



**Kairu & another v Wanyeki & another (Civil Appeal 171 of 2019)
[2024] KECA 253 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KECA 253 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 171 OF 2019
W KARANJA, J MOHAMMED & LK KIMARU, JJA
MARCH 8, 2024**

BETWEEN

PAUL GICHURI KAIRU 1ST APPELLANT

CHRISTOPHER WERU WAHOME 2ND APPELLANT

AND

JOHN KIAGO WANYEKI 1ST RESPONDENT

PAUL KARIERA WANYEKI 2ND RESPONDENT

*(Being an appeal from the judgment of the Environment and
Land Court at Nyeri (L. N. Waitbaka J.) dated 7th March, 2019
in ELCA No. 4 of 2018 (Formerly Nyeri HCCA No.4 of 2016))*

JUDGMENT

1. Paul Gichuri Kairu and Christopher Weru Wahome, the appellants herein, instituted a suit against Wangui Karuku (deceased), before the Chief Magistrate’s Court at Nyeri. By a plaint dated 8th October, 2013, the appellants alleged that they were the registered owners of parcel LR Nyeri/Municipality/BlockII/221 (hereinafter “the suit property”), and that Wangui Karuku, without any colour of right, continued to occupy the suit property. The appellants sought delivery of vacant possession of the suit property, eviction of Wangui Karuku, mense profits for loss of user and general damages for trespass. The 1st and the 2nd respondents are substitutes of the deceased.
2. The appellants’ case was that the 2nd appellant’s late father, Watson Wahome Njuru, purchased the suit property from one Marion Wairimu Nguru, vide a sale agreement dated 23rd February 1995. The suit property was originally owned by Nguru Ndirangu, Marion’s husband. They contended that the respondents trespassed into the suit property and have refused to vacate the same. They averred that



the late Watson Wahome transferred the suit property to them, and that they obtained a certificate of lease dated 25th July 2013 to that effect.

3. Wangui Karuku, vide a statement of defence dated 7th November 2013, denied the allegations made by the appellants and asserted that there was a pending suit over the suit property before the Environment and Land Court, between herself and the appellant's late father, Watson Wahome Njuru (i.e Nyeri ELC Case. No. 79 of 2010), where she was seeking ownership rights over the suit property by virtue of adverse possession. It was her case that she was granted ownership of the suit property by PC Kangethe, but that her ownership documents got destroyed in a house fire. She contended that the High Court had determined that she acquired proprietary rights over the suit property by way of adverse possession, a decision which is yet to be challenged by the appellants. She availed a court official as witness, who produced a copy of the court proceedings with respect to Nyeri High Court Civil Case No. 203 of 1996 and Nyeri ELC Case No. 79 of 2010.
4. After hearing the parties, the trial court (Onyiego, C.M., (as he then was)) dismissed the appellant's suit.
5. The appellants, dissatisfied with the judgment of the trial court, preferred an appeal before the High Court at Nyeri, vide Civil Appeal No. 4 of 2016. The suit was transferred to the Environment and Land Court at Nyeri, as ELCA No. 4 of 2018. The appellant's sole ground of appeal faulted the trial court for dismissing their suit, which they argued was contrary to the evidence on record. The first appellate court (L. N. Waithaka J.) determined that the appellants acquired bad title as the suit property was transferred to them during the pendency of suit before the Environment and Land Court, between the late Watson Wahome and Wangui Karuku, where Wangui Karuku claimed rights to the suit property, on account of adverse possession. The learned Judge determined that whilst there is evidence that the appellants are the registered proprietors of the suit property, this was subject to overriding interests that affected the suit property, as at the time of registration. She dismissed the appellants' appeal and affirmed the decision of the trial court.
6. It is this decision of the learned Judge that provoked the instant appeal. The appellants' contention, on their sole ground of appeal, is that the learned Judge erred in failing to adjudge the suit property to the appellants, despite sufficient evidence on record proving their entitlement to the said property, and failure by the respondents to provide any proof of ownership.
7. The appeal was canvassed by way of written submissions. The firm of Peter M. Muthoni and Company Advocates was on record for the appellants. It was submitted by the appellants that no evidence was tendered by the respondents to prove ownership of the suit property, and that the learned Judge misapprehended the evidence on record in finding that the appellants' title was subject to existing overriding interests. They urged that the fact that they cannot access the suit property has greatly prejudiced them and violated their right to own property as guaranteed under Article 40 of the Constitution . In the circumstances, the appellants invited us to allow the appeal as prayed. The respondents did not file any written submissions in response thereto.
8. This is a second appeal. We are alive to our mandate as a second appellate court to confine ourselves to matters of law only, unless it is shown that the courts below considered matters they should not have considered, or failed to consider matters they should have considered, or looking at the entire decision, it is perverse. See Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR and Stanley N. Muriithi & Another v Bernard Munene Ithiga [2016] eKLR.
9. Guided by the foregoing principles, the record of appeal as well as the written submissions by the appellant, we are called upon to determine whether the learned Judge erred in law, in affirming the decision of the trial court, which dismissed the appellants' case.



