Atieno v Kaoto (Environment and Land Appeal E021 of 2022)
[2024] KEELC 13611 (KLR) (4 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13611 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT AND LAND APPEAL E021 OF 2022

M SILA, J

DECEMBER 4, 2024

BETWEEN

PAMELA ATIENO ..... APPELLANT

AND

JOHN KAOTO ..... RESPONDENT

(Being an appeal from the decision of Hon J. Munguti, Senior Principal Magistrate, delivered on 3 August 2022, in the suit Migori CMCC/ELC No.149 of 2019)

JUDGMENT

(The appellant, a widow, being the registered proprietor of the suit land; respondent being husband to the appellant's sister and in occupation of part of the land; appellant filing suit for the eviction of the respondent; respondent contending that he assisted the appellant financially, helped her build a house, and also helped process her title deed and that in return the appellant invited him to live on the land and promised to give him one acre of land; respondent also contending that he has stayed on the land for a long time and deserves title by adverse possession; appellant's response being that she allowed the respondent temporary stay as he looked for other land since the respondent had been chased away from his ancestral home; at the Magistrates' court judgment entered for the respondent on the ground that he financially assisted the appellant and also that he was entitled to the land by adverse possession; appellant aggrieved hence the appeal; appellate court finding that there is no tangible evidence of any assistance given by the respondent to the appellant and nothing tangible to show that the appellant promised him one acre of the suit land; in any event mere assistance to a person by itself does not entitle one to land; trial court also erred in holding that the respondent was entitled to the land through adverse possession as the respondent by his own admission had not attained 12 years of possession; judgment of the trial court set aside; judgment entered for the appellant; respondent given three months to give vacant possession)

1. The appellant is the registered proprietor of the land parcel Suna West/Wasweta II/5025 measuring 8.91 Ha. The respondent is her brother-in-law, given that he is married to the appellant's sister. Both parties act in person.

2. Through a plaint filed on 10 May 2019, the appellant sued the respondent and pleaded that the respondent has without any colour of right invaded her land and trespassed into it. She averred that he has erected three structures therein without her consent claiming that he has purchased the same. She pleaded that her several demands to have the respondent remove the structures went unheeded hence the suit. In the plaint she asked for orders for a declaration that she owns the suit land and for an order of eviction of the respondent and his family members/assigns.

3. The respondent filed a statement of defence wherein he admitted that the appellant is the owner of the suit land. He however denied trespassing into the land. He pleaded that he has resided on the suit land since August 2007 on the invitation of the appellant as she was his sister-in-law. He pleaded that it all started in 2006 when the appellant, who is the immediate follower of his wife, approached him and his wife, and pleaded with them to move from their home to her land so that the respondent could take care of the appellant. He pleaded that it took almost one year for him to be convinced to move into her land. He pleaded that after a lengthy talk at family level, involving the family of the appellant and his family, it was unanimously agreed that since he had built for her a semi-permanent house and a kitchen, and he had also paid and processed for her the title deed, he would be rewarded with a portion measuring approximately one (1) acre to put up a home so that he could continue assisting her financially. He pleaded that he initiated the construction of the appellant's home in 2007 before he could move in and all this was at the invitation and consent of the appellant. He averred that he has since been enjoying peaceful stay until the appellant came up with the suit. He contended that by virtue of adverse possession, he qualifies for a portion of the suit land, and whatever the case, the appellant was the author of her own misfortune for interfering with his peaceful stay in his original home which is about 8 kilometres away and convinced them to move into her land. He denied any demand notice being issued to him.

4. With pleadings closed the matter proceeded for hearing.

5. PW-1 was the appellant. In her evidence, the appellant testified that she assisted the respondent to settle on the suit land for one year. After one year, she offered to sell the land to the respondent for Kshs. 20,000/= but he failed to pay for the land. She took him to the area Chief who ordered him to vacate the land. At the Chief's office he pleaded to be given two years, but after two years he came with a letter from an advocate. When he brought the letter, she realized that he was claiming that he has built her a house and also processed for her the title deed. That is what prompted the case. Cross-examined by the respondent, she denied approaching him to come and stay with her. She stated that he was chased from his home and that she decided to assist him settle on her land as he looked for land to settle. She denied giving him free land and denied that he assisted her process the title deed. She asserted that she only allowed him to stay on the land for one year.

6. PW -2 was Sylvanus Gibore Obonyo, the Senior Chief, Suna South Location, Suna West Sub County. His evidence was that the case started before the Assistant Chief of Wasweta II Sub-Location, one Millicent Tinga, and the case was subsequently referred to his office. He testified that the appellant allowed the respondent to buy a piece of land for Kshs. 20,000/=. On 28 March 2017, the appellant came to his office. They had a sitting and the respondent agreed to move away. They entered into an agreement to that effect and the respondent also wrote a letter to affirm. He produced the letter as an exhibit. Cross-examined, he testified that he did not force the respondent to write the letter. He refuted

that the respondent had bought the land and stated that he was just allowed to stay there after he had problems at his original home. The appellant came to him complaining that he had grabbed her land.

7. With the above evidence the appellant closed her case.

8. The respondent testified as DW-1 on 14 October 2020. He contended that the appellant heard that he was looking for land and pleaded with him to go stay with her on the suit land. He averred that he had paid Kshs. 21,000/= to one Hesbon Awounda and the appellant went and pleaded with Mr. Awuonda to be given the said Kshs. 21,000/= which she was so given. He claimed that Mr. Awounda had the agreement. At this juncture, the court adjourned to allow the respondent file and serve a copy of the said agreement. I have not seen any agreement filed and the appellant stated before the trial court that she was never served with any such document despite the respondent mentioning that he served the same. Hearing continued on 27 January 2021 when the respondent completed his evidence. He proceeded to state that after the Kshs. 21,000/= was paid to the appellant, he used it to buy for the appellant iron sheets to build her house and that she promised that he could stay with her. He asked her if she has a title deed and her response was that the area had no title deeds. They then started processing the title deed, though curiously, he also stated that when he asked the appellant for the title number she refused to disclose it to him. He testified that he has lived on the land for 9 years, has dug a well, and built a permanent house. He asked that if the orders in the plaint are allowed the appellant should be ordered to give him a place to stay.

9. Cross-examined on why he does not have any title deed for the portion he claims, he stated that it is because the appellant failed to cooperate despite promising to transfer it to him. He claimed that she did not even have a bed when he came to her home and that she used to live in a grass-thatched house. He denied that she bought for him 30 iron sheets. It is not clear from the proceedings whether it was the appellant or respondent who went to collect the money deposited to Mr. Awuonda for the botched sale and I am completely unable to comprehend that bit of evidence.

10. DW-2 was Peter Ambich Kimira. The appellant is his step-mother. His father had three wives and the appellant is the only surviving widow. He testified that his father died in 1995 and that the appellant was living in a grass thatched house. It was his evidence that the land in dispute (one acre) was sold to the respondent by the appellant and that the respondent processed for her the title deed but when it was issued the appellant refused to transfer to him the portion sold. He claimed that the respondent bought one acre at the consideration of Kshs. 100,000/=. He never saw the balance of Kshs. 75,000/= being given and he added that they had agreed that he was to take a loan. Cross-examined, he testified that he personally saw Kshs. 25,000/= being given to her by the respondent and that it was witnessed by Mr. Awuonda and a village elder (unnamed) who was present.

11. DW – 3 was Jeniphfer Atieno Otieno the wife of the respondent and sister to the appellant. She testified that her husband comes from Rusinga. She stated that he bought iron sheets and built a home for the appellant and that he also processed the appellant's title deed. She averred that when her husband settled on the disputed land he built a permanent house and sunk a well. She stated that it was the appellant who invited them to stay on the land. She averred that her husband (respondent) paid Kshs. 21,000/= to Mr. Awuonda and that the appellant went and collected that money on 10 November 2007. Cross-examined, she testified that she did not see the money being given to the appellant. She also did not see any agreement. She added that Mr. Awuonda was alone when he gave her the money.

12. DW – 4 was Richard Okello Odhiambo. To his knowledge, the respondent assisted the appellant to acquire her title deed. He stated that he went together with the appellant and respondent to Migori with a surveyor; that the respondent paid Kshs. 10,000/= then Kshs. 20,000/= then Kshs. 8,000 totalling Kshs. 43,000/=. He stated that the respondent was given the receipts which he handed over

to the appellant. Cross-examined, he now stated that he was not present when the appellant met the surveyor, but was present when the appellant came to collect the title deed from his brother in his (DW-4's) home.

13. DW-3 appears to have been recalled and testified again. She mentioned recording a witness statement which she said she was adopting. In that witness statement, she stated that in 2006 the appellant approached her and pleaded with her to persuade her husband to assist her build a home for her since her husband had died. She managed to convince him after her several visits to their home. She stated that her husband built for her a semi-permanent house which she resides in. She eventually approached them and requested them to go and live with her so that, through the respondent, she could be able to acquire her husband's land which was being threatened by strangers keen to grab it. She stated that after lengthy discussion they agreed to go and live with her and she apportioned them one acre. She stated that she looked for masons to commence building their house before moving there. She stated that she was now perturbed by the turn of events. She continued to state that it was her husband who paid for the processing of the title from the appellant's late husband to her, and also was providing for her up keep. Cross-examined further, she insisted that it was the respondent who assisted the appellant build a house.

14. With the above evidence the respondent closed his case.

15. The parties were given an opportunity to file their final submissions, which they did, and the court delivered judgment on 3 August 2022. In the judgment, the trial court held that it was not true that the respondent had invaded the appellant's land. He/She found that the correct position is that the appellant invited the respondent to live on her land and it is pursuant to this invitation that the respondent built a homestead and sunk a borehole. On the claim for adverse possession, she held that the appellant did not respond to the same. He/She considered that the respondent entered the land in 2006 and the case was filed in 2019 and therefore the respondent had lived on the land for 13 years. He/She held that the document allegedly signed on 28 March 2017 was not produced by the maker as the name of Sylvanus Gibore Obonyo (PW-2) was not appearing therein and that it is the name of one Belvick Obonyo Okoko that appears. He/She held that the appellant did not deny that the respondent built for her a house and that her own sister testified as to how they came to live on the land. He/She held that the appellant cannot use her title to evict people she had invited to be on the land and had built permanent structures. The trial Magistrate was of opinion that to issue the order of eviction would be an injustice to the respondent who assisted the appellant build a house and offered other general assistance. The court was convinced that the appellant offered to give the respondent one acre of land and therefore the respondent was entitled to a share of the land limited to one acre. The trial court held that the excision should take into account where the homestead and the borehole are sunk and it should have access to a public road. It was further held that the respondent should be evicted from the rest of the land apart from the one acre which the court held he was entitled to "through adverse possession and building a house for the plaintiff". The court made no orders as to costs.

16. Aggrieved, the unsuccessful plaintiff has preferred this appeal. I gave an opportunity to both parties to file their submissions on the appeal and I have seen that they duly complied.

17. I have given the appeal due consideration. An appeal is in the nature of a rehearing as held in the case of Selle & Another vs Associated Motor Boat Company Limited & Others (1968) EA 123 where it was stated as follows by Sir Clement De Lestang, VP at page 126 :

> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though

> it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this aspect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

18. In a nutshell, the case of the appellant is for orders of eviction of the respondent from the suit land. It is common ground that the appellant is the registered owner of the suit land and being the owner, she is entitled to it unless the respondent proves that he has a legitimate and legally recognized claim over it. In his pleadings, the respondent contended that it was the appellant who invited him to come and live on the land so that he could take care of her. It will be recalled that he pleaded that it took him almost one year to be convinced to bring down his home and move to her land. He also pleaded that the family had a lengthy discussion and it was agreed that because he had built for her a house and processed her title deed, he can be rewarded with one acre of the suit land so that he can continue assisting her financially. He further pleaded that he is entitled to the land by virtue of adverse possession.

19. It will be seen that the pleadings of the defendant assert the position that the appellant voluntarily invited him to her land and agreed to reward him with one acre as a sign of gratitude. In his evidence there was introduction of a Mr. Hesbon Awuonda who was alleged to have sold his land to the respondent but the respondent was persuaded to abandon that sale and the money he had paid (Kshs. 21,000), was given to the appellant to help her build. Whereas in his evidence the respondent appeared to stick to this line of defence, DW-2 testified that the appellant sold the land to the respondent. He in fact stated that the parties had agreed to have the land sold for Kshs. 100,000/= and that a deposit of Kshs. 25,000/= was paid. The evidence of DW-3, his wife was to effect that they were invited to live with the appellant and they built their house on the land pursuant to the invitation. She also alleged that they built her house and helped her process the title deed. The evidence of DW-4 was that the respondent paid a total of Kshs. 43,000/= to process the title deed.

20. Now, it cannot be deemed that the respondent is on the land by virtue of any sale as contended by DW-2. To be enforceable, agreements for sale of land are supposed to be in writing as required by Section 3 (3) of the *Law of Contract Act* which provides as follows

> (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
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> (a) the contract upon which the suit is founded—
>
> (i) is in writing;
>
> (ii) is signed by all the parties thereto; and
>
> (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
>
> Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

21. Without there being an agreement for sale of land it cannot be alleged that there was one acre sold to the respondent. If the respondent called DW-2 so that he can assert title to the land through purchase, he must fail for want of a sale agreement and/or consent of the Land Control Board under the *Land Control Act*, Cap 302, Laws of Kenya.

22. Let me put away the issue of sale and assess the other aspect of the case which was that he assisted the appellant and was being rewarded by an acre of land. The appellant refutes this by contending that the respondent had been chased away from his home and she only agreed to give him refuge for a year or two, and that he extended his stay beyond the time hence the suit. I actually have no tangible evidence of any assistance given to the appellant by the respondent save for word of mouth. It was claimed that part of the assistance given to the appellant was the Kshs. 21,000/= which had been deposited by the respondent to Mr. Awuonda to enable the respondent purchase some land from him. However, Mr. Awuonda was not called as a witness in the case. No witness called by the respondent confirmed seeing the appellant being given money by Mr. Awuonda. His wife (DW-3) in cross-examination testified that she never saw her being given the money and that Mr. Awuonda was alone when he gave her the money. There is therefore no tangible proof of any money being given to the appellant by the respondent or any tangible evidence of financial assistance coming from the respondent to the appellant.

23. It was also mentioned that part of the assistance involved the respondent paying to process the title deed of the appellant. I cannot put too much premium into that allegation because I see that the title deed of the appellant was not processed in 2007 but was issued in the year 2016. I do not see how it can be said that the respondent was being rewarded in 2007 for helping process a title that emerged in 2016. Even assuming that he helped process the title and it took long for it to be prepared, there is no evidence of the respondent making any payment for processing of the title of the appellant. The receipts for payment of title must be there, and even if the originals were handed over to the appellant, there must be copies in the land parcel file which the respondent could have made to show that payments for processing the title were made about the year 2006/2007 or thereabouts. No such receipts were ever availed. I also found it curious that in his evidence, the respondent testified that when he asked for a title deed number, she refused to disclose it. Surely, if he was helping her process title, at the very least he should have known the land parcel number. The long and short of it is that I really have nothing to support the contention of any special assistance given to the appellant by the respondent and for which there was an understanding, that in return, the respondent would be entitled to one acre of the suit land.

24. The position of the appellant is that she had given temporary shelter which the respondent extended beyond the time given. She availed a document dated 28 March 2017 signed at the Chief's office where the respondent wrote that it has been agreed that he would stay on the land for two more years and thereafter migrate. The respondent did not deny writing that document, and I think it was wrong for the trial court to dismiss it for reason that the maker was not called. The maker was actually the Chief who testified and produced it. In its judgment, the trial court mentioned that the document was made by Belrick Obonyo Okoko , but that is not the case. Belrick was only listed as a witness alongside DW-2 and one Tobias Athiambo.

25. I think in light of the denial by the appellant, that she had neither sold not offered the land to the respondent, the respondent needed to avail something more tangible to prove that there was an agreement, or understanding, that the appellant would give him one acre of land. It is not strange to find close relatives helping each other or giving temporary accommodation if they have nowhere to stay. Neither can it be asserted that one deserves land because he has helped the owner of the land in one way or another. The case of the respondent was more convoluted by the contradictions on whether or not he bought the land or it was offered to him as a gift. It was also alleged by the respondent that there was a family meeting where it was agreed that he would be given the one acre for assisting the appellant. You would imagine that such a meeting would be of great significance and that there would be minutes of it. No minutes were presented. Not even any family member who was said to be present in that meeting was called as a witness. I am therefore unable to hold that there was any such meeting where the appellant's family agreed that one acre of land could be given to the respondent.

26. If there was any evidence of a gift, then a trust would have ensued in favour of the respondent, but as I have said, I have no such evidence.

27. I find no substance in the allegation of the respondent that he assisted the appellant to such great extent that he was gifted one acre of the suit land as he claims. If there was any assistance, I am unable to tie it to a promise, that in return, he would be entitled to one acre of the suit land.

28. But even assuming that the respondent indeed assisted the appellant in building a house, or in processing the title, the mere fact that one has assisted another, by itself, does not entitle him/her to the land of the person assisted. There is no law which says that because you have assisted a particular owner of land then you deserve a portion of it on the basis only of that assistance without there being more. You don't deserve land, for reason only, that out of your own free will and generous heart, you have helped the owner build a house on it, or helped the owner process title, or offered other forms of assistance. Neither does one deserve land for reason only that he has been invited to occupy the land temporarily without there being any intention or promise that the land will be allocated to him. If there was a promise, then, as I have said, a trust may ensue, but in this instance, I am not persuaded of any such promise and therefore no trust ensues.

29. The other limb of the defendant's case was that he was entitled to the suit land by way of adverse possession which the trial court agreed with. There is no basis upon which the respondent would be entitled to the suit land through the doctrine of adverse possession. It is trite law, and I need not cite any authority, that to succeed in a case of adverse possession, one must show continuous possession for at least 12 years. But 12 years had not reached at the time this suit was filed. In his pleadings (paragraph 5 of the defence to be specific) the respondent pleaded that he has resided on the land since August 2007. In his evidence, he testified that he had been on the land for 9 years. In his final submissions he stated that he had been on the land for 10 years. Even if we take August 2007, which is the oldest of the dates, as the date of entry, this suit was filed on 10 May 2019, which is a few months before the attainment of 12 years. It was erroneous for the trial court to hold that the respondent had proved that he was entitled to the land through adverse possession.

30. From the foregoing it will be seen that I am not persuaded that the respondent made out any case for entitlement to any part of the suit land as of right. Having not established any legal entitlement, the rights of the appellant, as proprietor, must be given full effect. These rights are enshrined in Section 24 of the *Land Registration Act* which provides as follows :

> 24. Interest conferred by registration
>
> Subject to this Act—
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> (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
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> (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.

31. It is the appellant who is the registered proprietor of the suit land, and by virtue of that registration, she is the one vested with all rights and privileges attaching to the land. That includes the right of exclusive use, ingress, and egress. She has the right to decide whether or not to continue allowing the respondent to occupy part of the land and she has made a decision not to allow the respondent to

continue enjoying the land. That decision needs to be respected. The respondent cannot be allowed to act like the proverbial camel, who was only allowed to shelter its head, but in due course of time, proceeded to put its whole body in the tent, destabilizing the owner.

32. From the foregoing it will be seen that I find merit in this appeal. I proceed to set aside the judgment of the trial court that was in favour of the respondent. Instead, I enter judgment for the appellant as prayed in the plaint. I give the respondent 3 months to give vacant possession of the suit land or he be evicted. On expiry of the 3 months, the respondent, and any other person claiming under him, is restrained from entering, being upon, occupying or in any other way interfering with the appellant's quiet possession of the suit land.

33. The last issue is costs. Given the relationship of the parties, there will be no orders as to costs.

34. Judgment accordingly.

DATED AND DELIVERED THIS 4TH DAY OF DECEMBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LA ND COURT

AT MIGORI

Delivered in the presence of :

Pamela Atieno - Appellant acting in person;

John Kaoto - Respondent acting in person;

Court Assistant – Tom Otieno.