



Kariuki v Mica (Civil Appeal 196 of 2018) [2025] KECA 31 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KECA 31 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 196 OF 2018
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
JANUARY 17, 2025

BETWEEN

JONAH MUCHOKI KARIUKI APPELLANT

AND

RAHAB WANJA MICA RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court of Kenya at Murang'a (J. G. Kimei, J.) dated 23rd February 2018 in ELC Case No. 318 of 2017)

JUDGMENT

Introduction

1. This is a first appeal. Jonah Muchoki Kariuki, (the appellant), appealed against the decision of the Environment and Land Court (ELC) (J. G. Kimei, J.) delivered on 23rd February, 2018 that found in favour of Rahab Wanja Mica, (the respondent), and allowed the respondent's claim of adverse possession against the appellant over land parcel No. Loc.2/Kinyona/T.28 (the suit property).
2. In context, the respondent moved the ELC via Originating Summons dated 25th September, 2008 seeking orders inter alia that she is entitled by way of adverse possession to the suit property registered in the name of the appellant and 4 other parcels of land No. Loc. 2/Kinyona/T.27, 29, 30 and 31 registered in the names of other persons not named as parties to the suit. The reasons in support of the summons were that the respondent had been in possession and occupation of the said plots for more than 12 years preceding the suit and that the appellant's title was obtained fraudulently. In an affidavit in support of the summons, the respondent averred that she was born and lived with her parents on the suit property;

she got married in the year 1965. That her marriage broke down in the year 1973 when she went back to live on the suit property with her mother who died in the year 1978 leaving her in occupation of the suit property with her children to the time of filing the suit (2008). The respondent further averred that she lived on the suit property for about 35 years after



her mother's death and was surprised when the local Area Chief summoned her on a claim by the appellant and asked her to vacate the suit property hence the suit.

3. In response to the respondent's summons, the appellant, by an affidavit dated 4th November 2008 deponed that the respondent was not entitled to the orders sought in the summons for various reasons. Among the reasons were that the respondent had failed to demonstrate that she had acquired the suit property by way of adverse possession under Section 37 and 38 of the Limitation of Actions Act and by the respondent's failure to extract an abstract of the title to the suit property to show when the appellant obtained title to the said suit property.
4. In his written statement the appellant stated that he bought the suit property from the first registered owner in 1971. The title in respect of the suit property was issued to the first registered owner in 1963. That the appellant was registered as absolute proprietor of the suit property in 1971 but the title deed was issued to him in 2001. That since he acquired the title in 2001, this is when time started running under Section 37 and 38 of the Limitation of Actions Act and the respondent's summons having been filed in 2008, 12 years had not yet lapsed as required by law for granting the order of adverse possession sought. The appellant also picked issue with the respondent's move of suing him alone without enjoining the registered owners of the other 4 parcels of land that she was claiming.
5. After considering the evidence before it, the ELC outlined the issues for determination as: whether the appellant had made out his case in respect of all or any of the 5 parcels of land; and whether the claim of fraud against the appellant was proved. In determining the said issues, the ELC found that the respondent was not entitled to an order of adverse possession for the 4 parcels of land No. Loc.2/Kinyona/T.27, 29, 30 and 31 and the prayer for the same was struck out for non-joinder of the registered owners.
6. Regarding parcel of land No. Loc.2/Kinyona/T.28 registered in the name of the appellant, the ELC relied on the authority of this Court in the case of Githu vs Ndeeta [1984] KLR 776 where it was stated that "a change of ownership does not interrupt a claim for adverse possession", found in favour of the respondent and held that the respondent had met the test for granting the orders sought over the suit property. Further, the ELC held that the respondent abandoned her claim of fraud against the appellant during the hearing.
7. The ELC thus ordered as follows:
 - i. The plaintiff (respondent herein) has been entitled by way of adverse possession to all that piece of land comprised in title number Loc.2/Kinyona/T.28 in Murang'a district registered in the name of the Defendant (appellant herein) because the plaintiff has been in possession and occupation for more than 12 years immediately preceding the presentation of the suit.
 - ii. The defendant's title to the said piece of land that is Loc.2/Kinyona/T.28 measuring ¼ of an acre or thereabout has been extinguished in favour of the plaintiff under section 37 and 38 of the Limitation of Actions Act.
 - iii. The defendant do transfer to the plaintiff the suit premise being land parcel no. Loc.2/Kinyona/T.28 free from all encumbrances, failing which the Deputy Registrar of this court (the ELC) be authorized to sign all necessary documents and transfer forms, and application for consent of the land control board to ensure that the plaintiff is registered as the owner of the said piece of land free from all encumbrances.
 - iv. Costs shall be borne by the defendant.



8. It is this finding that provoked the appeal herein. The appellant filed his notice of appeal against the judgment of the ELC delivered on 23rd February 2018. The appellant, in the Memorandum of Appeal sought for the appeal to be allowed and that the respondent's suit for adverse possession be dismissed with costs.
9. The appellant's grounds of appeal are that the ELC erred in law and in fact by:-
 - a. Allowing the respondent's claim for adverse possession against the appellant on her failure to note the following glaring errors in the respondent's evidence:
 - i. The statutory period of 12 years between the time the appellant got title deed to land parcel no. Loc.2/Kinyona/T.28 (suit property) in 2001 and 2008 when the suit for adverse possession was filed had not lapsed.
 - ii. The respondent had placed a caution on the suit property claiming licensee's interest which interest cannot transform or crystalize to adverse possession.
 - iii. By the mere fact that the respondent pleaded in her Originating Summons that the appellant had obtained the suit property fraudulently, the claim for adverse possession would not suffice.
 - iv. The allegation and averments in the respondent's pleading that the appellant's title for the suit property was obtained illegally and through fraud and the mere fact that the respondent did not recognize the validity of the appellant's title to the suit property, the suit on adverse possession was unsustainable.
 - b. Granting the respondent an order for adverse possession while in the evidence in cross-examination, she categorically stated that she wanted the appellant to vacate from the suit property inferring that she was not in exclusive possession of the suit property and her claim for adverse possession was thus unsustainable.
 - c. Failure to note that the appellant got title of the suit property and immediately asserted his rights as the owner as result of which the respondent filed the suit for adverse possession in 2008 when the statutory period of 12 years had not lapsed.
 - d. Observation in abstract that the respondent vacated the ground of fraud and proceeded with his claim on adverse possession while there was no evidence to that effect and no application to amend his pleadings thus arrived at a wrong decision
 - e. Failure to note that parties are bound by their pleadings and the moment the respondent pleaded fraud in his pleadings and indeed lodged a caution to the title claiming licensee's interest, the claim for adverse possession ought to have collapsed.

Submissions by Counsel

10. The appeal was disposed of by way of written submissions which were highlighted by counsel for the parties during the hearing. The appellant through his advocates Messrs Kirubi, Mwangi Ben & Co. Advocates filed his written submissions while the respondent through Messrs P.K Njoroge & Co Advocates filed her written submissions.
11. Learned counsel for the appellant, Mr. Kirubi submitted on the mandate of this Court as the first appellate court to re-evaluate the evidence and draw its own conclusions. Reliance was placed in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] E.A 123 and *Peter vs Sunday Post Limited* [1958] E.A 424. On the issues before the Court, the appellant submitted that



the copy of the green card in respect of the suit property showed that the appellant was registered as the proprietor in 1971. However, acquisition of the title occurred in 2001. That the respondent had a burden to demonstrate that she occupied the suit property continuously, peacefully and for an uninterrupted for a period of 12 years from the date when the appellant acquired title. Counsel asserted that time starts running when the appellant acquired the title and not when he was registered as owner. Accordingly, while the suit was filed in 2008, the cause of action had not accrued, it was premature and a non-starter.

The appellant's counsel submitted further that the statement by the respondent before the ELC was that the appellant's title was obtained fraudulently yet she sought to have the said title extinguished in her favour by way of adverse possession. It was the appellant's submissions that the above statement by the respondent failed to recognize the appellant's title as genuine but fraudulently obtained thus her claim for adverse possession ought not to have succeeded.

12. Learned counsel Mr. Nabutete holding brief for learned counsel Mr. P.K. Njoroge for the respondent opposed the appeal. Counsel submitted that by virtue of Sections 7, 13 and 38 of the *Limitation of Actions Act* the trial court rightly declared the respondent as entitled to the suit property by way of adverse possession. Counsel submitted that the appellant failed to give evidence in support of his alleged purchase of the suit property and that he confirmed through his testimony that he was not living on the suit property and had not developed the same but that it was the respondent who was in occupation of the suit property. Counsel further submitted that the appellant also confirmed that when he allegedly bought the suit property, the respondent's family was in occupation. That the appellant's proprietary rights over the suit property were extinguished by effluxion of time. Counsel relied on this Court's decision in *Kasuve vs Mwaani Investments Limited & 4 Others* (1984) KLR in support of that proposition. It was the respondent's further submissions that the instant appeal does not merit overturning the judgment of the ELC, urging the Court to dismiss it with costs and reaffirm the trial Court's judgment.

