John & 8 others v Gikunda (Civil Appeal 168 of 2018)
[2024] KECA 1221 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1221 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 168 OF 2018

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

SEPTEMBER 20, 2024

BETWEEN

JOYCE NCEE JOHN ..... 1ST APPELLANT

BEATRICE MIRIAM ISMAIL ..... 2ND APPELLANT

ABDUL MWIRIGI MUNYUA ..... 3RD APPELLANT

PETER MEME ..... 4TH APPELLANT

JACKLINE NKATHA JOHN ..... 5TH APPELLANT

FLORENCE KANJA MWITI ..... 6TH APPELLANT

SAMWEL MIRITI MUNYUA ..... 7TH APPELLANT

TITUS NKUNJA ISHMAEL ..... 8TH APPELLANT

SERIBA KANGAI ..... 9TH APPELLANT

AND

SAMWEL GIKUNDA ..... RESPONDENT

(Appeal from the Judgment of the Environment and Land Court at Meru by (Hon. Mwangi Njoroge, J.) dated the 23rd February, 2018 in ELC No 82 of 2011)

JUDGMENT

1. Joyce Ncee John and Beatrice Miriam Ismail (the 1st and 2nd appellants respectively) were wives of the deceased Munyua Miguiri The deceased was the registered owner of Land Parcel No. Timau Settlement Scheme/128 (the suit property) The deceased was polygamous and had many children who included the 3rd to the 7th appellants in this appeal.

2. Sometime in 1987, the deceased decided to dispose of part of his land amidst protest from part of his family. On 24th April, 1987 he entered into a sale agreement with Samuel Gikunda (the respondent) for the sale of 5 acres out of the suit property. The sale price was said to be Ksh.70.000 but according to the respondent he paid only Ksh.25,000. It is not clear from the evidence whether the balance was ever paid or when the respondent took possession.

3. Unfortunately, the deceased died on 27th March, 1996 before the transaction was completed and the family refused to sanction the transaction. Correspondence exchanged between the local chief and the other officers in the provincial administration (which are on record) show that as early as February 1987, the family had protested to the chief about the intended sale, and the chief had written to the settlement officer requesting him not to convene the Land Control Board and not to allow the transfer.

4. From the proceedings before the Land Disputes Tribunal which form part of the record, the respondent moved into the property in 1997 amidst the protests and refusal to take back the sale price as ordered by the court and also by the Tribunal.

5. Instead of vacating the suit propety, the respondent colluded with the 2nd appellant and they clandestinely filed Meru Succession Cause No.46 of 1999 in which the 2nd appellant named the respondent as a beneficiary whereby he was awarded 2 acres of the suit property. The said Grant was revoked later, it having been issued without the knowledge and consent of the other beneficiaries.

6. The respondent did not prefer an appeal against that decision. In the meantime, another Grant of letters of administration was issued and the land was subdivided into several parcels which were registered in the names of the rightful beneficiaries. The respondent had been excluded from the list of the beneficiaries as he was not a beneficiary.

7. After the sub-division and distribution of the deceased's Estate the portion occupied by the respondent fell on the 4th appellant's plot. The 4th appellant PETER MEME demanded that the respondent vacates the portion but the respondent resisted and refused to vacate. The 4th respondent then moved to the Land Disputes Tribunal vide LDT Case No. 68 of 2001 urging the Tribunal to evict the respondent from the 2 acres he was forcefully occupying as a trespasser.

8. The Tribunal heard the dispute and was referred to proceedings in Meru Civil Case No. 68 of 1990 where the court had found that the sale transaction had not been completed as per the terms of the sale agreement and the court had ordered a refund of the Ksh.25,000 which had been paid to the deceased. The respondent, nonetheless, declined to take the money and refused to give up possession.

9. It is against that backdrop that the respondent moved to the High Court by way of Originating Summons dated 20th June, 2011 and filed on the same date, seeking a declaration that he had acquired five (5) acres out of Land Parcel Timau Settlement Scheme/128 (the suit property) now sub-divided into Timau Settlement 1188- 1199, by adverse possession. He sought to be declared and registered as owner of the land, and to be issued with a certificate of title.

10. In support of his claim, he filed an affidavit sworn on even date, where he claimed that he had purchased 5 acres of the suit property from the deceased and having paid the entire consideration price took possession of the 5 acres in August 1987.

11. He further deponed that the deceased passed on before he could transfer the said 5 acres and that the administrators of the deceased's estate secretly and fraudulently sub-divided the suit property into twelve (12) resultant portions with the intention of defeating his claim and that despite the said sub-divisions he is still in occupation of the said 5 acres.

12. The appellants opposed the Originating Summons through a replying affidavit sworn by Joyce Ncee John dated 30th June 2011. She deponed that the current case is res judicata LDT Case 5 of 2002 and Succession Suit No 46 of 1999 where the respondent had petitioned for letters of administration and had been awarded 2 acres of land and which letters of administration were revoked and the deceased's Estate redistributed. Further, that the respondent did not reside on the suit property which does not exist as the same had been sub-divided in LR No. Timau Settlement Scheme 1188-1199 and separate titles issued.

13. Upon considering the evidence, the learned Judge (Mwangi Njoroge J) held that;

> "33. In my view therefore the plaintiffs claim is not res judicata. He is therefore entitled to 2 acres of land herein by way of adverse possession.34.I therefore find that the plaintiff's originating summons is well founded. I am aware that the subdivision of the land into several portions has been effected. In the circumstances an appropriate order should issue to bring closure to this litigation. The subdivision of the original title land is hereby nullified. In lieu thereof there shall be conducted a fresh subdivision of the land to facilitate registration and issuance of title to the plaintiff as proprietor in respect of the two acres that the plaintiff has been in occupation of and which he has developed during his occupation"

14. Aggrieved by the above orders, the appellants appealed to this Court through the memorandum of appeal dated 14th September 2018 on grounds, inter alia, that; the learned Judge erred in law and in fact: in holding as he did since he failed to appreciate that the issue for determination was whether indeed the respondent was a bona fide purchaser and whether he had ever occupied the disputed parcel of land; in finding that the respondent had adverse possession as a purchaser; by failing to determine whether the respondent was in actual possession of the land or has ever occupied the said land or had ever developed it; by holding that the respondent had adverse possession of the two acres of land despite the failure by the respondent to state the actual time the claim of adverse possession arose and when the sale agreement became void; by awarding the respondent 2 acres of land by way of adverse possession; by failing to appreciate the weight and evidential value presented by the appellant to show the respondent was not in possession of the land nor was he a bonafide purchaser; in accepting a purported sale agreement which was not known to the appellants as they had earlier restricted the deceased from selling the said piece of land; by nullifying the subdivisions of the original titles among the deceased's beneficiaries; and by stating the suit is not res judicata as the Land Dispute Tribunal had no jurisdiction in ruling that the respondent cannot acquire any proprietary interest.

15. When the appeal came up for hearing, learned counsel Mr.Bizimana appeared for the appellants while. Ms Thangicia appeared for the respondent. Ms Thangicia informed the Court that she had not filed submissions as the submissions by the appellant's counsel were served on her late. The Court allowed her 14 days to file her submissions, which she did. Both counsel relied entirely on the written submissions without any oral highlights. We have carefully considered the said submissions along with the record of appeal in its entirety and the relevant law.

16. This being a first appeal, it is our mandate under Rule 31 of the Court of Appeal Rules to re-evaluate the evidence tendered before the trial court and come up with our own findings and conclusions, bearing in mind that we did not have the occasion to see or hear the witnesses and make due allowance for the same. This mandate was amplified in the case of Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR this Court expressed itself as follows:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re- evaluate, re-assess and re-analyse the extracts on the record and then determine

whether the conclusions reached by the learned trial Judge are to stand or not Authority v Kustron (Kenya) Limited [2000] 2EA 212

17. We decipher the issues that commend themselves to us for determination to be:

i) whether the suit was res judicata and

ii) whether the respondent proved his claim for adverse possession as against the appellants.

18. Section 7 of the Civil Procedure Act defines 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 Section 7 contemplates five conditions which, when co-existent, will oust the hearing and determination of a subsequent suit.
>
> These are:the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; the former suit must have been between the same parties or privies claiming under them; the parties must have litigated under the same title in the former suit; the court which decided the former suit must have been competent to try the subsequent suit; and the matter in issue must have been heard and finally decided in the former suit.
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> Expounding on the principle of res judicata, the Supreme Court of Kenya in the case of Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others [2014] eKLR, expressed itself as follows:
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> > '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...

19. In this appeal, the appellants contended that the instant suit was res judicata LDT Case No.5 of 2002 and Meru Succession Case No.46 of 1999. Holding that the suit was not res judicata, the trial Judge observed that:

> "On the other hand an award by the Land Disputes Tribunal is not enforceable due to lack of Land Disputes Tribunal Jurisdiction over the subject matter. It is a well-established position in law that for the principle of res judicata to be effectively invoked a court that is said to have determined a similar issue must have been possessed of jurisdiction. Jurisdiction is an essential test of res judicata prescribed by Section 7 of the Civil Procedure Act. In my view, therefore, the plaintiff's claim is not res judicata. He is therefore entitled to 2 acres of land herein by way of adverse possession."

20. On the issue of res judicata, we note that the claim before the Land Disputes Tribunal was filed by the 4th appellant against the respondent claiming that he was a trespasser on the suit property and he should be ordered to vacate. The suit was heard and ultimately, the Tribunal held that the respondent had failed to comply with the terms of the sale agreement and the agreement was, therefore, unenforceable. The Tribunal allowed the claim and ordered the appellants to refund the Ksh.25,000 paid by the respondent as part payment for the suit property and also ordered the respondent to vacate the suit property.

21. We observe that in arriving at the said decision, the Tribunal was referred to an earlier decision of the High Court in Meru HC case No. 68 of 1990 where the court had ordered a refund of the Ksh.25,000. Unfortunately, the proceedings and judgment in the said suit were not presented to the High Court to enable the learned Judge determine whether the Originating Summons was res judicata that suit. We do not make any determination in that regard either. As far as the Land Dispute Tribunal matter is concerned, we note that the dispute related to registered land and a determination as to the proprietary rights of the parties. Clearly, the Tribunal lacked the requisite jurisdiction to determine the said issues.

22. In Meru Succession Cause No.46 of 1999, the 2nd appellant and the respondent petitioned for grant of letters of administration in the matter of the Estate of John Munyua Miguari wherein he was granted two (2) acres of the suit property as a beneficiary. The confirmed Grant which had awarded the respondent the land was subsequently revoked. The suit had not, therefore, determined whether or not the respondent had any proprietary rights to the two acres. In any event, a probate court lacks jurisdiction to determine disputes predicated on adverse possession. We hold the view that the learned Judge did not err when he made the finding that the suit was not res judicata. The challenge on the judgment on that ground is without merit and is hereby dismissed.

23. We now turn to whether the respondent proved his 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

24. 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. See Mtana Lewa vs Kahindi Ngala Mwagandi [2015] eKLR. The essential prerequisites in a claim based on adverse possession are 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 that:

> The onus was on the respondent to 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 entitle him, the respondent, to title to that land by adverse possession.

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

26. 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:

> See also this Court's decision in Richard Wefwafwa Songoi vs Ben Munyifwa Songoi [2020] eKLR,

27. 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, peaceful and uninterrupted 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.

28. Did the respondent's claim meet the above threshold? It was the respondent's case that on 24th April 1987 he purchased five (5) acres of the suit property from Munyua Miguari (deceased) and had been residing on the suit property since then. From the evidence adduced, it is clear that the suit property was later subdivided following a certificate of grant issued in Nairobi Succession Cause No 2 of 2000 wherein the 1st appellant and 2nd appellants were made administratrices of the deceased's Estate. The Estate was eventually distributed in accordance with the schedule as endorsed by the court on 9th November 2009 to the rightful beneficiaries of the estate.

29. For his part, the respondent stated that he took possession of the suit property from 1987 and enjoyed uninterrupted occupation until he was chased away from the suit property by the appellants. The respondent did not demonstrate the date he was evicted from the suit land. The suit for adverse possession was not filed until 20th June 2011.It is not in dispute that the respondent was not in possession of the suit property at the time of filing the summons. We also note that record is not clear when the respondent's occupation of the suit property commenced despite his claim that he took possession of the same in 1987 upon purchase of the same from the deceased.

30. A claim predicated on adverse possession is statutorily time bound. It behoved the respondent herein to prove to the trial court when he occupied the suit premises and when he was evicted, or when he lodged his claim, as the case may be. As stated earlier, there was evidence on record that the deceased's family lodged an objection to the sale even before the sale agreement was entered into. It would appear, however that regardless of the incessant protestations the respondent occupied the land at some point, on the basis of the sale agreement. We assume that to be in April 1987 or thereabouts.

31. We note however, that the entry into the suit property was with permission of the deceased. The germane question, on which this appeal stands or falls is at what point that permission was withdrawn, which was the point when time started running. When was that consent withdrawn so that time could start running? If we go by the respondent's evidence that the entered the suit property in 1987 on the basis of the sale agreement and never left until he filed the suit in 2011, the legal position would be that his occupation was permissive and since the agreement had no completion date, he remained on the suit property with permission and he was not an adverse possessor. In that case, time could only start running upon the annulment of the Grant by the Court in 2002. Time could only start running from 2002, and so by the time he filed the Originating summons, the statutory 12 years had not lapsed and his claim was inchoate.

32. If on the other hand the consent is assumed to have been withdrawn upon the death of the deceased in 1996, then from 1996 to the time the High Court annulled the Grant in 2002 and ruled that he

was not a beneficiary of the deceased and allowed the distribution of the suit property to the other beneficiaries, his claim for adverse possession was reduced to a mirage.

33. We note that the sale of the land to the respondent was strongly opposed, even before the sale agreement was made and the objections and hostility continued throughout with interventions from the provincial administration, court cases, both criminal and civil, until the respondent was evicted from the land on a date that he could not demonstrate. It cannot be said that the respondent's occupation of the suit property was ever peaceful. We are not persuaded that the respondent proved on a balance of probability that he was in peaceful occupation of the suit property without the permission of the deceased; and that he was in exclusive and uninterrupted possession of the suit property for 12 continuous years before he filed his suit.

34. From the foregoing, from whichever way we look at the matter, the inevitable conclusion we can arrive at is that the learned Judge erred in finding that the claim for adverse possession was proved.

35. We find the appeal meritorious and allow it with the result that the judgment of the trial court is set aside and in its place we issue orders dismissing the respondent's Originating Summons dated 20th June 2011 with costs to the respondent both here and in the Environment and Land Court.

Orders accordingly.

DELIVERED AND DATED AT NYERI, THIS 20TH DAY OF SEPTEMBER.2024

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR