



REPUBLIC OF KENYA



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**Hika v Kagwima alias Wairiri (Environment and Land Appeal
E012 of 2024) [2025] KEELC 1186 (KLR) (12 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1186 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL E012 OF 2024
JM KAMAU & CM KAMAU, JJ
MARCH 12, 2025**

BETWEEN

SIMON KIMATHI HIKA APPELLANT

AND

ROBERT WAIRIRI KAGWIMA ALIAS WAIRIRI RESPONDENT

*(Appeal against the Judgment and Decree of Hon. E. Wanjala Ms. Principal
Magistrate in Engineer SPM ELC Civil No. E008 of 2023 delivered on 9/5/2024)*

JUDGMENT

1. This Appeal emanates from the Honourable E. Wanjala Ms. Principal Magistrate Engineer Senior Principal Magistrate's Court ELC Civil Case No. E008 of 2023 delivered on 9/5/2024. In the said court, the Appellant had been sued by the Respondent on claims that the Respondent Robert Wairiri Kajwimi alias Robert Wairiri was the registered proprietor of the parcel of land known as L.R. No. Nyandarua/Malewa/166 which he said he had acquired for valuable consideration from the late Hika Kimani (who at the time of filing the suit was already deceased). He fenced the suit land and started to occupy it as soon as he acquired it. He has been engaged in farming activities thereon and that though the Appellants do not reside on the land, they have committed acts of trespass, wastage, damage and alienation of the same. This has made the Respondent not to fully occupy, possess and use the suit land hence occasioning him loss. He therefore, prayed for:-
 - a. An Order of permanent injunction restraining the Defendants (Appellants), their employees, servants and/or agents from trespassing, wasting, damaging, alienating or in any other manner interfering with the Plaintiff (Respondent's) right to quiet enjoyment and use of the land parcel No. Nyandarua/Malewa/166.
 - b. Costs of the suit together interest at court's rates.
 - c. Any other or further relief that the court may deem fit or just to grant.



2. The Appellants entered appearance on 2/3/2023 and filed a Defence on 26/5/2023 in which they said that their names were John Kimani Hika, instead of Simon Kiman Hika for the 1st Defendant (Appellant) and that Daniel Kamau Hika (the 3rd Defendant/Appellant) goes by the name David Kimani Hika. They averred that the suit property belonged to their late father, Hika Kimani and were not aware that the same had been sold to the Respondent. They claimed to have lived on the suit premises with their children and their late mother, Elizabeth Njoki Hika since prior to 1974 uninterruptedly.
3. In their Counter-claim the Appellants repeated the averments in the foregoing paragraphs and stated that their late mother lodged a caution against the Title on 19/3/1984 claiming absolute ownership by virtue of adverse possession and also obtained an Order of prohibition in Nakuru Civil Case No. 90 of 1986 but which was lifted in Miscellaneous Application No. 290 of 2010 at Resident Magistrate's Court, Nyahururu. Subsequently, the Title Deed was issued to the Respondent on 6/1/2011. In spite of the above, the Appellants remained on the suit property where they have been paying land rates and rent using the Account of their late father, Hika Kimani. They therefore sought for Orders of:
 - a. The Respondent's (Plaintiff's) Title to Land Parcel No. Nyandarua/Malewa/166 has been extinguished by the doctrine of adverse possession due to open occupation by the Appellants (Defendants) and that the court do issue an Order to compel the transfer of L.R. No. Nyandarua/Malewa/166 to the Appellants (Defendants) within 30 days from the date of Judgment in default thereto, the Executive Officer of Engineer Chief Magistrate's Court be authorized and Ordered to execute the transfer documents.
 - b. Costs of the suit together with interest at court rates.
 - c. Any other relief that the court would deem fit and just to grant.
4. In his Reply to Defence and Defence to Counter-claim, the Respondent denied the contents of the Counter-claim and stuck to his averments as contained in the Plaintiff.
5. The Hearing of the case commenced on 31/8/2023 when the Respondent testified by adopting his statement dated 23/2/2023 as his evidence in chief. In the statement, he repeated the averments in his Plaintiff. He testified that he is the registered proprietor of Nyandarua/Malewa/166 which he acquired between 1983 and 1984 from the late Hika Kimani for valuable consideration. Kimani was the father to the Appellants and who was survived by his widow, Elizabeth Njoki Hika – mother to the Appellants and who also subsequently passed on. He claimed that he had never seen the Appellants. He asked for an Order of eviction against the Appellants. He produced the following documents to muscle up his case:-
 - a. Title Deed in respect to land reference No. Nyandarua/Malewa/166 issued on 6/1/2011.
 - b. Court Order dated 7/12/2010 from Nyahururu Principal Magistrate's Court Miscellaneous Application No. 29 of 2010 vacating the caution lodged against the suit land on 19/3/1984 and also lifting the prohibitory Order lodged against the same on 6/12/1988 vide Nakuru High Court Civil Case No. 90 of 1986.
6. On cross-examination the Respondent said he did not have a copy of the sale agreement in court but that he went to the Land Control Board for consent and obtained the same but also did not carry the consent to court. He said that he bought the land from Hika Kimani during the latter's lifetime. He had put up a small structure on the land but could not tell whether the same was still intact.