Determination

13. As a first appeal and as submitted by the appellant, the court reminds itself of its mandate as the first appellate Court to re-evaluate the evidence, assess it and reach a conclusion bearing in mind that it neither saw nor heard the witnesses and make due allowance for that. See Rule 31 (1) of the Court of Appeal Rules 2022 and this Court's decision in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR. See also *Selle & Another vs Associated Motor Boat Co Ltd & Others* (supra).
14. We have considered the record of appeal, the submissions by both parties, the authorities cited and the law. We discern that the only issue for determination before this Court is whether the respondent was entitled to the suit property by way of adverse possession.
15. Turning to the issue for determination, as to whether the respondent met the threshold to be declared an adverse possessor of the suit property, we restate the definition of adverse position as expressed by A. Makhandia JA in *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR in the following terms:

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



16. The respondent's claim was anchored on the provisions of Sections 7, 13, 37 and 38 of the Limitation of Actions Act. Section 7 thereof provides that:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to same person through whom he claims, to that person.

Section 38 thereof provides that:

“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.”

17. The threshold for a claim of adverse possession was laid out in the case of *Kimani Ruchine vs Swift Rutherford & Co Ltd* [1980] KLR that:

“The plaintiffs have to prove that they have used this land which they claim, as of right: nec vi, nec clam, nec precario

... The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration.”

18. We have re-evaluated the evidence as part of our mandate and taken note of the appellant's testimony in part as follows:

“I do not live on T.28. I have not constructed any building either. It is occupied by Rahab the plaintiff.

...

I bought the T.28 in 1971 from Ephraim Kuria and was registered in 2001. The plaintiff was in occupation through her family.”

19. From the above testimony, the appellant confirmed to the ELC that he was not in occupation or possession of the suit property despite having bought the same from one Ephraim in 1971. That the respondent's family occupied the suit property. This evidence tallies with the respondent's testimony that she was born on the suit property and lived thereon until she was married in 1965 and returned to live on the suit property with her children in 1973 when her marriage broke down. Further, that she remained thereon even as at the time of filing of the summons in the year 2008. It is therefore not in doubt that the respondent's occupation and possession of the suit property was well known by the appellant who did nothing to interrupt the respondent's open and continuous possession.

20. From the pleadings and the testimony given, it is clear that the appellant's contention is not about the respondent's open, continuous and uninterrupted possession of the suit property but that the statutory 12 years' period had not lapsed from 2008 when the respondent filed suit.



According to the appellant, time started running against him in 2001 when he acquired the title. A similar argument was raised in the case of Douglas Mbugua Mungai vs Harrison Munyi [2019] eKLR where this Court held that:

“The issue in the Githu case was whether the mere change of ownership of land that is occupied by another under adverse possession would interrupt such person’s adverse possessions. And the answer was correct that where the person in possession has already begun and is in the course of acquiring rights under section 7 of the *Limitation of Actions Act*, those rights are overriding interests by virtue of section 30(f) of the RLA, to which the new registered purchaser’s title will be subject.”

Further, in Titus Kigoro Munyi vs Peter Mburu Kimani [2015] eKLR, this Court observed that:

“It must be noted that under section 7 of the *Limitation of Actions Act*, the law relating to prescription affects not only present holders of the title but their predecessors.”

21. From the foregoing authorities, it matters not when the appellant became the registered owner. Of importance is whether the respondent was in possession of the suit property and her rights as an adverse possessor had crystallized as at the time the appellant acquired the title. Going by the appellant’s own testimony, the respondent was in occupation of the suit property in 1971 when he bought the land. As such, the acquisition of the title to him in 2001 was subject to the respondent’s overriding interest protected by Section 30(f) of the Registered *Land Act* (now repealed).
22. As regards the issue of fraud pleaded by the respondent, we are in agreement with the ELC that the same was abandoned during hearing as evidenced by the proceedings.
23. It is also urged by the appellant that the respondent had placed a caution on the title claiming a licensee’s interest. The same can be gleaned from the copy of the green card produced in court during trial.
24. However, the appellant did not plead to be the licensor of the respondent. There was no evidence led regarding who gave the licence for the respondent’s occupation on the suit property. From the record, the evidence tendered was that the respondent was born on the said land and as confirmed by the appellant, the respondent lived thereon with her parents and continued to live thereon even after her parents’ demise. With that, we find that the trial court rightly held that there was no evidence indicating that the respondent’s occupation and possession of the suit property was permissive.
25. From the foregoing, we conclusively find that the appeal lacks merit. We find no reason to disturb the findings of the ELC. The appeal is hereby dismissed with costs to the respondent. It is so ordered.

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

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE



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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

