Gichomo & another v Kiiru (Civil Appeal 109 of 2021)
[2025] KECA 124 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 124 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 109 OF 2021

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

FEBRUARY 7, 2025

BETWEEN

BONIFACE MAINA GICHOMO ..... 1ST APPELLANT

JOSEPH MWANGI THUO ..... 2ND APPELLANT

AND

CHARLES MWANGI KIIRU ..... RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court at Murang'a (J.G. Kemei, J.) dated 30th June 2021 in ELC Case No. 98 of 2018 consolidated with 96 of 2018 & 97 of 2018)

JUDGMENT

1. Charles Mwangi Kiiru (the respondent) sued Boniface Maina Gichomo & Joseph Mwangi Thuo (the 1st and 2nd appellants) regarding 0.16 hectares of land parcel No. LOC. 14/Gakurwe/314 (the suit land) by way of adverse possession. The respondent's case was consolidated with the cases of Cyrus Muciri Kiiru in ELC Case No. 96 of 2018 and Stephen Muya Kiiru in ELC Case No. 97 of 2018 both against the appellants.

2. The respondent's case was that his father, Kiiru Waithaka who died in 1997, purchased the suit land from one Gichomo Kahu (Gichomo) in 1967 and settled thereon with his family. In 1996, he subdivided the suit land among the respondent and his two brothers namely, Stephen Muya Kiiru (Stephen) and Cyrus Muciri Kiiru (Cyrus) the plaintiffs in the consolidated suits.

3. The respondent claimed that he and his two brothers lived on the suit land for over 12 years, thereby acquiring the right to land by way of adverse possession. He stated that his father developed the suit land by planting coffee in 1968 and other subsistence crops. However, the temporary structures his father had put up on the suit land were removed when he died. The respondent further claimed that his father lived on the land adjacent to the suit land.

4. The respondent stated that trouble over the suit land began in 2017 when it was rumored that the 1st appellant's brother was selling the suit land.

   This prompted the respondent to conduct a search over the suit land when he discovered that the suit land was registered in the 1st appellant's name following a succession cause in respect of the estate of Gichomo.

5. The respondent stated that his occupation and that of his brother of the suit land was never interfered with since 1996. They openly, exclusively, and continuously occupied the suit land for over 22 years. The respondent claimed that he was allocated 54 coffee trees by his father. Further, that the appellants destroyed the crops on the suit land as evidenced by the valuation report.

6. Reiterating the respondent's evidence, Stephen Muya Kiiru (PW2) stated that he occupies the middle portion of the suit land and that he was allocated 60 coffee trees by his late father. He then permitted the respondent to tend to and pick his coffee trees. That he he came to know the 2nd appellant in 2019 when he entered the suit land and destroyed the crops thereon and uprooted the coffee trees, in an attempt to evict PW2 and his family.

7. Cyrus Muciri Kiiru (PW3) adopted the evidence of the respondent and PW2 and added that his portion of the suit land was on the western side.

8. According to Beatrice Wanjiku (PW4) she knew the respondent, his brothers, and their late father. She stated that the respondent and his two brothers and father had been utilizing the suit land since the 1970s and even after the death of their late father in 1997. That they planted coffee, maize, napier grass, and bananas on the suit land. It was her evidence that her land is adjacent to the suit land, separated by a road. Further, that she always knew that the suit land belonged to the respondent and his family. She confirmed that the coffee trees were uprooted in 2019.

9. Joseph Kamau Maina (PW5) stated that he knew all the parties to the suit, save for the 2nd appellant. It was his evidence that since 1968, he saw the respondent's father farming on the suit land and he assumed that the land belonged to him. After the death of the respondent's father, his sons continued to farm on the suit land growing bananas, coffee, and other subsistence crops. He stated that he did not know Gichomo but had heard about him.

10. Opposing the claim, the 1st appellant through his brother, Joseph Wambugu Gichomo (DW1), claimed that the suit was res judicata as the respondent's father had instituted a similar suit against his father, Gichomo in Nyeri HCCC No. 365 of 1992. It was his evidence that the suit abated after the respondent failed to substitute his late father. He contended that no sale agreement was produced to prove the alleged purchase of the suit land.

11. The 1st appellant's brother (DW1) stated that the 1st appellant was indisposed which necessitated his donation of the Power of Attorney to him. He stated that the appellant sold the suit land to offset his medical bills. He contended that the respondent had never occupied the suit land nd that it was the Gichomo family that utilized the suit land by planting coffee thereon. He stated that his mother had occupied the land until she died in 1986. He further stated that when he visited the suit land in 2017, there were patches of coffee managed by the 1st appellant.

12. In further opposition to the claim, the 2nd appellant stated that he was the registered owner of the suit land. He stated that he purchased the land from the 1st appellant and produced a sale agreement dated 27th March 2019 in support of the same. He further stated that he carried out due diligence and also obtained consent from the Land Control Board.

13. Joseph Mwangi Thuo (DW2) stated that he was the registered proprietor of the suit land and a neighbour of the respondent's family. He stated that he was an innocent purchaser for value having bought the suit land from the 1st appellant after conducting the requisite due diligence. He further stated that at the time, no one was in occupation of the suit land and that he knew that the land belonged to Gichomo. He, however, confirmed that he destroyed the coffee trees on the suit land, but he allowed Cyrus' wife to harvest the maize and subsistence crops thereon.

14. In the impugned judgment, the ELC held that the suit was not res judicata as HCCC No. 365 of 1992 was not heard and finally determined by the court, in accordance with Section 7 of the *Civil Procedure Act*.

15. The ELC further held that the issue of abatement of HCCC No. 365 of 1992 was moot as the respondent did not file the suit on behalf of the estate of their father but on their own behalf.

16. On whether the respondent and his brothers were in adverse possession of the suit land, the ELC observed that they were in occupation of the suit land by virtue of the evidence of DW2 that he destroyed their coffee trees and other subsistence crops. The ELC held that as of 1997 when their father died, the consent with which the respondent and his brothers occupied the suit land ceased, and time started running afresh in their favour against the estate of Gichomo who had been succeeded in 1992.

17. The ELC further held that from 1997 to 2009, 12 years had passed and so, adverse possession had accrued, crystalized, and vested in favour of the respondent and his brothers. Therefore, the estate of Gichomo held the title in trust for the respondent and his brothers, as its title had been extinguished.

18. The ELC held that the respondent led evidence to the effect that their father planted coffee trees which in 1996 he distributed to them alongside the portions of land on the ground, which showed their animus possidendi on the land as to their intention to occupy the land as of right and against the interests of the appellants.

19. On whether the 2nd appellant was a bonafide purchaser, the ELC held that his conduct could not be taken as a bonafide purchaser without notice. That he purchased the suit land knowing that it had occupants and even allowed them to harvest their maize and crops. Therefore, the 2nd appellant did not acquire any interest from the 1st appellant as the title was encumbered with an overriding interest in favour of the respondent and his brothers.

20. The ELC ordered that the title to the suit land be canceled under Section 80 of the *Land Registration Act*.

21. Consequently, judgment was entered in favour of the respondent and his brothers. The costs of the suit were to be borne by the appellants jointly and severally.

22. Dissatisfied with the judgment, the appellants lodged the instant appeal in which they raised the following five grounds of appeal, to wit:

    a. The learned Judge erred in holding that the respondent had proved a case for adverse possession against the weight of the evidence produced at the hearing;

    b. The learned Judge erred in failing to consider that the respondent was not on the suit land in their own right but through their deceased father, but they had sued in their names, therefore lacked capacity to sue;

c. The learned Judge erred in failing to take into account the evidence that the respondent did not have independent possession of the land and therefore did not demonstrate the requisite intention to possess the land to the exclusion of all other persons;

d. The learned Judge erred in holding that the respondent's suit was not res judicata whereas there was another suit on the same touching on the same suit land which had been filed by the appellants' father; and

e. The learned Judge erred in allowing the orders as prayed against the evidence adduced in support of the same factually and legally.

23. The appellants sought orders that the appeal be allowed and that the judgment and decree of the ELC dated 30th June, 2021 be set aside and/or vacated against the appellants.

Submissions by Counsel

24. When the appeal came up for hearing, Ms. Kimata learned counsel

holding brief for Ms. Kimari appeared for the appellant while Mr. Waiganjo Gichuki, learned counsel appeared for the respondent. Counsel relied on their respective written submissions.

25. In their written submissions, counsel for the appellants submitted that the respondent did not prove a claim for adverse possession as the respondent claimed to have gained access to the suit land through their father and could only sue in their father's name.

26. Counsel further submitted that the respondent did not demonstrate independent possession of the suit land and therefore, failed to demonstrate the requisite intention to possess land to the exclusion of all others. Counsel relied on the case of Joseph Mutafari Situma v Nicholas Makhanu Cherongo [2007] KECA 486 (KLR), to buttress this proposition.

27. Counsel further submitted that the suit was res judicata because the respondent's father had filed a similar suit for adverse possession in HCCC No. 365 of 1992. While relying on the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR, counsel submitted that HCCC No. 365 of 1992 met the threshold for the doctrine of res judicata as the respondent was claiming adverse possession over the same parcel of land that their father had filed a suit for adverse possession.

28. Opposing the appeal, counsel for the respondent submitted that their claim for adverse possession was in their own right and not on behalf of their father. Counsel refuted the appellants' claim that they did not have any coffee on the suit land as the 2nd appellant admitted that his workers uprooted the coffee that was planted on the suit land.

29. Counsel further submitted that this case was different from the decision of Joseph Mutafari Situma v Nicholas Makhanu Cherongo, (supra), as evidence was adduced to show that each of the plaintiffs occupied a distinct portion of the suit land, the suit land was not occupied communally, and by planting coffee on their respective portions, the plaintiffs showed their intention to occupy the suit land to the exclusion of all other persons.

30. While citing the case of The Tee Gee Electrics and Plastics Co. Limited v Kenya Industrial Estates Limited, [2005] KLR 97 counsel submitted that res judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merit.

31. Counsel relied on the case of Mtana Lewa v Kahindi Ngala Mwagandi KECA 532 (KLR) in submitting that their case fell within the principles in this case and they were entitled to the award by the trial court.

Determination

32. This is a first appeal. Rule 31(1)(a) of the Court of Appeal Rules, 2022 provides that:

> "On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power—
>
> (a) to re-appraise the evidence and to draw inferences of fact; and..."

33. The primary role of this Court as a first appellate court is to re-analyze and re-evaluate the evidence that was placed before the learned trial Judge and draw its inferences of fact. However, in doing so, we bear in mind that the trial court had the advantage of seeing and hearing the witnesses and we give allowance for the same. In the case of Peters v Sunday Post Ltd [1958] EA 424, at P 429 O'Connor P. stated thus:

> "An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand".

34. We have carefully considered the appeal, the submissions by counsel, the authorities cited, and the law. The issues for determination are whether the suit was res judicata and whether the respondent proved their claim for adverse possession.

35. The issue of res judicata is a preliminary issue and the same ought to be dispensed with in the first instance. It is common ground that the respondent's father filed HCCC No. 365 of 1992 claiming adverse possession over the suit land. However, during the pendency of the suit, he died in 1997. Prior to his death, in 1996 he subdivided the suit land and the coffee trees thereon among his three sons, including the respondent. Upon his demise, the suit abated. The deceased was also not substituted in the suit. Consequently, the suit was dismissed for want of prosecution.

36. The doctrine of res judicata is anchored on Section 7 of the Civil Procedure Act. The Section provides that:

> "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

37. From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title, and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally. The Supreme Court in Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 others [2014] eKLR expressed itself as follows:

> "The concept of res judicata operates to prevent causes of action, or issues from being re-litigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings....
>
> [319] There are conditions to the application of the doctrine of res judicata:

(i) the issue in the first suit must have been decided by a competent Court;

(ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and

(iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title Karia and Another v. The Attorney General and Others, [2005] 1 EA 83, 89."

38. The learned trial Judge held that HCCC No. 365 of 1992 was not heard and finally determined by the court on merit having been dismissed for want of prosecution.

39. Black's Law Dictionary, 10th edition defines the terms "heard and determined" as follows:

> " of a case, having been presented to a Court that rendered Judgment."

40. The term "hearing" is defined in the same dictionary as:

> " A judicial session usually open to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying."

41. In the case of Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Limited, (supra), the Court stated thus:

> "A judicial session usually open to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying."

42. It is common ground that HCCC No. 365 of 1992 was dismissed for want of prosecution. This Court in the aforementioned case was explicit that res judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits.

43. In the circumstances, we find that the doctrine of res judicata does not apply in the circumstances as the case was dismissed for want of prosecution.

44. On the issue of adverse possession, the respondent and his two brothers testified that their father subdivided 0.16 hectares of the suit land among them in 1996. The respondent was given the eastern part while one of the brothers was given the middle part and the last brother was given the western part. Although the brothers did not reside on the suit land, they testified that when they were being given the land, it already had coffee trees growing thereon, and after their father died in 1997, they continued to tend to them while also practicing subsistence crop farming thereon.

45. Their evidence was supported by the evidence of PW4 and PW5 who live close to the suit land. The two witnesses testified that they had always seen the respondent tending to the suit land. PW5 stated that he assumed that the suit land belonged to the respondent.

46. The respondent claimed that he and his two brothers had utilized the suit land freely, openly, and without any interruptions until 2017 when it was rumored that the 1st appellant's brother intended to sell the suit land.

47. In December 2018, the respondent filed a claim for adverse possession against the estate of Gichomo over the suit land. They claimed that they had been in occupation of the suit land for over 12 years.

48. The ELC held that from 1997 to 2009, 12 years had passed and in the circumstances, adverse possession had accrued, crystalized, and vested in favour of the respondent and his brothers. Therefore, the estate of Gichomo held the title in trust for the respondent and his brothers, as its title had been extinguished.

49. The law and requirements for adverse possession was reiterated in the case of Mbira v Gachuhi, (2002) IEALR 137 where it was held that:

> "...a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption..."

50. It is common ground that the respondent's father had a proprietary interest in the suit land that he could give the appellant and his brothers to use. This is evidenced by the fact that before his death, he had filed a claim for adverse possession seeking to acquire the rights to the suit land. This suit was never determined and as such, the suit land remained the property of Gichomo until succession was done and the title was transferred to the 1st appellant.

51. The appellants contend that the respondent has never been in possession of the suit land. In a claim for adverse possession, the owner's non-use of the property, even for an extended period, does not affect their title. The situation changes only when another individual takes possession of the property and asserts a claim over it. In the case of Alfred Welimo v Mulaa Sumba Barasa, *CA No 186 of 2011*, this Court stated that:

> "It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it; for as Robert Megarry aptly observed in his Megarry's manual of the Law of Property, 5th ed. page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So the mere fact that the appellant abandoned possession of the suit property and went to live at Ndalu scheme by and of itself does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with animus possidendi (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land..."

52. In this case, the appellants were not in occupation of the suit land. The 2nd appellant testified that when he bought the suit land from the 1st appellant, his workers uprooted the coffee trees that were on the land that belonged to the respondent. He also stated that he allowed Cyrus' wife to harvest the maize and other crops that were on the land.

53. From the foregoing, we find that the respondent and his brothers had a peaceful and uninterrupted use of the suit land from 1996 until 2017 when the 2nd appellant came into the picture. By farming on the suit land, and particularly growing coffee trees thereon, which is a long-term venture, the respondent proved the physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner of the suit land.

54. In the case of Mate Gitabi v Jane Kabubu Muga & Others, Civil Appeal No. 43 of 2015 (unreported), this Court held that:

> " 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 secrecy, without force, and without license or permission of the land owner, with the intention to have the land."

55. In Wambugu v Njuguna [1983] KLR 173, this Court held that adverse possession involves two key concepts: possession and the discontinuation of possession. Additionally, it was stated that the correct method for evaluating proof of adverse possession is to determine whether the title holder has been dispossessed or has ceased their possession for the statutory period. It is not about whether the claimant has successfully demonstrated possession for the required number of years.

56. In the case of Thika Garissa Road Developers Limited v Mwangi & 4 others (As duly Elected Officials of Gachagi Land Committee Representing Residents of Gachagi) & 4 others (Sued as the Chairman, Secretary and Vice Chairman respectively of Thika Municipality Block 31 Welfare Group) [2023] KECA 269 (KLR), this Court held thus:

> " We are satisfied from the evidence on record that, by building structures, farming and even harvesting sand on the suit property without obtaining permission from the appellant the 1st respondent manifested animus possidendi, a clear mind and intention of dealing with the suit property as if it was exclusively theirs and in a manner that was in clear conflict with the appellant's rights. The appellant was, as such dispossessed of the suit premises by those acts. The 1st respondent's acts were not by force, nor secretly, and were without permission."

57. In the circumstances, we find that by filing the claim for adverse possession in their own names and not their father's name, the respondent intended to have the suit land as their own and not as was given to them by their father, who in this case had no title or proprietary interest to transfer the suit land to them. They entered the suit land openly, without force, and without the permission of the 1st appellant or the estate of Gichomo.

58. Consequently, the respondent demonstrated the principles of the doctrine of adverse possession satisfactorily. We find no reason to interfere with the findings of the trial court.

59. The upshot is that the appeal lacks merit. It is hereby dismissed with costs to the respondent.

Orders accordingly.

DATED AND DELIVERED AT NYERI THIS 7TH DAY OF FEBRUARY, 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