



**Kibunya v Karanja & 2 others (Environment and Land Appeal
E023 of 2021) [2023] KEELC 19246 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19246 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E023 OF 2021**

**MD MWANGI, J
JULY 31, 2023**

BETWEEN

MARY WAMBUI KIBUNYA APPELLANT

AND

HENRY MUGETHE KARANJA 1ST RESPONDENT

JAMES WAMUNYU KARANJA 2ND RESPONDENT

JOHN MBURU KARANJA 3RD RESPONDENT

JUDGMENT

Background

1. This Judgment is in respect of the appeal lodged by way of the Memorandum of Appeal dated 29th March 2021. The appeal is against the Judgment of the Senior Principal Magistrate's Court in Kikuyu SPMCC 220/2006 delivered by Hon. D.N. Musyoka (S.P.M.) on 16th March 2021.
2. The Appellant has listed 13 grounds of appeal in his Memorandum of appeal. She prays that the Respondents' plaint dated 15th September 2006 be dismissed with costs and the Defendant's Defence and Counter-claim be allowed. She too prays for the costs of the appeal.

Court's Directions.

3. The court's directions were that the appeal be dispensed with by way of written submissions. Both sides complied and filed their respective submissions as directed.



Submissions by the parties .

A. Submissions by the Appellant.

4. The Appellant commences her submissions by giving a brief background of the case. She explains that the suit property Muguga/Kahuho/428 belonged to the late Kang'ethe Mwega, her deceased father, who died on 17th October 2002. After his death, his son Joseph Njuguna Mugethe, a brother to the Appellant allegedly secretly filed a succession cause before the High Court in Eldoret (High Court Succession Cause 304 of 2001) without the knowledge and the consent of the Appellant; who was a daughter of the deceased.
5. After the confirmation of the grant, the suit property was registered in the name of the said Joseph Njuguna Mugethe who subsequently sold it to 3rd parties, the Respondents herein.
6. The Appellant asserts that the sale of the suit property by her brother to 3rd parties essentially disinherited her and her siblings defeating their beneficial rights as the true beneficiaries who were entitled to inherit from the estate of their father. The Appellant avers that she only learnt of the succession cause when the suit before the Kikuyu Senior Principal Magistrate's Court was instituted. She affirms that she filed an application in the High Court at Eldoret seeking to revoke the grant issued to her brother Joseph Njuguna Mugethe but he unfortunately passed on before the application could be heard and determined.
7. Justice Ibrahim (as he then was) held that upon the death of the Administrator, the grant of letters of administration which was confirmed, lapsed and stood revoked by operation of the law, since it was personal to the administrator. Therefore, any beneficiary who wished to act for the estate or take any action as an administrator had to be appointed first to replace the deceased. The Appellant allegedly attempted to take action as guided by the Succession Court but the same was still pending in court by the time of the judgment of the Kikuyu Senior Principal Magistrate Court.
8. The Appellant summed up her grounds of appeal into 4 issues for determination as follows: -
 - a. Whether Joseph Njuguna Mugethe could sell the suit property and pass a good title to the Respondents.
 - b. Whether the Respondents are innocent purchasers for value without notice.
 - c. Whether the Appellant has any recognizable rights over the suit property.
 - d. Did the Appellant become entitled to the title and ownership of the suit property by virtue of adverse possession and occupation of the suit premises.
9. The Appellant has submitted on each of the 4 issues. I will refer to the submissions in my analysis and determination later on in the judgement.

Submissions by the Respondents.

10. In their submissions, the Respondents too have given a brief background of the suit before the Senior Principal Magistrate's Court at Kikuyu.
11. The Respondents were the Plaintiffs before the Magistrate's Court – Kikuyu SPMCC No. 220 of 2006. They initiated the suit seeking for an order of eviction of the Defendant (now Appellant) from the suit property and an order of permanent injunction restraining the her from trespassing



into, encroaching upon, selling, transferring, excavating in, alienating, fencing off and or in any other manner dealing with the Plaintiff's parcel of land known as Muguga/Kahuho/428.

12. The Appellant on her part filed a statement of Defence and Counterclaim claiming adverse possession and laches as against the Plaintiffs stating that she had uninterruptedly occupied the suit premises with their knowledge since 1992 and they had never moved to eject her from it. She further claimed that the Plaintiffs did not have proper/legal title to the suit property adding that their interest over the suit property was acquired fraudulently and/or through false misrepresentation and collusion with Joseph Njuguna Mugethe.
13. Judgment was given in favour of the Plaintiffs on 16th March 2021 by the Learned Senior Principal Magistrate and the Appellant's statement of Defence and Counter-claim dismissed with costs to the Plaintiffs.
14. The Respondents in their submissions clustered the Appellant's 13 grounds of appeal in the Appellant's memorandum of appeal into 3 and submitted on them as such:
 - a. Grounds 1 and 2.
 - b. Grounds 3, 4 & 5 together.
 - c. Grounds 6-13 together.

Issues for Determination

15. This being a first appeal, the court's primary role as the first appellate court is to re-evaluate, re-assess, and re-analyze the evidence before determining whether the conclusions reached by the Learned Magistrate are to stand or otherwise and give reasons either way (Abok Jame Odera t/a A.J. Odera & Associates (2013) eKLR).
16. I must note that the Respondents clustering corresponds to a large extent with the issues identified by the Appellant in her submissions. I will therefore adopt the 4 issues identified by the Appellant for purposes of determining this appeal, namely;
 - A. Whether the Appellant became entitled to the title and ownership of the suit property by virtue of adverse possession and occupation of the suit premises.
 - B. Whether Joseph Njuguna Mugethe could sell the suit property and pass a good title to the Respondents.
 - C. Whether the Respondents are innocent purchasers for value without notice.
 - D. Whether the Appellant has any recognizable rights over the suit property.

Analysis and Determination.

A. Whether the Appellant became entitled to the suit property by virtue of adverse possession.

17. There is a plethora of decisions on adverse possession by the Superior courts of this country and other countries. In the case of Peter Okoth vs Ambrose Ochido Andajo and Benedict Odhiambo Oketch (2021) eKLR, the court in defining what amounts to adverse possession referred to the Court of Appeal



decision in *Wilson Kazungu Katana & 101 others vs Abdalla Bakshwein & another* (2015) eKLR, where the court had stated that for a claim of adverse possession to succeed: -

- i. The subject parcel of land must be registered in the name of a person other than the Applicant;
 - ii. The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner; and
 - iii. The Applicant must have been in occupation for a period in excess of twelve (12) years having dispossessed the owner or there having been discontinuance of possession by the owner.
18. The Court of Appeal in the *Wilson Kazungu Katana* case (supra) had discussed other decided cases on the concept of adverse possession citing the case of *Kasuve Vs Mwaani Investments & Wanje Vs Saikwa*.
19. The court elaborated that a claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a 12 years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition.
20. In the *Wanje* case, the court expressed the view that in order to acquire title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it.
21. Dispossession constitutes of acts done which are inconsistent with the proprietor's enjoyment of the soil for the purpose for which he intended to use. Therefore, a person who occupies another person's land with that person's consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and his possession is not illegal.
22. The persuasive decision of the Indian Supreme Court in the case of *Kamataka Board of Wakf vs Government of India & Others* (2004) 10 SCC 779 emphasized the well settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario" meaning, peaceful, open and continuous.
23. Similarly, in the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR Kuloba J (as he then was) enumerated the elements that need to be proved by a party invoking the doctrine of adverse possession as follows;
 - a. The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for statutory period.
 - b. The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
 - c. The occupation of land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupant.
 - d. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi. that is to say occupation with the clear intention of excluding the owner as well as other people.



- e. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, given reason for notice to the owner and the community, of the exercise of dominion over the land,
- f. The possession must be continuous uninterrupted, unbroken, for the necessary statutory period.
- g. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.

24. The Court of Appeal in the case of *Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui* [2017] eKLR while acknowledging adverse possession is a common law doctrine restated the same by citing the India Supreme Court decision in the case of *Kamataka Board of Wakf vs Government of India & Others* [2004] 10 SCC 779 where the court stated thus: -

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

- 25. In this case, the Appellant claims to have had uninterrupted possession since 1992. This was before her father passed on. In essence, the Appellant is claiming that her right of adverse possession to the suit property started compounding against her own father in 1992. Her case is that her claim of adverse possession had crystallized by the year 2005 when the title to the suit property was transferred to the Respondents and could not therefore be defeated by the transfer of title to the Respondents.
- 26. The Respondents’ position was that the Appellant in her own testimony admitted that her parents joined her at the suit property in 1997 when ethnic clashes began in the Rift Valley and lived with her until the clashes were over. The Respondent’s submissions were that the Appellant’s claim cannot qualify as non-permissive, non- consensual, actual, open, notorious exclusive and adverse to the title of the proprietor.
- 27. From her submissions, it is clear that the Appellant is the daughter of the late Kangethe Mwega who passed on, on 17th October 2002.
- 28. The first question that the court must ponder is whether a child can validly seek adverse possession over her parents’ land.
- 29. I find the answer in the case of *Mcintosh –vs- Fire Company*, 220 va 553, 260 S.E 2d 457(va 1979) where the Supreme Court of Virginia found that, ‘use by a child of his parents’ land is presumably permissive’.



30. The Court of Appeal of Kenya in Samuel Miki Weru –Vrs- Jane Njeru Richu, Civil Appeal Number 122 of 2001 too stated that,

“It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner.”

31. Secondly, the Appellant did not demonstrate that even if her possession had been non-permissive, it was hostile to her father’s title, unequivocally exclusive, and with an evinced unmistakable ‘animus possidendi’. That is to say occupation with the clear intention of excluding the owner as well as other people.

32. If the Appellant’s possession had been hostile to her late father’s title she would then not have allowed him access as she did in 1997.

33. I therefore agree with the holding by the Learned Magistrate on this aspect. The Appellant’s occupation of the suit property which was owned by her own father was permissive. It was further not adverse to her father’s title. The Appellant’s claim of adverse possession lacks both legal and factual basis.

B. Whether Joseph Njuguna Mugethe could sell the suit property and pass a good title to the Respondents.

34. At the time of sale of the suit property, it is apparent that the title to the suit property was in the name of Joseph Njuguna Mugethe as the sole proprietor, after the High Court in Eldoret confirmed the grant in his name in Eldoret High Court Succession Cause 304 of 2001. The Appellant confirms the said information but alleges that her brother secretly and fraudulently obtained the grant in her father’s estate without her consent. The Appellant alleged that she only learnt of the succession cause when the suit before the Kikuyu Senior Principal Magistrate’s Court was instituted. She attempted to revoke the grant issued to her brother Joseph Njuguna Mugethe in the High Court in Eldoret but was unsuccessful.

35. From the foregoing, it is clear that the grant issued and confirmed by the High Court in Eldoret had not been revoked by the time of the judgment by the learned Magistrate. There was no evidence tabled before the Learned Magistrate to support the Appellant’s allegation that the grant was obtained fraudulently. The Appellant’s allegations could at best only be treated as such, mere allegations. Joseph Njuguna Mugethe having been confirmed as the administrator of the estate of his late father lawfully acquired and transferred the title to himself and could there pass a good title to the third parties.

36. It is a well settled principle of law that where a party alleges fraud, he must not only specifically plead the same but must also strictly and distinctly prove the allegations. Tunoi JA (as he then was) in the case of Vijay Morjaria vs Nansingh MadhuSingh Darbar & another (2000)

eKLR stated that:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”



37. The Court of Appeal in *Kinyanjui vs George Kamau* (2015) eKLR while affirming the above position reiterated that,

“The burden of proof lies on he who alleges the fraud.”

C. Whether the Respondents are innocent purchasers for value without notice.

38. Flowing from the above reasoning, the Respondents acquired a good title. No evidence was adduced to support the allegations of fraud either against the Respondents or against Joseph Njuguna Mugethe who sold the land to them. I find no error in the decision of the learned Magistrate in this aspect.

D. Whether the Appellant has any recognizable rights over the suit property.

39. I find this question misplaced. The Appellant claims the right of a beneficiary. Neither the Senior Principal Magistrate’s Court nor this Court can answer that question. It is a question that may only be answered by the Succession Court under the *Law of Succession Act*. It is a question that the Appellant should have pursued before the Succession court that issued the grant of letters of administration.

40. The Appellant had also alleged that she had been given the suit property as a gift by her late father in 1992; a gift inter vivos.

41. The legal position on gifts inter vivos was discussed by Mumbi Ngugi J, (as she then was) in the *Re Estate of Chepkwony Arap Rotich* (2018) eKLR who quoted with approval the decision of Nyamweya J (as she then was) in *Re Estate of the late Gideon Mauthi Nzioka - deceased* (2015) eKLR.

42. Justice Nyamweya in the above cited case specified that there are two types of gifts in law - gifts inter vivos and gifts mortis causa.

a. Gifts inter vivos must be complete for them to be valid.

“For a gift inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of declaration of trust by the donor, or by way of resulting trusts or the presumptions of (trust). Gifts of land must be by way of registered transfer, or if the land is not registered, it must be in writing or by a declaration of trust in writing”.

43. The Appellant did not produce any deed by her late father granting her the property or a transfer for that matter. Her claim has no basis in law.

Final Disposition

44. The conclusion is that this court agrees with all the findings of the learned Magistrate. The appeal herein therefore fails in its entirety. It is dismissed with costs to the Respondents.

45. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Kamotho holding brief for Mrs. Kihika for the Appellant.



No Appearance for the Respondents.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

