



**Masese & another v Onyancha (Environment and Land Appeal
12 of 2021) [2022] KEELC 3640 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3640 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL 12 OF 2021**

JM ONYANGO, J

JULY 21, 2022

BETWEEN

EVANS OINO MASESE 1ST APPELLANT

ALOIS MAPANGA MASESE 2ND APPELLANT

AND

JOHN GWAKO ONYANCHA RESPONDENT

*(Being an appeal from the judgment of Honourable P.K Mutai, Resident
magistrate delivered on 23.12.2020 in Kisii CMELC Case No. 558 of 2020)*

JUDGMENT

Introduction

1. This appeal arises from the judgment of Hon. P.K Mutai - Resident Magistrate, delivered on the 23rd December 2020 in Kisii CMELC Case No. 558 of 2020. The Respondent who was the Plaintiff in the lower court filed suit against the Appellant (then Defendant) vide a plaint dated 23rd November, 2020 seeking a permanent injunction restraining the Defendants from removing the body of the Teresa Nyagonge Masese (Deceased) from Bosongo Hospital Mortuary and interring her remains on the Plaintiff's parcel of land known as L.R No. Wanjare/bokeire/1076. He also prayed for the costs of the suit.
2. The Appellants filed a Defence and Counterclaim dated 2nd December 2020 denying the Respondent's claim and urged the court to dismiss the case as it was time-barred. In their Counter claim the Appellants claimed that the Respondents had acquired the suit property by way of fraud. In addition, they claimed that they had acquired the suit property by way of adverse possession. They therefore prayed for the following reliefs:



- a. A declaration that the registration of the suit land being L.R No. Wanjare/bokeire/1076 is tainted with fraud.
 - b. A declaration that the Defendants have acquired the suit land being L.R No. Wanjare/bokeire/1076 by prescriptive rights.
 - c. An order directing the Plaintiff to transfer the title number for L.R No. Wanjare/bokeire/1076 to the Defendants failing which the Executive Officer of this Honourable Court should be authorized to sign all the necessary forms and do the necessary requirements to effect the transfer of the suit portion in favour of the Defendants and
 - d. Any other relief that this Honourable Court may deem fit to n.
3. The suit was set down for hearing on 7th December, 2020 and both parties testified and closed their cases. The Respondent' case was that he was the registered proprietor of the suit property. He claimed that the Appellants were the sons of the late Teresia Nyangoge Masese (Deceased) with whom he shared a boundary. He testified that the Appellants had destroyed the common boundary between them and they were making arrangements to bury the remains of the deceased on the Respondent's land. This is what prompted him to file suit.
 4. The Appellants on their part testified that they had been occupying the suit property peacefully and continuously for a period of 49 years as their only family land and that they had therefore acquired prescriptive rights in respect thereof. It was their case that Respondents had during the process of adjudication obtained registration of the suit property by way of fraud.
 5. In his judgment the trial Magistrate dismissed that Appellants' Counterclaim and held that the Respondent was the lawful owner of the suit property and that the Appellants' occupation thereof was unlawful. He held that the Respondent had proved his case on a balance of probabilities and issued a permanent injunction restraining the Appellants from burying the remains of their mother Teresia Nyagonge Masese on the suit property.
 6. Being aggrieved by the said judgment, the Appellants filed this appeal through a Memorandum of Appeal dated and filed on 21st January 2021 and a Supplementary Record of Appeal filed on 16th November 2021 citing the various grounds:
 7. The appeal was disposed of by way of written submissions and both parties filed their submissions, which I have carefully considered. The Respondent's Counsel also briefly highlighted her submissions orally.
 8. This being a first appeal, this court is enjoined to revisit the evidence that was tendered before the trial court afresh, analyze it, evaluate it and arrive at its own independent findings and conclusions, but always bearing in mind that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanour and giving allowance for that. See *Selle vs. Associated Motor Boat Company* (1968) EA 123.

Issues For Determination

9. Having considered the pleadings, evidence on record, Grounds of Appeal and rival submissions, the issues for determination are whether the trial magistrate erred in allowing the Respondent's claim for injunction and dismissing the Appellant's Counterclaim for adverse possession.



Analysis And Determination

10. In his judgment the trial Magistrate determined three main issues :
 - i. Whether the Plaintiff is the registered owner of land parcel number Wanjare/Bokeire/1076
 - ii. Whether the Defendants have acquired the suit land by prescriptive rights
 - iii. Whether the Plaintiffs/Defendants are entitled to the reliefs sought.
11. Based on the title deed held by the Respondent, the trial magistrate arrived at the finding that the Respondent was the registered owner of the suit property.
12. With regard to the second and third issues, the trial magistrate held that that the Appellants could not succeed in their claim for adverse possession as their claim was based on the fact that the suit property was their ancestral land since they had been born and brought up on the land and that the Respondent had never been in possession of the land. He further held that the Appellants had not established evidence of discontinuance of possession by the owner of the suit property as they claimed that he was a stranger. He therefore held that the Appellants' occupation of the suit property was unlawful. He then dismissed the Appellant's counterclaim and granted the prayers sought in the Plaint.
13. Although this matter was presented as a burial dispute, it is clear that both parties, particularly the Appellants came out strongly to assert their rights to the suit property. The Respondent's case is that the Appellants had destroyed the boundary of land parcel number Wanjare/bokeire/1076 which is registered in the Respondent's name and taken possession of the whole parcel. He therefore sought a permanent injunction restraining the Appellants for interring the remains of Teresia Nyagonge Masese on the suit property. It is surprising that the Respondent did not seek any substantive orders with regard to the suit property other than the order of injunction to restrain the Appellants from interring the remains of the deceased on the suit property. However, during the hearing, he led evidence on how he acquired the suit property and produced the sale agreement dated 1.9.1971 between himself and one Stanslaus Masese Osenda, He also produced a title deed and green card in respect of the suit property among other documents.
14. On the other hand, the Appellants mounted a spirited defence of adverse possession and led evidence to show that they had been in exclusive, open and uninterrupted occupation of the suit property for a period of more than forty years and that it was the only place they knew as home. It is therefore not surprising that the trial magistrate dwelt on the issue of adverse possession.
15. The law on adverse possession is now well settled. In order to prove adverse possession, the Plaintiff must satisfy the following conditions which have been discussed in various authorities.
16. The first element that a claimant must prove on a balance of probability for a claim of adverse possession is that he has made physical entry on the land and is in actual possession or occupancy of the land for the statutory period. Adverse possession rests on the use and occupation by the claimant. It has been held in numerous decisions that possession must be actual.
17. Secondly, the occupation of the land by the claimant must be non-permissive. If one is in possession as a result of permission given to him by the owner, or if he is in possession as a licensee, he cannot claim to be in adverse possession. It has been held that any time an adverse possessor and the true owner discuss the issue of adverse possession, permissive agreement may have occurred and that act destroys the claim for adverse possession. (See *COBB Vs Lane* (1952) 1 ALL ER 1199 and *Wallis Cayton Bay Holding Company Ltd Vs Shell Mex and BP Ltd* (1974) 3 ALL ER 575



18. The occupation by the claimant must be with the clear intention of excluding the owner from the property. One must therefore have the animus possidendi to succeed in a claim for adverse possession. One must show that he either dispossessed the owner of the land or the owner of the land discontinued his possession. Dispossession is where a person comes in and drives another out of the land while discontinuance of possession is where a person in possession goes out and another person takes possession.

19. In the case of *Wambugu vs Njuguna* (1983) KLR 173, the Court of Appeal held as follows:

“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights 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 soil for the purpose of which he intended to use it.

The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

20. Similarly, in *Celina Muthoni Kitbinji v Safiya binti Swaleh & Others* [2018] eKLR the court stated that:

“It is also a well settled principle that a party claiming Adverse Possession ought to prove that the possession was “nec vi, nec clam, nec precario”, that is peaceful, open and continuous. The possession should not have been through force, nor in secrecy and without the authority or permission of the owner. This being a claim for Adverse Possession, the Plaintiffs must show that they have been in continuous possession of the land for 12 years or more; that such possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property”

21. In the instant suit, the Appellants’ case is that they have lived on the suit property since they were born and they consider it as their ancestral home. They claim that they only learnt that it was registered in the Respondent’s name when they were served with the pleadings herein. This means that in their minds they did not dispossess the owner of the suit property nor did they acknowledge that the land had a known owner. They even assert that the Respondent fraudulently acquired to the suit property and had it registered in his name. The element of animus possidendi is therefore absent.

22. In the case of *Catherine Koriko & 3 Others v Evaline Rosa* (2020) eKLR the Court of Appeal cited with approval the case of *Haro Yonda Juaje v Sadaka Dzengo Mbauro & Another* (2014) eKLR where the court observed as follows:

“Can one claim to have acquired land by adverse possession if he claims that the land he is occupying is his ancestral land and that he only learnt of the true owner a few years ago (less than 12 years)” I do not think so. I say so because as was held in the Wambugu case (supra), the mere fact that one has been in possession of land for more than 12 years is not enough. In fact, the assertion by a claimant that he was not aware that the land was registered in favour of some person against whom time could start running means that he did not have the animus possidendi to acquire the land by way of adverse possession and he can therefore not be able to succeed to defeat the title of the true owner”.



23. The other issue is that the Appellants are challenging the Respondent's title as they claim that it was acquired fraudulently. This is inconsistent with their claim for adverse possession as one cannot succeed in a claim for adverse possession before conceding that the registered proprietor is indeed the owner of the land. Simply put, adverse possession and fraud are strange bed-fellows. If the Appellants expect the Respondent to transfer the land to them how then would the fraudulent title be transferred?
24. Regarding the issue that the Respondent's claim is statute barred, it is clear from the pleadings that the cause of action is trespass and from the evidence on record, the acts of trespass by the Appellants are continuing as they admitted that they are still in occupation of the suit property. In the circumstances, it is my finding that the suit is not statute-barred.
25. Having anxiously considered the pleadings, evidence on record, the rival submissions and the relevant law as well as the authorities cited to me, I am constrained to agree with the trial Magistrate that the Appellants did not prove their claim of adverse possession despite the longevity of their stay on the suit property.
26. That being the case there was no basis for denying the Respondent the order of injunction as he had proved that he was the owner of the suit property and the Appellants were occupying the same unlawfully. The court could not sanction an illegality by allowing them to inter the remains of the deceased on the suit property. Although the trial Magistrate did not fully analyze the conditions for grant of injunctions as set out in the celebrated case of *Giella v Cassman Brown* (1973) E.A. 358 it is clear that the Respondent established a prima facie case with a probability of success and by virtue of the fact the he is the lawful proprietor of the suit property, the balance of convenience tilts in his favour.
27. Even though I sympathize with the Appellants, I am not persuaded that they have established a valid claim over the suit property by way of adverse possession and there is no basis for interfering with the judgment of the lower court. In the final result, I find no merit in the appeal and I dismiss it.
28. Bearing in mind the nature of this case, each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 21ST DAY OF JULY, 2022.

J.M ONYANGO

JUDGE

