Ndeto (Suing as a legal representative of James Mutua Ngui - Deceased) v Chania Enterprises Ltd & Nominees (Civil Appeal 121 of 2019) [2025] KECA 299 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 299 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 121 OF 2019

PO KIAGE, WK KORIR & GV ODUNGA, JJA

FEBRUARY 21, 2025

BETWEEN

JUSTINAH NZILANI NDETO (SUING AS A LEGAL REPRESENTATIVE OF JAMES MUTUA NGUI - DECEASED) ..... APPELLANT

AND

CHANIA ENTERPRISES LTD & NOMINEES ..... RESPONDENT

(An appeal from the judgment of the Environment and Land Court of Kenya at Makueni (C.G. Mbogo, J.) dated 19th November 2018 in E&LC Case No. 104 of 2017)

JUDGMENT

Judgement of Kiage,JA

1. I have had the advantage of perusing in draft the judgment of my learned brother Korir, JA with which I am in agreement.

2. It is safe to say that the law on adverse possession in this jurisdiction is firmly settled, with Mtana Lewa Vs. Kahindi Ngala Mwagandi [2015] KELA 532 a decision of this Court sitting in Malindi, being a valuable treatise on the subject and tracing its jurisprudential journey in our courts.

3. For one to succeed in such a claim, he must show that he has been in possession (with actual occupation being the best form of such possession) of the property of the true owner, without such owner's permission and in a manner hostile, adverse, prejudicial and defiant of the rights of that owner for a period of at least twelve years. The possession has to be actual, effective and continuous, so that mere occasional visits to the land, in a touch-and-go fashion, cannot suffice to dispossessed the titleholder.

4. Such possession-based dispossession, which must be without right, without secrecy and without violence on the part of the trespasser-now-turned-claimant, must be proved by evidence. Only if there has been such dispossession of the title holder by the adverse possessor or, in the alternative,

the voluntary abandonment of the land in question coupled with the adverse possessor's entry and continued occupation for the prescribed period can the trespasser have acquired title by prescription, having literally and displaced the title holder from the position of owner.

5. In the present case, the essential ingredients remain unsatisfied as the true owner's title was never seriously denied and it seems clear that that owner, the respondent, gave permissions to members of the appellant's family to continue in occupation and had even considered hiving off some 5 acres for their benefit.

6. As to the original appellant himself, the evidence clearly established that he only visited the suit land sporadically, as he and his family resided elsewhere. He did not establish adverse possession as understood in law.

7. Being so satisfied myself, I readily agree with Korir, JA that this appeal is for dismissal, and with costs.

As Odunga, JA also agrees, it is so ordered.

Judgment Of Korir, J.A

1. The original appellant, James Mutua Ngui ("James"), passed away on 23rd June 2019 during the pendency of this appeal and through an order of this Court issued on 23rd April 2021, he was substituted by the current appellant, Justinah Nzilani Ndeto. James had moved the Environment and Land Court (ELC) at Makueni through an originating summons, seeking to be declared the lawful owner by reason of adverse possession of land parcel number Makueni/Kikumini/460 ("the suit property"), registered in the name of Chania Enterprises Ltd and Nominees ("the respondent"). In the judgment delivered on 19th November 2018, C.G. Mbogo, J. dismissed the summons, finding that James had not satisfied the threshold for grant of an order of adverse possession. The appellant is now before this Court raising four grounds of appeal as follows:

    i. The Honourable Judge erred in both law and in fact in finding that the appellant had not established that he had acquired title to the subject parcel of land (No. Makueni/Kikumini/460) by reason of adverse possession thereof, when evidence on record showed that he had.

    ii. The Honourable Judge erred in both law and in fact by failing to assess all the evidence presented by the appellant and his witnesses and proceeding to make a decision that was against the weight of evidence.

    iii. The Honourable Judge erred in both law and fact in failing to enter Judgement in favour of the appellant, in view of the evidence presented.

    iv. The Honourable Judge erred in both law and fact in failing to find and to hold that the respondent did NOT in any way rebut the evidence presented by the appellant and that to a great extent, the evidence presented by the respondent supported the appellant's claim.

2. The basis of James' claim was as per the affidavit he swore on 10th February 2010, in support of the originating summons and a supplementary affidavit sworn on 20th September 2016. It was his averment that he was a son of Ngui Mbuvi, who was the first registered owner of the suit property. That on 1st February 1973, the suit property was charged in favour of Kenya Commercial Bank with respect to a loan facility of Kshs. 25,000. In 1979, Kenya Commercial Bank auctioned the property, which was acquired and duly registered in the respondent's name on 10th August 1979. It was his deposition that after obtaining the registration, the respondent never took possession of the suit property. According to James, he had continued to live openly, continuously, and uninterrupted on the suit property for

over 30 years alongside his elderly mother and siblings, some of whom had died, and their remains interred in the suit property. James claimed that it was not until February 2010, that the respondent attempted to take possession of the suit property. It was his position that he was by law entitled to be registered as the owner of the suit property by way of adverse possession.

3. At the hearing of the summons, James testified as PW2, stating that he was a son to the late Mbuvi Ngui, who was registered as the first owner of the suit property on 1st September 1967. His elder brother requested their father to guarantee him to secure a loan facility of Kshs. 25,000 from Kenya Commercial Bank, which loan his brother did not repay. On 26th August 1975, the suit property was advertised for sale by the bank in the Standard Newspaper and auctioned in 1976. The land was sold to the respondent and registered on 10th August 1979, with the title deed being issued on 25th May 1990. He went on to state that his father, who died in 1996, his mother Beth Mukule Ngui (PW1), his brother Mwonga Joseph, one Ndaka and three of his sisters by the names of Phyllis Mumo, Beatrice Muendi and Joyce Nthenya, as well as himself, all lived on the land. James stated that they not only lived on the land but also reared livestock therein. He further asserted that his family members were all settled on the land when the respondent acquired it, that the respondent has never required him and the others to vacate the land, and that their occupation had never been interrupted in any way by the respondent or its agents. According to him, it was not until 2010 that he received a call from his nephew, Musembi, informing him of encroachment by the respondent's agents. He denied any communication with any agent of the respondent regarding their continued stay on the suit property before 2010. James conceded that he lived in Mombasa where he worked and resided in Kibwezi where he had settled although he used to farm on the suit property.

4. The second witness for the appellant was Beth Mukule Ngui (PW1), who adopted her affidavit sworn on 16th September 2015. It was her averment that, alongside her family, she had lived on the suit land since the 1960s and that she had never seen the respondent or its agents lay claim over the suit property. She maintained that her stay on the suit property was never interrupted by anyone, let alone Winfred Nyiva Mwendwa (DW1), who she denied ever knowing or meeting. On cross- examination, she insisted that the suit property was hers and denied being aware of the sale of the land, by a bank. She, however, admitted that someone had visited the land at a time she could not recall claiming to have bought it from a bank and that one, David Wambua Masika had indeed discussed the fate of the land with James.

5. John Ngovi Kioko (PW3) also adopted his statement dated 21st November 2014 as his evidence in chief. Therein, he stated that he was a neighbour to the family of the late Mbuvi Ngui, who owned the suit property. He denied knowing anyone claiming ownership of the suit property which the family of the late Ngui peacefully occupied. In cross-examination, he testified that he did not know if James had another home in Kibwezi but that it was Beth Ngui and her husband who lived on the suit property. The witness denied being aware of the sale of the land, admitting that he would not ordinarily know of persons visiting the suit property.

6. On the side of the respondent, Winfred Nyiva Mwendwa (DW1) adopted the depositions in her replying affidavit sworn on 2nd March 2015. Her evidence was that she was a director of Chania Enterprises Limited. She averred that the respondent owned the suit land after buying it in an auction. She testified that she had visited the property numerous times when she would ordinarily find PW1 at the suit premises. She stated that when the respondent acquired the suit property, PW1 had a home situated on it and there were some family graves. She had ceased visiting the land after the suit was filed. According to her, she engaged a valuer called David Wambua Masika to value the land and voluntarily offered PW1 five acres of the land. She insisted that PW1 was on the land with her permission and knowledge. On cross-examination, she reiterated her willingness to grant PW1 five acres of the suit land. She also reiterated that the respondent acquired registration of the suit property on 10th August

1979. She acknowledged that she had not written any letter to PW1 indicating the terms under which she allowed her continued stay on the property but testified that her consent for the continued stay was made verbally. Further, that the Ngui family was not utilizing the whole land but was only farming around the homestead.

7. When this appeal was placed before the Court for hearing, neither party had filed submissions. At the hearing, the respondent was neither present nor represented, while learned counsel Mr. Mundia appeared and urged the appellant's case orally.

8. Counsel addressed the first ground of appeal, which he indicated would encompass the other grounds. Counsel submitted that five primary conditions must be met for a claim of adverse possession to succeed. Counsel pointed out that the evidence on record was sufficient to establish the five prerequisites. He urged that the learned Judge erred in finding that the appellant was not qualified to lay a claim of adverse possession. Counsel also insisted that there was evidence that the appellant was not only in occupation but also had developments on the suit property. He also pointed out that the appellant's stay on the suit property was continuous and that the respondent did not interfere. Further, the fact that the appellant also lived in Kibwezi did not in any way extinguish his claim for adverse position. Counsel referred to the holding in Public Trustee vs. Wanduru Ndegwa [1984] KECA 72 (KLR) to bolster the submissions.

9. We are seized of this matter on a first appeal and therefore our duty as enshrined under rule 31 (1) (a) of this Court's Rules, 2022 is to re-appraise the evidence and draw inferences of fact so as to arrive at an independent decision. In delivering on this mandate, we are also alive to the holding in Makube vs. Nyamuro [1983] eKLR that:

> " However, a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."

10. I have carefully addressed my mind to the record of appeal and the submissions by counsel for the appellant. In my view, the only issue for determination is whether the appellant made a case for invocation of the doctrine of recent possession in pursuit of his proprietary rights over the suit property.

11. The doctrine of adverse possession finds its statutory underpinning in section 7 of the *Limitation of Actions Act* which provides as follows:

> " 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 some person through whom he claims, to that person."
>
> Additionally, it is also prudent to point out that sections 17, 37, and 38 of the *Limitation of Actions Act* further provide for the procedure for registration of property acquired through adverse possession.

12. The doctrine of adverse possession has received sufficient attention from the courts of this country. To fully appreciate this doctrine, I find the definition by Makhandia, J.A in Mtana Lewa vs. Kahindi Ngala Mwagandi [2015] KECA 532 (KLR) to be concise. He defined the doctrine thus:

> " 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, which in Kenya, is twelve (12) years."

His Lordship proceeded to identify the ingredients of the doctrine as follows:

> " 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 or 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."

13. It is, therefore, without doubt that in the dispute, the onus lay with the appellant to prove and demonstrate that he had occupied the land openly and without the land owner's permission for over 12 years. The appellant was also required to establish that there was an apparent dispossession of the land from the landowner. Those prerequisites were reiterated by the Court in Chevron (K) Ltd vs. Harrison Charo Wa Shutu [2016] KECA 248 (KLR) as follows:

> " 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."

14. In this case, the parties agreed the respondent acquired registration of the suit property on 10th August 1979, and a title deed was issued on the 25th May 1990. This was after the property had been auctioned by Kenya Commercial Bank upon failure by the appellant's brother to pay a loan of Kshs. 25,000. The parties were also in agreement that even after the acquisition of the suit property, the respondent did not evict the family of Mbuvi Ngui from the suit land and that as at the time of filing the suit property, Beth Mukule Ngui (PW1), was still living on the suit property.

15. The point of divergence between the parties is whether the appellant was indeed in continuous occupation of the suit property. From the evidence of James and his witnesses, James lived and worked in Mombasa and had another home in Kibwezi, which he acquired in 1993. DW1 denied meeting James during her visits to the suit property and said she would ordinarily meet his mother Beth Mukule Ngui.

16. It must be recalled that it is not Beth Mukule Ngui but James who had sued for adverse possession. The question that begs to be answered is whether the case put forth by James established a continuous dispossession of the respondent of the suit property. In Teresa Wachuka Gachira vs. Joseph Mwangi Gachira [2009] eKLR, the Court considered the issue of dispossession to be a question of fact,

depending solely on the evidence and peculiar circumstances of each case. In that case, the Court held that:

> " We have considered the evidence on record ourselves and we are satisfied that the appellant did not discharge the onus placed on her in establishing a case for entitlement to the disputed land through adverse possession. There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing or cultivation depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor."

17. I also find useful the decision of the Court in Robert Shume, Kazungu Dzombo, Nicholus Ngolo Gona & Lucy Buya vs. Samson Kazungu Kalama [2015] KECA 185 (KLR) wherein it cited with approval a passage in Wabala vs. Okumu [1997] LLR 608 (CAK) that:

> " Similarly in Wabala vs. Okumu [1997] LLR 608 (CAK), this Court emphasized that:
>
> "Thereafter he left and he had not lived there upto the time he was sued in 1990. The house which he had built on the land and which constituted tangible or physical evidence of his occupation had fallen down. That means that the only form of "occupation" the respondent had over the land was cultivating it. That in these circumstances, the learned magistrate was perfectly justified in coming to the conclusion that the respondent had failed to prove that he had been in occupation of the land for a continuous period of twelve years. We think that it would not only be wrong but also dangerous to introduce the concept of constructive occupation. To be able to acquire title to land registered in another person's name, one had to literally be in occupation of the land, for mere presence of crops on land may not necessarily mean that the grower of such crops is asserting a claim of ownership to the land. As the lawyers of old used to say, the occupation must be nec vic, nec clem, nec precario."

18. From the evidence, it was not clear as to when the period of 12 years started running. Indeed, James' assertion of dispossession was that his mother (PW1), his brothers and sisters lived on the land continuously. On his part, he stated that his own family lived in Kibwezi and that he only farmed on the suit land. There is also a corroborated assertion by DW1 that she frequently visited the suit land and always met PW1, to whom she was amenable to hiving off 5 acres for her occupation. Even though PW1 could not recall when she encountered the new owners of the suit land, she acknowledged encountering someone laying claim on the suit land and even one David Wambua Masika who DW1 confirmed was the valuer she had sent to the suit property. Her testimony that David Wambua Masika was dealing with James contradicted the testimony of James that he had never dealt with the registered owner of the suit property.

19. From the evidence available for my consideration, two aspects remain a mystery. First, I am unable to ascertain the 12 years in which the appellant was allegedly in possession of the suit property. Secondly, there is no evidence that James continuously dispossessed the respondent of the suit land. The case put forth by James failed to satisfy the test established by the Court in Richard Wefwafwa Songoi vs Ben Munyifwa Songoi [2020] eKLR thus:

> " A person who claims adverse possession must inter alia show:
>
> a. On what date he came into possession.
>
> b. What was the nature of his possession?

c. Whether the fact of his possession was known to the other party.

d. For how long his possession has continued and

e. That the possession was open and undisturbed for the requisite 12 years."

20. From the foregoing analysis, I find that the trial court correctly addressed its mind to factors that establish adverse possession, analyzed the evidence, and arrived at a proper decision that the occupation, if any, was not uninterrupted. In the circumstances, there is no basis for faulting the conclusion of the trial Judge that:

> " Given the above circumstances, my finding is that there is no evidence to show that the Plaintiff/ Applicant ever dispossessed the Defendant off its land. It seems to me that the Plaintiff/Applicant is hiding behind Beth (PW1) and his siblings in an attempt to justify his claim for adverse possession. He cannot succeed in light of the glaring evidence that Beth (PW1) is on the suit land with permission from the Defendant/Respondent. There is no evidence of the Plaintiff/Applicant having occupied the Defendant/Respondent land openly and without force for a period of 12 years as he spends most of his time in Kibwezi."

21. As was held by this Court (per Hancox, JA), in Mohamed Mahmoud Jabane vs. Highstone Butty Tongoi Olenja [1986] eKLR:

> " this Court...will not lightly differ from the findings of fact of a trial judge who has had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."

22. The upshot is that the appeal lacks merit and I would dismiss it with costs to the respondent.

23. Notwithstanding the outcome of this appeal, it is hoped that DW1's magnanimity has not been extinguished by the unnecessary litigation and the directors of the respondent are still magnanimous enough to carve out a portion of the suit property for Beth Mukule Ngui or her beneficiaries, should she no longer be with us.

Judgment Of Odunga, JA

1. I have had the advantage of perusing in draft the judgments of my Lords Kiage, JA and Korir, JA and I am in full agreement.

2. Once there is evidence that the possession of the land claimed by way of adverse possession was by consent of the owner, the burden is upon the claimant to prove at what point in time that possession became adverse to the interest of the owner. Failure to do so renders the claim to land by way of adverse possession untenable.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY 2025.

P .O. KIAGE

JUDGE OF APPEAL

W. KORIR

JUDGE OF APPEAL

G. V. ODUNGA

JUDGE OF APPEAL

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

Signed

Deputy Registrar