



REPUBLIC OF KENYA



KENYA LAW
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**Njuguna v Kamau (Civil Appeal 53 of 2019)
[2025] KECA 368 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 368 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 53 OF 2019
W KARANJA, J MOHAMMED & LK KIMARU, JJA
FEBRUARY 21, 2025**

BETWEEN

PETER MUCHOKI NJUGUNA APPELLANT

AND

ELIAS MWORORO KAMAU RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court at Murang'a (J.G. Kemei, J.) dated 12th April 2018 in ELC CASE NO. 19 OF 2017 (O.S))

JUDGMENT

1. The appellant took out an Originating summons filed on 3rd January 2013 against the respondent. The suit property in dispute is Loc 16/Mbugiti/2102.
2. The appellant asked the court to determine the following questions; that the appellant is entitled to be registered as the proprietor of all that parcel of land known as Loc 16/Mbugiti/2102 by way of adverse possession; that the respondent's title has been extinguished by dint of section 17 of the *Limitation of Actions Act*; and that the appellant be registered as the proprietor of the suit land under section 38 of the Limitations of Actions Act.
3. The suit property is registered in the name of the respondent. In the Originating Summons, the appellant sought to be declared the rightful owner of the suit property by virtue of the application of the doctrine of adverse possession.
4. In support of the originating summons, the appellant asserted that the suit property was a resultant sub-division of Loc. 16/Mbugiti/143 originally registered in the name of Kamau Mwororo, the respondent's father now deceased, and also his uncle. That during the land demarcation in 1960s Loc. 16/Mbugiti/143 was registered in the name of Kamau Mwororo to hold on his behalf and that of Njuguna Mwororo who died before the said consolidation. The appellant is the son of the said Njuguna Mwororo.



5. Further, that in 1986, he took over possession of a portion of two acres of the suit property out of Loc 16/Mbugiti/143 and has been living on the said land to date. That in 2005 the respondent and one Teresia Wanjiru Kamau subdivided Loc. 16/Mbugiti/143 into two creating Loc. 16/Mbugiti/2102 measuring 2 acres, the suit property. That the respondent's title was therefore extinguished in 1998, after a period of 12 years.
6. In opposing the Originating Summons, the respondent filed his replying affidavit where he denied that his father Kamau Mwororo was registered as trustee of Loc.16/Mbugiti/143 on behalf of the appellant's father Njuguna Mwororo. He stated that Kamau Mwororo was the owner of Loc.16/Mbugiti/143. That Kamau Mwororo had 2 other brothers and he could not have been a trustee of only one of them if indeed the land was family land. He confirmed that the respondent is the son of Njuguna Mwororo.
7. He deponed that the appellant's occupation of the land was as a licensee pursuant to the permission given by his father on humanitarian grounds. And that the respondent and his mother Teresia Wanjiru Kamau became registered owners of Loc.16/Mbugiti/143 pursuant to the certificate of confirmation of grant of letters of administration issued on 21/6/2004 in Succession Cause No. 75 of 2001. That the appellant's father died in 1992 while the respondent's father died in 2001 as evidenced in the death certificates presented to court. That the appellant's father never raised any claim on the suit land during his lifetime. That original land was later subdivided into 2 portions creating Loc.16/Mbugiti/2102 (suit land) and 2103.
8. That the respondent's grandfather Ikuu Mwororo owned Loc.16/Gatura/112 and upon his death his estate was distributed vide a certificate of confirmed grant issued on 18.3.2011 as follows;
 - a) Nganga Mwororo - 1.4 acres
 - b) Julia Njeri Mwororo - 1.1 acres
 - c) Sarafina Njeri Njuguna - 1.2 acres
 - d) John Kanyori Mwangi - 1.2 acresThat the appellant's mother Sarafina Njeri Njuguna was allocated her husband's share in their grandfather's estate.
9. The respondent further stated that he gave notice to the appellant on 17th September 2012 to vacate the suit property by 31st December 2012 because the appellant and his family were given their share of the family land i.e Loc.16/Gatura /112.
10. The case was heard by way of viva voce evidence. In a judgment dated 12th April 2018, J.G. Kemei J. dismissed the appellant's claim of adverse possession. The learned Judge determined that the appellant failed to prove the assertion that he has acquired title to the suit property by way of adverse possession.
11. The appellant, aggrieved by this decision, lodged this appeal. He has proffered four (4) grounds of appeal, faulting the learned Judge for: dismissing his suit for adverse possession when there was weighty and enough evidence by the appellant and his witnesses for adverse possession; failing to note that the appellant had proved that he was in exclusive possession of the suit property openly and as of right without interruption from the respondent for a period of twelve (12) years from 1986 after dispossessing the respondent and by discontinuation of possession by the owner of his own volition; failing to note that the appellant's physical entry and actual possession of the respondent's land was non-permissive, unequivocally exclusive and with the clear intention of excluding the owner (animus possidendi) and that such non permissive entry was inconsistent with the respondent's enjoyment of



- the soil; and when she held that the occupation of the appellant on the respondent's Land Parcel No. Loc 16/Mbugiti/2102 was with the consent and permission of the registered proprietor of the suit property whereas the evidence on record was that the appellant was allowed to enter the respondent's parcel by third parties i.e. his father and his uncles.
12. The appeal was canvassed by way of written submissions. Learned counsel, Mr. Mwangi Ben appeared for the appellant while Mr. Kamau Mwangi appeared for the respondent.
 13. Mr Mwangi Ben submitted that from the record, the original mother title of land parcel Loc.16/Mbugiti/2102 the suit property was Loc.16/Mbugiti/143 which was registered in the name of the respondent's father Kamau Mwororo during land consolidation and demarcation in the 1960's to hold in trust for the appellant's father.
 14. It was submitted that in 1986 the appellant, his father and siblings came back from Nyandarua (Njabini) where they had settled and the respondent in the presence of other members of his family showed them where to build, on the respondent's parcel of No. Loc.16/Mbugiti/143. It was submitted that the appellant's entry in the said land was peaceful and quiet.
 15. Further it was submitted that parcel No. Loc.16/Mbugiti/143 was sub-divided into two parcels being Loc.16/Mbugiti/2103 and that the appellant continued to occupy, use and stay on the former parcel No.2102 comprising of about 2 acres without any objection from either the respondent's father or the respondent. It was submitted that evidence was led to show that since 1986 the appellant built a house, cultivated subsistence crops as well as tea bushes.
 16. It was further submitted that the appellant's version at the trial court was that since 1986 when he entered into the suit property the respondent did not take any steps to assert his proprietary rights on land parcel Loc.16/Mbugiti/2102 up to the time of filing the suit at the trial court on 3rd January 2013, a period of over 27 years. It was thus submitted that it was the appellant's assertion that he had dispossessed the respondent's title to Loc.16/Mbugiti/2102 having occupied and stayed on the same for a period of over 12 years and the respondent having taken no step to evict him before the lapse of the statutory period. Reliance was placed on *Githu -vs- Ndeete* [1984] KLR 776-781.
 17. According to learned counsel, from 1986 the appellant had been in open, quiet and exclusive possession of parcel No. Loc.16/Mbugiti/2102 whose title had become adverse by 1998. We were urged to allow the appeal and quash the trial court's judgment dated 12th April 2018 and to allow the appellant's originating summons.
 18. In rebuttal, counsel for the respondent submitted that the appeal is purely academic meant to buy time for the reasons that the appellant has already been evicted from the suit property. We were urged to disallow the appeal since the appellant did not demonstrate any of the grounds envisioned under section 38 of the *Limitation of Actions Act*.
 19. Finally, it was submitted that the appellant's reliance on *Githu v Ndeete* [1984] KLR 776-781 is inapplicable for the reason that he was allowed to gain access to the land by the respondent's father as a "muhoi" being a person who was in dire need of survival.
 20. We have considered the appeal, the respective submissions by both counsel, the authorities cited and the law applicable. A first appeal is by way of retrial and this Court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence tendered in the trial court and draw its own conclusions, of course, bearing in mind that it did not see witnesses testifying and therefore must give



due allowance for that. See *Gitobu Imanyara & 2 Others vs. Attorney General* [2016] eKLR, where this Court stated that:

“An appeal to this Court from a trial by the High 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 allowances in this respect.”

21. Having evaluated the record of appeal, the grounds of appeal as well as submissions by parties to the appeal, we find that the issue that falls for our determination is whether the appellant sufficiently proved all the ingredients of adverse possession, with respect to the suit parcel of land.
22. In Kenya, ownership by adverse possession has been given statutory underpinning in sections 7, 13, 17 and 38 of the *Limitation of Actions Act* (Cap. 22 Laws of Kenya). The law as espoused in these provisions has been applied consistently and we can say that the law in this area has now been settled.
23. Courts have judicially developed the elements which must be satisfied before a claimant can succeed in an action for adverse possession. The leading cases from this Court in this regard include: *Titus Mutuku Kasuve -vs- Mwaani Investments Limited & 4 others* [2004] eKLR; *Titus Kigoro Munyi -vs- Peter Mburu Kimani*, Civil Appeal No. 28 of 2014; *Wambugu -vs- Njuguna* [1983] KLR 172) and *Karuntimi Raiji -vs- M'Makinya* [2013] eKLR.
24. The principles distilled from these cases are that in order to establish a claim of adverse possession, the possession must be:
 - a. adverse to the interests of the owner – meaning that the claimant is in possession as owner in contradistinction to holding in recognition of or subordination to the true owner or to a recognized superior claim of another;
 - b. Actual - as opposed to constructive possession where the test is the degree of the actual use and enjoyment of the parcel of land involved by the claimant or his agent, tenant or licensee;
 - c. Open and notorious - meaning that the possession must be open and conspicuous to the common observer so that the owner or his agent on visiting the land might readily see that the owner's rights are being invaded. Differently put, the possession must be manifest to the community;
 - d. Without force - meaning that the possession and occupation must have been achieved peaceably not through actual or threatened violence;
 - e. Exclusive - meaning that the possession must be of such exclusive character that it will operate as an ouster of the owner of the legal title. Differently put, the claimant must demonstrate that she wholly excluded the owner from possession for the required period;
 - f. Continuous and uninterrupted for the period of twelve years - meaning that the title owner did not re-enter the property under circumstances showing her intention to assert dominion against the adverse user for at least twelve years.
25. Did the appellant satisfy all these six elements which are essential to prove of a claim of adverse possession? The learned trial Judge in her judgment at paragraph 24 noted that based on a consent that had been recorded in court on 3rd May 2016 it was clear that the appellant did not enjoy exclusive possession of the suit property and neither did he dispossess the registered owner of land. She further



stated that no evidence was adduced to show that the appellant was in exclusive possession or that such possession would dispossess the registered owner or that would be hostile or in conflict with the registered owner.

26. We begin the analysis by observing, like the trial court, that from the undisputed facts in this case, the appellant had established that he had possession to the suit property and that the possession was actual, open and notorious.
27. The key issues, however, are whether the appellant established, on balance of probabilities that he had entered into the suit property with hostility, or without the permission of the owner; that he was in peaceful possession/occupation of the suit property for more than 12 years before he filed the suit.
28. Starting with the entry of the respondent into the suit premises, as noted by the learned Judge, the appellant in his testimony stated as follows:

“I entered into the land with the permission of the defendant’s father, in the presence of my father and my uncles. He pointed out to me the portion where I settled.”
29. The appellant was, therefore, on the suit property with the express permission of the respondent. In those circumstances, it would not matter how long he stayed on the land because he was a licensee and he could be ordered to vacate the suit property any time.
30. The trial Judge noted that the respondent demanded that the appellant vacates the suit property when the family land at Gatura became available for distribution and where the appellant’s father was allocated 1.2 acres through his mother. The trial Judge held that this act is consistent to the humanitarian act exercised by the respondent’s father in 1986 when he permitted the appellant to settle on his land before he acquired his own. We agree as held by the trial court that the respondent waited until the appellant had found an alternative land i.e family land at Gatura, before he asked him to leave his land.
31. In our view this clearly shows that the respondent, in the true African spirit of compassion and sharing with the less financially endowed relatives, allowed the appellant to live on the suit property until such a time when he would have his own place to move to. Instead of being grateful to the respondent for his hospitality, he decided to abuse the respondent’s generosity and attempted to dispossess him of his property. The learned Judge addressed both the facts and the law properly and arrived at the inevitable conclusion that the respondent was not an adverse possessor. We have no reason to depart from those findings.
32. The upshot of this analysis is that the learned Judge was correct to conclude that the appellant had failed to prove all the elements of adverse possession. The appeal lacks merit and we dismiss it with costs to the respondent.

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

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL



L. KIMARU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

