



REPUBLIC OF KENYA



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M'Kirigia (Sued as Legal Representative of M'Rimberia M'Mururu) v Murigu & 10 others (Civil Appeal 142 of 2019) [2025] KECA 28 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KECA 28 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 142 OF 2019
J MOHAMMED, AO MUCHELULE & LK KIMARU, JJA
JANUARY 17, 2025**

BETWEEN

**JANET KATHURE M'KIRIGIA APPELLANT
SUED AS LEGAL REPRESENTATIVE OF M'RIMBERIA M'MURURU**

AND

**CATHERINE WAMBUI MURIGU 1ST RESPONDENT
MOSES KINOTI MURIUNGI 2ND RESPONDENT
GEOFFREY MURIIRA 3RD RESPONDENT
NANCY MWARI 4TH RESPONDENT
ROBERT MUGAMBI 5TH RESPONDENT
SIMON BUNDI 6TH RESPONDENT
JEDIEL KIREMA 7TH RESPONDENT
PAUL MUTUA 8TH RESPONDENT
JOHN GIKUNDA 9TH RESPONDENT
EMILY NJAGI 10TH RESPONDENT
MARY WANJIKU 11TH RESPONDENT**

(Being an appeal from the judgment and decree of the Environment and Land Court of Kenya at Meru (Mwangi Njoroge J.) delivered on 18th October, 2018) in MERU HCC ELC NO. 145 OF 2019 (O.S.)



JUDGMENT

Background

1. This appeal has been commenced by Janet Kathure M'Kirigia (the appellant) against the judgment and decree of the Environment and Land Court (Mwangi Njoroge, J.) dated 18th October, 2018 wherein the Environment and Land Court (ELC) held that Catherine Wambui Murigu, Moses Kinoti Muriungi, Geoffrey Muriira, Nancy Mwari, Robert Mugambi, Simon Bundi, Jediel Kirema, Paul Mutua, John Gikunda, Emily Njagi and Mary Wanjiku (the 1st to 11th respondents) had acquired by way of adverse possession and were entitled to be registered as proprietors of the portions of land they occupy in L.R. No. Ntima/Igoki/276 (the suit property).
2. A brief synopsis of the facts giving rise to this appeal can be found in the amended Originating Summons dated 16th September, 2015 filed by the respondents. The amended Originating Summons was supported by the affidavit of Catherine Wambui Murigu (the 1st respondent) dated and sworn on even date. It was pleaded that on various dates in the year 1996, the respondents purchased the suit property and subsequently divided it into L.R. No. Ntima/Igoki 8197 - 8198 and L.R. No. Ntima/Igoki 8838 – 8841 (the suit portions).
3. The 1st respondent deposed that each of the respondents took possession of their respective portions and thereafter undertook extensive developments including constructing permanent houses. She further deposed that their occupation has been open and notorious for a period of more than 12 years.
4. From the above brief background, the respondents invited the trial court to determine whether the suit property which was subsequently divided into the suit portions was registered in the name of the appellant; whether the appellant was the legal representative of the proprietor of the suit property; whether the suit property measured one (1) acre; whether the respondents obtained the title to the suit portions of the suit property by way of the *Limitation of Actions Act* and the doctrine of adverse possession; whether the court should determine ownership of the suit property; and whether the respondents were entitled to costs.
5. The respondents' amended Originating Summons was opposed by way of an amended replying affidavit dated and sworn on 14th May, 2016 by the appellant. The appellant deposed that the issue regarding the suit property was settled in Meru High Court Succession Cause No. 121 of 1998. That the suit property was shared between herself, Geremano Samaki M'Artithi and Moses Muriungi as ordered in the Succession Case. The appellant contended that the respondents did not join the owners of the parcels of land Nos. Ntima/Igoki/8838 - 8841 and they stood to be condemned without being heard. The appellant further stated that the respondents have no case against her in view of the determination made in the Succession Cause.
6. The suit proceeded by way of oral testimony. Nancy Mwari Douglas (PW1), Catherine Wambui Murigu (PW2), Simon Bundi (PW3), John Gikunda (PW4) and Mary Wanjiku Muriithi (PW5) all testified in support of the respondents' case. Doris Kanja Kinoti (DW1) and Janet Kathure M'Kirigia (DW2) testified in support of the appellant's case.
7. Upon considering the evidence on record, the ELC found that the issue arising from the suit was whether the respondents were entitled to be declared owners of the suit portions by way of adverse possession. The ELC observed that one Moses Kinoti (Moses) (formerly the 2nd respondent herein) who was granted a share of the suit property in the Succession Cause lived alongside the other



respondents. The court was of the view that Moses having filed the suit together with the respondents, admitted that a claim lay in adverse possession. The ELC held that it was in fact the appellant, Geremano and Moses Kinoti who failed to disclose the respondents' interests in the suit property despite the fact that they had been staying therein for many years.

