



**Kumba v Oyamo & another (Environment and Land Appeal
9 of 2019) [2022] KEELC 3760 (KLR) (6 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3760 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 9 OF 2019**

A OMBWAYO, J

MAY 6, 2022

BETWEEN

ISAAC OUMA KUMBA APPELLANT

AND

PERES AWITI OYAMO 1ST RESPONDENT

MILLICENT ADHIAMBO OYAMO 2ND RESPONDENT

*((Being an Appeal from the Judgment /Decree of the Principal
Magistrate's Court at Kisumu delivered on 9th April 2019, in the
Original Kisumu Chief Magistrate's Court ELC Case No. 166 of 2018))*

JUDGMENT

BRIEF FACTS

1. The respondents herein by way of a plaint filed a suit on August 5, 2016 where they averred that they are the registered owners of Land title number Kisumu/Nyalenda "B"/1883 which measures nought decimal two six (0.26) hectares or thereabout situated in Nyalenda "B" in Kisumu. It was the plaintiffs' case that the defendant and his family occupies their land without lawful justification and has refused to move out despite being asked to do so.
2. The plaintiffs further averred that there was a suit filed in Kisumu HCCC No 131 of 2007 between the 1st plaintiff and the defendant where the 1st plaintiff had sued the defendant to remove caution, he had placed on Land Title Number Kisumu/Nyalenda "B"/1883. The appellant 1st respondent therefore prayed for the following orders:
 - a. Delivery of vacant possession of Kisumu/Nyalenda "B"/1883 by the defendant or anybody claiming through him.



- b. General damages for trespass.
- c. Costs of this suit and interest from the date of filing suit to the date of full payment.
3. The appellant filed a defence in which he denied the claim and put the respondents to strict proof and prayed that the suit be struck out and/or dismissed with costs.
4. The suit was heard and judgment was entered in favour of the respondents together with costs.

Grounds of Appeal

5. Aggrieved by the decision of the lower court, the appellant herein filed a memorandum of appeal which was based on the grounds that the learned trial magistrate erred in both fact and law by:
 1. Failing to consider the relevant evidence before him.
 2. Failing to find that the appellant was not a party to the sale agreement in question
 3. Failing to consider that the appellant had lived in the suit parcel of land since he was born and hence was entitled to the same way by adverse possession.
 4. Failing to consider that the respondents acquired the title to the said parcel of land unprocedurally.
6. The appellant prayed for orders that the appeal be allowed and:
 - a. The judgment of the lower court be set aside and in its place, make an order dismissing the plaintiff's suit.
 - b. The costs of this appeal be awarded to the appellants together with the costs of the suit in the subordinate court.

The appeal was canvassed by way of written submissions.

Appellant's Submissions

7. The appellant filed his submissions on December 6, 2021 and the following issues were raised for determination:
 - i. Whether the learned trial magistrate erred in both fact and law by failing to appreciate that the appellant having lived in the suit land for more than 12 (twelve) years had acquired title to the same by way of adverse possession.
 - ii. Whether the learned trial magistrate erred in both fact and law by failing to consider the appellant's evidence that the 1st respondent's husband acquired the suit land unprocedurally and therefore no valid title passed.
8. On the first issue, the appellant stated that he has been living in the suit parcel since the year 2000 a fact which was never disputed at the lower court. That the suit property was initially registered in his name alongside his late brother and that his late brother fraudulently disposed the suit proper to the 1st respondent's late husband. It is the appellant's submission that even after the sale of the suit property to the 1st respondent's husband, the 1st respondent's husband never took possession of the suit property and even after his demise, his wife who is the 1st respondent never took possession of the suit property.
9. It was further stated that the appellant having been in possession of the suit property for more than 12(twelve) years without the permission of neither the Respondents nor the 1st respondent's husband,



the respondent's title extinguished in 2012 by the appellant's adverse possession. The appellant placed reliance in the case of Kerugoya ELC Case No 42 of 2017(OS) *Muchambi Ndigwa & Another vs Octavian Mwaniki Kariuki* (2021) eKLR. It was submitted that the appellant's possession of the suit property has been continuous for 21 years which exceeds the statutory limit of 12 years and relied in the case of *Gabriel Mbui vs Mukindia Maranya* (1993) eKLR and *Abulitsa vs Albert Abulista*, Kakamega HCCC No 86 of 2005 (UR).

10. It was stated that the suit filed by the 1st respondent in 2007 against the appellant was meant to discharge the caution lodged by the appellant and was not meant to evict or dispossess the appellant from the suit land. That the suit for eviction which is subject to the present appeal was filed in 2018 after the appellant had been in continuous possession of the suit land.
11. On the second issue, the appellant stated that one of the elements of a valid contract is that all parties ought to have legal capacity. That at the time the contract was being executed, the appellant was a minor and on the original title deed, the National ID number is not indicated. That the agreement for sale was neither executed or attested by the appellant. It was the appellant's submission that the agreement for sale did not comply with section 3 of the *Law of Contract Act*.
12. The appellant therefore prayed that judgement of the lower court be set aside and in its place make an order dismissing the plaintiff's suit and that costs be awarded to him.

Respondents' Submissions

13. The respondents filed their submissions on February 21, 2022 and stated that this being a first appeal, the court is allowed to look at both facts and law as was held in the case of *Selle & Another vs Associated Motor Boat Company Limited* 1968 EA 424. That the trial court held that the entry of the plaintiff's late husband as the proprietor of the suit land and issuance of a title deed in his name effectively extinguished the previous right over the suit land held by the appellant and his brother.
14. It was further stated that in the pleadings before the lower court, there was no counterclaim raised by the appellant and the claim for adverse possession was not raised at the trial court. That to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owners. It must be actual, visible, exclusive, open and notorious as was held in *Mtana Lewa vs Kabindi Ngala Mwakandi* (2005) eKLR.
15. It was the respondents submission that adverse possession is not available to the appellant as a ground that could succeed in this appeal. It was further stated that according to the appellant's pleadings, exhibits and testimony, the original land was in their joint names and they divided the land into 4 portions where the appellant remained with 3 parcels after selling the suit property.
16. It was the respondents' prayer that this court upholds the ruling of the trial court and this appeal be dismissed with costs.

Analysis and Determination

17. the appellant filed this appeal on grounds that the learned trial magistrate erred in law and in fact by failing to consider the relevant evidence before him, by failing to find that the appellant was not a party to the agreement for sale in question, by failing to consider that the appellant had lived in the suit land since he was born and was entitled to adverse possession and by failing to consider that the respondents acquired the title to the suit property unprocedurally.
18. I have looked at the Judgment in Kisumu HCCC N 131 of 2007 *Peres Awiti Oyamo* (Suing as administratrix of George Barrack Oyamo) vs *Ouma Kumba* where the 1st respondent herein sued the



appellant seeking for an order for the discharge of a caution lodged by the appellant herein in respect to the suit parcel. That the 1st respondent's husband had purchased the suit parcel and was issued with a title deed. When the 1st respondent herein conducted a search, it was discovered that the appellant had placed a caution on the suit property claiming interest.

19. In his defence, the appellant stated that the 1st respondent had used a wrong procedure for removal of the caution and the title deed was obtained by the 1st respondent's husband through fraudulent means. The court clearly dealt with the issue of proprietorship where it stated that the entry of the 1st respondent's late husband as the proprietor of the suit property effectively extinguished previous rights over the suit property held by the appellant herein. Judgment was entered in favour of the 1st respondent against the appellant in that the caution lodged by the appellant was discharged and costs awarded to the 1st respondent.
20. In the case filed by the 1st respondent in Kisumu chief magistrate's court ELC Case No 166 of 2018 *Peres Awiti Oyamo & Millicent Adhiambo Oyamo vs Isaac Ouma Kumba*, the respondents sought for orders of delivery of vacant possession of the suit property by the appellant or anybody claiming through him and damages for trespass where the court made a finding in favour of the respondents.
21. I have looked at the pleadings, the evidence on record and submissions of both parties and the following issues need to be determined:
 - i. Whether the respondents acquired the suit property procedurally.
 - ii. Whether the appellant is entitled to the suit property by way of adverse possession.
 - iii. Who is the valid proprietor of the suit property?
22. On the issue of whether there was a valid sale agreement between the 1st respondent's husband and the appellant; the appellant in his submissions has stated that he had no legal capacity to enter into the agreement for sale in the year 2000 as he was a minor. That as per the title deed his ID number was not included and only his brother's National ID was included. It is clear from the evidence on record that the original land was in the joint names of the appellant and his brother who subdivided the land into four portions that is Kisumu/Nyalenda B/1883,1884,1885 and 1886. That the appellant remained with 3 portions after selling Kisumu/Nyalenda B/1883 to the 1st respondent's husband.
23. I have looked at the Judgment in Kisumu HCCC No 131 of 2007 *Peres Awiti Oyamo (Suing as administratrix of George Barrack Oyamo) vs Ouma Kumba* and do confirm that there was a sale agreement between the appellant, his brother and the 1st respondent's husband which agreement was produced in court and was duly signed by the vendors and the purchaser. The said agreement was duly witnessed and the purchase price of Kshs. 160,000/= was paid in installments and it is also evident that the suit property was transferred to the 1st respondent's husband. This court is of the view that the 1st respondent's husband lawfully and procedurally acquired the suit property.
24. On the issue of whether the appellant is entitled to the suit property by way of adverse possession;
25. In the case of *Joseph Gahumi Kiritu v Lawrence Munyambu Kabura* Civil Appeal No 20 of 1993, the Court of Appeal held that;

Time which has begun to run under the act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent



time from running against him. ...He must therefore make a peaceable and effective entry, or sue for recovery of land.”

26. In the case of *Littledale v Liverpool College (1900)* 1 ch19, 21 it was held that;

In order to acquire by the statute of limitation a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it the next question, therefore, is what constitutes dispossession of the proprietor"acts must be done which are inconsistent with his (the owner's) enjoyment of the soil for the purpose for which he intended to use it.”

27. This court is of the view that the doctrine of adverse possession by the appellant cannot succeed as the title deed to the suit property by the respondents was acquired in 2009 by virtue of them being beneficiaries to the estate of the deceased. This court is also of the view that the Appellant ought to have claimed adverse possession in Kisumu HCCC No 131 of 2007 *Peres Awiti Oyamo (Suing as administratrix of George Barrack Oyamo) vs Ouma Kumba* where the respondents sought for orders of discharge of the caution the appellant had lodged against the suit property or the appellant should have claimed for adverse possession in the trial court.

28. On the issue of who is the valid proprietor of the suit property; the *Land Registration Act* is very clear on issues of ownership of land and section 24(a) of the *Land Registration Act* provides as follows:

Subject to this act, 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.”

29. Section 26 (1) of the *Land Registration Act* states as follows:

The certificate of title issued by the Registrar upon registration ... 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... 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.”

30. Based on the above provisions of the *Land Registration Act* and the Judgment in Kisumu HCCC No 131 of 2007 *Peres Awiti Oyamo (Suing as Administratrix of George Barrack Oyamo) vs Ouma Kumba*, it is evident that the respondents are the registered proprietors of the suit property. The respondents are beneficiaries to the estate of the late George Barrack Oyamo and this court has looked into the certificate of confirmation of grant which confirms the same. From the evidence on record, it is clear that the Respondents acquired the suit property legally and procedurally. In the upshot, this appeal is hereby dismissed with costs to the respondents.

DATED AT KISUMU THIS 6TH DAY OF MAY, 2022

ANTONY OMBWAYO

JUDGE

This judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.



ANTONY OMBWAYO
JUDGE

