Wakio & 101 others v Mombasa (Civil Appeal E061 of 2021)
[2024] KECA 316 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KECA 316 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E061 OF 2021

M NGUGI, KI LAIBUTA & GV ODUNGA, JJA

MARCH 22, 2024

BETWEEN

PRUDENCE WAKIO & 101 OTHERS ..... APPELLANT

AND

REGISTERED TRUSTEES OF THE CATHOLIC ARCH DIOCESE OF MOMBASA ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (C. K. Yano, J.) dated 15th March 2021 in E.L.C Case No. 500 of 2011)

JUDGMENT

1. By a plaint dated 26th August 2011, the respondent, the Registered Trustees of the Catholic Archdiocese of Mombasa, sued the appellants, Prudence Wakio and 101 others, in the High Court of Kenya at Mombasa in HCCC No. 500 of 2011 claiming ownership of LR No. 15031/169 Taita District (the suit property), praying for:

> "a) A declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that parcel of land known as L.R No 15031/169 Taita District ("suit property").
>
> b. A declaration that the defendants whether by themselves or their servants or agents and/or otherwise howsoever are wrongfully in occupation of the suit property and are accordingly, trespassers on the same.
>
> c. A declaration that the defendants whether by themselves or their servants or agents and/or otherwise however are not entitled to remain on the suit property.

d. An order that the defendants and all other trespassers do forthwith vacate and deliver vacant possession of the suit property to the plaintiff company.

e. An order of eviction against each of the defendants, their agents, servants, as well as any other parties whom the defendants or any of them have permitted to occupy any part of the suit property.

f. A permanent injunction restraining the defendants whether by themselves or their servants or agents and/or otherwise howsoever from remaining on or continuing in occupation of the suit property.

g. General damages for trespass.

h. Mesne profits for the wrongful occupation of the suit property as trespassers.

i. An order directed to the Provincial Police Officer Coast Province, the Officer Commanding Police Division, Taita Taveta and all police stations in the vicinity of the suit property to execute the orders of this Honorable Court and evict all trespassers and unauthorized occupants of the suit property including the defendants and their servants and agents.

j. Costs of this suit together with interest thereon at such rate and for such period of time as this Honorable Court may deem fit to grant.

k. Any such other or further relief as this Honorable Court may deem appropriate."

2. The respondent's case was that they were the registered proprietors of the suit property, which was donated to them by Voi Development Company Limited (the company) in 1995 and subsequently registered in their name in 2010; that the appellants trespassed on the suit property and started erecting permanent and temporary dwellings, keeping livestock, cutting down trees, and cultivating, all without the respondent's authority or consent; and that the respondent continually sought to have the appellants removed from the suit property, but all in vain, thereby prompting them to file the above-mentioned suit.

3. In their statement of defence and counterclaim dated 14th August 2012, the appellants denied that the respondents were the registered owners of the suit property and averred that they had acquired the suit property by adverse possession; that they had enjoyed continuous and uninterrupted occupation thereof for a period of over 12 years; that the respondents' were therefore time barred under and by virtue of the *Limitation of Actions Act*; that they had allegedly constructed permanent structures, including a school, and had been paying land rates to Voi Municipal Council (the Council); that the respondents fraudulently curved out LR No. 15031/169 from the mother title, to wit, LR No. 15031/20; that the respondents trespassed on the suit property and erected a convent and a school thereon; and that they tricked the appellants with resettlement on a 7-Acre piece of land, which belonged to Voi Development Company Limited. They prayed that the respondents' suit be dismissed with costs.

4. In addition to the foregoing, the appellants sought: a declaration that the appellants were the legal owners of approximately 10 Acres of the suit property to the exclusion of the respondents; a declaration that the appellants acquired title to approximately 10 Acres of the suit property by way of adverse possession; an order that their names be entered in the title register; a permanent injunction restraining

the respondents from trespassing on the 10 Acres of the suit property; costs of the suit; and any other relief that the Honourable court may deem fit and just to grant.

5. The respondents filed a reply to defence and defence to the appellants' counterclaim dated 22nd August 2012 denying that their suit was statute barred. In addition to the foregoing, the respondents contend that they acquired title to the suit property and were issued with a certificate of title No. CR 47503 on 19th March 2010; and that, in view of the foregoing, the appellants cannot claim adverse possession thereof. They denied all the particulars of fraud. It is noteworthy that, in view of the paucity of the record, we are unable to ascertain the respondents' prayers in their reply to defence and defence to counterclaim.

6. In its judgment dated 15th March 2021, the trial court (C. K. Yano, J.) entered judgment against the appellants jointly and severally, and made the following orders:

> " a) The defendants' counterclaim is dismissed.
>
> b. The defendants be and are hereby ordered to vacate and deliver vacant possession of the suit property, Land Reference No 15031/169 to the plaintiff within 30 days from the date of service of the decree herein upon them.
>
> c. In default of compliance with (b) above as aforestated the plaintiff shall be entitled to an order of eviction for the forcible removal of the defendants, their agents and/or servants from Land Reference No 15031/169 upon application.
>
> d. A permanent injunction be and is hereby issued restraining the defendants whether by themselves or their servants or agents or otherwise howsoever, from remaining on or continuing in occupation of the suit property.
>
> e. The plaintiff is awarded Kshs. 500,000/= as general damages for trespass together with interest at court rates from the date of judgment until payment in full.
>
> f. Costs of the suit are awarded to the plaintiff to be borne by the defendants jointly and severally."

7. Aggrieved by the decision of the trial court, the appellants moved to this Court on appeal on 9 grounds set out in their memorandum of appeal dated 10th June 2021 in which they fault the learned Judge for erring in law and fact by: finding that, although the suit property was vacant when donated in 1995, it did not amount to abandonment of possession; finding that there was no evidence that the appellants dispossessed the respondents; finding that time began running against the respondents upon acquisition of title to the suit property; concluding that the appellants acknowledged the authority of the then Municipal Council of Voi and, therefore, time did not run against the respondents; reaching the conclusion that the appellants were paying fees to the Council without evidence of receipts in acknowledgment of payment; finding that the appellants were in occupation of the suit property with permission since they were paying fees to the Council; finding that the appellants' occupation was not hostile, and that computation of time began when the respondents became registered owners; finding that the appellants failed to prove that they were in actual, open, notorious, regular, continuous, uninterrupted, hostile and exclusive occupation without any permission from the respondents for 12 years; and by failing to consider the evidence adduced, the appellants' arguments, submissions and authorities when arriving at his decision.

8. In support of the appeal, learned counsel for the appellants, Mr.Nyange Sharia, Advocate, filed written submissions dated 7th October 2023. Counsel cited the Court of Appeal decision in Samuel Gikaru Njoroge vs. KENATCO Transport Company Limited – Civil Appeal No. E037 of 2021 (Unreported), arguing that transfer of title to land does not interrupt computation of time in claims for adverse possession.

9. In reply, learned counsel for the respondents, M/s. Cootow & Associates, filed their written submissions and case digest dated 10th November 2023 citing 7 Court of Appeal Decision in CMC Aviation Ltd vs. Cruis Air Ltd (No. 1) [1978] KLR 103; Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited [2015] eKLR; and Jennifer Nyambura Kamau vs. Humphrey Mbaka Nandi [2013] eKLR, highlighting the principles stipulated in section 107 of the *Evidence Act*, namely that he who alleges must prove; and that pleadings do not constitute evidence.

10. In addition, counsel cited the House of Lords decision in Re B (Children) (FC) [2008] UKHL 35, submitting on the principle that if a legal rule requires a fact to be proved, a judge must decide whether or not it happened; and, if a party who bears the burden of proof fails to discharge it, the fact is treated as not having happened.

11. On the authority of Wambugu v Njuguna [1983] KLR 173 and Gabriel Mbui v Mukindia Maranya [1993] eKLR, learned counsel highlighted the ingredients of the doctrine of adverse possession to which we will shortly return. Finally, counsel cited the case of Emfil Limited vs. Registrar of Titles, Mombasa, and 2 Others [2014] eKLR, submitting on the settled principle that allegations of fraud are of a serious nature and, therefore, ought not only to be specifically pleaded but also proved to a higher level than that of a balance of probabilities.

12. Our mandate on a first appeal as set out in rule 31(1) (a) of the Rules of this Court is to reappraise the evidence and to draw our own conclusions. In Peters vs. Sunday Post Limited [1958] EA 424, the predecessor of this Court, the Court of Appeal for Eastern Africa, stated that:

> "Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

13. Having considered the record as put to us, the impugned judgment, the written and oral submissions of learned counsel for the appellant and for the respondent, we settle the following as the main issues that commend themselves to us for determination, namely: (i) Who are the registered proprietors of the suit property, and when did their right thereto arise; (ii) whether the appellants were at all material times in actual, open, notorious, regular, continuous, uninterrupted, hostile and exclusive occupation of the suit property without any permission from the respondents for a period of 12 years; (iii) whether the undisputed occupation of the suit property by the appellants amounted to adverse possession thereof or, in the alternative, whether the appellants proved adverse possession as against the respondents; (iv) whether the learned Judge was at fault by allowing the respondents' suit against the appellants in terms of the impugned judgment; and (v) what orders ought we to make in determination of the appeal, including orders on costs.

14. On the 1st and 2nd issues, which are intertwined, it is not disputed that Voi Development Company Limited was the original proprietor of the suit property, which they donated to the respondents sometime in 1995. It is also common ground that the respondents secured title to the suit property

on 19th March 2010. In effect, the donor company remained as the registered proprietor until formal transfer to the respondents and issuance of the certificate of title on 19th March 2010.

15. Notwithstanding the date on which the respondents were registered as proprietors of the suit property, the appellants contend that they were in occupation of the suit property for a period exceeding 12 years as evidenced in two letters dated 24th September 1991 and 26th July 1995 on the basis of which the learned Judge concluded that time did not start to run while the appellants were paying conservancy fee to Voi Municipal Council;and that the appellants' occupation of the suit property was with permission of the Council during the period when they paid such fees. Accordingly, the claim that they were in adverse possession of the suit property because they neither sought nor obtained permission from the respondents for occupation thereof does not hold.

16. On their part, the respondents submitted that the suit property donated to them by the Company aforesaid measured 40 Acres in the approximate, while the appellants laid their claim in adverse possession for a portion thereof measuring 10 Acres or thereabouts; and that the two above-mentioned letters had no bearing on the occupation of the suit property. They were specifically addressed to her and not to the entire group of appellants. Neither did they make any reference to the suit property.

17. Be that as it may, and for the avoidance of doubt, the letter dated 24th September 1991 read as follows:

> "Re: Repair of Temporary Plot/house No. 222 At Mwakingali A Village
>
> Having carried an on-site inspection on your temporary house No. 222 at the above village, it has been established that the House requires repair and you are authorised to carry out the repairs on condition that;
>
> a. You do not extend the temporary house in any way;
>
> b. You use only temporary materials, that is mud, sisal poles in repairing the house;
>
> c. You will demolish the temporary house at short notice in case the Council requires the space for other needs.
>
> If you contravene any of the above conditions, the Council will be at liberty to demolish the same without any notice to you."

18. Even though the record does not contain similar letters (if any) addressed to the other appellants, we take to mind the fact that the letter aforesaid does not speak of a person occupying the suit property or any part thereof as of right. Condition (c) of the letter and the concluding paragraph clearly demonstrate that the 1st appellant and all other persons in occupation of the suit property on similar terms and conditions were mere licensees of the Council, which had control of the tenure over the suit property before the respondents obtained title thereto on 19th March 2010.

19. The second letter dated 26th July 1995 equally speaks for itself and reads:

> "re: Outstanding Conservancy Fees Temporary Plot 221
>
> At Mwakingali 'a' Village Kshs 450/-
>
> I wish to inform you that your above temporary house is in arrears of conservancy fees amounting to Kshs. 450/- as from 1990 - 1994 December.
>
> You are required to clear the arrears immediately upon receipt of this letter if you still wish to keep the temporary house. You should note that conservancy fees is payable annually and

you should not wait to be reminded. If you do not pay the fees immediately, an interest will be charged on the outstanding fees."

20. A reading of the two letters shows that the 1st appellant and her neighbours occupied a portion of the suit property with permission from the Council. They were licencees for a conservancy fee payable to the Council, and by no means claimants in adverse possession of the suit property or any part thereof. Their occupation as such continued until the respondents obtained title to the suit property on 19th March 2010. In view of the foregoing, the learned Judge cannot be faulted for finding that:

> "26. The plaintiff produced a Certificate of Title No CR 47503 dated 17th March 2010 to prove ownership over the suit property. The title did not show any leases, charges and other encumbrances and other conditions and restrictions. More to that the defendants did not produce any evidence to the contrary. This court is guided by Section 26 of the *Land Registration Act* 2012 to take the Certificate of Title as prima facie evidence that the plaintiff is the proprietor of the land and is the absolute and indefeasible owner. The plaintiff as the registered proprietor has all the rights, interest and liabilities incidental to the suit property."

21. As the learned Judge correctly observed:

> 36. ... The defendants were paying a fee to the Municipal Council of Voi in order to maintain temporary structures on the suit property which were meant to remain temporary and nothing permanent. The defendants therefore were permitted to stay on the suit property before it was donated to the plaintiff. The defendants did acknowledge the authority of the then Municipal Council of Voi by paying the conservancy fees in order to keep their temporary houses. Time therefore did not run against the plaintiff when the defendants were paying the conservancy fees to the Municipal Council of Voi between 1990-1994. Time began running against the plaintiff when they became registered owners of the suit property with rights, interest and liabilities."

22. Indeed, it is not in dispute that the respondents were, and still are, the registered proprietors of the suit property with effect from 19th March 2010. Up to that date, and at all times thereafter, the appellants were by no means in actual, open, notorious, regular, continuous, uninterrupted, hostile and exclusive occupation of the suit property for a period of 12 years without any permission from the Council, the Company, or from the respondents for that matter. And that settles the 2nd issue.

23. Turning to the 3rd issue as to whether the appellants proved their claim on adverse possession, it is noteworthy that, even if time had started to run against the Company as proprietor in the appellants' favour to found an action in adverse possession, that time stopped running the moment the respondents became the registered proprietors of the suit property on 19th March 2010, the day the respondents' proprietary rights crystalised.

24. In addition to the foregoing, it is also instructive that the appellants' occupation of a portion of the suit property was interrupted as far back as the year 2000 when, following the protracted dispute, the appellants, through their self-help group known as "Kilio Cha Haki," urged the respondents to facilitate assignment to them of a portion measuring 7 Acres out of the suit property. Their letter dated 24th September 2008 read in part:

> " Re: Settlement Of Kilio Cha Haki S. H. Group
>
> ... ...

You will agree with us that much time and money has been wasted from 2000 – 2008 (Nine years) trying to sort out these matters without success. This has been as a result of advises [advice] from un affected people whose end results will never affect them in any way. As a result of this, therefore we the executive give you mandate to:-

1. Sub – divide the 7 acres of land and prepare Title Deed Under The Name Kilio Cha Haki S.

   H. Group.

2. Sub – divide the 7 acres of this land to the number of members in accordance to the picking order done by the D. O Mr. Otieno in 2002...."

25. It is indubitable that, all along, the appellants occupied part of the suit property on condition as to payment of conservancy fees to the Council with whose permission they erected temporary dwelling structures, which were liable to demolition in the event of breach of any of the conditions aforesaid. In effect, the Council had authority over their occupation until the respondents' proprietary rights crystalised on 19th March 2010 after which the Council ceded control over the suit property to the respondents. The subsequent attempts by the respondents to remove and relocate the appellants, and their subsequent suit only a year later in ELC Case No. 500 of 2011 stopped time from running in the appellants' favour in the event that they purported to assert a claim in adverse possession as was the case here.

26. To determine the nature of possession, this Court is guided by the decision in Samuel Kihamba v Mary Mbaisi [2015] eKLR where this Court sitting in Kisumu held:

> " Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land"

27. In the same vein, this Court sitting in Malindi in Mtana Lewa v 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 nor 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." [Emphasis added]

28. The question as to when time starts to run in favour of a claimant in adverse possession has been the subject of numerous judicial pronouncements. In Wines & Spirits Kenya Limited & another v George Mwachiru Mwango [2018] eKLR, the Court of Appeal held:

> " The law is clear on when time starts running for purposes of adverse possession. The possession or occupation must be with the knowledge of the registered owner (See Kimani Ruchine & Another v Swift Rutherford & Co. Ltd [1980] supra. Time cannot therefore start running until the registered owner becomes aware that there is a trespasser occupying

his/her property and does nothing to assert his rights on the property for at least 12 years." [Emphasis ours]

29. In the same vein, the Court of Appeal in Wambui Gikwa v Paul Kimani Muraba [2016] eKLR pronounced itself on the question as to when time stops running and held:

> "We understand the law to be that time stops running in favour of an adverse possessor either when the title holder asserts his right to the land in question or when the adverse possessor admits the title holder's right. As set out in Kirutu v Kabura (supra) assertion of a title holder's right can be through the institution of legal proceedings to regain possession. Whether or not the title holder succeeds in such proceedings is another matter altogether. The fact that such proceedings are instituted and prosecuted is in our view, a clear indication of the title holder exerting his right to the land interrupting possession of the adverse possessor." [Emphasis ours]

30. The appellants were unequivocal in acknowledging the respondents' title to the suit property, which explains their written request to be apportioned part thereof. In addition, the respondents moved to the ELC to assert their proprietary rights and have the appellants removed or relocated to a portion of the suit property. In effect, time stopped running as against the respondents barely a year after registration of Transfer in their favour the moment they moved to court to exert their right to the property.

31. On the authority of Peter Kamau Njau v Emmanuel Charo Tinga [2016] eKLR, we reach the inescapable conclusion that the respondents did not merely stand by, but took positive steps to assert their title in judicial proceedings. In this regard, this Court held:

> "In order to stop time which has started running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land." [Emphasis ours]

32. In conclusion, the appellants were by no means in actual, open, notorious, regular, continuous, uninterrupted, hostile and exclusive occupation of the suit property as claimed. As licencees of the Council, and in view of the respondents' positive steps taken to assert their right of ownership within a year of registration of Transfer in their favour, the appellants failed to establish adverse possession of the suit property, which settles the 3rd issue. Simply put, the undisputed occupation of the suit property by the appellants did not amount to adverse possession thereof as claimed.

33. We form this view on the authority of Peter Kamau Njau v Emmanuel Charo Tinga [2016] eKLR where this Court set out the circumstances under which the title of a registered owner may be defeated by a claim of adverse possession 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."

34. It is noteworthy that no such application were ever made by the appellants to be adjudged owners of the suit property in adverse possession. All they did in the suit leading to the impugned judgment was to defend the respondent's suit for their eviction.

35. In Mombasa Teachers Co-operative Savings & Credit Society Limited vRobert Muhambi Katana & 15 others [2018] eKLR, the Court of Appeal held:

> " 18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, nec vi nec clam nec precario. See Jandu vs. Kirplal & Another [1975] EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court's decision in Wambugu v Njuguna [1983] KLR 173 ...." [Emphasis added]

36. In view of the foregoing, we find nothing to fault the learned Judge for allowing the respondents' suit against the appellants with orders in terms of the impugned judgment.

37. Having considered the record as put to us, the impugned judgment, the rival submissions of learned counsel for the appellants and for the respondents, the cited authorities and the law, we reach the inescapable conclusion that the learned Judge was not at fault by allowing the respondents' suit against the appellants in terms of the impugned judgment.

38. In conclusion, we find that the appellants' appeal has no merit and is hereby dismissed with costs to the respondents. Consequently, the judgment and decree of the ELC at Mombasa (C.K. Yano, J.) delivered on 15th March 2021 in ELC Case No. 500 of 2011 are hereby upheld. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MARCH, 2024.

MUMBI NGUGI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR