Waweru v Nguthi (Civil Appeal 170 of 2019)
[2025] KECA 1372 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KECA 1372 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 170 OF 2019

S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA

JULY 18, 2025

BETWEEN

STANLEY WARIMA WAWERU ..... APPELLANT

AND

FRANCIS NDONGA NGUTHI ..... RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Murang'a (Kemei, J.) dated 20th December, 2018 in ELC Case No. 415 'A' of 2018)

JUDGMENT

1. Before this Court is an appeal from the judgment of the Environment and Land Court at Murang'a (Kemei, J.) dated 20th December, 2018 in ELC Case No. 415 'A' of 2018.

2. A brief background of the matter is that the appellant filed a suit against the respondents through an originating summon (OS) dated 4th July, 2017 and amended with leave of the court on 30th April, 2018 to remove the name of Ndonga Munga who was the 1st respondent in the suit, since he was deceased. The appellant sought orders that he be declared as the absolute owner of Land Parcel Title No. Fort Hall Location 19/Gacharageini/T.237 also known as Loc.19/Gacharageini/T.237 (referred to as the 'suit land') by way of adverse possession.

3. The appellant's case, as projected in both the application and his supporting affidavit sworn on even date was that, he was in peaceful and uninterrupted occupation of the suit land for twelve (12) years, with the full knowledge of the respondent, having entered the same in the year 1998, and where he carried out small scale farming since then. He claimed, as a result, that he had acquired title to the suit land by way of adverse possession and that the respondent's rights to it were extinguished by effluxion of time.

4. The respondent entered an appearance and filed his replying affidavit, sworn on 6th December, 2017, and denied the claim by the appellant. He averred that he was the registered owner of the suit land and had been in both actual and physical occupation of it since he inherited it from his late father, Ndonga Munga, in the 1960s.

5. He averred that the appellant was a stranger, and he had never met him in his life. He claimed that the appellant was a trespasser and an imposter and had never been in occupation of the suit land. In addition, when he transferred the title of the suit land from his late father's name to his on 10th February, 2011, roughly six years before the filing of the suit, the appellant was nowhere in sight. The respondent thus prayed that in the event the appellant had encroached in the suit land as he alleged, the court should grant an eviction order against him. The respondent did not, however, file a counter claim for eviction orders.

6. On his part the appellant relied on his written statement and called one (1) witness, Charles Macharia Kamau [Kamau]. The gist of his case was that the respondent knew of his presence on the land as he had been given permission to enter the suit land by the 2nd respondent's brother, Kimindi Nguchu (deceased). He confirmed that the house in the picture adduced as evidence was not on the suit land. Further the picture was taken in 2017, the same year he planted nappier grass on the suit land. His witness, Kamau, a farmer, testified that he knew the appellant as he was his neighbour and that he was cultivating the suit land from 1997 or 1998. He confirmed that the house in the picture belonged to him but it was standing on another parcel of land, not the suit property. He testified further, that he never knew Ndonga Munga nor the respondent but knew Kimindi (deceased) as the owner of the suit land. Lastly, he testified that he did not know how the appellant entered the suit land but noted that the appellant entered the suit land either in 1997 or 1998.

7. On his part, the respondent relied on his statement and his replying affidavit. He testified that he was the registered owner of the suit land which he inherited from his late father, Munga Nguthi. He further stated that he had not utilized the suit land because he left it and went to Kericho when he was a young man. He confirmed that Kimindi (deceased) was his step brother and that he, Kimindi, was not in charge of the suit land. He testified that he was last on the suit land in 1968 and stated that he did not know the person that was occupying and/or cultivating it.

8. In the judgment of the trial court dated 20th December, 2018 Kemei, J. noted that the appellant had given two contradictory versions of how he entered the suit land. She found that in the first instance, he stated that he entered the suit land with the permission of Kimindi (deceased) and in the second instance, he stated that he entered the suit land with the full knowledge of the respondent. The learned trial Judge found that the appellant had not explained how the respondent had actual or constructive knowledge of his alleged occupation of the suit land. Further, she noted that the respondent had contended that he did not have knowledge of the occupation and utilization of the suit land by the appellant, and that although he last visited the suit land in 1968, he had never needed to utilize it and neither did he detail Kimindi to take care of it and in any event Kimindi died long before he relocated to Kericho.

9. In view of the evidence adduced and the material placed before the trial court, the learned Judge found that the appellant had not proved adverse possession and consequently dismissed his suit with costs to the respondent.

10. Aggrieved and dissatisfied with the said judgment the appellant preferred an appeal to this Court as evinced in his notice of appeal dated 24th December, 2018. In his memorandum of appeal dated 10th July, 2019, the appellant faulted the learned Judge on the following grounds:

1. "The learned judge erred in law and fact in the interpretation of the defence of limitation of time.

2. The learned judge erred in law and fact when it found that the claim by the appellant was time barred.

3. The learned judge erred in law and fact in the interpretation of facts in the suit, framing of the issues for determination and failing to make a determination on all of the framed issues.

4. The learned judge misdirected herself in law and fact by not paying regard to the correct principles of law and in entering the judgment against the appellant.

5. The learned judge erred in law and fact in failing to find that the respondent obtained the titles illegally."

11. At the hearing learned counsel Mr. Njiraini was present for the appellant, whereas learned counsel Mr. Mbuthia was present for the respondent. Both counsel expressed their wish to adopt and rely on their written submissions dated 15th May, 2023 and 19th May, 2023 respectively.

12. Highlighting his submissions, Mr. Njiraini urged that only one issue was up for determination; whether the appellant was entitled to ownership of the suit land by way of adverse possession. He submitted that the appellant had occupied and cultivated the suit land since 1998, over twenty (20) years way above the twelve (12) years threshold for adverse possession, and no one had asked him to vacate the land. That in addition, the appellant had confirmed that he knew one Kimindi (deceased) who was the respondent's step brother and maintained that the respondent had relatives in the same area who would have informed him of the appellant's occupation on the suit land. The appellant thus argued that the learned Judge erred for holding that the respondent had no actual or constructive knowledge of the appellant's occupation of the suit land.

13. Mr. Njiraini submitted further that the change of name of the suit property, as reflected in the green card was not a transmission of the title deed to the respondent and therefore did not amount to an interruption of the appellant's occupation on the suit land and relied on the case of Wanje & Others vs. Saikwa & Others [1984] KLR 284 for that proposition.

14. Learned counsel maintained that he had proved to the satisfaction of the trial court all the ingredients for a claim of adverse possession as enumerated in the case of Tabitha Waitherero Kimani vs. Joshua Ng'ang'a [2017] eKLR and Manason Ogendo Afwanda vs. Allice Awiti Orende & Mark Ataga Agutu (Environment & Land Case 44 of 2018) [2020] KEELC 104 (KLR) (18 December 2020) (Judgment).

15. Lastly, relying on the case of Teresia Matoke Anyoka & Another vs. Daniel Nyaburi & 2 Others [2021] eKLR, the appellant's learned counsel emphasized that it was evident and clear that the appellant's possession of the suit land was actual, physical and continuous with the knowledge of the 2nd respondent who neither attempted to re-enter nor enter the suit land to break his continuous possession. The appellant, therefore, asks this Court to overturn the judgment of the Environment and Land Court and enter judgment in his favour with costs.

16. On his part, Mr. Mbuthia, for the respondent, submitted that there was evidence that the appellant entered into the suit land with his implicit permission. It was argued that the appellant confirmed that he was given permission to enter the suit land by Kimindi (deceased), who was the 2nd respondent's stepbrother.

17. The respondent further submitted that there was no evidence of possession of the suit land by the appellant for a period of twelve (12) years or more at the time of filing the suit. Further, there was also no evidence of his possession of the said land prior to 2017.

18. In addition, counsel for the respondent submitted that the appellant failed to discharge his burden of proof to the required standard of how he entered the suit property. He contended that the appellant had propounded two mutually exclusive positions; entry with permission, where he stated that the appellant claimed he entered the land with the permission of Kimindi (deceased); and secondly where he asserted that he entered the suit land without permission,

19. Lastly, the respondent's counsel submitted that the appellant admitted that he did not know the respondent as he had never met him, and further, that the respondent lived in Kericho and had never gone to the suit land. He urged that it was clear evidence that the respondent was not aware of the appellant's presence on the land. The respondent relied on this Court's decision in Chairman, Board of Governors Murang'a College of Technology Primary School vs. Julius Ngigi Munjuga [2018] eKLR which, counsel submitted, adopted the reasoning in the case of Alfred Welimo vs. Mulaa Simba Barasa, *CA No. 186 of 2011* to the effect that abandonment of the land requires the one taking occupation to have animus possidendi (the intention to possess) and emphasized that the court must be shown that the owner of the land knew or had the means to know of the occupier's possession of the land. The respondent, therefore asks this Court to dismiss the appeal with costs.

20. This being a first appeal, we have the onus to reconsider both matters of law and fact without losing sight that we did not have the advantage of seeing and hearing the witnesses. In John Teleyio Ole Sawoyo vs. David Omwenga Maobe [2013] eKLR this Court held:-

> "This being a first appeal we have the duty to reconsider both matters of fact and of law. On facts, we are duty bound to analyze the evidence afresh, re-evaluate it and arrive at our own independent conclusion but must bear in mind that the trial court had the advantage of hearing the witnesses testify and seeing their demeanour and should make allowance for the same.
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> Still on the duty of the first appellate Court, Hancox JA (as he then was), stated in Ephantus Mwangi & another vs. Duncan Mwangi Wambugu [1982 -88] 1 KAR 278 at page 292, as follows:
>
> > 'A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.'"

21. We have considered the submissions of both counsel, the cases cited and the relevant law, as well as analyzed afresh the evidence that was adduced before the trial court while bearing in mind that we neither saw nor heard the witnesses and giving due allowance. We are mindful of the fact that we can only depart from the findings by the trial Court if they were not based on the evidence on record; where the said court is shown to have acted on wrong principles of law as held in Jabane vs. Olenja [1986] KLR 661; or if its discretion was exercised injudiciously as held in Mbogo & Another vs. Shah (1968) E.A.

22. We note that the trial Judge identified one issue for determination: whether the appellant proved title by way of adverse possession.

23. Having considered the arguments of the counsel to the parties, the applicable law and the evidence, we find that the issue that falls for our determination is whether the trial Judge fell into error when she found that the respondent's title had not been extinguished by the appellant's occupation, use and/or possession of it.

24. A claim for adverse possession is brought on the strength of section 38 of the *Limitation of Actions Act* that section provides;

> " 38. Registration of title to land or easement acquired under Act.
>
> (1) Where a person claims to have become entitled by adverse possession to land registered 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."

25. For a party to succeed in a suit for adverse possession, the following circumstances must arise as considered by this Court in the case of Mtana Lewa vs. Kahindi Ngala Mwagandi [2015] eKLR:

> "Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner."

26. The appellant's evidence before the trial court was that he entered into the suit land on his own volition in 1998. He also stated that he was given permission to enter the suit land by Kimindi Nguthi (deceased), the stepbrother of the respondent. He testified that he had been in occupation of the suit land since then and that he was cultivating maize, fruit trees and Napier grass, the latter of which he planted in 2017. He said that he was in occupation and use of the suit land for a period in excess of 12 years, that the use was with the full knowledge of the respondent, who never claimed the suit land from him, and that, therefore the respondent's title to the suit land was for those reasons extinguished by effluxion of time. The appellant called a neighbour whose land was about 100 meters from his. The neighbour corroborated his evidence and testified that he had personal knowledge that the appellant started using the land and cultivating it either in 1997 or 1998.

27. The trial Judge found that the appellant had two versions of how he entered the land; one where he stated that he entered on his own volition and the second where he said that the respondent's step brother gave him permission, finding his evidence to that extent implausible.

28. We find, with respect, that it was a misdirection for the learned Judge to have considered that the step brother of the respondent could have permitted the appellant to occupy the land. It cannot be a license or permission to use or occupy land if that license has been given by a person other than the owner of the land. The significance of the appellant's statement was not to show he had permission to enter, but that a member of the respondent's family knew of his occupation and use of the suit land. That

was the holding by this Court in the case of Samuel Miki Waweru vs. Jane Njeri Richu [2007] eKLR where it stated:

> " It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise..."

29. That brings us to the other issue of whether the respondent knew that the appellant was in occupation of his land; and related to that, whether it was important for the owner of the suit land to know of the adverse possession. This Court in the case of Benjamin Kamau Murima & Others vs. Gladys Njeri, *CA No. 213 of 1996* held that:

> "The combined effect of the relevant provisions of Sections 7, 13 and 17 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of Adverse Possession of that land."

30. The same Court held that the onus is on the person claiming Adverse Possession. The Court delivered itself thus:

> " ... to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the Applicant must show that the respondent had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration."

31. The onus was on the appellant to show that either the respondent knew of his adverse possession of the suit land, or that he had the means of knowing or finding out. In that regard, the evidence of the appellant was that the respondent came from the area where the land was situated, and that he had relatives living there. It is not disputed that the respondent left for Kericho before 1968, the year he said he last visited the area. We note that both the appellant and the respondent stated that none knew the other, except that the appellant knew Kimindi, whom the respondent admits was a stepbrother. He, however, made it clear that Kimindi had no role over the suit land, further that he died before the respondent left for Kericho. He did not give details of when Kimindi died.

32. The evidence is clear that the appellant did not know the respondent physically. What was required was for the appellant to show that the respondent had the means of knowing, whether actually or constructively, that the appellant was using or occupying the suit land. We do find that there is sufficient evidence to find, on a balance of probabilities that the respondent had the means of knowing that the appellant was using the suit land.

33. The appellant brought a witness who corroborated his testimony that he started using the land in 1997 or 1998, and that he used it continuously until the time he filed this suit in 2017. In terms of computation of time, whether the appellant entered the suit land in 1997 or 1998, the appellant would still have met the essential prerequisites of being in possession of the suit land in continuity, in publicity and in extent, neither by force or stealth nor under the license of the owner. The Judge was not impressed by the appellant's witness because of saying he could not tell the actual year the appellant entered the land, whether it was 1997 or 1998. We are of the view that although he gave two possible years when the appellant entered the suit land, it does not mean he was not truthful, rather it was because he was careful and honest. As the Judge noted, the witness was candid that the picture

of a house produced at the trial belonged to the appellant but was on a different parcel of land owned by the appellant.

34. The Judge found that the appellant had not proved he had been in use and occupation of the suit land because the photographs he produced of mature maize and nappier grass which he said he had planted in 2017 was insufficient to prove the requisite period required of 12 years. The appellant adduced the direct evidence of a witness who corroborated his evidence of the period of time he had occupied and used the land. That was direct evidence of an eye witness. The photographs of plants and plantations he had on the land only proved that he was using the land, and we find it was a misdirection to suggest that the pictures were meant as proof of prolonged use of the land. Maize does not take years to grow.

35. In the respondent's replying affidavit he stated as follows:

> " 5. That, I do not know the applicant herein and I have never met him in my life.
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> 6. That, I am the one who has been in both actual and physical occupation of the suit land ever since I inherited it from my late father Ndonga Munga in the 1960's.
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> 7. That, the applicant herein is a trespasser and an imposter; he has never occupied the suit land at any one given time.
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> 8. That, barely six years ago from now I transferred the title from my father's name into my sole name as it appears on the title deed and the green card.
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> 9. That in reply to paragraph 2 of the supporting affidavit, it is not true that the applicant has been in occupation of the suit land for 12 years as alleged; the truth of the matter is that I am the one who has been in the occupation of the suit land ever since.
>
> 10. That in· reply to paragraph 3 of the supporting affidavit, it is not true that the applicant entered my parcel in 1998 and has been practicing small scale farming."

36. We note that the certificate of title to the suit property adduced in evidence by the respondent, that the first registered owner was Ndonga Munga whose title was issued on 3rd May, 1963. That was the father of the respondent from whom, in his evidence, he inherited the land in the 1960's. We note that he transferred the land to his name and got a title on the 10th February, 2011. However, in his testimony in court, he said his name is Ndonga Munga and that he changed his name from Ndonga Munga to Francis Ndonga Nguthi and effected the change on the title in 2011. The appellant did not make it an issue at the trial court, whether the name Ndonga Munga was the respondent's or his late father's name, and how come he changed the title holder's name from one to the other without it being a transmission through succession? The appellant raised it as an issue for the first time in this appeal. It is trite that an appellant cannot raise a new matter on appeal that was not canvassed before the trial court.

37. Be that as it may, from the record, the respondent left the suit land in 1968 and did not return there until 2011 for the purpose of effecting the transfer of the suit land to his name. His evidence before the trial court was that all along he was in occupation and use of the suit land and was not aware of anyone else utilizing it. At the same time, the respondent testified that he never needed to utilize the land between 1968 to the time he changed ownership of title holder to his name in 2011.

38. We do not find the evidence of the respondent to have been candid. The evidence before the court was that he abandoned the suit land and went to live in Kericho in 1968, and according to his testimony,

he did not need the land to utilize it and further that he never bothered to know or find out what was happening on it. By the time the respondent changed title to his name in 2011, the appellant had been in occupation and use of the suit land as a true owner, continuously for the entire limitation period of more than 12 years. By the time of the change of title, the respondent's title to the suit land, including the person through whom he claimed, [his deceased father] was already extinguished by effluxion of time. That change did not interrupt the appellant's adverse possession, which means that time did not stop running by mere change of ownership.

39. As this Court held in Titus Mutuku Kasuve vs. Mwaani Investments Limited & 4 Others [2004] eKLR:

> "And in order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition [See Wanje v Saikwa (No 2) [1984] KLR 284.] A title by adverse possession can be acquired under *Limitation of Actions Act* for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person's adverse possession – (See Githu v Ndeete [1984] KLR 776)." [Emphasis added]

40. After carefully considering this appeal, we have come to the conclusion that the appeal has merit and should be allowed. We make the following orders:

    1. The judgment of the Environment and Land Court (J. Kemei, J.) dated 20th December, 2018 in Muranga ELC Case No. 415 'A' of 2018 be and is hereby set aside;

    2. The appellant be and is hereby declared the absolute owner of parcel of land No. Loc. 19/ Gacherege/T. 237 by adverse possession;

    3. The appellant will get the costs of this appeal and of the case before the ELC court.

DATED AND DELIVERED AT NYERI THIS 18TH DAY OF JULY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR