Naitira v Ngatuni (Civil Appeal 64 of 2019) [2025] KECA 576 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 576 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 64 OF 2019

W KARANJA, J MOHAMMED & LK KIMARU, JJA

MARCH 7, 2025

BETWEEN

IMATHIU NAITIRA ..... APPELLANT

AND

SAMWEL KIRIMI NGATUNI ..... RESPONDENT

(Being an appeal against the judgement/decree of the High Court at Meru delivered by A. Mabeya J. on 11th October 2018 in HCCC No 18 of 2011(OS))

JUDGMENT

1. This is an appeal from the judgment/decree of the High Court at Meru delivered by A. Mabeya, J. on 11th October 2018.

2. By Originating Summons dated 19th February,2011, instituted at the High Court of Kenya at Meru vide High Court Civil Suit No 18 of 2011(OS), the respondent sought the determination of the following questions; whether the appellant has been in occupation of Ntima/Ntakira/700 ("the suit property") adversely to the appellant's title for a period in excess of 12 years consequent whereof, the appellant's title thereto had been extinguished. He sought to be declared the rightful owner of the suit property by virtue of the application of the doctrine of adverse possession.

3. The background to the appeal, in brief, as pleaded by the respondent, was that in or about 1970, he entered, occupied and developed the suit property and has lived thereon to date. He stated that in 1980, the appellant claimed the suit property and asked him to vacate but he refused and that he continued to live there peacefully, openly and uninterrupted and has built houses, and developed the property by keeping cows and chicken, planted nappier grass, trees, maize, beans and other subsistence crops.

   He stated that the suit property has clear marked boundaries which he has used openly and adversely to the appellant's title which has been extinguished by operation of law.

4. In opposing the Originating Summons the appellant filed his replying affidavit where he averred that the suit was unfounded and fraudulently made. That at no time has the respondent been in exclusive use of the property. He deposed that the respondent had leased his houses as a tenant from 17th January, 1980 for a monthly rent of Kshs.600.00

5. He contended that the suit property was being farmed by his children who had planted seasonal crops. That the respondent has always paid rent as agreed and, therefore, the allegation of adverse possession on the suit property does not arise.

6. The case was heard by way of viva voce evidence. The respondent called five witnesses to support his case. PW1, was the respondent, he told the court that he entered the suit property in 1970, cleared the bushes thereon and first constructed a grass thatched house and occupied the same. That he got married in 1978 and came to know the appellant when the latter took him to Chief Thiora in 1980 accusing him of unlawfully occupying his land. He testified that the appellant wanted him to vacate the suit property but he refused. That the chief and elders told the respondent that he could not evict him as he had been in the land for over 10 years.

7. According to the respondent he had never seen the agreement of lease produced by the appellant. That agreement was allegedly made between the respondent and Kaura and Rwito Ltd on behalf of Imathiu Waitira. He further denied ever having paid any rent for the houses he occupied on the suit property. According to him, he had constructed all the five houses standing on the suit property along with a cow shed.

8. PW2 Isaac Kiambi M'Mukiri was employed as assistant chief of Tunka Location in 1988. He told the court that he knew the respondent but not the appellant. He was born in 1962 and came to know the respondent in 1970s since he was a young man and he was friendly to his father. He did not know who plants and harvests the seasonal plants farmed on the property occupied by the respondent.

9. PW3 M'Rugongo M'Anampiu told the court that he lived near the suit property. He recalled that in 1970, the respondent contracted him and one Gitonga, now deceased, to construct for him a mud grass thatched house which they did on the suit property. Later on, timber houses were constructed on that property but he did not know by who.

10. PW4, Dickson Kinoti M'Ringera, told the High Court that he has known the respondent since 1979. That in 1980 the respondent contracted him to construct two houses. Later in 1983 he constructed three houses and a cattle shed.

11. PW5, Monica Kajuju Japhet, is a neighbour to the respondent in the suit property. She has known the respondent since 1970 when he started clearing bushes and settled near her house. In cross-examination, she told the court that the land was not fenced when the respondent entered thereon and he is the one who created the boundary. She did not know whether the respondent was paying rent to the appellant for the land, but she has never seen any other person working on the land apart from the respondent.

12. On his part the appellant testified and called two witnesses. He told the court that he authorised Kaura and Rwito Limited to lease the premises on the suit property to the respondent in 1980. He stated that he used to receive rent on the lease until 2011. He stated that the respondent stopped paying rent in 2007. He denied that the respondent entered the suit property in 1970 and maintained that the respondent had not carried on any developments thereon.

13. In cross-examination, he stated that the trees were planted by him and the bananas were planted by Kibiti and the nappier grass was planted by a daughter of Kibiti. He could not remember when he gave the suit property to Kaura and Rwito Ltd.

14. DW2 Mercy Nkatha Kibiti testified that she knew the parties to this suit as well as the company known as Kaura and Rwito Limited. Her father, Henry Kibiti Rwito was the managing director of Kaura and Rwito Ltd. She knew the appellant for he had given the Company the work of managing the suit property. The suit property was developed with timber houses which were rented to the respondent on 17th January, 1980. The agreement was in writing and she recognized the handwriting as that of her late father since she used to stay and work with him in the office.

15. According to her, she was in school in 1980 but started working for the company in 1989. The respondent was leasing three houses which were built by the appellant. The receipts were issued by one Florence Kairigo who is deceased. Her father used to sign the receipts and she could be able to identify his signature on the receipts. The last receipt issued was on 3rd February, 2007 for that was the last time payment was received. She produced the agreement and the receipts.

16. In cross-examination, she admitted that the respondent was still on the land. She stated that in 2007 the respondent asked for permission to stop paying rent for some time to enable him finish a case he had with his brother in Chuka.

17. DW3, Mwirigi Fredrick Rimbere, testified that he was a driver employed by Kaura and Rwito Limited and used to drive the managing director of the company. He was aware that the respondent was a tenant in the houses on the suit property. He used to carry DW2 to the suit property where she has always farmed all the years and from where she harvested maize, beans and potatoes.

18. In the judgment now impugned, A. Mabeya J. allowed the respondent's originating summons and stated that the appellant's title to Ntima/Ntakira/700 had been extinguished by dint of section 38 of the Statutory Limitations Act; and that the respondent had acquired title to Ntima/Ntakira/700 by way of adverse possession; he thus ordered that the respondent should be registered as the proprietor of Ntima/Ntakira/700.

19. Aggrieved by the decision, the appellant lodged this appeal in which he has proffered six (6) grounds of appeal. He faulted the learned Judge for erring in law and fact by: disregarding the tenancy agreement dated 17th January 1980 which essentially made the respondent a tenant; by completely misinterpreting the purpose of issuance of receipts by Kaura & Rwito Ltd as the said company was not a real estate management entity but only meant to receive rent money and issued receipts on behalf of the appellant to formalize the entire process; by holding that no witness from Kaura & Rwito Ltd testified in support of the execution of the lease agreement whereas Mercy Nkatha Kibiti (DW2) was categorical that she was familiar with her father's handwriting which she recognised as that appearing on the receipts and agreement; by misdirecting himself by heavily relying on an error on the record relating to the date of death of Henry Kibiti Rwito to arrive to a conclusion that the receipts must have been forged without seeking clarification on the same; by failing to appreciate that failure to pay rent by the tenant merely bars the landlord's claim to recover any particular instalment of rent after 6 years from its failure due and does not give rise to adverse possession against the landlord and by failing to consider the unchallenged evidence of the appellant that the respondent was only utilizing the developed portion of the land whereas the respondent occupied and utilized the rest of the land through agents.

20. During the virtual plenary hearing of the appeal, learned counsel, Mr. Frank Gitonga and Mr. Maitai Rimita, appeared for the appellant and for the respondent respectively. Both parties filed written submissions which they briefly highlighted.

21. Mr Frank Gitonga submitted that the respondent has never been in adverse possession of the appellant's land and that he is in possession of the suit property as a tenant. It was submitted that the respondent only occupied the leased houses and it's compound while the rest of the land was being utilized by the appellant and his people for farming activities.

22. It was submitted, further, that in the year 2007 the respondent stopped paying rent but sought permission from Kaura & Rwito Ltd to be excused for a while as he was involved in a land dispute

with his brothers at Chuka. It was stated that the accruing rent arrears were to be treated as a debt to be paid later but the appellant did not demand the same. And that the respondent got his share of land from his brother being Land Parcel No. Karingani/Gitarene/3119 which measures approximately 3.22 Ha.

23. It was submitted that the appellant sold the suit land to Kaura & Rwito Company and when the respondent was asked to vacate the same to pave way for transmission to the purchasers he refused to do so and instead rushed to court and filed the originating summons subject to the proceedings.

24. Further, it was submitted that the respondent has never been in adverse possession of the appellant's land and that he is in occupation as a tenant and not a trespasser and that evidence was tendered to prove that he was a tenant through receipts and a lease agreement which makers were deceased at the time of hearing. It was stated that the credibility of such evidence should not be subjected to the witness who produced the same on their behalf and that by the court allowing the documentary evidence to be produced it should have accepted the documents as they are. It was submitted that based on that evidence the claim of adverse possession fails.

25. It was further submitted that the appellant and his people were not excluded from the use of the suit property as the evidence of DW2 clearly states that she was utilizing the same and that this fact was affirmed by the evidence of DW3 who was the driver of Kaura & Rwito Company.

26. Finally reliance was placed on David Munene Wamwati & 4 others -vs- The Registered Trustees of the Anglican Church of Kenya & Another (Nyeri Civil Appeal No. 36 of 2015 (unreported) for the proposition that the court held that due to the punitive nature of adverse possession against a land owner, a claim based on it cannot be affirmed unless certain elements are proven by the adverse possessor which ensures that the registered land owner will not arbitrarily lose their properties which they have worked hard for and sacrificed to acquire.

27. In conclusion we were asked to find merit in the appeal and to **allow the same.**

28. In rebuttal with regards to grounds 1, 2, 3 and 4 the respondent submitted that the big issue raised by the appellant was with regard to the lease agreement which the respondent denied to have entered with Kaura & Rwito Ltd. He also denied paying rent in respect to the suit property. It was submitted that the respondent relied on the said agreement which was vague in details such as the number of houses in the suit property which were leased and also that no officer from the alleged company was called to testify in support of that agreement and that the only reason it was admitted in evidence was because the person who signed it from the company, one Henry Kibiti Rwito had died. The respondent submitted that the documents were forged for purposes of defeating the case.

29. It was submitted, further, that there was no evidence to show that anyone witnessed the document and that the daughter of Henry Kibiti Rwito (deceased) who produced and identified the lease agreement and the purported receipts was in primary school when they were made, that she stated that she came across them and identified her father's hand writing. It was urged that she was not a handwriting expert.

30. It was thus submitted that the documents cannot be relied on because they must be proved to be genuine as the parties are in disagreement and that the law of contract requires such an agreement to be witnessed or attested by one or more persons and since the said lease agreement was not witnessed it stands to be considered as a forgery.

31. On grounds 5 and 6 it was submitted that adverse possession suffices for the reason that the respondent's case was that in the year 1968 to 1970 he found a bushy parcel of land and he occupied the same and that he started cultivating thereon, put up a small house on the land and that in 1979 he put up decent timber houses and installed piped water and kept cows and sheep until 1980 when the appellant appeared and complained that the respondent had built on his land; that he was ordered to move out; that the appellant threatened to report him to the chief which he never did; the respondent never heard from him again. It was submitted that the respondent went on to further develop the suit property extensively and it is where he brought up his children.

32. Counsel relied on Mbira -vs- Gachuhi [2002]1 EA on the legal requirements to establish adverse possession. It was submitted that based on the case, the respondent had proved his claim on adverse possession as he has been on the suit property exclusively and in uninterrupted use since 1968 till 1980 when the appellant laid a claim to the same which was after 12 years. Further, the respondent relied on Maliamu Ncurubi M'ibiri -vs- Francis M'Imanyara M'Ringera [2011] eKLR and urged us to dismiss the appeal.

33. This being the first appeal, as commanded by Rule 31(1) of the Court of Appeal Rules and as expressed by the predecessor of this Court in Selle -vs- Associated Motor Boat Co. [1968] EA 123 and reiterated in many decisions of this Court, the appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and it is incumbent on the court to reconsider the evidence, evaluate it and draw its own conclusions. The appellate court must, however, always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

34. Therefore, this Court is under a duty to delve into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties. See also Abok James Odera t/a A. J. Odera & Associates vs. John Patrick Machira t/a Machira & Co Advocates [2013] eKLR. In his judgment, the learned Judge found that the appellant was the registered owner of the suit property which the respondent allegedly took possession of in 1970 continuously for 12 years. According to the learned Judge, the appellant had not proved that the respondent was a tenant on the houses erected on the suit property as the lease agreement he relied on entered between a company known as Kaura & Rwito Ltd and the respondent for Kshs.600.00 per month and the receipts produced thereof did not prove the existence of a tenancy agreement.

35. Further, that the receipts produced were issued by one Florence Kairigo and signed by Henry Kibiti Rwito. That Mr. Kibiti died in 1996. The learned Judge held that an examination of those receipts showed that the signature of Mr. Kibiti was there until 2nd August, 1997 yet his daughter, DW2 testified that he had died in 1996. The learned Judge questioned how those receipts of between 1996 and August 1997, come to bear his signature? He held that this was neither explained nor clarified.

36. The trial Judge held that those receipts showed that they were not issued each month and that although it was not explained, it was probably because the respondent was falling in "arrears". Further the learned Judge stated that be that as it may, several serious discrepancies could be discerned from those receipts.

37. The learned Judge rejected the unattested agreement on the basis that from a look at that agreement it would show that, it did not disclose how many houses on the suit property were being leased to the respondent and that the alleged lease has no term and was an indeterminate period.

38. The trial Judge further held that in a normal cause of business it would be expected that if a tenant is in arrears for up to 7 months, as was in the case, he would be distressed, warned or even evicted all together and that was not the case. With this, the court did not believe the evidence of the appellant that the respondent was a tenant.

39. With respect, we do not agree with the reasoning of the trial Judge.

From our perusal of the record, it is evident that there was an undated agreement which was produced in evidence between Kaura & Rwito Ltd and Samwel Kirimi Ngatunyi (respondent) on the payment of rent for the house on the Land of Imathiu Naitira (appellant) on L.R. Ntima/Ntakira/700 from 17th January 1980. From the agreement it was agreed that the respondent would pay the agreed rent of Kshs.600 per month and that the said rent would be paid to Kaura & Rwito Ltd because they were the ones given the land by Imathiu Naitira (appellant) to manage. Further, it was agreed that after five years they would sit again to see whether the respondent would be allowed to continue staying in the houses and continue paying the same rent as was agreed or it would increase. The agreement was signed by both the appellant and the respondent. There were some payment receipts issued by Kaura & Rwito company to the respondent which were produced in evidence.

40. With respect to the learned Judge, it appears to us that the long- settled elements of adverse possession were not applied and emphasis seems to have been on the validity of the lease agreement. The elements that need to be proved for a claim of adverse possession to succeed are clearly discernible from the case of Mombasa Teachers Co-operative Savings & Credit Society Limited -vs- Robert Muhambi Katana & 15 others [2018] eKLR, where this Court held that:

> " Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non-permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, nec vi nec clam nec precario"

41. From the evidence on record, and as found by the learned Judge, the respondent claimed to have entered into the suit property in 1970, without the appellant's permission. There is on record the lease agreement which took effect on 17th January 1980 with one of the terms being that the respondent was to pay rent of Kshs.600.00 per month.

42. We note that by the date of the said agreement, 12 years had not expired and the claim for adverse possession was inchoate. Even if we disregard the lease agreement in question, like the learned Judge did, we note that there was evidence that the appellant had reported a dispute before the area chief and his elders and requested for the respondent to be ordered to leave the appellant's property. The evidence was that the elders decided that the respondent could not be evicted from the land as he had stayed there for 10 years.

43. That was evidently less than the statutory period required to prove adverse possession. The primary element of adverse possession of occupation for 12 years was not therefore proved. It is also important to note that from the time the dispute was taken to the chief and the elders who heard and gave a

determination in the matter, the respondent's continuous possession or occupation was interrupted before the 12 years statutory period. The time stopped running in favour of the respondent.

44. The case ought to have dismissed at that point. From 1980, the story changed as following the said lease, which was signed by both parties, the respondent remained on that property with the permission of the appellant. Whether rent was being collected by an unregistered agent; whether the respondent had defaulted in payment of rent and the reasons why he had not been distrained for rent or evicted was neither here nor there.

45. This Court in Samuel Miki Waweru -vs- Jane Njeri Richu [2007] eKLR held that:

> " ...it is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu -vs- Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted..."

Time, for purpose of adverse possession, stops running when the owner asserts his rights or when there is an admission by the other party and that assertion of rights occurs either when the owner takes legal proceedings or makes effective entry. See this Court's decision in William Gatuhi Murathe -vs- Gakuru Gathimbi Civil Appeal No 49 of 1996.

46. We do not find it necessary to examine whether the said lease was valid or not because given our findings above, that discussion will not impact the appeal before us at all.

47. In the premises, we allow this appeal, set aside the judgment dated 21st December 2018 and substitute therefor an order dismissing the appellant's Originating Summons dated 19th October 2018 with costs to the appellant both here and in the High Court.

DATED AND DELIVERED AT NYERI THIS 7TH DAY OF MARCH 2025.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR