



REPUBLIC OF KENYA



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**Chacha v Gentanya (Environment and Land Appeal 10 of 2020)
[2022] KEELC 15480 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15480 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 10 OF 2020
MN KULLOW, J
NOVEMBER 22, 2022**

BETWEEN

JULIUS MWITA CHACHA APPELLANT

AND

PAUSTINE GATI GENTANYA RESPONDENT

(Appeal emanates from the Judgment and Decree of Hon. L. Mesa in Principal Magistrates' Court at Kehancha in PM ELC Case No. 22 of 2018, delivered on 16th January, 2020)

JUDGMENT

1. This Appeal emanates from the Judgment and Decree of Hon. L. Mesa in Principal Magistrates' Court at Kehancha in PM ELC Case No. 22 of 2018, delivered on January 16, 2020. The grounds in the Memorandum of Appeal are that: -
 - i. The Learned Trial Magistrate erred in law and fact by finding that the Respondent was entitled to the Deceased's parcel of land by operation of adverse possession yet the same was not pleaded by the Respondent and neither had the Respondent applied for the same remedy.
 - ii. The Learned Trial Magistrate erred in law and fact by failing to acknowledge that the Respondent trespassed into the Appellant's land and she confirmed the same during cross-examination.
 - iii. The Learned Trial Magistrate erred in law and fact by noting that the Respondent confirmed that she was building on the Appellant's parcel but still failing to find merit on the Appellant's case citing lack of proof.
 - iv. The Learned Trial Magistrate erred in both law and fact by finding that the sale agreement relied on by the Respondent was fraudulent but failing to appreciate that the Respondent had trespassed onto the Plaintiff's land claiming purchase.



- v. The Learned Trial Magistrate erred in both law and fact by failing to appreciate that no evidence was offered by the Respondent in the form of rebuttal that she had actually put up permanent structures on the Appellant's land.
 - vi. The Learned Trial Magistrate failed to appreciate the basic provisions of law on pleadings that parties are bound by their pleadings before court and no award shall be granted if not pleaded.
 - vii. The Learned Trial Magistrate greatly misdirected himself in treating the submissions of the Appellant very superficially thereby erroneously arriving at a wrong conclusion in law.
 - viii. The Learned Trial Magistrate erred in law and fact by failing to take into account the provisions of all relevant land laws.
 - ix. The Learned Trial Magistrate erred in law and fact by failing to appreciate the provisions of the *Evidence Act* particularly on the standard of evidence in civil cases and onus of proof thus arrived at a wrong decision.
 - x. The Learned Trial Magistrate erred in law and fact by failing to consider the provisions of Article 40,48 and 50 of *the Constitution* of Kenya 2010 hence denying the Appellant his rights as stipulated in the said provisions.
 - xi. That as a result of the foregoing the Learned Trial Magistrate erred in law in finding that Appellant's claim was not worthy of the prayers sought in the Plaint dated June 7, 2018 despite the evidence on record.
2. The Appellant therefore prays for: -
 - a. The Judgment of the trial court be set aside and this Appeal be allowed.
 - b. A Permanent Injunction against the Respondent or her servants, agents from interfering with the Appellant's premises on L.R. No. Bugumbe/ Isebania/737 and an eviction order to issue therefrom.
 - c. Costs of the Appeal.
 - d. Interests of (b) at court rates.
 - e. The court to issue any other order it deems just and equitable in the circumstances.
 3. A brief background to bring the Appeal herein into perspective; the Plaintiff (now Appellant) sued the Defendant (now the Respondent) *vide* a Plaint dated 7/06/2018 seeking an Order of Permanent Injunction to restrain the Defendant from trespassing, occupying, building and/or carrying out any dealings on L.R. No. Bugembe/ Isebania/737, an Eviction order together with costs of the suit.
 4. The Defendant filed a Statement of Defence dated June 28, 2018; wherein she generally denied all the averments made by the Plaintiff against her, particularly the claims of trespass. She maintained that she has been in occupation of a portion of the suit land measuring approx. 50ft by 100ft for more than 30years; having purchased the portion thereof sometimes in the year 1988 from the Plaintiff's late father one Jacob Chacha Marwa and hence she is a beneficiary of the said estate. It was also her claim that the Plaintiff has persistently interfered with her peaceful occupation and use of the said portion of the suit parcel despite being fully aware that she legally acquired the same.
 5. The matter proceeded for main hearing and subsequently judgment was delivered on the January 16, 2020 whose effect was to dismiss the Plaintiff's suit with costs to the Defendant hence the instant Appeal.



6. On February 8, 2022, I directed that the Appeal be canvassed by way of written submissions, to be filed and exchanged within 14 days for each party. Both parties filed their respective written submissions which I have taken into consideration in arriving at my decision.

Appellant's Submission

7. He mainly submitted on the issue of trespass and the evidence before the trial court. It was the Appellant's submission that he produced photographs of structures on the suit land which the Respondent duly admitted that the said structures belonged to her and were erected on the suit land. It was therefore his contention that where there is an admission of encroachment on another's land, the court is under duty to hold the aggressor liable to her admission. That even though there was no proof of the extent of trespass, the court was under a duty to take into account the admission of the Respondent that she indeed was in possession of the part of the suit land.
8. With regards to the Sale Agreement produced by the Respondent as DExh 1, it was his submission that the said sale agreement was not only statute barred but the same was also voidable as the exact acreage of the subject matter was omitted.
9. It was his claim that the Respondent has extensively interfered with the Appellant's possession and all the beneficiaries claiming under him over the suit parcel. He maintained that he adequately proved his case against the Respondent and thus urged the court to allow the Appeal as presented.

Respondent's Submission

10. It was her submission that the Appellant's claim for trespass was neither supported by a surveyor's report to ascertain the extent of such trespass nor did he indicate in his plaint the exact acreage trespassed upon.
11. She further stated that her testimony in the trial court confirmed that she had been in uninterrupted occupation of a portion of the suit parcel measuring approx. 50ft by 100ft, having acquired the same from the Appellant's deceased father. In addition, it was her contention that the said occupation has been for more than 30 years and hence the limitation period to lodge any claim of trespass had been overtaken by events.
12. It was her claim that the Appellant failed to prove his case to the required standard to warrant the issuance of the orders sought and thus urged the court to dismiss the Appeal with costs.
13. Having looked at the Record of Appeal, the Memorandum of Appeal herein and the rival submissions in totality; I find that the main issue for determination is whether this Court should interfere with the exercise of discretion by the trial court and set aside its Judgment delivered on October 29, 2018.
14. The Court of Appeal in *Selle v Associated Motor Boat Co.* [1968] EA 123) held as follows: -

“this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”



15. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. The issue before the trial court was on the ownership of the suit parcel and whether or not the Defendant had encroached and/or trespassed onto the Plaintiff's suit land.
16. I will now proceed to re-evaluate and re-assess each of the party's claim from the trial court record and the resultant judgment in order to determine whether the trial magistrate rightly exercised his discretion in dismissing the Plaintiffs' claim; on account of the issue of Adverse Possession and the issue of Trespass.
17. The Appeal herein is anchored on the issue of adverse possession; Appellant maintains that the trial court erred in law and in fact in finding that the Defendant had acquired a valid title to the parcel of land forming part of the estate of the deceased since she has been in occupation of the subject land for the last 30 years. It is further his assertion that the issue of adverse possession was never pleaded by the Defendant in her pleadings nor sought by way of a counter claim. He thus urged the court to allow the Appeal.
18. The Respondent on the other hand maintained that the Appellant did not prove his claim on trespass to the required standard to warrant the grant of the reliefs sought and hence the court rightfully dismissed their claim.
19. I have carefully looked at the pleadings of the Respondent from the record of Appeal, particularly the Statement of Defence and the testimonies of the parties and I do note that from the same, the issue of adverse possession was neither pleaded in the statement of defence nor did it arise during the testimony. The Respondent relied on the sale agreement as the basis of her entry into the suit parcel and occupation and use thereof.
20. Further, with regards to the issue of adverse possession as held by the trial magistrate in his judgment; I wish to reiterate that the said court lacked the requisite jurisdiction to grant the said reliefs. As aptly stated in the *Limitation of Actions Act*, the High Court and which pursuant to the Article 162 (2) (b) of *the constitution* the Environment and Land Court is the appropriate forum vested with the requisite jurisdiction to entertain claims of adverse possession. To this end, I find that the trial court acted in excess of its jurisdiction in finding that the Respondent had acquired a valid title to the suit parcel by virtue of adverse possession.
21. I will now proceed to the issue of trespass which was the basis of the Appellant's claim against the Respondent. Trespass is an intrusion by a person into the land of another who is in possession and ownership. Section 3 (1) of the *Trespass Act*, Cap 294 provides that:

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
22. I have carefully looked at the record of appeal and I do note that the Respondent's occupation of the suit land is not in contention. Both PW1 and PW2 testified to the effect that the Defendant/ Respondent had been in occupation of a portion of the suit land until recently when she started to encroach. However, what appears to be in dispute is the portion she occupied prior to the said encroachment. The Appellant either inadvertently or by design failed to mention the portion that the Respondent earlier occupied that she was given by their late father. Further he did not mention the extent of the Respondent's encroachment but I have noted that during his cross – examination he indicated that the said encroachment was on a portion measuring approx. 25ft.



23. It is trite law that he who alleges must prove. Where a person is bound to prove the existence of any fact the burden of proof lies on that person. Section 107(i) of the Evidence Act provides that: -

“Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

CONCLUSION

24. In conclusion, I accordingly find that the Appeal is partially merited and is therefore allowed on the following terms: -

- I. The Appeal succeeds to the extent of Adverse Possession.
- II. The Respondent’s occupation be and is hereby limited to a portion measuring approx. 50ft by 100ft and an Order is hereby issued directing the County Surveyor to visit the suit land for purposes of carving out the said portion and clearly demarcating the same with boundaries.
- III. An Order of Permanent Injunction be and is hereby issued restraining the Respondent either by herself, servants and agents from interfering with the Appellant’s premises on L.R. No. Bugumbe/ Isebania/737 in excess of her entitlement being 50ft by 100ft.
- IV. Each party to bear their costs of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 22ND DAY OF NOVEMBER, 2022.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

.....for the Appellant

.....for the Respondents

Court Assistant - Tom Maurice

