Mugo v Makengo (Civil Appeal 47 of 2019) [2024] KECA 716 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 716 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 47 OF 2019

J MOHAMMED, AO MUCHELULE & LK KIMARU, JJA

JUNE 21, 2024

BETWEEN

CHARLES NJERU MUGO ..... APPELLANT

AND

IRIGA MAKENGO ..... RESPONDENT

(An appeal from the judgment of the Environment and Land Court of Kenya at Embu (Y.M Angima, J.) dated 28th June 2018inELC No. 99 of 2014 (formerly Kerugoya ELC Case No. 171 of 2013(formerly Embu HCCC No. 13 of 2011)

JUDGMENT

1. As the first appellate Court, our duty is to reconsider and re- evaluate all the evidence that was placed before the trial court, and draw our own independent conclusions thereon, while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses who appeared before it. (See Kenya Ports Authority v Kuston (Kenya) Ltd [2009]2 EA 212).

2. The dispute between the appellant, Charles Njeru Mugo, and the respondent, Iriga Makengo, related to land parcel Evurore/Kathera/2522 (the suit property) that measured about 2.2 Hectares, and which was registered in the name of the respondent since 1972. When the appellant filed the originating summons on 11th March 2011 he was seeking a declaration that he had become entitled to the suit property by way of adverse possession, having lived on the property for over 12 years without any interruption and having extensively developed it by planting 2 khat trees, 19 timber trees and other indigenous trees.

3. The respondent filed a replying affidavit denying that the appellant had either lived on the suit property or had developed it. He stated that he was the one who has always been in occupation. He further stated that the appellant had through Case No. 321 of 2006 sued him at the Mbeere District Land Disputes Tribunal claiming the land, but that the Tribunal had rendered a decision finding that he (the respondent) was the owner of the land and had therefore dismissed the claim. The appellant had filed

a judicial review application in Misc. Civil Application No. 49 of 2008 at the High Court at Embu, but had abandoned the same.

4. The Environment and Land Court (ELC) at Embu (Y.M. Angima, J.) heard the dispute, and on 28th June 2018 returned the verdict that the appellant had failed to establish that he had been in exclusive possession of the suit property for a period of 12 years, and had dismissed the originating summons with costs to the respondents. In reaching the conclusion, the learned Judge considered the evidence of the appellant and his witness, Kamunyi Mbuari (PW 2), and the evidence of the respondent and his witnesses, Njeru Mugo (DW 2), and Phides Muchuki Ngari (DW 3).

5. The evidence of the appellant before the trial Judge was that he was from Ngithi Clan and that he entered the suit property in 1965, after buying it from one Murekie Kangocho. He settled thereon with his wife and children, and planted various types of trees. During land demarcation in 1972, he sent the late Nduara Nyanjui to get him the suit property number. Instead, Nduara Nyanjui gave the land to the respondent's brother, one Emmanuel Njeru Makengo. When he inquired from Nduara Nyanjui why he had done this, he responded that he (the appellant) would not get back the land. The appellant assaulted Nduara Nyanjui. The Chief had him arrested, charged and jailed for three years. In the meantime, the land was registered in the name of the respondent. He testified that he was still living on the land as he testified in 2015.

6. According to the respondent, the suit property was given to him by his father who had got it from his father (the respondent's grandfather). His father gave him the suit property in 1972. He was then a young boy, having been born in 1955. Although he lives on another parcel of land, he stated, he has always cultivated and utilized the suit property. He explained that his family belongs to Ngai Clan, which is different from the appellant's clan; that during demarcation, he was 17 years old and that Nduara Nyanjui was authorised to give the land to the respondent's family and, for this, he was assaulted by the appellant who got jailed for it. He testified that Nduara Nyanjui was instructed by Murekie Kangocho to give the land to the respondent's family. Murekie Kangocho was from the appellant's clan. DW 2 is the respondent's father and testified to this. He stated that Murekie Kangocho gave the land to his father who gave it to him (DW 2) and, in turn, gave it to the respondent. DW 3 is the respondent's wife who testified that the respondent inherited the land from his father (DW 2).

7. This is the evidence that the trial Judge considered and came to the conclusion as follows:-

> " The court has noted from the record that the plaintiff did not demonstrate that there was a house on the suit property... Similarly, there was no other evidence to back the allegation of having planted various trees and cash crops on the suit property. Where the development of a property is highly contested, as was the case here, the burden lies upon the plaintiff to demonstrate the existence of such developments through cogent evidence."

8. Citing section 107(1) of the *Evidence Act* (Cap. 80), the trial Judge went on to find as follows:-

> " In my opinion, the plaintiff has failed to demonstrate on a balance of probabilities that he has had exclusive possession of the suit property for the statutory period of at least 12 years... "
>
> The suit was dismissed, the appellant having failed to prove it on a balance of probabilities.

9. The appellant was aggrieved and filed this appeal. His grounds contained in the memorandum of appeal were as follows:-

> "1) The honourable Judge erred in law and in fact in failure to appreciate that the Land Dispute Tribunal has NO jurisdiction to hear and decide issues of ownership of registered land.
>
> 2. The honourable Judge erred in law and in fact in failure to appreciate that the decision by the Land Dispute Tribunal to leave the suit in the name of the registered party is a judgment awarding the respondent the suit land.
>
> 3. The honourable Judge erred in law and in fact in failure to appreciate that the Land Dispute Tribunal to leave the land registered in the name of the respondent was the final judgment which settled the claim of ownership in favor of the respondent and against the appellant.
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> 4. The honourable Judge erred in law and in fact in failure to appreciate that Hon. Justice Bwonwonga who on 25/2/2015 heard the plaintiff and his witness had NO jurisdiction to hear them as he was not ELC Judge who has exclusive jurisdiction to hear land matters.
>
> 5. The honourable Judge erred in law and in fact in failure to appreciate that Environment and Land Court came into force in 2011 and that court under this Act is defined as Environment and Land Court established under Section 4 pursuant to Article 162(2)(b) of *the Constitution*.
>
> 6. The honourable Judge erred in law and in fact in failure to appreciate that jurisdiction can only be conferred by *the Constitution* or the Act of parliament.
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> 7. The honourable Judge erred in law and in fact in failure to appreciate that the appellant has given evidence that he entered the suit land in 1995 and NO one claimed the suit land from him.
>
> 8. The honourable Judge erred in law and in fact in failure to appreciate that the respondent admits he has never lived on this land as he had his land elsewhere.
>
> 9. The honourable Judge erred in law and in fact in failure to appreciate that the appellant's evidence that he lived on the land is stronger than respondent evidence where he admits that he does not live in the land and that he was a child during demarcation while appellant claims to have occupied the land in 1965 long before demarcation.
>
> 10. The honourable Judge erred in law and in fact in raising issues of the appellant having not photographed his development as evidence which was raised by the honourable Judge during the judgment and the parties had NO chance to deal with the issues.
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> 11. The honourable Judge erred in law and in fact in failure to appreciate that it the issue of photograph or video that since the respondent says they bought the suit land the court should allow the appellant to raise the issues of written sale agreement as respondent claims his grandfather bought the suit land.

12. The honourable Judge erred in law and in fact in failure to appreciate that in stating that by seeking adverse possession, the appellant was admitting that the respondent was the proprietor.

13. The honourable Judge erred in law and in fact in failure to appreciate that on filing the suit claiming adverse possession the petitioner had to allege that he is in adverse possession and there is no other way you can frame your case."

10. Grounds 4, 5 and 6 raised a jurisdictional issue. The appellant claimed that part of the evidence had been taken by a High Court Judge; and that it was part-heard when the ELC Judge, the learned Y.M. Angima, J., took over to complete it. However, nothing regarding the grounds was raised in the written submissions by counsel for the appellant. We consider that the grounds were abandoned, and we shall make no further reference to them. In any case, the decision that the learned Judge takes over the case on the evidence on record was taken by the consent of counsel for the parties.

11. In the submission by counsel for the appellant, there was sufficient evidence to prove that the appellant had entered into the suit property without permission from the respondent; that he had been in exclusive possession of the suit property, set up a home and undertaken development thereon; that the possession was not interrupted for over 12 years; and that the appellant had demonstrated the intention to dispossess the respondent of the suit property. Counsel cited to us the decisions in Chevron (K) Ltd v Harrison Charo wa Shutu [2016]eKLR and Amina Ahmed Omar Mzee Haji v Kahindi

    Katana Chengo & Others [2016]eKLR, and urged us to find that the learned Judge had erred in finding that the appellant had not proved that he had become entitled to the suit property by adverse possession.

12. According to counsel for the respondent, it was material that the appellant had previously filed a claim against the respondent in the Mbeere District Land Disputes Tribunal and a determination had been made against him and in favour of the respondent over the suit property. The award had been confirmed as the judgment of the court by the Senior Principal Magistrate's Court at Siakago. The decision had not been reviewed or overturned on appeal.

13. Regarding the instant case, learned counsel submitted that the evidence pointed to the fact that it was the respondent who was in exclusive possession and use of the suit property, over and above the fact that he was the registered owner whose title was absolute and not encumbered.

14. We have carefully considered the record, the appeal and its grounds, the impugned judgment and the rival submissions.

15. The respondent was the registered proprietor of the suit property, and had been so registered since 1972. It would appear clear that the registration followed land demarcation. The appellant was around, he says, during the process of demarcation and he was laying claim to the suit property. He does not appear to have filed a formal claim as required by the law, if he was aggrieved at that stage. Nonetheless, he stated that he had since 1965 been in possession. When he became aware in 1972 that the respondent had been registered in respect of the land he was occupying, he did not sue to recover it or evict him.

16. The first time he sued was before the Tribunal in 2006. It is not in dispute that he lost his claim over the suit property to the respondent. The award became a judgment of the court after it was filed in the Magistrate's Court. His bid to challenge the award by way of judicial review was not pursued to its logical conclusion. In our considered view, there was a judgment by a competent court determining that the suit property belonged to the respondent. If the appellant continued to stay on the suit

property, time begun to run after the judgment. If he filed the originating summons in the High Court in 2011, 12 years had not elapsed.

17. However, the learned Judge proceeded on the basis that there was a claim for adverse possession and that the appellant was saying he had settled on the suit property since 1965; that he had lived here for over 12 years without interruption; that he had extensively developed the suit property; and that his occupation had been exclusive, and therefore he had become entitled by way of adverse possession. The learned Judge considered this evidence against the respondent's claim that this suit property belonged to his grandfather, who had passed it to his father; who had passed it over to him; that he was the one who had been in use of the suit property; and that the appellant's claim that he had been in possession or was using the suit property was not true.

18. We consider that the learned Judge had the feel of the case. We have looked afresh at the evidence that was tendered before him by the parties and their witnesses. We find that the conclusion that was reached was supported by the evidence.

19. The burden was on the appellant to show that he had been in exclusive and uninterrupted possession and use of the suit property for over 12 years, that the possession was without the permission of the respondent, and that the respondent had been dispossessed of the suit property by the acts of the appellant. (See Amina Ahmed Omar Mzee Haji -vs- Kahindi Katana Chengo & Others (Supra). The trial Judge found that the appellant had not discharged the burden. We have no reason to depart from that finding. It was clear to us that, on the evidence, the suit property was handed down to the respondent by his father who had it from the respondent's grandfather. The respondent was, and is the one using the suit property, since it was registered in his name in 1972.

20. In conclusion, therefore, we find no merit in the appeal, which we dismiss with costs.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF JUNE 2024

JAMILA MOHAMMED

JUDGE OF APPEAL

.....

L. KIMARU

JUDGE OF APPEAL

.....

A.O. MUCHELULE

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR