Njami v Njami (Civil Appeal 34 of 2018) [2025] KECA 492 (KLR) (14 March 2025) (Judgment)

Neutral citation: [2025] KECA 492 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 34 OF 2018

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

MARCH 14, 2025

BETWEEN

JOHNSON MUIGAI NJAMI ..... APPELLANT

AND

LOISE MUTURA NJAMI ..... RESPONDENT

(An appeal from the judgment and decree of the Environment and Land Court of Kenya at Nakuru (J.N. Mulwa, J.) dated 6th October 2017 and delivered by R.L. Korir, J. on 24th October 2017 in ELC No. 55 of 2013)

JUDGMENT

1. The concept of land ownership and acquisition is an emotive issue in Kenya that has the infelicitous effect of splitting many families; the reverse seldom materializing. In this case, two brothers, Johnson Muigai Njami, the appellant and James Mutura Njami, now deceased, spent the better part of their lives in a litigious embattlement. Upon the death of respondent, the button was picked by his widow, one Loise Wanjiru Kinuthia; and the battle still rages on. The pith issue before us is the question of ownership of all that parcel of land namely L.R. No. Nyandarua/Tulaga/5217 which is a subdivision from land parcel No. Nyandarua/Tulaga/1002. Both claiming ownership, it was therefore incumbent on the parties to establish that on a preponderance of the evidence adduced, one was the lawful proprietor of that piece of land. In the circumstances, the main issue for determination is whether the respondent held the suit property in trust for the appellant and in the alternative, whether the appellant had acquired title through the well-known doctrine of adverse possession. The court was thus tasked to determine with the evidence adduced before it, who should be declared its proprietor.

2. To contextualize the appeal, we shall give an abridged background of the dispute. By plaint dated 31st December 2008 and filed on 7th January 2009, the respondent contended that he was the legal and registered proprietor of all that parcel of land namely Nyandarua/Tulaga/5217 measuring 39 acres. He averred that in 1963, he was allotted land parcel No. Nyandarua/Tulaga/1002 by the Settlement Fund Trustees, which he fully paid for. It was his case that in 1972 he allowed the appellant to settle on

a portion of the land which is now the subject of the suit. According to the respondent, the appellant was allowed to gain access to the property as a tenant or what is commonly known as 'muhoi' in in the kikuyu culture. A 'muhoi' was a landless person who was allowed to settle on a parcel of land on a temporary basis and who could be requested to leave at any time.

3. In his defence and counterclaim, the appellant contended that the suit land was held in trust by the respondent for himself and his other family members. It was his position that the entire land before subdivision was purchased by his father but could not be registered as an owner for the reason that the then rules of the Settlement Trustees Fund did not authorize a person who owned another parcel of land to be allotted land.

4. Parties gave evidence and called their respective witnesses. We shall revisit and refer to that evidence later in this judgement where necessary. The respondent sought a declaratory order that the land belonged to himself as the lawful registered owner and on his part the appellant sought declaration orders that the registration of the property in favor of the respondent was done in trust for himself and his family and in the alternative, that the appellant had acquired title by way of adverse possession.

5. In her judgment delivered on 24th October 2017, J.N. Mulwa, J. held in part as follows:

> "It is agreed by all the parties that the plaintiff invited his brother the defendant to settle and occupy this Plot No. 5217 as he did not have his own land in 1972. He was then only 24 years old.
>
> 23. However, evidence was lead (sic) that the defendant bought/acquired his own land at Uthari Wa Rari, Plot No. 4111 upon which his brother, the plaintiff asked him to leave and go to his plot but he refused, and laid a claim of ownership of 39.5 Acres out of Plot No. 5217.
>
> 24. I have confirmed that Plot Nyandarua/Tulaga/5217 is registered in the plaintiff's names (PExt 2). The plaintiff's claim is that the entire suit property from which the sub divisions were created belonged to him and did not hold it in trust for the defendant or anybody else as he alone paid for the purchase price to the settlement Fund Trustee through a loan that he paid in instalments. I have particularly considered evidence of DW2 Joseph Mashamba, the Settlement Officer Nyandarua South District. He narrated from documents that he produced as exhibits that the suit plot was allocated to one Kamau Kagunda in 1963 but he declined it, that it was then re-allocated and transferred to the plaintiff vide a transfer between the 1st allotee to himself including the development loan that he paid. No where did the Settlement Fund Trustee show that the said plot was allocated to the plaintiff in trust for his brother the defendant. This evidence was not challenged or controverted.
>
> 25. DW3 the brother to the plaintiff's father and defendant, DW3 laid no claim on the suit plot. His evidence that the loan to the settlement Trustee was paid by the party's father was not supported by any evidence. He went further to state that his late brother did not tell them that the suit land was held in trust by the plaintiff for the defendant or anybody else. It is instructive that at all the material times, during the allotment of the suit plot to the plaintiff, the party's father was alive and did not raise any objection that the plaintiff was holding the suit plot for himself to the exclusion of his brother/family.

26. The defendant admitted having been invited to the suit property by his brother the plaintiff as he looked for money to buy his own land. For that, the plaintiff's submission that the defendant was a tenant at will of the plaintiff holds ground. A tenant at will is a person who occupies real property owned by another until such time as the landlord gives him notice of termination of the tenancy at any time. The tenant occupies the property with the Landlords permission, ordinarily it is an oral tenancy agreement and usually between family members. The defendant in his evidence stated that he did not bring himself to the suit property but was by the plaintiff's authority, and permission...

27. A licensee and therefore a tenant at will cannot claim ownership of land by dint of the doctrine of adverse possession as he does not have time running in his favour...

28. In the present case, it is on record that the defendant did not have peaceful and uninterrupted occupation of the suit land for a continuous period of 12 years. He was requested to leave and vacate the suit land in 1980. This is the first time the occupation was interrupted, a period of 8 years from 1972. Thereafter, a suit was filed for his eviction vide Naivasha CMCC No. 706/2004, followed by HCCC No. 2 of 2009 and now ELC No. 55 of 2013. It is my finding that the defendant never had uninterrupted and peaceful occupation of the suit land since 1980 when the plaintiff decided to terminate the Tenancy at will.

29. Had the Defendant entered the plaintiffs land as a trespasser, the position would be different. Further, the defendant did not demonstrate by any tangible evidence what type of occupation he had. He did not demonstrate his claim over the 39½ Acres – what he did on the said land on the ground other than stating that he was invited by the brother to the land...

30. In the matter on whether the plaintiff held the suit property on trust for the defendant, the defendant has failed to conclusively and satisfactorily prove the claim on trust. The settlement officer (DW2) was categorical, and documents produced confirmed that the suit land was allocated to the plaintiff for himself and not in trust.

31. Allegations stated by the defendant and his witness - DW1 – that the intention of the plaintiff's father was that the suit land would be registered in the plaintiff's name on his behalf was not substantiated nor proved. The alleged payments by him of the development loan on behalf of the plaintiff too remain as allegations...The title of a registered owner of land is free from all interests and encumbrances except those shown against the register such as overriding interests that exist and need not be noted in the register...

32. I am not persuaded that a constructive trust was created or arose when the plaintiff was registered as the owner. That intention to have a trust created has not been adequately demonstrated. This is more so that when all the registrations, subdivisions and request to the defendant to leave the plaintiffs land were being done, the plaintiffs and Defendants father was alive. Had that been the intention he would have said so to his two warring sons. He died in 1986. The dispute started in 1980.

33. Having found that the suit property was acquired by the plaintiff by direct allotment and purchase from the original allotee of the same, then and without any evidence of a trust, I find that suit property, and more specifically the subdivision known as Nyandarua/Tulaga/1002 is the property of the plaintiff and that the defendant has no legal or beneficial claim either by trust or by adverse possession."

6. The appellant is aggrieved by the said judgement and filed a notice of appeal dated 14th February 2018. He also filed a memorandum of appeal dated 7th May 2018 raising 5 grounds disputing those findings. We take the liberty to summarize them as follows: that the suit land was held by the respondent in trust for the appellant; that the appellant had acquired the suit land by way of adverse possession; and that the judgement went against the weight of the evidence that was adduced by the appellant.

7. In the premised circumstances, the appellant prayed that the appeal be allowed by setting aside the judgment of the trial court. He also urged this Court to allow his counterclaim as prayed and further prayed for costs at trial and in this appeal.

8. When this appeal was heard virtually on 27th January 2025, learned counsel Mr. Gakuhi Chege appeared for the appellant while the respondent was represented by learned counsel M/s Gatu Magana. Parties highlighted their respective diametrically opposed written submissions.

9. The appellant relied on his written submissions dated 16th November 2023. He also relied on a list and bundle of authorities similarly dated. Quoting many authorities which we have considered and which we shall refer to where necessary, the appellant submitted that the evidence that he adduced established that the respondent held the suit land in trust for himself and his family as it was bought by his father on behalf of the family. It was further submitted that the father could not be registered as the owner as he owned another parcel of land in Kiambu and thus, under the then regulations of Settlement Fund Trustees, he could not qualify to be registered. The alternative submission was the in any event, the appellant had acquired the land by way of adverse possession as he was in continuous and uninterrupted possession for more than 12 years.

10. The respondent filed her written submissions and case digest both dated 25th January 2025 to oppose the appeal. The submissions can be summarized as follows: that the counterclaim was bad in law for non joinder of registered owners of the land; that the appellant had no locus standi to file the counterclaim; that the suit was an incompetent representative suit; that the counterclaim was time-barred under the Limitations of Actions Act; that there was no proof of the existence of a trust; and that the claim of the land on the basis of adverse possession was unsustainable.

11. We have considered the parties' rival submissions, examined the record of appeal and analyzed the law. As a first appellate court, an appeal is by way of a 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 and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and thus should make due allowances in this respect. [See Gitobu Imanyara & 2 others vs. Attorney General [2016] eKLR].

12. As earlier stated in this judgment, in our view, the issues for determination are condensed into two: Whether the respondent held the suit land in trust for the appellant and whether in the alternative, the appellant had acquired the land through the well- known doctrine of adverse possession.

13. As we answer these questions, it is important to remind ourselves that it is the respondent who filed suit seeking declaratory orders that he was the registered owner of the land; that the appellant was

a mere licensee whose tenancy had been terminated; and that orders for eviction should be issued against the appellant. The appellant filed a defence and counterclaim. In the defence, he admitted that the respondent was the registered owner of land parcel Nyandarua/Tulaga/1002 which had been subsequently subdivided into parcels nos. Nyandarua/Tulaga/5208-5220.

14. The appellant claimed a parcel of the suit land measuring 39.5 acres on the basis that it .... "a declaration that the trust has terminated and the plaintiff (read respondent) transfer to the defendant (read appellant) 39.5 acres in land parcel no. Nyandarua/ Tulaga /1002 (Nyandarua /Tulaga /5208-5220) and any transfers to 3rd parties be cancelled". In the alternative the appellant prayed that ... "the plaintiff (read respondent) title to Nyandarua/Tulaga/ 1002 (Nyandarua/5208-5220) has been extinguished and the defendant (read appellant) has acquired title by adverse possession to 39.5 acres in then said parcel of land."

15. Even before delving into the issues, a perfunctory look at the prayers clearly shows that contrary to the submissions by the appellant, he did not claim the suit land for himself and his siblings, as the prayers clearly show that he was claiming the land for himself. Secondly, the appellant admits that the land was subdivided and rights acquired by third parties yet he has not named them and worse still, the prayer for 39.5 acres is not specific to which portion of the subdivision he claims to have acquired by adverse possession.

16. The respondent has raised a constitutional issue on the rights of those third parties but that was not an issue argued in the trial court. There is no determination on that issue in the judgment. In the circumstances, we will not swallow the ruse that the respondent is throwing in at this stage. It is also equally clear that the appellant was not bringing the suit on behalf of the estate of his late father and therefore, the attempt by the respondent to drag us into that issue is also not legally tenable.

17. Turning to the germane issues for determination, we will first address the question whether the appellant established to the required standard that the respondent held the suit land in trust for the appellant and his family. The definition of a constructive trust was at length demystified by this Court in Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR, where it was held:

> "According to the Black's Law Dictionary, 9th Edition; a trust is defined as:
>
> "1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)."
>
> Under the *Trustee Act*, "... the expressions "trust" and "trustee" extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...
>
> ...Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. Halsbury's Laws of England vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to

> the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black's Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. Halsbury's Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. In the present case, a constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the third party. Therefore, there is no unjust enrichment to be forestalled. This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra)."

18. Our apex Court in the case of Shah & 7 others vs. Mombasa Bricks & Tiles Limited & 5 others [2023] KESC 106 (KLR) also weighed in on this matter as follows:

> "The *Trustee Act* defined a "trust" and "trustee" as extending to implied and constructive trusts. A constructive trust was an equitable instrument which served the purpose of preventing unjust enrichment. Trusts were created either expressly, where the trust property, its purpose and the beneficiaries were clearly stated, or established by the operation of the law. Like in the instant case, where it was not expressly stated, the trust may be established by operation of the law...
>
> A constructive trust was a right traceable from the doctrines of equity. It arose in connection with the legal title to property when a party conducted himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust would thus automatically arise where a person who was already a trustee took advantage of his position for his own benefit."

19. As the trial Judge held, it was clear from the evidence that the property in dispute was a morphosis of a subdivision from land parcel number Nyandarua/Tulaga/1002; that is to say land parcel number Nyandarua/Tulaga/5217 measuring 39.5 acres. The trial Judge held that the evidence adduced by the appellant established that the original land parcel Nyandarua / Tulaga/1002, was allocated to the respondent by the Settlement Land Trustee and the respondent was advanced a development loan. The respondent called the settlement land officer, one Joseph Mashamba, who produced records relating to the parcel of land. The evidence clearly revealed that the respondent was the first allottee.

20. We have carefully analyzed the evidence adduced by the appellant on this issue and we agree with the trial Judge that that the appellant did not adduce even an iota of evidence that his father or indeed

any other member of the family, contributed to the purchase of the suit land. The appellant's witness statement filed in the trial court makes general remarks that remained unsubstantiated throughout the trial. For instance, the appellant alleges that he was present when his father withdrew Kshs 2,000.00 which was given to the respondent as part of the purchase price and that the balance of Kshs 2000.00 was paid in instalments.

21. Even if we give the appellant the benefit of doubt, how can such evidence controvert, countermand or dispose the respondent's evidence that he was the first allottee and that he took a loan to buy the suit land? Can a title be cancelled on the basis of such evidence? Certainly not and the trial Judge cannot be faulted.

22. One glaring question that ought to be addressed is why the father to these fighting siblings never raised this issue during his lifetime? Why did the appellant wait until he was sued to raise this issue? We agree with the trial Judge that there is absolutely no evidence to sustain the allegation that the respondent held the suit land in trust for the appellant. In making this conclusion, we adopt the pronouncements of the Supreme Court of Kenya in Shah & 7 others vs. Mombasa Bricks & Tiles Limited & 5 others (supra) that held as follows:

> "While sections 25, 26 and 28 of the *Land Registration Act* recognized that the rights of a registered proprietor of land were absolute and indefeasible, those were only subject to rights and encumbrances noted in the register and overriding interests. The overriding interests included trusts. In the absence of any limitation as to the trusts, that included constructive trusts. Applying the provisions of article 24 of *the Constitution* therefore, the limitation of the right to property was provided under law, and included a constructive trust. Section 28 of the *Land Registration Act* provided that the registration was subject to overriding interests. One of the overriding interests was a trust, which included constructive trust...
>
> ... Constructive trusts could arise in various circumstances, including in land sale agreements. A trust was an equitable remedy which was an intervention against unconscionable conduct. Where the circumstances of the case were such that it would demand that equity treated the legal owner as a trustee, the law would impose a trust. It was imposed by law whenever justice and good conscience required it. A constructive trust can be imported into a land sale agreement to defeat a registered title."

23. A thorough analysis of the evidence shows that the respondent was the first allottee of the land leading to the advancement of a development loan by the Settlement Fund Trustees in his favor. The evidence that the appellant was present when his father disbursed Kshs 2,000.00 to the respondent and that the loan was paid through proceeds from the farm remained bare allegations throughout the trial. We have said enough to state that nothing revealed that a constructive trust arises in this appeal.

24. This now brings us to the second issue that was pleaded in the alternative; that is, the appellant has acquired the suit land under the doctrine of adverse possession. The law on adverse possession is now well-settled, and this Court has pronounced itself on the applicable principles. Whether or not a party has acquired a parcel of land by way of adverse possession is a question of fact and law. The facts must

be cogent and credible. In Richard Wefwafwa Songoi vs. Ben Munyifwa Songoi [2020] KECA 942 (KLR), this Court ruminated itself as follows on the doctrine of adverse possession:

> " 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…."
> >
> > … Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It must start with a wrongful dispossession of the rightful owner. (See comparative Indian cases of S. M. Kenni alias Tamanna Sabeb – v- Mst Bibi Sakina AIR 1964 SC 1254; and Parsimi – v- Sukhi, 1993 4 SCC 375)
> >
> > … For a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted user of the land. Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are important factors in a claim for adverse possession…
> >
> > In this appeal, the appellant had the burden to prove not mere possession of the suit property, but possession that was nec vi, nec clam, nec precario. (See Kimani Ruchine -v- Swift, Rutherfords Co. Ltd. [1980] KLR 1500 and Karnataka Board of Wakf -v- Governemnt of India & Others [2004] 10 SCC 779) …
> >
> > 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."

25. The appellant has submitted extensively on this issue and quoted many authorities, which we have considered. However, at the end of the day, that which is most pertinent is the evidence that was placed before the trial Judge. Did the appellant demonstrate that he was in continuous and uninterrupted possession of the suit land for 12 continuous years?

26. In his written statement that he adopted as his evidence in chief, the appellant states that he and his brother settled on the suit land in 1975 and that soon thereafter, the respondent sold 5 acres. That land was later subdivided. At the time, he had misled them to believe that he wanted to transfer the land to him and the siblings. On unearthing that this was not the respondent's intention, the appellant lodged a caution on the land. This in itself is evidence that the possession was not peaceful. He would continue to state …. "I lived in original plot Tulaga No. 435..my other brothers also lived on plot no 435…we remained on that land until 2004 when problems emerged. In the year 2004, James subdivided the land and moved to parcel 1002 yet that parcel was set aside for our mother…after subdivision James brought 12 people and settled them on 1002 which measures 39.5 acres…."

27. In answer to cross examination he said ... “my mother testified saying that the land did not belong to the family...”

28. One notable aspect of this piece of evidence is that the appellant readily admits that other members of his family settled on the land. This raises the question: Did the appellant then have exclusive and quiet possession of the 39.5 acres that he is claiming if other members of the family were also in occupation? This version of the evidence was controverted by the respondent, who disputed that the appellant was in uninterrupted occupation for 12 years.

29. We note that the trial Judge addressed the question of adverse possession and found that even if the appellant moved on the suit land in 1972, there was an interruption in 1980 when the appellant was requested to vacate the land. It is also common ground that a civil suit was filed in Naivasha Law Courts namely CMCC No. 706 0f 2004 by the respondent seeking eviction orders against the appellant. Though the suit was dismissed and the trial magistrate though acknowledged that the issue at hand revolved around of adverse possession, rightly refused to determine it on account of no jurisdiction, which amounted to further interruption.

30. The appellant has also admitted in his evidence and his pleadings that indeed the land was subdivided and other parties are in occupation. After our own evaluation of the evidence we agree with the trial Judge that the appellant’s evidence fell far short of what is required to prove a claim for adverse possession.

31. In the end, we agree with the submissions by the respondent that this is one of those cases where a party has cast the net in the ocean and hopes to catch any fish. The pleadings and the evidence adduced by the appellant are so weak and it is unfortunate that the respondent died before he could peacefully enjoy his land. We hope that this now settles this dispute and that the appellant, who is now an old man, will find peace and enjoy what he has rightfully acquired.

32. In conclusion, we find that this appeal has no merit and we dismiss it in its entirety with costs to the respondent.

DATED AND DELIVERED AT ELDORET THIS 14TH DAY OF MARCH 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR