Juma & 10 others v Wali & 2 others (Civil Appeal E081 of 2021)
[2024] KECA 577 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 577 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E081 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

MAY 24, 2024

BETWEEN

SALIM SAID JUMA ..... 1ST APPELLANT

MOHAMED SALIM SAID ..... 2ND APPELLANT

JUMAA CHARO SALIM ..... 3RD APPELLANT

NASSIR SALIM SAID ..... 4TH APPELLANT

ABUBAKARI SALIM SAID ..... 5TH APPELLANT

SAUDA SALIM SAID ..... 6TH APPELLANT

REUBEN ATHMAN DZUYA ..... 7TH APPELLANT

RIZIKI CHARO KITTSAO ..... 8TH APPELLANT

ASHA ABDALLA JUMA ..... 9TH APPELLANT

FATUMA CHARO ..... 10TH APPELLANT

MATI CHARO MATSERE ..... 11TH APPELLANT

AND

RAFIQ MOHAMED WALI ..... 1ST RESPONDENT

MOHAMED ANSWARI ..... 2ND RESPONDENT

LAWRENCE GACHARIA MAGU ..... 3RD RESPONDENT

(Being an Appeal against the Judgment of the Environment and Land Court at Mombasa (C. K. Yano, J.) delivered on 20th May, 2021 in Environment and Land Court Case No. 326 of 2014 (O.S))

JUDGMENT

1. By an originating summons dated 19th December, 2014 and filed on the same date, the appellants sought a declaration that they had acquired Plot No.137/I/MN (the suit property) comprising 3.60 hectares by adverse possession. They sought to be declared and registered as owners of the land, and to be issued with a certificate of title. In support of their claim, they filed an affidavit sworn by Salim Said Juma on his own behalf and on behalf of the other appellants, where they claimed that they had occupied and resided in the suit property for over twelve (12) years without the permission, consent or authority of the respondents, who are the registered owners of the suit property.

2. They claimed to have entered upon the land in 1964 and have not known any other place as their residence; that all their children were born on the suit property; and that their occupation had been continuous, open, adequately uninterrupted and, above all, adverse to the respondents' title. They contended that the respondents do not have any buildings or structures on the suit property which, in their view, was a clear indication that they effectively discontinued the respondents' possession in their favour, and that it was them who had developed the suit property. They asserted that the respondents have been indolent and have sat on their rights of ownership over the suit property for many years, and that, therefore, the law could not come to their aid to wrest it back from them since they had already acquired it by way of adverse possession.

3. In his evidence, PW1, Salim Said Juma, testified that he was in court because he was evicted from the suit property where he was residing. He told the court that he had lived there for more than 30 years before he was ejected. He informed the court that the other appellants in the suit were his children and grandchildren who had authorized him to file it on their behalf; and that he had 9 children and 12 grandchildren. He stated that they no longer resided on the suit property but in a neighboring plot where he had built a house, but was farming on the suit property; that the coconut trees, maize and other crops that he had planted were cut down and the graves situated thereon destroyed. He further stated that they were arrested whilst in a meeting on the land.

4. Upon cross-examination, PW1 admitted that they were removed from the suit property in the year 2013 before they filed the suit. He also admitted that his houses were not demolished, but that he had brought them down himself and had gone to live with his mother in a nearby plot. He stated that he was not aware of HCCC NO. 123 of 2009 and Constitutional Petition No. 36 of 2011, but was aware of a criminal case in which he was charged alongside others, among them his brothers and children.

5. The 1st respondent did not participate in the suit but, in response by way of an affidavit sworn on 30th March 2015, the 2nd respondent testified that he bought the suit property in the year 2010 from one Dr. Lawrence Gikonyo Gathua and that, at the time of purchase, the property was vacant, although there was a caretaker who had planted maize. By this time, the appellants were residing in a neighboring plot. He produced a title in his name, a certificate of postal search, a supply contract with Kenya Power & Lighting Company, photographs, valuation and survey reports, and a demand letter issued to him by the appellants' advocates.

6. His evidence was that the appellants were his neighbours to the extent that he stored his building materials in their house at the time he was developing the property; that all was well from the year 2010 until 14th September 2014 when a group of rowdy people invaded the suit property, destroyed crops and other property and subdivided the land among themselves. A report was made to the police and eight (8) people were arrested and charged. A criminal case against some of the invaders is still pending at Shanzu Law Courts; and that the appellants had filed HCCC No.110 of 2006 (OS) claiming adverse

possession. Other cases filed were HCCC No.123 of 2009 and Constitutional Petition No.136 of 2011.

7. Upon considering the evidence, the trial Judge dismissed the appellants' claim for want of merit.

8. Aggrieved by the judgment of the trial court, the appellants appealed to this Court on grounds that the learned Judge did not appreciate that adverse possession rights or interest are not lost through unlawful or forceful repossession of a parcel of land, whose registered owner has already lost ownership rights after the respondent's title was extinguished; that all the appellants either entered onto the suit property or were born thereon between 1964 and 1992; and that, by the time the suit was filed in the year 2014, they were all living on the suit property until May 2015; that their relatives' graves were present on the suit land, though not cemented, when the respondents demolished their houses and evicted them from the suit property; and that the Judge was wrong in finding that the suit was res judicata for reasons of the existence of 3 other cases, being HCCC No. 110 of 2006 (0.S), HCCC- No. 123 of 2009 and Constitutional Petition No. 136 of 2011, yet there was no connection between the suits.

9. When the appeal came up for hearing on a virtual platform, learned counsel Ms. Chengo appeared for the appellant while learned counsel Ms. Gichura appeared for the respondent. Though Ms. Chengo claimed to have filed written submissions, a review of electronic system did not disclose such filing. For her part, Ms. Gichura sought time to review the appellant's written submissions and thereafter to file the respondent's submissions. However, both parties agreed to file their written submissions within 14 days from the hearing date, whereupon the Court would render its judgment. Sadly, neither counsel for the appellants nor counsel for the respondents filed their written submissions. But failure on counsel's part notwithstanding, we shall nevertheless proceed and render the judgment.

10. The mandate of this Court on a first appeal as set out in rule 31(1) (a) of the rules of this Court is to reappraise the evidence and draw our own conclusions. See Peters vs Sunday Post Limited [1958] EA 424.

11. Having considered the record and grounds of appeal and the impugned judgment, we consider that the issues that commend themselves for determination, are: i) whether the suit was res judicata and ii) whether the appellants proved their claim for adverse possession as against the respondents.

12. Section 7 of the *Civil Procedure Act* defines the doctrine of res judicata as applying to a suit in which the issues or subject matter were directly and substantially in issue in a former suit between the same parties. The section provides that:

> No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

13. Section 7 contemplates five conditions which, when co-existent, will oust the hearing and determination of a subsequent suit. These are:

(i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;

(ii) the former suit must have been between the same parties or privies claiming under them;

(iii) the parties must have litigated under the same title in the former suit;

(iv) the court which decided the former suit must have been competent to try the subsequent suit; and

(v) the matter in issue must have been heard and finally decided in the former suit.

14. In the case of Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others [2014] eKLR, the supreme Court expressed itself as follows on the issue of res judicata:

QUOTE

The concept of res judicata operates to prevent causes of action, or issues from being re-litigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings...

(319) There are conditions to the application of the doctrine of res judicata: (i) the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title Karia and Another v. The Attorney General and Others, [2005] 1 EA 83, 89."

See also Independent Electoral and Boundaries Commission vs Maina Kiai

and 5 Others [2017] eKLR.

In this appeal, the respondent contended that the instant suit was res judicata in respect of Mombasa Civil Suit No 110 of 2006, Mombasa HCC No.123 of 2009 and Constitutional Petition No.136 of 2011.

Holding that the suit was res judicata, the trial Judge observed that:

Moreover, it is also quite clear from the material on record that the plaintiffs, together with others, filed different cases claiming adverse possession for different portions of land which cases they lost. No doubt the present suit would still be res judicata those previous cases. Those include HCCC No.110 of 2006 (OS), HCC No.123 of 2009 and Constitutional Petition No.136 of 2011. Some of the plaintiffs herein were parties in those cases. Quite clearly, the matters raised in those suits are substantially the same as those in present suit. All the suits raise the claim of alleged adverse possession. It does not matter that the current suit has been filed by a few parties, it is still the same issues. I therefore have no hesitation in finding that this matter was alive for determination in the previous suits and were settled in the rulings and judgments in those previous cases."

A review of the records shows that, in Mombasa Civil Suit No 110 of 2006, the parties are Mati charo Matsere, Asha A. Juma, Karisa Matsere, Nyawa Ndoro and Roy Tezzy Bongo vs Kenya National Assurance Co. (2001) Ltd. The course of action was adverse possession with regard to Parcel No. 397 (Original No. 181 & 187/1/MN) measuring 86.84 acres. In Mombasa HCCC No.123 of 2009, the suit was filed by Kencent Holdings Ltd and Kenya National Assurance Co. (2001) Ltd vs the appellants and 318 others, and the course of action was

for trespass with regard to Parcel No 397 (Original No. 181 & 187/1/MN). Constitutional Petition No.136 of 2011 was filed by 274 Claimants vs Kencent Holdings Ltd and Kenya National Assurance Co. (2001) Ltd.

From the foregoing, it cannot be gainsaid that the parties in the forestated suits were the same as those in the instant suit. The appellants' suit concerned different parties and an entirely different parcel of land. For res judicata to apply, the parties in the suits ought to be more or less identical. Consequently, given that the suits differed in the specified respects, the learned Judge was wrong to have held that the appellants' suit was res judicata, and we so find.

Now, we turn to whether the appellants proved their claim for adverse possession.

Section 7 of the *Limitation of Actions Act* addresses the question of adverse possession in the following terms:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it is first accrued to some person through whom he claims, to that person."

Section 13(1) and (2) of the *Limitation of Actions Act* further provides:

1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is this Act referred to as adverse possession), where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on

that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land cease to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land."

In the case of Mtana Lewa vs Kahindi Ngala Mwagandi [2015] eKLR,

adverse possession was defined as:

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner."

In the case of Wambugu vs Njuguna (1983) KLR 173, this Court restated the principles for adverse possession and held as:

1. The general principle is that until the contrary is proved, possession in law follows the right to possess.

2. In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of this soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years as to enable him, the respondent, to title to that land by adverse possession.

3. The *Limitation of Actions Act*, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession. The proper

way assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years."

This Court in the case of Francis Gicharu Kariri vs Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi), upholding the decision of the High Court in the case of__ Kimani Ruchire vs Swift Rutherfords & Co. Ltd (1980) KLR 10 pg, 16, Kneller, J. had this to say:

The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the plaintiff must show that the company had knowledge

(or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration."

In the case of Richard Wefwafwa Songoi vs Ben Munyifwa Songoi [2020] eKLR, this Court emphasized, inter alia, that an adverse possessor requires to demonstrate:

a. on what date he came into possession;

b. what was the nature of his possession;

c. whether the fact of his possession was known to the other party;

d. for how long his possession has continued and

e. that the possession was open and undisturbed for the requisite 12 years."

It becomes clear that, in order for an applicant to succeed in a claim of adverse possession, they must demonstrate that they have been in continuous possession of the land for the period of twelve (12) uninterrupted years. Further,

a right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run.

It was the appellants' case that they were born on the parcel of land and had been staying on the suit property for close to 30 years. From the evidence adduced, it is clear that the 2nd respondent is the registered owner of the suit property. According to the title documents produced in evidence, the 2nd respondent's ½ share was registered on 12th November, 2011. The other half was transferred to him on 17th October, 2014. For his part, the 2nd respondent stated that he took possession of the suit property from 2010 and enjoyed uninterrupted occupation until 2014 when some youths including the appellants, trespassed onto the land and built shelters. The suit for adverse possession was not filed until 19th December 2014.

The record is clear that the appellant's occupation of the suit property commenced in 2014. Though they claim to have been in occupation of the suit property for over 30 years, the evidence points to their having invaded the respondents' property sometime in 2014. Shortly thereafter, they were evicted, and the suit was filed in December 2014. Clearly therefore, time only began to start running in 2014. In effect, just as the trial Judge held, and we agree, the appellants cannot purport to have been in possession adverse to the respondents for the requisite period of 12 years, with the result that having failed to establish

their claim for adverse possession, the appeal on this count is without merit and accordingly fails.

In our view, since we have found that the claim was not res judicata, the appellant's appeal succeeds on this count, and the claim for adverse possession failed, the appeal therefore succeeds in part, and we order each party to bear their own costs.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY, 2024

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR