismissal ultimately.

(b) Whether the Trial Court exercised its discretion judiciously

26. The Appellant was dissatisfied with the order of injunction granted by the trial court. The principles constituent to grant or refuse injunctive relief have been well set out and captured by the celebrated case of *Giella v Cassman Brown* [1973] E.A. 358 as follows:

- a. The Applicant has a prima facie case with probability of success.
- b. The Applicant will suffer irreparable loss or damage that will not be adequately compensated by an award of damages.
- c. If in doubt on the above two (2) requirements, the court will decide the Application on the balance of convenience.

27. In determining that the 1st Respondent had demonstrated that he had established a prima facie case, the trial court found that while the Appellant had a legal charge over the suit land, the 1st Respondent had demonstrated that he had been in possession of the suit land since 2008. That he was an innocent purchaser for value and may be having an interest over the suit land could not be wished away. It is an issue that must go for trial.

28. The Court of Appeal in *Mrao v First American Bank of Kenya Limited & 2 Others* [2003] KLR 125 defined prima facie case as:

“..... in a civil Application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

29. The 1st Respondent claims adverse possession over the suit land. He entered on the suit land pursuant to the execution of an agreement of sale between him and the 2nd Respondent on 12/04/2008. He enjoined the Appellant while being aware that the suit property was encumbered.

30. The Appellant on the other hand claims a legal interest over the suit property which it intends to dispose of. This court finds that, if the Appellant was allowed to sell the property, the suit would have grounded into being an academic exercise. It is this court’s view that a preservation of the subject until the determination matter as to the rights of the parties in the suit whose ruling is appealed from, and now is for determination, was and is cardinal since its absence would undeniably defeat the 1st Respondent’s claim. The passing of the property to a third party would uncontrovertibly extinguish the claim since its very nature is dependable on the subsistence of the present registered proprietor when time started running.



31. Without going into the merits and issues for determination, I find that the issues that are to be canvassed before the trial court are arguable, genuine and call for an explanation. For these reasons, the trial court properly exercised its discretion when ascertaining that a prima facie case had been established by the 1st Respondent.
32. Next is, on whether the 1st Respondent stood to suffer irreparable harm that could not be compensated by an award of damages. The trial court found that the 1st Respondent enjoyed quiet possession of the suit land without interference. The risk of the property being sold to a third party was real and could not compensate the 1st Respondent.
33. It must be remembered that the 1st Respondent claims adverse possession against the current registered proprietor of the suit land. Since his claim is on ownership, I find that he will suffer irreparable harm that cannot be compensated by an award of damages if the Appellant is allowed to exercise its statutory power of sale. This is because the 1st Respondent will have no right to claim against the third party. Having established that the 1st Respondent ably demonstrated that he was entitled to the injunctive reliefs, I find that the trial court properly exercised its discretion in granting the same.
34. Having demystified the issues for determination as above, I come to the unwavering conclusion that the Appellant's Appeal in totality lacks merit. It is hereby dismissed with costs to the 1st Respondent. I further direct that the lower court matter be placed before the trial court on 06/06/2023 for further directions. The original trial court file shall be transmitted forthwith to the lower court registry for purposes of it being processed further.
35. Orders accordingly.

Judgment dated, signed and delivered at Kitale via Electronic Mail this 26th day of April, 2023.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE

