



REPUBLIC OF KENYA



KENYA LAW
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**Mbiti v Mbaluto (Environment and Land Appeal E014 of 2021)
[2024] KEELC 998 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 998 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E014 OF 2021
CA OCHIENG, J
FEBRUARY 28, 2024**

BETWEEN

BEATRICE MUENI MBITI APPELLANT

AND

HON TOM MBALUTO RESPONDENT

*(Being an Appeal from the Judgment of Machakos Chief Magistrate's Court in
ELC No. 42 of 2019 delivered on 22nd April, 2021 by Hon. A. Nyoike (PM))*

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated the 28th April, 2021, the Appellant appealed against the Judgment of Hon. A. Nyoike, Principal Magistrate, Machakos, dated the 22nd April, 2021 in Machakos CMCELC No. 42 of 2019; Beatrice Mueni Mbiti v Hon. Tom Mbaluto. The trial Magistrate had dismissed the Appellant's suit and entered Judgment in favour of the Respondent as per the Counter-claim.
2. The Appellant, being dissatisfied with the whole of the said Judgment, filed a Memorandum of Appeal dated the 28th April, 2021 based on the following grounds:-
 1. In the absence of proof, the learned trial Magistrate erred in law and fact in upholding the Defendant's contention that the Defendant allowed the Plaintiff to settle on the suit land temporarily and that the Plaintiff was a licensee.
 2. The learned trial Magistrate misdirected herself when she accepted that the Defendant's evidence that his occasional visits to the suit land whenever he was in Machakos amounted to interruption of the Plaintiff's possession of the land.



3. The learned trial Magistrate erred in law and fact when she implied in her Judgment that the Appellant was not in possession as if that was not the case, she could not have given orders of eviction.
4. The declaration made by the learned trial Magistrate that the Defendant is the sole proprietor of the suit land is not material since the Appellant was claiming adverse possession against the proprietor thus the said Magistrate's decision was a misdirection.
5. Based on the material presented to her together with the pertinent statutory provisions, the trial Magistrate erred in failing to appreciate and hold that;
 - a. The suit land was land under a Co-Operative Society and that the
 - b. A suit for adverse possession can be brought by either Originating Summons or by Plaint.
 - c. The period of limitation had ran.
6. The decision of the said learned trial Magistrate was against the weight of the material presented to her.

Reasons Wherefore the Appellant prays that:-

- a. Her Appeal be allowed.
 - b. The Judgment and Decree of the trial Magistrate be reversed.
 - c. The costs of this Appeal and those of the court below be awarded to the Appellant.
3. The Appeal was canvassed by way of written submissions.

Appellant's Submissions

4. The Appellant in her submissions contended that she had acquired equitable interest in the suit land. She insisted that her claim was based on the doctrine of constructive trust. Further, that having entered into a Sale Agreement for the suit land in 1996, paid the complete purchase price and lived thereon for a period of over 20 years, a constructive trust had been established in her favour over the suit land. She submitted that failure to acquire the consent of the Land Control Board did not void the transaction, as the same is enforceable by virtue of Article 10(2) of the *Constitution* of Kenya. She reiterated that she was entitled to the suit land through adverse possession having been in active possession of the said land for a period of over 20 years. She concluded that the burden of proving that there was a license was upon the Respondent. To buttress her arguments, she relied on Article 40 of the *Constitution* as well as Section 28(b) of the *Land Registration Act* including the following decisions: *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR; *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* (2014) eKLR; *Mbira v Gachubi* (2002) 1 EALR 137; *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR and *Duncan Kabui v Samuel Bede Ogembo & Another* (2014) eKLR.

Respondent's Submissions

5. The Respondent in his submissions denied that the Appellant purchased three (3) acres of land from his Plot No. Machakos/Katheka-kai "A" 267 hereinafter referred to as the 'suit land', as the alleged Sale Agreement failed to meet the requirements of the law on contract. He argued that the alleged document had not been signed by the person who allegedly made it nor any persons who were present when the money was paid. He further submitted that the Appellant had not established a claim for



adverse possession as she had not demonstrated to the satisfaction of the court that she had been in continuous, open and peaceful occupation of the land for a period of twelve (12) years. Further, that the possession of the Appellant on the suit land had been interrupted in 2013 when he raised a claim to the Area Chief that the Appellant sold a portion of the land to one Kiili Ngea. The Respondent further submitted that he further interrupted the Appellant's possession by filing Machakos CMCC No. 733 of 2017 wherein he sued the said Kiili Ngea for the portion that had been sold to him by the Appellant and obtained a decision that upheld his ownership of the land as well as eviction orders. It was the Respondent's further submission that the Appellant had not established any basis upon which this Court should overturn the Judgment of the trial court dated the 21st April, 2021 in Machakos CMC ELC Case No. 42 of 2019. He challenged the submissions filed by the Appellant and insisted that since there was no Sale Agreement between the parties, he did not hold the land in trust for the Appellant as claimed. Further, that the lack of the Land Consent Board is not an issue that was raised nor was it the ratio decidendi for the decision of the court. He reiterated that the Appellant should meet the costs of the Appeal since costs follow the event.

6. To support his averments, he relied on the following decisions: *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR; *Ogwom v Juma* (Environment and Land Case Civil Suit E016 of 2022) (2023) KEELC 18529 (KLR) (10 July 2023); *Ramadhan Wanzala Omoro v County Government of Kakamega* (2020) eKLR which favourably cited the case of *Samuel Miki Waweru v Jane Njeru Richu*, Civil Appeal No. 122 of 2001 and *Mbira v Gachubi* (2002) 1 EALR 137.

Analysis and Determination

7. Upon consideration of the Memorandum of Appeal, Record of Appeal and the rivalling submissions, the following are the issues for determination:-
 - a. Whether there was a valid Sale Agreement between the Appellant and Respondent.
 - b. Whether the Appellant acquired the suit land through adverse possession.
 - c. Whether the Appeal is merited.
8. This Appeal emanated from a suit filed by the Appellant in the Lower Court against the Respondent claiming the suit land as a purchaser or in the alternative through adverse possession. The Appellant (Plaintiff) through a Plaint dated the 16th April, 2019 sought for the following Orders as against the Respondent:-
 - a. A declaration that Plaintiff is the rightful beneficial owner of land measuring 3 acres or thereabouts, the same having been excised from Plot No. Machakos/Katheka - KAI/ 'A' 267 and having been purchased by the Plaintiff for valuable consideration in the year 1996.
 - b. In the alternative and without prejudice to prayer (a) the Plaintiff be declared to have a beneficial interest and/or to have acquired land measuring Acres or thereabouts, the same having been excised from Plot No. Machakos/katheka – KAI 'A' 267 by way of adverse possession.
 - c. In further alternative and without prejudice to prayers (a) and (b) an order to issue to compel the Defendant to compensate the Plaintiff a sum equivalent to the current market value of the land measuring 3 Acres or thereabouts, the same having been excised from plot No. Machakos/ katheka – KAI 'A' 267.
 - d. Costs of this suit and interest.
 - e. Any other relief this court may deem fit and just to grant.



9. The Respondent who was the Defendant in the lower court filed his Defence including Counter-claim dated the 21st May, 2019 where he sought for the following Orders:-
- a. A dismissal of the suit filed herein by the Plaintiff with costs.
 - b. A declaration that the Defendant is the sole proprietor of the suit land.
 - c. Permanent injunction orders restraining the Plaintiff, her agents, servant or any person claiming under her from remaining on the suit land or any portion thereof, using it, dealing with it in any manner whatsoever including alienating it to any third parties or charging it and from interfering with it in any manner whatsoever.
 - d. Orders of eviction against the Plaintiff, her agents, servants or any person claiming any right over the suit land or a portion thereof under her.
 - e. Mesne profits.
 - f. Interest on (e) above and costs of the Counter-claim.
10. The Appellant in the trial court had claimed to have entered into a Sale Agreement dated the 3rd August, 1996 for the purchase of the suit land from the Respondent and sought for Orders for the Respondent (Defendant) to be compelled to sign transfer documents in her favour or be ordered to compensate her, the equivalent of the land to the current market value. She had further argued that in the alternative, the court to declare that she had acquired beneficial interest by way of adverse possession.
10. The Respondent insisted that the Appellant was a licensee on the suit land as he had taken her there, allowed her to occupy $\frac{1}{4}$ of an acre for the sole purpose of taking care of the whole land, on his behalf. He denied that there was an agreement for sale of the suit land nor consent from the Land Control Board. He claimed the Appellant had committed an irregularity, fraud and forgery in the purported agreement.
11. The Trial Magistrate having heard the respective parties made a determination that the Appellant had not proved her case to the required standard and dismissed it, while allowing the Counter-claim in favour of the Respondent. It is this Judgment that forms the fulcrum of the Appeal.
12. The role of this court as an appellate court was emphasized in the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR where it was held inter alia:-
- "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way..."
13. The instant Appeal revolves around a dispute between siblings. The Appellant admitted that the Respondent was her elder brother who took care of her from a young age until adulthood. The Appellant as PW1 claimed that in 1996, she purchased the suit land from the Respondent and paid for the same at Kshs. 90,000, wherein the said amount was handed to the Respondent in a white envelope, in the presence of his wife and other witnesses. The Appellant produced a document dated the 3rd August 1996, written in Kikamba Language claiming it was the Sale Agreement. From the English translation, it stated that the Appellant had given her brother Kshs. 90,000 for 3 acres of the land at Katheka-Kai, in the presence of her mother, Samuel Mweu and brother Muasya Mbiti.



14. For a valid disposition in land, the Law of Contracts Act provides as follows:

Section 3(3) of the [Law of Contract Act](#) provides as follows:-

"No suit shall be brought upon a contract for the disposition of an interest in land unless—

a. the contract upon which the suit is founded—

i. is in writing;

ii. is signed by all the parties thereto; and

b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

15. While Section 107(1) of the [Evidence Act](#) provides that:-

"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

16. Further, Section 108 of the [Evidence Act](#) stipulates thus:-

"The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."

17. Yet, Section 109 of the [Evidence Act](#) stipulates inter alia:-

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided for by law that the proof of that fact shall lie on any particular person."

18. From the evidence in the lower court, inasmuch as the authenticity of this document cannot be verified, in relying on the legal provisions I have cited, I find that the same was not signed by any party and hence cannot qualify for a valid contract for transmission in land. I note the Appellant admitted during her cross-examination that she only recorded the terms of the alleged sale in a paper for future reference. What is ironical is that the Appellant claimed to have purchased the suit land in 1996, but continued to stay at the Respondent's home upto 2005. Further, the Appellant claims to have given the Respondent money to purchase the land, yet it was the Respondent who had been taking care of her including her children and even got her a job as a subordinate staff at the Postal Corporation of Kenya. I note the Respondent on 28th August, 2000 even wrote a letter to the Post Master General confirming he was the owner of the suit land, had given Beatrice a portion to construct a house and was ready to release title documents to enable them create a security for the house loan she intended to apply for. The Respondent as DW1 insisted that the Appellant never gave him any money and argued that he could not have sold three (3) acres out of the suit land which measured 3.3 acres. I hence find that the document dated the 3rd August, 1996, cannot be deemed to be a Sale Agreement that entitles the Appellant to any proprietorship rights over the suit land. Further, even if the lack of a valid contract was to be excused for allegedly having taken place in the year 1996, before the amendment to the Law of Contracts Act, the conduct of the parties which the court finds to be in line with reasonable intentions was that the Respondent was a big brother to the Appellant who had always looked after her, got her a job, bequeathed her a portion of the land to live thereon as she took care of the rest of the land. In line with the provisions of the [Evidence Act](#) cited above, I find that the onus of proving the sale of the suit land, whether express or implied, laid squarely upon the Appellant, which I opine that she



failed to discharge to the required standard. Further, I note the Appellant who was a subordinate staff did not demonstrate how she obtained the purchase price and even admitted that she resided at the Respondent's residence upto around 2005. In the circumstance, I find that there was no valid Sale Agreement between the Appellant and Respondent as claimed.

19. As to whether the Appellant acquired the suit land through adverse possession.
20. Adverse possession is governed by the provisions of Sections 38(1) and (2) of the Limitation of the Actions Act which stipulates thus:-
21. 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.”
22. The Court of Appeal in *Mtana Lewa –v- Kabindi Ngala Mwangandi* [2015] eKLR provided tenets on adverse possession and stated thus:-

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.” (Emphasis mine)

23. Further, in the case of *Samuel Miki Waweru v. Jane Njeru Richu*, Civil Appeal No. 122 of 2001, the Court of Appeal held the following that:-

...it is trite law 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.”

24. In the lower court case, the Appellant as PW1 claimed she entered the suit land in 1996. However, during cross-examination, she admitted having left the Respondent's house in 2005. The Respondent in his evidence confirmed that he had taken care of the Appellant from the time she was a child and through his wife, got her a job at Postal Corporation of Kenya. Further, I note the Respondent wrote a Letter to the Post Master General, Postal Corporation of Kenya, on 28th August, 2000 informing them that he had given the Appellant a portion of the land, to enable her get a housing loan. The Respondent confirmed Appellant left his home at Kenya Israel Machakos in 2007. Further, he confirmed that he allowed the Appellant to occupy a portion of the suit land around 2007. From the aforementioned letter alone, it is clear the Appellant had not entered the suit land to reside thereon as at the year 2000. The Respondent has argued that the Appellant's occupation on the suit land had been interrupted in 2013 when he raised a claim to the Area Chief that the Appellant sold a portion of the land to one Kiili Ngea. The Respondent contended that he interrupted the Appellant's possession by filing Machakos CMCC No. 733 of 2017 wherein he sued the said Kiili Ngea for the portion that had been sold to him, by the Appellant and obtained a decision that upheld his ownership of the said land as well as eviction orders. From the evidence in the lower court, it is clear the Respondent allowed the Appellant to occupy the suit land.



25. In the case of *Daniel Kimani Ruchine & Others versus Swift Lotherford & Co. Ltd and Anor* (1977) eKLR the court held that:-

The Plaintiffs have to prove that they used the land as of right, nec vi, nec clam, nec precario (no force, no secrecy, no evasion).”

26. *Professor Tom Ojienda’s Principles of Conveyancing Hand Book*, Law Africa Vol II at page 97 clarifies the position on adverse possession by stating thus:-

Where the claimant is in possession of the land with leave and licence of the true owner in pursuance of a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse.”

27. From the evidence in the lower Court, I find that the Appellant had direct authorization from the Respondent to enter the suit land. This has not been denied by any party in the proceedings herein. This in essence means she was a licensee on the suit land. The Respondent has demonstrated that he filed a matter over the suit land in the year 2013. This was seven (7) years from 2005 when the Appellant claimed to have entered the land. It is my considered view that the Appellant was a mere licensee over the suit land, but has now sought to take advantage of the Respondent who is her elder brother to take away the said land. Consequently, I find that the Appellant has not demonstrated to the satisfaction of the court that she had been in continuous, open and peaceful occupation of the suit land for a period of twelve years, so as to be entitled to claim the said land through adverse possession.

28. In the circumstance, I find that the Learned Magistrate did not err in law in holding that the Appellant was a mere licensee on the land since she occupied it with permission from the Respondent. I opine that the Learned Trial Magistrate did not misdirect herself in accepting the Respondent’s evidence that his occasional visits to the suit land whenever he was in Machakos amounted to interruption of the Appellant’s possession of the land. To my mind, I find that the Trial Magistrate was correct in making a declaration that the Respondent was the sole proprietor of the suit land and this decision was not a misdirection as claimed.

29. In the foregoing, I find that the Appeal is not merited and will dismiss it with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 28TH DAY OF FEBRUARY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of;

Mrs. Mwangangi for Respondent

No appearance for Appellant

Court Assistant – Simon/Ashley

