



REPUBLIC OF KENYA



KENYA LAW
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**Mugo & another v Ngari (Environment & Land Case 26 of 2019)
[2022] KEELC 12680 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12680 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 26 OF 2019
JO OLOLA, J
SEPTEMBER 28, 2022**

BETWEEN

TERESA WANGECHI MUGO 1ST APPELLANT

ZIPPORAH WANJIRU MUGO 2ND APPELLANT

AND

JOSHUA WAMBUGU D. NGARI RESPONDENT

JUDGMENT

1. This is an Appeal arising from the Judgment of the Honourable R. Kefa Senior Resident Magistrate dated 20th September, 2019 in Nyeri MCL &E Case No. 197 of 2018. The said case arose from the consolidation and transfer of two suits originally filed in this Court as Nyeri ELC Case No. 37 of 2015 (OS) and Nyeri ELC Case No. 11 of 2015.
2. By the Originating Summons dated 14th February, 2015 as filed in the said ELC Case No. 37 of 2015, the 1st Appellant – Teresa Wangechi Mugo had sought orders against the Respondent herein Joshua Wambugu Ngari to the effect that:
 - (a) The Applicant for herself and her family had acquired by adverse possession the whole of the parcel of land known as Nyeri/Uasonyiro/145;
 - (b) An order issues to the Land Registrar of Nyeri to rectify the land register of Nyeri/Uasonyiro/145 and register the Plaintiff herein as the proprietor thereof in place of the Respondent;
 - (c) The Respondent be ordered to sign all and surrender all the documents necessary to effect the rectification failing which the Court may order that the documents necessary to effect the same be dispensed with; and
 - (d) The costs of the suit be provided for.



3. The said Originating Summons was supported by an Affidavit sworn by the 1st Appellant wherein she deposed that sometime on 13th July, 1987 her husband (now deceased) had entered into a Sale Agreement for the said parcel of land with the Respondent. Pursuant to the agreement, the deceased and his entire family moved and took possession of the suit land which nevertheless remained in the Respondent's name.
4. The 1st Appellant further avers that for reasons unknown to her, her late husband only paid part of the purchase price and the Respondent had severally sought to evict them from the suit land in vain. It was her case that there has never been any break in her possession and that together with her family, they have developed the parcel of land over the years to the exclusion of the Respondent and hence the orders sought in the Originating Summons.
5. A month before the Originating Summons was filed, the Respondent had by a Plaint dated 16th January, 2015 instituted ELC Case No. 11 of 2015 against the 1st Appellant and her daughter Zipporah Wanjiru Mugo (the 2nd Appellant) praying for:
 - (a) A declaration that the Defendants, their servants and/or agents are trespassers on the suit land;
 - (b) (An order) that the Defendants, their servants and/or agents be evicted from the suit land forthwith;
 - (c) A permanent injunction be issued as against the 1st and 2nd Defendants, their servants and/or agents from trespassing the suit land;
 - (d) That the Defendants be ordered to return to the Plaintiff the original documents of ownership of the suit premises that were issued to them;
 - (e) Loss of user of the suit premises as may be assessed by this Honourable Court; and
 - (f) Costs of the suit.
6. Those prayers arose from the Respondents contention that he was the registered proprietor of the suit property measuring approximately 13 acres (5.2 Ha.). The Respondent pleaded that on 13th July 1987, he had entered into a Sale Agreement for the purchase of the suit property with one Josphat Mugo Murenga who was the 1st Appellant's husband at a consideration of Kshs.150,000/-.
7. The Respondent further pleaded that the 1st Appellant's husband who is now deceased defaulted in paying the purchase price thereby compelling the parties to execute two Supplementary Agreements on 27th August, 1987 and another one on 27th February, 1997. The deceased passed away in 2002 without honouring the second Supplementary Agreement which required him to pay the Respondent for land and house rent for the period between 1988 and 1996 when they had occupied the land. The deceased was also required to pay such land and house rent for any period from the date of the second Supplementary Agreement in case of any further default.
8. It was the Respondent's case that the deceased had defaulted and his demands to the Appellants to pay for land and house rent outstanding to-date had failed to yield any positive result and hence the prayers in the Plaint.
9. Having heard the consolidated suit and in a Judgment delivered on 20th September 2019, the Learned Trial Magistrate dismissed the Appellants prayers in the Originating Summons and upheld the Respondent's case. Aggrieved by the said determination, the Appellants lodged the Memorandum of Appeal herein dated 8th October, 2019 urging that the Judgment of the Learned Trial Magistrate be set aside and or reviewed on the grounds that:



1. The Learned Trial Magistrate erred in fact and in law in failing to appreciate analyse and apply principles governing the operation of the doctrine of adverse possession;
 2. The Learned Trial Magistrate erred in fact and in law in that while finding the Appellant a trespasser on the suit land belonging to the Plaintiff, finding that the said occupation was with the permission of the owner (sic);
 3. The Learned Trial Magistrate erred in fact and in law in finding that the Appellant was a Licensee on the suit parcel belonging to the Respondent;
 4. The Learned Trial Magistrate erred in fact and in law in making a finding that an agreement for sale, the Land Dispute Tribunal case and/or the Judicial Review proceedings could halt the time for purposes of the Statute of Limitation; and
 5. The Learned Trial Magistrate erred in fact and in law in failing to properly and fully analyse the evidence presented before the Court, thereby misdirecting herself on the issues before the Court thereby rendering a finding not supported by the facts.
10. As the first appellate Court, this court is mandated to re-evaluate the evidence before the trial Court as well as the Judgment and arrive at its own independent Judgement on whether or not to allow the Appeal. A first appellate Court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its conclusion about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. (See *Selle & Another -vs- Associated Motor Boat Company Limited & Others*).
 11. While the Memorandum of Appeal sets out five (5) grounds of Appeal, both parties were in concurrence that the same could be reduced into one (1) ground as all the grounds concern themselves with the issue as to whether or not the Appellants' case met the threshold for the grant of orders of adverse possession in relation to the suit land.
 12. The facts leading to the Appeal herein from the record placed before me is that sometime on 13th July 1987, the Respondent herein and one Josphat Mugo Murenga who was the husband to the 1st Appellant and the father to the 2nd Appellant, entered into a sale agreement for the sale of the suit property. The agreement placed the purchase price for the parcel of land known as Nyeri/Uasonyiro/145 including a semi-permanent building erected thereon by the Respondent at Kshs.150,000/- with the completion date set for 31st August 1987.
 13. The Purchaser who together with his family took immediate possession of the land was however unable to pay the consideration within the time given. In order to address the issue, the parties entered into the 1st Supplementary Agreement wherein the completion date was extended to 31st December, 1987. Despite the Respondent executing the necessary transfer documents and procuring the Land Control Board consent to transfer the land, the Purchaser did not complete the purchase price for another long period of time.
 14. Some 10 years down the line, the Respondent and the Purchaser executed a 2nd Supplementary Agreement on 27th February, 1997 wherein it was inter alia agreed that the parties would agree to a new purchase price once the purchaser had sorted out some unspecified family issues and sold one of his properties to enable him meet the full purchase price that was to be agreed on. The parties further agreed that the documents of title and transfer that had by then been released to M/S Kaburu & Company Advocates would be rendered nugatory and that a fresh application for the Land Control Board consent would be made.



15. Even more significant, the parties agreed by the 2nd Supplementary Agreement that in the event the Purchaser failed to honour the terms of this Agreement and the period lapsing approached the number of years contemplated in the statute of limitation, the Purchaser would vacate the suit land and pay for the “lease of the land and house rent” for the period 1988 to 1996 that he had been in occupation of the land.
16. As fate would have it, the Purchaser passed away on 24th May, 2002 without honouring the 2nd Supplementary Agreement. It was apparent from the record that following the Purchaser’s death, the Respondent started engaging his family, in particular his widow who is the 1st Appellant herein with a view to ensuring completion of the agreement. To that effect, the Respondent’s family and the 1st Appellant’s family had a meeting on 15th December, 2003 whereupon it was agreed that the outstanding debt was Kshs.138,000/- and the 1st Appellant was to settle the same by 10th February, 2004.
17. The 1st Appellant did not however honour that arrangement. Apparently after several meetings between the parties and the Provincial Administration, the 1st Appellant and her family were ordered to vacate the suit land. They did not however comply and on 24th February 2003, the Respondent wrote a letter to the Appellants seeking to have the Agreements of Sale nullified. On 26th October 2004, the Respondent through his then lawyers Bali Sharma Advocates wrote to the Appellants demanding payment of Kshs.433,500/- as outstanding land and house rent.
18. The Appellants did not respond to the demand. Instead the 1st Appellant moved to the Mweiga Divisional Land Dispute Tribunal, Kieni West Division and instituted Land Dispute Tribunal Case No. 11 of 2005 accusing the Respondent of seeking to repossess the land which had partially been purchased by her deceased husband and on which she and her family had lived for 19 years. Among other things, the 1st Appellant exhorted the Tribunal to determine the case fairly since she was ready to clear the balance and have the land transferred to herself.
19. In their decision rendered on 6th October 2005, the Elders found and determined that the 1st Appellant’s husband had failed to honour all the agreements of sale and that the Respondent had now written a letter cancelling all the transactions. On the basis that the 1st Appellant had nowhere else to settle if evicted, the Tribunal ordered that she be given one (1) acre of land excluding the portion where the Respondent had developed.
20. It would appear that thereafter the Respondent tried to enforce the orders of the Tribunal by having proceedings adopted and executed through Nyeri CMCC Award case No. 18 of 2005. Sometime in the year 2010, Zipporah Wanjiru Mugo (the 2nd Appellant herein) claiming an interest as a beneficiary of the suit property instituted Nyeri High Court Judicial Review Application No. 11 of 2010 against her mother (the 1st Appellant) and the Respondent herein seeking to have the Tribunal’s decision quashed for failing to involve her as a party and for want of jurisdiction. By a decision rendered on 25th July 2013 the Honourable Justice Wakiaga quashed the award of the Tribunal for want of Jurisdiction.
21. It was against that backdrop that thereafter in 2015, the Respondent filed his suit against the 1st and 2nd Appellants seeking their eviction from the land while the 1st Appellant filed the Originating Summons seeking orders of adverse possession against the Respondent.
22. The Appellants herein submit that they have acquired the suit land by way of adverse possession having been in possession thereof continuously for more than 12 years and that as such, the title of the owner of the land as well as his remedy to recover the land has been extinguished by virtue of the provisions of Sections 7, 9, 13, 37 and 38 of the Limitations of Actions Act.



23. It was their case that the time for completion on account of the agreement between the 1st Appellant's husband and the Respondent was on or before 31st August, 1987 and that from that time on possession by the Purchaser and his family became hostile to the Respondent. The Appellants assert that having breached the legal conditions set out in their contract, it was incumbent upon the Respondent to assert his rights by either retaking possession of the suit property or filing a suit for its recovery. The Respondent having waited until the year 2015 was therefore woefully out of time and could not be allowed to proceed with the recovery of the suit property.
24. As was stated by the Court of Appeal *Samuel Kihamba -vs- Mary Mbaisi* (2015) eKLR:
- “Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is without force, without secrecy and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land.”
25. In the matter before me, it is was not in dispute that the 1st Appellant and her deceased husband first gained entry into the suit premises in or about the year 1987 with the permission of the Respondent. That permission was granted on the basis that the 1st Appellant's husband would pay the full purchase price for the suit property on or before 31st August, 1987. Some three (3) days before the expiry of the said period, the parties entered into the First Supplementary Agreement by which the conclusion date was extended to 31st December, 1987.
26. While the First Supplementary Agreement was not honoured for another decade, the 1st Appellant's husband once again acknowledged that they were on the suit land with the permission of the Respondent when he executed the Second Supplementary Agreement with the Respondent on 27th February, 1997. By this Agreement the 1st Appellant's husband in principle agreed with the Respondent that if he failed to honour the same, the Respondent would be entitled to recover “rent” for the period he had been in occupation being between the year 1988 and 1996 as well as any period in future as long as the agreement was not honoured.
27. The arrangement under which the parcel of land was occupied by the 1st Appellant's family was well known to the Appellants. That was the reason when the 1st Appellant filed the case before the Mweiga Divisional Land Disputes Tribunal in the year 2005, the proceedings captured her as stating that she was ready to clear the balance (of the purchase price) and to have the land transferred to herself.
28. Indeed in acknowledgment of the fact that they occupied the suit property with the consent of the Respondent, the 1st Appellant met the Respondent herein on 15th December, 2003 at the White Rhino Hotel Nyeri after the death of her husband to negotiate settlement of the purchase price. At that meeting, the parties and their witnesses executed a hand-written Agreement (page 36 of the Record) wherein the 1st Appellant committed to pay to the Respondent herein the sum of Kshs.138,000/-. Asked about that meeting during her cross-examination in the Trial Court, the record captures the 1st Appellant to have responded as follows:

“My husband recorded an agreement with Wambugu (the Respondent). After death of my husband we met with Wambugu and it was written an agreement that there was a balance and that he revoked earlier agreement. We met at White Rhino Hotel. This is the Agreement dated 15th December, 2003. I was to pay by 10th February, 2004 but we had not agreed. There was a second supplementary agreement. I have lived there for 31 years. The agreement



was done by my husband, it was illegal. Since 2004, I only knew of Kshs.60,000/- in the Agreement on 10th February, 2004 we wrote down the agreement. He later started harassing me after my husband died ...”

29. As it were, 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 or in pursuance of an agreement for sale or lease. A purchaser of land under a contract of sale who is in possession of the land with the permission of the vendor pending completion cannot lay a claim of adverse possession of such land at any time during the period of validity of the contract unless and until the contract of sale has first been repudiated or rescinded by the parties in which case adverse possession starts from the date of termination of the contract (see *Sisto Wamburu -vs- Kamau Njuguna (1982 – 88) 1 KAR 217*).
30. There was nothing placed before the Trial Court in the matter herein to demonstrate that the contract between the 1st Appellant’s husband had been repudiated and or rescinded. The 1st Appellant in acknowledgment of the consent from the Respondent allowing them to occupy the land had executed further agreements between herself and the Respondent by her own admission, on 15th December, 2003 and on 10th February, 2004. The Appellants did not pay the sum of Kshs.138,000/- that had been agreed to be outstanding debt for the suit premises. In 2005 when she instituted the case before the Land Disputes Tribunal, she again acknowledged the debt.
31. Barring anything else, the Respondent instituted this suit on 16th January, 2015 and 12 years had clearly not lapsed from the time of that acknowledgment to oust his right to recover the land. As the Learned Trial Magistrate rightfully concluded, the Appellants possession of the suit land have all along been with the Respondent’s consent and the various agreements entered into by the parties had interrupted the running of time in favour of the Appellants such that by the time the 1st Appellant filed the Originating Summons on 14th February 2015, the Appellants were yet to acquire the title to the suit land by adverse possession.
32. It follows that I did not find any basis to disturb the Judgment of the Learned Trial Magistrate as delivered in the Subordinate Court on 20th September, 2019. This Appeal is accordingly dismissed with costs to the Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 28TH DAY OF SEPTEMBER, 2022.

In the presence of:

Ms Miriti holding brief for Nderi for the Respondents

Mr. Muchiri Wa Gathoni for the Appellant

Court assistant - Kendi

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J. O. OLOLA

JUDGE

