



Karisa v Tinga (Appeal 23 of 2022) [2023] KEELC 21789 (KLR) (20 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21789 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
APPEAL 23 OF 2022
MAO ODENY, J
NOVEMBER 20, 2023**

BETWEEN

RODGERS KARISA APPELLANT

AND

STANLEY NDAGO TINGA RESPONDENT

(Being an Appeal from the judgment delivered by Hon. J. M Kituku Senior Principal Magistrate delivered on 14th June, 2012 in Kilifi SPMCC No. 45 of 2020)

JUDGMENT

1. This appeal arises from the Judgment dated 14th June 2020 delivered by Hon. J.M Kituku Senior Principal Magistrate delivered in Kilifi SPMCC No 45 of 2020. The appellant herein being aggrieved by the judgment lodged a Memorandum of Appeal dated 8th July 2022 and listed the following grounds:
 1. That the Learned Trial Magistrate erred in law and fact by failing to apply the doctrine of adverse possession as enunciated under section 38 of *Limitation of Actions Act*, Cap 22 Laws of Kenya. In the alternative and without prejudice to the doctrine of prescription, he purchased the property from the late Abdalla Mbwana and that the doctrine of nemo dat quod non habet applied.
 2. That the Learned Trial Magistrate erred in law and fact by failing to take into account the common law principle that all sale transactions in respect of land are made free of encumbrances and all interest in land ought to be in writing witnessed and attested.
 3. That Learned Trial Magistrate erred by admitting that a controlled transaction such as the suit premises required approval of the Land Control Board and allegation “I followed all due process” would not suffice.



4. That the Learned Trial Magistrate erred in law and fact by failing to appreciate the Appellant's evidence in regard to overriding interest to wit;
 - a. The burial of his wife Margaret Rogers Karisa on the site on 17th September 2008 without raising any complaint.
 - b. The existence of the Appellant's semi-permanent house on the suit property.
 - c. The trees and or fruits planted thereon such as mangoes, coconuts, cashew nuts etc and arrived at a wrong decision.
 - d. A counterclaim, which was not defended.
 5. That the Learned Trial Magistrate erred in law and fact in excluding the evidence documents at the hearing to the suit after pretrial.
 6. That the Learned Trial Magistrate, underscored the fact that the respondent's pleading were evidentially in nature and substance improper.
 7. That the Learned Trial Magistrate was not qualified to hear and determine the matter. He exhibited by failing to take into account the Appellant's evidence and his witnesses thus bungled his judgment.
2. A brief background to the case is that the Respondent instituted a suit by way of a plaint dated 23rd June 2020 before the lower court wherein he sought a declaration that he was the bona fide and rightful owner of the land parcel Majaoni/Block 5A/223, an injunction and an order for vacant possession of the suit property to be issued against the Appellant. The Respondent's case was that he purchased the suit property from one Abdallah Mbwana sometime in the year 1988 and was duly registered as the owner on 13th September 1993.
 3. The Respondent averred that prior to that transaction, the said Abdallah had hosted the Appellant in the suit property on condition that he should never erect any permanent structures. When the Appellant was asked to vacate the suit property upon the sale, he refused to do so and even unsuccessfully attempted to give some money to Abdalla to enable him own the property. Undeterred, the Appellant lodged a complaint with the area chief where it was concluded that the Appellant vacate the suit property. The Appellant's refusal to give vacant possession necessitated the suit before the subordinate court.
 4. The Appellant filed a statement of defence and counterclaim dated 18th August 2020 wherein he averred that he purchased the suit property from the said Abdallah on 19th September 1988 for a consideration of Kshs. 13,000/- which he paid in instalments. Thereafter, he developed the suit property by constructing first a semi-permanent house and later a permanent house. That he also planted mango, cashew nut and coconut trees and cultivated without any interruption. The Appellant averred that his occupation was without secrecy, that his late wife was buried therein, and that the Respondent's suit was time barred by dint of Section 38 of the *Limitation of Actions Act*.
 5. In his counterclaim the Appellant urged the court to declare him the owner of the suit property, an order for cancellation of the Respondent's title and the same be registered in his name and a permanent injunction against the Respondent from interfering with the suit land.
 6. The court gave directions that the appeal is canvassed by way of written submissions and at the time of writing this ruling only the Respondent had complied.



Respondent's Submissions

7. Ms. Mwangi, counsel for the Respondent submitted that the Appellant's claim for adverse possession ought to have been filed by way of originating summons as required by the law. She argued that for a claim of adverse possession to succeed, an applicant must show by clear and unequivocal evidence that their possession was not permissible and open to the exclusion of the registered owner as was held in the case of *Maweu v Liu Ranching and Farming Cooperative Society* [1985] KLR 430.
8. Counsel further submitted that Section 7 of the *Limitation of Actions Act* barred the Appellant from filing an action to recover land based on his claim that he had occupied the suit property in excess of 12 years and relied on the cases of *Wambugu v Njuguna* [1983] KLR 172, *Mtana Lewa v Kahindi Ngala Mwagandi* [2015] eKLR; and *Mbira v Gachuhi* [2002] 1 EALR 137 on the principles of adverse possession.

Analysis and Determination

9. This is a first appeal and in the case of *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123 the court stated that:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).

10. The issue for determination is whether the Appellant is the rightful owner of the suit property as claimed.
11. The law is protective of title holders but the titles must be procured procedurally, legally and without fraud or misrepresentation. Section 24(a) and 26 (1) (a) and (b) of the *Land Registration act*, 2012 which echoes the former Section 23 (1) of the Registration of Titles Act (repealed) provides that;

24(a) Subject to this Act, 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.

Section 26 (1);

The Certificate of Title issued by the Registrar upon registration ... 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... 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.”



12. From the records, it shows that both the Appellant and Respondent produced a copy of title for the suit property measuring approximately 1.7Ha in the name of the Respondent herein. The Appellant's claim was that he purchased the suit property from the previous owner, Abdalla Mbwana for a sum of Kshs. 13,000/-. He also claimed that he had acquired adverse interest against the Respondent's interest over the suit property.
13. The Appellant relied on a handwritten document dated 19th September 1998 which he claimed that it was written by the said Abdalla stating that he has sold land to the Appellant for a consideration of Kshs. 13,000/-. Notably, neither Abdalla nor the mentioned witnesses thereon signed the document. The parcel of land subject of that alleged transaction was also not identified.
14. It should be noted that none of the documents relied upon by the Appellant identified the land parcel number and therefore it possible to establish whether the Appellant indeed purchased the suit property from the previous owner, Abdalla Mbwana.
15. On the issue of adverse possession against the Respondent's title, the principles on adverse possession are well settled and for a claimant to be declared to have acquired land by adverse possession, the same has to be met.
16. The statutory provisions that underpin the doctrine as set out in the Limitations of Actions Act Cap 22 are ;

Section 7 Cap 22 states that

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.

Section 38(1) and (2) further state;

- (1) 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 comprised 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.
- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

17. The effect of these sections is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years of occupation. Section 28(h) of the *Land Registration Act, 2012* recognizes overriding interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription under section 7 of the *Land Act, 2012*.
18. In the case of *Kasuve -v- Mwaani Investments Limited & 4 others* 1 KLR 184, the Court of Appeal restated what a claimant in a claim for adverse possession has to prove;

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a



period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

19. The Appellant claimed that the Respondent was not in possession of the suit land. In the case of *Christopher Kioi & another v Winnie Mukolwe & 4 others* [2018] eKLR when dismissing an Appeal on a judgment that dismissed an Originating Summons the court held that;

“The appellants have laid great emphasis on the fact that Kituri did not use the suit property in his lifetime, but that in itself is not conclusive evidence of dispossession because where the owner has little use of his land, others may use it without that possession amounting to dispossession or being inconsistent with the owner’s title”.

20. The evidence led by the Appellant did not amount to dispossession of the Respondent from the suit land. The Respondent acquired the title to the suit property on 13th September 1993 and the Appellant stated in his evidence that he occupied the suit property even before that time.
21. It was incumbent upon the Appellant to prove that he had been in open, quiet occupation without interruption for a period of more than 12 years. It is evident from the Appellant’s evidence on record that a dispute over the suit property arose as early as 1998 whereby the Area Assistant Chief issued summons.
22. In the circumstances, the Appellant cannot claim to have been adversely in quiet possession of the suit property for a period of 12 years. The Appellant therefore cannot fault the Learned Trial Magistrate for dismissing the claim for adverse possession.
23. The upshot is that the appeal herein lacks merit and is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF NOVEMBER 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure Rules*.