8. The trial court held that the appellant had not demonstrated that there was interruption in possession of the suit property occupied by the respondents since 1996. The ELC held that the respondents' evidence in this regard was uncontroverted. It was further held that the respondents proved uninterrupted and peaceful possession of the suit property for a period of more than 12 years. Accordingly, the respondents' claim was found to have merit. The ELC found that the respondents were entitled to the subdivided suit portions of land referred to as Ntima/Igoki 8197 - 8198 and 8838 - 8841 as the registered proprietors thereof. The trial court inter alia declared the subsequent sale of the suit portions as irregular and null.
9. Aggrieved by the said decision, the appellant filed the instant appeal and preferred five (5) grounds of appeal which we hereby reproduce verbatim as follows: -
 1. "The learned Judge of the Superior Court erred in law and fact by finding that the respondents had established their claim under adverse possession despite the evidence on record which was adduced by the appellant that they did not prove their case;
 2. The learned Judge of the Superior Court erred in law and in fact by finding that the 1st respondent testified in court on behalf of the other respondents yet he had no written authority to do so as the suit before the court was not a representative suit which authority was a mandatory legal requirement;
 3. The learned Judge of the Superior court erred in law and fact by failing to find that the respondents were claiming land as purchasers as per their pleading but they departed from the same when they testified in court thereby departing from their pleadings which is not sanctioned by the law;
 4. The learned Judge of the Superior Court erred in law and fact by failing to find that the respondents had all along prevented the appellant from accessing the suit property and therefore they were not occupying the land peacefully and quietly as required in a claim under adverse possession;
 5. The learned Judge of the Superior Court further erred by failing to consider the submissions and judicial authorities filed by the appellant."

Submissions by Counsel

10. The appeal was canvassed by way of written submissions. At the hearing of the appeal, learned counsel for the appellant, Mr. Karanja was holding brief for Messrs Kiogora Ariithi & Associates Advocates. Counsel submitted that the respondents as well as the interested party, (Doris Kanja Kinoti) in the Succession dispute stated that they had purchased the suit portions from Moses Kinoti when the matter was still in court. It was submitted that the 1st and 4th respondents forged documents alleging that they had purchased the suit property from one Francis M'Mboroki (Deceased). The appellant submitted that except for the 2nd respondent, the rest of the respondents have not been on the suit property for more than 12 years.
11. Counsel further submitted that the respondents entered into sale agreements with the deceased between 2000 and 2016. The matter was in the High Court in 2010 and therefore none of the respondents had established the required period for adverse possession. To support this argument,



counsel relied on the decision of *Kasuve vs Mwaani Investments Limited & 4 Others* I KLR 184 where this Court pronounced itself on what it entails to prove an adverse possession claim.

12. The appellant faulted the ELC for finding that the 1st and 4th respondents had testified on behalf of others while there was no written authority to do so as the suit was not a representative suit. Counsel further submitted that the respondents filed their claims as purchasers but they later departed from the same. Counsel asserted that the evidence of some of the respondents amounted to approbating and reprobating and the court ought to have considered this and strike out the suit. On the question whether the respondents prevented the appellant from accessing the suit property, it was submitted that the appellant was awarded a portion of the suit property in the Succession Cause and the 4th respondent admitted that the appellant was still in the parcel of land. Counsel contended that the respondents ought to have conducted due diligence before purchasing the suit property and therefore, they cannot be bona fide purchasers for value as it was held by this Court in the decision of *Muriithi Njeru vs Mary Wanjiru Njuguna & Another* [2018] eKLR.
13. In conclusion, counsel faulted the ELC for failing to consider the submissions and authorities filed on behalf of the appellant. Counsel urged that the respondents were not entitled to the prayers sought. Counsel urged this Court to set aside the judgment and decree of the ELC with costs to the appellant.
14. In rebuttal, counsel for the respondents, Messers. Otieno C. & Co Associates Advocates filed joint written submissions dated 16th April, 2023. Counsel submitted that the issue in dispute does not revolve around succession. On the allegations of fraud, it was submitted that the appellant in the trial court never raised the same. Counsel submitted that their claim as raised in the Amended Originating Summons was mainly for adverse possession arising out of peaceful possession and use of the suit portions.
15. On the allegations that the 4th respondent did not establish her claim of adverse possession, we were invited to consider the evidence on record which indicates that she had been living on her suit portion for over 14 years. It was submitted that the sale of land agreements were never produced as evidence in chief or otherwise. Counsel asserted that the respondents satisfactorily explained how they come into possession of the suit property.
16. Counsel further submitted that the appellant and her witness, Doris Kanja Kinoti (DW1) did not dispute knowledge of the respondents on the suit property, the developments made thereon for over 12 years and the peaceful co-existence. It was submitted that there was no proof to the disruption of possession.
17. On the testimony of the 1st respondent on behalf of the other respondents, it was submitted that each of the 4 witnesses took oath, gave their evidence, and were subjected to cross - examination. It was contended that their position reflected the position of all the respondents, which was not challenged in cross-examination.
18. Counsel further submitted that there was nothing on record to demonstrate that the appellant was denied access to the suit property. Counsel asserted that it is a mere allegation, which was not established. Further, that the appellant is on record stating that she had not met any of the 10 respondents which is an indication that she had never confronted any of the respondents in the purported prevention of access to the suit property. We were urged to find that there was peaceful and quiet possession of the suit property by the respondents. The respondents further urged us to dismiss this appeal with costs. Determination
19. We have given due consideration to the record of appeal before us, the written submissions by counsel, the authorities cited and the law. This being a first appeal, we have re - appraised the material before the



ELC as we are mandated to under Rule 31 (1) of the Court of Appeal Rules 2022 and our scope which was expounded in *Selle vs Associated Motorboat Company Limited* (1968) EA 123 to re- consider and re-evaluate the evidence in order to come up with our own conclusion. We are also mindful that unlike the trial court, we do not have the benefit of hearing the first account of the witnesses and as such, we should give allowance for that. As such, this appeal is determined on the issue of whether the respondents pleaded and proved their adverse possession claim.

20. The burden of proving that a person is entitled to land by virtue of adverse possession lies on the person claiming. The principles thereof are well settled that the claimant must demonstrate that he or she has been in continuous, uninterrupted, open occupation, without licence or permission of the landowner and they must have dispossessed the registered owner of the suit property for a period of not less than 12 years. This Court in the case of *Chevron (K) Ltd vs Harrison Charo Wa Shutu* (2016) eKLR pronounced itself as follows on adverse possession: -

“...Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it. See *Littledale vs Liverpool College* (1900)1 Ch.19, 21.”

21. Still on what needs to be proved in a claim of adverse possession, this Court in the decision of *Samuel Kihamba vs Mary Mbaisi* [2015] eKLR observed thus: -

“Strictly, 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 force, without secrecy, and without license or permission of the landowner, with the intention to have the land. There must be an apparent dispossession of the land from the landowner.”

22. It is common ground that the original parcel of land L.R. No. Ntima/Igoki/276 was later subdivided into L.R. No. Ntima/Igoki 8197 - 8198 and L.R. No. Ntima/Igoki 8838 – 8841, which the respondents alleged that they took possession of their respective portions in the year 1996.
23. Having perused the amended Originating Summons dated 16th September 2015, what we understood to have been the grievance of the respondents was that having lived on the subdivided suit portions for a continuous period of more than 12 years, they were entitled to their respective portions by virtue of adverse possession. The appellant refutes that the respondents filed their suit claiming adverse possession but rather that they filed their claim as purchasers for value.
24. The oral testimonies of the respondents are all geared towards the fact that they had entered into a mutual agreement by Francis Muriuki Mboroki (deceased) the father to Moses Kinoti to stay on the suit property in exchange for some services. There is nothing to demonstrate that during the trial, the issue of whether the respondents were bonafide purchasers for value was litigated upon. We have not encountered anything in the proceedings suggesting that sale agreements were produced in evidence and interrogated by the trial court.
25. In the Succession dispute, as we have read and understood from the judgment dated and delivered on 22nd October, 2010 (Kasango, J.) one of the properties which the appellant wished to be declared as part of her deceased husband’s properties was the suit property in question. However, Geremano and



Moses objected to the confirmation of grant on the basis that they had a beneficial interest in the suit parcel of land.

26. In the end, the trial court held that the suit property be subdivided equally between the appellant, Geremano and Moses. If indeed, the suit property was to be shared equally and the appellant having had her rightful share, we see no reason as to why she would want to interfere with the peaceful and quiet possession of the suit portions, which she found the respondents already living in. The person who ought to have issue with the occupation of the respondents is Moses since the respondents occupy a part of the parcel of land allocated to him.
27. Furthermore, in the amended replying affidavit, the appellant did not sufficiently respond to or attempt to disprove the allegations raised by the respondents in their Amended Originating Summons. For instance, the occupation of the respondents in their respective suit portions is anchored on the argument that they have lived on their respective portions for an uninterrupted period of 12 years which assertion was uncontroverted by the appellant in her response. What the appellant is trying to argue now is that the trial court did not consider her submissions and authorities. We need not to elaborate more on the principle that submissions are not evidence. Evidence must be subjected to the rules of evidence which submissions cannot be done.
28. In the premise, we find that the respondents did prove that they had been in occupation in the suit portions for a period of more than 12 years and that they are entitled by law to titles to their suit portions of land by way of adverse possession.
29. As we conclude our findings, we do note that the appellant in this appeal has argued that the suit was not a representative suit and therefore the trial court erred in allowing the 1st and 4th respondents to testify on behalf of the respondents. We once again note that there was no objection raised by the appellant in the trial court concerning production of a letter of authority. In *Visram & Karsan vs. Bhatt* (1965) EA 789, the predecessor of this Court held that where an issue which has not been pleaded or canvassed is raised for the first time on appeal, it should not be allowed to be argued unless the evidence establishes beyond doubt that the facts, if fully investigated, would have supported the plea of the party seeking to raise the new issue. Therefore, we cannot address ourselves on this issue since it was not a subject of contention before the trial court.
30. In the circumstances, upon exercising our mandate to re – evaluate the evidence of the trial court, we are unable to find the point of error in the decision of the ELC. We find that the respondents sufficiently proved the ownership of the suit portions they currently occupy by dint of the doctrine of adverse possession.
31. We find no merit in this appeal. It is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NYERI THIS 17TH DAY OF JANUARY, 2025.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE



JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

