



REPUBLIC OF KENYA



KENYA LAW
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**Maina v Langat & 2 others (Civil Appeal 21 of 2016)
[2025] KECA 75 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KECA 75 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 21 OF 2016
MA WARSAME, SG KAIRU & FA OCHIENG, JJA
JANUARY 24, 2025**

BETWEEN

TERESIA MUTHONI MAINA APPELLANT

AND

DANIEL LANGAT 1ST RESPONDENT

GEOFFREY LANGAT 2ND RESPONDENT

FRANCIS MAINA MWANGI 3RD RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nakuru delivered by Honourable M.J. Anyara Emukule, J. on 7th November 2013 in HCCC No. 154 of 2010)

JUDGMENT

1. This appeal relates to the property known as Molo South/langwenda/block 8/5 Cheptagum. The 1st and 2nd respondent approached the High Court by way of an Originating Summons dated 5th July 2010, in which they successfully obtained a declaration that they are entitled to the land by adverse possession, having entered and remained in quiet, peaceful continuous and uninterrupted possession and occupation of 4 acres of the suit property, and that such possession has been adverse to that of the appellant and the 3rd respondent, a husband and wife.
2. The 1st and 2nd respondents claimed their title over the suit property from purchases from the appellant and the 3rd respondent. The 1st respondent's case is that he bought two acres of land by virtue of a sale agreement dated 22/06/1995 after which he moved into possession upon payment of the full sale price of Shs.66,000/-. On the other hand, the 2nd respondent's case is that he purchased the same by paying off a loan to the Industrial and Commercial Development Corporation (ICDC) on account of the 1st respondent on 10th April 1996 and took possession of the land upon being showed by the 3rd respondent.



3. It was common ground that the 3rd respondent had disappeared and correspondence was brought to show that he was a missing person. Some reports suggested that he was hiding away in Mombasa after selling the suit property to the 1st and 2nd respondents. The 3rd respondent therefore never appeared to testify or file any pleadings before the trial court leaving it to the appellant.
4. The appellant denied the existence of such sale agreements on account of her being away in Murang'a with her children, having escaped the tribal clashes that affected Molo area where the land is situated sometime in 1992. She urged that the sale agreement was a forgery and that the 1st and 2nd respondents were trespassers to property. The dispute was referred to the Molo Land Disputes Tribunal which found, as a matter of fact, that the suit land had been sold by appellant and 3rd respondent to the 1st and 2nd respondents.
5. The trial court found that the lower court had correctly declined to adopt the Award of the Tribunal as it lacked jurisdiction to arbitrate over contracts of sale of land resulting in the matter ending up before the High Court.
6. In its judgment, the trial court was satisfied that the 1st and 2nd respondents rightly took possession of the land with the consent of the appellant and 3rd respondent and that the 3rd respondent having disappeared from the area after selling the suit land, no effort was made to secure consent from the Land Control Board for sale and transfer of the suit land. The trial court also faulted the husband and wife for not taking any effort to rescind the Agreement of Sale. This allowed the 1st and 2nd respondents to continue enjoying quiet, peaceful, continuous and uninterrupted possession of the respective two acres of land.
7. The trial court concluded that the title of the 3rd respondent to the four acres of the suit land was extinguished by the adverse possession by the 1st and 2nd respondents. The court held that the appellant and 3rd respondent hold the title in relation to the four acres in trust for the 1st and 2nd respondents. The court further held that the two respondents are entitled to be registered as the proprietors of the respective two acres in place of the appellant and 3rd respondent.
8. Consequently, the 1st and 2nd respondents were directed to commission the District Surveyor Nakuru to survey and demarcate the two respective acres within the next ninety (90) days, and the Deputy Registrar of the High Court to sign the Transfer to the said respondents in respect of the respective two acre parcels of land.
9. It is these findings that have aggrieved the appellant. The ten grounds of appeal contained in the Memorandum of Appeal have been condensed into three broad arguments, the basis upon which submissions were filed.
10. The first broad ground of appeal is hinged on the non- participation of the 3rd respondent in the proceedings both through his absence and without any evidence of efforts made to trace and serve him. The appellant faults the trial court for making a finding against her, yet the suit property is vested in the 3rd respondent as the registered proprietor. The appellant argues that for a claim of adverse possession to exist, there has to be a land owner with a legal title as manifested by registration under section 26(1) of the *Land Registration Act*. In this case, the appellant submits that the land subject of the adverse possession claim is registered to the 3rd respondent.
11. Reference is made to the Court's cases in *Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others* [2004]eKLR and *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & Another* [2015]eKLR.



12. On the absence of the 3rd respondent, the appellant rehearses her testimony before the trial court on the disappearance of the 3rd respondent. She maintains that lack of service of summons on the 3rd respondent denied him from the right to be heard contrary to Article 50 of *the Constitution*. She cites the case of John Akasirwa v Alfred Inai Kimuso (*CA No.164 of 1999*) (UR) as quoted in Law Society of Kenya v Martin Day & 3 others [2015]eKLR and James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another [2016]eKLR which emphasize on service being effected on the defendant.
13. The second consolidated ground of appeal is the grievance against the finding of adverse possession over the suit property in favour of the 1st and 2nd respondents while extinguishing the rights of the appellant and the 3rd respondent. In urging the Court to reconsider the evidence, evaluate and draw its own conclusion bearing in mind that it has neither seen nor heard the witnesses and should make due allowance in that court (as enunciated in Kenya Ports Authority v Kuston (Kenya) Ltd (2009) 2 EA 212), the appellant submits that trial court did not consider the appellant's evidence comprised in her replying affidavit.
14. To this end, it is her argument that the period of 12 years had not lapsed as she interrupted them in the seventh year upon returning to Molo from Murang'a. She also claims not to have been dispossessed as she built structures and continued living on the land enjoying the soil as the respondents had not manifested animus possidendi to deal with the land to the exclusion of the appellant. Reference is made to Virginia Wanjiku Mwangi v David Mwangi Jotham Kamau [2013]eKLR and Littledale v Liverpool College (1900) 1 CH.19, 21. She also faults the respondent for not having attached a certified extract of the title to the land, a fete that goes to the root of the adverse possession claim as stated in Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & Another [2015]eKLR.
15. On whether the learned judge erred in law in finding that the 1st and 2nd respondents were in lawful occupation of the four acres of the suit land and adjudging this suit in absence of enough evidence on balance of probabilities, the appellant reiterates that there was neither quiet long continued enjoyment nor exclusive use of the suit land by the 1st and 2nd respondents.
16. In the end the appellant prays that the appeal be allowed as no reason exists for deviating from the well-established principle in section 27 of the *Civil Procedure Act* that costs follow the event unless the court is satisfied otherwise.
17. From the record, we discern that the respondents did not participate in the proceedings. By a ruling of a single Judge (Ngenye J.A.) in Civil Application No.E076 of 2023 involving the same parties as in this appeal, and delivered on 12th April 2024, the appellant's application for leave to serve the case management notice to the respondents by way of substituted service was disallowed. We have therefore not had the benefit of the submissions by any of the respondents.
18. Being a first appeal, the appellant has rightly noted our jurisdictional contours. We are allowed to re-evaluate the evidence on record and where we deem appropriate make our own findings. However, we remain cautious that not having had the advantage of the witness testimony and demeanor, we should defer to the trial court's exercise of discretion and only interfere with the findings of fact when it is manifest that the trial court acted injudiciously and capriciously.
19. With the above background, it emerges that the appeal circles around the appellant's dissatisfaction with the finding on adverse possession in favour of the 1st and 2nd respondents as against the appellant and the 3rd respondent. In our view, the grounds of appeal pivots towards the discontent on the part of the appellant as to whether the circumstances of this case affirmed the applicability of adverse possession to the suit land.



20. There appears no argument on the nature of extent of the doctrine of adverse possession. In *Mate Gitabi vs Jane Kabubu Muga Alias Jane Kaburu Muga & 3 Others* [2017] eKLR, this Court 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*.

Thus, the claimant must prove that he or 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 or her own volition (See *Kasuve vs Mwaani Investments Limited & 4 Others* [2004] 1KLR). Adverse possession contemplates two concepts: possession and discontinuance of possession as was held in *Wambugu vs Njuguna*, (1983) KLR 173.

21. The appellant is adamant that there was no continuous possession as she disrupted the same as soon as she came back to the property from Murang'a sometimes in November 1996. She considered the 1st and 2nd respondents as invaders and reported to the matter to Molo Police Station including the disappearance of the 3rd respondent, her husband. She also deposed in her replying affidavit that she reported to the Chief on 1st July 2003 whereupon the matter was adjourned till the husband was found. She again went to the then District Officers office where she was requested to report to the OCPD. She reported to the OCPD in February 2009 where she was informed to report to the Land Registrar. In December 2009, she deposed that she reported to the then District Commissioner about the destruction of trees by the 'invaders'.
22. On the other hand, she disowned the sale agreement on two fronts. That she was not around at the time of such sale and therefore did not sanction the sale and that she was illiterate and the signature attributed to her is a forgery. She also denies that there was any consent given to the 2nd respondent to pay the loan
23. What emerges from the above analysis of evidence is that it would appear, and we make no finding in that regard, that the 1st and 2nd respondents were in possession of the property as at 1996 by the time the appellant came back from Molo. Further, that the appellant's attempts to deal with the 1st and 2nd respondents as invaders did not bear fruit as she only complained to the authorities over the period.
24. On their part, the 1st and 2nd respondents invoked the Land Dispute Tribunal which found in their favour cementing their assertion over the land they claimed to have continued to occupy.. As this Court stated in *Joseph Gachumi Kiritu vs Lawrence Munyambu Kabura* [1996] eKLR:

“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him.

...He must therefore make a peaceable and effective entry, or sue for recovery of land.”

25. However, and more importantly, the appeal has raised an issue of ownership of the property. While it is common ground that the appellant was married to the 3rd respondent, it is also undisputed that



the 3rd respondent did not participate in the proceedings before the trial court. It is not lost to us that adverse possession accrues as against the owner on the land. Under section 38(1) of the *Limitation of Actions Act* the adverse possession must be made against the person registered as proprietor in land.

26. From the evidence on record, it is unclear whether the appellant has a proprietorship interest in the land as a registered owner or whether she merely has a spousal interest over the land, the land being registered to the 3rd respondent. It is also not lost to us that on one hand, the appellant claims to be asserting ownership over the title as against the 1st and 2nd defendant, and at the same time raising the issue that the land in question belongs to the 3rd respondent, whose absence is fundamental to the determination made by the trial court.
27. From the inconclusive evidence before us and noting the emotive nature of transactions involving land, we believe this is a matter that requires proper interrogation particularly after affording the 3rd respondent an opportunity to be heard before any drastic measures are taken as against his title. In all these, the trial court should have an opportunity to address itself on the nature and extent of granting adverse possession as against someone such as the appellant who appears to claim spousal interest and seeks to assert the right over land as against a person claiming adverse possession.
28. In this regard, and to retain the sanctity of the judicial process, we decline to make any findings on the merits of the appeal and instead by virtue of the powers granted to us under Rule 33(b) of the Court of Appeal Rules remit it back to the trial court for a rehearing of the suit de novo upon the trial court being satisfied that all parties are duly served. Accordingly, we make the following orders:
 - a. The matter be and is hereby remitted to the Environment and Land Court at Nakuru for hearing and determination de novo on priority basis.
 - b. Each party to bear own costs.

DATED AND DELIVERED AT NAKURU THIS 24TH DAY OF JANUARY, 2025.

M. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