7. On re-examination by his counsel, the Respondent said that the Defendants (now Appellants) do not reside on the suit land but use it from time to time. He said he did not know the Appellants (Defendants) but was given their names by his kin who took after the land.
8. The Plaintiff/Respondent called a witness by the name Joseph Mwangi Kinyanjui, the area elder who testified by adopting his statement recorded on 12/7/2023 as his evidence in chief. In the aforesaid recorded statement, Mr. Kinyanjui said that he knew the Respondent since 1978 when the latter's brother married the witness's sister who he said bought the suit land from the Appellant's father. He also testified that he knows the Appellants (Defendants) because they live in his neighbourhood. He said that Hika Kimani relocated immediately after selling the suit land together with the Defendants (Appellants) who were by then very young. They do not reside on the suit land nor have they constructed anything thereon. But he said that they occasionally use the land. On cross-examination by Mr. Njau for the Defendant, the witness, a village elder in Malewa Sub-location said that the Respondent was not his brother-in-law as wrongly indicated in his (witness) statement. He said that only a store was constructed on the suit land. The land is occasionally farmed and that the Defendants/Appellants live on a separate land at Geta Sub-Location.
9. On re-examination, the witness said that no one resides on the suit land.
10. Having had the Plaintiff's case closed, the Defendants (Appellants) called one witness, Haron Njoroge Hika, the 2nd Defendant who produced his statement dated 4/4/2023 as his evidence and documents to hinge upon without saying a word in addition. In the statement aforementioned, the witness testified as had been averred in the Defence and Counter-claim. He said that he and his 6 siblings have been living on the suit land from earlier than 1974 and have remained in possession in spite of the Plaintiff (Respondent) having been given Title to the land on 6/1/2011 and even after their caution and prohibition were lifted by the court vide Nyahururu RMCC Misc. Application No. 290 of 2010. He concluded his testimony by saying that he and his siblings have been remitting Rent and Rates in respect to the suit land. He prayed that the Defendants (Appellants) be declared the owners of the land by way of adverse possession. On cross-examination by Mr. Njihia for the Plaintiff, Mr. Hika said that his late father had a case over the suit land for adverse possession. His mother also sued the Respondent when he wanted to buy the suit land. She was against it and that the Respondent sued his father claiming the land. The land belonged to his mother and not his father. The 197-born son who was 7 years old in 1984 said he could not tell whether his father had sold the land or not. He said he lives on that land but had bought a piece of land elsewhere on which he had constructed. He said that there was a case between his mother and the Respondent.
11. On re-examination, the 2nd Defendant (2nd Appellant) said that his mother had a dispute with the Respondent. The Appellants then closed their case and Judgment followed.
12. The learned trial magistrate held that under Section 26(1) of the Land Registration Act No. 3 of 2012 a certificate of Title issued by the Land Registrar upon registration or transmission is prima facie evidence of proprietorship of land. She held that the Defendants (Appellants) did not challenge the acquisition or authenticity of the Title held by the Respondent. Further, the Appellants did not demonstrate that they had had quiet enjoyment of the suit property for a period of over 12 years in order to entitle them to the suit property by adverse possession.
13. On a balance of probabilities, the court was persuaded that the Plaintiff (Respondent) had established his claim against the Defendants (Appellants) to warrant the grant of the reliefs sought in the Plaintiff.
14. Quoting the Case of Mokuia V. Abuya & 2 Others ELC Misc. Application No. E001 of 2022 where Justice J.M. Onyango stated that a claim for adverse possession ought to be filed in the High Court



(read ELC Court) and being guided by the provisions of Section 38 of the Limitations Act Cap.22, the Learned Magistrate held that she had no jurisdiction to determine whether the Appellants were entitled to the land by way of adverse possession. She consequently entered Judgment as follows:

- a. Judgment is entered for the Plaintiff against the Defendant jointly and severally in terms of prayers (a) of the plaint to the extent that an order for permanent injunction is hereby issued restraining the Defendants, their employee servants and/or agents from trespassing, wasting, damaging alienating or in any other manner interfering with the Plaintiff's right to his quiet enjoyment and use of Land Parcel No. Nyandarua/Malewa/166. The Plaintiff is awarded costs of the suit since costs follow the event and interest on costs at court rates.
 - b. The defendant's counterclaim fails for want of jurisdiction. There shall be no orders as to costs on the Counter-claim.
15. The Appellants having been aggrieved by the aforesaid Judgment appealed to this court on the following grounds:
1. That the Learned Magistrate erred in law and in fact by failing to consider the provisions of Section 26 of the Environment and Land Court Act together with Section 9 of the Magistrate's Court Act thus reaching a conclusion that it lacked jurisdiction to entertain a claim for Adverse Possession.
 2. That the Learned Magistrate erred in law and in fact by failing to investigate the facts as presented before it thus holding that the Defendants have failed to demonstrate that they have enjoyed quiet possession of the suit property for uninterrupted period of 12 years.
 3. That the Learned Magistrate erred in law and in fact when it acknowledged that there was no Sale Agreement presented before it, no proof of payment of consideration, no consent to transfer property and no evidence of transfer of the suit property but still failed to interrogate the glaring anomalies.
 4. That the Learned Magistrate erred in law and in fact by failing to consider the evidence, submissions and authorities filed on behalf of the Appellants thus dismissing the Appellant's Counter-claim.
 5. That the Learned Magistrate erred in law and in fact by failing to establish that the Appellants had established their case on a balance of probability while the Respondent's evidence on record was unsatisfactory.
 6. That the Learned Magistrate erred in law and in fact by entering Judgment in favour of the Plaintiff as against the Defendants.
 7. That the Learned Magistrate erred in law and in fact in failing to have any regard to the principle of substantive justice when dealing with the suit.
 8. That in the circumstances of the case the Learned Magistrate failed to uphold the law.
16. The court asked parties to file written submissions which the court has considered before retiring to write this Judgment.
17. A certificate of Title is conclusive evidence of ownership and is prima facie evidence that the registered proprietor is the owner of the land. Section 24 of the Land Registration Act 2012, gives the registered proprietor absolute rights over land. It provides:
- Subject to this Act—



- (a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease
18. Further, this Title is protected under Section 26 of the same Act which provides:
- (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.
19. Flowing from the foregoing provisions, a registered proprietor enjoys the statutory protection of Title as long as he can show that the Title was acquired legally.
20. Under Section 143 (1) of the repealed Registered Land Act, the court was empowered to order the rectification of the Register by directing a registration to be cancelled if it was obtained by fraud or mistake.
21. The circumstances when Title can be cancelled or revoked have been enumerated above. Section (26(1) (a) & (b) of the Land Registration Act under the heading: Certificate of title to be held as conclusive evidence of proprietorship provides:
- (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.”
22. Before any order may be made in terms Section 26 (1) (a) of the Land Registration Act 2012 that the Title to land was acquired by fraud, misrepresentation and or illegally and it is therefore not protected by the Constitution, the fraud, misrepresentation and illegality in the acquisition of the property must be proved to the required standard. A registered proprietor only enjoys the statutory protection of Title as long as he/she can show he acquired the Title lawfully and procedurally.
23. Section 80 of the Land Registration Act, 2012 provides as follows: -



1. Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
Subsection (2) of the Act,
(2)) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default”
24. If the court is satisfied by evidence to the required standard that the Applicant is guilty of fraud or other illegality in the acquisition of the Title to the property, the court cannot enforce the Title and is, as a matter of law, enjoined by the provisions of Article 40 (6) to disregard the purported Title. Article 40 (6) of the Constitution is in terms as follows:
(6) The rights [to protection of right to property] under this Article do not extend to any property that has been found to have been unlawfully acquired.”
25. In civil proceedings, when any fact e.g. fraud is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.
26. In the case of Dr. Joseph Arap Ngok – Vs – Justice Moiwo Ole Keiwua & 5 Others, Nai. Civil Appeal No. 60 of 1997 the court categorically declared that:-
Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Section 25 and 26 of the Land Registration Act) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the titleholder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”
27. Genuine proprietors must be protected under the law. The Constitution protects a higher value, that of integrity and the Rule of law.
28. No evidence of fraud was brought out in evidence nor were any particulars of fraud given in the counterclaim as is required under Order 2 Rule 4 (1) of the Civil Procedure Rules:
A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
(a) which he alleges makes any claim or Defence of the opposite party not maintainable;
(b) which, if not specifically pleaded, might take the opposite party by surprise; or
(c) which raises issues of fact not arising out of the preceding pleading”.



29. With a Title Deed at hand, I am obliged to uphold the Rule of Law with regard to the Respondent's rights as a registered proprietor, under Section 25 of the Land Registration Act, 2012, until and unless fraud has been established in accordance with section 26 (1) of the Land Registration Act, 2012 which I must observe has not been done. I find that since the Respondent's evidence of his ownership of the suit property was not shaken by the Appellants, he is therefore entitled to the declaration sought of ownership and any consequential rights, privileges, entitlements, protections or benefits afforded to everyone arising from such ownership.
30. On the issue of adverse possession, the learned Trial Magistrate got it right. It is settled law that Subordinates Courts are not endowed with jurisdiction to decide on Adverse possession. In any case, even if the said Court had jurisdiction, and that adverse possession had already accrued the same was terminated the moment the Respondent filed suit.
31. The upshot of the above is that the Appeal is dismissed in its entirety. I also award the costs of this Appeal in addition to those of the lower Court to the Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 12TH DAY OF MARCH, 2025.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Eric.

Appellants' Counsel: Ms. Olendo.

Respondent's Counsel: Mr. Obore.

