Tilak Company Ltd v Mageta Enterprises Ltd (Civil Appeal E080 of 2021) [2024] KECA 342 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KECA 342 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL E080 OF 2021

K M'INOTI, J MOHAMMED & S OLE KANTAI, JJA

MARCH 15, 2024

BETWEEN

TILAK COMPANY LTD ..... APPELLANT

AND

MAGETA ENTERPRISES LTD ..... RESPONDENT

(Appeal from the Judgment and Decree of the Environment and Land Court at Nakuru (Mutungi, J.) dated 17th December 2020inELCC. No. 289 of 2018)

JUDGMENT

JUDGMENT OF MINOTI JA

The appellant, Tilak Company Ltd is aggrieved by the judgment and decree of the Environment and Land Court at Nakuru (Mutungi, J.) dated 17th December 2020. By that judgment, the learned judge held that the respondent, Mageta Enterprises Ltd, had, through adverse possession, acquired title to the property known as Nakuru Municipality Block 11/195 (the suit property). The learned judge further ordered the respondent to be registered as proprietor of the suit property and awarded it costs of the suit.

The background to the appeal is a bit convoluted, entailing an exparte judgement in favour of the respondent, which was subsequently set aside and a fresh hearing ordered. The relevant background, briefly, is as follows. On or about 8th August 2008, the respondent took out an originating summons (Civil Suit No 165 of 2008) in the High Court of Kenya at Nakuru for determination of whether it was in adverse possession of the suit property and whether it should be registered as proprietor thereof in lieu of the appellant. Ultimately, upon promulgation of *the Constitution* of Kenya, 2010 and the establishment of the Environment and Land Court (ELC), the suit was transferred to the ELC and became Nakuru ELCC No. 289 of 2018.

The respondent's summons was supported by an affidavit sworn by its director, Kenneth Maweu Kasinga on 8th August 2008, in which he deposed that the appellant was the registered owner of the suit property and that on 6th November 1995, the parties entered into a sale agreement for sale of the suit property to the respondent

for Kshs 6,500,000, which, by mutual agreement as witnessed by an addendum, was revised downwards to Kshs 4,500,000. The respondent immediately paid a deposit of Kshs 2,000,000 and the

1. balance by three instalments, the final one being on 20th July 1996. Upon signing of the agreement for sale, the respondent took possession of the suit property and occupied the same openly, peacefully and uninterrupted. Subsequently the appellant refused to transfer the suit property to the respondent, as a result of which the latter instituted adverse possession proceedings, having continuously been in possession of the suit property for more than 12 years.

   The appellant opposed the summons through a replying affidavit sworn by its director, Zaina Mukami Chelanga on 15th July 2009. The appellant averred that the Court did not have jurisdiction to entertain the summons because it was time barred and was based on an agreement for sale pursuant to which the respondent entered the suit property with the consent of the appellant. It was also averred that the summons was incompetent because of failure to annex the certificate of title.

   On the substance of the summons, the appellant pleaded that the respondent took possession of the suit property on or about 26th July 1995 as a rent-paying tenant and continued paying rent because the respondent was unable to complete the sale. The

2. appellant denied having received the purchase price from the respondent and added, in a rather contradictory turn, that the respondent took possession of the suit property pursuant to the agreement of sale dated 6th November 1995 and therefore the time for purposes of adverse possession did not start running until 7th November 2001. It was also contended that the respondent's remedy lay in a suit for refund of the money paid towards the purchase price rather than in an adverse possession claim.

   At the hearing of the suit, which proceeded by viva voce evidence, the appellant and the respondent called one witness each. After considering the pleadings and evidence, the learned judge identified four issues for determination, namely, whether the parties entered into the agreement for sale dated 6th November 1995, whether the respondent's occupation and possession of the suit property constituted adverse possession, whether the respondent was entitled to be registered the proprietor of the suit property, and who should bear the costs of the suit.

   On the first issue, the learned judge found that indeed the parties entered into the sale agreement and that the respondent paid in full the agreed purchase price of 4,500,000, the last instalment

3. being paid on 20th July, 1996. On the second issue, the learned judge found that the respondent took possession of the suit property pursuant to the agreement for sale but the appellant did not complete the sale after the respondent paid the final instalment on 20th July 1996. He concluded that the respondent became an adverse possessor after he paid the last instalment and that by the time it filed the suit on 8th August 2008, the respondent had been in adverse possession for more than 12 years, there being no evidence of interruption of the possession. Accordingly, the learned judge concluded that the respondent was entitled to be registered proprietor of the suit property and awarded it the costs of the suit.

   The appellant challenges the decision of the trial court on seven grounds which, at the hearing, its learned counsel reduced to three issues. Those issues fault the learned judge for holding that the respondent's case was of adverse possession, for holding that for purposes of adverse possession time stated running after payment of the last instalment; and for holding that the respondent proved adverse possession.

   On the first issue, it was submitted that the evidence led by the respondent did not prove adverse possession, but rather the

4. respondent's entitlement to the suit property as a purchaser. It was contended that the evidence produced by the respondent such as the agreement for sale, the addendum thereto, the evidence of payments of the purchase price and acknowledgements only proved that the respondent was entitled to the suit property as a purchaser rather than an adverse possessor. Citing the decision in *Muchanga Investments Ltd v. Safari Unlimited* (Africa) Ltd & 2 Others [2009] eKLR, the appellant submitted that a claim as a purchaser of property and a claim for adverse possession are mutually exclusive.

   The appellant further submitted that the respondent's possession of the suit property was with the leave and consent of the appellant pursuant to an agreement for sale, and therefore did not amount to adverse possession. The decisions in *Sisto Wambugu v. Kamau Njuguna* [1983] eKLR and *Samuel Miki Waweru v. Jane Njeri Richu* [2007] eKLR were cited to support the proposition.

   Regarding the second issue, the appellant submitted that in an adverse possession claim founded on an agreement for sale, time starts to run from the date of repudiation of the agreement. It was contended that even after payment of the last instalment, the respondent's possession of the suit property was still on the basis of

5. the consent of the appellant. It was the appellant's contention that the respondent led no evidence to prove repudiation of the agreement for sale and that once the respondent paid the last instalment, it became a beneficial owner rather than an adverse possessor. Accordingly, it was submitted, decisions, including of this Court, holding that time starts to run from the date of payment of the last instalment were wrongly decided because a person cannot be in hostile possession of his property. The appellant opined that in this case time started running on 7th November 2001, which was after expiry of 6 years from the date of the agreement (limitation period for contracts). Accordingly, it was submitted, by the time the respondent filed its claim on 8th August 2008, 12 years had not expired.

   On whether the respondent proved adverse possession, the appellant submitted that central to adverse possession is dispossession of the owner of the property by the person claiming to be the adverse possessor. It was submitted that from the evidence of the respondent's witness, it was the witness and his family rather than the respondent, a company and a different legal personality, who were in possession of the suit property. The appellant faulted the learned judge for failing to find that the respondent was not in

6. actual possession of the suit property, and therefore that adverse possession was not proved.

   The respondent opposed the appeal vide written submissions dated 2nd May 2022. It was submitted that the trial court properly found on the basis of the evidence before it that the parties entered into an agreement for sale pursuant to which the respondent took possession of the suit property pending completion of the transaction. The respondent submitted that the learned judge properly found that it was not a tenant in the suit property because the appellant did not produce any tenancy agreement or evidence of the alleged rental amount and payment of the same.

   Turning to whether the respondent proved adverse possession, it was submitted that the respondent tendered evidence which established all the elements of adverse possession, namely peaceful, open, notorious and continuous possession of the suit property for more than 12 years. It was contended that the respondent elected to pursue its claim in adverse possession rather than enforcement of contract and it was not for the appellant to tell it how to proceed. The respondent further submitted, relying on *Public Trustee v. Wanduru* [1984] KLR 314, *Sospeter Wanyoike v. Waithaka*

7. *Kahiri* [1979] KLR 239 and *Sisto Wambugu v. Kamau Njuguna* (supra) that for purposes of adverse possession, time started to run from the date the respondent paid the last instalment, which was more

than 12 years of peaceful, continuous and uninterrupted possession before the respondent filed the suit.

I have considered the record of appeal, the grounds of appeal, the submissions by the parties and the authorities that they relied on. As is settled law, the duty of a first appellate court is to reappraise the evidence that was adduced before the trial court, evaluate the same and reach its own independent findings. In so doing, the court must have regard to the fact that it does not have the advantage of the trial court of hearing and seeing the witnesses as they testified. Accordingly, where an issue turns on credibility of witnesses, the first appellate court must defer to the trial court, unless there are compelling reasons not to. (See *Susan Munyi v. Keshar Shiani,* CA. No. 38 of 2002).

I start with the appellant's contention that what the respondent presented was not a case for adverse possession but one entitling the respondent to relief as a purchaser of the suit property. I am at a loss of what to make of this contention because, starting with the

8. pleadings, what was before the learned judge was a suit commenced by way of originating summons taken out specifically under sections 37 and 38 of the Limitations of Acts Act and the former Order 36 rule 3D of the *Civil Procedure Rules*. In the summons the respondent claimed:

> " to be entitled to be registered as proprietor of parcel No. Nakuru Municipality Block 11/195 having acquired title thereto by way of adverse possession and which titles is currently registered in the name of the defendant (the appellant)."

9. The respondent expressly asked the court to determine the following four questions, namely:

   i. Whether the plaintiff (respondent) has been in adverse possession of all that piece of land registered in the name of the defendant as Nakuru Municipality Block 11/195, for the requisite period of 12 years;

   ii. Whether the plaintiff is entitled under section 38 of the Limitation of Actions Ac to be registered as proprietor of parcels No. Nakuru Municipality Block 11/195 in place of the defendant;

   iii. Whether the court should order the plaintiff be registered as the proprietor of parcel No. Nakuru Municipality Block 11/195 in place of the defendant; and

   iv. Who should pay costs of this suit?

10. As far as I can tell, that is the standard pleading in an originating summons for adverse possession. From the respondent's defence, the testimony of the two witnesses who testified on behalf of the parties, the general conduct of the suit, the submissions and judgment of the learned judge, there was no illusion that the dispute as framed and prosecuted was a claim for adverse possession.

    If it is the appellant's contention that the respondent should have filed a claim as a purchaser of the suit property rather than as an adverse possessor, then I would agree with the respondent that the appellant is not its legal adviser and has no business telling it how to frame its claim. The mere fact that the respondent could have lodged a claim for specific performance to enforce the agreement for sale did not preclude it from claiming the suit property through adverse possession if it was able to marshal the necessary evidence

11. to prove adverse possession. The learned judge was well aware of this fact and expressed himself thus in the judgement:

> "The registered owner of the property after the full purchase price was paid, held the title to the property in trust. The plaintiff would have been entitled in a suit for specific performance to an order of specific performance if such a suit had been brought within the period of limitation. In the present suit the plaintiff is not seeking specific performance of the contract but is rather seeking to be declared as owner of the suit property by reason of having been in adverse possession for the requisite period of 12 years." (Emphasis added).

12. That the respondent could have lodged a claim for specific performance did not, ipso facto, mean that the respondent could not sustain a claim for adverse possession. I see no merit in the contention and would dismiss it as completely misconceived.

Closely related to the above issue is the contention that after paying the purchase price, the respondent became a beneficial owner of the suit property and therefore it could not have sustained a claim for adverse possession because it would have amounted to the respondent asserting that it was in adverse possession of its own property. I think this argument is equally misconceived and a bit disingenuous. This is because although the respondent had paid the entire purchase price, the appellant did not transfer the suit property

13. to the respondent and therefore it remained, in the eye of the law, the property of the appellant in whose name it was still registered. As at the time the respondent filed the adverse possession claim, the suit property was registered in the name of the appellant, as was amply demonstrated by the copy of the certificate of title, which was produced in evidence. As of that date, no court had declared the respondent the beneficial owner of the suit property. So long as the appellant was the registered owner of the suit property which the respondent claimed to have possessed nec vi, nec clam, nec precario (peaceful, open, continuous) for a period of more than 12 years, the respondent was entitled to move the court for a declaration that he was the owner of the suit property.

This leads me to what I consider to be the heart of this appeal, namely, whether the respondent proved on a balance of probabilities that it was entitled to be registered as owner of the suit property through adverse possession. The respondent's pleadings and the evidence that was adduced by its director, Kenneth Maweu Kasinga showed that on 6th November 1995 the parties entered into an agreement for the sale of the suit property for Kshs 6,500,000. On the same day they varied the purchase price to 4,500,000 through a

14. written addendum. Both the agreement and addendum were produced in evidence. The initial completion date was agreed as 31st December 1995, but by a letter dated 7th December 1995 the respondent requested the competition date to be extended to end of July 1996. Thereafter the respondent paid the balance of the purchase price in three instalments as follows:

(i) 4th May 1996 - Kshs 800,000

(ii) 13th May 1996 - Kshs 500,000, and

(iii) 20th July 1996 - Kshs 1,200,000.

15. The appellant received the money and evidence of that fact was tendered in the form of acknowledgements by a director of the appellant, Mr. Ishmael Chelang'a and bank statements.

Upon payment of the deposit of Kshs 2,000,000.00 on 6th November 1995, the respondent took possession of the suit property. As has been stated time and again, possession for purposes of adverse

possession is a question of fact depending on the particular circumstances of the case. (See *Wali's Cyaton Bay Holiday Camp Ltd v. Shell-Mex and BP Ltd* [1975] QB 94). Looking at the evidence on record, there's absolutely no evidence of the appellant attempting to dispossess or evict the respondent from the suit property. There is

16. also no evidence on record that the respondent's possession was anything but open and peaceful.

The appellant's case as pleaded and presented through evidence is quite confused and inconsistent. On one breath, the appellant pleaded in its reply that the respondent was in possession of the suit property as a rent-paying tenant. On the other, it pleaded that the respondent took possession pursuant to the agreement for sale dated 6th November 1995 and was therefore in possession with its consent. Even though the appellant denied having received the purchase price from the respondent, it nevertheless pleaded that the respondent's remedy lay in suing for refund of the purchase price, not in adverse possession. That then raised the question, sue for which purchase price, if the respondent did not pay any? To make matters worse, the appellant's witness, Shamira Chepkemei Chelang'a, in her testimony alleged that the signatures of the appellant's directors on the agreement for sale were forged, an issue that had not been pleaded in the reply by the said directors. It is noteworthy that the response to the originating summons was by one of the directors, who never raised the issue of the alleged forgery.

The learned judge closely analysed the evidence whether the respondent was in possession of the suit property as a tenant and concluded that he was not. The appellant's witness could neither tell the amount of rent the respondent was allegedly paying nor produce any evidence of a tenancy agreement or payment of rent by the respondent. Having examined the evidence on record, I am satisfied that it firmly establishes that the respondent took possession of the suit property pursuant to the agreement for sale dated 6th November 1995 rather than as a tenant. The learned judge heard and saw the appellant's witness as she testified and specifically noted that her evidence was unbelievable because she was only 10 years old when the parties entered into the agreement, and unlike the respondent's witness, she was not involved in the transaction. Accordingly, I see no basis to fault the conclusion by the learned judge in that regard.

The appellant also submitted that the learned judge erred by holding that time started to run on 20th July 1996 after the respondent paid the last instalment. In the appellant's view, time should have been reckoned from the date of repudiation of the agreement for sale or after the expiry of six years (the limitation period for claims founded on contract) from the date of violation of

17. the agreement, which in its view was 7th November 2001. In support of the contention that time starts to run from the date of repudiation of the agreement, the appellant relied on the following passage from *Samuel Miki Waweru v. Jane Njeri Richu* [2007] eKLR:

