Gaiti & 5 others v M'Nkanata (Suing as the Legal Representative of the Estate of M'Nkanata M'Mwirichia) (Civil Appeal 86 of 2018) [2024] KECA 1031 (KLR) (2 February 2024) (Judgment)

Neutral citation: [2024] KECA 1031 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 86 OF 2018

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

FEBRUARY 2, 2024

BETWEEN

STANLEY GAITI ..... 1ST APPELLANT

GODFREY GIKUNDA ANJURI ..... 2ND APPELLANT

SIMON KIAMBI ..... 3RD APPELLANT

CHARLES KIRUJA ..... 4TH APPELLANT

MUTUMA M'INOTI ..... 5TH APPELLANT

JOSEPHAT KIOGORA ..... 6TH APPELLANT

AND

JOSEPH MURORI M'NKANATA ..... RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF M'NKANATA M'MWIRICHIA

(Being an appeal from the judgment of the Environment and Land Court at Meru (L. N. Mbugua J.) dated 13th February, 2019 in ELC Case No. 118 of 1985)

JUDGMENT

1. The respondent's late father, M'Nkanata M'Mwirichia (deceased), instituted the suit before the High Court at Meru against the 1st appellant, Stanley Gaiti, and Jelina Kaimuri (2nd defendant) vide his plaint dated 16th December, 1985. He sought to be registered as the absolute owner of four acres comprising of land title number Abothuguchi/Gaitu/318 (hereinafter 'suit property') by operation of the doctrine of adverse possession. Stanley Gaiti and Jelina Kaimuri were sued in their capacity as legal representatives for the Estate of Nkacha Kaiyanthi. In the course of the proceedings Jelina Kaimuri died, and the court marked the case against her as abated.

2. M'Nkanata M'Mwirichia's case before the superior court was that he purchased the suit property vide an agreement dated 22nd August, 1973, from Nkacha Kaiyanthi. The said Nkacha Kaiyanthi died before the suit property was transferred to M'Nkanata. He averred that he took immediate possession of the same and had been in occupation of the suit property for over twelve years. He deponed that he had extensively developed the suit property by building houses and undertaking farming activities on the same. M'Nkanata M'Mwirichia died before the suit was determined. He was substituted by his son, the respondent. The respondent averred that Abothuguchi/Gaitu/318 was approximately nine acres, but that the deceased occupied four acres, which formed the basis of his claim before the superior court.

3. According to the record, while this suit was pending before the superior court, the 1st appellant caused the suit property to be sub- divided into several parcels, which were subsequently sold to various purchasers, including the 2nd, 3rd, 4th, 5th and 6th appellants. Consequently, the respondent filed another suit, Meru High Court Civil Case No. 124 of 2012 against the six appellants. The 2nd appellant also filed a third suit before the Magistrate's Court at Tigania, Civil Case No.46 of 2012, against the respondent, seeking a permanent injunction to restrain the respondent from dealing with the piece of the suit property that he purchased (Abothuguchi/Gaitu/2200). The case was transferred to the High Court at Meru and was registered as Meru High Court Civil Case No. 57 of 2012.

4. The respondent, vide an application dated 20th February, 2014 applied for the three suits to be consolidated. The court (Njoroge J.) allowed the application for consolidation of the suits vide his ruling dated 13th April, 2016. On 27th September, 2017, the court gave directions that the case proceeds for pre-trial conference so that all the interlocutory issues impeding the trial may be settled.

5. Interestingly, when the matter came up for hearing on 7th March, 2018, by consent of the parties, the order that had earlier been issued by the court consolidating the separate suits was vacated. Counsel representing the 3rd to 6th appellants (at the time defendants in HCCC No.124 of 2012) made an application to have the hearing of the case adjourned, as she wished to apply for the appellants to be enjoined in the instant suit as interested parties. The 1st appellant was notably absent. The court declined to adjourn the hearing of the case and ordered the case to proceed for hearing, in the absence of the 1st appellant. The trial court however noted that the 1st appellant, despite being absent, had been duly served with the hearing notice.

6. The instant suit thereafter proceeded for hearing ex-parte, by way of viva voce evidence. After hearing the parties, the superior court (L. N. Mbugua J.), in a judgment dated 22nd November, 2017, held that the respondent had proved his claim with respect to four acres of Parcel No. Abothuguchi/ Gaitu/318, that he had acquired the ownership of the same by adverse possession. Since – Parcel No.Abothuguchi/Gaitu/318 had been sub-divided and sold to various purchasers, the learned Judge held that the purchasers of the suit property held the said subdivided parcels of land in trust for the respondent, to the extent of four acres adjudged in favour of the respondent.

7. The learned Judge directed the Land Registrar to cancel all new titles that fell within the four acres of land claimed by the respondent, and register the said four acres in the name of the respondent. The impugned judgment was not specific in regard to which titles, that arose from the sub-division of the suit property, were to be cancelled.

8. Aggrieved by this decision, the appellants lodged this appeal. They laid out nine grounds in the memorandum of appeal dated 26th April, 2019. In a nutshell, the appellants were aggrieved that the learned Judge misapprehended the law on adverse possession. They faulted the learned Judge for passing judgment against them without giving them an opportunity to be heard, as they were not parties to the suit before the superior court, and further, for finding in favour of the respondent,

noting that Parcel Number 318 that was the subject of the suit was non-existent at the time. They were aggrieved that the learned Judge failed to take into consideration the existence and pendency of other suits, related to the suit property. They took issue with the fact that the learned Judge gave orders which had not been sought by the respondent in his pleadings. The appellants urged us to allow the appeal, and set aside the impugned judgment in its entirety.

9. The appeal was canvassed by way of written submissions. The appellant appeared in person. The firm of Wambui Mwai & Associates Advocates is on record for the appellants, while the respondent was represented by the firm of Kaumbi & Company Advocates.

10. It was the appellants' submission that upon sale of the suit property to the respondent on 22nd August, 1973, the respondent occupied the suit property with the permission of the owner. Counsel for the appellants faulted the trial court for finding that time, for purposes of adverse possession, started running three months after the agreement was signed, since the parties failed to obtain the consent of the Land Control Board. Counsel pointed out that Section 8(1) of the *Land Control Act* Cap 302 provided that an application for such a consent was to be made within six months of execution of the agreement for sale. Counsel urged that occupation of the suit property by the respondent became adverse upon the lapse of six months, and not three months as determined by the trial court.

11. The appellants' counsel further submitted that the 2nd to 6th appellants, having purchased the suit property from the 1st appellant, ought to have been joined as parties to the suit before the trial court, as the orders of the said court affected their interests in the suit property. Counsel faulted the learned Judge for cancelling the titles held by the 2nd to 6th appellants, yet she stated in her judgment that she was uncertain whether the titles held by the appellants were indeed the resultant titles which arose from the sub-division of the mother title in respect of Parcel No. Abothuguchi/Gaitu/318. She submitted that it was improper that the suit was adversely determined against the appellants, yet the appellants, who had interest in the suit property, were not given the opportunity to be heard. She urged this Court to allow the appeal as prayed.

12. On his part, counsel for the respondent, in opposing the appeal, submitted that the trial court correctly interpreted clause 5 of the sale agreement which required the parties to obtain the consent of the Land Control Board within three months from the date of the signing of the agreement. As such, time started running after the three months had lapsed.

13. With regards to the submission that the appellants should have been joined as parties in the original suit, the respondent's counsel explained that the 1st appellant sub-divided and sold the suit properties to the appellants, in contravention of then existing court order, which had prohibited any dealings with respect to the suit properties pending the hearing and determination of the suit. He reiterated that the appellants, who were all along been represented by an advocate, consented to the vacation of the earlier order that had been made by the court consolidating the several suits that had been filed before the trial court touching on the suit parcel of land. Counsel submitted that the prevailing view held by the parties at the time was that the pending suits ought to be independently heard and determined. In the premises, counsel for the respondent urged this Court to affirm the decision of the superior court in its entirety.

14. This being a first appeal, it is the duty of this Court to analyze and re-assess the evidence on record, in light of the grounds of appeal put forth by the appellant, the submission made, and reach its own

independent conclusion. In Selle v Associated Motor Boat Co. [1968] EA 123, the court expressed itself as follows:

> " An appeal to this Court from a trial by the High Court is by way of retrial 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 witnesses and should make due allowance in this 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 (Abdul Hameed Saif v Ali Mohamed Sholan [1955], 22 E.A.C.A 270."

15. Having re-evaluated the evidence adduced before the trial court, the submissions by parties to the appeal, and the law, we take the following view of the matter.

16. From the record, we appreciate that this is an old case, dating back to 1985, and that the parties have waited a long time for the issues in dispute to be determined by the court. The main bone of contention for the appellants is that the learned Judge erred in granting orders, whose effect was to affect the rights of the 2nd to 6th appellants, who were not parties to the suit, but ought to have first been joined, before the issues in dispute in the suit were heard and determined.

17. As we have observed in the brief background of this case, when the suit was first instituted by the respondent's late father, the 2nd to 6th appellants were not parties to the suit, and the suit property parcel number Abothuguchi/Gaitu/318 was still in existence under one title. Upon application by the respondent vide the application dated 29th September, 1999, the trial court, in a ruling dated 4th October, 1999, issued an order of injunction restraining the 1st appellant not to deal or interfere in any way with the suit property pending final determination of the suit.

18. It was, therefore, evident that the 1st appellant acted in breach and in contempt of this court order, and proceeded to sub-divided the suit parcel of land Abothuguchi/Gaitu/318, and sold the resultant parcels to third parties, including the 2nd to 6th appellants. This triggered the filing of two other suits, relating to the suit property, other than the instant suit. Meru High Court Civil Case No. 124 of 2012 was filed by the respondent against the six appellants, after he realized that the suit property had been sub-divided and sold to third parties during the pendency of the suit.

19. On his part, the 2nd appellant filed a third suit before the Magistrate's Court at Tigania, Civil Case No.46 of 2012, against the respondent, seeking a permanent injunction to restrain the respondent from dealing with Abothuguchi/Gaitu/2200, which is a resultant parcel that he had purchased from the 1st appellant. The case was transferred to the High Court at Meru and was registered as Meru High Court Civil Case No. 57 of 2012. Nothing before this Court alludes to the fact that these two suits have either been heard or determined. They may very well still be pending before the superior court.

20. As observed earlier in this judgment, the three suits had been consolidated by the court. The parties had even been directed to proceed with the pre-trial procedures so that the suit could be made ready for hearing. For reasons we cannot discern from the record of the trial court, the 2nd to 6th appellants desired the three suits to be heard and determined independently, and by consent of the parties, the order that had earlier been made directing the consolidation of the three files was vacated by the court. Curiously, counsel for the appellants informed the trial court that she wished to have the appellants joined to the present suit as interested parties. This application was rejected by the trial court. This led

to the trial court determining the instant suit in the absence of any input by the 2nd to 6th appellants and making the resultant determination which has been challenged by the appellants in this appeal.

21. The effect of the foregoing is that the 2nd to 6th appellants were denied an opportunity to be heard on the question whether the respondent was entitled to the interest claimed with respect to the suit property. This, in our view, amounted to a violation of the rules of natural justice, and a violation of their right to be heard before being condemned. Although the appellants in this case are the authors of their own misfortune, as they are the ones who sought the order vacating the consolidation of the various suits touching on the suit property, it was clear to this Court that the appellants have a considerable interest in the outcome of this suit.

22. We hold that once the trial court came to the knowledge that the original Parcel Number 318 had been sub-divided (although in breach of the order that had been issued by the court restraining any dealings in the suit property), and resultant titles registered in the names of the appellants, the appellants ought to have been joined as parties to the suit, so that all parties with vested interest in the suit property could be given a chance to be heard. To that extent, we are persuaded that the learned Judge erred in granting orders which were final, and which affected the interests of the appellants with respect to the suit property, without the benefit of hearing all the parties. Accordingly, the learned Judge's finding that the respondent had proved his claim of adverse possession with respect to the suit property cannot stand, as it was made in violation of the rules of natural justice which disadvantaged the 2nd to 6th appellants.

23. This Court in David Oloo Onyango v Attorney Genral [1987] eKLR observed as follows, with respect to decisions made in violation of the rules of natural justice:

> "A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."

24. Similarly, in Kiai Mbaki & 2 Others v Gichuhi Macharia & Another [2005] eKLR, this Court held thus:

> " The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

25. The parcel of land then registered as Parcel No.- Abothuguchi/Gaitu/318 was said to measure approximately nine acres. The respondent's claim was in respect of four acres out of Parcel No. 318. After Parcel No.318 was sub-divided and some of the subdivided portions were sold to third parties, it was clear from the record of the trial court that it could not be determined with certainty where four acres, that were adjudged in favour of the respondent lay on the ground in relation to the titles that emanated from the subdivisions. The learned Judge noted as follows:

> " However, a problem now arises in that the land Abothuguchi/Gaitu/318 no longer exists. It has since been sub-divided into other parcels. A perusal of file No. 124/12 reveals that Charles Kirunja Rwito, 4th defendant owns title no. Abothuguchi/Gaitu/2676 which is 1.62 ha, where title was issued on 14.2.2008. Simon Kiambi, 3rd defendant owns Abothuguchi/Gaitu/2198 which is 0.81 ha, and title was issued 9.2.2000, whereas Celestino Mutuma Inoti, 5th defendant owns Abothuguchi/Gaitu/2197 which is 0. 4 ha where title was issued on 8.12.2011. A perusal of file no. 46/12 (Tigania) also shows that Godfrey Gikunda (2nd defendant in 124/12) owns parcel no. Abothuguchi/Gaitu/2200 which is 1.

62 ha. Where title was issued on 7.2.2000. No green cards have been availed by plaintiff hence I cannot state with certainty that all these parcels of land emanated from parcel no. 318."

26. It is notable from the foregoing that the learned Judge, in making her determination, decided to peruse through the two files of HCCC No. 124 of 2012 and Civil Case No. 41 of 2012 (Tigania), which were not part of the pleadings and proceedings before the trial court. It is trite law that the court's duty is to rule on the evidence on record and not introduce extraneous matters not canvassed by the parties before the court in evidence. The learned Judge determined that 'In the circumstances titles falling on the 4 acres will have to be cancelled'. She further found that the purchasers of the suit property held the land in trust for the respondent. The effect of the impugned judgment was that it condemned appellants, who were not part of the proceedings, unheard.

27. Given the nature of the dispute, and the predicament in which the parties find themselves in, it is our holding that prudent approach would be to order a retrial, so that all parties can be accorded a chance to be heard and a final determination of the suit can be made by the Environment and Land Court. Rule 33 of the Rules of this Court empowers us to remit proceedings back to the superior court, to order a new trial and to make any necessary incidental orders thereto. In the interest of justice, it is our opinion that the three suits ought to be consolidated and heard together, as the separate trials would merely serve to delay the conclusion and finalization of the dispute at hand.

28. In the premises therefore, we find that the appeal has merit. It is allowed in the following terms:

    i. The judgment of superior court is set aside together the subsequent orders thereto;

    ii. The file is to be remitted back to the Environment and Land Court for retrial and determination of the matters in dispute on merits;

    iii. The suit shall be consolidated and heard together with Meru HCCC No. 57 of 2012 and HCCC No. 124 of 2012;

    iv. The matter to be heard by another Judge, other than L. N. Mbugua J.;

    v. We direct that the suit be heard on a priority basis in view of the length of time that the suit has been pending in court;

    vi. An order is hereby issued prohibiting any dealings with the suit property, together with ALL resultant titles from the subdivision thereto, pending the hearing and final determination of the consolidated suit;

    vii. The respondent shall bear the costs of this appeal.

29. Orders accordingly.

DATED AND DELIVERED AT NYERI THIS 2ND DAY OF FEBRUARY, 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR