Ayoyih v Muhanji (Environment and Land Appeal E011 of 2022)
[2023] KEELC 17511 (KLR) (16 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17511 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ENVIRONMENT AND LAND APPEAL E011 OF 2022

DO OHUNGO, J

MAY 16, 2023

BETWEEN

WYCLIFFE MILIMU AYOYIH ..... APPELLANT

AND

BENARD HINGA MUHANJI ..... RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Kakamega (Hon. J.R. Ndururi, Principal Magistrate) delivered on 12th May 2022 in Kakamega MC ELC No E027 of 2022 Wycliffe Milimu Ayoyih v Benard Hinga)

JUDGMENT

1. The background of this appeal is that the appellant moved the Subordinate Court through plaint dated 25th February 2022 wherein he averred that he was the registered proprietor of the parcel of land known as Isukha/Shirere/2203 (the suit property) and that sometime in December 2021, the respondent unlawfully trespassed on the suit property and set up a structure therein. That the respondent's father, one Joseph Okello Muhanji passed away on February 21, 2022 and that the respondent was intending to inter the remains of the deceased in the suit property. The appellant therefore prayed for judgment for eviction of the respondent, his agents, servants, and any other person claiming under him from the suit property; permanent injunction restraining the respondent, his agents, servants, and any other person claiming under him from trespassing, wasting, cultivating, occupying, remaining [in], alienating and or burying the remains of the deceased on the suit property; mesne profits and costs of the suit.

2. The respondent filed amended statement of defence and counter claim dated March 24, 2022 wherein he denied the allegations of trespass, admitted the burial plans, and stated that the appellant's title was fraudulent. He averred that the suit property was purchased by his grandfather one Gabriel Muhanji Kwachi and that his family have been in continuous occupation of it since 1972. That the suit property was initially registered in the name of one Gerishom Imbwaka Makasu (deceased) and it was subject to

succession proceedings in Kakamega Succession Cause Number 218 of 2021 without adhering to the *Law of Succession Act*. He therefore prayed that the appellant's suit be dismissed, and that judgment be entered in his favour for revocation and rectification of the title to the suit property 'as currently held' so that title reverts to Gerishom Imbwaka (deceased), a declaration that the transmission and transfer of the suit property entered on November 18, 2021 was a nullity and illegal ab initio, a declaration that that the respondent is entitled to be registered as proprietor of the suit property by virtue of Section 38 of the *Limitation of Actions Act*, and for costs of both the suit and the counterclaim.

3. Upon hearing the matter, the Subordinate Court (JR Ndururi, Principal Magistrate) delivered judgment on May 12, 2022. The learned magistrate found merit in the respondent's case and therefore allowed it in the following terms:

    1. That a declaration is hereby made that the plaintiff acquired registration as the proprietor of Land Parcel No Isukha/Shirere/2203 by presenting a false certificate of confirmation of grant, and thus the said registration was illegal, null and void ab initio;

    2. That an order is hereby issued requiring the Registrar of Lands to expunge from the register all the entries made thereto on the strength of the false Certificate of Confirmation of Grant, so that the register will reflect that the said property is still registered in the name of the original owner Gershom Imbwaka Makasu.

    3. That a declaration is hereby made that the Defendant has acquired title to Land Parcel No Ishukha/Shirere/2203 by way of adverse possession and is entitled to be registered as the proprietor thereof;

    4. That an order is hereby issued directing the Registrar of Lands to register and enter the name of the Defendant as the registered proprietor of Land Parcel No Isukha/Shirere/2203;

    5. That all interim orders subsisting in this suit are hereby lifted;

    6. That Plaintiff will bear the Defendant's costs of the suit and the counter-claim.

4. Aggrieved by the judgment, the appellant filed this appeal, praying that the appeal be allowed with costs and the judgment be set aside. The following grounds of appeal are listed on the face of the Memorandum of Appeal:

    1. That the learned trial magistrate errored in law and fact by secretly making a purported site visit with the defendant to fish and /or procure evidence for defence long after the defence case had been closed and after dismissing the application dated April 19, 2022.

    2. That the learned trial magistrate conducted proceedings in collusion with the defendant without the presence of the plaintiff purportedly on May 9, 2022 when there was no order of site visiting thus denying the appellant an opportunity to respond to the application dated April 19, 2022.

    3. That the learned trial magistrate errored in law and in fact in cancelling a confirmed grant that enabled transmission of the suit property when there was no application for cancellation hence applied wrong legal principles causing a miscarriage of justice.

    4. That the learned trial magistrate errored in law and in fact in failing to consider that the defendant lacked locus standi to claim the reliefs sought in the counter-claim.

5. That the learned trial magistrate grievously errored in law and in fact in failing to properly consider the pleadings, submissions and evidence of the plaintiff that satisfied the requirements of granting an injunction and eviction orders.

6. That the learned trial magistrate erred in law and in fact in making declarations and granting reliefs which were purely a preserve of the Environment and land court judge hence acted outside of its mandate thereby causing unnecessary hardship to the plaintiff.

5. The appeal was canvassed through written submissions. The appellant argued that the learned trial magistrate did not visit the suit property and that the purported visit was carried out without fixing a particular date for it and without notifying the appellant and his counsel. That the learned trial magistrate erred by cancelling a confirmed grant without following Section 76 of the *Law of Succession Act*.

6. The appellant further submitted that the respondent lacked locus standi to sue on behalf of his late grandfather since he did not obtain letters of administration and that consequently, the claim for adverse possession ought to have been dismissed. That the procedure used by the respondent to seek adverse possession through a counterclaim was illegal and that an originating summons ought to have been filed in this court instead. He therefore concluded by urging the court to allow the appeal.

7. In reply, the respondent argued that he sought a site visit through an application dated April 20, 2022 and that in the presence of the counsel for the appellant on April 28, 2022, the learned magistrate exercised judicial discretion and directed that a site visit be conducted. It was the respondent's further submission that he has been in the suit property for a period of over fifty years and that he sought adverse possession for himself. That he only mentioned his late grandfather to give history of the suit property. In submitting that his claim of adverse possession is an overriding interest on the title and that the learned trial magistrate had jurisdiction to grant adverse possession, the respondent relied on the cases of *Gachuma Gacheru vs Maina Kabuchwa [2016] eKLR* and *Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & another [2020] eKLR*. He thus contended that this appeal should be dismissed.

8. Since this is a first appeal, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR*.

9. I have considered the memorandum of appeal, the pleadings, the evidence, and the parties' submissions. The issues that arise for determination in this appeal are whether there was a site visit and its effect, whether the respondent lacked locus standi to claim the reliefs in the counterclaim and whether the parties were entitled to the reliefs which they sought.

10. Whenever it becomes necessary for a court of law to conduct a site visit, the court does so to reach a just determination of the matter before it. The raw materials that a court of law uses in its determination are the law and facts. Facts are to be presented before the court as evidence. Consequently, site visits are essentially an occasion to receive evidence since the law can be cited by parties in pleadings or submissions. Further, the court can access the law on its own. A site visit that is incapable of yielding any evidence is not a prudent use of the court's time and resources. See *Beatrice Ngonyo Ndungu & another v Samuel K Kanyoro & 2 others [2017] eKLR*.

11. The Court of Appeal discussed the question of site visits in the case of *Cyrus Nyaga kabute v Kirinyaga County Council [1987] eKLR* as follows:

> On the point of law in this appeal which attacked the wrong procedure adopted by the trial magistrate, it is established law that when magistrate or judge visits land and makes notes, the parties should be given chance to agree or deny or contradict the notes on oath, if those notes were to be relied upon in judgment. In Fernandes v Noronha [1969] EA 506 at page 508, duffus V P as he then was stated.
>
> '..... the judge although reluctantly, did the Locus in quo, but unfortunately there is no report of his visit, on the record although this is mentioned in his judgment.
>
> The judge does not in this case appear to have relied on any of his own observations, but in cases where the court finds it expedient to visit a Locus in quo, the court should make a note of what took place during the visit in its record and this note should be either agreed to by the advocates or at least read out to them, and if a witness points out any place or demonstrates any movement to the court then this witness should be recalled by the court and give evidence of what occurred.'
>
> This decision has been followed in subsequent cases. But the learned judge on appeal dealt with this portion and ignored those notes. He found that even without relying on those notes, it would not affect the result of the case nor does it in any way result to injustice to any of the parties.

12. Thus, a site visit is as much a judicial process as a hearing in open court. It should be part of the record in all its aspects, in terms of the date when it is scheduled, the coram and what took place. Parties should be made aware of the date when it is scheduled and be given the opportunity to be present during the visit and to offer evidence in response to any notes taken by the court during the visit.

13. In this case, an order for site visit was made on April 28, 2022, in the presence counsels for both parties. The site visit was scheduled for May 5, 2022 at 3.00pm. The court further ordered that "no proceedings will be conducted" during the visit. Simultaneously with scheduling the site visit, the court also scheduled delivery of judgment on May 12, 2022. It seems that the site visit did not take place on May 5, 2022 as scheduled. Instead, there are proceedings recorded by the learned magistrate on May 9, 2022 headed "Site visit." The coram for that day shows that both the respondent and his counsel were present. There was however no appearance for the appellant.

14. There is nothing within the proceedings to show how and why the date of the visit changed from May 5, 2022 to May 9, 2022. Equally, it is not stated whether the appellant and his counsel were notified of the new date. There is, however, at page 80 of the record of appeal, a notice issued on May 4, 2022 by the Court Administrator, stating that the learned magistrate would not sit on 4th and 5th May 2022 since he was unwell. That, perhaps, is the explanation for the change of dates. During the visit, the learned magistrate took some notes as to developments and activities on the suit property. Even though the learned magistrate relied on the notes in the judgment, I do not think the contents of the notes change the outcome of this appeal, as will become manifest later in this judgment. Thus, the answer to the first issue for determination is that there was a site visit, but it has no effect in the overall outcome of the matter.

15. The next issue for determination is whether the respondent lacked locus standi to claim the reliefs in the counterclaim. A perusal of the amended statement of defence and counter claim filed by the respondent shows that the respondent averred therein that his family had been in continuous occupation of the suit property since 1972. He prayed inter alia for judgment against the appellant for

a declaration that he was entitled to be registered as proprietor of the suit property by virtue of Section 38 of the *Limitation of Actions Act* or in other words, adverse possession.

16. Although the respondent mentioned the family of his grandfather Gabriel Muhanji Kwachi, he did not aver anywhere that he brought the counterclaim on behalf of the estate of his grandfather. On the contrary, he specifically stated at paragraph 14 of the amended statement of defence and counter claim that the title had been extinguished by his adverse possession. Further, the prayers in the counterclaim refer to him personally and not the estate of his grandfather. I am aware that he stated under cross-examination that he was claiming on behalf of his deceased grandparents. The capacity in which parties sue is defined primarily by their pleadings as opposed to the evidence. I find that the respondent had the requisite locus standi to pursue the reliefs in the counterclaim.

17. The last issue for determination is whether the parties were entitled to the reliefs which they sought. The appellant was the registered proprietor of the suit property as at the time of trial. Ordinarily, a registered proprietor of land is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Further, Section 26 of the Act obligates the court to accept his certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. The said sections provide as follows:

> 24. Interest conferred by registration
>
> Subject to this Act—
>
> (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; ....
>
> 26. Certificate of title to be held as conclusive evidence of proprietorship
>
> (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
>
> (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
>
> (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ...

18. Thus, the grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

19. Based on his title, the appellant sought eviction of the respondent and his agents from the suit property, permanent injunction restraining the respondent and his agents from dealing with the suit property or burying the remains of the deceased on the suit property and mesne profits. On the other hand, the respondent sought revocation and rectification of the title to the suit property so that title reverts to Gerishom Imbwaka (deceased), a declaration that the transmission and transfer of the suit property entered on November 18, 2021 was a nullity and illegal ab initio and a declaration that that the respondent is entitled to be registered as proprietor of the suit property by virtue of adverse possession. Going by the averments at paragraphs 18 to 21 of the respondent's counterclaim, the respondent's case

for revocation of the title and nullification of the transmission was built on the argument that the suit property was subject to succession proceedings in Kakamega Succession Cause Number 218 of 2021 without adhering to the *Law of Succession Act*. In terms of the grounds for nullification under Section 26 (1) (a) or (b) of the *Land Registration Act*, I take it that the respondent challenged the appellant's title on grounds of misrepresentation, illegality and want of procedure.

20. If the appellant's title remains as it was at trial, and if there was no counterclaim for adverse possession, there would be no reason to keep the appellant from enjoying the rights and privileges of a registered proprietor of land. That said, any proprietor of land, even one with the most impeccable of titles, must contend with a claim for adverse possession. I will return to the issue of adverse possession later.

21. The appellant was aware that his title was being challenged in terms of the counterclaim and the entire collection of material that the respondent had filed before trial. In the face of the challenge, the appellant was content to simply produce a copy of his title, an eviction notice issued to the respondent after he obtained title and a certificate of search. Simply put, the appellant was content to just wave his title document to the court. The Court of Appeal demonstrated its disapproval of that kind of conduct when it stated in *Munyu Maina v Hiram Gathiha Maina [2013] eKLR* thus:

> We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony.

22. In the face of the appellant just relying on his title document, the respondent dug up and availed before the Subordinate Court the material pursuant to which the appellant became the registered proprietor. The appellant had a chance to challenge those documents by filing a further list of documents. He did not.

23. Among the documents that the respondent produced is a certified copy of the register in respect of the suit property, letters of administration intestate issued to Solomon Ahindukha Makasu and Isaac Magomere Imbwaka in respect of the estate of Gerishom Imbwaka Makasu (deceased) on October 12, 2021 in Kakamega CM Succession Cause Number 218 of 2021, a certificate of confirmation of grant issued to the said administrators on October 21, 2021 and application to be registered as proprietor by transmission. A perusal of those documents shows that Gerishom Imbwaka Makasu (deceased) was registered as proprietor of the suit property on May 30, 1983 and that Solomon Ahindukha Makasu and Isaac Magomere Imbwaka became registered proprietors on November 18, 2021 by way of transmission pursuant to the grant in Kakamega CM Succession Cause Number 218 of 2021. On the very November 18, 2021 that they became registered proprietors, they transferred the suit property to the appellant.

24. Upon analysing those documents against those produced by the appellant, the learned magistrate stated as follows:

> As I was examining the documents ... two things struck me. The first one is that the grant was issued on October 12, 2021 and the date stamped on the Certificate of Confirmation of Grant shows October 22, 2021, that is, 10 days after the issuance of the grant. Under S. 71(1) of the *Law of Succession Act*, no grant of letters of administration can be confirmed before the expiry of six months after the date of its issue, unless the holder of the grant has made

> an application for confirmation of the grant before the expiration of that period, and the court has made that direction. Secondly, the Certificate of Grant contains an alteration in connection with the suit property. A Certificate of Confirmation cannot be signed if it bears an alteration, and Rule 43 of the Probate and Administration Rules provide for procedure to be applied in rectification of a grant if contains an error or errors.

25. I too have perused the documents and I have noted the anomalies cited by the learned magistrate. The law on those issues is clear enough. The appellant had a chance to offer explanations but did not. The transactions between Solomon Ahindukha Makasu, Isaac Magomere Imbwaka and the appellant took place on the same day and further, the appellant's name is included in the certificate of confirmation of grant as a beneficiary of the estate. Clearly, he was party to everything that took place. Overall, I am satisfied that the learned magistrate properly granted the relief of nullification of title. The argument that the learned magistrate cancelled a confirmed grant is not supported by material on record. He simply expressed an opinion on the nature of the documents that the appellant used to obtain title.

26. I now turn to the issue of adverse possession. The appellant contended in this appeal that the procedure used by the respondent to seek adverse possession through a counterclaim was illegal and that an originating summons ought to have been filed in this court instead. Suffice it to restate that it is no longer a requirement that adverse possession claims be commenced by way of originating summons. A litigant can commence such a claim by plaint or even counterclaim. See *Gulam Miriam Noordin v Julius Charo Karisa [2015] eKLR* and *Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR*. In this case, the respondent could not reasonably be expected to go and file a separate case by way of originating summons. He was perfectly within procedure to respond to the appellant's claim by way of a counterclaim for adverse possession.

27. As regards the appellant's argument that that adverse possession ought to have been sought in this court as opposed to the subordinate court, the simple answer to that is that pursuant to Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011, 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, magistrates' courts have jurisdiction and power to handle cases involving claims of adverse possession so long as the presiding magistrate is duly gazetted under Section 26 (3) of the *Environment and Land Court Act*, 2011 and has the requisite pecuniary jurisdiction. See Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & another [2020] eKLR.

28. The question then arises as to whether the respondent established adverse possession. The Court of Appeal restated the essentials of adverse possession in *Loise Nduta Itotia v Aziza Said Hamisi [2020] eKLR* as follows:

> In line with the Act, Kneller, J (as he then was) in the case of Kimani Ruchire vs Swift Rutherford & Co Ltd [1980] KLR 10, outlined some tenets of adverse possession thus; 'The plaintiffs have to prove that they have used this land which they claim as of right. Nec vi, nec clam, nec precario (No force, no secrecy, no persuasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it or by way of recurrent consideration.'

29. In a claim of adverse possession, the burden of proof lies with the claimant who must prove that he has had peaceful and uninterrupted possession for 12 years. To succeed, he must demonstrate that the occupation was without the proprietor's permission and that he had an intention to dispossess the registered proprietor.

30. The appellant conceded in his testimony that the respondent has houses and trees on the suit property and that he only started pursuing the respondent after obtained title on November 18, 2021. The respondent testified that he was born on the suit property in 1973, that his family has lived on the suit property since he was born and that his grandfather, his grandmother, and his aunt who passed away on various dates between 1984 and 1998 are all buried on the suit property. He further stated that his family has built three semi-permanent houses, planted trees, and even drilled a borehole on the suit property. He produced burial permits to support his claims about the burials. Evidence of the respondent's possession and development of the suit property was corroborated by DW2 to DW4, all of whom were familiar with the area. In the eviction notice that the appellant issued to the respondent, he stated that the respondent was on the suit property without his consent. The appellant confirmed in his testimony that there were houses and trees on the suit property. Although the magistrate relied on the notes that he made during the site visit, I am persuaded that even without relying on those notes, the respondent demonstrated that he had been in peaceful and uninterrupted possession of the suit property for 12 years. The respondent's case on adverse possession was proven.

31. In view of the foregoing, the respondent was entitled to the reliefs that he sought. The appellant on the other hand did not prove his case.

32. I find no merit in this appeal. I dismiss it with costs to the respondent.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 16TH DAY OF MAY 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Ondieki for the appellant

Mr Tanui for the respondent

Court Assistant: E. Juma