Mumira v Chege (Sued as Administrator of the Estate of Chege Mbatha Njogu) (Civil Appeal 214 of 2019) [2025] KECA 63 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 63 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 214 OF 2019

MSA MAKHANDIA, S OLE KANTAI & A ALI-ARONI, JJA

JANUARY 24, 2025

BETWEEN

DAVID KIRURI MUMIRA ..... APPELLANT

AND

MARGARET WANJIRU CHEGE ..... RESPONDENT

SUED AS ADMINISTRATOR OF THE ESTATE OF CHEGE MBATHA NJOGU

(Being an appeal against the Judgment of the Environment and Land Court at Nairobi (B. M. Oboso, J.) delivered on 25TH September, 2018 in E.L.C Case No. 644 of 2003 (OS))

JUDGMENT

1. This is a first appeal from the judgment of the Environment and Land Court ('ELC') at Nairobi (Eboso, J.) delivered on 25th September, 2018 where the appellant's (David Kiruri Mumira) case was dismissed. Our mandate as a first appellate court is to re- appraise the evidence said evaluate it ourselves but must remember that we lack the advantage of the trial Judge of seeing and hearing the witnesses and must give due allowance for that – see Selle vs. Associated Motor Boat Co Ltd & Others [1968] EA 123 where that mandate was recognized by this Court as follows:

> "...this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ..."

2. The appellant approached the High Court of Kenya at Nairobi (the suit was later transferred to ELC) by Originating Summons where the Court was asked to determine the following questions.

> " a) That one (1.00) acre of land in Title No Karai/Renguti/57 does not form part of the estate of the deceased Chege Mbatha Njogu and that his right and title to the said one (1.00) acre have been extinguished by the plaintiff's adverse possession thereof exclusively peacefully openly and as of right for a period of over twelve years prior to the institution of this suit.
>
> b. The plaintiff is under Section 38 of the *Limitation of Actions Act* entitled to be registered as proprietor of the said one (1.00) acre of the suit land.
>
> c. That the said one acre does not form part of the late Chege Mbatha Njogu estate.
>
> d. That costs of this suit be awarded to the plaintiff."

3. The appellant stated in a supporting affidavit the suit related to the parcel of land known as L.R No. Karai/Renguti/57 ('the suit land') registered in the name of Chege Mbatha Njogu (deceased); that he had since 1984 continuously, peacefully, openly and as of right exclusively sued 1 acre of the said suit land which he had developed by growing trees, napier grass and other crops and had never been displaced from the suit land. He attached to the summons an extract of the title to the suit land which showed that he had placed a caution on the title claiming a right as "succession beneficiary."

4. In a replying affidavit the respondent, a widow of the deceased denied that the appellant had ever possessed any part of the suit land stating that she and the deceased had always been in occupation of the land and that the appellant lived at a place called Renguti.

5. Three witness statements were filed by the appellant. In his statement the appellant stated that he and the deceased had in 1984 agreed that the deceased would sell to him 1 acre to be excised from the suit land in consideration of Kshs.30,000 to be paid by instalment; that he had paid 2 instalments total Kshs.11,200; that he had taken possession of the 1 acre in 1984 and planted trees and crops; that the deceased had refused to accept balance of purchase price.

6. Mary Ngechi Kimani stated in a witness statement that she knew the appellant since 1982; that she had in 1985 witnessed the respondent collect Kshs.2000 from the appellant as part of purchase price, that the appellant wanted to pay more but the respondent had declined stating that the deceased had sent her to collect only Kshs.2000; that the appellant had taken possession and occupied the 1 acre of the suit land in December, 1984.

7. James Ngibe Kuria in his witness statements stated that he knew the appellant, the deceased and the respondent as neighbours in Renguti Sub- location; that on 1st September, 1985 while at the appellant's house he witnessed the appellant pay to the respondent Kshs.2000 as part of purchase price for 1 acre from the suit land; that the appellant occupied that 1 acre of land in December, 1984.

8. Witness statements were also filed for the respondent. In his statement the respondent stated that her husband had died on 10th March, 2000; that her husband had agreed to sell 1 acre of land to the appellant but the transaction failed because the appellant was unable to pay balance of purchase price; that there was no formal agreement for sale; that when the appellant attempted to occupy the suit land the move was resisted by the deceased after his death, by his children; that she grew crops and trees on the whole and.

9. Ruth Njoki, a neighbour of the respondent, in her witness statement stated that since occupying her neighboring land in the year 2000 she had witnessed numerous quarrels involving the appellant and the respondent and the deceased; that she had witnessed the respondent uprooting bananas planted by the appellant; that:

> " ..I wish to state that to my knowledge there has never been any harmony over the plaintiff's trespass over Karai/Renguti/57."

10. When the hearing commenced the appellant adopted his witness statement and affidavit and produced into evidence green card for the suit land, an agreement dated 18th October, 1984 and other agreements dated 1st November, 1984 and 1st September, 1985. In cross examination he stated that he did not live on the suit land but lived elsewhere; that he had not paid balance of purchase price as the deceased had refused to accept the same. He denied being served by the deceased with a letter terminating the agreement.

11. Mary Ngechi Kimani, the appellant's wife, adopted her witness statement adding that they lived 1½ km away from the suit land.

12. James Ngibe Kuria also adopted his witness statement stating that he was present when 1 acre was curved out of the suit land. He lived 1½ km away from the suit land.

13. The appellant's case was then closed and in her testimony the respondent also adopted her witness statement and replying affidavit adding that the deceased had terminated the agreement with the appellant by a letter dated 12th December, 1999 which letter she produced into evidence.

14. Ruth Njoki also adopted her witness statement adding that she had purchased land from the respondent; that the relationship between the appellant and the respondent had not been cordial.

15. Those were the cases put forward by both sides and as we have seen the suit was dismissed leading to this appeal.

    There are 6 grounds set out in Memorandum of Appeal drawn for the appellant by his lawyers M/s Kiania Njau & Company Advocates. It is said that the Judge erred by finding that there was no factual possession of the 1 acre of land which according to the appellant was against weight of evidence; that the Judge erred by not addressing the question when time for adverse possession started to run ; that the Judge erred by placing weight on evidence of DW2 who lived way from the suit land until the appellant acquired title to the suit land by adverse possession; that the Judge erred in not finding that the appellant had occupied the land for over 12 years; that the Judge erred by finding that no party had produced an agreement for sale and, finally, that the judgment was against the weight of evidence. The appellant prays that the appeal be allowed and the said judgment be set aside with an order that the respondent's right to 1 acre of the suit land has been extinguished by the appellant's possession thereof.

16. When the appeal came up for hearing before us on 26th June, 2024 the appellant was represented by learned counsel Mr. Kiania Njau while the respondent was represented by learned counsel Mr. Musyoki. Both sides had filed written submissions which they fully adopted without finding it necessary to highlight any point.

17. We have considered the whole record, submissions made and the law.

    The grounds for appeal are inter-related and can be taken together.

18. The case for the appellant as set out in Originating Summons and affidavit was that he had peacefully and openly occupied 1 acre of the suit land for over 12 years since 1984 which he had fenced off and

had developed by planting grass, trees and crops. In his witness statement filed in Court he enumerated how he had entered into an understanding with the deceased for sale and purchase of 1 acre from the suit land; that he had paid part of purchase price total Kshs.11,200 leaving a balance which the deceased declined to accept when he wanted to pay.

19. That position was denied by the respondent who testified that the appellant had been unable to pay the balance and had variously been ordered to vacate the land including by a letter by the deceased dated 26th December, 1999.

In testimony before the Judge the appellant stated:

> " I live in Renguti. I do not stay on the piece of land.
>
> I live on a different piece of land. ..."

20. He also admitted that he had not paid balance of purchase price.

21. The Judge considered the whole case and considered the legal framework forming the doctrine of adverse possession. He considered that there had not been any excision of 1 acre from the suit land; that the respondent and her family occupied the whole parcel of land; that attempts by the appellant to occupy the land had always been thwarted by the deceased and his family. He held at paragraph 17 of the judgment.

> "17. The common law doctrine of adverse possession connotes possession which is inconsistent with and in denial of the title of the true owner of land. To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land [animus possidendi]. Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion [nec vi, nec clam, nec precario] for the prescribed limitation period of twelve years. Thirdly, he must demonstrate that the registered owner had knowledge [or the actual or constructive means of knowing] that the adverse possessor was in possession of the suit property. Fourthly, the possession must be continuous; it must not be broken or interrupted. In Titus Kigaro Munyi v Peter Mburu Kimani, CA No 28 of 2014, the Court of Appeal held that computation of time starts from when there is actual or constructive knowledge by the registered proprietor."

21. The appellant admitted before the Judge that he had never resided on the land- he live 1½ km away from the suit land. The respondent and her witness testified that the appellant's attempts to occupy the land had been resisted where plants and crops had been uprooted and the appellant chased away from the land.

22. For the doctrine of adverse possession to apply the principles set out by the Judge in that part of the judgment we have reproduced have to be satisfied. The appellant did not live on the land and did not prove actual possession of the same; his attempts to occupy the land had been resisted; he did not prove that the respondent or her late husband had allowed him to occupy the land for any time at all.

23. The Judge reached the correct decision that the appellant had not proved he had acquired the land by adverse possession. This appeal has no merit and we dismiss it with costs to the respondent.

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

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar