



**Mohamed v Mwabwika (Civil Appeal E002 of 2021)
[2023] KEELC 16917 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16917 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
CIVIL APPEAL E002 OF 2021**

AE DENA, J

APRIL 20, 2023

BETWEEN

FATUMA MOHAMED APPELLANT

AND

MWINYIHAJI MOHAMED MWABWIKA RESPONDENT

JUDGMENT

1. This is an appeal from the judgement of Hon. Paul Wambugu Principal Magistrate delivered on July 30, 2021 in Kwale Land Case 29 of 2019 wherein the appellant was the defendant.
2. The suit the subject of this appeal was in respect of land parcel Kwale/Tiwi/1640 (herein suit property). It was the Plaintiffs claim that he together with his deceased brothers were the legal owners of the suit property which they inherited from their deceased father but that he was the only surviving son. According to the Plaintiff the Defendant Appellant was welcomed into the suit property on humanitarian basis following a dispute where she initially lived. That it was the understanding that the Defendant would return to where she lived after the dispute. However, the Defendant had refused to go back claiming ownership alleging that she had been given the land by the owner and started to construct a permanent structure.
3. The plaintiff termed the defendant Appellant acts as amounting to trespass and a violation of his right to property. He thus sought a permanent injunction restraining the Defendant and her agents from trespassing and or dealing with the suit property and an eviction order. The Plaintiff also sought for costs of the suit.
4. The Defendants case was that the Plaintiff together with 4 of his deceased brothers who were her cousins were the legal owners of the land. That two of them had gifted her their portions of the suit property where she had resided for over 20 years while at all times the Plaintiff never stayed on the suit.



Plaintiffs Evidence

5. The Plaintiff testified (PW3) and two witnesses Mohamed Salim Bwika (PW1), Rashid Mwinyikhamis Bwika (PW2). The Plaintiffs evidence was that he lived in Mackinon Road. That he gave the Defendant a place to stay in the suit property on learning she had been chased from her home. That later the Plaintiff started behaving as if the land was hers by building a permanent structure which she continued building despite opposition from PW2 and PW1 who he clarified in cross examination were his nephews. That the defendant also defied the area chief. He also adopted his witness statement dated 30/4/2019 which essentially reiterated the averments in the plaint. He produced a copy of a title deed for the suit property.
6. PW3 admitted in cross examination that he did not live in the suit property and had not been there for 3 years. That the Defendant was welcomed on the land by the Plaintiffs brother Juma Mohamed Haji who was one of the registered proprietors.
7. PW2 was Mohamed Salim Bwika from Tiwi. It was his evidence that the Defendant was a relative who used to live at her father's home but had differed with her brothers. That she was housed in the suit property awaiting resolution of the dispute but had started constructing a permanent structure which she revived after the death of his (PW2) parents stating she had purchased the land. That the chiefs and police intervention was sought to stop her.
8. On cross examination PW2 conceded that he was not one of the registered proprietors and had no grant of letters of administration. He agreed the Defendant had lived on the suit property for long, bore children who were now adults. He affirmed he was not present when the Defendant was invited to the suit property neither was the invitation in writing. He clarified in reexamination was a gentleman's agreement and their fathers had all agreed on temporary stay.

Defendants Evidence

9. The Defendant (DW1) gave evidence in support of her case. It was her oral testimony that she had lived on the suit property for over 20 years. That her elder brother one Juma Kesi (since deceased) gave her the land to build and live with her children and who had grown up on the land. She told the court that she had built a house which she was walling at the time of the hearing. She adopted her witness statement as part of her evidence.
10. Upon cross examination DW1 stated that the Plaintiffs father and her father were siblings. She reiterated she was given the land over 20 years ago though there was no written agreement in this regard. She testified that said portion was never surveyed.
11. The trial Magistrate first sought to determine whether the land was owned jointly or in common between the four brothers since the title was silent on the same. Upon analyzing the provisions of sections 101 (1), 102(1) and 103(1) of the Registered Land Act(now repealed) and sections 91(4) of the Land Registration Act the trial court found as follows; -
 - a. That the Plaintiff and the deceased brothers held the suit property as joint proprietors and that a presumption would arise that the tenancy was intended to be joint.
 - b. That the Plaintiff had survived the brothers and was the sole registered owner of the suit property pursuant to section 91(4) of the Land Registration Act.
 - c. That the two brothers could not pass a good title or gift to the Defendant as the same had to be done by all others. That their interest could also not pass to the Defendant by way of



