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M'itunga v Ibere & another (Civil Appeal 215 of 2019) [2025] KECA 1435 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KECA 1435 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 215 OF 2019

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

JULY 31, 2025

BETWEEN

ISAIAH MUTEA M'ITUNGA .... APPELLANT

AND

FRANCIS KAIRETHA IBERE ALIAS KAIRETHIA IBERE .... 1ST RESPONDENT

PETER MUTHAMIA KAIRETHIA .... 2ND RESPONDENT

(Being an appeal from the judgment and decree of the Environment and Land Court at Meru (L. Mbugua, J.) dated 17th December 2018 in ELC No. 90 of 2010 (O.S))

JUDGMENT

1. The 1st respondent, Francis Kairetha Ibere alias Kairethia Ibere, is the registered proprietor of Land Parcel No. Kianjai/Thau/153 [the suit property] which measures 2.2. Hectares. Peter Muthamia Kairethia, the 2nd respondent, is his son. By originating summons dated 30th June 2010, the appellant, Isaiah Mutea M'Itunga, claimed to have acquired 2 acres of the suit property by adverse possession, having been in continuous and uninterrupted possession for over 25 years, since 1984. He filed the summons because the 2nd respondent had begun to harass him while seeking to evict him from the suit property. He sought to be declared to have acquired the 2 acres, and that the registration in the name of the 1st respondent be cancelled so that he could be registered in his place.

2. The respondents denied the claim and sought the dismissal of the appellant's suit.

3. Before the ELC [L. Mbugua, J.] the appellant testified and called Lucy Kinganga [PW 2], John M'Ibung'a [PW 3] and Charity Karugu M'Utuaruchiu [PW 4]. The appellant's case was that, vide a written agreement signed before B.J. Advocate in 1984, he bought 2 acres of land of the suit property from the 1st respondent. He was given possession and settled here. He built a house and erected a water

tank, after fencing the portion. He planted trees. He lived here up to 2010 when the 2nd respondent came and built on the same portion, and chased him away from the land.

4. The respondents testified in defence. According to the 1st respondent, he lives on the suit property with his family. He denied selling any portion of the suit property to the appellant. He stated that he leased one acre of land to the appellant for 5 years, beginning 1984. When the 5 years ended in 1989 the appellant left the one acre. During the five years, the appellant was not living on the land. He would come and farm, and return to his home. He never built on the land, or erected a water tank. The 1st respondent denied that his children, the 2nd respondent included, chased him from the suit property. The 2nd respondent testified that he was shown 2 acres of the suit property in 2002 by the 1st respondent, and that is where he has erected his home. He denied that he chased the 2nd respondent from the said property.

5. The learned Judge considered the evidence of the parties and the witnesses, and concluded that the appellant had not proved his case against the respondents. The learned Judge found that the appellant and his witnesses had not shown that there was any land sale transaction between the appellant and the 1st respondent. The version that the appellant had leased a portion of the suit property, and that he would come and farm on the land and go away, was accepted by the court. Consequently, the appellant's suit was dismissed with costs to the respondents.

6. The appellant was aggrieved by the decision and appealed to this Court, raising the following grounds:-

> "1. The learned judge erred by holding that continuous possession was interrupted in the year 2010, when the suit was filed without any tangible evidence to support the finding.
>
> 2. The judge erred in law by holding that, the plaintiff only used to come to the subject matter for farming activities only and leave without proper evidence on record.
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> 3. The learned judge erred in law by holding that no sale actually took place between the respondent and appellant.
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> 4. The judge grossly misapplied the rule and application of the doctrine of adverse possession and thereby arrived at a wrong decision."

7. We reiterate that an appeal to this Court from the ELC is by way of a retrial. We have to reconsider the evidence that was placed before the court, evaluate it and draw our own conclusions thereon. In doing this, we have to take into account the advantage that the court had of seeing and hearing the witnesses. [See Ngati Farmers Corporate Society Ltd v Ledidi & 15 Others [2009] KLR 331]. In Peters v Sunday Post Limited [1958] EA 424, it was emphasized that –

> "It is a strong thing for an appellate court to differ from the finding of fact of the Judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

8. This Court in Peter Kamau Njau v Emmanuel Charo Tinga [2016 eKLR expressed itself regarding the circumstances under which the title of registered owner may be defeated by a claim of adverse possession. It stated as follows:-

> "A registered owner of land, may not, by the provisions of section 7 of the *Limitation of Actions Act* bring an action to recover land after the end of twelve years from the date on which the right of action accrued to him. At the expiration of that period the owner's title will be extinguished by operation of the law. Section 38 of the Act permits the person in peaceful possession, without the land owner's permission, for a continuous and uninterrupted period of 12 years, but who has also done acts on the land which are inconsistent with the registered owner's enjoyment of the soil for the purpose for which he intended to use it, to apply to be registered as its owner."

9. When the appellant went before the ELC to claim two acres of the suit property from the 1st respondent who was the registered owner, he was required to prove that he had acquired the two acres openly and without force, without secrecy, and without the licence or permission of the 1st respondent for a period of twelve years, and with the intention of dispossessing the respondent of the land. [See Samwel Kihamba v Mary Mbaisi [2015] eKLR].

10. In our view, the only issue that falls for our determination is whether, based on the evidence adduced before the trial court, the learned Judge erred in finding that the appellant had failed to prove that he was entitled to the suit property by way of adverse possession.

11. In the written submissions filed on behalf of the appellant, it was contended that the appellant had called evidence to prove that he had bought the two acres of the suit property in 1984, taken exclusive possession and remained on the land, without interruption, up to 2010 when he was chased away; that was for a period of 26 years.

12. On the part of the respondents, learned counsel asked us to accept the findings by the learned Judge that the appellant had leased part of the suit property for only five years, and that, upon expiry of the period, he had left the land. It was submitted that the learned Judge had reached this finding upon considering that the appellant and his witnesses had tendered contradictory evidence; evidence that could not be believed.

13. We have reviewed the evidence. The appellant's case was that he took possession of the two acres of the suit property following an agreement between him and the 1st respondent; that he bought the two acres from the 1st respondent; and that the sale agreement was signed before an advocate. He did not produce a copy of the agreement. When asked where the agreement was, he stated that it got burnt when his house was burnt. The advocate who drafted the agreement, and before whom the same was signed, was B.G. Kariuki. There was no effort to call him. The particulars of the agreement were not given. How much was the purchase price? Was it paid, and in full? When was the sale to be completed? Were the parties supposed to go to the Land Control Board? Why did the 1st respondent not transfer the two acres? Why did he not ask the 1st respondent to transfer the portion? All these questions remained without answers.

14. PW 3 and PW 4 each stated that the appellant bought the 2 acres from the 1st respondent. PW 3 was cross examined and stated that it was the appellant who told him that he had bought the land. He [PW 3] was not there when the land was bought. PW 4 stated that he was present when the appellant bought the land. Asked further, he contradicted himself and stated that he was not there when the land was bought. He went on to state that the appellant did not show him the sale agreement.

15. Against that evidence, the 1st respondent's version was that what brought the appellant to the suit property was a lease; that it was a lease for one acre for five years; and that the appellant left when the term came to an end.

16. The learned Judge, who saw and heard the witnesses, accepted the version by the 1st respondent. On the recorded evidence, we have no reason to find otherwise.

17. The appellant testified that he settled on the 2 acres, and built a house after fencing and planting trees. According to the respondents, the appellant would come to the portion, cultivate and go away. He did not live there, and neither did he establish a home there. When PW 3 was cross examined, he stated that:

> " He used to come and farm on the land [Isaiah] and he would go away. He was cultivating and going away. He never lived on that land. His family never lived there. Mutea used to come with his workers and go away with his workers."

18. The appellant had stated that he was staying on the two acres that he had bought from the 1st respondent. The learned Judge, once again, was unable to accept the testimony of the appellant, given that his own witness [PW 3] never saw him live on the portion. We have independently reviewed the testimonies, and we agree with the learned Judge.

19. In Wambugu v Njuguna [1983] KLR 171, this Court laid down several guiding principles in regard to adverse possession. Two of the principles are in regard to a purchaser under a contract of sale. The Court stated as follows:-

> " 7. Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run 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 from 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 instalment of the purchase price. The claimant will succeed under adverse possession upon occupation of at least 12 years after such payment."

20. In this case, to be able to determine when the permitted appellants occupation of the suit property became adverse following the purchase, one had to look at the terms of the sale agreement signed between him and the 1st respondent. The appellant was required to show when it was that he paid the final installment of the purchase price; what the parties agreed would happen following such payment; and when it was that the 1st respondent repudiated the agreement, if at all. But, as was found by the trial court, evidence of purchase was not sufficiently tendered.

21. In the final analysis, we find no merit in the appeal as the appellant was not able to prove that he had become entitled to the 2 acres by way of adverse possession, or otherwise. We dismiss the appeal with costs to the respondents.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF JULY 2025.

W. KARANJA

JUDGE OF APPEAL

L. KIMARU

JUDGE OF APPEAL

A.O. MUCHELULE

JUDGE OF APPEAL