



**Mulei v Mutua (Environment and Land Appeal E017 of 2020)
[2022] KEELC 2869 (KLR) (16 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2869 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E017 OF 2020**

CA OCHIENG, J

MAY 16, 2022

BETWEEN

JULIANA KOKI MULEI APPELLANT

AND

KATUNGE MUTUA RESPONDENT

(Being an Appeal from the Judgment of the Senior Principal Magistrate's Court at Kangundo in ELC Case No. 37 of 2019 by Hon. M. Opanga (SRM) delivered on 1st December, 2020)

JUDGMENT

- 1 By a memorandum of appeal dated the December 10, 2020 and filed on December 15, 2020, the appellant (defendant) appealed against the whole judgement of the Senior Resident Magistrate Hon. Martha Opanga based at Chief Magistrate's Court at Kangundo. The genesis of this Appeal is the Judgement delivered by the trial court on December 1, 2020 which allowed the respondent's (plaintiff's) suit and dismissed the appellant's (defendant's) counter-claim.
2. The appellant being dissatisfied by the said judgement of the trial court filed an appeal vide the memorandum of appeal dated the December 10, 2020 which contained the following grounds;
 - 1) That the learned trial magistrate erred in law and in fact by arriving at a conclusion that the appellant entered into the suit property with the permission of the Respondent despite lack of evidence to support the same.
 - 2) That the learned trial magistrate erred in law and in fact by failing to appreciate that the Respondent's testimony was marred with inconsistencies on when the Respondent was gifted the suit property.
 - 3) That the learned trial magistrate erred in law and in fact by failing to appreciate the provisions of section 35 of the Contract Act that a memorandum of disposition of land must be in writing.



- 4) That the learned trial magistrate erred in law and in fact by ignoring express testimony of defense witnesses and the appellant's deceased mother was of sound mind when she sold the suit property to the appellant.
- 5) That the learned trial magistrate erred in law and in fact by failing to appreciate that the appellant's mother is the one who sold to Boniface Mulwa Katona and not the respondent.
- 6) That the learned trial magistrate erred in law and in fact by failing to appreciate that the appellant has been in peaceful and quiet occupation of the suit property since 1988 and not from 2002.
- 7) That the learned trial magistrate erred in law and in fact by arriving into a conclusion that the appellant entered into the suit property with the permission of the respondent despite lack of support to support the said conclusion and evidence on record showing otherwise.
- 8) That the learned trial magistrate erred in law and in fact by failing to appreciate that the suit property against the appellant was time barred by virtue of *limitation of Action Act*.
- 9) That the learned trial magistrate erred in law and in fact by failing to appreciate and interrogate the documents filed in support of the Appellant's case and testimony by witnesses that the deceased did not transfer the suit property to the respondent.
- 10) That the learned trial magistrate erred in law and in fact by failing to appreciate that fraud had been proved to the required standard on part of the respondent.
- 11) That the learned trial magistrate erred in law and in fact in relying on conjecture, supposition and extraneous matters.

The Appellant prays that:

1. The decision of the subordinate court be set aside and vacated and the counterclaim be allowed.
2. Such other just relief as this Honourable Court made deem fit.
3. Costs of the appeal and interest

The Appeal was canvassed by way of written submissions.

Submissions

Appellant's Submissions

3. The Appellant in her submissions reiterated the grounds of appeal as set out above and contended that the lower court's determination ought to be set aside and vacated. She contended that the trial court erred in law and in fact since the respondent did not provide any evidence in writing as to her alleged 'gifting' contrary to provisions of section 3(3) of the *Law of Contract Act*. Further, this was contrary to provisions of section 107 of the *Evidence Act*. She claimed she had adduced evidence in support of her purchase of the suit property vide a sale agreement dated May 31, 2014. She insisted that the respondent's testimony was marred with inconsistencies which were not mere discrepancies. Further, that the learned Magistrate disregarded provisions of section 26(1) of the *Land Registration Act* by ignoring allegations of fraud on the part of the respondent. She argued that the trial court erred in law and in fact by not finding that the respondent was estopped by her own actions from laying claim over the suit property when she allowed the deceased mother in law to sell part of the property to one Mulwa Katona. As for the claim on adverse possession, she opined that the learned magistrate erred in law and in fact by failing to appreciate she had proved all elements of adverse possession on a



balance of probabilities. To buttress her averments, she relied on the following decisions: *Gatirau Peter Munya V Dickson Mwenda Kitbinji & 2 others* (2014) eKLR; *David Ojeabuo Vs Federal Republic of Nigeria; Erick Onyango Odeng V Republic* (2014) eKLR; *Kiplangat Shelisheli Mutarakwa V Joseph Rotich Kones* (2018) eKLR; *Gladys Wanjiru Ngacha Vs Theresa Chepsaat & 4 others* (2013) eKLR; *Serah Njeri Mwobi V John Kimani Njoroge* (2013) eKLR; *Mtana Lewa Kabindi V Kabindi Ngala Mwangandi* (2005) eKLR and *Mbira Vs Gachuhi* (2002) 1EA.

Respondent's submissions

4. The respondent insisted that the memorandum of appeal herein did not meet the threshold for setting aside of the judgement entered by the subordinate court on December 1, 2020. She explained that she was the registered proprietor of the suit property and this vested to her the absolute ownership of the said property. She averred that the appellant in her evidence confirmed learning that she was the registered proprietor of the suit land in 2014 but only complained in 2019 after the lower court suit had been filed. Further, that this was clearly a case of waiver and estoppel on the part of the appellant in respect to the suit property. She averred that there was no proof on the claim of fraud. Further, that the Memorandum of Appeal filed herein sought to enforce an invalid contract and hence it lacks merit. She stated that the Appellant's claim of the suit property through adverse possession is invalid since time only started running in 2014 yet the lower court suit was filed in 2019. To support her arguments, she relied on the following decisions: *Kiplangat Shelisheli Mutarakwa V Joseph Rotich Kones* (2018) eKLR; *Serah Njeri Mwobi V John Kimani Njoroge* (2013) eKLR; *Kajiado ELC 635 of 2017 'OS' Jacob Mwanto Wangora V Mary Waruga Wokabi & others*; *Kisii High Court OS No. 122 of 2014 Josinter Atieno Ouma & Another vs Joshua O. Omiti & another* and *Muranga ELC No. 323 of 2017 (OS) James Maina Kinya Vs Gerald Kwendaka aka Michael Kwendaka*.

Analysis and determination

5. Upon consideration of the materials presented in respect to the appeal including the memorandum of appeal and rivaling submissions, the following are the issues for determination: Whether the respondent proved her claim of ownership of the suit property? Whether the appellant's claim for adverse possession was valid? Whether this appeal is merited.
6. I note that this being a first appeal, the role of this court is to subject the materials presented before the trial court to a fresh analysis so as to reach an independent conclusion and at the same time evaluate whether or not the conclusions arrived at by the trial court were justified. The Appellate Court will not unnecessarily interfere with the findings of the trial court. See the decisions of *Selle vs Associated Motor Boat Co.* [1986] EA 123; *China Zhongxing Construction Company Ltd vs. Ann Akuru Sophia* [2020] eKLR and *Peter vs. Sunday Post Limited* [1958] E.A. 424.
7. As to whether the Respondent proved her claim of ownership of the suit property, I wish to provide a brief background of this matter which involves two relatives seeking ownership of plot number 759 Muka Mukuu Farmers' Co-operative Society Limited (hereinafter referred to as the suit property). It was the Respondent's contention that she had allowed the Appellant who had returned home after a matrimonial disagreement, to use the suit property, to maintain her children. The parties are sisters-in-law and both have claimed ownership over the suit property, with the Respondent claiming to have been gifted the same by her late mother-in-law while the Appellant insisting she purchased it from her mother. In addition to her statement of Defence, the Appellant filed a counter-claim against the Respondent, seeking a declaration that she is the rightful owner of the suit property through adverse possession. Upon the conclusion of the matter, the court passed judgement in favour of the Respondent, declaring her to be the beneficial owner of the suit property and consequently dismissing the Appellant's counter-claim.



8. This is an excerpt from the said Judgment: “The upshot of all this is that I find the Plaintiff has ably demonstrated that she was the initial registered owner of the plot number 759 being member number 750 and hence the beneficial owner of the five acres within the said plot. The defendant’s allegations of fraud of the Plaintiff is unsubstantiated and far-fetched.”
9. It is trite law that the person whose name appears on ownership documents shall be deemed to be the owner of the subject property unless the same was fraudulently or illegally acquired. The trial court relied on this principle and the holding in *Kiplangat Shelisheli Mutarakwa vs Joesph Rotich Kones*, Nakuru ELC No.171 of 2014 wherein the court reiterated that a certificate of title shall be conclusive evidence of proprietorship. However, section 26 of the [Land Registration Act](#) 2012 provides instances when a title can be defeated.
10. From the proceedings in the lower court, the Respondent produced a Plot Card from the Muka Mukuu Farmers’ Co-operative Society Limited bearing her name as the registered owner of the suit property. From the judgement, it is evident that the trial court relied on the said plot card dated October 22, 1982 as produced by the Respondent, to make a determination over the ownership of the suit property. It was the appellant’s testimony that upon visiting the offices of Muka Mukuu Farmers’ Cooperative Society Limited in 2014, they discovered the respondent was registered as a proprietor of the suit property. The appellant argued that her late mother was of sound mind when she sold her the land in 2014. further, that the respondent had allowed the mother in law to sell a portion of land to one Bonface Mulwa Katona, who I note in his evidence in chief testified that it is the Respondent who actually sold him the three acres of land. The main question we need to ponder is if indeed the mother in law was of sound mind, how come for 22 years, she never complained to Muka Mukuu Farmers Cooperative Society Limited that the Respondent had been registered as proprietor of the suit property without her consent. Further, in 2014, upon discovering the Respondent had been registered as proprietor of the suit property, the Appellant failed to tender any evidence on what actions they took together with her late mother to ensure the said registration was revoked. The Appellant through her pleadings alluded that the Respondent had fraudulently had the suit property registered in her name. The trial magistrate however found that the Appellant had not produced any evidence to substantiate her allegations of fraud and consequently dismissed the same. It is trite that allegations of fraud must be proved and mere itemizing them on pleadings is not enough. Section 112 of the [Evidence Act](#) stipulates that “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
11. In the case of [Vijay Morjaria v Nansingh Madhusingh Darbar & another](#) [2000] eKLR, Tunoi JA (as he then was) stated as follows:

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.”
12. From the proceedings and judgment herein, I find that the appellant failed to place adequate evidence to support her averments that the respondent fraudulently got registered as owner of suit property. Insofar as she alleges that the respondent’s testimony was marred with inconsistencies which amount are not mere discrepancies and should not be ignored, it is my considered view that the onus of prima facie proof was much heavier upon her to table evidence and actions she undertook when she discovered the Respondent had allegedly acquired the suit property fraudulently. However, at



this juncture, I find that this failed and mere allegations do not weaken the Respondent's claim of ownership.

13. On whether the respondent's title was authentic, I note the appellant never tendered evidence from Muka Mukuu Farmers' Cooperative Society Limited, to confirm the Respondent's registration as owner of suit property within the plot card was undertaken fraudulently. Further, whether the said Cooperative Society proceeded to cancel the Respondent's registration and revert it to the deceased. Insofar as she insists the Respondent failed to provide an instrument to prove transfer of suit property as a gift, from her deceased mother in law to her, I opine that it is actually the deceased who should have sought the same but did not do so, before her demise. In the case of *Arthi Highway Developers Limited -Vs- West End Butchery Limited and others* Civil Appeal No. 246 of 2013 the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. The court specifically referred to the law as stated in the case of Dr. *Joseph Arap Ngok -Vs- Justice Moiwo Ole Keiwua & 5 others*, Nai. Civil Appeal No. 60 of 1997 where the court categorically declared that:-

Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Section 25 and 26 of the *Land Registration Act*) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the titleholder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

See also the decision of Kiage JA in *Chemei Investments Limited -vs- The Attorney General & others* Nairobi Petition No. 94 of 2005.

14. Based on the evidence presented in the lower court, I find that the registration of the suit property in the name of the Respondent as per the Plot Card Records at Muka Mukuu Farmers Cooperative Society Limited, which was produced as an exhibit was prima facie evidence of her proof of ownership of the said suit property as from October 22, 1982 and will proceed to uphold it. I opine that the deceased Lydia Muendi did not have capacity to sell the five (5) acres of land to the appellant as claimed from 1994 as she did not own it.
15. As to whether the appellant's claim for adverse possession is valid, the trial magistrate held as follows;

The defendant's claim for adverse possession cannot stand given that she first entered the suit land with the authority of the Plaintiff. Further, the duration within which the Defendant held onto the suit land since the year 2014 when the cause of action seems to have arisen to the time the suit was filed do not add up to twelve years to sustain a under adverse possession.”

16. In the evidence in the lower court, the appellant claimed she had been in occupation of the suit property since 1988. She contended that the respondent did not adduce any evidence in support of her claim that she was granted permission to enter the suit property. On perusal of the materials on record, I note in her witness statement, the appellant stated as follows:

“that in 1988 I was given property known as plot number 19 – 068 from share number 759 to till. That in 1999, my mother Lydia Muendi Kilonzo approached me and told me she had sold 3 acres to Mulwa Katona who is my cousin and wanted to sell the remaining portion



to me because she did not want to sell to an outsider. She told me the land belonged to her and I started the purchase.”

17. From these averments alone, it is evident the appellant was granted permission to enter the suit property as she was given a portion of the same to till. The appellant however in her evidence did not inform court on who gave her the land to till. The Respondent confirmed in her evidence in the lower court that she granted the Appellant permission to be on the suit property so as to educate her children. Bearing in mind that it is the Respondent who was registered as proprietor of the suit property by 1988 as per the records of Muka Mukuu Farmers Cooperative Society Limited, this court will deem that she is indeed the one who granted the Appellant permission to cultivate it. It was the Respondent’s testimony that when she sought for the Appellant to move from the suit property, she refused and claimed she bought it from her mother, which fact the Respondent disputed and insisted the mother in law was not of sound mind to sell it.

18. In the case of *Wambugu Versus Njuguna* 1983 KLR 174 cited in *Karuntimi Raiji Vs. M’makinya* (2013) eKLR, the Court of Appeal held that:-

in order for a person to acquire title by the operation of the statute of limitation to land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the suit for purposes for which he intended to use it. The Plaintiff is required to prove that he has dispossessed the defendant of the suit land or that the Defendant had discontinued possession of the suit land for a continuous period of 12 years so as to entitle the plaintiff to the title to the suit land by adverse possession.”

19. While in the case of *Daniel Kimani Rubine & others versus Swift Lothberford & Co. Ltd and anor* (1977) eKLR the court held that “The plaintiffs have to prove that they used the land as of right, nec vi, nec clam, nec precario (no force, no secrecy, no evasion).”

20. Professor Tom Ojienda’s *Principles of Conveyancing Hand Book*, Law Africa Vol II at page 97 clarifies the position on adverse possession by stating thus:

Where the claimant is in possession of the land with leave and licence of the true owner in pursuance of a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse.”

See the decisions in *Mbira -v- Gachubi*, (2002) IEALR 137; Alfred Welimo -v- Mulaa Sumba Barasa, CA No 186 of 2011 and Haro Yonda Juaje V Sadaka Dzengo Mbauro & Another (2014) eKLR.

21. From the proceedings in the lower court, I note the Appellant’s entry to the suit property was permissive. Further, the Appellant in her testimony did not tender evidence on the dates she later re entered the suit property without permission from the owner after the license had expired. It is my view that the burden of proof was upon her to prove that after being allowed to cultivate the suit property, the said permission had been terminated and she continued to be on the suit property and dispossessed the respondent. However, based on the evidence that was tendered in the lower court, I find that the appellant entered the suit property with permission of the respondent and continued to cultivate it which acts were not inconsistent with the owner. The appellant in her testimony indicated she cultivates the said suit property but did not state whether she is a resident thereon.



22. It is against the foregoing and in associating myself with the judicial authorities cited above, I find that insofar as the appellant has been on the suit property for more than 12 years, she had not proved her claim for adverse possession since entry was permissive. Further, I note the appellant has not proved she dispossessed the respondent from the suit property. To my mind, the appellant who is a sister in law to the respondent seeks to take advantage of the situation after their mother's death to take the land from the respondent through the doctrine of adverse possession but this must fail.
23. In the circumstance, I find that the learned trial Magistrate did not err in law and in fact by arriving at a conclusion that the appellant entered into the suit property with the permission of the respondent. Further, I do not find that the learned trial magistrate erred in law and in fact by appreciating the evidence tendered that the respondent was gifted the suit property as there was no evidence tendered to demonstrate the deceased ever sought for cancellation of the said registration. Further, from the evidence tendered by some of the defendant's witnesses, which I find amounted to hearsay, when they intimated they were told the deceased had not sold the land to a third party. If indeed the deceased was of sound mind as claimed, then there should have been evidence tabled that she sought for cancellation of registration of Respondent as owner of suit property. I hence do not find that learned trial magistrate erred in law and in fact by failing to appreciate the provisions of Section 35 of the Contract Act that a memorandum of disposition of land must be in writing. I further do not find that learned trial magistrate erred in law and in fact by failing to appreciate that the Appellant's mother is the one who sold to Boniface Mulwa Katona and not the Respondent as the said Boniface Mulwa Katona expressly stated in his testimony that it is the Respondent who sold him land. On the issue of occupation, I will not belabour this point and find that learned trial magistrate did not err in law and in fact by failing to appreciate that the Appellant has been in peaceful and quiet occupation of the suit property since 1988 as her entry therein was permissive as per her evidence in chief. I note the Appellant never raised the issue of limitation in the lower court in her Defence including counterclaim and I hence hold that the learned trial magistrate did not err in law and in fact by failing to appreciate that the suit against the Appellant was time barred by virtue of Limitation of Action Act.
24. It is against the foregoing that I find this appeal unmerited and will dismiss it.
25. On the issue of costs, since the parties herein are related, I will direct each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF MAY, 2022

CHRISTINE OCHIENG

JUDGE

