



REPUBLIC OF KENYA



KENYA LAW
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**Wahiu v Nzoka (Environment & Land Case E014 of 2022)
[2025] KEELC 3904 (KLR) (20 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3904 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E014 OF 2022**

JA MOGENI, J

MAY 20, 2025

BETWEEN

BONIFACE WANG'OMBE WAHIU APPELLANT

AND

WINNIFREDAH MUENI NZOKA RESPONDENT

JUDGMENT

1. Vide a Memorandum of Appeal dated 26/02/2022, the Appellant appeals to this Court challenging the Judgment dated 27/01/2022 in Ruiru MCELC NO. E062 OF 2021 wherein the Court declared the Plaintiff to be the lawful proprietor of LR No Ruiru/Ruiru East Block 2/990 and dismissed the Defendant's Counter-claim.
2. A brief background of the case is that the Respondent filed a Plaint dated 27/04/2021 laying claim to the suit property and sought to have the Appellant evicted from land parcel LR No Ruiru/Ruiru East Block 2/990. That she was issued with the title deed having secured the plot through balloting from Nyakinyua Investment Company Ltd where she was a member. During the hearing she produced her Share Certificate as number 1219 and Ballot Card number 609. She also produced a Search undertaken on 29/01/2021 which showed her as the proprietor of the suit property.
3. She was issued with a title deed on 27.02.1992 and the parcel file was opened on 27/02/1992. A copy of the Green Card produced at the hearing show her as the proprietor of the suit property,
4. On his part the Defendant filed a Statement of Defence and Counter claim dated 14/06/2021 and laid claim to the suit property and sought to be declared as the owner having acquired the said suit property by adverse possession since the title to the Plaintiff had been extinguished in favour of the Defendant by operation of Section 7, 13 and 17 of the *Limitation of Actions Act*. That the Plaintiff was holding the title to the suit property in trust for the Defendant. He also sought a permanent injunction against the Plaintiff.



5. At the hearing the Plaintiff testified as PW1 and did not call any other witness and she stated that she had been in actual occupation of the suit property. That she has been growing food crops since 2004 but that the Defendant started encroaching and when she got sick in 2006 she went to seek treatment abroad and upon her return she found that the Defendant had planted trees on the suit property and she reported to the Police and the Chief and later filed the instant suit.
6. On his part the Defendant called 4 witnesses. As DW1 he testified that he was shown the suit land by his father in 1994 and in 2005 as a family, they agree to construct on the suit property. He claimed to having been farming on the suit property. He testified that he fenced the suit property in 2006 and dug a dam, planted trees and put up iron sheet structures. That in 2008 he put up four kiosks and a bar and in 2014 he was approached by a Pastor Mukuhima who sought to put up a Church on the suit property and he allowed him to construct a Church.
7. He also stated that he has constructed a matrimonial home and other developments including a Church and incurred a cost of Kesh 2 million and he asked the Court to grant him the land by way of adverse possession. DW4 Priscilla Wambui testified that she was the owner of the suit property having a ballot and Share Certificate from Nyakinyua since she was a member. She however confirmed that she did not obtain title to the suit property but she had a ballot and a Share Certificate. She testified to having shown and allowed the Defendant to construct on the suit property.
8. The Court found in favour of the Plaintiff and this is the reason the Defendant filed the instant Appeal.
9. I do however note that the Appeal was dismissed on 16/02/2023 for want of prosecution but was reinstated on 21/09/2023 following an Application made by the Appellant and the Court directed that the Appellant was to deposit Kesh 100,000 in Court as security within 30 days from 21/09/2023. The Court was conditional in the sense that if the Appellant defaulted in fulfilling the orders issued, then the orders staying the execution of the Judgment will automatically lapse pending the hearing of the Appeal.
10. On 20/11/2022 Mr Kosini Counsel for the Respondent alerted the Court that the orders staying the execution of the Judgment had lapsed automatically following failure of the Appellant fulfilling what the Court ordered. On 21/05/2024 the Appellant requested for two weeks from the date thereof to deposit the amount decreed on 21/09/2023. However as at 21/10/2024 when the Appellant's new Lawyer attended Court the Appellant had not deposited the decreed amount.
11. However the eviction orders issued on 21/02/2023 are executable since there is no stay pending determination of the Appeal.
12. At the same time the Counsels agreed to file their written submissions and Judgment date was preserved, However at the time of writing this Judgment neither the Appellant nor the Respondent had filed any submissions.
13. Be as it may this Court has considered the Grounds of Appeal and this being a first Appeal, this Court is under a duty to reconsider the evidence adduced and analyze it so as to be able to reach its own independent conclusions and thus determine whether the conclusions reached by the trial Court are consistent with the evidence and the applicable law. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court held that:

“This being a first appeal, it is trite law that this Court is not bound necessarily to accept the findings of fact by the Court below and that an appeal to this Court from a trial by the High Court is by way of a 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 respect.”

14. The lower Court’s decision necessitated this Appeal after Hon. JA Agonda, PM found for the Plaintiff and issued a permanent injunction against the Defendant, his servants and agents and directed the Defendant to remove or demolish the structures on the suit property within 60 days. At the same time the Defendant’s Counter claim was dismissed. Hence the evidence on record for this Court to reconsider and analyze is the evidence in respect of the Appeal against the finding of the Hon JA Agonda PM.

Analysis and Determination

15. In exercise of the duty vested in this Court as a first Appellate Court, I have re-evaluated the evidence adduced before the lower Court with a view of reaching my own conclusion on it. I have reminded myself that a first Appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial Court acted upon wrong principles in reaching the finding. In that regard see *Selle & Another vs. Associated Motor Boat Co. Ltd* (1968)E.A 123 and *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs. Kiruga & Another* (1988)KLR 348.
16. A review of the pleadings filed in the lower Court shows that the dispute preferred before the lower Court was on ownership of plot No. 609 also known as Ruiru/Ruiru East Block 2/990. Both the Plaintiff and Defendant are laying claim to the same suit property. Although when the Defendant was arrested and Criminal charges preferred against him he had recorded a statement at the Police where he claimed that his suit property was different from that of the Plaintiff and that his suit property was LR No. Ruiru/Ruiru East Block 2/919.
17. The dispute presented in Court particularly was to resolve who was the owner of the suit property given that both the Plaintiff and the Defendant were claiming the same suit property.
18. Whilst the Plaintiff presented here ballot no. 609 and Share Certificate No. 1219 and a letter from Nyakinyua Investment Ltd showing that the land was transferred to her upon being issued with Clearance Certificate from Nyakinyua Investment and title deed issued on 27/02/1992. The Defendant’s ballot No. 609 and Share Certificate No. 1219 was in the name of Plisila Wambui Wahiu and it was hand written and he claimed that Plisila Wambui Wahiu was his mother and that she was deceased. He did not however produce the mother’s deceased Certificate or a letter from Nyakinyua to support his claim that his mother was a member of the Investment Company.
19. Of importance to note is that Nyakinyua Investment Company wrote a letter which the Plaintiff produced in Court dated 30/10/2019 to DCIO, Juja Division ascertaining that the Plaintiff was the registered owner of the suit property LR Ruiru/Ruiru East Block 2/990.
20. Thus the Ground for Appeal that the Learned Trial Magistrate erred in law and in fact in awarding the Respondent reliefs she had sought does not hold because the Plaintiff had the documentation to support her claim. My perusal of the evidence tendered in the lower Court show that the Plaintiff is the registered owner of the suit property with the Green Card indicating that the Plaintiff was the registered owner and there is no subsequent registered owner. On his part the Defendant claims to be the registered owner without a title deed because the title deed produced by the Plaintiff is Ruiru/Ruiru East Block 2/990.



21. The contention in the Appeal by the Appellant that the Learned Magistrate erred in law and fact in relying on extraneous matter in reaching her decision completely disregarding the evidence tendered by the Appellant's witness was not supported by any evidence to show the extraneous matter she relied on.
22. On the Counterclaim, the trial Court concluded that since the Defendant had failed to establish ownership of the suit property, the Counterclaim was not proved and stood dismissed.
23. The situation here involves two parties who both claim to have legally and regularly acquired the suit property. The Appellant has a ballot and a Certificate both from Nyakinyua Investment whereas the Respondent has a ballot and a Certificate from Nyakinyua, a transfer letter and a title for the suit property ascertaining her ownership of Ruiru/Ruiru East Block 2/990.
24. In its determination, the trial Court took into account how the two parallel ownership documents were issued, and it determined that the Respondent's document, which was accompanied by a Certificate of Title, was superior to that of the Appellant because the Appellant had a ballot and Certificate as opposed to a ballot, Certificate, transfer letter and Title document from Nyakinyua Investment Limited. The Court also found that the ballot and Certificate documents by the Defendant were suspect both being hand written and that the Defendant never had any letter from Nyakinyua to prove that the late Pilisia Wambui Wakahiu was their member and so the documents could possibly not come from the Nyakinyua as they were hand written.
25. The trial Court further held that to challenge a title one has to prove fraud or misrepresentation in the acquisition of the title in which the holder of the title is party to pursuant to Section 23 of the repealed Registration of Title Act. I find that the holding of the trial Court was sound on this finding.
26. To impeach the title held by the Respondent on fraud, I will rely on the case of Kuria Kiarie & 2 Others v Sammy Magera [2018] eKLR where the Court held that:

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states as follows: “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
27. The Appellant also broached the subject of adverse possession which came up at the trial and the Appellant claimed to have been in uninterrupted occupation since 2005 to date and to have acquired the suit property by adverse possession. The Respondent testified that she had been farming on the suit land and was in actual possession since 2004.
28. There has been quite a lot litigated in our Courts touching on adverse possession. The law seems to have crystallized what one needs to prove to succeed in a claim of adverse possession. The burden of proof in a claim of adverse possession rests with the Applicant. I place my reliance on the sentiments of Kuloba J. (as he then was), in Gabriel Mbui v Mukindia Maranya [1993]eKLR, where the Court held:

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use and de facto occupation must be shown.”



29. The principle of adverse possession is well captured under the *Limitation of Actions Act*. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further Section 13 of the same Act provides that adverse possession is the exception to this limitation:-

“(1)(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2)Where a right of action to recover land has accrued and thereafter before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3)For this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”

Finally, Section 38 of the Act provides that:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

30. The principle of adverse possession was more elaborately set out in yet another case - *Wambugu v Njuguna* [1983] KLR 172, where the Court held that:

“To acquire by the statute of limitations 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. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.” In addition:” The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

31. On the issue of adverse possession against the Respondent’s title, the principles on adverse possession are well settled and for a claimant to be declared to have acquired land by adverse possession, the same has to be met.

32. The statutory provisions that underpin the doctrine as set out in the Limitations of Actions Act Cap 22 are;

“Section 7 Cap 22 states that



An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person, through whom he claims, to that person.

Section 38(1) and (2) further state;

1. Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.
 2. An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”
33. The effect of these sections is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years of occupation. Section 28(h) of the [Land Registration Act](#), 2012 recognizes overriding interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to the [Limitation of Actions Act](#) or by prescription under Section 7 of the [Land Act](#), 2012.
34. In the case of *Kasuve –vs- Mwaani Investments Limited & 4 Others* 1 KLR 184, the Court of Appeal restated what a claimant in a claim for adverse possession has to prove;
- “In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”
35. The Appellant claimed that the Respondent was not in possession of the suit land that it is the Respondent who was in occupation. In the case of *Christopher Kioi & Another v Winnie Mukolwe & 4 Others* [2018] eKLR when dismissing an Appeal on a Judgment that dismissed an Originating Summons the Court held that;
- “The Appellants have laid great emphasis on the fact that Kituri did not use the suit property in his lifetime, but that in itself is not conclusive evidence of dispossession because where the owner has little use of his land, others may use it without that possession amounting to dispossession or being inconsistent with the owner’s title.”
36. The evidence led by the Appellant did not amount to dispossession of the Respondent from the suit land. The Respondent acquired the title to the suit property on 27/02/1992 and the Appellant stated in his evidence that he was shown the suit land in 1994 by his father. Although he testified to have fenced the suit property in 2006 he also stated that he built his matrimonial home in 2017 which is 5 years to the time the suit was filed. He was even summoned to the DCI and the Chief in 2020 thus, he was not able to prove the said occupation.
37. It was incumbent upon the Appellant to prove that he had been in open, quiet occupation without interruption for a period of more than 12 years. It is evident from the Appellant’s evidence on record that a dispute over the suit property arose as early as 2006 when the Respondent came back from treatment abroad.



38. In the circumstances, the Appellant cannot claim to have been adversely in quiet possession of the suit property for a period of 12 years. The Appellant therefore cannot fault the Learned Trial Magistrate for dismissing the claim for adverse possession.
39. In conclusion therefore, the Court hereby makes the following orders as appertains the Memorandum of Appeal dated 26/02/2022;-
- a. The Memorandum of Appeal dated 26/02/2022 be and is hereby dismissed.
 - b. The Judgement and Decree of Hon J.A Agonda, Principal Magistrate pronounced on the 27/01/2022 in Ruiru MCELC NO. E062 of 2021 is hereby upheld.
 - c. The Appellant shall bear the costs of this Appeal as well as the trial Court proceedings.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 20TH DAY OF MAY 2025
VIA MICROSOFT TEAMS.**

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MOGENI J

JUDGE

In the presence of:

Appellant - Absent

Mr. Kisini for the Respondent

Mr. Melita – Court Assistant

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MOGENI J

JUDGE

