



REPUBLIC OF KENYA



**Reuben v Mwangangi & 7 others (Environment & Land Case E011 of 2023)
[2023] KEELC 21899 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21899 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND CASE E011 OF 2023
CK YANO, J
NOVEMBER 30, 2023**

BETWEEN

SULEIMAN KINYAMU REUBEN APPELLANT

AND

ANDRIANO MWANGANGI 1ST RESPONDENT

PAUL KITHURE MURITHI 2ND RESPONDENT

JOHN MUTHOMI MWANGANGI 3RD RESPONDENT

CATHERINE KATHURE GITONGA 4TH RESPONDENT

PETER KIRIMI MWANGANGI 5TH RESPONDENT

MURIUNGI MWANGANGI 6TH RESPONDENT

GEORGE MURITHI 7TH RESPONDENT

JOHN KIUMA MUGAO 8TH RESPONDENT

(Being an appeal from the judgment/decree of (Hon. Mbayaki Wafula, Principal Magistrate) delivered on 14th April, 2023 in Marimanti ELC Case No. E010 of 2021)

JUDGMENT

Introduction

1. Vide the plaint dated 8.5.2021 and filed in court on 11.5.2021, the appellant filed suit in the lower court against the respondents seeking an order of permanent injunction restraining them, their agents, servants, assigns, relatives or anybody else acting on their behalf from trespassing or interfering in any way with the appellant's right of use, ingress or working on L.R No. Tharaka Nithi/Chiakariga 'A'/2556 as well as costs of the suit.



2. The appellant's case was that he was the sole registered proprietor of the suit land which measures 0.24 hectares or thereabouts. The appellant contended that the respondents, in collusion with each other, and while threatening the appellant with physical harm, prevented the appellant from accessing the said land as a consequence of which the appellant was unable to enjoy the fruits of the ownership of the land and therefore had suffered loss and damage.
3. The respondents filed a defence dated 21.6.2021 which was later amended on 15th March 2022 to include a counterclaim. It was the respondents' case that on 20th February, 1992, the 1st respondent was allocated land parcel No. 458 in Chiakariga Adjudication Section by the then Utonga Clan/Chief's Committee. They contended that land parcel L.R No. Tharaka Nithi/Chiakariga 'A'/2556 was and still is part and parcel of the original land parcel No. 458 in Chiakariga 'A' Adjudication Section.
4. The respondents pleaded that the suit land and other two parcels LR Nos. Tharaka Nithi/Chiakariga 'A'/2558 and Tharaka Nithi/Chiakariga 'A'/2557 were illegally hived from the original land L.R No. Tharaka Nithi/Chiakariga 'A'/458 without the 1st respondent's knowledge. That upon learning of the illegality, the 1st respondent approached the High Court at Meru via a Judicial Review Application No. 19 of 2012 seeking orders to reverse the said illegality. The 1st respondent argued that the illegality having not been amended, the titles for the three portions hived from the main land parcel L.R No. Tharaka Nithi/Chiakariga 'A'/458 were processed in the year 2017. It was the 1st respondent's contention that the appellant had no good title to the suit land and was therefore not entitled to the orders sought.
5. In the counter claims, the respondents pleaded that the 3rd, 5th, 6th and 7th respondents are sons of the 1st respondent while the 2nd, 4th and 8th respondents are children of the 1st respondent's brother. It was pleaded that the 1st respondent was the owner of the suit property where he lives and works with his family since 1992. The respondents further contended that the 2nd, 4th and 8th respondents were wrongly joined in the suit. The respondents further stated that the appellant had never been in possession and actual occupation of the land.
6. The 1st respondent pleaded that he acquired rights or was in the process of acquiring rights over the suit property pursuant to Section 30 (f) and (g) of the Registered Land Act Cap 300 (repeated) arguing that it was an overriding interest which subsists without registration. The 1st respondent further pleaded that the appellant's claim over the suit property, if any, had been extinguished by dint of Section 7 of the Limitation of Actions Act since the 1st respondent had been in possession and occupation of the land for a period of more than 12 years, and had therefore acquired title over the property by way of adverse possession. Therefore, in the counterclaim, the 1st respondent prayed for judgment against the appellant for the dismissal of appellant's suit, a declaration that the 1st respondent is the owner of the suit property or in the alternative, that the 1st respondent had acquired title over the suit property by way of adverse possession and an order directing the Land Registrar to cancel the appellant's title and issue a fresh title to the 1st respondent and register the 1st respondent as the proprietor of the suit property plus costs of the suit and of the counterclaim.
7. Upon hearing and determination of the case, the learned trial magistrate found and held that the appellant's suit was statute barred under Section 7 of the Limitation of Actions Act and struck it out with costs to the respondents. The trial court further held that the question of ownership and remedies must be a question for determination by the High Court as envisaged under Section 38 of the Limitation of Actions Act.
8. Being aggrieved by the said judgment, the appellant preferred this appeal on the following grounds:-



