



**Gicho v Kenatco Transport Co Limited (Civil Appeal
E084 of 2021) [2024] KECA 717 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KECA 717 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E084 OF 2021
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
JUNE 21, 2024**

BETWEEN

MARGARET NJERI GICHO APPELLANT

AND

KENATCO TRANSPORT CO LIMITED RESPONDENT

*(Being an appeal against the judgement and decree of the Environment
and Land Court at Mombasa (C. K. Yano, J.) delivered on 11th February
2021 in Civil Suit No 265 of 1996 as consolidated with Civil Suit No 266 of 1996)*

JUDGMENT

1. This is an appeal from the judgement and decree of the Environment and Land Court at Mombasa delivered by Justice C. K. Yano on 11th February 2021 in Civil Suit No 265 of 1996 as consolidated with Civil Suit No 266 of 1996. Civil suit No. 265 of 1996 was filed by the respondent herein against Geoffrey Gikaru Njoroge while civil suit No. 266 of 1996 was filed by the respondent against one James Gicho Makumi (the deceased), the appellant's father. In both suits, the respondent sought vacant possession of the suit property, mesne profits, costs and any other relief the court deems fit to grant. The defendants in Civil Suit No. 265 of 1996 filed a separate appeal being Mombasa Civil Appeal No. E037 of 2021 - *Samuel Gikaru Njoroge (appealing as representatives of the estate of the late Geoffrey Gikaru Njoroge) v Kenatco Transport Co. Limited*, which was determined on 27th October 2023.
2. After hearing the consolidated suit, the Learned Judge directed the appellant in this suit and in the said appeal to vacate the suit property within 60 days of the date of the judgement and, in default, the registered proprietors be at liberty to evict them. The learned Judge also awarded the respondent mesne profits at the rate of Kshs 800 per month from 1st November 1983 till the date of vacant possession. He dismissed the counterclaims for adverse possession filed by the appellants and awarded costs to the respondent.



3. The brief background of the dispute, as pleaded by the respondent, was that the respondent was the registered proprietor of the land parcel known as Plot No. 2362 Section VI/MN and Plot No. 2360 Section VI/MN (hereafter “the suit property”); that the deceased was an employee of the respondent who, in that capacity, was assigned one house in the suit property conditioned to his employment with the respondent at a token rental of Kshs 800/- per month; that the deceased was to vacate the suit property upon termination of his employment with the respondent; that, on 1st November 1983, the respondent went into receivership whereby the deceased’s employment was terminated; and that the deceased failed, refused and/or neglected to vacate the suit property.
4. Aggrieved by the deceased’s refusal to vacate the suit property, the respondent, after issuance of a notice to the deceased to vacate the suit property, filed Mombasa Civil Suit 266 of 1996 seeking the following remedies against the appellant:
 - a. vacant possession and eviction of the appellant;
 - b. mesne profits from 1st November 1983 until delivery of vacant possession;
 - c. costs of the suit and interests thereon and on(b) above at court rates; and
 - d. any other relief the court may deem just to grant.
5. In response, the deceased filed an amended defence and counterclaim dated 17th April 2000 in which he denied occupation of the suit property, but admitted that he was an employee of the respondent. It was his case that, while in the course of employment, through the respondent, he purchased a house standing on Plot No. 2362 Section VI/MN together with the plot at the cost of Kshs 80,000 which purchase price was to be paid by the respondent; that the respondent was to recover the said purchase price by monthly instalments of Kshs 800 to be deducted from the deceased’s salary; that, in pursuance of the said agreement, the deceased was put in occupation as purchaser, and that the respondent recovered the said instalments until the time it went into receivership when the deceased left the respondent’s employment; and that the deceased continued paying the monthly instalments, land rates and repaired the house and completed the remaining works.
6. According to the deceased, he left the respondent’s employment in 1977, yet the suit to recover the land was not brought until after 18 years and, therefore, was barred under section 7 of the Limitation of Actions Act. The deceased pleaded, in the alternative, that he had acquired title to Plot No. 2362 Section VI/MN by adverse possession having been in occupation of the same for over 12 years from 1st November 1983 when he first went into occupation. In the alternative, the deceased pleaded that he had been in adverse possession of the same property since 28th September 1978.
7. In his counterclaim, the deceased prayed for a declaration that he had acquired title to Plot No. 2362 Section VI/MN by adverse possession, and for an order that the respondent executes a transfer thereof to him; costs; and any other order which the court deems fit to grant.
8. At the hearing of the suit, the respondent’s case was presented by Paul Chelanga, who testified that he was the Recoveries Manager of National Bank of Kenya (the Bank) and the respondent’s Receiver Manager; that the Bank had extended banking facilities to the respondent, which the respondent failed to pay, and hence the appointment of the Receiver Manager; that the respondent went into receivership between 1980’s and 1990’s; that, at the time the Bank sought to realise the properties in 2012/2013, they were vacant; that the two properties were sold to Wanje Holdings Ltd, who was the current owner



- thereof; and that, technically, the Bank had no interest in the suit properties. However, he admitted that there were 4 identifiable houses on the two plots.
9. On his part, the appellant relied on the deceased's statement filed on 15th June 2012. According to her, the respondent was the deceased's employer and began living on the property from 1974 and that, as at the time of her testimony, they were still staying on the property. It was her evidence that the respondent had staff houses which it agreed to sell to the occupants at an agreed purchase price of Kshs 80,000 payable at the rate of Kshs 800 per month. According to her, in 1977, when the deceased was served with an eviction notice, he stopped paying the monthly instalment and that, although the deceased left the employment, he did not vacate the property. It was her evidence that they had been living on the said property since 1977, and that the deceased passed away while they were on that property. It was her case that they were entitled to the property by virtue of adverse possession, and prayed that the suit be dismissed and the counterclaim allowed.
 10. In cross examination, the witness admitted that the deceased initially went into occupation as the respondent's tenant. According to her, the deceased paid instalments of Kshs 800 per month for 100 months and only paid the same for 4 years. She admitted that she had no sale agreement and admitted that the deceased was not able to conclude the sale.
 11. In his judgement, the learned Judge considered, *inter alia*, the cases of [Mtana Lewa v Kabindi Ngala Mwangandi](#) [2015] eKLR; [Delamere Estate v Ndugu Njai & Others](#) [2006] eKLR; and [Wellington Lusweti Barasa & 75 others v Lauders Limited & Another](#) [2014] eKLR, and found that the appellant took possession of the suit property under licence of the owner by virtue of his employment and as a rent paying tenant. The court was not convinced that the appellant's possession was adverse to that of the registered owner and held that a person who occupies as a licensee cannot claim land under adverse possession.
 12. Regarding the claim for mesne profits, the court considered the case of [Mistry Valji v Janendra Raichand & 2 others](#) [2016] eKLR and calculated the profits using the amount that the appellant was paying at the time of taking possession and, as we have stated above, ordered that the appellant vacates the suit property or be evicted, and awarded the respondent mesne profits from 1st November 1983 at a flat rent rate of Kshs 800 per month until the date of the judgement, or until surrender of vacant possession.
 13. Dissatisfied with the said decision, the appellant lodged this appeal based on numerous grounds, which may be summarised as follows: that the learned Judge erred in failing to find, based on the evidence, that the claim by the respondent against the appellant was time barred; by failing to find that, in light of the dismissal for want of prosecution of Mombasa Civil Suit No. 545 of 1983 between the same parties in respect of the same subject matter, the respondent was barred from bringing similar proceedings; that the learned Judge erred in granting vacant possession to the respondent notwithstanding the fact that the suit property had already been sold to a third party, Wanje Holdings Ltd; that the learned Judge erred in awarding the respondent mesne profits at the sum of Kshs 800 per month when no evidence was placed before the court in support thereof; that the learned Judge erred in failing to uphold the counterclaim on the ground that the deceased's occupation of the suit property was with permission of the respondent as a rent paying tenant against the evidence, and when no evidence was adduced regarding the existence of the tenancy; and that the learned Judge erred in not considering the evidence adduced by the appellant.
 14. The appellant sought to have the impugned judgement set aside and substituted for an order dismissing the respondent's suit and allowing the appellant's counterclaim with costs.



15. On 28th February 2024, we heard this appeal on this Court’s virtual platform. Learned counsel Mr. Ayub Muhuni appeared for the appellant while Mr. Kazungu appeared for the respondent. Mr Muhuni entirely relied on the submissions dated 7th July 2022 filed by the firm of S. W. Muhuni & Co. Advocates while Mr Kazungu, while relying on the submissions dated 26th February 2024 filed by the firm of Lumatate Muchai & Co Advocates, emphasised that the issues in dispute in this appeal were conclusively decided in Civil Appeal No. E037 of 2021.
16. We have considered the rival submissions made to us. In Mombasa Civil Appeal No. E037 of 2021 - *Samuel Gikaru Njoroge (appealing as representatives of the estate of the late Geoffrey Gikaru Njoroge) v Kenatco Transport Co. Limited*, this Court (differently constituted), after considering the issues raised in the said appeal which, as we have pointed out hereinabove, arose from the same consolidated suit as the present appeal, expressed itself, inter alia, as hereunder:
- “In this case however, the appellant’s evidence was that the deceased was claiming the suit property as the owner thereof having completed payment of the purchase price. There is no evidence of the agreement for sale and when payment was to be made and when, if at all, it was made. The law is clear that the claimant’s possession of the land only becomes adverse to that of the owner upon the determination of the licence and as long as he is in possession with the permission of the owner whether as a tenant or as an intending purchaser, time does not begin to run against the owner. Since determination of when time begins to run is such a crucial factor in claims to land by way of adverse possession, the claimant must cogently prove the time when time began to run. Where there is no certainty as to when time began to run, the claimant is unlikely to succeed in his claim.”
17. In that appeal as in the present one, the deceased originally went into occupation of the suit property as a rent paying tenant by virtue of his employment by the respondent. According to the appellant’s evidence, there was some arrangement to purchase the suit property even though the details were not clear. It was incumbent upon the appellant to adduce satisfactory evidence regarding the existence of the said agreement and its terms so that the Court could determine when time began to run since mere possession for the statutory period does not justify an inference of adverse possession, unless there is evidence that the titleholder has been dispossessed or has discontinued his possession for the statutory period.
18. The appellant has alluded to the existence of the previous instituted Civil Case No. 374 of 1978 by the respondent, but which was dismissed for want of prosecution. This Court in *William Gatubi Murathe v Gakuru Gathimbi* Civil Appeal No. 49 of 1996 held that time stops when the owner asserts his rights, or when there is an admission by the other party, and that assertion of rights occurs either when the owner takes legal proceedings or makes effective entry. If the appellant’s position is correct, then the running of time was interrupted in 1978 when the said suit was filed, and it was not until 1988 when the suit was dismissed that the running of time resumed. This suit having been filed 8 years later in 1996, the appellant cannot claim uninterrupted occupation by the deceased or the appellant of the suit property for a continuous period of 12 years in order for the claim to the suit property by way of adverse possession to succeed. The appellant’s counterclaim was rightly dismissed.
19. However, the respondent disclosed that the suit property had changed hands to a third party, Wanje Holdings Ltd. This Court found in *Samuel Gikaru Njoroge (appealing as representatives of the estate of the late Geoffrey Gikaru Njoroge) v Kenatco Transport Co. Limited*, (*supra*) that both the respondent’s suit and the appellant’s counterclaim were unmaintainable since the appellant, not being the registered proprietor of the suit property, could not maintain an action in its own name against the appellant. The Court proceeded to allow the appeal, set aside the order allowing the respondent’s claim against



the appellant and substituted therefor an order striking out the said suit while affirming the decision to dismiss the counterclaim.

20. The Court concluded that:

“In other words, none of the parties herein is entitled to the reliefs sought either in the plaint or in the counterclaim and as the suit property is now registered in the name of Wanje Holdings Limited who was not made a party to these proceedings, we wish to say no more.”

21. We share the same view and, in the circumstances, find it unnecessary to consider the remaining issues raised in this appeal. Accordingly, we hereby set aside the judgement entered by the learned Judge against the appellant in favour of the respondent, but affirm the order dismissing the appellant’s counterclaim.

22. We likewise make no order as to the costs of this appeal and in the court below.

23. Orders accordingly.

DATED AND DELIVERED AT MALINDI THIS 21ST DAY OF JUNE, 2024

A. K. MURGOR

JUDGE OF APPEAL

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

JUDGE OF APPEAL

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G. V. ODUNGA

JUDGE OF APPEAL

I certify this to be a true copy of the original

Singed

DEPUTY REGISTRAR