10. The appellants have produced evidence to prove the fact that they are the registered proprietors of the suit property. The title was transferred to them by the previous owner, Watson Wahome Njuru, the 2nd appellant's late father, on 25th July, 2013. That being said, a perusal of the record showed that Watson Wahome Njuru, purchased the suit property vide a sale agreement dated 23rd February, 1995, and that the suit property was transferred to Watson on 19th January, 1996. A certificate of lease was issued to that effect. It is not clear when Wangui Karuku entered the suit property. However, Watson filed a suit before the High Court of Kenya at Nyeri, in 1996, vide High Court Civil Case No. 208 of 1996, seeking to evict Wangui Karuku from the suit property. This means that Wangui Karuku was in possession of the suit property, as at 1996, when the suit seeking her eviction was lodged by the appellant's father.
11. Unfortunately, the proceedings with respect to H.C.C.C. No. 208 of 1996 did not form part of the record, and therefore, this Court did not have the opportunity to peruse the decision of the said court. From the evidence of the court official, Samuel Koskei, who produced a copy of the said proceedings before the trial court, we note that H.C.C.C. No. 208 of 1996 was dismissed vide a judgment dated 30th January, 1998. As such, the late Watson Wahome's request to the court for eviction orders against Wangui Karuku was denied. A copy of an official search of the suit property dated 14th March, 2007, produced by the respondents, indicated that Wangui Karuku registered a caution against the suit property on 26th April 1999, claiming ownership rights.
12. The court was not informed whether at any time the said caution was removed. How the title of the suit property was transferred to the appellants whilst a caution registered against the title existed is a mystery.
13. Section 71 (1) of the [Land Registration Act](#) creates instances where one may lodge a caution against a title. It provides thus:
 - “A person who:
 - a. claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;
 - b. is entitled to a licence; or
 - c. has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge.”
14. Section 72 (2) provides thus:
 - “A disposition that is inconsistent with the caution shall not be registered while the caution is still registered except with the consent of the cautioner or by the order of the court.”
15. Section 73 goes ahead to state as follows:
 - “1. A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.
 2. The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.



3. If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.
 4. If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.
 5. After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee's power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.
 6. On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under section 74 shall not be affected by the cancellation.”
16. In this appeal, the appellants did not provide any evidence to show that the caution was lifted before the suit property was transferred to them on 25th July, 2013. Further, it is clear from the evidence on record that Wangui Karuku, in July 2010, filed a suit against Watson Wahome, before the Environment and Land Court (ELC), claiming proprietary rights over the suit property by way of adverse possession. From the record, that case is still pending before the said court. It is notable that Watson Wahome transferred the suit property to the appellants during the subsistence of the suit filed by Wangui Karuku before the ELC, which challenged Watson's ownership rights to the suit property.
17. We find that Watson Wahome could not deal or transfer the suit property to the appellants as he did, as it was the subject of contentious litigation pending before a court of law. The doctrine of lis pendens applied.
18. This Court in *Rose Wakanyi Karanja & 3 Others v Geoffrey Chege Kirundi & another* [2016] eKLR had this to say:
- “The doctrine of lis pendens rests upon the foundation that it would plainly be impossible that any action or suit could be brought to a successful conclusion if alienations pendent lite were permitted to prevail. In *Bellamy v Sabine* 1 De G & J 566 it was held:
- “The doctrine of lis pendens intends to prevent not only the defendant from transferring the suit property when litigation is pending but it is equally binding on those who derive their title through the defendant, whether they had or had no notice of the pending proceedings. Expediency demands that neither party to a suit should alienate his interest in the suit property during the pendency of the suit so as to defeat the rights of the other party ...”
19. The 2nd appellant is a son to Watson Wahome. He cannot therefore feign ignorance as to the unsettled litigation touching on the suit property, specifically ELC Case No. 79 of 2010, which was pending before the ELC, at the time the title was transferred to him and the 1st appellant. The said suit challenged Watson Wahome's title to the suit property, as the respondents claimed to be adverse possessors of the suit property. According to the record, that suit was still pending before the ELC when the 1st appellate court delivered its judgment. This Court has not been informed otherwise. We



agree with the finding of the learned Judge that the registration of the appellants as proprietors of the suit property was subject to such overriding interests as affected the suit property, as at the time of registration.

20. It is our considered view that it would be a mockery of due process of the law for the appellants to ask a court of law to issue eviction orders against the respondents, whilst there is a pending suit before the ELC, where the respondents are claiming proprietary rights over the suit property by virtue of adverse possession, and while a decision on who the rightful owner of the suit property is yet to be considered by the said court.
21. In the end, we find no material in this appeal to warrant our interference with the concurrent finding of the two courts below. The appeal is devoid of merit. We accordingly dismiss it, with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH 2024.

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

