



Karaya (Suing as the Administrator of the Estate of Mungai Ndarwa alias Karaya Wa Jonah Deceased) v Gachimo (Sued as the Administrator of the Estate of Samuel Gachimo Mungai Deceased) (Environment and Land Appeal 44 of 2018) [2023] KEELC 16835 (KLR) (18 April 2023) (Judgment)

Neutral citation: [2023] KEELC 16835 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 44 OF 2018**

SO OKONG'O, J

APRIL 18, 2023

BETWEEN

MARY WAIRIMU KARAYA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF MUNGAI NDARWA ALIAS KARAYA WA JONAH DECEASED) APPELLANT

AND

ZIPHORA NYAMBURA GACHIMO (SUED AS THE ADMINISTRATOR OF THE ESTATE OF SAMUEL GACHIMO MUNGAI DECEASED) ... RESPONDENT

(Being an appeal from the judgment and decree of the Principal Magistrate Hon. Mr. M.W. Murage delivered on 9th June 2006 in Kikuyu PMCC No. 10 of 2006)

JUDGMENT

1. Gachimo Mungai(deceased) (hereinafter referred to only as “the Respondent”) filed a suit against Karaya Wa Jonah (also deceased) (hereinafter referred to only as “the Appellant”) in the Principal Magistrate’s Court at Kikuyu on 24th January 2006, namely, Kikuyu PMCC No. 10 of 2006 (hereinafter referred to as “the lower court suit”) seeking eviction of the Appellant from all that parcel of land known as Title No. Karai/Gikambura/T.796 (hereinafter referred to as “the suit property”) under the supervision of the O.C.S Kikuyu Police Station.
2. The Respondent’s case in the lower court was that he was the registered owner of the suit property and that the Appellant resided thereon with his permission. The Respondent averred that he gave the Appellant an option to purchase the suit property but the Appellant refused and/or neglected to do so. The Respondent averred that the Appellant was claiming that he had acquired the suit property by adverse possession despite having knowledge that he resided on the suit property with the permission of the Respondent as his caretaker. The Respondent averred that the Appellant became a nuisance



- and an unpleasant character to live with by causing disturbance to the Respondent and the neighbors living around the suit property. The Respondent averred that this forced him to serve the Appellant with a notice to vacate the suit property.
3. The Appellant filed a defence dated 2nd February 2006 to the Respondent's claim in the lower court. The Appellant denied the Respondent's claim in its entirety. The Appellant averred that he bought the suit property from the Respondent in 1963 and paid a sum of Kshs. 300/= to the Respondent as a consideration. The Appellant averred that despite having paid the agreed purchase price, the Respondent refused to have the suit property transferred to him.
 4. The Appellant averred that he had resided on the suit property since 1963 which was in excess of 40 years at the time the suit was filed against him. The Appellant averred that for the entire period of his occupation of the suit property, the Respondent had never asked or demanded that he vacates the suit property. The Appellant denied that he had gone around claiming that he had acquired the suit property by adverse possession. The Appellant also denied that he had resided on the suit property with the permission of the Respondent as his caretaker.
 5. The lower court heard the case and delivered a judgment on 9th June 2006 in favour of the Respondent. The lower court made a finding that the Respondent had proved that he was the registered owner of the suit property and that the Appellant's claim that he had purchased the suit property from the Respondent was not supported by evidence. The lower court awarded the Respondent possession of the suit property and the costs of the suit.
 6. The Appellant was dissatisfied with the said judgment and preferred the present appeal. In his amended Memorandum of Appeal dated 22nd November 2019, the Appellant challenged the lower court's judgment on the following grounds:
 1. That the learned magistrate erred in law and fact in disregarding the evidence of the Appellant.
 2. That the learned magistrate erred in law and in fact in finding that the Respondent had proved ownership merely by reason of holding a title to the plot.
 3. That the learned magistrate erred in fact and in law in disregarding the sale agreement produced by the Appellant in evidence and also disregarding the weight of the evidence adduced by DW2 and DW3.
 7. The Appellant prayed that the appeal be allowed with costs and the judgment entered by the lower court be set aside and/or varied.

The submissions:

8. On 9th November 2021, the court admitted the appeal and directed that the appeal be heard by way of written submissions. The court also gave timelines within which each party was to file its submissions. From the record, only the Appellant filed submissions. In his submissions dated 28th January 2022, the Appellant argued all the three grounds of appeal together. The Appellant submitted that the Respondent had pleaded that he had allowed the Appellant to reside on a portion of the suit property with an option to purchase the same. The Appellant submitted that the Respondent had claimed that the Appellant had refused to purchase the suit property or to vacate the same. The Appellant submitted that the Respondent testified that he was not in occupation of the suit property and that he was residing at Ngong where he had lived all along. The Appellant submitted that the Respondent testified further that the Appellant had built a house on the suit property. The Appellant submitted that during cross-examination, the Respondent admitted that the Appellant had lived on the suit property for more than 40 years. The Appellant submitted that this admission confirmed that the Appellant was not a



- trespasser on the suit property. The Appellant submitted further that in his testimony, the Respondent neither stated that the Appellant was his caretaker on the suit property nor did he spell out the duties that he had assigned to the Appellant. The Appellant submitted further that there was no evidence of any payment that the Respondent had made to the Appellant as caretaker's salary.
9. The Appellant submitted that the Respondent had not occupied the suit property since 1960 and even upon his demise he was not buried on the suit property. The Appellant submitted that DW2 and DW3 in their testimonies corroborated the Appellant's evidence that he had lived on the suit property for a long time. The Appellant submitted that the trial court in its judgment failed to take into account the Appellant's prolonged occupation of the suit property together with his family for well over 40 years. The Appellant submitted that the Respondent did not call any evidence to prove that the Appellant was a caretaker and not a purchaser of the suit property. The Appellant submitted that through the doctrines of proprietary estoppel and constructive trust, he was entitled to the suit property. The Appellant cited two cases in support of this submission.
 10. The Appellant submitted that the agreement for sale between him and the Respondent did not require the consent of the Land Control Board since the [Land Control Act](#), Chapter 302 Laws of Kenya was not in force when they entered into the said agreement in 1960. The Appellant submitted that there was no conflict in the pleadings of the Appellant and his testimony with regard to the date when the Appellant purchased the suit property as implied in the judgment of the lower court. The Appellant submitted that the Appellant purchased the suit property in 1960 but occupied the same in 1963. The Appellant submitted further that even if there was a problem with the date of the said agreement for sale, the agreement between the Appellant and the Respondent for the purchase of the suit property would still be enforceable as an oral contract as the same was not affected by section 3(3) of the [Law of Contract Act](#), Chapter 23 Laws of Kenya that came into force on 1st June 2003. The Appellant submitted that he performed his part of the said agreement by paying the purchase price and that the agreement was not rescinded by the Respondent.
 11. The Appellant submitted further that the fact that Title No. Karai/Gikambura/T310 a portion of which he had purchased was no longer in existence the same having been subdivided to give rise to Title No. Karai/Gikambura/T796 could not defeat his claim over the suit property. He submitted that what was important was that he continued to occupy the same parcel of land that he purchased in 1960. The Appellant relied on Nyeri Civil Appeal No. 6 Of 2011 consolidated with Civil Appeal No.26 & 27 of 2011, *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* in support of this submission.
 12. The Appellant submitted that the trial magistrate erred in his finding that the Respondent had proved ownership of the suit property merely by reason of holding a title to the suit property. The Appellant submitted that the Appellant's defence was that he was a bona fide purchaser of the suit property for value and that the Respondent had refused to transfer to him the suit property. The Appellant submitted that the lower court failed to take into account the fact that the Appellant had purchased the suit property and had paid for the same in its finding that the Respondent had proved ownership of the property. The Appellant submitted that the lower court also failed to take into consideration the Appellant's prolonged occupation of the property.

Analysis and Determination:

13. The main issues arising for determination in this appeal which summarises the three grounds of appeal put forward by the Appellant are the following;
 1. Whether the lower court erred in issuing an order for the eviction of the Appellant from the suit property; and



2. Whether the Appellant's appeal should be allowed.
14. The two issues are intertwined and as such I will consider the same together. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. See, *Verani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269 and *Selle v. Associated Motor Boat Co. Ltd.* [1968] E.A 123 on the duty of the first appellate court.
15. It is also well settled that an appellate court will not ordinarily interfere with the findings of fact by the trial court unless they were not based on evidence at all, or on a misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v. Sunday Post Ltd.* [1958] E.A 424 and *Makube v. Nyamuro*[1983] KLR 403.
16. I have reviewed the pleadings by the parties and the evidence that was tendered before the lower court. The Respondent's suit in the lower court was based on the tort of trespass. The Respondent had claimed that the Appellant was a trespasser on the suit property and as such should be forced to vacate the same through an order of eviction. The Respondent averred that he had allowed the Appellant to reside on the suit property. The Respondent averred that the Appellant became a nuisance on the property and he served him with a notice to vacate which he did not comply with making the filing of the lower court suit necessary.

Section 3 of the *Trespass Act*, Chapter 294 Laws of Kenya provides:

- “(1) 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.
- (2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”
17. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, *Clerk & Lindsell on Torts*, 18th Edition, page 923, paragraph, 18-01. In *Gitwany Investments Limited v. Tajmal Limited & 3 others* [2006] eKLR, it was held that title to land carries with it legal possession. This means that even if one does not have actual possession of land, so long as he has a title to the land, that is deemed as possession for the purposes of trespass. To establish trespass, the Respondent was required to prove that he was either lawfully in possession of the suit property or was the owner thereof and that the Appellant had entered and occupied the property without any justifiable cause.
18. It is not disputed that the suit property was at all material times registered in the name of the Respondent as the owner thereof. The lower court was therefore correct in its finding that the Respondent had proved ownership of the suit property. The Respondent having proved his ownership of the suit property, the burden shifted to the Appellant to prove that he had justifiable cause for occupying the suit property. The Appellant pleaded and led evidence that he purchased the disputed parcel of land from the Respondent in 1960 at a consideration of Kshs. 300/- and that the Respondent had refused to transfer the same to him despite having paid the purchase price. I am of the view that from the evidence adduced by the parties, the relationship between the Appellant and the Respondent pointed more towards that of a seller and a purchaser rather than an owner and a caretaker. The



Respondent admitted that the Appellant had occupied the suit property for over 40 years at the time he moved the court in 2006 to evict him from the property. The Respondent also admitted that he was not residing on the suit property and that it was the Appellant who had put up a house on the suit property and was residing thereon. Save for claiming that the Appellant was his caretaker, the Respondent adduced no single piece of evidence in support of this claim. As correctly submitted by the Appellant, the Respondent did not adduce evidence of any payment made to the Appellant as salary for his caretaker services. The Respondent did not also explain how a caretaker came to construct his residence on the suit property. The Respondent claimed that he had given the Appellant an option to purchase the suit property but he failed to do so. The Respondent did not however tell the court when the offer was made to the Appellant and the terms thereof.

19. In the absence of evidence that the Appellant was a caretaker or any other explanation by the Respondent for his occupation of the suit property, the only logical conclusion that was supported by evidence was that the Appellant had entered the suit property as a purchaser. I am in agreement with the Appellant that having bought the suit property and occupied the same for over 40 years, he had a beneficial interest in the property. The Appellant's purchase and occupation of the suit property for over 40 years created a constructive trust in his favour against the Respondent's claim to the suit property. Although the Respondent was registered as the owner of the suit property, he held the property in trust for the Appellant. The suit property was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the Registered Land Act provide as follows:

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“27. Subject to this Act -

- (a) a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- (b) b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”



20. In *John Gitiba Buruna & Another v Jackson Rioba Buruna*, Court of Appeal at Kisumu, Civil Appeal No. 89 of 2003, the court stated as follows:

Although the rights of a registered proprietor of land are indefeasible under section 28 of the Registered *Land act*, such registration does not as the proviso to section 28 states relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

21. The Appellant having proved that he had a beneficial interest in the suit property and that the Respondent held the property in trust for him, he had demonstrated that he had a lawful cause for occupying the suit property. The Appellant was therefore not a trespasser on the property and should not have been evicted therefrom. I am in agreement with the Appellant that the fact that the agreement that was said to have been entered into between the Appellant and the Respondent referred to Title No. Karai/Gikambura/T.310 while the Respondent’s claim was in respect of Title No. Karai/Gikambura/T.796 could not defeat his claim. The evidence on record shows that the Respondent had partitioned Title No. Karai/Gikambura/T.310 into two equal portions. It was not disputed that the parcel of land that was occupied by the Appellant was Title No. Karai/Gikambura/T.796. The chances that Title No. Karai/ Gikambura/T.796 was a portion of Title No. Karai/Gikambura/T.310 cannot be ruled out. The subdivision or partitioning of Title No. Karai/Gikambura/T.310 could not divest the Appellant of the interest that he had acquired in a portion thereof.

22. Due to the foregoing, it is my finding that the lower court erred in allowing the Respondent’s claim against the Appellant and ordering his eviction from the suit property. I therefore find merit in the Appellant’s appeal.

Conclusion:

23. In conclusion, I allow the Appellant’s appeal. The judgment of the lower court delivered on 9th June 2006 and the decree extracted therefrom on 24th July 2006 are set aside and in place thereof, there shall be an order dismissing the Respondent’s suit in the lower court. Since both the Appellant and the Respondent are deceased, each party shall bear his own costs of the lower court suit and of this appeal.

DELIVERED AND DATED AT KISUMU ON THIS 18TH DAY OF APRIL 2023

S. OKONG’O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Kariuki for the Appellant

Mr. Mwariri for the Respondent

Ms. J. Omondi-Court Assistant

