



**Syokau v Kariavu & another (Environment and Land Appeal
65 of 2019) [2023] KEELC 17220 (KLR) (3 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17220 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 65 OF 2019**

A NYUKURI, J

MAY 3, 2023

BETWEEN

BENEDETTA SYOKAU APPELLANT

AND

MUTHANJE PAULINE KARIAVU 1ST RESPONDENT

NZISA NZIVU 2ND RESPONDENT

*(Being an appeal from the Judgment and decree of Hon. D. Orimba Senior Principal
Magistrate Kangundo, dated 27th November 2019 in Civil Case No. 117 of 2013)*

JUDGMENT

Introduction

1. The Appellant herein being dissatisfied with the judgment of D Orimba, Senior Principal Magistrate Kangundo, in Civil Case No 117 of 2013 delivered on November 27, 2019, appealed against the said judgment vide a Memorandum of Appeal dated December 23, 2019 on the following grounds;
 - a. The Learned Senior Principal Magistrate erred in proceeding with the trial *ex parte* and thus denying the Appellant any opportunity to cross-examine the Plaintiffs and their witnesses simply because the Appellant was momentarily outside the courtroom. The entire proceedings therefore amounted to a mistrial.
 - b. Considering that the Defendant had been represented by an advocate until the eleventh hour and that the Defendant was uneducated so as to understand the pleadings and procedures of trials, the said magistrate was clearly wrong in insisting on proceeding with trial without giving the Defendant a chance to seek legal representation and thus giving undue advantage to the Plaintiffs.



- c. Under the circumstances as given by the 1st Plaintiff, the Learned Trial Magistrate was wrong in accepting that the Plaintiff had conducted due process notwithstanding that the Plaintiffs did not avail a certificate of official search and neither had they sought any explanation as to the effect of the occupation of the suit land by the Defendant.
 - d. Upon hearing evidence adduced by the 2nd Respondent and PW5 that she did not authorize the Appellant to use the land the Learned Trial Magistrate erred in holding that the possession by the Appellant was not adverse as against the 2nd Respondent.
 - e. The Appellant was not accorded a fair hearing hence a blatant violation of her Constitutional rights and an offence to the rules of natural justice.
 - f. The decision of the trial court was not fair and just in the circumstances of the case before him.
2. Consequently, the Appellant sought that the appeal be allowed and the trial court's judgment be set aside and substituted with an order dismissing the case or alternatively the case be remitted back for retrial.

Background

3. By a plaint dated October 3, 2013 and amended on October 5, 2018, the Plaintiffs who are the Respondents in this appeal sued the Defendant, (the Appellant herein) seeking the following orders;
- a. A permanent injunction restraining the Defendant either by herself, servant, agents, and/or employees or any other person working under her instructions from remaining into, alienating, wasting, transferring and/or interfering with the 1st Plaintiff's possession and/or other ownership rights or in any other manner dealing with all that parcel of land known as Land Title No Donyo Sabuk/Donyo Sabuk West Block 1/2471 under membership No 2095 and Share/Plot No 2161 (7-026) under Muka Mukuu Farmers Cooperative Society Limited in Machakos County.
 - b. A declaration that the 1st Plaintiff herein is the owner of land in land Title No Donyo Sabuk/Donyo Sabuk West Block 1/2471 under membership No 2095 and Share/Plot No 2161 (7-026) under Muka Mukuu Farmers Cooperative Society Limited in Machakos County.
 - c. An order of eviction do issue against the Defendant, her servants, agents or any other person acting under her authority from the suit property being land Title No Donyo Sabuk/Donyo Sabuk West Block 1/2471 under membership No 2095 and Share/Plot No 2161 (7-026) under Muka Mukuu Farmers Cooperative Society Limited in Machakos County.
 - d. Special damages for the destruction of the property as to be assessed by the Agriculture Officer from the Ministry of Agriculture, Livestock and Fisheries.
 - e. General damages for loss of user from January 17, 2012 till the determination of this suit.
 - f. Costs of this suit.
 - g. Any other or further relief the court deems fair and expedient to grant in the circumstances.
4. The suit was opposed. The Defendant filed a statement of defence and counterclaim dated October 22, 2013. He stated that he had acquired good title to Plot No 7-026 Share No 2161 Muka Mukuu Farmers Cooperative Society. He stated further that he had acquired the suit property by adverse possession having been in open and continuous occupation of the premises since 1978 and had extensively developed it. Her position was that in 1978, with the full authority, consent and permission



of the original owner she entered the suit property which she occupied without interruption. Further that she had buried her relatives on the land. She faulted the sale to the 1st Plaintiff insisting that the same was void abinitio and unlawful.

5. In the counterclaim, the Defendant sought the following orders;
 - a. That a permanent injunction be issued restraining the Plaintiff, her servants, agents and or employees or otherwise from entering, interfering, occupying, committing acts of waste, destruction, demolition and or in any other manner whatsoever interfere with the Defendant's quiet and peaceful possession, occupation and use of Plot No 7-026 Share No 2161 Muka Mukuu Farmers Cooperative Society, the suit premises.
 - b. General damages.
 - c. Costs of this suit with interest thereof.
 - d. Any other better and or alternative relief this Honourable Court may deem fit to grant.

Plaintiffs' Evidence

6. PW1, the 1st Plaintiff testified that the suit property originally belonged to the 2nd Defendant who sold the same to her at a consideration of Kshs 696,000/- on December 15, 2010, which sale was ratified by Muka Mukuu farmers Cooperative Society wherein the seller held a Share No 2161 for Plot No 7-026. She stated that she was cultivating the suit property till February 1, 2012 when she was chased away from her farm by the Defendant. She stated that the Defendant had put up a temporary structure on the land and that this dispute was adjudicated on by Muka Mukuu Farmers Cooperative Society, the District Officer, Assistant Chief, Chief of the area and County Commissioner. Her position being that the Defendant's occupation of the suit property was unlawful and amounted to trespass. She stated that on July 20, 2016, she obtained title registration of the purchased land being Title No Donyo Sabuk/Donyo Sabuk West Block 1/2471.
7. PW2 was Nzisa Nzivu. PW2's evidence was that the testimony of PW1 was true. She confirmed selling the land to the 1st Plaintiff and denied allowing the Defendant to be on the land and stated that when she came on the land, he reported her to the District Officer.
8. PW3 Elizabeth Thenya Nziva the daughter of PW2 confirmed that her mother sold the suit property to the 1st Plaintiff. PW4 Bernard Kioko Kilonzo a neighbour of the Plaintiff confirmed to have known that the land belonged to the 1st Plaintiff who purchased it from the 2nd Plaintiff. PW5 Veronica Koki also a neighbour of the 1st Plaintiff stated that the land was owned and occupied by the 1st Plaintiff before the Defendants entry thereon. That marked the close of the Plaintiff's case.

Defendant's Evidence

9. The Defendant testified that he came on the land in 1978 when the same was vacant. She stated that the land belonged to the 2nd Defendant and that she was asked by the owner to guard the land and that she had buried her relatives on the land. She stated that the 2nd Plaintiff allowed her to stay on the land and was given a place to stay on humanitarian grounds. She stated that she did not stay on the whole portion but only given a portion thereof. She stated that she was promised by the 2nd Plaintiff that she would be given a portion of the land but that did not happen.
10. She confirmed that the 2nd Plaintiff sold the suit property to the 1st Plaintiff. She stated that she farms on the land. She confirmed that she got a letter from Muka Mukuu Farmers Society Limited asking her to vacate but she refused to vacate. That there were several meetings over the suit land and that the



District Officer advised the 1st Plaintiff to file suit in court. She confirmed that she was aware the 2nd Plaintiff was a member of Muka Mukuu Farmers Cooperative Society Limited and that she was aware the 2nd Plaintiff was paying the rates to the society. She confirmed being aware that the 1st Plaintiff had obtained title thereof. That marked the close of the Defendant's case.

11. Upon hearing both parties, the trial court found that from the Defendant's own evidence, she entered the suit property by permission of the 2nd Plaintiff and that therefore her occupation thereof was not adverse possession. Ultimately, she dismissed the counterclaim and allowed the Plaintiffs' claim with costs as sought in the amended plaint, save for the prayer for general damages for loss of user. It is that judgment that provoked this appeal.
12. The appeal was canvassed by way of written submissions. On record are the Appellant's submissions dated March 11, 2022 and the Respondents' submissions dated April 18, 2022.

Appellant's Submissions

13. Counsel for the Appellant submitted in regard to grounds 1 and 5 of the Memorandum of Appeal that the Defendant attended court and for a moment stepped out but that no effort was made to call the Defendant outside the courtroom although that the Defendant was in court on the same day and testified. Counsel argued that the record does not show that she was invited to cross examine the Plaintiffs and their witnesses. According to counsel this was a mistrial.
14. In respect to the second ground, counsel argued that the trial court required the Appellant to proceed with her case without representation which was a violation of her right to a fair hearing under Article 50 (1) of the Constitution. As regards ground No 3, counsel argued that the 1st Plaintiff did not produce a search certificate to show that she conducted due diligence. Counsel also faulted the Respondent for failure to call an official of Muka Mukuu Farmers Society to testify in her favour. Counsel argued that the fact that the Appellant was in occupation was not in dispute.
15. Counsel relied on the evidence of PW2 that she testified that she had not authorized the Appellant to occupy the suit property and that therefore the Appellant was a trespasser and that as the Appellant had entered the suit property in 1978, time for filing suit against her had already lapsed by 2010 when the 1st Plaintiff purchased the suit property.

Respondent's Submissions

16. Counsel for the Respondent pointed out that the hearing of the Plaintiff's case in the trial court came up on September 4, 2019 when five witnesses for the Plaintiffs testified. She further argued that during the time allocation, the Appellant was in court but disappeared during the hearing and that therefore the defence hearing was fixed on October 9, 2019 where the Defendant testified.
17. On the issue as to who was the owner of the suit property, counsel argued that it was not in dispute that the suit property was registered in the name of the 1st Respondent as shown by the title deed in her name and that there was no dispute that the 1st Respondent purchased the suit property from the 2nd Respondent. Counsel relied on Article 40 of the Constitution and Section 26 of the Land Registration Act to argue that a title is evidence of ownership of property.
18. Counsel also submitted that the Appellant entered the suit property with knowledge that the land had belonged to the 2nd Respondent who sold it to the 1st Respondent. Counsel emphasised that from the Appellant's own testimony, it was clear that she entered the suit property with consent of the 2nd Respondent who had promised to give her a portion thereof. Reliance was place on the case of



Gabriel Mbui v Mukindia Muraya [1993] eKLR, for the proposition that a person claiming adverse possession must prove non permissive use. Counsel argued that the appeal was a fishing expedition.

19. On whether there was a fair hearing, counsel argued that the Appellant had been present when hearing time allocation was made but left the court and was unavailable when the Respondents five witnesses testified. Counsel argued that the court was fair enough to give another date for defence hearing. Counsel argued that the Appellant had an opportunity on October 9, 2019 to recall the Plaintiff's witnesses for cross-examination but failed to do so and that therefore the Appellant's complaint that she was not given a fair hearing is erroneous. On whether the Appellant was denied opportunity for legal representation, counsel argued that the Appellant failed to exercise that right and opted to represent herself. Counsel pointed out that the firm of Priscillar Kioko & Associates Advocates who had previously acted for the Appellant, ceased from acting almost 12 months to the hearing, and that the Appellant opted to act in person and never appointed another advocate.
20. On the issue of the 1st Respondent's failure to produce a search certificate, counsel argued that the 1st Respondent produced a copy of title confirming ownership, a sale agreement, consent to transfer and a receipt for payment of transfer fees. Counsel contended that no contrary evidence was produced by the Appellant and that therefore the issue of ownership was not disputed.
21. Counsel argued that as the Appellant admitted that she entered the suit property by the owner's consent, the Appellant is estopped from denying her own evidence. Counsel relied on the case of *Kibiro Wagoro vs Francis Nduati Macharia & Another* ELC No 63 of 2012.

Analysis and Determination

22. I have carefully considered the appeal, submissions and the entire record. The Memorandum of Appeal raise two issues;
 - a. Whether the trial in the lower court was fair;
 - b. Whether the Appellant proved her claim of adverse possession.
23. This being a first appeal, the duty of this court is to re-evaluate, reconsider and re analyse the evidence on record and to make its own conclusions, but bearing in mind that it did not have the opportunity to see or hear the witnesses who testified in the matter and give due allowance for that.
24. In the case of *Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [201]3 eKLR, the court discussed the duty of a first appellate court in the following terms;

"This being a first appeal, we are reminded of our primary role as a fist appellate court namely, to re-evaluate, re-assess and re-analyze the extracts or the record and they determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way."
25. In the instant appeal, the Appellant complained that she was not accorded a fair hearing because her name was not called outside the court and that she was not given a chance to have legal representation. On that issue, I note that on September 4, 2019 when the matter came up for hearing, the Appellant was in court and informed court that she had no advocate and that she was ready to proceed in person. However, when the matter was later called out the court noted that although the Defendant was not in court, the trial magistrate had earlier seen her in court and that the Defendant confirmed to be ready to proceed. The court ordered for the matter to proceed. On that date, five witnesses testified and at the close of the Plaintiff's case, still the Defendant was nowhere. It is at that point that counsel for the Plaintiffs asked the court to give another date for defence hearing, which the court acceded to by



giving a date for defence hearing on October 9, 2019. On that date, the Defendant proceeded to give her evidence and no application to cross-examine the Plaintiffs was sought.

26. The above being the position, it is dishonest and misleading for the Appellant to argue that the hearing of the Plaintiffs' case and the defence case was done on the same day and that she was denied an opportunity to cross-examine. The record shows that the Plaintiffs' evidence was taken on September 4, 2019 while the Defendant's evidence was taken on October 9, 2019. The Appellant has not explained why he failed to be in court when the matter proceeded. She did not even bother to file an application in court to explain her failure to be in court when the matter had been confirmed for hearing in her presence. The evidence of five witnesses was not a short testimony. It took a while for that evidence to be taken, yet the Appellant did not even show up in the middle of those proceedings. In addition, when the Appellant turned up on October 9, 2019, she never sought for an opportunity to cross-examine the Plaintiff's witnesses. An opportunity to be heard is just that; an opportunity. It is up to the party given the opportunity to use the opportunity. A party who disappears when the matter proceeds for hearing when they were present when the same was confirmed for hearing, cannot be heard to argue that they were denied a fair hearing, because they deliberately failed to utilize the opportunity to be heard when the same was given to them.

27. In the case of *Union Insurance Co of Kenya Ltd v Ramzan Abdul Dhanji* Civil Application No Nai 179 of 1978, the court held as follows;

"Whereas the right to be heard is a basic natural justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the Applicant was denied the right to defend itself. ...The law is not that a party must be heard in every litigation. The law is that parties must be given reasonable opportunity of being heard and once utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

28. Although the Appellant argued that she was not allowed to get legal representation, the record shows that on September 4, 2019 when the matter came up for hearing, she told court that she had no advocate and that she was ready to proceed in person. She did not ask the court for time to get legal representation. Therefore, her complaint in that regard is also a dishonest complaint as the trial court could not be faulted when she chose to proceed in person. The court could not force her to appoint an advocate. It was an option she did not take. In any event, the record shows that on June 12, 2019, a Ms Musa advocate holding brief for Mr Kioko for the Defendant informed court that counsel for the Defendant had filed application to cease acting. That application was allowed by the trial court on July 10, 2019. Therefore, when the matter came up on September 4, 2019, the Appellant was acting in person, which she stated as much and informed court that she was proceeding in person. It is therefore my finding that by allowing the Appellant to proceed with the hearing in person, the trial court did not error, neither did it fail to accord the Appellant a fair hearing.

29. Article 50 (2) (g) of the *Constitution* provides as follows;

"Every accused person has the right to a fair trial which includes the right;

g. to choose, and be represented by an advocate, and to be informed of this right promptly."

30. Essentially, the above provision read in the context of this matter means that every party to a dispute has a right to a fair trial and that right includes being able to choose and be represented by an advocate. In the instant matter, the previous counsel for the Appellant had been discharged from the proceedings, a matter that the Appellant was aware of. She came to court on the hearing and stated that she was



appearing in person and was ready to proceed. She did not indicate that she had chosen an advocate and neither did she request for time to choose an advocate to represent her. Therefore, the trial court cannot be faulted for allowing the Appellant to proceed with the hearing in person, as that was what she wanted to do, which was also within her right to do.

31. On whether the Appellant proved adverse possession, the pleadings and evidence of the Appellant show that it was not disputed that the suit property was initially owned by the 2nd Respondent and was subsequently sold to the 1st Respondent. The Appellant is on record in his defence and counterclaim as well as his evidence in chief and in cross-examination that he entered the suit property with the consent of the 2nd Respondent who had allowed her to guard the suit property on the promise that she will be given a portion thereof. She admitted that she was not using the entire suit land but was given a portion to live on.
32. To prove adverse possession, a claimant must demonstrate nec vi, nec clam and nec precaria. That means that their entry on the land was without force, without secrecy and without permission. Entry on land with the consent of the owner does not confer a right under adverse possession.
33. In the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR, the Court of Appeal held 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 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 nor under 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."

34. In the instant appeal, the Appellant's pleadings and testimony was that she was allowed by the 2nd Respondent to occupy the suit property to guard it on the promise that she will be given a portion thereof. She also confirmed that she just used a portion thereof and not the entire land. That evidence clearly shows that the Appellant did not prove that her occupation of the suit property was adverse, as she was permitted by the owner of the land to occupy the same. Therefore I find and hold that the trial court did not fall into error in holding that permissive occupation was inconsistent with adverse possession.
35. In the premises, there is no justification or reason to interfere with the findings of the trial court. The upshot is that this appeal lacks merit and the same is hereby dismissed with costs to the Respondent.
36. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 3RD DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Ms. Mutua for Appellant

No appearance for Respondents

Ms Josephine – Court assistant

