



REPUBLIC OF KENYA



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**Munyanya v Keya (Environment and Land Appeal E003 of 2021)
[2022] KEELC 15045 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15045 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E003 OF 2021
DO OHUNGO, J
NOVEMBER 22, 2022**

BETWEEN

MOHAMMED MUNYANYA APPELLANT

AND

MICHAEL KEYA RESPONDENT

(Being an appeal from the judgment and decree of the Principal Magistrate's Court at Butere (Hon. F. Makoyo, Principal Magistrate) delivered on 28th January 2021 in Butere PMCC No. 15 of 2015 Michael Samwel Keya v Mohammed Munyanya)

JUDGMENT

1. The background of this appeal is that on 4th March 2015, the respondent herein filed a suit in the subordinate court against the appellant through plaint dated 4th March 2015 wherein he averred that he was the registered proprietor of the parcel of land known as Marama/Shinamwenyuli/2967 measuring 0.16 hectares (the suit property). The respondent further averred that the appellant had without any colour of right trespassed on the suit property and thus causing him great economic loss and denying him his right of possession and peaceful use of the suit property. The respondent therefore prayed for eviction of the appellant from the suit property and a permanent injunction restraining the appellant as well as his agents and servants from trespassing upon, claiming or interfering with the suit property.
2. The appellant filed a statement of defence and counterclaim on 14th December 2018 wherein he stated that he owns a parcel of land in Marama Shinamwinyuli area measuring approximately 0.23 hectares which he purchased from one Eliakim Shibia Musa (deceased) in the year 2002 and which was hived off from land parcel number Marama/Shinamwinyuli/4 whose acreage was 0.8 hectares. That he had been in peaceful occupation and possession of the land from 2002 until the suit was filed in 2015. That the parcel he occupied was subdivided from Marama/Shinamwinyuli/1944 and 1945 on 28th May 2008 by Eliakim Shibia Musa and that the portion he bought was to be given a title deed upon



further subdivision of Marama/Shinamwinyuli/1944 but Eliakim Shibia died in the year 2009 before subdivision and transfer in his favour could be effected.

3. The appellant further averred that the suit property does not exist on the ground and that in case it does, then it is not on the portion of land the appellant occupies. He therefore prayed for dismissal of the respondent's case and for judgment to be entered against the respondent for a declaration that the respondent's title deed to the suit property is null and void, a declaration that the appellant is the beneficial owner of the land parcel he occupies and which is to be hived off from land parcel number Marama/Shinamwinyuli/1944, an order that the administrator of the estate of the late Eliakim Shibia Musa to conduct a sub-division and transfer of the parcel the appellant is occupying to the appellant.
4. Upon hearing the matter, the subordinate court (F. Makoyo, Principal Magistrate) delivered judgment on January 28, 2021. The learned magistrate found merit in the respondent's case and therefore allowed it as prayed. The appellant's counterclaim was dismissed.
5. Aggrieved by the judgment, the appellant filed this appeal on February 2, 2021 through Memorandum of Appeal dated 29th January 2021 which was later replaced with amended memorandum of appeal dated February 7, 2022. The following grounds of appeal are listed on the face of the amended memorandum of appeal:
 1. The learned trial magistrate completely ignored the appellant's evidence that he had acquired the land by adverse possession having been in possession of the land for a period of more than 12 years, a matter that was pleaded and was not challenged by the plaintiff at all.
 2. The learned trial magistrate misdirected himself by failing to accurately appreciate the evidence that was before him and made fundamental mistakes on the facts that were placed before him thereby coming to wrong conclusions and findings which informed his decision.
 3. The learned magistrate erred in fact and in law by completely ignoring, the appellant's evidence in the counterclaim that was neither responded to nor challenged by the plaintiff who failed to file a reply to the counterclaim nor to challenge the issues raised therein during the trial and failed to address the said issues in the judgment which disregarded the appellant's submissions in their entirety.
 4. That the learned trial Magistrate erred in fact and in law by making a finding that Eliakim Shibia Musa (deceased) was a person of unsound mind and lacked the capacity to contract and to sell his land to the appellant and made a finding that the contract for the sale of land between the appellant and the said Eliakim Shibia Musa was null and void, issues which were neither pleaded by the respondents nor proved during the hearing.
 5. That the learned trial magistrate erred in fact and in law and misdirected himself by finding that the evidence of DW2 and DW3 who testified that the said Eliakim Shibia Musa had no wife or children meant that he was a person of unsound mind, yet this fact was not pleaded and or proved.
 6. That the learned trial magistrate erred in fact and in law by holding that the certificate of title issued to the plaintiff is lawful and valid when the same was obtained illegally and irregularly while the appellant's caution was in existence.
 7. That the learned magistrate erred in fact and in law and misdirected himself by ignoring the entire evidence and submissions of the appellant that the green cards filed by the appellant proved that the land the appellant occupied belonged to the respondent and ignored the glaring evidence that the mutation of the said parcel was irregularly conducted , and the land changed



position, and was founded from two different numbers, facts that rendered the certificate of the title held by the respondent null and void.

8. That the learned magistrate misdirected himself by ignoring the evidence of the appellant on the counterclaim which was neither defended nor challenged by the respondent herein and failed to make a finding in favor of the appellant who had formally proved his claim during the hearing of the case.
 9. That the learned trial magistrate erred in fact and in law when he ignored the evidence of the appellant in the counterclaim that he had lived on the land for a period of more than 12 years and had hence acquired the land by way of adverse possession and ignored the sound legal principle that the rights of an adverse possessor transcend those of a subsequent purchaser and that being a registered owner does not defeat the rights of an adverse possessor.
 10. That the learned trial magistrate erred in fact and in law by ignoring the evidence of the appellant that the plaintiff's suit was time-barred by the statute of the *limitation of actions Act*, by bringing a suit for eviction against the appellant who had been in adverse occupation of the suit property for a period of over 12 years a fact that was proved by the appellant and his witnesses.
 11. That the learned Magistrate erred in fact and in law when he upheld the certificate of title of the respondent on land which was allegedly sold to him by an alleged administrator of the estate of the late Eliakim Shibia Musa one Jemimah Sarah Mbakaya who testified as PW2 without letters of administration and a confirmed grant being filed in court as is required by law to demonstrate that she had the authority to transfer the land by transmission.
 12. That the learned trial magistrate erred in fact and law by holding a finding that the title deed held by the respondent was valid and was in reference to the land that was occupied by the appellant, yet the original proprietor of the land Eliakim Shibia Musa died when the land parcel number was Marama/Shinamwinyuli/1944 and no mutation forms were produced in court by the respondent and or the alleged administrator who sold to him to demonstrate that indeed land parcel number Marama/Shinamwinyuli/2967 was located at the exact place the plaintiff was occupying and decided the case on mere conjecture and unproven facts.
6. Based on those grounds, the appellant prayed that the appeal be allowed with costs, the subordinate court's judgment be set aside, that the court hold and find that the appellant is the beneficial owner of the land parcel he occupies to be hived off from Marama/Shinamwinyuli/1944, that this court do find that the respondent's title deed is null and void having been acquired irregularly, unprocedurally and in excess provisions of the law and that the administrator of the estate of the late Eliakim Shibia Musa conduct a subdivision and transfer to the appellant the portion of land he is occupying in his name.
 7. The appeal was canvassed through written submissions. The appellant filed his submissions on 15th February 2022. He grouped the grounds of appeal into three groups and argued them together as follows: grounds 1, 9, 10 which he argued raise the common question of whether he had acquired the suit property by adverse possession; grounds 2, 3, 4, 6, 7 and 8 which he argued raise the common question of whether the trial magistrate disregarded his evidence and whether there were irregularities in the respondent's title as to render it null and void; and, lastly ground 5 on whether the trial court's finding on the mental capacity of the original owner and his capacity to contract was justified, well founded or tenable in law.
 8. On the question of whether the respondent's title to the suit property is valid, the appellant submitted that the proprietor of the disputed property one Eliakim Musa died in 2009 and as such his parcel was



transferred by way of transmission after several irregular entries and sub-division in the register and the land was subsequently transferred to the respondent by Jemimah Sarah as seen in the sale agreement dated August 27, 2013. He further submitted that for the respondent's title to be valid, an investigation into the process of transmission and subdivision to the suit property must be undertaken to ensure that it is in compliance with the law. The appellant further submitted that the seller did not give the succession cause number in which she was given a confirmed grant in reference to the suit property as she claims or any other property belonging to the said Eliakim Musa that gave her authority to subdivide and sell the land and as such the transfer was done unlawfully and unprocedurally and that by the time the seller was transferring the suit property, the land had not vested in the administrator and that there is no evidence that the aforementioned seller did eventually get the confirmed grant and even if she did, that confirmation does not run retrospectively. In explaining this position, the appellant relied on *Zacharia Wambugu Gathimu & another v John Ndugu Maina* [2019] eKLR.

9. On whether the respondent proved his claim and whether he was entitled to the orders sought, the appellant submitted that the respondent was not entitled to the orders granted by the subordinate court because he was not an innocent purchaser for value and was part of the scheme that transferred the title to his name irregularly, unprocedurally and unlawfully and also that the respondent has not proven that the land the appellant occupies is indeed land parcel number Marama/Shinamwinyuli/2967 which is registered in his name. It was also the appellant's submission that the sale agreement was drawn on 27th August 2013, yet a caution was registered on the said parcel on 26th August 2013 just a day before the execution of the sale agreement and that consequently, by the time the respondent was purchasing the suit property, he knew there was a dispute over it. That due diligence required him to conduct a search before purchase which he failed to demonstrate that he did and that he went ahead and caused the removal of the caution contrary to section 73 of the [Land Registration Act](#) 2012. That although the respondent filed in court a notice to remove caution allegedly served upon the appellant, neither the original of the notice nor a copy certified by the land registrar was produced. The appellant further relied on sections 64, 66, 67 and 68 of the [Evidence Act](#) and submitted that the documents filed by the respondent as notices to remove caution purporting to have been issued by the land registrar to the appellant were inadmissible in evidence. To further explain his position, the appellant relied on [Dickson Ngigi Ngugi vs Morrison Njenga Waweru](#) [1979] eKLR.
10. On whether the learned trial magistrate erred by making a finding that Eliakim Shibia Musa (deceased) was a person of unsound mind who lacked the capacity to contract to sell his land to the appellant and that the contract null and void, the appellant argued that those issues were neither pleaded by the respondent nor proved during the hearing. That if it was true that the deceased was a person of unsound mind who lacked the capacity to sell his land, it would mean that the administrator of the deceased's estate would have no authority to have grant other persons including the respondent portions of the disputed land without first complying with section 26 (1) of the [Mental Health Act](#). In submitting that the law presumes that every person is of sound mind, the appellant relied on [African Cotton Industries Limited v Rural Development Services Limited](#) [2021] eKLR.
11. On whether the respondent's claim against the appellant was time-barred under the [Limitation of Actions Act](#) and whether the appellant acquired the land by adverse possession, the appellant submitted that the plaintiff's suit was time barred under section 7 of the [Limitations of Actions Act](#) because the appellant purchased the parcel from Mr Eliakim Shibia in 2002 and took immediate possession and remained in possession for 14 years until 2015 when the suit was filed against him. He further submitted that apart from the issue of adverse possession, his pleading and testimony before trial court disclosed that he had acquired proprietary rights over the disputed land by way of constructive trust.



12. The respondent filed his submissions on April 19, 2022 and identified the following issues for determination: which of the parties is a bona fide purchaser for value, whether the respondent was properly sued, whether the document filed alongside the supplementary memorandum of appeal are properly on record and whether the advocates for the appellant are properly on record.
13. On the issue of which of the parties is a bona fide purchaser for value, the respondent submitted that the deceased was illiterate and did not know money and as such he lacked proper mental capacity to transact. That the record bears witness that several persons received funds at different times on behalf of the deceased and that the acknowledgements were written and signed by those persons. The respondent further submitted that the appellant never attended the land control board or objected in the succession proceedings and consequently the land remained a free estate and was available for distribution. The respondent urged this court to find that the deceased Shibia Musa never sold land to the appellant and that since the land vested in the heirs vide a succession cause was never challenged by the appellant, the contract of sale to the respondent remains valid and as such the land was available for sale to the respondent in the year 2013 as per the sale agreement and that the respondent carried out due diligence as exhibited in his list of documents. He relied on the Court of Appeal decision in *Rabemtulla Omar & another v Musa Hersi Fabiye & 5 others* [2014] eKLR in explaining the duties bestowed upon a person claiming bona fide purchaser's interest and further submitted that the caution was removed through proper procedure as the registrar duly served the appellant with the requisite notice and that thereafter the respondent was registered as the owner of the suit property and that he was therefore a bona fide purchaser for value.
14. On whether the respondent was properly sued, the respondent submitted that the appellant filed a counter claim to the respondent's case seeking orders that the respondent's title deed be declared null and void and that the administrator of the estate of Eliakim Musa to conduct a subdivision and transfer the parcel. He submitted that the said administrator is Jemimah Sarah Mbakaya and that the appellant failed to join her as a party to the suit.
15. On the issue of the documents filed by the appellant in a bundle titled "Supplementary Memorandum of Appeal", the respondent submitted that the appellant attempted through the said bundle to introduce new documents that were not relied on at the trial stage. On whether the advocates for the appellant are properly on record, the respondent submitted that the firm of Amasakha and Company did not seek leave to come on record, never filed notice of change of advocates nor a consent by advocates thus making this appeal fatal.
16. In conclusion, the respondent submitted that it is important to note that the size of land claimed by the appellant is not equal to what the respondent owns as the appellant claims that he bought ½ an acre, yet the subject land herein is 0.16 acres which is less than his claim. The respondent urged the court to dismiss the appeal with costs.
17. The appellant filed supplementary submissions on 6th May 2022 whose contents I have noted.
18. This being a first appeal, my mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore make due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.



19. In view of the foregoing guidelines, I have carefully considered the grounds of appeal and the parties' respective submissions. There is no dispute that the respondent is the registered proprietor of the parcel of land known as Marama/Shinamwenyuli/2967 (the suit property). The appellant himself concedes that much and that is why he sought nullification of his title. Similarly, in his evidence and submissions, the appellant urged the court to find that he had acquired the suit property through adverse possession. A claim for adverse possession presupposes that the claimant is acknowledging the defendant's title to the suit property. From the material on record, it is apparent that the respondent became the registered proprietor of the suit property on October 14, 2014 and that a title deed was issued to him on October 15, 2014. The respondent produced in evidence a copy of the title and a copy of the register in respect of the suit property. Similarly, the appellant's exhibits 5 and 10 were a copy of a certificate of official search and a copy of the register, respectively, of the suit property which confirm that the respondent is the registered proprietor.
20. With the above common background in mind, the issues that arise for determination are whether the respondent's title to the suit property is null and void, whether the appellant has established adverse possession and whether the reliefs sought by the parties should issue.
21. As a registered proprietor of land, the respondent is entitled to the rights and privileges accorded by the law. Under section 26 of the *Land Registration Act*, the court is required to accept the respondent's certificate of title as proof of ownership. Nevertheless, the title can be nullified if it is shown that it was acquired illegally, unprocedurally or through a corrupt scheme.
22. Section 26 of the *Land Registration Act* provides:
- Certificate of title to be held as conclusive evidence of proprietorship
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
23. Thus, the grounds upon which a title can be nullified are on fraud, misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme. Through his counterclaim, the appellant sought nullification of the respondent's title.
24. The appellant's case as pleaded in his defence and counterclaim is that he owns the same land that the plaintiff is claiming as the suit property. According to the appellant, he purchased the land from Eliakim Shibia Musa (deceased) in the year 2002 and that he took immediate possession and remained



in peaceful occupation from the year 2002 until the suit was filed in 2015. He concedes that he does not have a title since Eliakim Shibia Musa died in the year 2009 before subdivision and transfer in his favour could be effected. According to him, the mother title which the deceased owned was land parcel number Marama/Shinamwinyuli/4 which the deceased subdivided in his lifetime into Marama/Shinamwinyuli/1944 and Marama/Shinamwinyuli/1945. As far as he is concerned, a title was to be issued to him by the deceased upon further subdivision of Marama/Shinamwinyuli/1944. He further maintains that the subsequent subdivisions of Marama/Shinamwinyuli/1944 which resulted into the suit property were conducted irregularly and unprocedurally.

25. If the appellant seriously wanted to interrogate the manner in which the deceased or his estate subdivided Marama/Shinamwinyuli/1944, he should have joined the administrator of the deceased's estate to his counterclaim, but he did not do so. I agree with the learned trial magistrate that the appellant did not offer anything to warrant impeaching the respondent's title. The requirements of section 26 of the [Land Registration Act](#) were not met, and the appellant therefore failed to demonstrate that the respondent's title to the suit property is null and void.
26. The appellant also claimed, without any specific prayer to that effect in his counterclaim, that he had become entitled to the suit property through adverse possession. The ingredients of adverse possession were discussed by the Court of Appeal in [Mtana Lewa v Kabindi Ngala Mwangandi](#) [2015] eKLR as follows:

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the [Limitation of Actions Act](#)

27. In the subsequent case of [Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others](#) [2018] eKLR, the court elaborated further as follows:
18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, *nec vi nec clam nec precario*. See [Jandu vs. Kirplal & Another](#) (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court's decision in [Wambugu vs. Njuguna](#) [1983] KLR 173...
28. The appellant's claim is that he took possession of the suit property in 2002 when he purchased it from Eliakim Shibia Musa (deceased) and that by the year 2015 when the suit in the subordinate court was filed, he had had 12 years of uninterrupted peaceful occupation. At paragraph 17 of his counterclaim, he pleaded that the purchase price was KShs 650,000 which amount he paid in various instalments resting with a final payment of KShs 20,000 on 19th May 2008. He reiterated the payments in his testimony. Having entered the property pursuant to a sale agreement, his presence thereon would have been with the permission of the seller and time for purposes of adverse possession could only begin to run upon full payment of the purchase price. See [Muchanga Investments Ltd v Safaris Unlimited \(Africa\) Ltd & 2 others](#) [2009] eKLR. Clearly, from 2008 when the appellant claims to have completed



payment of the purchase price to 2015 when the suit was filed, a period of 12 years had not passed. I find that the claim for adverse possession was not established. Even though the trial magistrate did not address that aspect of the counterclaim, nothing turns on it in this appeal.

29. The upshot of all the foregoing is that the respondent's title remained unchallenged. In answer to the respondent's claim of eviction, the appellant stated emphatically that he was in possession and even sought title to the suit property by way of adverse possession. The learned magistrate cannot be faulted for granting the respondent the reliefs that he sought.

30. In view of the foregoing, this appeal is devoid of merit. I dismiss it with costs to the respondent.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 22ND DAY OF NOVEMBER 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Muthami and Ms Ikhumba for the Appellant

Mr Iddi for the Respondent

Court Assistant: E. Juma

