



**Kairu & another v Karuku (Environment and Land Appeal
4 of 2018) [2019] KEELC 4308 (KLR) (7 March 2019) (Judgment)**

Paul Gichuri Kairu & another v Wangui Karuku [2019] eKLR

Neutral citation: [2019] KEELC 4308 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ENVIRONMENT AND LAND APPEAL 4 OF 2018

L WAITHAKA, J

MARCH 7, 2019

(FORMERLY NYERI HCCA NO. 4 OF 2016)

BETWEEN

PAUL GICHURI KAIRU 1ST APPELLANT

CHRISTOPHER WERU WAHOME 2ND APPELLANT

AND

WANGUI KARUKU RESPONDENT

JUDGMENT

1. By a plaint dated 8th October 2013, the appellants herein, instituted a suit in the lower court to wit Nyeri CMCC No. 345 of 2013 seeking judgment against the respondent for delivery of vacant possession to them of L.R. No. Nyeri/Municipality/Block II/221 (the suit property) and if need be, forcible eviction of the respondent and her family and any other person there at, demolition and carting away of the structures erected on the suit property by a court bailiff assisted by the police at the respondent's expense, mesne profits for loss of user and general damages for trespass. The appellants also sought costs of the suit.
2. The appellants' claim was premised on the ground that the respondent had without any shred/colour of right remained in occupation of the suit property thereby denying them their proprietary rights over the suit property as well as occasioning them loss of use.
3. In reply and opposition to the appellants' claim, the respondent had denied the allegations levelled against her and averred that the court lacked jurisdiction to hear and determine the dispute preferred before it because there was a case pending in court between herself and the appellants' predecessor in entitlement to the suit property, Watson Wahome Njuru, to wit Nyeri HCCC No. 79 of 2010.



4. During trial, the appellants adduced evidence showing that they were the registered proprietors of the suit property. They also produced documents showing how they acquired interest in the suit property. In this regard, they produced a sale agreement executed between their predecessor in entitlement to the suit property (their father-Watson Wahome Njuru and Marion Wamumo Nguru); letter from the town clerk to the Provincial Commissioner (PC) to the effect that the suit property belonged to Watson and documents showing that they were the ones who paid rates in respect of the suit property.
5. The lower court heard that after the respondent was served with a demand letter requiring her to vacate the suit property, she said that the suit property is hers.
6. Concerning the averment by the respondent that there was a case pending in court between her and their predecessor in entitlement to the suit property the appellants contended that they were unaware of that case.
7. In cross examination, the 2nd appellant informed the court that the suit property was transferred to them by their father. He was however unable to produce any document to prove that fact or to show that the suit property was unencumbered when it was transferred to them.
8. He stated that he was not aware how long the respondent had stayed in the suit property. He was also not aware of any previous proceedings between the respondent and their father.
9. On her part, the respondent informed the lower court that the suit property was given to her by D.C Kangethe and she has stayed there for many years; that the documents in support of her claim to ownership of the suit property were burnt when her house caught fire and that she does not know the 2nd appellant who had testified in support of the appellants' case.
10. Samuel Koskei, a court staff who was at the time the one in charge of the Nyeri High Court Civil Registry produced the court files in respect of Nyeri HCC No. 203 of 1996 and Nyeri ELC No.79 of 2010.
11. The court heard that in Nyeri HCC No.203 of 1996 the appellants' father, Watson Wahome Njuru Sought to evict the respondent from the suit property but lost the case.
12. With regard to ELC No.79 of 2010, the court heard that the parties are the respondent herein and the appellants' father, Watson Wahome Njuru. In that case, (which was still pending in court at the time of trial of the suit at the lower court), the respondent claim was for ownership in respect of the suit property by adverse possession. Francis Njuru Wahome was substituted in place of Watson on 6th May, 2014.
13. Upon considering the cases urged by the respective parties the trial magistrate observed:-

“...the plaintiffs are the registered proprietors in the lease on the parcel in the suit. How they acquired the land has not been supported. The plaintiffs have not laid basis for entitlement to mesne profits. The second plaintiff does not know for how long the defendant has occupied that land. There is no evidence that before the plaintiffs acquired the land title that they did search to establish the status of the land.

There is no evidence that the defendant is the owner of the land by adverse possession. The defendant did not just trespass on this land after the plaintiffs had acquired it. P.W.1 does not know how long she stayed there.

The plaintiff says there have been no previous litigation between the parties and this is true but the previous litigation related to the same parcel of land Nyeri/Municipality Block II/221.



If P.W.1 cared he should have known that his father had wanted the defendant out.

Having assessed the evidence in the entire case, this court is of the view that the plaintiffs have not proved their case on a balance of probabilities and cannot get judgment. The court avoids the danger and embarrassment of having the same subject matter arbitrated upon time and again. The plaintiffs suit is therefore not proved to the required standard and the suit is dismissed with costs to the defendant.”

14. Aggrieved by the above decision the appellants appealed to this court on the ground that the learned Trial Magistrate erred in law and in fact by dismissing their suit.
15. The sole issue for the court’s determination is whether the learned Trial Magistrate erred by dismissing the appellants suit.
16. In answering that question, this being a first appeal, this court has a duty to evaluate afresh the evidence adduced before the lower court in order to arrive at its own independent conclusion, bearing in mind that it neither saw nor heard the witnesses testify, and make allowance for that. In this regard see *Selle & Another vs. Associated Motor Co. Ltd & Others* (1968) E.A. 123.
17. The evidence adduced in the lower court was as summarized herein above.
18. A review of the evidence adduced in the lower court reveals that the suit property was transferred to the appellants by their own father at a time when there existed a suit between the appellants’ father and the respondent. In that suit, which is still pending before this court, the respondent is claiming entitlement to the suit property by adverse possession.
19. Whilst there is evidence that the appellants are the registered proprietors of the suit property and as such entitled to the rights conferred on a registered proprietor of land by inter alia Section 25 of the Land Registration Act, 2012 those rights are not absolute as they may be challenged if good grounds exist for challenging the title of the proprietor. In that regard see Section 25(1)(b) which provides as follows:-
 - “25.
 - (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.”
20. Were there good grounds for challenging or failing to give effect to the rights of the appellants as the registered proprietors of the suit property in the circumstances of this case?



21. My answer is in the affirmative. This is because, registration of the appellants as the proprietor of the suit property was subject to such overriding interests as affected the land as at the time of registration.
22. According to the evidence led in the lower suit, one of the overriding interests which affected the suit property at the time the appellants gained proprietary interest to it is the respondent's rights as a person in occupation of the suit property on account of her claim that she had become entitled to the land by adverse possession and which claim was pending in court.
23. By dint of the provisions of Section 25(1)(b) as read with Section 28 of the Land registration Act, 2012, the learned Trial Magistrate was justified in not finding in favour of the appellants on account of the respondent's rights in the suit property as a person in occupation of the suit property. In this regard see Section 28 aforementioned, which at the relevant part provides as follows:-

“ 28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (h) rights acquired or in the process of being acquired by virtue of any written law relating to the Limitation of Actions or by prescription.”

24. In upholding the rights of the respondent as a person in possession of the suit property and whose right to occupy the suit property was upheld by a court of competent jurisdiction through the proceedings which had been previously instituted by the Appellants' predecessor in entitlement to the suit property, I can do no better than adopt the decision of my sister, Kasango J., in the case of *Betha Kanini Bainsi v. Agnes Ithiru Njoka* (2011)eKLR where she stated:-

“ Possession of land if lawful entitles the possessor to exercise right to possess, use and enjoy that land. It can indeed be said that the rights of a possessor of land are akin to the rights of a registered owner. ...a possessor can enforce those rights against one seeking to either eject them from the land or to interfere with their occupation of it.”

25. In the circumstances of this case, the right of the respondent to continue occupying the land was upheld by the court when it refused to accede to the plea by the appellant's father to eject her from the suit property on similar grounds to those raised by the appellants.
26. I agree with the learned Trial Magistrate's holding that if the appellants cared to know, they would have known that their father wanted the respondent out, so that their right to the suit property vis-a-vis that of the respondent, unless the contrary is proved through the proceedings instituted by the respondent concerning her entitlement to the suit property, is no better than that of their predecessor in entitlement to it.
24. The upshot of the foregoing is that the appeal has no merit and is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 7TH DAY OF MARCH, 2019.

L N WAITHAKA

JUDGE

Coram:



N/a for the 1st appellant

Christopher Weru Wahome – 2nd appellant

Ms Mwikali h/b for Mr. Andrew Kariuki for the respondent

Court assistant - Esther

