



**Kariuki (Legal Representative of Eustace Karuri Githenya) v Joreth Limited & 2 others
(Civil Appeal E391 of 2020) [2024] KECA 420 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KECA 420 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E391 OF 2020
K M'INOTI, HA OMONDI & GWN MACHARIA, JJA
APRIL 26, 2024**

BETWEEN

**MARIA GORETTI MUTHONI KARIUKI (LEGAL REPRESENTATIVE OF
EUSTACE KARURI GITHENYA) APPELLANT**

AND

**JORETH LIMITED 1ST RESPONDENT
TIMOTHY LELGO 2ND RESPONDENT
TERESIA MISTI LENGES 3RD RESPONDENT**

*(An Appeal from the Judgment and Decree of the Environment and Land Court at
Nairobi (Eboso, J.) dated 25th February 2020 in ELC Case No. 183 of 2009 (OS))*

JUDGMENT

1. Eustace Karuri Githenya (the deceased) instituted a suit, ELC No.183 of 2009, through an Originating Summons dated 24th April 2009, seeking a declaration that he acquired title by adverse possession of Plot No. 299 Thome Farmers No. 5 Ltd, also known as Land Reference Number 13330/51 measuring 0.469 acres (being a subdivision of LR No. 133300) which belonged to the 1st respondent, Joreth Ltd. The 1st respondent sold the suit property to Timothy Lego (2nd Respondent) and Teresia Misti Ledges (3rd respondent), who were eventually registered as proprietors in June 2009. However, in the mix of all this, the appellant averred that he purchased a share known as Thome Farmers No. 5 Ltd (Thome Farmers); entered into the suit property, took possession, and control; planting crops, grass, and trees. While the appellant was in possession, the parcel was surveyed and given the identity of Land Reference Number 13330/51. The appellant maintained that he continued with uninterrupted use of the land from the year 1991 to April 2009 when he learnt of the presence of some strangers who had been seen inspecting the land; and that the 1st respondent had in fact sold the property to the 2nd and 3rd respondents. As far as the appellant was concerned, he had adversely acquired the parcel by virtue of



- 17 years of uninterrupted occupation. He also sought an order cancelling the registration of the titles of the 2nd and 3rd respondents as proprietors of the suit property; and the land register to be rectified by entering his name as the registered owner.
2. The 1st respondent opposed the claim, and maintained that it previously held title to two parcels of land, LR No. 4920/ and LR No. 4921/3 which were subsequently consolidated into LR 13330 and for which it was the registered owner and did not sell, let, assign its rights to any party prior to the disposition of the suit property to the 2nd and 3rd respondents; that it was a separate entity from Thome Farmers; and it had asserted its rights against Thome Farmers in a civil suit filed in Nairobi in 1992, on grounds of trespass by the latter and eviction of all identifiable occupiers of LR No. 13330.
 3. The 2nd and 3rd respondents opposed the appellant's claims, contending that they were innocent purchasers for value of the parcel which was vacant, and was sold to them by the 1st respondent.
 4. The deceased's case was that he had purchased a share in Thome Farmers and took possession and control, planting crops and generally using the suit property without interruption from 1991 to 2009. While the deceased was in possession, the suit property was surveyed as L.R. No. 13330/51. In April 2009, the deceased learnt about the presence of some strangers who were inspecting the property; and upon inquiry he established that the 1st respondent had sold the property to the 2nd and 3rd respondents.
 5. The deceased's further contention was that he had uninterrupted occupation of the suit property for 17 (seventeen) years, running from 1991 to 2003; he had fenced the property; and by then title by adverse possession had crystallized as time started running in 1991. It was his position that there was no valid title to be passed to the 2nd and 3rd respondents and nothing to warrant the respondents pulling down his fence, which led to the deceased filing suit.
 6. After the death of the deceased, he was substituted in the Originating Summons by his widow, Maria Gorretti Muthoni Karuri, as the plaintiff, now the appellant. The appellant, who testified as PW2, stated that in 1991, her late husband bought the suit property measuring 0.5 of an acre from James Ndirangu Ng'ang'a and David Njeri Wainaina who had a share in Thome Farmers No 5 Limited. They were shown a vacant plot which had beacons; they visited the offices of Thome Farmers; a sale agreement was drawn between the vendors and the deceased; transfer fees was paid; the deceased's name was entered in the register; subsequently, the deceased was issued with a share certificate, share transfer fee receipt, ballot paper and survey fee receipt. They were in open and peaceful occupation of the suit property for 17 years their intention being, to eventually construct a residential home on the property. In April 2009, their caretaker informed them about the presence of some trespassers on the suit property; upon inquiry, they established that the 1st respondent had purported to sell the property to the 2nd and 3rd respondents, yet, according to the appellant, the 1st respondent had no property to sell.
 7. The appellant maintained that prior to buying the suit property, her late husband conducted a search at the offices of Thome Farmers in Githunguri; and by 1999, there was no title to the suit property. She had been involved in the purchase of the property and they took possession by the year 1991. She later realized that the 1st respondent had sold the suit property to Hon. Magugu, who was in fact a director in the 1st respondent. She was not aware that Thome Farmers were joined as a party in HCCC 6206/1992, nor had she ever heard of the 1st respondent until this suit was filed.
 8. The appellant also relied on the evidence of Erick Muraya, (PW1) told the trial court that while working for one Nelson Wachira, a neighbour to the deceased, the latter approached him in 1993, and requested him to be "looking after" his plot; he continued to work for Wachira, and did not move into the suit property. He [PW1] planted a variety of crops on the suit property, which was fenced; and the deceased frequently visited the property. According to this witness, during that time, no one ever questioned



- the deceased's use and occupation, at least until the year 2008 when he moved to Naivasha, and left someone else in charge of the property. When he got back in the year 2009, he learnt that the 2nd and 3rd respondents were not only claiming ownership, but had already removed the fence that the deceased had erected.
9. The 1st respondent, relying on the replying affidavit sworn by James Njenga Karume, contended that it held title to two parcels of land; LR No. 4920/3 and LR No. 4921/, which were subsequently consolidated into LR. No. 13330; that the suit property was a subsequent sub-division out of LR No. 13330; that prior to the disposition of the suit property to the 2nd and 3rd respondents, it was the registered proprietor of the suit property; and did not sell, let or assign its rights to any other party. The 1st respondent maintained that it was a separate entity from Thome Farmers and that it had asserted its rights against Thome Farmers in Nairobi HCCC No. 6206 of 1992, where all identifiable occupiers of LR No. 13330 by virtue of being Thome Farmers shareholders were sued for trespassing on the suit property and that orders of eviction were sought against them; that upon filing Nairobi HCCC No. 6206 of 1992 against the trespassers, time stopped running for purposes of adverse possession.
 10. The 2nd and 3rd respondents explained that they came across a newspaper advertisement by the 1st respondent indicating availability of land for sale; they subsequently entered into a sale agreement with the 1st respondent, purchasing the suit property for a sum of Kshs.1, 500,000/-. In her evidence at the trial, the 3rd respondent, (DWI) pointed out that after entering into the sale agreement, they paid Kshs.148,000/- as Stamp Duty; were issued with a deed plan; the transfers were processed; and on 20th December 2006, they took vacant possession of the property, which was then not fenced; fenced it and remained in possession until 20th April 2009, when the deceased destroyed their fence; and the matter was reported to Kasarani Police Station. Relying on a bundle of documents which comprise the Sale Agreement, the Deed Plan issued on 18th September 2007, and the Title document issued in June 2009, she contended that the title showed them as the registered owners.
 11. She explained on cross-examination that there were many plots advertised by the 1st respondent, most of which were vacant; and that a search had revealed that the suit property belonged to the 1st respondent, with nothing whatsoever to suggest any dealings in the suit property between 1991 and 2006 when they took possession. She was categorical that the transfer dated 24th December 2007, was lodged and registered on 12th June 2007; the Deed Plan was issued on 18th September 2007; and the title deed was issued in June 2009, long before an injunction was issued. She however conceded that by the time the suit was filed in court, she had not obtained title as the process took long and the transfer was registered while the suit in the trial court was on-going. She maintained that they had been in occupation of the land since December 2007, and their caretaker, Moses Mbugua, lived there and was growing crops.
 12. This was the same narrative by the 2nd respondent, Timothy Jelgo, who testified as DW2.
 13. The other defence witness, Robertson Nderitu, DW3, the site and operations manager of the 1st respondent, maintained that the appellant and Thome Farmers had never ever been in possession of the suit property, LR No. 13330, which was an amalgamation of LR No. 4920/3 and LR No. 4921/3; and that LR No.13330/51 was a sub-division of LR Number 13330. He was categorical that the 1st respondent was not the same as Thome Farmers; nor did the latter own shares in the 1st respondent; and as a matter of fact the 1st respondent had filed a suit, being HCCC No. 6202 of 1992 against 24 persons including Thome Farmers No. 5 Ltd Limited for trespass; and a consent was entered into that each individual would pay Kshs.200,000/- to the 1st respondent, so as to have the land transferred to them. That Thome Farmers did not comply with the terms of the consent order; and the 2nd and 3rd respondents bought the suit property after its sale had been advertised by the 1st respondent, therefore



a claim of adverse possession would not stand as the 1st respondent had been in possession throughout the relevant period and the appellant was a trespasser.

14. DW3 was emphatic that at the time the 2nd and 3rd respondents took vacant possession of the unfenced land, the beacons were not in place, and that the beacons were replaced by a surveyor brought in by the 2nd and 3rd respondents, at a time when the land was not under cultivation. The 1st and 2nd respondents maintained that the appellant did not satisfy the conditions for grant of title under adverse possession and they further submitted that the appellant was never in actual possession as he had never lived on the suit property.
15. The learned trial Judge considered all the evidence on record and framed two issues for determination, first, whether the deceased should be declared to have acquired title by adverse possession, and secondly, whether the registration of the 2nd and 3rd respondents as proprietors should be cancelled and the name of the appellant be entered in the register.
16. The trial court noted that with regard to HCCC No. 6206/92, the 1st respondent did indeed assert its right to the suit property, but that the appellant was not one of those identified and sued. The trial court was also of the view that in the absence of developments on the suit property and in the absence of actual physical possession of the suit property by the deceased, it could not be reasonably concluded that the deceased was in actual open and physical possession of the suit property, and as such it was not possible for the 1st respondent to know that the deceased had intruded onto the suit property with intent to dispossess the 1st respondent of the suit property; that the possession had to be manifest and apparent to a reasonable landowner who can see and be able to tell that an intruder had invaded his land. It was thus the court's finding that from the evidence on record, there was no open and physical possession of the suit property by the deceased.
17. From the caretaker's evidence, the trial court determined that it was the caretaker who used to grow the subsistence crops; and that the deceased would make intermittent visits to the suit property, but did not have any developments on the suit property; that the said intermittent visits by the deceased and cultivation along the river by the caretaker did not constitute sufficient open, physical control over the land. The trial court hence found that the deceased did not acquire title to the suit property under the doctrine of adverse possession and dismissed the appellant's Originating Summons, with costs to the respondent.
18. The appellant, being aggrieved by the judgment challenges the decision of the Superior Court on 8 grounds of appeal, namely, that: the learned Judge erred in law and fact in his finding that there was no evidence to show that the appellant had been in actual physical possession of the suit property, against the very clear evidence presented by the appellant and her witness; in finding that PW2 was not a caretaker of the appellant simply because he was also employed to take care of another plot in the neighbourhood; in finding that the documentary proof of purchase of a share of Thome Farmers by the deceased did not demonstrate open and adverse possession of the suit property by the deceased or the circumstances under which he entered into the suit property; in finding that claims by the appellant on occupation and possession were not supported by the evidence, yet there was evidence of open and exclusive use of the suit property by the deceased in excess of a period of 12 years prior to the commencement of the suit; by failing to appreciate that the suit property was transferred by the 1st respondent to the 2nd and 3rd respondents while the suit was pending in court; and while there were orders of injunction restraining such transfer, which orders were known to the respondents; by failing to find that the doctrine of *les pedens* was fully applicable to the whole of the transfer, and rendered the same unlawful and unsustainable in the eyes of the law; by failing to hold that the 1st respondent purported to sell the suit property to the 2nd and 3rd respondents yet its claim to title over the said property



had already been extinguished and the respondent was no longer in possession of a valid title to pass to the 2nd and 3rd respondents; and by rendering a judgment that was against all evidence presented.

19. Obviously recognizing that most of the grounds were repetitive of each other, the appellant consolidated grounds 1, 2, 3, 5 and 7 which raises this main issue: whether the appellant had acquired the suit property by adverse possession at the time of filing the suit; and whether the learned judge erred in dismissing the suit. The appellant concedes that the 1st respondent was the registered owner of the suit property as of 12th June 2009 when the suit was commenced before the trial court on 24th April 2009. The appellant contends that the 1st respondent, although being the registered owner, had discontinued possession of the same and that possession was with Thome Farmers, as the suit property was a sub-division of LR 13330.
20. The appellant further submits that the 1st respondent admitted to the entry on the suit property by the appellant on which he planted crops, which in the appellant's view was evidence that he had taken control of the suit property, thus, such acts were inconsistent with the 1st respondent's enjoyment of the suit property. The appellant further contends that by the time the suit was filed, the deceased had been on the suit property since 1991, eighteen (18) years before the filing of the suit. Basically, the appellant is arguing that the deceased was in open actual and physical control of the suit property.
21. The respondents on the other hand argue that the appellant was not able to prove the claim for adverse possession, as she was unable to prove the deceased's exclusive possession for twelve (12) years; emphasizing that it is on record that it was the caretaker and not the deceased who stayed on the suit property.
22. This being a first appeal, and as has been reiterated in several decisions of this Court, it is the Court's primary duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per rule 31(1)(a) of the Court of Appeal Rules. This duty has been reiterated in *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Company Advocates* [2013] eKLR.
23. One of the essential elements of the doctrine of adverse possession is that there must be sufficient degree of physical occupation of the land and that possession of the land must be actual, notorious, exclusive and continuous, and apparent and manifest to the actual landowner.
24. The burden of proof is placed on the person alleging that he is entitled to the land by adverse possession. Owing to the nature and extent of orders for adverse possession, to wit, extinction of the right to property, the burden lies squarely on the appellant to demonstrate by clear and cogent evidence that he has met the requirements for grant of an order of adverse possession. The appellant is the one who has alleged and therefore must prove. (See *Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui* [2017]eKLR).
25. This Court in *Richard Wefwafwa Songoi v. Ben Munyifwa Songoi* [2020] eKLR expressed that a person claiming adverse possession must establish the following:
 - i. On what date e came into possession;
 - ii. What was the nature of his possession;
 - iii. Whether the fact of his possession was known to the other party;
 - iv. How long his possession continued; and
 - v. That the possession was open and undisturbed for the requisite period of 12 years.



26. The appellant contends that the deceased entered the suit property in 1991 and occupied the same without interruption until 2009. If that is the case, then the deceased had been in occupation of the suit land for a period of 18 years, which is beyond the prescribed statutory time.
27. The appellant also argues that a person claiming under adverse possession did not have to be in the suit property physically, and that cultivation was proof of occupation.
28. To determine the nature of possession this Court [Maraga, JA. (as he then was) and Anzangalala and Kantai; JJ.A.] in *Samuel Kihamba v Mary Mbaisi* [2015] eKLR 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 landowner, with intention to have the land. There must be an apparent dispossession of the land from the landowner.”
29. From the evidence on record, the appellant has conceded that at the material time, the 1st respondent was the registered owner of the suit land and no evidence has been led to the effect that the appellant dispossessed or discontinued the 1st respondent’s right over the suit property. The appellant claims that the deceased in 1991 purchased shares from Thome Farmers, a land buying company, and as such the said shares entitled him to the suit property.
30. An analysis of the evidence presented, and the evaluation by the trial court leads us to concur with the trial court that the mere fact that the deceased had share certificates and internal allotment documents from Thome Farmers did not demonstrate open and physical possession of the suit property by the deceased.
31. From the evidence on record, Thome Farmers had entered into an agreement for sale with the 1st respondent but the same fell through as Thome Farmers was unable to pay the agreed price, and shortly some shareholders of Thome Farmers entered the suit property on the basis of shares they held in Thome Farmers, provoking the 1st respondent to institute Nairobi HCCC No. 6206 of 1992 against the shareholders, thus asserting its right on the suit property, although the appellant was not one of the defendants in the suit. In the filing of the said suit in 1992, the appellant’s claim for adverse possession could not hold.
32. The *Land Registration Act* is very clear on issues of ownership of land; Sections 24 (a) and 26(1) are instructive. The law is clear that the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, un- procedurally or through corrupt scheme.
33. PW1, testified that he served as a caretaker on a piece of land owned by Mr. Nelson Wachira that was separated from the suit property by four other properties, and that he was the one who grew crops and cultivated the suit property between 1993 until 2009; that the deceased only made intermittent visits on the suit property; and that the deceased did not have any development thereon. PW2, the widow of the deceased, conceded that she did not live on the suit property but in South B.
34. From the foregoing, we hold the view that the trial judge did not err in his findings that the appellant had not proved that title had crystallized owing to the doctrine of adverse possession. The evidence is clear that the deceased did not stay on the suit property but instead made intermittent visits thereon and that there were no developments on the suit property, and that the crop on the field was planted by a caretaker.



- 35. It is also clear that the deceased’s possession was not apparent, as when the suit in the High Court for trespass was filed, the deceased was not among those sued, clearly demonstrating that the 1st respondent was not aware of the alleged possession by the deceased or any assertion by the deceased of rights over the suit property that were inconsistent with the rights of the 1st respondent as the owner of the suit property.
- 36. In the final analysis, we concur with the judgment of the trial court. The upshot is that the appeal lacks merit and is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2024.

K. M’INOTI

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JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

