Kiragu v Gicheha (Civil Appeal 138 of 2018)
[2024] KECA 61 (KLR) (2 February 2024) (Judgment)

Neutral citation: [2024] KECA 61 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 138 OF 2018

F SICHALE, LA ACHODE & WK KORIR, JJA

FEBRUARY 2, 2024

BETWEEN

JACOB KINYUA KIRAGU ..... APPELLANT

AND

PAUL KAMANDE GICHEHA ..... RESPONDENT

(Being an appeal from the Judgment and Orders of the ELC Court at Nyahururu (M.C Oundo J) dated 30th May 2018In(Nyahururu ELC Case No. 239 of 2017 (O.S))

JUDGMENT

1. Jacob Kinyua Kiragu (the appellant herein), has filed this appeal against the judgment of M. C Oundo J, dated 30th May 2018.

2. The appeal arises from a suit (O.S) that had been filed at the Environment and Land Court in Nyahururu sometimes in the year 2016 by the respondent against the appellant, in which the respondent had sought inter alia a declaration that he had become entitled to be registered as the proprietor of Land Title No. Nyandarua/Ndemi/75 (hereinafter the 'suit property') measuring 2.4 hectares by virtue of the doctrine of recent possession.

3. The matter was heard by M. C Oundo J, who in a judgment delivered on 30th May 2017, entered judgment for the respondent and found that he had become entitled to be the registered proprietor of the suit property by virtue of the doctrine of adverse possession and further directed that the Deputy Registrar of the Court do execute all necessary documents to facilitate the registration of the respondent as the absolute proprietor of the suit land.

4. The appellant was aggrieved by the aforesaid judgment and findings thus provoking the instant appeal vide a Notice of Appeal dated 12th June 2018 and a Memorandum of Appeal dated 10th August 2018, setting out the following grounds of appeal;

1. The learned judge erred in law and fact by failing to find that the court lacked jurisdiction to hear and determine the suit as it was *res judicata*.

2. The learned judge erred in law and fact by failing to find that the respondent did not produce the agreement that made him enter a portion of the suit land for purposes of ascertaining when time was to start running for purposes of computing time.

3. The learned judge erred in law and fact by failing to find that the respondent was in the suit in his capacity as a purchaser and to safeguard his interest as such, awaiting completion of the sale transaction.

4. The learned judge erred in law and fact by failing to find that the respondent had taken possession of 1 acre out of the suit land, and which portion he failed to identify for purposes of an adverse possession claim over it.

5. The learned judge erred in law and fact by failing to find that by litigating the title of the suit land before the District Land Disputes Tribunal, the Provincial Lands Disputes Tribunal and the Nyahururu Chief Magistrate's Court, the respondent was acknowledging the appellant's title over the suit land.

6. The learned judge erred in law and fact by failing to find that the period during which the parties were litigating before the District Land Disputes Tribunal, the Provincial Lands Disputes Tribunal and the Nyahururu Chief Magistrate's Court that ended on 13th September 2011, ought not to have been computed for the sake of adverse possession claim over the suit land.

7. The learned judge erred in law and fact by failing to find that the respondent had not accumulated a period of over 12 years to entitle him to lay a claim of adverse possession.

8. The learned judge erred in law and fact by failing to find that the respondent had not met the well settled ingredients of an adverse possession claim, and as such had not proved his case.

5. The brief facts in this appeal are that on or about 21st June 1986, the respondent purchased from one M' Mugambi M Rinjau the suit property at a consideration of Kshs 44,000/= and paid the full consideration and took vacant possession of the suit property. However, no application for Land Control Board consent for the sale and transfer of the land was sought and obtained, rendering the transaction null and void by dint of Section 6 of the *Land Control Act*, CAP 302 of the Laws of Kenya.

6. It was the respondent's case that on or about 1st February 2000, the said M' Mugambi M' Rinjau transferred the suit property to the appellant (who was his son) without any due regard to his interest and that the appellant thereafter demanded that he gives vacant possession of the suit land. The respondent remained on the land in defiance of the demand. He maintained that he had been in actual, continuous, exclusive and notorious use of the property without the appellant's permission for a period of 12 years, thus acquiring the title by way of adverse possession.

7. On the other hand, the appellant (then defendant in the ELCCourt) case was that he was the owner of the suit property, having purchased the same from one Mr. Mugambi in the year 2000 and that in the same year, he was issued with a title deed whereupon he demanded that the respondent vacates the suit property but he declined saying that he had acquired the suit by way of adverse possession.

8. That, sometimes in the year 2003, the respondent filed a claim at the District Land Tribunal which Tribunal ordered cancellation of his title which decision was later overturned on appeal by the Provincial Land Appeals Tribunal.

9. When the appeal came before us for hearing on 20th February 2023, Mr. Nderitu Komu learned counsel appeared for the appellant whereas Mr. Gakuhi Chege appeared for the respondent. Both parties sought to rely on their written submissions and digest of authorities dated 26th April and 27th October 2022 respectively, which they did not orally highlight in Court.

10. It was submitted for the appellant that the suit before the ELC Court was res judicata as there were in existence previous proceedings that had made a conclusive finding on its ownership and that in Nyandarua District Land Dispute Tribunal Suit No. 49 of 2000, the Tribunal in its award, ordered the cancellation of the appellant's title of the suit property.

11. It was further submitted that the decision of the Land District Tribunal was set aside by the Provincial Land Appeals Tribunal which ordered registration of the appellant as the proprietor of the suit land; that the award was adopted as a judgment of the Court in Nyahururu Land Disputes Case No. 10 of 2011; that the said adoption confirmed the final determination of all the issues that were before the District Tribunal and Appeals Tribunal and that there had been no appeal lodged against the said decision.

12. It was further submitted that the ELC Court failed to consider that time had stopped running in favour of the respondent; that the time for computing the period for an adverse claim over the suit property would start from 14th September 2011; that by the time the respondent filed suit , a period of 12 years had not lapsed; that in the circumstances, the respondent's occupation was interrupted from 20th July 2000 to 13th September 2011 and that therefore this period should not computed in the calculation of adverse possession period.

13. On the other hand, it was submitted for the respondent that it was indeed not in dispute that prior to the case before the ELC Court, the respondent had previously instituted Land Dispute Tribunal Case No. 49 of 2000 which was heard and determined; that the Land Disputes Tribunal Act, conferred upon Tribunals the jurisdiction to deal with boundary disputes, sub division, claim to occupy or work on land and trespass to land but the case preferred before the tribunal by the parties pertained to ownership of land and that as such the Nyandarua District Land Tribunal lacked jurisdiction to hear and determine the case and thus its decision was void and a nullity and that in view of the foregoing, the suit before the ELC Court was not *res judicata*.

14. As to when time started running, it was submitted that time started running when the respondent took possession of the suit property, which was the day the previous owner's possession was discontinued; that the suit property was in the name of Settlement Fund Trustees until the year 1998, when it was registered in the name of M' Mugambi M' Rinjau, the person who sold land initially to the respondent herein; that the aforesaid vendor was an allottee of the land by the Settlement Fund Trustees when he sold the land, despite not having a title deed under the *Registered Land Act* and was undoubtedly the owner of the land. Reliance was placed on the case of *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR (Civil Appeal No. 121 of 2006) for the proposition that time in adverse possession claims can start running against a person whose land is not registered but who is in possession of a letter of allotment by the Settlement Fund Trustees.

15. We have carefully considered the record, the grounds of appeal, the rival submissions by the parties, the responses thereto, the cited authorities and the law. We are required as a first appellate court by Rule 31 of the Court of Appeal Rules 2022, to re- appraise the evidence and to draw inferences before coming to our own independent conclusion. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and *Kenya Anti-Corruption Commission v Republic & 4 others* [2013] eKLR.

16. Having clearly perused the record and the rival pleadings by the parties, we have framed the following 3 main issues for our determination;

    1. Whether the learned judge erred in law and fact by failing to find that the court lacked jurisdiction to hear and determine the suit as it was res judicata.

    2. Whether the learned judge erred in law and fact by failing to find that the respondent did not produce the agreement that made him enter a portion of the suit land for purposes of ascertaining when time was to start running for purposes of computing time.

    3. Whether the learned judge erred in law and fact by failing to find that the respondent had not met the well settled ingredients of an adverse possession claim, and as such had not proved his case.

17. Turning to the 1st issue, it is indeed not in dispute that sometimes in the year 2000, the respondent instituted Nyandarua District Land Disputes Tribunal Suit No. 49 of 2000, against the appellant and M' Mugambi M' Rinjau seeking cancellation of the title deed that was in the name of the appellant and further seeking to be registered as the proprietor of the suit property upon cancellation of the appellant's title. Subsequently thereafter the tribunal ruled in his favour and ordered that the suit property be registered in his name.

18. Being aggrieved with the aforesaid Tribunal's award, the appellant filed an appeal at the Provincial Land Appeals Tribunal which Tribunal set aside the award and ordered that the suit property reverts in the name of the appellant.

19. On 13th September 2011, the Provincial Appeals award was adopted as a judgment of the Court in Nyahururu Land Disputes Case No. 10 of 2011. It is imperative to note that this judgment that was adopted as an order of the Court has never been set aside or appealed against and still stands to date. Additionally, no appeal was lodged against the said adoption and neither were any judicial proceedings instituted against the said decision which decision remains valid to date.

20. The respondent on the other hand contended that the Land Disputes Tribunal Act conferred upon the tribunals the jurisdiction to deal with boundary disputes, sub-division, claim to occupy or work on land and trespass to land and that in the instant case, the case preferred before the tribunals herein pertained to ownership of land and that as such, the Nyandarua District Land Tribunal lacked the jurisdiction to hear and determine the case hence its decision was a nullity.

21. As we alluded to earlier, no appeal was lodged against the adoption of the decision of the Provincial Lands Appeals Tribunal on 13th September 2011 as a judgment of the Court and as such the said adoption confirmed the final determination of all the issues that were before the District Tribunal and the Appeals Tribunal. Suffice to state that the said judgment is still legally valid.

22. In the case of *John Mungai Tama v Anjelica Muthoni Tama* [2005] eKLR, Khamoni J stated persuasively as follows as regards a decision of the Land Disputes Tribunal that had been adopted as an order of the Court but had not been appealed against;

> " ...In law once a decision of a Land Disputes Tribunal has been adopted by a court of law as a judgment of that court, it is unsound for a party thereof to ignore that judgment of the court ..."

23. In *Florence Nyaboke Machani v Mogere Amosi Ombui & 2 Others* [2014] eKLR, this Court rendered itself as follows;

> " .....The appellant in this appeal did not challenge the decision of the tribunal in accordance with the said procedure set out in the Act.....As the learned Judge found in the judgement appealed from..."It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. "(Emphasis Ours).

24. The learned judge while addressing this issue stated as follows in his judgment;

> " Based on the above decision, it is clear that the District Land Dispute Tribunal as well as the Provincial Land Appeals Tribunal had no jurisdiction in determining ownership and title of No. Nyandarua/Ndemi/75 and by the said determination therefore the same were a nullity. The adoption of the said award/decisions of the two tribunals by the Chief Magistrates Court Nyahururu did not lend it legitimacy either. They remain equally null and void ....." "In this regard therefore I find that this matter is not Res Judicata and that it is properly before this Court."

25. In our view it matters not that the land Dispute Tribunal and the Provincial Land Appeals Tribunal did not have jurisdiction. Of crucial importance is that the award of the Provincial Land Appeals Tribunal was adopted as an order of the court and was thereafter not challenged. Faced with a similar situation in the case of *David Gombe Githinji v Mary Wanjiku Githinji (Legal Representative of Andrew Maina Githnji)* [2014] eKLR, Obaga J persuasively stated thus:

> " The plaintiff's suit cannot be sustained on this ground. I now move to address the issue of *res-judicata*. The proceedings before the Kwanza Land Disputes Tribunal were in respect of the same suit land. The parties in that suit as well as the present suit are the same. The dispute was resolved and the verdict adopted as judgment of the court vide Kitale Chief Magistrate Land Case No.63 of 2003. The tribunal was competent in the sense that the Act gave it powers to decide on the dispute. Whether it had jurisdiction to entertain the claim or not cannot be a subject of the present suit. It ought to have been attacked in the manner provided for under that Act. The verdict may have been null and void but that is a matter outside the procedure followed by the plaintiff herein. Unless and until the tribunal verdict is set aside through proper procedure, it remains and had determined the dispute. I therefore find that this suit is not only improperly before the court but it is also res-judicata. The Court of Appeal decision cited by Mr. Kiarie is distinguishable in that, in that appeal, the High Court had quashed the decision of the tribunal and the Magistrate's Court which had adopted it. When an appeal was preferred against the High Court decision, the Court of Appeal found that the High Court judge was right in quashing the decision of the tribunal on account that the tribunal lacked jurisdiction to entertain the dispute. This is not the case in the present suit where the plaintiff is faulting the verdict of Kwanza Land Disputes Tribunal after failing to have the same quashed." (Emphasis Ours).

26. From the circumstances of this case, we fully adopt the reasoning taken by Obaga J in the above cited case. We are of the considered view that the learned judge fell into grave error when she delved into

the issue of whether the Land Disputes District Tribunal had the jurisdiction to deal with the matter before it which issue was clearly not before her and more so when the decision of the Provincial Land Appeals Tribunal had not been appealed against and having been adopted as a judgment of the Court which judgment again was not appealed against.

27. In view of the above and having come to the above conclusion, we are of the considered opinion that it would be superfluous to consider the other issues raised by the appellant in this appeal.

28. Accordingly, we find merit in the appellant's appeal and set aside in its entirety the judgment of M.C Oundo J dated 31st May 2018 and all the consequential orders thereof with no order as to costs.

29. It is so ordered.

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

F. SICHALE

JUDGE OF APPEAL

.....

L.A ACHODE

JUDGE OF APPEAL

.....

W. KORIR

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR