



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 18 OF 2019

WILLIAM NZIOKI KISELI.....APPELLANT

VERSUS

JACKSON MUSYOKA KISELI.....RESPONDENT

(Being an Appeal from the Judgment of Hon. A.G. KIBIRU, CM

delivered on 10th April 2019)

BETWEEN

JACKSON MUSYOKA KISELI.....PLAINTIFF

VERSUS

WILLIAM NZIOKI KISELI.....DEFENDANT

JUDGMENT

1. Vide a Complaint dated 18th October, 2010, the Respondent sought for an eviction order against the Appellant from parcel of land known as Muputi/Kimutwa/1522 (*hereinafter referred to as 'the suit property'*). The Respondent filed his witness statement and a list of documents dated 22nd October, 2013. The Appellant filed the Defence dated 22nd November, 2010.
2. In the Complaint that was filed in the lower court, the Respondent pleaded that he purchased the suit property from Ngui Kithuku in 1977 before the suit property had been registered; that after the adjudication process, he was registered as the proprietor of the land on 23rd September, 1987 and that he acquired rights over the suit property by virtue of adverse possession.
3. The Appellant herein testified in the lower court that the suit property belongs to the Kiseli family and not the Respondent since it was bought by their late father as a family land. The Appellant stated that the Respondent was his brother and that they are eleven (11) children in the family.
4. The Appellant testified that when the Respondent started to sell the suit property, the family did a letter dated 30th December, 2005; that the Respondent lives on parcel of land number 1465 and that the problems started when their father and brother died in 1993 and 1995 respectively.
5. It was the evidence of the Appellant in the lower court that the suit property was sold to their father by Ngui Kithuku Mutiso; that when the Respondent reduced the Agreement in writing, he substituted their father's name with his name and that the Title Deed was erroneously issued in the Respondent's name.
6. It was the testimony of the Appellant that he entered on the suit property in 1977 and not 2009; that he has been growing crops on the said land since then and that the Respondent sued them in respect to the suit property after their mother died.
7. On the other hand, the Respondent's case was that the Appellant was his brother; that the suit property was registered in his name on 23rd September, 1987; that he purchased the suit property from his Aunt Priscilla Mbeti Nzoi and that the suit property was subsequently registered in his favour in 1987.
8. According to the evidence of the Appellant, he has two other parcels of land being parcel number 156 and 1465; that her mother lived on parcel of land number 535 and not 1522 and that no one lives on parcel of land number 1522. The Respondent informed the trial court that he

had allowed the Appellant to cultivate the suit land.

9. The Appellant called PW2 who stated that the suit property initially belonged to her and that she sold the suit property to the Respondent. According to PW2, upon selling the suit property to the Respondent, she moved out of the suit property. According to PW2, the Appellant took the suit land by force.

10. Upon hearing the matter, the trial Magistrate held that the Respondent had produced a Title Deed to prove ownership of the suit property while the Appellant did not tender any evidence to prove that their late father purchased the suit property. The learned Magistrate held that the Appellant had failed to prove that the registration of the suit property in favour of the Plaintiff was illegal or obtained by fraud and further that the Appellant had failed to prove the claim for adverse possession. The trial Magistrate proceeded to grant the Respondent vacant possession orders.

11. The Appeal proceeded by way of written submissions. Counsel for the Appellant submitted that the Verifying Affidavit that was filed alongside the Plaint in the lower court was defective for not complying with Order 4 Rules 1(1)(f) of the 2010 Civil Procedure Rules since it contains an averment that there had been previous suits between parties in the criminal court at Machakos, Case Number 590 of 2009.

12. It was submitted that parties are bound by their pleadings; that the trial court issued orders that were never pleaded or canvassed during the hearing; that the Respondent admitted that the Appellant has been cultivating the suit property since 1977 and that the Appellant was an old man and forgot to testify on adverse possession since he was unrepresented in court.

13. It was submitted by the Appellants' counsel that the Respondent did not produce a copy of the current search of the suit property; that the title produced in court was not attached to the Plaint; that no Agreement was produced to show the sale between the Respondent and Ngui Kithuku and that no documents from the land adjudication department were produced in evidence.

14. The Appellant's counsel submitted that the Appellant was entitled to the plea of adverse possession in the manner he did before the trial court. Reliance was placed on the case of **Kibutuk Arap Too vs. Peris Shanyasi Allulya & 4 Others. [2017] eKLR.**

15. In response, counsel for the Respondent submitted that the Appellant and his witness, DW2, were accorded a fair hearing; that the Title Deed issued on 23rd September, 1987 established that the suit property was registered in the name of the Respondent; that the Respondent's parents were alive during the adjudication process; that the issuance of the Title Deed in favour of the Respondent was not challenged by their parents and that a Sale Agreement was not produced to show that their father purchased the suit property as claimed by the Appellant.

16. Counsel submitted that Order 2 of the Civil Procedure Rules dictates that particulars of fraud must be pleaded but none were pleaded by the Appellant; that the Respondent's right to property is protected under Article 40 of the Constitution and Sections 24 and 26 of the Land Registration Act and that the Appellant did not prove the claim for adverse possession.

17. I have considered the Memorandum of Appeal, the pleadings that were filed in the lower court, the evidence that was adduced and the submissions. This being a first Appeal, the role of this court is to re-evaluate and subject the evidence to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court.

18. While re-evaluating the evidence, the court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. In **Peters vs. Sunday Post Ltd [1958] EA 424**, the Court held that:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial Judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.”

19. The evidence that was adduced by the Plaintiff (*Respondent herein*) in the lower court was that the Appellant is his brother; that the suit property was registered in his name on 23rd September, 1987; that he purchased the suit property from his Aunt Priscilla Mbeti Nzoi and that the suit property was subsequently registered in his favour in 1987.

20. According to the evidence of the Appellant, he has two other parcels of land being parcel number 156 and 1465; that her mother lived on parcel of land number 535 and not 1522 and that no one lives on parcel of land number 1522. The Respondent informed the trial court that he had allowed the Appellant to cultivate the suit land and that the said land does not belong to the family.

21. The Plaintiff produced in evidence a Title Deed in respect of land known as Muputi/Kimutwa/1522 (*the suit property*) which shows that he was registered as the proprietor of the land on 23rd September, 1987. Although the Respondent did not produce any Sale Agreement between himself and PW2, PW2 informed the court that she is the one who sold to the Respondent the suit property.

22. The Title Deed that the Respondent produced in evidence shows that the same was registered under the Registered Land Act (*repealed*) which is the applicable law. Section 27(a) of the of the Registered Land Act (*repealed*) provides thus:

“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.”

23. Although counsel for the Appellant has submitted that the Respondent never produced an official search or a Sale Agreement between him and PW2, the Respondent's Defence in the lower court did not allege that the said Title Deed was issued to the Respondent by fraud or

misrepresentation.

24. Indeed, having not contested the authenticity or legality of the Respondent's title in the Defence, and in view of the provisions of Order 2 Rule 11 of the Civil Procedure Rules which obligates parties to plead fraud and or misrepresentation, and prove the same, the Appellant cannot raise the issue of the Title Deed having been issued to the Respondent fraudulently at his stage.

25. The Appellant's case is that the suit property was bought by the family. However, no evidence was produced by the Plaintiff to show how and when the family purchased the suit property. Indeed, the Defendant did not produce a Sale Agreement to show that his father purchased the land, and if he did so, why he never had the land registered in his favour.

26. Indeed, despite the Appellant's father having been alive as at the time the Respondent acquired the Title Deed to the suit land in 1987, there is no evidence to show that his father ever claimed the land from the Respondent, either by way of a complaint to the Chief or filing of a suit.

27. Although the Appellant has stated that the family made a formal complaint to the Chief in respect of the suit property, the copy of the letter by the Chief does not make any reference to the suit property, neither does it allege that the suit property belongs to the Appellant's family.

28. The Appellant pleaded in the Defence that he is entitled to the suit property by way of adverse possession. Asike-Makhandia, JA defined adverse possession in ***Mtana Lewa vs. Kahindi Ngala Mwangandi [2015] eKLR*** 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 certain 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 or under the 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. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act...”

29. In the case of ***Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430*** the Court held as follows:

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

30. From the above decisions, it emerges that one cannot succeed in a claim for adverse possession unless he proves that possession of the land has been adequate, continuous and without the permission of the registered owner of the land. In ***Samuel Miki Waweru vs. Jane Njeri Richu, (2007) eKLR***, the Court of Appeal held as follows:

*“...It is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v Kirpal [1975] EA 225* possession does not become adverse before the end of the period for which permission to occupy has been granted.”*

31. In ***Wambugu vs. Njuguna (1983) KLR 172*** the Court held;

“Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined.”

32. A person who seeks to acquire title to land by the method of Adverse possession for the applicable statutory period must prove non-permissive or non-consensual, actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption.

33. The Appellant's acts of occasionally cultivating the suit property cannot amount to acts of adverse possession of the suit land. Indeed, the Appellant did not call for any evidence to rebut the Respondent's testimony that he allowed him to cultivate the land, and that when he sent people to work on the land in the year 2009, the Appellant chased them away.

34. It is not lost to this court that the Appellant being a brother to the Respondent must have been allowed to cultivate on the land by the Respondent. The burden of showing that he was on the suit property for twelve (12) years without the Respondent's blessings was on the Appellant, which burden was not discharged at all. That being the case, the learned Magistrate was entitled to reject the Appellant's plea of having acquired the suit property by way of adverse possession.

35. The Appellant having not pleaded and proved that the Respondent acquired the suit property fraudulently or by misrepresentation, and the Appellant having not proved that he had acquired the suit property by way of adverse possession, it is my finding that the learned Magistrate did not err by arriving at the Judgment of 10th April, 2019 in which he allowed the Respondent's claim.

36. For those reasons, it is my finding that this Appeal is not meritorious. The Appeal is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 25TH DAY OF JUNE, 2021.

O. A. ANGOTE

JUDGE