Zephan Kareithi and Company Limited & another v Githae & 2 others (Civil Appeal 208 of 2019) [2025] KECA 963 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 963 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 208 OF 2019

JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA

MAY 9, 2025

BETWEEN

ZEPHAN KAREITHI AND COMPANY LIMITED .... 1ST APPELLANT

TABITHA WANJUKU KAREITHI .... 2ND APPELLANT

AND

JACK KAGUO GITHAE .... 1ST RESPONDENT

THE COUNTY GOVERNMENT OF NYERI .... 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL FOR THE NATIONAL LAND COMMISSION SUCCESSOR TO THE COMMISSIONER OF LANDS .... 3RD RESPONDENT

(An appeal against the Judgment of the Land and Environment Court, Nyeri (L.N Waithaka, J) dated 8th February, 2019 in ELC Case No. 38 of 2014)

JUDGMENT

1. By a plaint dated 11th March 2014, filed on even date and amended on 21st May 2015, the 1st respondent sued the appellants, the 2nd respondent, Nyeri District Land Registrar and the 3rd respondent.

2. In that suit the 1st respondent contended: that on 16th February 1987, the 2nd appellant as a director and proprietor of the 1st appellant, entered into a sale agreement with the 1st NYR Civil Appeal No 208 of 2019 Page 1 of 22 respondent for the sale of the parcel of land known as LR. No. Aguthi/Gatitu/667/101, Ruringu Town (the suit property) at a consideration of Kshs 650,000, which was duly paid and receipt thereof acknowledged by the 2nd respondent; that immediately upon the payment of the purchase price, the 1st respondent took possession of the property and developed it by constructing permanent buildings and planting trees as a result of which the value of the suit property appreciated to more than Kshs 20 million; that in breach of the sale agreement, the appellants refused to execute

the transfer forms and to specifically perform the agreement by transferring the suit property to the 1st respondent despite his requests to do so; that in the alternative, the 1st respondent acquired the title to the suit property by way of adverse possession; that the lease for the suit property, having been issued to the appellant for a term of 33 years from 1st January 1961 July 1994, expired on 1st January 1994.

3. The 1st respondent therefore sought orders: and the appellants be compelled to execute the documents to transfer the suit property from the 1st appellant to the 1st respondent; that in the alternative, the court issues an order that the suit property be registered in the name of the 1st respondent pursuant to sections 7, 37 and 38 of the *Limitation of Actions Act*; that the Deputy Registrar of the court executes the transfer form to effect the transfer of the suit property from the 1st appellant to the 1st respondent and the Land Registrar do register the transfer and issue a fresh lease to the 1st respondent for 99 years from 1st January 1994; and, in the alternative, for award of general damages for breach of contract and or for actionable misrepresentation against all the defendants in the suit, jointly and severally based on the market value of the suit property.

4. The appellants by way of a statement of defence and counter- claim filed on 29th April 2014 and amended on 19th June 2015, denied the existence of the sale agreement referred to by the 1st respondent and averred: that if any agreement was entered into, it was null and void ab initio; that if any buildings were erected by the 1st respondent, the same were illegally erected and ought to be removed from the suit property; that they have no obligation to execute the transfer; that the doctrine of adverse possession does not apply to leasehold property; that the orders sought are not supported by any known law; that the property is still registered in the name of the 1st appellant; that the 1st respondent's continued occupation of the suit property is illegal as he is a trespasser and ought to be evicted by an order of the court; and that the 2nd appellant had no capacity to represent the 1st appellant in any transaction whatsoever hence the suit against her was bad in law as she was non-suited.

5. The appellants sought that the suit be dismissed and that judgment be entered against the 1st respondent for an order of eviction from the suit property, the costs of the suit and interest at court rates, and any other or further relief the court may deem fit to grant.

6. The gist of the 2nd respondent's defence was that the 1st respondent was non-suited as against it as it was a stranger to the averments in the plaint.

7. In his reply to the defence and defence to counter-claim, the 1st respondent maintained that, under section 28(e) and (h) of the *Land Registration Act*, 2012, his occupation of the suit property constituted an overriding interest to the title held in respect of the suit property. He also maintains that he was entitled to the suit property by adverse possession.

8. When the matter came up for hearing on 2nd October 2018, the 1st respondent's suit was dismissed for want of prosecution, and the 2nd respondent was discharged from the proceedings as no adverse orders were sought against it by the 1st respondent. The appellants then proceeded to prosecute their counter-claim.

9. The 2nd appellant, in her evidence, relied on her witness statement dated 25th April 2014. In that statement she stated: that she was a director of the 1st appellant; that the suit property was registered in the 1st appellant's name in 1963 and was so registered at the time of her statement; that her husband, a co-director in the 1st appellant, died in 1968; that she was never a party to the sale of the suit property and that the signature appearing on the alleged sale agreement was a forgery; that the said agreement did not have the seal of the 1st appellant; that she was up to date in the payment of the land rates and rent hence the 1st respondent had no right over the suit property; that the 1st respondent was aware

that his caution placed on the suit property was removed on 25th October 2013 thus interrupting the 1st respondent's occupation; and that the suit property being a leasehold, the doctrine of adverse possession did not apply.

10. During the hearing, the learned Judge took notice of the fact that the 2nd appellant was elderly and appeared forgetful. It was the 2nd appellant's evidence: the suit property was a lease from the Government; that the 1st appellant was a company operating a petrol station and when her husband died, the 1st respondent approached her to lease the property to him, a request which the 2nd appellant agreed to; that being a neighbour, and due to the trust she had in the 1st respondent, no formal lease was entered into and the period of lease was not agreed; that although payment for the lease was agreed to be on a monthly basis, the 1st respondent only paid rent for 2 months; that she was the one paying rates and rent to the County Government; that at the time she leased the property to the 1st respondent, there was an existing timber house and that, apart from small structures, the 1st respondent did not put up any new structures; that although she never took any step to evict the 1st respondent or demanded rent, she had asked the 1st respondent, severally, to go to her house but the 1st respondent never did so; and that she had never occupied the suit property.

11. In the judgement, the learned Judge found: that the appellants lost their right to evict the 1st respondent from the suit property after the time stipulated in law for taking action against a person in wrongful possession of land elapsed without any action being taken to remove the 1st respondent from the suit property; that the appellants' right to evict the 1st respondent from the suit property accrued a month after the 1st respondent failed to pay rent in respect of the oral lease agreement they allegedly entered into; that the 2nd appellant admitted that she took no action to remove the 1st respondent from the suit property even after he defaulted from meeting his rent payment obligations to her and the 1st appellant; that by dint of section 30 of repealed Registered *Land Act*, which applies by dint of section 107 of the *Land Registration Act*, 2012, the 1st respondent's occupation of the suit property constituted an overriding interest to the 1st appellant's title; that under section 7 of the *Limitation of Actions Act*, the appellants lost the right to bring action with a view of removing the 1st respondent from the suit property after 12 years lapsed without them taking any action to do so; that the 1st respondent continued living in the suit property for about 30 years without interference from the appellants; and that the appellants did not make up a case for the grant of the orders sought.

12. The learned Judge dismissed the appellants' counter-claim.

13. Dissatisfied with the decision, the appellants challenged it on, rather long grounds, but which we summarised as: that the learned Judge erred in disallowing the counterclaim after dismissing the 1st respondent's case; that the learned Judge failed to consider the material placed before the court; that the learned judge's findings on adverse possession had no factual and/or legal basis; that the learned Judge overlooked the appellants' submissions; that the learned Judge failed to consider the fact that the appellants' case was not controverted; and that the learned Judge failed to effectually and finally determine the issue of ownership by writing an equivocal judgement.

14. When the appeal was called out for virtual hearing on 28th January 2025, learned counsel, Mr Peter Muthoni, appeared for the appellants, learned counsel, Mr C. M Kingori, appeared for the 1st respondent, and learned counsel, Ms Wairimu Karanja, appeared for the 2nd respondent. There was no appearance for the 3rd respondent, who was duly notified of the hearing date. Ms Karanja informed the Court that the 2nd respondent was discharged from the proceedings before the trial court, hence she had no role to play in the appeal. Both Mr Muthoni and Mr Kingori relied entirely on their written submissions.

15. The submissions by the appellants', part of which amounted to adducing evidence, were to the effect: that the learned Judge having dismissed the 1st respondent's claim, had no evidential, factual and/or legal basis upon which to hold that the 1st respondent's occupation of the suit property constituted an overriding interest to the appellants' title; that in light of the failure by the 1st respondent to support his case, his pleadings remained mere averments; that the mere occupation by the 1st respondent of the suit property, neither amounted to an overriding interest nor adverse possession because adverse possession is not available against Government Land; that the appellants' counterclaim proceeded largely as a formal proof which was straightforward, uncontroverted, unequivocal testimony with sufficient material to merit the grant of the orders sought; that by claiming general damages, the 1st respondent had tacitly abandoned his claim to land; and that the 1st respondent's claim to the suit land was barred after 12 years from the date of the agreement.

16. The 1st respondent submitted that the learned Judge was right in holding that the appellants' claim over the suit property was time barred by limitation of time; that since the 2nd appellant was not a director of the 1st appellant, the counterclaim had no basis in law; and that the appeal should fail.

17. We have considered the record of the proceedings and submissions placed before us.

18. This being a first appeal, this Court's mandate, as espoused in Ng'ati Farmers' Co-Operative Society Ltd. v Ledidi & 15 Others [2009] KLR 331 is that:

> " An appeal to this Court from a trial by the High Court is by way of re-trial 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 witness and should make due allowance in that respect. In particular, this 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."

19. The learned Judge dismissed the appellants' case on the ground that the 1st respondent had, by effluxion of time, acquired an overriding interest in the suit property by way of adverse possession. However, in his submissions, the 1st respondent has introduced the issue of the 2nd respondent's capacity in the suit and her locus in making counterclaim on behalf of the 1st appellant. That was not the basis upon which the learned Judge made the decision. Rule 107(a) of the Court of Appeal Rules (the Rules) provides that:

    At the hearing of an appeal—

    a. no party shall, without the leave of the Court, argue that the decision of the superior court should be reversed or varied except on a ground specified in the memorandum of appeal or a notice of cross-appeal, or support the decision of the superior court on any ground not relied on by that court or specified in a notice given under rule 95 or rule 96;

20. Rule 96(1) of the Rules provides that:

> A respondent who desires to contend on an appeal that the decision of the superior court should be affirmed on grounds other than or additional to those relied upon by that court shall give notice to that effect, specifying the grounds of the respondent's contention.

21. From the two rules above, a party is not permitted, without leave of the Court, to rely on any ground not specified in the Memorandum of Appeal, Notice of Cross-Appeal or Notice of Grounds, Affirming, Varying or Reversing Decision. The 1st respondent could have either sought leave of this Court to argue that issue or filed a Notice pursuant to rule 96 aforesaid.

22. Coming to the merits of the appeal, the 1st respondent's case was hinged on the agreement for sale and adverse possession. It was however decided on the latter, notwithstanding that its case was dismissed for want of prosecution.

23. Section 38(1) of the *Limitation of Actions Act*, provides that:

> " Where a person claims to have become entitled by adverse possession to land under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

24. Section 7 of the same Act provides:

> An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

25. Section 13 of the aforesaid Act, on other hand, provides that:

> A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under section 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

26. The case of Wambugu v Njuguna (1983) KLR 171 laid down the following guiding principles as regards adverse possession:

    1 The general principle is that until the contrary is proved possession in law follows the right to possess.

    2. In order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it.

       Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.

    3. The *limitation of Actions Act*, in adverse possession contemplates two concepts, disposition and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.

    4. Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale or agreement, the possession becomes adverse and time begin to run at the time the licence is determined. Prior to the determination of the licence, the occupation

is not adverse but with permission. The occupation can only be either with permission or adverse; the two concepts cannot co-exist.

5. The rule on permissive possession is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land.

6. Adverse possession means that a person is in possession in whose favour time can run.

7. Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to rum in favour of the purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase the vendors would have evicted him. The possession can only become adverse once the contract is repudiated.

8. Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is the claimant's possession as deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation of at least 12 years after such payment.

27. The claimant must also prove open, continuous and exclusive possession of the land for at least 12 years and in this regard, it was held in Mbira v Gachuhi (2002) I EALR 137 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...."

28. From the above decisions, the ingredients of adverse possession are: ownership of the land by the person against whom the claim is made; open, continuous and exclusive possession of the land by the claimant for at least 12 years; assertion of right by the dispossessor which must be inconsistent with the rights of the owner. All these ingredients must be proved and where the claimant fails to prove any one of them, the claim to land, based on adverse possession, must fail.

29. The assertion of right by the dispossessor must be inconsistent with the rights of the owner. It does not suffice to simply aver that the claimant was in possession for more than 12 years. The claimant must adduce evidence of the steps or action taken with a view to asserting rights, which must be adverse to, or inconsistent with the title of the valid owner. In other words, there must be an adverse incident in the possession, and that incident must be shown to be present right from the time the claimant takes possession of the land.

30. Where therefore, the claimant's entry into the land was as a licensee, then there must be evidence of the incident or the point at which the licence was terminated or lapsed and the continued possession became adverse to that of the owner. In Alfred Welimo v Mulaa Sumba Barasa, *CA No 186 of 2011*, this Court expressed itself thus:

> "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 land 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…."

31. In this case, although the 1st respondent averred that there was an agreement for sale between him and the 2nd appellant, the dismissal of his case for want of prosecution rendered this contention a bare averment with no evidential value. That left the testimony of the 2nd appellant as the only evidence as to how the 1st respondent went to occupation of the suit land. According to that evidence, the 1st respondent went into occupation as a licensee. That being the position, it was not enough for the 1st respondent to simply count years of occupation, but to go further and show when that licence came to an end and the possession became adverse. According to the 2nd appellant she had several times requested the 1st respondent to go and see her regarding their relationship but the 1st respondent had not done so. It was her evidence that the transaction was based on trust. In her view, she did not see the reason to evict the 1st respondent from the suit property. As held in Alfred Welimo v Mulaa Sumba Barasa (supra), the mere fact that the owner of the land, at present, has little or no use for the land and leaves it to be used by others, without those others demonstrating a possession inconsistent with the title of the owner, does not render the possession adverse. In the absence of the evidence adduced by the 1st respondent, there was no basis for finding that the 1st respondent's possession of the suit property was adverse to that of the appellants.

32. The respondent contended that the lease granted to the appellants expired on 1st January 1994. If that position is correct, then it follows that by 2014 when the suit was filed, the appellants' interest in the suit land had expired by effluxion of time. The land would then revert to the Government. In that event, the claim by the 1st respondent, based as it was, on adverse possession, would collapse on the basis of section 41(a)(i) of the *Limitation of Actions Act* which provides that:

This Act does not –

a. enable a person to acquire title to, or any easement over –

    i. Government land or land otherwise enjoyed by the Government.

33. Clearly, the 1st respondent's claim for the suit property by adverse possession was unmerited.

34. We also agree with the appellants that the determination by the learned Judge led to an unfortunate situation where, notwithstanding the fact that the 1st respondent's claim to the suit land on grounds of adverse possession was dismissed, a favourable judgement was handed down in which he, nevertheless, acquired the suit property by adverse possession, based, as it were, on a suit that stood dismissed.

35. The predecessor to this Court in dealing with a defence case in Abdul Rehman v R H Gudka [1957] EA 4 held that:

> "In the absence of any counterclaim, the learned Judge had no jurisdiction to make in favour of the defendant the declaration. A declaration should not be made in favour of the Defendant, unless there is a counterclaim for it, or perhaps, where it is merely the negative of a declaration claimed in the plaint.

36. By parity of reasoning, a declaration ought not to be made in favour of a plaintiff where the suit has been dismissed, unless it is merely the negative of a declaration claimed in the defence and counterclaim.

37. We therefore find merit in this appeal which we hereby allow.

We set aside the judgement in Nyeri ELC Case No. 38 of 2014 delivered on 8th February 2019 and substitute therefor a judgement in favour of the appellants. We allow the appellants' counterclaim and direct that the 1st respondent gives vacant possession of the parcel of land known as LR. No. Aguthi/ Gatitu/ 667/101, Ruringu Town, to the appellants within 60 days from the date of this judgement and in default, the appellants be at liberty to evict the 1st respondent.

38. The costs of this appeal are awarded to the appellants to be borne by the 1st respondent.

39. We so order

DATED AND DELIVERED AT NYERI THIS 9TH DAY OF MAY, 2025.

J. LESIIT

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR