

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU

JJ.A.) CIVIL APPEAL NO. 37 OF 2020

BETWEEN

HESBORN JAHONGA SON OF ISAKA UNGADI.....APPELLANT

AND

PRISCILLA MUHONJA.....RESPONDENT

*(Being an appeal from the Judgment and decree of the Environment
& land court of Kenya at Kakamega, (Matheka, J.) dated 2nd July,
2019*

in

ELC NO. 209 OF 2019)

JUDGMENT OF THE

COURT

[1] This is a first appeal from the judgment and decree of the Environment and Land Court “**the ELC**” at Kakamega (Matheka, J.) delivered on 2nd July 2019 in ELC Case No. 209 of 2017. As a first appellate court, we are obligated to re-evaluate, re-analyze, and re-appraise the evidence on record and draw our own independent conclusions, while bearing in mind that we did not have the benefit of observing the demeanor of witnesses and make due allowance

for it. (See **Selle v Associated Motor Boat Co. Ltd & Others**
[1968] 123.)

[2]The facts preceding this appeal are that the respondent, **Priscilla Muhonja**, “**the respondent**”, instituted court proceedings by way of a Plaint dated 27th March 2017, claiming ownership of all that piece or parcel of land known as **Kakamega/Mudete/198 “the suit property”**. Her case was that she was the registered proprietor of the suit property, having acquired it through transmission as the sole heir and beneficiary of the estate of her late mother, **Agneda Chambula Adulu**, who was the registered proprietor thereof until her demise on 6th June 1985. However, in or about December 2003, the appellant, **Hesborn Jahonga son of Isaka Ungadi** a son to her stepbrother, unlawfully entered into the suit property without her consent, took possession of the semi-permanent house thereon, and commenced residence therein with his family.

[3]She contended that the appellant’s actions amounted to trespass and that the trespass was a continuing one, thereby depriving her of the use and enjoyment of the suit property and causing her loss and damage therefor. She sought possession of the suit property, a declaration that the appellant was not entitled to enter or remain on the suit property, an order for his eviction, a

permanent injunction restraining him from future access or use of
the suit property, general

damages for trespass, costs of the suit, interest, and any other or further relief that the court may deem fit and just to grant.

[4] In defending the suit, the appellant denied the respondent's claim to exclusive ownership of the suit property; asserting that he had lawfully entered and occupied the suit property pursuant to a land sale agreement executed between himself and the deceased in or about 2003. That he had taken possession of the suit property with the deceased's consent and had since continuously occupied it with his family, thereby acquiring prescriptive rights over it. He further averred that the respondent's title, obtained through transmission, was subject to his prior equitable interest and occupation as a step grandson of the deceased. In the alternative, the appellant pleaded that his long and uninterrupted possession of the suit property amounted to adverse possession, which extinguished the respondent's title under the Limitation of Actions Act. He therefore denied allegations of trespass and prayed that the suit be dismissed with costs.

[5] The suit was duly heard, and at the conclusion thereof, the ELC, after evaluating the pleadings, oral testimony, and documentary evidence, found that the respondent was the lawful registered

proprietor of the suit property, having acquired the title through transmission. The court noted that the respondent had produced a certified copy of the title deed, official search, and confirmation of grant, all of which established her legal ownership of the suit property.

[6] On the issue of adverse possession, the ELC found that the appellant had entered the suit property in or about December 2003, illegally and on the basis of a false sale agreement, without the respondent's consent. The court rejected the appellant's claim of purchase, noting that the alleged sale agreement was not executed by the registered proprietor and lacked evidentiary support. The ELC further held that the appellant had not demonstrated the requisite elements of adverse possession, as his occupation was neither peaceful, open, nor uninterrupted in the manner required by law. Consequently, the ELC concluded that the appellant's continued occupation amounted to trespass and that the respondent was entitled to possession and protection of her proprietary rights. As a consequence, judgment was entered in favour of the respondent, granting her prayers for possession, eviction, a permanent injunction.

[7] Aggrieved by the said judgment and decree, the appellant filed the instant appeal on grounds, *inter alia*, that the ELC erred in law and

fact in: holding that the respondent had proved her case on a balance of probabilities; finding that the respondent had acquired title to the suit property through transmission; declaring the appellant a trespasser; disregarding the appellant's evidence relating to the alleged purchase of the suit property; and in failing to appreciate that the appellant had acquired the suit property by way of adverse possession.

[8]When the appeal was called out for hearing, **Mr. Manyoni**, learned counsel appeared for the appellant whereas **Ms. Atamba Wilunda**, learned counsel appeared for the respondent. They opted to canvass the appeal by way of written submissions with limited oral highlights.

[9]Counsel for the appellant submitted that the ELC erred in finding for the respondent and ordering the eviction of the appellant eviction from the suit property. He contended that the respondent had failed to prove her case on a balance of probabilities, particularly because the suit was filed in June 2017, more than twelve years after the appellant had taken possession thereof, without leave of court, thereby rendering the claim time-barred under the Limitation of Actions Act.

[10] He further challenged the legitimacy of the respondent's title, arguing that she was registered as proprietor in 2004 before initiating succession proceedings in 2005, and was again issued with a title in

2017. These inconsistencies, he submitted, cast doubt on the integrity of the registration process and undermined the respondent's claim to lawful ownership. On the issue of possession, counsel maintained that the appellant entered the suit property pursuant to a sale agreement he executed with Lena Savai Chiviywa, a relative of the respondent, and that he was therefore a purchaser for value and not a trespasser. He faulted the ELC for disregarding the agreement and failing to consider the appellant's evidence of purchase of the suit property.

[11] Counsel also invoked the doctrine of adverse possession, asserting that the appellant's continuous and uninterrupted occupation of the suit property for over twelve years prior to the filing of the suit against him by the respondent entitled him to ownership of the suit property by operation of law. He argued that the ELC failed to address this legal issue, despite it being raised in submissions. In conclusion, counsel urged this Court to allow the appeal, set aside the judgment of the ELC, restore his possession of the suit property, and award him compensation for the losses suffered following the eviction. He relied on the Supreme Court's decision in **William Musimbi & 10 Others v Margaret Kanini**

Keli & 2 Others (Petition No. 2 of 2018), where compensation was awarded for unlawful eviction.

[12] Opposing the appeal, counsel for the respondent, submitted thus: that the ELC's judgment was sound both in law and fact, and ought to be upheld in its entirety. She maintained that the respondent had lawfully acquired title to the suit property through transmission as the sole heir of her late mother's estate, and was registered as proprietor in 2017. The suit was filed in the same year, and therefore, contrary to the appellant's assertions, it was not time-barred.

[13] Counsel further submitted that the appellant's claim of purchase was untenable, as the alleged vendor, Lena Savai Chiviywa, was not the registered proprietor of the suit property, and therefore lacked capacity to transfer any proprietary interest in the suit property to the appellant. That the sale agreement was therefore null and void. Counsel emphasized that fraud had neither been pleaded with particularity nor proved and that the respondent's title supported by official search, confirmation of grant and title deed was indefeasible under **Sections 24** and **26** of the Land Registration Act.

[14] In support thereof, the respondent cited **Elijah Makeri Nyang'wara v Stephen Mungai Njuguna & Another [2013]**

eKLR, where the court reiterated that title may only be impeached on grounds of fraud or illegality, and only where the registered proprietor is shown

to have been party to such conduct. Counsel argued that no such evidence was adduced, and the appellant's allegations were speculative and unsupported by evidence.

[15] On adverse possession, counsel submitted that the appellant's entry into the suit property was based on a purported sale agreement, which negated any claim of adverse possession. Moreover, the respondent had only become registered owner thereof in 2017, and the suit was filed within the same year. The respondent was not suing on behalf of the previous owner, but in her own capacity, and therefore the claim of adverse possession was premature and legally untenable.

[16] Lastly, counsel opposed the appellant's prayer for compensation, arguing that the issue was not part of the trial proceedings and could not be introduced at the appellate stage. She urged the Court to find that the ELC had properly evaluated the evidence and applied the law correctly, and dismiss the appeal with costs.

[17] Having carefully considered the record, rival submissions of the parties, the authorities cited and the applicable law, three concise issues arise for determination; whether: the respondent's

suit was statute-barred under the Limitation of Actions Act; the respondent held a valid and indefeasible title to the suit property; and whether the

appellant had acquired any rights over the suit property either through purchase or adverse possession.

[18]The appellant, on the first issue contended that the respondent's suit was statute-barred, having been filed in 2017, more than twelve years after he allegedly took possession of the suit property in 2003. He argued that the respondent failed to seek leave to file the suit out of time, rendering it incompetent. However, the record is clear that the respondent became the registered proprietor of the suit property in 2017 following a confirmed grant of letters of administration to the estate of her late mother. The cause of action, being one of trespass, accrued upon her registration as proprietor of the suit property. **Section 7** of the Limitation of Actions Act provides that an action for recovery of land may not be brought after the end of twelve years from the date the right of action accrued. In **Gathoni v Kenya Co-operative Creameries Ltd [1982] KLR 104**, the Court held that limitation is a matter of law and must be strictly construed. Since the respondent's title was registered in 2017 and the suit was filed in the same year, the action was brought within time. Had the respondent initiated the suit on behalf of her deceased mother or

on behalf of her estate, then perhaps, the appellant's argument on this could hold. However this is

not the case! The ELC therefore correctly found that the suit was not time-barred.

[19] On the second issue, the appellant challenged the legitimacy of the respondent's title, alleging that it was obtained fraudulently and through irregular succession proceedings. However, the respondent produced a certificate of confirmation of grant, an official search, and a title deed issued in her name. The Certificate of Confirmation of Grant was issued to the respondent on 19th September 2016 in Kakamega High Court Succession Cause No. 41 of 2005. This confirmed her as the legal heir and administrator of the estate of her late mother, including the suit property in line with **Section 79** of the Law of Succession Act.

[20] It is also common ground that she was the sole beneficiary of her late mother's estate. Further, the Land Register and Title Deed indicate that the respondent was registered as the absolute proprietor of the suit property on 28th March 2017. The title deed was subsequently issued on 31st March 2017. **Section 26(1)** of the Land Registration Act, provides that a certificate of title is *prima facie* evidence that the person named therein is the absolute and indefeasible owner of the land. The title may only be challenged

on grounds of fraud or

misrepresentation to which the registered owner is proved to be a party, or where the title was acquired illegally, unprocedurally, or through a corrupt scheme. None of the above was pleaded nor proved against the respondent by the appellant.

[21] In **Kuria Kiarie & 2 Others v Sammy Magera [2018]**

eKLR, the court held that allegations of fraud must not only be specifically pleaded but also strictly proved. In the present appeal, the appellant neither pleaded fraud with the required particularity nor led any evidence to prove it. He only raised the issue in his written submission. Submissions cannot take the place of pleadings. The process leading to the respondent's acquisition of the title to the suit property cannot be impugned on that basis. The sequence of events culminating in the respondent's acquisition of the suit property was proper and the appellant's submissions to contrary are clearly untenable. The ELC was therefore correct in holding that the respondent's title was valid and indefeasible.

[22] Thirdly, the appellant claimed that he had acquired rights over the suit property either through a sale agreement or by way of adverse possession. He relied on an agreement allegedly entered into with one Lena Savai Chiviya, an aunt of the respondent

wherein it is alleged

that the appellant bought the suit property for Ksh.300,000/-. The sale agreement relied upon by the appellant is dated 9th August 2003. There is no evidence on the record that Lena Savai Chiviya was ever appointed as the administrator of the estate of the deceased. Her name does not even appear in the succession proceedings, the certificate of confirmation of grant, or the land register. The registered proprietor of the suit property at the time was still the deceased. The estate had not yet been administered. One then wonders in what capacity she was transacting with the appellant.

[23] In a nutshell, Lena Savai Chiviya had no legal authority to dispose the suit property to the appellant. It is trite that only the registered proprietor of land can pass good title to a purchaser in terms of **Section 24(a)** Land Registration Act. In the absence of registration or proof that Lena Savai Chiviya had authority from the deceased either as an agent or had been granted Power of Attorney by the deceased, to sell the suit property, the agreement conferred no proprietary interest to the appellant. This Court in **Joseph Arap Ng'ok v Justice Moiwo ole Keiwua & 5 Others** [1997] eKLR held that:

“...title to landed property is acquired only through registration.”

[24] As for adverse possession, the appellant's claim was undermined by his own evidence that he entered the suit property pursuant to a sale agreement with Lena Savai Chiviywa and not the real registered proprietor. In any event, and given the foregoing, time for purposes of adverse possession could only have run against Lena Savai Chiviywa, the imposter and not the deceased and or the respondent.

[25] In the case of **Mate Gitabi vs Jane Kabubu Muga Alias Jane Kaburu Muga & 3 Others [2017] eKLR**, this Court addressing generally, the concept of adverse possession stated as follows:

“For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin maxim nec vi, nec clam, nec precario. See also ... Kasuve vs Mwaani Investments Limited & 4 Others [2004] 1KLR where this Court stated as follows:

‘In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his

own volition.'"

[26] In **Public Trustee v Wanduru Ndegwa [1984] eKLR**, the Court also held that possession based on permission or contractual

arrangement cannot be adverse. It would appear that the appellant's entry into the suit property was fraudulent, a court of equity would not sanction such misadventure. Furthermore, and even if we were to disregard the foregoing, the respondent became the registered proprietor of the suit property in 2017, and the suit was filed in the same year. The period of adverse possession had not even crystallized against her therefor. The appellant resided in a semi-permanent house but did not produce evidence of exclusive control or possession of the entire suit property. Furthermore, his entry was based on a void sale agreement with a person who had no legal title or authority, there was no evidence that his occupation was adverse to the deceased's title or that he excluded the estate's beneficiaries. Lastly, from the record, it is clear that the respondent initiated legal proceedings promptly upon registration hence the appellant's possession was interrupted by the suit, and there was evidence that there were prior disputes and demand notices.

[27] From the above, we are satisfied that the ELC correctly found that the appellant had not satisfied the legal requirements for a claim of adverse possession and which claim was premature in any

event.

[28] In conclusion, we find no fault in the ELC's reasoning or conclusions. The respondent's suit was properly before the court, her title was valid and indefeasible, and the appellant failed to establish any lawful claim to the suit property. The appeal is devoid of merit and is accordingly dismissed with costs to the respondent.

Dated and delivered at Kisumu this 13th day of February, 2026.

ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

H.A. OMONDI

.....
JUDGE OF APPEAL

L. KIMARU

.....
JUDGE OF APPEAL

*I certify that this is a
true copy of the original*

Signed
DEPUTY REGISTRAR