> "a purchaser of land under a contract of sale who is in possession of the land with the permission of the vendor pending completion cannot lay a claim of adverse possession of such land at any time during the period of validity of the contract unless and until the contract of sale has first been repudiated or rescinded by parties in which case adverse possession starts from the date of the termination of the contract."
>
> The above statement was made by the Court as an explanation of its earlier decision in *Sisto Wambugu v. Kamau Njuguna* [1983] KLR 173. I am persuaded that the appellant has misapprehended both decisions. In *Sisto Wambugu v. Kamau Njuguna* (supra), the Court accepted as correct the principle stated in *Hosea v. Njiru & Others* [1974] EA 526 that once payment of the last instalment of the purchase price had been effected, the purchaser's possession became adverse to the vendor and that he thenceforth, by occupation for twelve years, was entitled to become registered as proprietor of it. However, in Sisto Wambugu the

Court found that the respondent had neither paid the purchase price, nor repudiated the contract.

18. Clearly understood, the position is that time starts to run upon payment of the last instalment, or if it has not been paid, upon repudiation of the contract.

The position that time starts to run after payment of the last instalment of the purchase price is reiterated in several other decisions, two of which the learned judge relied on, namely *Public Trustee v. Wanderi* [1984] KLR 314 and *Simon Nga'ng'a Njoroge*

19.

v. *Daniel Kinyua Mwangi* [2015] eKLR. To those I may add James Mutinda *Moni v. Tom Muthiani Mumo* [2004] eKLR and *Peter Mbiri Michuki v. Samuel Mugo Michuki* [2014] eKLR. Accordingly, I am persuaded that the learned judge did not err on his conclusion regarding when time started running.

Lastly, the appellant contended that the respondent did not prove that it was in possession of the suit property because at all material times the suit property was occupied by the respondent's director and his family. First this issue was neither pleaded nor decided by the court. It is being raised late in this appeal, clearly as an afterthought. But even if the issue were properly before us, it would be of no moment because, the respondent, as a legal person cannot occupy the suit property other than, for example, for its

20. purposes and through natural persons. In *Peter Njau Kairu v Stephen Ndung'u Njenga & Another*, C.A. 57of 1997, this Court held as follows:

> "In order that a registered owner of land may be deprived of his title to such land, in favour of a trespasser (who claims by adverse possession), stringent but straightforward proof of possession is necessary. This of course does not mean that the trespasser must be all the time in possession. He may for instance be in possession through his wife or an off-spring as those are members of his immediate family or a person appointed by him in that respect."

There is no merit in this belated contention.

For the foregoing reasons, I am satisfied that the learned judge did not err in holding that the respondent was entitled to be registered owner of the suit property through adverse possession. I would dismiss the appeal in its entirety with costs to the respondent.

Dated and delivered at Nairobi this 15th Day of March 2024

K. M'INOTI

.....

JUDGE OF APPEAL

IN THE COURT OF APPEAL AT NAKURU

(CORAM: M'INOTI, J. MOHAMMED & KANTAI, JJ.A.) CIVIL APPEAL NO. E080 OF 2021

BETWEEN

TILAK COMPANYLTD... APPELLANT

AND

MAGETA ENTERPRISES LTD RESPONDENT

QUOTE

(*Appeal from the Judgment and Decree of the Environment and Land Court at Nakuru (Mutungi, J.) dated 17th December 2020 in ELCC. No. 289 of 2018*

CONCURRING JUDGMENT OF J. MOHAMMED, J.A.

21. I have had the benefit of reading in draft, the judgment of my brother, K. M'Inoti, J.A. I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add.

Dated and delivered at Nairobi, this 15th day of March 2024.

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

IN THE COURT OF APPEAL AT NAKURU

**(CORAM: M'INOTI, J. MOHAMMED & KANTAI, JJ.A.)__

CIVIL APPEAL NO. E080 OF 2021

BETWEEN

TILAK COMPANY LIMITED APPELLANT

AND

MAGETA ENTERPRISES LIMITED RESPONDENT

(An appeal from the Judgment of the Environment and Land Court of Kenya at Nakuru (Mutungi, J.) dated 17th December, 2020 in ELC No. 289 of 2018)

JUDGMENT OF KANTAI, JA

I have seen in draft the Judgment of my brother M'Inoti, JA and I am in full agreement that this appeal has no merit and should be dismissed. I have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH 2024.

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR