



**Wahinya & 2 others v Chege (Environment and Land Appeal
11B of 2021) [2022] KEELC 14475 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14475 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 11B OF 2021**

BM EBOSO, J

OCTOBER 31, 2022

BETWEEN

JOSPAT NGURU WAHINYA 1ST APPELLANT

KIRINGA WAHINYA 2ND APPELLANT

BERNARD KAHURA WAHINYA 3RD APPELLANT

AND

JOHN CHARLES CHEGE RESPONDENT

*(Being an Appeal arising from the Ruling of Hon. L. M. Wachira, Senior
Principal Magistrate, delivered at Gatundu Senior Principal Magistrate
Court on 11/10/2017 in Gatundu SPMC Civil Case No. 26 of 2015)*

JUDGMENT

Background

1. This appeal was filed in the High Court at Kiambu on November 10, 2017. It was transferred to Nairobi Environment and Land Court vide an order made by Kasango J on December 18, 2020. Subsequently, on February 1, 2021, Okongo J transferred the appeal to Thika Environment and Land Court. The appeal arose from a ruling rendered on October 11, 2017 by Hon L M Wachira [Mrs], Senior Principal Magistrate, in Gatundu SPMC Civil Case No 26 of 2015. Before I delve into the issues that fall for determination in the appeal, I will briefly outline the background leading to the appeal.
2. Vide a plaint dated February 10, 2015, John Charles Chege, [the respondent in this appeal] sued Josphat Nguru Wahinya, Kiringa Wahinya, and Bernard Kahura Wahinya [the appellants in this appeal] in Gatundu SPMC Civil Case No 26 of 2015. His case was that he was the registered proprietor of land parcel number Ngenda/Nyamang'ara/2402, measuring approximately 1.40 hectares and situated within Nyamang'ara Village, Mangu Location of the then Thika District [the Land]. He



contended that the appellants were in wrongful and unlawful occupation of the land. He sought the following reliefs against the appellants: (i) a permanent order restraining the appellants against entering, trespassing on and/or interfering with the suit property; (ii) an order of eviction from the land; and (iii) costs of the suit.

3. The appellants filed a joint statement of defence dated February 20, 2015, in which they contended that land parcel number Ngenda/Nyamangara/2402 did not exist and that the title held by the respondent had been fraudulently obtained through forged documents. They further contended that they had been in possession and occupation of land parcel number Ngenda/Nyamangara/66, which they asserted was their family land, for over 30 years. It was their case that the respondent's title was purported to be a subdivision out of land parcel number Ngenda/Nyamang'ara/65 which did not exist on the ground. They contended that documents relating to title number Ngenda/Nyamang'ara/65 had been fraudulently altered to purport to be title documents relating to parcel number Ngenda/ Nyamang'ara/66 where they [the appellants] lived. It was therefore, the appellants' case that title number Ngenda/ Nyamang'ara/2402 had been obtained through fraud. They itemized various particulars of fraud.
4. The appellants added that even if the respondent had a genuine title relating to the land where they lived, [the appellants] they had acquired ownership of the said land through adverse possession. They added that the suit in the subordinate court was intended to 'circumvent' High Court Civil Case No 1668 of 2002 which subsisted at the time of filing the suit in the subordinate court. They did not, however, give finer details of the said High Court Case. It was the appellants' further defence that the subordinate court lacked jurisdiction to hear the case because it related to a land dispute hence only the Environment and Land Court was the only court vested with jurisdiction to hear and determine the case. Lastly, the appellants contended that the suit in the subordinate court was misconceived; lacked merit; and was an abuse of the court process. They urged the court to dismiss the suit.
5. About sixteen (16) months after filing the defence, the appellants filed a notice of preliminary objection urging the subordinate court to strike out the suit on the following verbatim grounds:
 - i. That this being a land matter the court lacks jurisdiction on the matter as the same should be filed at the environment and land court in the high court;
 - ii. The suit was statute barred by virtue of adverse possession; and
 - iii. There was a pending suit between the appellants and one Githua Githegi and the Attorney General for the Land Registrar Thika over the same suit premises.
6. The preliminary objection was canvassed through written submissions dated September 7, 2017. In response, the respondent filed written submissions dated October 4, 2017. The preliminary objection was disposed through the impugned ruling, dated October 11, 2017. The subordinate court dismissed the preliminary objection for lack of merit.

Appeal

7. Aggrieved by the ruling of the subordinate court, the appellants brought this appeal, advancing the following five verbatim grounds of appeal:
 1. The trial magistrate erred in law and in fact by failing to find that the suit was statute-barred.
 2. The trial magistrate erred in law and in fact by failing to find that the issue of the suit being statute-barred was a point of law and could be canvassed by way of preliminary objection.



3. The trial magistrate erred in law by holding that the time the plaintiff was registered as the owner of the suit premises in 2002 and the time the suit was filed in court in 2015 and the defendants' occupation were matters of evidence which could not be canvassed by way of preliminary objection.
 4. The trial magistrate erred in law and in fact by failing to find that there was another suit filed in the High Court being HCCC No 1668 of 2002 where the subject matter was the same suit premises.
 5. The trial magistrate erred in law and in fact in holding that the defendants' preliminary objection on the issue of the pending High Court Suit No 1668 of 2002 was an issue of res judicata while the preliminary objection was not on res judicata.
8. The appellants urged this court to allow the appeal with costs; set aside the impugned ruling; and strike out the respondent's suit in the subordinate court.

Submissions

9. The appeal was canvassed through written submissions dated August 30, 2022, filed by M/s Muia V M & Co Advocates. Counsel for the appellants submitted that although the appellants had challenged the respondent's suit on the ground that the subordinate court lacked jurisdiction to hear the dispute, they had abandoned that limb of objection in this appeal because it had been established that, indeed, the subordinate court had jurisdiction to hear the dispute.
10. Counsel for the appellants condensed ground nos 1, 2 and 3 into one issue – the question as to whether the respondent's suit was statute-barred. Counsel faulted the subordinate court for finding that the question as to when the plaintiff was registered as the proprietor of the suit land and the question as to who had been in occupation of the land and for what period were all matters of evidence that could not be canvassed by way of a preliminary objection. Counsel argued that the question as to when the respondent was registered as a proprietor of the suit land and the question as to which party was in possession were not matters of evidence. Counsel contended that these were 'issues contained in the pleadings'. Counsel argued that the relevant title deed had been placed before the court and was part of the plaintiff's pleadings hence the issue did not require any other evidence.
11. Counsel for the appellants cited Section 7 of the *Limitation of Actions Act* and submitted that the respondent's right to recover the suit land accrued on December 16, 2002 and was extinguished upon expiry of twelve years, reckoned from December 16, 2002.
12. On the question as to whether High Court Civil Case No 1668 of 2002 was a bar to the suit in the subordinate court, counsel faulted the subordinate court for treating the question as one of res judicata instead of treating it as an issue of sub-judice. Counsel pointed out that the doctrine of sub-judice was contained in Section 6 of the *Civil Procedure Act* while the doctrine of res judicata was contained in Section 7 of the *Civil Procedure Act*. Counsel argued that the subordinate court erred when it treated the appellants' objection as a question of res judicata. Counsel urged this court to allow the appeal.
13. The respondent filed written submissions dated July 20, 2022 through M/s Muturi Njoroge & Co Advocates. Counsel for the respondent adopted the written submissions filed in the subordinate court in reply to the preliminary objection. Further, counsel adopted the reasoning of the subordinate court in the impugned ruling. Counsel reiterated that the subordinate court had jurisdiction to hear the dispute and that the suit was not sub-judice.



Analysis and Determination

14. I have read the entire original record of the subordinate court and the record of appeal filed in this appeal. I have considered the five grounds of appeal set out in the memorandum of appeal together with the parties' rival submissions. Further, I have considered the relevant legal frameworks and the applicable jurisprudence on the issues that fall for determination in this appeal. The appellants condensed the five grounds of appeal into two thematic issues.
15. Taking into account the grounds of appeal and the submissions tendered in this appeal, the following are, in my view, the two issues that fall for determination in this appeal: (i) Whether the subordinate court erred in finding that the points raised by the appellants in their preliminary objection in relation to the question as to whether the respondent's suit was statute – barred under the doctrine of adverse possession were matters of evidence that could not be canvassed by way of a preliminary objection; (ii) Whether the subordinate court erred in failing to uphold the appellants' objection anchored on the ground that High Court Civil Case No 1668 of 2002 rendered the respondent's suit untenable. Before I dispose the two issues, I will briefly outline the principle upon which this court exercises appellate jurisdiction.
16. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of [*Susan Munyi v Keshar Shiani \(2013\)eKLR*](#) as follows:-
- ' As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.'
17. The above principle was similarly outlined in [*Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates \[2013\] eKLR*](#) as follows:
- ' This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.'
18. The first issue to be determined in this appeal is whether the subordinate court erred in finding that the points raised in the appellant's preliminary objection in relation to the question as to whether the respondent's suit was statute-bared under the doctrine of adverse possession were matters of evidence and could not be canvassed by way of a preliminary objection. For clarity the relevant ground of objection read as follows:
- ' (ii) The suit is statute-bared by virtue of adverse possession.'
19. The above ground was canvassed in the subordinate court as point no 2 in the appellants' written submissions on the preliminary objection. The appellants' verbatim submissions on the point of objection were as follows:-
- ' (2) The suit is statute barred.'



Your honour according to the title deed, the plaintiff was registered as the owner of the suit premises on December 16, 2002 when the cause of action arose. This suit was filed on February 10, 2015.

Under the provisions of Section 7 of the *Limitation of Actions Act* (Cap 22) Laws of Kenya, a claim for land should be filed within 12 years after the cause of action has accrued. This suit was filed after twelve years and two months and without leave of the court. The suit is therefore time-barred under the statute.

It is important to note that the defendants were and are still in possession and occupation of the suit premises adversely against the plaintiff and have an adverse claim over the suit premises against the plaintiff by virtue of adverse possession. The plaintiff cannot seek to evict the defendants from their own land.

In the case of *Githu vs Ndeete (1984)KLR776* the court held that time ceased to run under the limitation of actions when the owner takes or asserts his right. Assertion occurs when the owner takes legal proceedings or makes an effective entry into the land. We submit that at the time of taking this legal proceedings, the claim was already statute-barred by the law.'

20. The subordinate court considered the above submissions and rendered itself on the ground of objection as follows:

' The question as to when the plaintiff was registered as the owner and the question as to who has been in occupation and for what period are all matters of evidence that cannot be canvassed by way of a preliminary objection. The court is therefore unable to make a finding on the issue of limitation.'

21. Our courts have umpteen times defined what point can be raised on the platform of a preliminary objection and what point should not be raised as a preliminary objection. Sir Charles Newbold, P, defined the parameters of a preliminary objection in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Limited [1969] EA 696* as follows:

' The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse issues. This improper practice must stop.'

22. The gist of the relevant ground of objection that culminated in the impugned ruling was that the respondent's suit was statute-barred by virtue of the doctrine of adverse possession. Section 7 of the



Limitation of Actions Act is a codification of the doctrine of adverse possession. The said section 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.'

23. The doctrine of adverse possession is normally invoked by an adverse possessor to defeat a valid title of a registered proprietor of land. To succeed, the adverse possessor must demonstrate through evidence [or through the pleadings of the registered proprietor] that he [the adverse possessor] entered the land openly and without resistance or permission from the registered proprietor and he has remained in uninterrupted possession of the land for a period of at least twelve years without any resistance or permission from the registered proprietor.
24. Having elected to use a preliminary objection as the platform on which to canvass the point relating to limitation on account of the doctrine of adverse possession, the appellants denied themselves the right to adduce evidence relating to adverse possession. The only available avenue for them to demonstrate limitation under the doctrine of adverse possession, on the platform of a preliminary objection, was to rely on the respondent's plaint and reply to defence and demonstrate to the subordinate court that the respondent had admitted existence of all the key elements of adverse possession hence the suit was statute-barred. Looking at the respondent's plaint and reply to defence, there is nothing to suggest that the respondent admitted the appellants' defence of adverse possession. In paragraph 6, of the respondent's reply to defence, he denied the appellants' contention that they had acquired title to the suit property through adverse possession.
25. The import of the foregoing is that the precise date when the alleged adverse possession commenced and the date when the twelve year period ended are questions that require proof through evidence. Put differently, the date when the appellants entered the suit land, the absence of resistance, and the date of expiry of the limitation period under Section 7 of the Limitation of Actions Act are questions that require proof through evidence.
26. For the above reasons, it is my view that the learned magistrate was right in holding that the question as to when the respondent was registered as proprietor of the suit land; the question as to who had been in occupation of the land; and the question as to what period the appellants had been in occupation were all factual questions to be answered through evidence and could not be disposed on the platform of a preliminary objection. Consequently, my finding on the first issue is that the subordinate court did not err in finding that the points raised in the appellants' preliminary objection in relation to the question as to whether the respondent's suit was statute-barred under the doctrine of adverse possession, were matters of evidence and could not be canvassed by way of a preliminary objection.
27. The second issue is whether the subordinate court erred in failing to uphold the appellants' objection anchored on the ground that High Court Civil Case No 1668 of 2002 rendered the respondent's suit untenable. The point of objection which gave rise to the impugned finding read as follows:
 - ' (iii) There is a pending suit between the defendant and one Githua Githenji and the Attorney General for the Land Registrar Thika over the same suit premises'

28. The appellant's submissions before the subordinate court on this point were as follows:

' (3) The suit is subjudice.



Your honour, we have laid the background of the suit premises. This clearly shows the suit premises is subject of a High Court dispute in HCCC No 1668 of 2002 between Josephat Nguru Wahinya & other v Githua Githenji and the Land Registrar. The subject matter in the said High Court case is the suit premises. This suit therefore offends the provisions of Section 6 of the *Civil Procedure Act*.'

29. First, based on the jurisprudence relating to preliminary objections, this is a point which should not have been raised through a preliminary objection. How was the subordinate court expected to know about the existence of the suit, the cause of action and the subject matter? Where was the subordinate court expected to find the pleadings relating to the said suit? It is clear from the findings in the subordinate court that the appellants realized the folly of canvassing the above point on the platform of a preliminary objection and purported to unprocedurally annex to their written submissions a re-amended plaint relating to Nairobi HCCC Civil Case No 1668 of 2002. In my view, the fact that this factual point had been raised on the platform of a preliminary objection was fatal.
30. Even if the trial court were to look at the re-amended plaint that was improperly annexed to the written submissions, there was nothing in it to suggest that the existence of Nairobi HCCC No 1668 of 2002 rendered the respondent's suit untenable. I say so because the respondent was not a party to the said suit and therefore the doctrine of sub-judice could not be invoked to defeat his suit. If the appellants so desired, they were at liberty to apply for transfer and consolidation of the two suits or for transfer and combined hearing and determination of the two suits.
31. In my view, the subordinate court's misapprehension of the point of sub-judice which the appellants had raised does not change the fact that the point was irregularly raised as a preliminary objection and that the point lacked merit because it did not satisfy the requirements of Section 6 of the *Civil Procedure Act*. For clarity, Section 6 of the *Civil Procedure Act* provides as follows:

' No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court'.
32. I have deliberately underlined the relevant parts of the above framework to emphasize the gist of my reasoning. I think I have said enough to demonstrate that the subordinate court did not err in its ultimate rejection of the appellant's contention that existence of High Court Civil Case No 1668 of 2002 rendered the respondent's suit untenable.
33. For the above reasons, I do not find merit in this appeal. The appeal is accordingly dismissed. The appellants shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 31ST DAY OF OCTOBER 2022

B M EBOSO

JUDGE

In the Presence of: -



Mr Muthuri for the Appellants

Mr Muturi Njoroge for the Respondent

Court Assistant: Ms Osodo

