



**Thaitumu v Iguathu & 8 others (Civil Appeal 220 of 2019)
[2024] KECA 1084 (KLR) (19 August 2024) (Judgment)**

Neutral citation: [2024] KECA 1084 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 220 OF 2019
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
AUGUST 19, 2024**

BETWEEN

JULIUS THAITUMU APPELLANT

AND

KIBAAARA IGUATHU 1ST RESPONDENT

EZEKIA M'IBIIRI 2ND RESPONDENT

HENRY M'AKWALU 3RD RESPONDENT

M'MWONGO M'THILI 4TH RESPONDENT

JOSECK MITHEU 5TH RESPONDENT

KAUNGA KIRIKUA 6TH RESPONDENT

JACOB MUNGANIA KIRITI 7TH RESPONDENT

**DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER, (MERU
NORTH DISTRICT) 8TH RESPONDENT**

THE ATTORNEY GENERAL 9TH RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court of Kenya at Meru (Cherono, J.) dated 28th February, 2019 in E.L.C. Case No. 137 of 2007 (O.S))

JUDGMENT

1. The appellant took out originating summons dated 18th December 2007, against the respondents in this case. The suit properties in dispute are Land Parcels Nos. 251, 308, 2248, 651, 1650, 1560 and 1169, forming part of Uriungu 1 Adjudication Section. The suit properties are registered in the names of the 1st to 7th respondents respectively. In the Originating Summons, the appellant sought to be



declared the rightful owner of the suit properties by virtue of the application of doctrine of adverse possession.

2. In support of the Originating Summons, the appellant asserted that the suit properties were, before adjudication, owned by his grandfather, the late M’Kiriiti. That his grandfather, during his lifetime, bequeathed the suit properties to his only daughter, Kanjathi M’Kiriitu, the appellant’s mother. That his mother was to hold the suit properties in trust for her male heir, who was to be named after her father. That the appellant, being the male heir, moved into the suit properties and has since developed the same extensively by planting various trees and crops. He averred that he has been living on the suit properties since 1963.
3. The appellant deponed that in 1967, his mother’s brothers, Shadrack M’Iguathu and Ezekia M’Ibiri, tricked him into giving them the ownership documents of the suit properties, after which they caused the mother parcels of land to be registered in their names. Shadrack M’Iguathu was registered as the owner of Folio No. 428, while Ezekiah M’Ibiri became the registered proprietor of Folio No. 485. The appellant averred that in 1985, he discovered that the two folios had been sold to the 3rd respondent. A suit was instituted against him by the 3rd respondent, who claimed to be the rightful owner of the suit properties, but that the suit was eventually dismissed, after it was referred to the elders, who directed the parties to await the adjudication and demarcation process. The appellant stated that after the demarcation process, he filed Objection Nos. 935 and 937 of 1997 to protect his interests with respect to the suit properties against the 3rd respondent. That the 3rd respondent conspired with the then Land Adjudication and Settlement Officer, Meru North District, and the objections were heard in his absence, and determined in favour of the 3rd respondent.
4. The appellant urged that the two mother parcels of land were sub-divided and are now registered in the names of the 1st to 7th respondents, as Uringu 1 Adjudication Section. He averred that he has been in open, continuous, uninterrupted occupation of the suit properties since 1963, and that he would suffer great injustice if the suit properties were not reverted to him.
5. In opposing the Originating Summons the 1st, 2nd, 3rd, and 4th respondents filed their respective replying affidavits stating that they are in exclusive possession and use of their respective parcels of land. They averred that Objections Nos. 935 and 937, filed by the appellant with respect to the suit properties, were dismissed, and that the said decisions have not been challenged by the appellant, either by an appeal before the Minister, or before the High Court on judicial review.
6. The 8th respondent, who was the Land Adjudication and Settlement officer, Tigania West, filed a replying affidavit dated 8th December 2017 explaining the history of each suit property as follows:
 - i. Parcel No. 251 owned by the 1st respondent was gathered jointly from Uringu 1 and Uringu 2 under Folio 428. Total area demarcated as under 251 is 4.30 acres. At the consolidation period, an exchange was made between 1st respondent and P/No. 705 of M’Muthuri Gikandi of 3.30 acres. There is no record of any Land committee case or arbitration board case filed against the 1st respondent. The only case filed is A/R Objection No. 935, filed by the appellant, which was heard ex-parte and dismissed.
 - ii. Parcel No. 308 owned by the 2nd respondent was gathered under Folio No. 485 in the names of Ibiiri Kiriti and an application for change of name to Ezekia M’Ibiiri done vide R.E.R Objection No. 4088. He gathered a total of 11.10 acres. Among the transfers effected was one of 2 acres but sub-divided vide A/R Objection No. 509. There is no record of any Land committee case or arbitration board case filed against the 2nd respondent. A/R Objection No. 935 filed by the appellant was heard ex-parte and dismissed.



- iii. Parcel No. 2248 of 3rd respondent under Folio 377 was demarcated at 6.18 acres but transferred to Samwel Mutege Akwalu vide A/R Objection No. 75. He got 7 acres from the 2nd respondent and 10 acres from the 1st respondent among others. There was a dispute over its ownership, court ruled that the parties await demarcation to award the land, vide Meru SRM CC No. 192 of 1985. There was also a prohibitory order vide Civil Suit No. 117 of 2000. A/R Objection No. 935 filed by the appellant was heard ex-parte and dismissed.
 - iv. Parcel No. 651 owned by the 4th respondent was gathered and demarcated away from the other parcels in dispute. it measures approximately 0.57 acres. It has not been involved in any Land committee or arbitration case. It was also affected by A/R Objection No. 935 filed by the appellant which was heard ex-parte and dismissed. The appellant has not been in occupation of the suit land.
 - v. Parcel No. 1650 registered under the 5th respondent: He got 2.75 acres from parcel number 1278 of Silas Kingaru Magiri vide Objection No. 2908. The area is demarcated is 2 acres. There is no record of any case against this suit land except for A/R Objection No. 935 filed by the appellant which was heard ex-parte and dismissed.
 - vi. Parcel No. 1560 registered under the 6th respondent: He obtained 1.50 acres from Folio 308 of Francis Munjuri vide Land Committee Case No. 142/73/74. The suit property is covered by the appellant's trees and measures approximately 1.41 acres.
 - vii. Parcel No. 1169 registered under the 7th respondent: He got 1.26 acres from Folio 1800 owned by Thimangu Nkiriti vide Objection No. 1244 less 0.07 acres. It measures 1.19 acres. The appellant has trees planted on this parcel.
- 7 The case was heard by way of viva voce evidence. In a judgment dated 28th February 2019, Cheronno J. dismissed the appellant's claim of adverse possession. The learned Judge determined that the appellant failed to prove the assertion that he was in open, exclusive uninterrupted possession of the suit properties. The learned Judge found that the appellant failed to challenge the decision in A/R Objections Nos. 935 and 937 under the proper channels, as the suit properties were the subject of the adjudication process.
- 8 The appellant, aggrieved by this decision, lodged this appeal.
- He has proffered seven (7) grounds of appeal. He faulted the learned Judge for:
- a. Failing to consider his evidence to the effect that the original parcel of land comprising of Iriungu 1/485 and Iriungi 1/428 is ancestral land which belonged to his grandfather;
 - b. failing to take into account the 3rd respondent's testimony, where he admitted that the original parcel of land was bequeathed to the appellant's mother;
 - c. deciding in favour of the respondent, based on the affidavit of the 8th respondent, who failed to testify under oath, as his evidence was not subjected to cross-examination;
 - d. ignoring the appellant's evidence, and that of his witnesses;
 - e. failing to consider the site visit report filed by the Executive Officer;
 - f. determining that objections, with respect to the suit property, were heard and determined, in the absence of any evidence thereof; and
 - g. making a decision that was against the weight of the evidence and the law.



9. The appeal was canvassed by way of written submissions. Mr. Sandi for the appellant submitted that the suit properties were originally owned by the appellant's grandfather, who handed them over to the appellant's mother. They were eventually inherited by the appellant. Counsel explained that the appellant furnished sufficient evidence, through his witnesses and bundle of documents, showing how he came to be in possession of the suit properties. He faulted the learned Judge for failing to consider the averments made by the 3rd respondent, to the effect that the appellant is in possession of the suit properties. He pointed out that during cross-examination, the 3rd respondent admitted that the appellant was given the suit land by his grandfather.
10. It was counsel's submission that Ali Chemasuet, who swore the replying affidavit on behalf of the 8th respondent, was not a witness before the trial court, and his evidence was not tested by way of cross-examination. Counsel insisted that the site visit report revealed that the appellant and his son were in occupation of parcels number 1650 and 251 respectively, and that none of the respondents occupied the remaining suit properties. Counsel urged that the learned Judge, from the onset, was biased, and formed the opinion that the appellant's case lacked merit, based solely on the replying affidavit of the 8th respondent. He urged us to allow the appeal.
11. In rebuttal, Mr. Gikunda for the 1st to 7th respondents stated that the suit properties were subject to the [Land Adjudication Act](#). He submitted that the appellant, through his pleadings, contended that he had filed objection proceedings under the adjudication process, which objections were dismissed. It was his submission that the appellant's averments that the suit properties formed ancestral land was not supported by any evidence on record. He reiterated that the replying affidavits filed by the respondents revealed that the appellant was in occupation of parcel number 1975 Uringu Adjudication Section 1, which belonged to his brother Domiziano Ratanya. Counsel explained that the 8th respondent's replying affidavit which indicated that the objections filed by the appellant, with respect to the suit properties were dismissed, remained unchallenged. He urged us to dismiss the appeal for lack of merit.
12. Mr. Kimathi for the 8th and 9th respondents submitted that for adverse possession to be established, the period when the appellant stated that he inherited the suit property, to the time when he alleges his uncles were registered as the owners of the suit property, did not count. He stated that during that period, the ascertainment and recording of rights and interests in the suit land had not been carried out under the [Land Adjudication Act](#). Therefore, before ascertainment of such rights, the appellant could not claim that he had acquired title by adverse possession. Counsel submitted that although the appellant claimed to be in occupation of the suit properties, the site visit report revealed that the respondents were in possession of the same. He submitted that the appellant, during cross-examination, conceded that he resided on his brother's parcel of land. Counsel urged that according to the appellant, his entry into the suit properties was by the permission of his mother. He explained that the appellant could not on one hand claim that the suit properties were a gift from his grandfather, and at the same time found his claim on adverse possession. Counsel urged that the appellant did not follow the due redress procedure provided for in the [Land Adjudication Act](#), after his objections with respect to his claim over the suit properties were dismissed. He urged that the instant suit was an attempt by the appellant to appeal the decision of the 8th respondent under the [Land Adjudication Act](#). Counsel urged us to dismiss the appeal.
13. This being a first appeal, it is our duty to analyze, and re-assess the evidence on record, and reach our own conclusions. In *John Teleyio Ole Sawoyo vs David Omwenga Maobe* [2013] eKLR this Court held:

“This being a first appeal we have the duty to reconsider both matters of fact and of law. On facts, we are duty bound to analyze the evidence afresh, re-evaluate it and arrive at our own



independent conclusion, but must bear in mind that the trial court had the advantage of hearing the witnesses testify and seeing their demeanour and should make allowance for the same. In the case of *Mwangi vs Wambugu* [1984] KLR 453 at page 461, Kneller JA (as he was then) stated:

‘This is a first appeal so this Court is obliged to reconsider the evidence assess it and make appropriate conclusion about it, remembering we have not seen or heard the witnesses and making allowance for this; (*Selle & Another –vs- Associated Motor Boat Company Ltd & Others* [1968] EA 123, 126 (CA Z) and *Williamson Diamonds Ltd –vs- Brown* [1970 EA 1.12] (C A T)).’

Still on the duty of the first appellate Court, Hancox JA (as he then was), stated in *Ephantus Mwangi & Another –vs- Duncan Mwangi Wambugu* [1982 - 88] 1 KAR 278 at page 292, as follows:

‘A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.’

14. Having evaluated the record of appeal, the grounds of appeal as well as submissions by parties to the appeal, we find that the issue to be determined by this Court, is whether the appellant sufficiently proved his claim of adverse possession, with respect to the suit parcels of land.
15. It was common ground that the suit parcels of land were subjected to the adjudication process, after which the respondents were registered as the legitimate owners of their respective parcels of land. The appellant filed Objection Proceedings Numbers 935 and 937 of 1997, challenging the demarcation and adjudication process. The objections were dismissed ex-parte, after the appellant was summoned, but failed to appear before the Land Committee for the hearing. Although the appellant in his grounds of appeal contended that there was no evidence that he had filed the said objection proceedings, it is clear from his pleadings, and his testimony before the court, that he indeed filed the said objections, with respect to the suit parcels of land. A copy of the objection proceedings also forms part of the record of appeal (from page 19).
16. The appellant’s objections were dismissed in March 1998. Awards were made in favour of the respondents. The *Land Adjudication Act* has an elaborate mechanism of appeal, in the event a party is aggrieved by the decision of the Land adjudication and settlement officer. Section 29 of the Act directs that any individual aggrieved by the determination of an objection, under Section 26 of the Act, may lodge an appeal before the Minister. There is no evidence on record that the appellant lodged such appeal, or that he challenged the decision of the adjudication officer with regard to the objection proceedings. Nine years later, the appellant filed the instant suit before the Environment and Land Court, claiming prescriptive rights to the suit properties, by virtue of the application of the doctrine of adverse possession.
17. The elements to be proved in a claim of adverse possession have been aptly stated by various decisions of this Court. In *Samuel Kihamba v. Mary Mbaisi* [2015] eKLR, this Court observed thus:

“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 land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner.”



18. In essence, a party claiming adverse possession has to prove that they have occupied the land in question openly without license or permission of the land owner, with the intention to have the land, and that they have dispossessed the registered owner of the suit property for the statutory period, as opposed to merely establishing that they have been in possession of the land for twelve years. The onus of proving these elements remains on the party claiming such rights.
19. We have re-evaluated the testimony and evidence of the parties.
First and foremost, the appellant's assertion that the suit properties formed his ancestral land is not supported by any evidence on record. It was the appellant's evidence that the suit properties were gathered from the original parcel of land, owned by his grandfather, which comprised of Folio Numbers 428 and 485. We have considered the replying affidavit sworn by the Land adjudication and settlement officer (8th respondent), which gave a history of how the suit properties were gathered. Other than Parcels Numbers 251 and 308, which were gathered from Folio numbers 428 and 485 respectively, the remaining parcels of land were gathered from different folios or parcels of land.
20. Further, the appellant, in his testimony before the court, acknowledged that he does not reside on any of the suit properties, but rather resides on a 2-acre parcel of land in Parcel No.1975, belonging to his brother, Domiziano Ratanya. He failed to prove that he is in occupation of the suit parcels of land as pleaded in his claim. The report dated 6th December 2018, filed by the Executive Officer, who was directed by the court to visit the suit properties, revealed that only parcel number 1650 was being utilized by the appellant for farming purposes.
21. Even if we were to go by the appellant's averment that he was gifted the suit parcels of land by his grandfather, then his occupation of the same was not adverse. When the objections filed by the appellant with respect to the suit parcels of land were dismissed in 1998, and the respondents were registered as the owners of the suit parcels of land, after the adjudication process was completed, his claim to have owned the said parcels of land pursuant to an ancestral right was extinguished.
22. We hold that, with respect to land that is subject to the adjudication process, time for purposes of adverse possession, does not start running until the adjudication process is completed, rights are ascertained, and owners of the said properties are registered. The appellant filed his suit in the year 2007. The statutory period of twelve years had not lapsed by he filed the said suit following the completion of the adjudication process.
23. The other contention by the appellant, was that the trial court improperly relied on the information tendered by the 8th respondent, in the replying affidavit sworn by Ali Chemasuet, on 8th December 2017. The appellant argued that the said deponent was not availed in court to testify, and therefore his evidence, having not been tested by way of cross-examination, was not of any probative value. We note that Order 19 of the Civil Procedure Rules allows evidence to be adduced by affidavits. Courts have discretion to direct a person to be cross- examined in respect of the contents of an affidavit, upon application by an aggrieved party. In this case, the appellant did not make such application before the trial court to cross- examine the Land adjudication officer. This ground of appeal must therefore fail.
24. In these circumstances, it is our finding, upon our re-evaluation of the evidence on record, that the appellant did not discharge both the legal and evidential burden to prove his claim for adverse possession in respect of the suit parcels of land. The trial court did not err in reaching the verdict that it did.
25. We find no merit in this appeal. It is hereby dismissed with costs to the respondents.
26. Orders accordingly.



DATED AND DELIVERED AT NYERI THIS 19TH DAY OF AUGUST 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