1. The learned Trial Magistrate erred in law and in fact in failing to appreciate the issues before him thereby delivering a judgment based on a misapprehension of facts and issues in dispute between the appellant and the respondents.
2. The learned Trial Magistrate erred in law and in fact failing to appreciate the pleadings of paragraph 5 of the plaint wherein the appellant had pleaded that the respondents had prevented him from the suit land and accessing the suit land and that therefore the trespass was continuing.
3. The learned Trial Magistrate erred in law and in fact in misdirecting himself that the plaintiff's claim was based on a claim for land while the same was purely anchored on a tort of trespass onto the suit land which is solely registered in the name of the Appellant.
4. The learned Trial Magistrate erred in law and in fact in finding that he had no jurisdiction to entertain the suit before him yet proceeded to make orders which had the effect of awarding the suit land to the Respondents which therefore amounts to adjudication over the matter.
5. The learned Trial Magistrate erred in law and in fact in proceeding to deliver a judgment in the suit while the 1st defendant had already died.
6. The leaned Trial Magistrate erred in law and in fact in failing to consider the submissions of the Appellant by totally ignoring them.
7. The findings and judgment of the learned Trial Magistrate are against the weight of evidence on record.
9. The appellant prays that the judgment/decree of the learned Trial Magistrate be set aside, that the judgment/decree aforesaid be substituted with an order allowing the appellant's claim as set out in the lower court with costs of the appeal together with costs in the lower court.
10. The respondents raised a cross appeal dated 25th May 2023 and set out the following ground:-
 - i. The learned trial Magistrate erred in law and in facts by failing to hold that the respondents have acquired the suit property by way of adverse possession the magistrate having found that the plaintiff's suit is time barred and is extinguished by virtue of section 7 of the [Limitation of Actions Act](#) Cap 22 Laws of Kenya.
 - ii. The learned trial Magistrate erred in law and in facts by holding that the issue of ownership of the suit property is a question for determination by the High Court as envisaged under section 38 of the [Limitation of Actions Act](#) therefore suggestion that the magistrate's court has no jurisdiction to deal with the issue of adverse possession.
 - iii. The learned trial Magistrate erred in law and in facts by failing to order and direct the Land Registrar of Tharaka Nithi County to cancel the plaintiff's title and issue a fresh title and register the defendants as the proprietors of the suit property, the defendants having obtained the suit property by way of adverse possession.
11. The respondents prayed that the appellant's appeal be dismissed and the respondents' counterclaim in the trial court be allowed as prayed and for the appellant to pay the costs of the appeal.
12. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 18th September, 2023 through the firm of Basilio Gitonga, Muriithi & Associates Advocates while the respondents' filed their submissions dated 16th October, 2023 through the firm of Jesse Mwiti Advocates.



The Appellant's Submissions

13. The appellant's advocates argued grounds 1 and 2 of the appeal together and the rest separately. The abandoned ground 5. They contended that in striking out the suit, the trial court stated that the suit was time barred and that the court lacked jurisdiction to entertain it. The appellant's counsel submitted that it is not clear from where the learned magistrate got the impression that the suit was time barred. They pointed out that at paragraph 4 of the plaint, it was clear that the appellant is the registered owner of that parcel of land known as LR No. Tharaka Nithi/Chiakariga 'A' 2556 and that he produced the title deed and search certificate as Exhibit 1 and 2 respectively. Further, that the prayer sought in the plaint was an order of permanent injunction.
14. The appellant's counsel submitted that the appellant was not claiming for ownership since the suit land was already registered in his name. That the appellant was seeking for orders in regard to continuing trespass and the cause of action was therefore still alive. The appellant's counsel found it surprising that the trial court found the claim time barred when the respondents themselves made an admission that they were still in occupation of the suit land without permission of the appellant. It was submitted that as a proprietor of the land, the appellant enjoyed the protection of that ownership by dint of Section 25 (1) of the *Land Registration Act, 2012*.
15. Learned counsel for the appellant submitted that the trespass was discovered on 6.7.2020, prompting the appellant to lodge a complaint with the police and filed suit on 11.5.2021. They therefore failed to understand why the trial court made a finding that the suit was time barred. That in any event, the respondents were still on the suit land as at the date the suit was lodged in the trial court and argued that the trespass was therefore continuing and the issue of limitation of time did not arise.
16. Learned counsel for the appellant further submitted that the learned trial magistrate misapprehended the appellant's cause of action and proceeded on the wrong footing. He referred to the main prayer sought which was an order of permanent injunction and submitted that the trial magistrate proceeded to treat the claim as though it was one of ownership of land while it was one of trespass. It was further submitted that the trial court failed to consider part of the appellant's submissions for example that the respondents did not in their pleadings and submissions plead/prove allegations of fraud.
17. Learned counsel for the appellant faulted that learned trial magistrate for observing that he did not have jurisdiction to determine the issue of ownership of the suit land and accused him of exhibiting bias by proceeding to make comments which had the effect of giving out the land to the respondents, yet it proceeded to state that the question of ownership and remedies was for determination by the High Court as envisaged under Section 38 of the *Limitation of Actions Act*.
18. It was also submitted that the learned trial magistrate failed to consider the appellant's submissions and authorities presented. The appellant's counsel relied on the Estate of David William Kimemia (Deceased) [2021] eKLR, Eviline Karigu v M'Chabari Kinoro [2022] eKLR, and Muchambi Ndwiga & Another v. Occaman Mwaniki Kariuki [2021] eKLR.
19. The Appellant urged the court to dismiss the cross-appeal and argued that the respondents (the appellants in the cross-appeal) could not have acquired ownership of the suit property by way of adverse possession because the suit land was registered in the name of the appellant (respondent in the cross-appeal) on 27.7.2016 and the title issued on 9.3.2017. That by the time of filing of the counterclaim, time for a claim on adverse possession in favour of the appellant in the cross-appeal had not started running. That the 1st appellant in the cross-appeal had lodged a claim in Meru High Court (JR No. 19 of 2012) against the Respondent in the cross-appeal over the same subject matter. It was further submitted that the occupation was not continuous, undisturbed, notorious, open and adverse



to the rights of the respondent in the cross-appeal since litigation was ongoing. That the claim for adverse possession could only be entertained if brought by way of originating summons as required by order 37 of the Civil Procedure Rules and Section 38 of the *Limitation of Actions Act*. The appellant submitted that the trial court cannot be faulted in holding that the jurisdiction to determine matters on adverse possession vests in the High Court. That the orders sought by the appellant in the cross-appeal could not be granted. The appellant urged the court to allow the appeal and dismiss the cross-appeal with costs.

Respondent's Submissions

20. Learned counsel for the Respondents submitted that the court has the power to hear the appeal and vary the decision of the trial court if it is found to have been given without evidence or using the wrong principles of the law. He relied on the case of *Samson Wafula Wanyonyi v Ngugi Njuguna t/a Golden Eagle Bus Services* [2016]Eklr, *Kiruga v Kiruga & Another* [1988] KLR 348 and submitted that the court has the jurisdiction to review the evidence in the trial court in order to determine whether the conclusion reached upon that evidence should stand or fail. That this jurisdiction however, should be exercised in caution bearing in mind that the appeal court had not had the advantage of hearing or seeing the witnesses.
21. The Respondents' advocate submitted that the decision of the trial court ought not be disturbed save only for the part that the trial court failed to find that the respondents have acquired title to the suit property by way of adverse possession.
22. Learned counsel for the respondents urged the court to find that the appellant's action to try to recover the suit property after the end of 12 years is barred by the *Limitation of Actions Act*. They cited Section 7 of the said Act and relied on the case of *Haron Onyancha v National Police Commission & Another* [2017] eKLR, *Iga v Makerere University* [1972] EA 65 and submitted that the appellant's suit was filed against the respondents after the respondents had been in possession and actual occupation of the suit property since 1992 and the statutory limitation of 12 years had already lapsed. They also relied on the case of *Patrick Kirimi M'nganabu v Njeru Muchai* [2021] eKLR which cited *Bosiere Ogero v Royal Media Services* [2015]eKLR and submitted that the trial court was correct in holding that the appellant's claim is barred by limitation and urged the court to uphold it and dismiss the appeal.
23. With regard to the cross appeal, learned counsel for the respondents submitted that the trial court having struck out the appellant's suit for being barred by limitation, the court should have held that the respondents who were in possession and occupation of the suit property for a period of 12 years have acquired the suit property by way of adverse possession. The Respondents' counsel relied on the case of *Mtama Lewa v Kahindi Ngala Mwangandi* [2015]eKLR and submitted that the reason the appellant was seeking to evict the respondents from the suit property is because he is the registered owner of the property and the respondents are trespassers in the suit property. It was submitted that the law recognizes that trespassers to land can claim for adverse possession by showing that they have occupied and possessed the land for more than 12 years. The respondents prayed that the court finds that they have acquired title to the suit property by way of adverse possession.
24. The respondents also submit that the fact that the appellant was registered in the year 2017 as the owner of the suit property does not stop the respondents claim for adverse possession because the claim for adverse possession runs on the land and not on the title. The respondents relied on the case of *Cachuma Gacheru v Maina Kabuchwa* [2016]eKLR which referred to the decision in *Maweu v Liu Ranching & Farming Co-operative Society* [1985] eKLR and submitted that the appellant's allegation that he bought the suit from one Mukambi did so without knowing who is in possession of it, and therefore put the title at risk for failing to inspect the property at the time of the alleged sale. That



had the appellant inspected the suit property at the time of the time, he would have realized that the respondents were in actual occupation and possession of it which could have discouraged him from buying. The respondents submitted that the reason why the trial magistrate failed to order that the respondents had acquired the suit property by way of adverse possession was that according to him, it is only the High Court that can issue orders of adverse possession under Section 38 of the Limitation of Actions Act which was an erroneous holding. The respondents' counsel relied on the case of Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & Another [2020] eKLR and submitted that the trial court had the jurisdiction and power to issue orders for adverse possession and urged the court to hold that the respondents have acquired title to the suit property by way of adverse possession and issue an order directing the Land Registrar to cancel the appellant's title and to issue another title and register the respondents as the proprietors of the property.

25. The respondents' counsel concluded by submitting that the appellant's title to the suit property is challenged and that the production of title by the appellant is not enough to confer ownership when the same title is under challenge. That the evidence on record shows that the appellant did not prove the legality of how he acquired the property and that the acquisition was legal. Relying on Munyu Maina v Hiram Gathiha Maina [2013] eKLR, the respondents submit that the appellant has not proved the legality of the title deed which is under challenge. The respondents' however submitted that the trial court correctly found that the appellant's suit was barred by the Limitations of Actions Act. They further submit that the doctrine of adverse possession has arisen in their favour and ought to be allowed. The respondents therefore pray for the appeal to be dismissed and the respondents' cross-appeal be allowed with costs.

Analysis And Determination

26. I have considered the record of appeal, the grounds of appeal and the submissions by the parties together with the authorities relied on. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusion reached by the learned magistrate were justified on the basis of the evidence presented and the law. (See *Selle & another vs Associated Motor Boat Company Limited & Others* [1968] IEA 123).

It has also been held that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on misapprehension of the evidence, or where the court clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or where the trial court is shown to have acted on wrong legal principles in reaching the findings he did.

27. The issues for determination in my view are:
- i. Whether the appellant's suit in the trial court was time barred.
 - ii. Whether the trial court had jurisdiction and power to handle a case involving a claim of adverse possession.
 - iii. Whether the trial court misapprehended the issues before him.
 - iv. Whether the findings and judgment of the learned trial magistrate were against the weight of the evidence on record.
 - v. Whether the appeal and the cross appeal are merited or not.
28. It is not in dispute that the appellant is the registered owner of the suit land LR No. Tharaka Nithi/chiakariga 'A'/2556. The appellant's case was that the respondents had colluded and prevented him



from accessing the suit land and in the plaint, he sought an order of permanent injunction restraining the respondents from trespassing onto or in any way interfering with the appellant's use, ingress or working on the said land. The appellant stated that he was issued with the title deed of the suit land on 9.3.2017 after having been officially registered as the owner on 27.7.2016. The appellant's evidence was that prior to such registration, the 1st respondent and his family had made unsuccessful attempts challenging ownership of the suit land. It was the appellant's evidence that his attempts to access the land was thwarted by the respondents, hence the filing of suit. From his own evidence, the appellant acknowledged that the respondents were in possession and occupation of the suit land and wanted them evicted therefrom. The appellant did not however specify when the respondents prevented him from accessing the land. During cross-examination, the appellant stated that he bought the land on 15.12.2011 from one Makambi Mwenda who used to be the chairman of Utonga Clan.

29. The respondents on their part asserted that the suit land was fraudulently subdivided from parcel No. 458 which they were given in 1992 by the Utonga Clan and that they have been in possession and actual occupation since then.

30. Section 7 of the [Limitation of Actions Act](#) provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims, to that person.” (Emphasis added).

31. The evidence on record clearly showed that the respondents were the ones in actual possession and occupation of the land. They stated that they have been on the land since the year 1992. The appellant did not controvert this fact by telling the trial court when the respondents entered the land. All that the appellant wanted was to have the respondents removed from the land. In my considered view, the evidence tendered by the respondents as to the date from which they entered the land and took possession was not adequately challenged. Therefore, since the respondents were in possession and occupation since 1992, which was about 29 years before the suit was filed, it follows that the appellant's suit was time barred as it was filed after 12 years contrary to the provisions of Section 7 of the [Limitation of Actions Act](#). I am therefore in agreement with the learned trial magistrate's finding that the appellant's suit was statutory barred and the magistrate was right in striking out the same.

32. The next issue to consider is whether the magistrate's court had jurisdiction and power over the respondents claim of adverse possession. Section 38 (1) of the [Limitation of Actions Act](#) provides that:

“Where a person claims to have become entitled by adverse possession to land registered under any of the acts cited in Section 37 of this act, or land composed in a lease registered under any of those acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

33. Owing to the express provisions of Section 38 (1) of the [Limitation of Actions Act](#) which specifically refer to the High Court, claims in the nature of adverse possession have traditionally been filed in the High Court and in this court (ELC) following the enactment of the [Environment and Land Court Act](#), 2011. This is in line with the jurisdiction of this court to hear and determine disputes relating to the environment and the use and occupation of and title to land as provided for under Article 162 (2) of [the constitution](#) of Kenya, 2010 and Section 13 of the [Environment and Land Court Act](#). The wording in Section 38 (1) of the [Limitation of Actions Act](#) does not mention any other court, including the magistrate's court. I am aware that there exists within the magistrate's court, duly gazetted magistrates who are granted jurisdiction and power to handle cases involving occupation of and title



to land. I am however, not persuaded that the magistrates courts have jurisdiction to adjudicate title on account of adverse possession. It is therefore my finding that the learned trial magistrate rightly declined jurisdiction over the respondents' claim of adverse possession.

34. Considering the totality of the evidence on record, and applying the legal principles outlined in law, I am satisfied that the learned trial magistrate was justified in arriving at the decision he made. The findings and holding of the learned magistrate were well founded and I find no basis to interfere with the same.

In the result, I find no merit in the appellant's appeal and in the respondents' cross-appeal. The same are dismissed. Each party to bear their own costs.

35. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 30TH NOVEMBER, 2023

In the presence of:

Court Assistant – Martha

Muriithi holding brief for Basilio for the Appellant

Mwiti for the Respondents

C.K YANO,

JUDGE