intestate or testate succession the Plaintiff having survived them since the right of survivorship takes precedent.

- d. Having been granted permission or licence to enter into the land by the joint owners including the Plaintiff the cause of action for adverse possession could not arise.
12. In conclusion the trial court found that the Plaintiff succeeded in his claim against the Defendant and issued the orders prayed in the plaint.
 13. Aggrieved by the above judgement the Defendant Appellant brought this appeal. The memorandum of appeal dated November 22, 2021 raises the following verbatim Grounds of Appeal.
 1. The Learned Magistrate erred in fact and in law in holding that the Respondent had valid title to the suit property sufficient to dislodge the Appellants claim.
 2. The Learned Magistrate erred in fact and in law in finding that the property was initially owned in common (sic) tenancy.
 3. The Learned Magistrate erred in fact and in law in failing to apply the provisions of the Limitation of Time Act with regards to actions brought for recovery of land.
 4. The Learned Magistrate erred in fact and in law in failing to recognize that the orders granted which amount to eviction were not the most appropriate orders which the court should have granted considering the circumstances that the Appellant has lived in the suit premises for over 30 years and had children and grandchildren born there and have nowhere else to go to.
 5. The Learned Magistrate erred in the exercise of his discretion in the order for costs.
 14. The Appellant prays that the appeal is allowed with costs and the court to issue an order dismissing the Respondents claims.

Hearing Of The Appeal

15. The Appeal was disposed off by way of written submissions. Parties were also given an opportunity to highlight orally on the same which they did on 30/01/23. Mr. Paul Magolo represented the Appellant Defendant and Mr. Bwika the Respondent Plaintiff.

APPELLANTS SUBMISSIONS

16. It was submitted that having been gifted the suit property by two of the registered owners without objection of the others the suit property became the Defendant property. Consequently, the rights were subject of protection as envisaged by article 40 of the *Constitution*. That since the title deed did not specify the nature of the proprietorship the fall back position was to presume that the land was held in common. Consequently, Juma Mohamed Haji and Mwinyi Hamisi Katunza had the right to gift the Appellant rights to their portions of the suit property. Reliance was placed on the case of *Moses Bii vs. Kericho District Land Registrar & Another* (2015).
17. Citing Section 7 of the Limitation of Time Act it was also contended that the Plaintiffs Respondent suit was barred by limitation. That the Defendant Appellant had stayed on the land for more than 12 years and could not be evicted. The holding of A. Omollo J in ELC Civil Suit No. 583 of 2000 *Aula Ali Aula & others v Katana Shungu & 2 others* was relied upon. The court was invited to allow the appeal.



Respondents Submissions

18. Arising from the Memorandum of Appeal herein the Respondent Plaintiff identified the following issues for determination; -
 - a. Did the respondent have a valid title to the suit property sufficient to dislodge the appellants claim.
 - b. Was the property initially owned in common tenancy.
 - c. Did the Honorable Magistrate error in failing to apply the provision of section 22 of the *Limitation of Time Act*.
 - d. Did the Honorable Magistrate error in failing to recognize that the orders granted which amount to eviction were not the most appropriate orders which the court should have granted considering the circumstances that the Appellant has lived in the suit premises for over 30 years and had children and grandchildren born there and have nowhere else to go to.
19. Relying on the provision of section 26, 24 and 25 of the *Land Registration Act* it was submitted the Plaintiffs Respondent name appearing in the title as well as the official search, there was no doubt he was the indefeasible absolute owner of the suit property and enjoyed all the rights and privileges appurtenant thereto. That these rights included the right to bring the present action and to obtain the orders sought. With regard to whether the property was initially owned in common tenancy, it was submitted that from the official search the Respondent Plaintiff and his brothers were indicated as proprietors in common in equal undivided shares. That consequently pursuant to sections 91(4) (6) of the *Land Registration Act* the gifting of the land to the Defendant Appellant never took place at all. Reliance was also placed on the case of *Diana Muchiri vs. Lydia Wariara Njenga & Another* (2022) eKLR.
20. As regards limitation, citing several authorities where the doctrine of adverse possession was explained, it was urged that having been granted permission to enter the suit premises by the proprietors including the Plaintiff Respondent the cause of action for adverse possession failed and which was in tandem with the trial magistrates finding. That there was no doubt the Respondent Plaintiff and his brothers were still the proprietors of the suit property to the exclusion of the Appellant Defendant. It was submitted that the eviction orders were appropriate.

Discussions and Determination

21. This is a first appeal. I will be guided by the case of *Selle vs. Associated Motor Boat Co.* (EA.123) where the court stated thus; -

‘.....Briefly put 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.’
22. Based on the pleadings and proceedings at the trial court, the Memorandum of Appeal and submissions the issue for determination is whether the Plaintiff Respondent was entitled to the orders that were granted as prayed in the Plaint.
23. Having considered the Plaint herein it is clear that the Plaintiff was desirous that the Defendant and her family are evicted from the suit property for being trespassers. What then constitutes trespass? section 3(1) of the *Trespass Act* Chapter 294 of the Laws of Kenya provides that; -



Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.

24. Justice A. Omollo in ELC Civil Suit No. 583 of 2000 *Aula Ali Aula & Others v Katana Shungu & 2 Others* observed that Trespass is defined by Concise Oxford Dictionary as unlawful or unwarranted intrusion especially on land or property of another.
25. Based on the above definitions it was incumbent upon the Plaintiff to prove that not only was he the owner of the suit property but that the Defendant entered the same unlawfully or without authority. The Plaintiff's case was that he was the registered proprietor of the suit property together with his deceased brothers and produced a copy of a title Deed for Kwale/Tiwi/1640 issued on 2/12/91. The title showed five (5) registered absolute proprietors including the Plaintiff. To this extent it sufficed that the suit property was private land. But I will come back to this later.
26. I will then interrogate the circumstances under which the Defendant came into the suit property. From my review of the witness statements as well as the oral testimonies by PW1, PW2 and PW3 it was very clear to me that there was no dispute among these witnesses including the Plaintiff himself that the Defendant was invited and or permitted into the suit property during the life of all the registered proprietors and there was no problem about the said invitation. Therefore, the alleged invitation or permission displaces the argument that the Defendant may have entered the land unlawfully or without permission or that she was an intruder.
27. On the other hand, the Defendant stated that she was gifted two portions of the suit property by two of the Plaintiff's brothers before their demise. The trial Magistrate faced with the situation where four of the proprietors were deceased and a Defendant who was claiming the interest of two of them, considered it necessary to interrogate the nature of the proprietorship. There was nothing wrong with this approach it was inevitable. After analyzing the law and precedent the learned Magistrate made a finding that there was a presumption that the Plaintiff and the deceased brothers held the suit property as joint proprietors. That therefore the two brothers who allegedly gifted the Defendant their portions could not pass good title or gift as the same had to be done by all others. In a nutshell it was held that the Plaintiff was now the only proprietor of the suit property.
28. Did the trial court err in the above finding? It is not in dispute that the title deed showed the registered absolute proprietors as Salimu Mohamed Mwabwika, Mwinyi Mohamed Bwika, Mwinyihamisi Mohamed Katunza, Mwinyihaji Mohamed Mwabwika and Juma Mohamed Haji. I observed the said title was silent on whether the five held the property jointly or in common. I therefore resorted to what the law provides in the such instances. The suit property was registered under the regime of the *Registered Land Act*, Cap 300 (repealed). Section 101 (1) provided as follows: -

“

“ 101.

- (1) An instrument made in favour of two or more persons, and the registration giving effect to it, shall show-
 - (a) whether those persons are joint proprietors or proprietors in common; and
 - (b) where they are proprietors in common, the share of each proprietor.”



It is noteworthy that the above provisions are also replicated in section 91(3) of the new regime the [Land Registration Act](#) 2012.

29. The contemplation of the law above was that where the proprietors are more than one, the register would reflect whether their registration is joint or common. What was to happen if the same is not reflected? I found the answer in Section 91 of the [Land Registration Act](#) 2012 which is on meaning and incidents of co-tenancies. It provides; -
- (1) In this Act, co-tenancy means the ownership of land by two or more persons and includes joint tenancy or tenancy in common.
 - (2) Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.
30. It is clear from the above that in the event that it is not stated whether the interest is a joint or tenancy in common then it was to be presumed that the ownership is in common in equal share. Applying this to the present circumstances the trial court was obligated (note use of the word 'shall') in law to have made a presumption that the Plaintiffs and his deceased brothers owned the land in common proprietorship. Counsel for the Plaintiff Respondent submitted that from the official search the Respondent Plaintiff and his brothers were indicated as proprietors in common in equal undivided shares. This court came across the official search dated 28/01/2019 (see page 34 of the Record of Appeal) but the problem is that it does not appear to have been produced as an exhibit. It was only marked for identification and guided by the case of [Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others](#) (2015) eKLR I did not consider it. But even assuming it had been produced the outcome would be the same anyway since in a tenancy in Common, the two or more holders hold the property in equal undivided shares. The trial Magistrate therefore in my view erred in making a finding that the proprietorship was joint. I therefore make a finding that the suit property is held in common proprietorship in equal undivided share.
31. Having made a finding that the proprietorship herein was in common, the implication would be that legally the Plaintiff cannot purport to claim under survivorship. Sections 103 of the RLA is material and provides as follows; -

103.

- (1) Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate.
- (2) No proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.

Section 103 (1) is equally replicated in Section 91(5) of the [Land Registration Act](#) is particularly on tenants in common. It provides that in the event of death of a tenant in common, their share of land vests on the estate of the deceased tenant.

32. Justice Samson Okong'o aptly stated in the case of [Diana Muchiri v Lydia Wariara Njenga & another](#) (*supra*).



‘Tenancy in common on the other hand is different from joint tenancy. In a tenancy in common, the two or more holders hold the property in equal undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants. In other words, they have separate interests only that it remains undivided and they hold the interest together. The largest factor that distinguishes a joint tenancy from a tenancy in common is the absence of the doctrine of survivorship in the latter. The share of one tenant is not affected by the death of one of the co-owners. The share of the deceased, devolves not to the other co-owner but to the estate of the deceased co-owner.’

33. Applying the law and persuaded by the above dictum it means therefore that the proprietary interest of the Plaintiffs deceased brothers still exists but as part of their estate. Copies of the death certificates were produced as evidence and in any case, it was not in dispute they were deceased. Secondly it would also follow that Juma Mohamed Haji and Mwana Khamisi Katunza had the right to gift the Appellant Defendant rights to their portions of the suit property during their lifetime but with written consent of the other co-tenants. But was the gifting proved by the Defendant? It was DW1 evidence that Juma Mohamed Haji and Mwana Khamisi Katunza gifted her their portions of the suit property. DW1 however admitted in cross examination that there was no written agreement between her and them. DW1 tendered no proof about this gifting. Based on the proceedings I found no evidence in proof of the gifting.
34. Upon review of the facts of this case and the evidence led by the parties the narrative that the Defendant is a relative and was invited to live in the suit property is more compelling. It is clear to me that the Plaintiff and his deceased brothers all consented to the Defendants stay on the suit property. The Plaintiff indeed stated in cross examination that the Defendant was welcomed on the land by Juma Mohamed Haji who was one of the registered proprietors though he also testified that he indeed gave the Plaintiff the land because he was told that she was chased away by her brothers. While at first the Plaintiff seems to basically to deny that he did not know the Plaintiff, his witness statement which he adopted and his own witnesses PW1 and PW2 acknowledged that the Defendant was their relative.
35. The only issue I have a problem with is the temporary nature of the stay. PW2 and PW1 admitted during cross examination that they were not present when the Defendant was told that her stay thereon was to be temporary. Nothing was presented before the trial court to show that the stay was conditional or temporary even by the Plaintiff who has brought this action. The fact that the Defendant had stayed for over 20 years on the suit property has not been controverted by the Plaintiff and his witnesses. The Plaintiff allowed the Defendant who is their relative to stay for this long and in the process the Defendant acquired an overriding interest on the portion that she occupied with their permission as contemplated under Section 30 of the RLA and section 25 & 28 of the [Land Registration Act 2012](#). They cannot now purport to use indefeasibility of title. I have been guided in this regard by the Supreme court case of *Isack M'inanga Kiebia vs Isaya Theuri M'Lintari* (2018)eKLR.
36. I have noted both parties' submissions on the doctrine of adverse possession. The law applicable for a claim of land by way of adverse possession is the [Limitation of Actions Act](#) Chapter 22 Laws of Kenya. The specific provisions are contained in section 7, 13, 17 and 38[1] and 37 of the Act. The requirements of adverse possession are now known and have been litigated in several cases. The elements are that the owner must have lost his right to the land by being dispossessed by the alleged adverse possessor, the applicant's possession of the land was without the true owner's permission; the discontinuance by possession has been open for a continuous period of 12 years; the owner has not taken any action against the adverse possessor to extinguish their occupation of the suit land or interrupt the same over the minimum statutory period of 12 years and that the applicant has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See *Wambugu v Njuguna* (1983) KLR 172, The court of appeal in *Benson Mukuwa Wachira v Assumption*



Sisters of Nairobi Registered Trustees [2016] eKLR as well as *Chevron (K) Ltd vs. Harrison Charo Wa Shutu* (2016)eKLR.

37. The trial Magistrate after considering the law and judicial precedents made a finding that having been granted permission or licence to enter into the land by the owners including the Plaintiff then the cause of action for adverse possession could not arise. Clearly the elements set out above cannot arise in the circumstances of the present case. The Defendant was invited to the land and additionally as a relative not a stranger. I find no case for adverse possession in the present circumstances and I agree with the trial Magistrate's finding. I would also be guided by the Court of appeal decision in *Samuel Kihamba vs Mary Mbaisi* (2015) eKLR, where the Court stated "we are persuaded by various dicta which we have quoted and relied upon in this judgment and must state it would create havoc for families and the society of Kenya generally if the principles of adverse possession applied within families against close relatives....."
38. Let me add that the case before me is for trespass and eviction. I have already made a finding that the Defendant was not a trespasser on the land and on this basis the orders for eviction would not be warranted and this is further fortified by the trust created following the actions of the Plaintiff and his co tenant.
39. The upshot of the discussions above is that this Appeal partly succeeds and based on this court's findings, the following orders shall issue; -
- i. The orders granted by the trial Magistrate *vide* the judgement read on 30th July 2021 are hereby vacated and shall be substituted with orders dismissing the Plaintiff's suit.
 - ii. In view of the nature of the dispute involving relatives I will not make any orders as to costs.
- 40 Orders accordingly.

DELIVERED AND DATED AT KWALE THIS 20TH DAY OF APRIL 2023.

A.E. DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. G. Magolo for the Defendant /Appellant

Mr Bwika for the Plaintiff /Respondent

Mr. Daniel Disii- Court Assistant.

