Onzere v Nanyama (Environment and Land Appeal 15 of 2022)
[2024] KEELC 1392 (KLR) (18 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1392 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL 15 OF 2022

FO NYAGAKA, J

MARCH 18, 2024

BETWEEN

EPHRAIM A. ONZERE ..... APPELLANT

AND

SELINA NANYAMA ..... RESPONDENT

(Being an Appeal from The Judgment of Hon. S.N. Makila (PM) in Kitale Chief Magistrates Court No. 50 Of 2020 Delivered on 20th July 2022)

JUDGMENT

Background

1. Ephraim Onzere, the Appellant herein, instituted a suit in the subordinate Court vide a Plaint dated 23/06/2020. He sought to permanently injunct and evict Selina Nanyama the Respondent herein, from land parcel No. Waitaluk/Mabonde Block 2 (Machunga)/276 measuring 0.4047 Ha (hereinafter 'The Suit land') on the claim that he was the registered proprietor.

2. Through his Defence dated 07/07/2020, the Respondent opposed the suit claiming that she purchased the suit land from the Plaintiff's brother, Joseph Omari, in the year 1988. It was her case that the issue of trespass, in the circumstances, could not arise and that the prayer for injunction was not tenable.

3. The Respondent averred further that there was a pending suit in Kitale ELC Case No. 33 of 2020 (O.S) wherein she claimed that land by way of Adverse Possession. Further, it was also her case that there existed Kitale Senior Principal Magistrates Civil Case No. 72 of 1989 and Kitale High Court Civil Appeal No. 18 of 1994 and as such, the dispute was res-judicata.

4. In its Judgment, the Trial Court was of the position that the suit was res-judicata. It also made the finding that despite the Appellant having proved ownership, the Respondent had been in occupation

for a continuous period of over 19 years thus the possibility that her right under adverse possession may have crystallized. To that end, it dismissed the Plaint with costs.

The Appeal

5. The Appellant was dissatisfied with the findings of the Trial Court. Through the Memorandum of Appeal dated 03/08/2022, he asserted grounds of appeal as hereunder:

    1. The learned trial magistrate erred in law and in fact in entering judgment and making Orders in favour of the Respondent which she had not sought or prayed for in her pleadings.

    2. That the learned trial magistrate erred in law and in fact in departing from the law and established practice in holding that a judgment for claim of adverse possession could not obtain without the institution of an originating summon or process.

    3. The learned trial magistrate erred in law and in fact in holding that the suit is res-judicata without any documentary evidence from Respondent to prove the fact.

    4. The learned trial magistrate erred in law and in fact in holding that the Respondent proved her claim of adverse possession without any tangible and cogent evidence to support the same.

    5. The learned principal magistrate erred in law and in fact by selectively relying on the Respondents documents that were never produced as exhibits in her judgment and in some instances using the Appellants documents to prove the defendant's case.

    6. The learned principal magistrate erred in law and in fact in making inferences, propositions, speculations and allegations of adverse possession without proper tangible and cogent evidence and particulars in the Respondent pleadings to support the same.

    7. The learned Principal Magistrate erred in law and in fact in misapplying the rules of engagement in civil litigation by extrapolating the respondent's pleadings to the detriment of the Appellant's case.

    8. The learned principal magistrate erred in law and in fact in not applying properly the provisions of section 107 and section 109 of the *Evidence Act* cap 80 laws of Kenya concerning the Respondent's evidence in the trial court.

The Submissions

6. The Appellant urged the appeal further through written submissions dated 02/01/2024. It faulted the trial court's finding on res judicata on the basis that despite acknowledging that there was no evidence on res-judicata it went ahead to make the finding that there was proof of the same in violation of Section 107 of the *Evidence Act*.

7. The Appellant submitted that whereas there were cases as alluded to by the Respondent, the same were not between the same parties as was in the Appellant's case. He argued that such denial by the Appellant automatically required the Respondent to adduce evidence and prove that in the mentioned cases, the parties were the same.

8. On the question whether there was proof of existence of Kitale ELC No. 33 of 2020 (O.S), the Appellant submitted that he denied, in his reply to defence, to such existence as he had not been served with any papers thereof and neither were any pleadings in respect of the said suit produced before the trial court.

9. The Appellant submitted that it was erroneous for the Trial Court to make such finding without proof. The Appellant urged the Court to allow the Appeal and set aside the judgment of the trial court and his case allowed as prayed.

The Respondent's Case

10. Selina Nanyama challenged the Appeal through written submissions dated 04/10/2023. It was her case that the cited cases, Kitale SRMCC 72/1989 and High Court Civil Application No. 18 of 1994 were part of the court record and that they proved Adverse Possession.

11. The Respondent submitted that the Appellant did not controvert in his Plaint the fact that she took possession of the suit land in the year 1988 and settled on it in the year 2002. She stated that from that period to 2022 when the Appellant instituted suit is 18 years.

12. In conclusion, the Respondent submitted that its documents are on record and it helped the Trial Court reach a judicious decision. It prayed that the Appeal be dismissed.

Issues for Determination

13. From the foregoing, the only issue that is at the core of this appeal is:

    i. Whether the Trial Court properly directed itself in dismissing the Appellant's suit

    ii. Remedies.

Analysis and Determination

14. The role of this Court, being a first appellate one is well settled and spelt out in many a decision. The findings in the longstanding case of *Okemo -vs- Republic* (1977) EALR 32 as well as in *Mark Oiruri Mose -vs- R* (2013) eKLR are to the effect that such a court is duty bound to re-visit the evidence tendered before the trial court, re-evaluate and re-analyse it and come to its own independent conclusions. And I now proceed to so do.

15. The Appellant's case is predicated on the claim that there was no material before the Trial Court to aid it in arriving at the finding that the Plaintiff's claim was res-judicata and that the Appellant had acquired the suit land by way of Adverse Possession. To establish the veracity or weight of this contention, as the first appellant court, I will carefully interrogate the evidence adduced before the trial court.

16. There is on record the Sale Agreement dated 02/07/1988. It was a land transaction between Joseph Omari Mulusa the vendor and Salina Nanyama Nabiswa, the purchaser, who is the Respondent herein. The first paragraph of the Agreement alludes to the fact that the vendor was disposing 2 acres of his developed land in Machungwa Farm. At the margin of the said paragraph, it is hand written 'Plot No. is 276', supposedly to refer to the suit land herein.

17. In his evidence before the trial Court, the Appellant (PW1) testified that he left his brother Joseph Omari, in his land as he worked in Kitale. That the land had houses but were destroyed and materials taken away. He stated that he had title to the land. It was his evidence that he did not institute the suit earlier because the District Administration threatened him at the time.

18. He testified that he wrote a demand letter in the year 2010 by the Respondent herein never vacated the suit land.

19. The Appellant stated that he was not involved in the sale of the land and did not authorize it. It was his evidence that he was not a party to the court case between the Respondent herein and his brother Joseph Omari. He stated that his brother did not have a share in his land.

20. On cross-examination, he stated that he did not know the case between his brother and the Respondent.

21. Wycliffe Musu Misoga testified as PW2. His evidence was that Jospeh Omari occupied the land but was evicted by the Police. That upon that they lost valuables including rental houses, structures and cows. He testified further that he neither knew ownership of the suit land nor the Respondent's claim on it.

22. On the other hand, the Respondent herein stated that she bought the land from Joseph Omari Mulusa and that she did not know the Appellant herein. She produced the Sale Agreement dated 02/071988. She produced for identification proceedings in Kitale SPMCC 72 of 1989 as DMFI-2 and the case in High Court Civil Appeal No. 18/1994 DMFI-3.

23. On cross-examination she stated that Joseph Omari Mulusa sold her the land but did not show her ownership documents when she bought it. It was her case that she did not do due diligence since it was her first time to purchase the land. She further stated that she had the title to the land. In respect to the proceedings in SPMCC 72 of 1989, she asserted that she did not bring the proceedings in court.

24. It was her case that upon paying the seller he disappeared thus prompting her to notify the police. She stated that she did not know the Appellant. She testified that she peacefully occupied the land to the time of the case.

25. From the foregoing evidence, the genesis of the dispute herein can be traced to the Land Sale Agreement that occurred between the Appellant's brother and the Respondent herein.

26. In paragraph 5 of the said agreement is the term which provides as follows;

> "...the purchaser has been shown the said land 2 acres developed and is entitled to have possession and enjoyment of the same from the date hereof".

27. Having reproduced the evidence before the trial court I now to the question whether the case was res-judicata whether the trial court properly addressed the issue on adverse possession.

28. I will briefly look at the principle of res-judicata. In Petition 14, 14A, 14B & 14C of 2014 (Consolidated) *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR, the Supreme Court made the following remarks on the doctrine.

> (317) The concept of res judicata operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on "issue estoppel", to bar the 1st, 2nd and 3rd respondents' claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice? all in the cause of fairness in the settlement of disputes.
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> (318) This concept is incorporated in Section 7 of the *Civil Procedure Act* (Cap. 21, Laws of Kenya) which prohibits a Court from trying any issue which has been substantially in issue in an earlier suit. It thus provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

(319) There are conditions to the application of the doctrine of res judicata: (i) the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title *Karia and Another v. The Attorney General and Others*, [2005] 1 EA 83, 89.

(320) So, in the instant case, the argument concerning res judicata can only succeed when it is established that the issue brought before a Court is essentially the same as another one already satisfactorily decided, before a competent court.

(333) We find that the petition at the High Court had sought to relitigate an issue already determined by the Public Procurement Administrative Review Tribunal. Instead of contesting the Tribunal's decision through the prescribed route of judicial review at the High Court, the 1st, 2nd and 3rd respondents instituted fresh proceedings, two years later, to challenge a decision on facts and issues finally determined. This strategy, we would observe, constitutes the very mischief that the common law doctrine of "issue estoppel" is meant to forestall. Issue estoppel "prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route" (Workers' Compensation Board v. Figliola [2011] 3 S.C.R. 422, 438 (paragraph 28)).

29. From the evidence, there is on record Court documents in High Court at Eldoret Civil Appeal No. 18 of 1994. The parties in the Appeal are Ephraim Onzere the Appellant herein as Appellant. The Respondents are Selina Nanyama and Joseph Omari Mulusa. The document is a Memorandum of Appeal in respect of a ruling from J. Wanjala R.M. in Kitale SRMCC No. 72 of 2989.

30. I have painstakingly tried to appreciate the contents of the document alluding to the presence of the case in Kitale SRMCC No. 72 of 2989 in vain. The parties cannot be discerned and let alone the issue is dispute.

31. Whereas the Appellant's contention that there was no material placed before the Trial Court to prove res-judicata is not accurate, it succeeds on the ground that the contents on the documents presented, which would have proved the issue but were only marked for identification, were on account of the deficiency in substance as to the subject in dispute and the parties and the decision thereon, not capable of being relied upon to make an assessment on the incidence of res-judicata. It is trite law that documentary evidence should be proven upon production. Documents marked for identification and not produced do not form part of the evidence which the Court can rely on. On that basis therefore, the Trial Court made a finding of res-judicata based on incomplete and insufficient evidence.

32. It is also noteworthy that even if the Trial Court were to be right on the finding of res-judicata, it ought to have immediately downed its tools for want of jurisdiction. Any further purported consideration of the other issues including the one on adverse possession was superfluous since it had no jurisdiction.

33. In the premises, I find the Appellant's challenge on res-judicata to be successful.

34. I now turn to the merits of the Trial Court's finding on adverse possession. In doing so, I will first set out its definition. The Black's Law dictionary 11th Edition, defines Adverse Possession at page 67 in the following terms:

> " The enjoyment of real property with a claim of right when that enjoyments is opposed to another person's claim and is continuous, exclusive, hostile, open, and notorious.
>
> The doctrine by which title to real property is acquired as a result of use or enjoyment over a specific period of time".

35. The ingredients as defined above are quiet enjoyment of another' land for a specific period of time. The *Limitation of Actions Act* sets that period at 12 years.

36. Courts have also pronounced themselves severally on the concept of adverse possession. In Civil Appeal 56 of 2014, *Mtana Lewa v Kahindi Ngala Mwagandi* [2015] eKLR, the Court of Appeal in Malindi referred to the Supreme Court of India and discussed the ingredients of Adverse Possession in the following terms;

> The Supreme Court of India discussed the essentials of adverse possession in *Karnataka Board Of Wakf v Government Of India & Others* [2004] 10 SCC 779 and stated as follows:
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> "In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period."

37. Adverse Possession was further discussed by the Court of Appeal in *Mtana Lewa v Kahindi Ngala Mwagandi* [2015] eKLR, when the learned Judges remarked as follows;

> " 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. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, which is in these terms:-
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> "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."

38. Similarly, in Civil Appeal 56 of 2014, *Mtana Lewa v Kahindi Ngala Mwagandi* [2015] eKLR, the learned Court of Appeal Judges discussed validity of Adverse Possession as hereunder;

> " ...a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court. See *Kyeyu v Omuto*, Civil Appeal No. 8 of 1990. See also the present position in Johnson Kinyua v Simon Gitura Civil Appeal No.265 of 2005, where this Court found that the existence and proprietorship of land can be proved either by an extract copy of title or certificate of official search. The registered owner of any person who may have an interest in the property the subject of the summons must be served with it".

39. In her evidence the Respondent stated she had been on possession from the time she bought it in the year 1988, she had been in peaceful possession. She marked for identification the sale agreement dated 02/07/1988. The Court cannot rely on the agreement as evidence of purchase of the land since it was not produced in evidence.

40. On his part, the Appellant testified that he left his brother, Joseph Omari, as the caretaker of the property as he worked in Eldoret. He admitted that he did not know if his brother sold the land. That said, the Appellant further testified that he had the title deed to the suit land. Further, he admitted that the Respondent had been in occupation since May, 1993. That when he discovered that she was on the land he issued a demand letter dated 07/05/2010 which he produced as P.Exhibit 4 but the Defendant did not vacate the land and had issued another one 19/09/1994 issued to the police about the destruction that occurred on 15/05/1993. He again issued another letter dated 12/03/2020, produced as P.Exhibit 5, to her to vacate land.

41. The documentary evidence adduced before the trial Court corroborate the foregoing position, of the Plaintiff that indeed she was on the parcel of land from the year 1988. I have keenly interrogated them. The title deed is in the Appellant's name. The certificate of official search done in the year 2018 indicates that the suit is registered in the Appellant's name. The Appellant's first challenge on the Respondent's occupation is seen to have occurred in year 2010.

42. The totality of the foregoing yields the inevitable conclusion that despite being the legal proprietor, the Appellant lost his ownership rights in the year 2000, twelve years after year 1988 which time the Defendant claims to have bought the land and took possession. Even if the period of occupation of 12 years from 1988 could not have been proven, the proof of the fact that around 1993 he wrote to the Police vide P.Exhibit 4 to complain about the destruction of his property on 15/05/1993 further complicates his claim in the sense that he did not claim the land from 15/05/1993 to the end of 12 years, being 15/05/2005. By this time his title was extinguished in terms of Sections 7 and 17 of the *Limitation of Actions Act*. The failure by the Appellant to keep tabs with what was happening what his land for a period of more than 12 years extinguished his ownership rights.

43. That said, it is immaterial whether there was a transaction between the Respondent and the Appellant's brother. If anything, the Appellant denies giving authority to the brother to sell the land yet the brother allegedly sold it and put someone on his (appellant's) land without his lawful authority, meaning he put him there adversely to the ownership thereof. Thus, the elements for adverse possession are on all fours in this suit irrespective of whether his brother illegally sold the land. I find so because the parameters that operationalize the doctrine of Adverse Possession do not allow any outcome other than that of loss of land through adverse possession.

44. That said, I now address is the pertinent question whether the finding on adverse possession could be made in favour of the Respondent herein pursuant to her Statement of Defence, in absence of the pleading of Originating Summons.

45. To resolve this impasse, I will seek refuge in the Court of Appeal decision in *Chevron (k) Ltd v Harrison Charo Wa shutu* [2016] eKLR where it was stated that a claim for adverse possession could be brought by way of plaint and granted even in instances where the prayer for adverse possession was not made. In the case the learned Judges referred to the case of *Njuguna Ndatho -vs- Masai Ituma & 2 Others* Civil Appeal No. 231 of 1999 where the court observed.

> " The courts, have since this decision, held that a claim by adverse possession can be brought by a plaint. See Mariba v Mariba Civil Appeal No.188 of 2002, Counterclaim or defence as was the case here. See *Wabala v Okumu* [1997] LLR 609 (CAK). In Gulam Mariam Noordin v Julius Charo Karisa Civil Appeal No 26 of 2015, where the claim was raised in the defence this court in rejecting the objection to the procedure stated as follows: -
>
> "Where a party like the respondent is in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of *Wabala v Okumu* [1997] LLR 609 (CAK) which like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The court of Appeal in upholding the claim did not fault the procedure. Similarly, in *Bayete Co. Ltd v Kosgey* [1998] LLR813 where the plaint made no specific plea for adverse possession, the plea was nonetheless granted"

46. The foregoing resolves the issue at once. The only instance where Originating Summons is invoked exclusively is where a person wants to change title in the land he or she has acquired adversely. Other than that, a court is entitled to make a finding of adverse possession even on the basis of Statement of Defence, a Counter-claim or A Plaint.

47. In the premises, the Appellant's bid to challenge the trial court's finding is without merit. The Appeal is without legs to stand on. The upshot is that the Appeal is without merit and is hereby dismissed with costs to the Respondent.

48. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 18TH DAY OF MARCH, 2024.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE