



**Kimani alias David Nganga Kimani (Suing as Personal Representative of Samuel Kimani Nganga (Deceased)) v Ndichu alias John Mbugua Ndichu (Civil Appeal E006 of 2023) [2024] KEELC 6739 (KLR) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6739 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
CIVIL APPEAL E006 OF 2023  
MN GICHERU, J  
OCTOBER 9, 2024**

**BETWEEN**

**DAVID KIMANI ALIAS DAVID NGANGA KIMANI ..... APPELLANT  
SUING AS PERSONAL REPRESENTATIVE OF SAMUEL KIMANI NGANGA  
(DECEASED)**

**AND**

**JOHN KISEMBEI NDICHU ALIAS JOHN MBUGUA NDICHU .. RESPONDENT**

**JUDGMENT**

1. This judgment is on the appeal by the appellant Davin Kimani alias David Ng'ang'a Kimani suing as the personal representative of Samuel Kimani Ng'ang'a (deceased). He seeks to have the judgment and decree dated 29/6/2023 in Ngong Chief Magistrates Court ELC Case No. 130/2018 (O.S) set aside and for other orders as follows,
  - c. The estate of the deceased has acquired title to L.R. Ngong/Ngong/37363 through adverse possession,
  - d. The title issued to John Kisembei Ndichu be cancelled and the personal representative of the estate of the deceased be registered as the proprietor of the suit land,
  - e. The costs of this appeal be provided for and,
  - f. This court makes such further or other orders that will meet the ends of justice.
2. In her judgment, the learned trial Magistrate dismissed the appellant's claim to be declared the owner of the suit land through adverse possession. The reasons given for the dismissal of the suit were as follows. Firstly, it was held that since the appellant was purchaser, his claim through adverse possession was not compatible with that of a person who is a purchaser. The two claims are mutually exclusive



and one person can not bring both and succeed on both. Secondly, the court found that a period of 12 years had not elapsed since the respondent got registered as the owner of the suit land as the land had previously been numberless.

3. In the memorandum of appeal dated 26/7/2023, the appellant raised the following nine (9) grounds against the judgment of the learned trial Magistrate. The learned trial Magistrate erred in both fact and law in finding/ failing to appreciate/holding/disregarding/failing to consider/and/or upholding,
  - i. that since late Samuel Kimani Ng'ang'a took possession pursuant to a sale agreement dated 15/11/1922 adverse possession could not arise,
  - ii. failing to appreciate that though the initial occupation was consensual, it became adverse after the completion of the payment of the purchase price, failure by the late Francis Nasieku to obtain the consent of the Land Control Board and transfer the property after the law distinguished any rights by the estate of Francis Nasieku Ndichu,
  - iii. in disregarding the open, continuous occupation of the suit property by the plaintiff for a period of over 29 years before commencement of the suit. The property has even the matrimonial home,
  - iv. holding that since time could only run from 2006 when the property was registered in the defendant's name yet adverse possession is against the land not the title holder,
  - v. holding that the suit property only became registered in 2006 yet the property was a resultant subdivision of a larger parcel hence registered but not assigned a number,
  - vi. in failing to interrogate how the defendant acquired his title and the illegality thereto,
  - vii. in disregarding the fact that any rights by the defendant arising out of the estate of Francis Nasieku Ndichu were extinguished 12 years after the plaintiff took possession of the suit property by dint of Sections 7 and 17 of the Limitation of Actions Act,
  - viii. in upholding the illegally obtained title by the defendant,
  - ix. in failing to consider the appellant's comprehensive submissions.
4. The appellant's case is as follows. Samuel Kimani Ng'ang'a bought two pieces of land from Francis Matindi Ndichu. The first plot was bought on 13/12/1982 and the second one on 15/11/1983. The first plot was surveyed and registered as No. Ngong/Ngong/2881. The second parcel did not have a number but the seller allowed Samuel Kimani to develop it. He built a permanent house on the numberless portion which was eventually registered as No. Ngong/Ngong/37363 in the year 2006. In the meantime, the seller had died in 1984. The respondent who was to ensure that the land was registered in the name of the appellant's father Samuel Kimani, instead registered it in his own name even though he had assured him that he has registered the land as expected. This is the genesis of the dispute. On the part of the respondent it is admitted that Samuel Kimani bought only one plot from his father Francis Ndichu which was No. Ngong/Ngong/2881 which he charged to HFCK. He is not aware of the second plot. Secondly, after his father died in 1984, Samuel encroached onto the suit parcel which was then numberless. At the core of the dispute is whether Samuel Kimani purchased one or two plots.
5. This being a first appeal, this court is not bound to necessarily accept the findings of the Lower Court. This court must reconsider the evidence, evaluate it itself and draw its own conclusions but bearing in mind that it did not see or hear the witnesses first hand and make allowance for that. In particular, this



court is not bound to necessarily follow the trial court's findings of fact if it appears either that it has clearly failed on some point to take account of particular circumstances.

See *Selle and another –versus- Associated Motor Board Company and others* EA 1968 123.

6. Counsel for the parties filed written submissions 2<sup>nd</sup> May 2024 and 17<sup>th</sup> September 2024 respectively. The appellant's counsel identified the following issues for determination.

- a. Whether the appellant proved adverse possession.
- b. When did time start running.
- c. Whether adverse possession may arise out of a sale agreement.
- d. Whether the title issued to the respondent should be cancelled.

On the other hand, the respondent's counsel's written submissions covered the following issues.

- a. Grounds of appeal.
- b. Adverse possession of unregistered land impossible.
- c. Essentials of adverse possession.
- d. Matters prior to the registration of the land.
- e. Conclusion.

7. I have carefully considered all written submissions by learned counsel and the issues raised therein as well as the law. I have also considered the entire record including the pleadings, proceedings and judgment of the Lower Court vis-a vis the orders sought on appeal and the grounds of appeal. I find that the following issues arise in this suit.

- i. Whether the appellant acquired the suit land through the doctrine of adverse possession.
- ii. Whether the appellant is entitled to the suit land otherwise than through adverse possession.

8. On the first issue, I find that strictly speaking, the appellant is not entitled to the suit land by way of adverse possession. The trial Magistrate was right to hold that the appellant or his parents should have claimed the suit land as purchasers than through adverse possession. When this dispute was filed in court on 15/11/2006, the defendant had been the registered proprietor for less than ten (10) months. He became registered on 27/1/2006. Twelve years had not elapsed from the date of registration to the date of filing of the dispute. I am persuaded, like the learned trial Magistrate was, by the authority of *Abdirashid Adan Hassan –versus- Estate of W H E Edgley* 2022 eKLR where it was held, inter alia that a claim for adverse possession must be brought against the registered proprietor since it seeks a declaration that the proprietor's title has been extinguished by prescription. The court went on to state as follows.

“...it follows therefore that the proceedings must be in respect of the correct parcel of the land whose ownership is verified by an annexed extract in terms of Order 37 rule 7 of the Civil Procedure Rules.

Sub rule 2 provides as follows,

“The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed”.



The copy of register annexed to the supporting affidavit to the amended originating summons dated 28/10/2020 shows that the defendant was registered as the owner of the suit land on 29/1/2006 and issued with the title deed on 3/2/2006. Twelve years would have elapsed on 30/1/2018.

9. On the second issue, I find that the appellant is entitled to the suit land otherwise than through adverse possession. In her judgment dated 29/6/2023, the learned trial Magistrate had this to say at page 5,

“In the instant case, it is the plaintiffs’ claim that the deceased Samuel Kimani Ng’ang’a purchased from the deceased Francis Matindi Ndichu alias Francis Ndichu Nasieku, a portion of land measuring 0.2337 ha. The plaintiff has supported the said portion with two sale agreements marked B1 and B2. The agreements ...”

Then at page 6, the learned Magistrate added,

“...It is therefore not clear from the above decision that a claim for adverse possession cannot arise where parties executed a sale agreement over the property, as in the instance case...”

The learned Magistrate was confronted with the evidence from the appellant showing that Samuel Kimani bought two parcels of land. He charged one and developed the other one where he built a house. She could not however go outside the narrow confines of the originating summons which only sought,

- i. A declaration that the plaintiff had acquired title to the suit land under the doctrine of adverse possession,
  - ii. Cancellation of the title issued to John Kisembei Ndichu and the registration of the appellant as the proprietor of the suit land.
10. Under Section 78(1) of the *Civil Procedure Act*, it is provided as follows.

78 (1) “Subject to such conditions and limitations as may be prescribed, an appellate court shall have power –

- a. To determine the case finally”

Again, as per the decision in *Selle –versus- Associated Motor Boat Company Limited* (Supra), this court is entitled to reconsider the evidence adduced in the Lower Court, evaluate it itself and draw its own conclusions and is not bound to follow the trial court’s findings of fact...”

The trial Magistrate in her judgment found that the suit has been in court for 15 years. In my own calculation, this is the 18<sup>th</sup> year of this suit in court. This is an inordinately long time. A child born in the year 2006 is now an adult. It is not fair or just for a case to last in court for this long. This is more so in the constitutional dispensation we are in where Article 159 requires that justice shall not be delayed. We also have Sections 1A and 1B which require that cases governed by the *Civil Procedure Act* be resolved in a manner that is just, expeditious, proportionate and affordable. This same requirement is repeated in Section 3 of the *Environment and Land Court Act*. Guided by the above provisions of *the Constitution* and the law, I find since the parties adduced all the evidence at the trial, I should finally resolve the dispute finally as per Section 78(1) (a) of the *Civil Procedure Act*.

11. It is my finding that Samuel Kimani Ng’ang’a bought two parcels of land from Francis Ndichu Nasieku. In arriving at this finding, I have relied on the evidence of Yuster Nyamwitha Kimani adduced in court before the learned trial Magistrate on 13/5/2021. She was a witness to the sale agreements. She has first



hand knowledge of the transactions and the fine details of the sale. In contrast, the respondent was not in the know of the transactions that his father and Samuel Kimani entered into. Having been born in the year 1970, he was only 12 and 13 years old when his father entered into the sale transactions with Samuel Kimani. I believe the evidence by the appellant's witness and I find it credible and consistent. The evidence by the respondent is hearsay and unreliable.

12. It is also my finding that under Section 30 (g) of the Registered Land Act (Cap 300), now repealed, a person in possession of land enjoys an interest which is superior to any title. It provides as follows.

30 “ Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted in the register – (g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, same where inquiry is made of such person and the rights are not disclosed”

13. In the case of Willy Kimutai Kitilit –versus- Michael Kibet, Civil Appeal No. 51 of 2015, the Court of Appeal at Eldoret held that for a purchaser of land who is in occupation the doctrines of constructive trust and proprietary estoppel apply and even in the absence of the consent of the Land Control Board. The purchaser was declared to be the lawful owner of the land in dispute. At paragraph 24 of the judgment dated 17/5/2018 the Court had this to say,

(24) “There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the Land Control Act. By Article 10 (2) (b) of the Constitution of Kenya, equity is one of the National values which binds the courts in interpreting any law (Article 159 (2) (e), the courts in exercising judicial authority are required to protect and promote the purpose and principles of the Constitution. Moreover, as stated before, by virtue of clause 7 of the Transitional and Consequential Provisions in the Sixth Schedule to the Constitution, the Land Control Act should be construed with the alterations, adaptations and exceptions necessary to bring it into conformity with the Constitution”.

14. In summary and for the reasons already given, I find that the appellant is the lawful owner of L.R. Ngong/Ngong/37363 through purchase and occupation. Consequently, I allow the appeal in terms of prayers (a), (b) and (d). Costs to the appellant.

It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 9<sup>TH</sup> DAY OF OCTOBER 2024.**

**M.N. GICHERU**

**JUDGE**

