Chetambe v Kirambi (Civil Appeal 219 of 2018)
[2024] KECA 1510 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1510 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 219 OF 2018

WK KORIR, SG KAIRU & FA OCHIENG, JJA

OCTOBER 25, 2024

BETWEEN

REDEMPTA SUSAN CHETAMBE ..... APPELLANT

AND

ALICE MUHONJA KIRAMBI ..... RESPONDENT

(Being an appeal from the Judgment of the Environment & Land Court of Kenya at Kitale (Mwangi Njoroge, J.) delivered on 14th June 2018 in ELC Misc. No. 48 of 2014 (O.S))

JUDGMENT

1. Before us is an appeal emanating from the respondent's originating summons against the appellant dated 3rd November 2014. In the matter, the respondent herein was the plaintiff before the trial court. She sued the appellant and Barclays Bank of Kenya Limited, hereinafter, "the bank" as the 1st and 2nd defendants respectively. The respondent's claim was over land parcel number Trans-nzoia/liyavO/187 hereinafter, "the suit land". The respondent prayed for the following orders:

    " a) A declaration that she had acquired and become entitled by adverse possession to the suit land herein.

    b. The respondent be registered as the proprietor of the suit land in place of the appellant herein.

    c. The appellant be ordered to liquidate the amount due to the bank on account of the charge registered as entry No. 1 on the encumbrance section dated 17th November 1999.

    d. An order vesting the rights in respect to the suit land in the respondent in place of the appellant.

e. Costs be awarded to the respondent."

2. It is worth noting that when this matter first came up for hearing on 14th March 2017, the appellant's counsel declined to cross- examine the appellant and her witnesses. Thereafter, the appellant filed an application which resulted in the consent dated 17th August 2017 allowing for the matter to start de novo.

3. In her supporting evidence, the respondent stated that she entered into a sale agreement with the appellant with regard to the suit land in 1996. She had however lost the said sale agreement. She further stated that on 6th June 1996, one Fred M. Wanyonyi, a District Lands Adjudication and Settlement (DLAS) Officer prepared the transfer documents concerning the suit land. These documents were executed by the appellant in her favour and later submitted to the DLAS.

4. According to the respondent, these documents were held by the DLAS at Trans-Nzoia pending the clearance of the dues of Kshs. 12,000/- owed by the appellant to the Settlement Fund Trustees. The documents were later forwarded to the DLAS at Kitale. Due to these issues, they could not obtain the consent of the Land Control Board (LCB).

5. The respondent further stated that in unforeseen circumstances, the title deed to the suit land could not be traced at the registry, thereby further delaying the transfer.

6. The respondent alleged that the appellant had become uncooperative thereafter but she continued to occupy the suit land which she had taken possession of in 1996. She stated that when she took vacant possession of the suit land, it was fallow but she has since developed the same by fencing it with barbed wire, planting trees, constructing a house, digging a well, and carrying on small-scale farming thereon.

7. The respondent stated that she had lodged a caution on the suit land on 25th April 2014 claiming interest as a purchaser. She was of the view that the appellant's title to the suit land was extinguished in 2008 following her continuous, uninterrupted, adverse occupation of the said land.

8. At the hearing, the respondent told the court that she had bought the suit land from the appellant for a consideration of Kshs. 680,000/- between 1995 - 1996. She stated that when she took possession of the suit land, a family was living thereon and tending to the land. She decided to retain the family's son, Nicholas on a salary to continue taking care of the land.

9. She told the court that although she was in contact with the appellant since they were friends, the appellant had never visited the suit land thereafter, and that there had never been any physical challenge to her occupation thereof.

10. The respondent's further testimony was that at the time of forwarding the transfer documents to Kitale DLAS, the appellant had already executed an application for LCB consent.

11. The respondent called Nicholas as PW2. He told the court that his father had leased the suit land in 1995. However, when his father died, he came to know that the suit land was on sale. He testified that sometime in 1995, the appellant brought the respondent to inspect the suit land. Later, his mother informed him that the respondent had bought the land. He stated that after the respondent took possession, she retained him as the caretaker.

12. According to PW3, the suit land belonged to the respondent. She told the court that the respondent had been on the land for over 20 years and that she came on the land while PW2's father was still alive.

13. In response to the respondent's pleadings, the appellant conceded that she had indeed agreed to sell the suit land to the respondent for Kshs. 680,000/- in a written offer dated 26th April 1995. According to

her, the offer was valid for one month. If the respondent agreed to the offer, she was to pay her a down payment of Kshs. 340,000/- and the balance after they had obtained the LCB consent.

14. The appellant stated that the respondent did not take up the offer during the one-month period, but she later approached her and she agreed to lease to the respondent the suit land, with the option of the respondent purchasing the same in the future. She stated that during the lease period, the respondent paid her at least Kshs. 300,000/- in small installments.

15. The appellant further stated that the legal charge to the bank for Kshs. 600,000/- in her favour was proof that she was the owner of the suit land and that she was surprised when the respondent claimed to be the owner of the suit land from the year 2000.

16. She stated that they had attempted to solve the dispute amicably through their mutual organization and her family members between 2003 and 2006 without success. She stated that the respondent's claim for adverse possession was far-fetched.

17. In her oral testimony, the appellant denied selling the suit land to the respondent, signing the transfer documents, or the LCB consent forms in 2014 or earlier, and disputed the signatures on the said documents. She told the court that although she was desirous of selling the suit land and she had made an offer to the respondent, the respondent did not honour the offer and she instead leased the suit land to the respondent for Kshs. 2,000/- per acre.

18. The appellant told the court that the dispute herein arose after the respondent had paid her Kshs. 300,000/- and claimed that she had sold her the land. She denied abandoning the suit land and stated that the land was always taken care of by a caretaker.

19. After analyzing the evidence which was tendered before the court, the learned Judge found that the respondent took possession of the suit land in 1996 and she was in occupation thereof for a minimum of 18 years at the time when this suit was filed, and therefore, she had been in occupation for more than 12 years.

20. The learned Judge held that as the appellant claimed that the offer had lapsed when the respondent entered the suit land, the respondent could not be considered to have entered the suit land by virtue of the sale agreement they claimed was lost. However, the learned Judge found that the respondent's evidence that she had paid the appellant Kshs. 340,000/- on 26th April 1995 and Kshs. 280,000/- on 12th October 1995 to be credible evidence that there was a sale agreement between the parties.

21. The learned Judge held that there was no lease agreement produced and the court had no basis for concluding that there was a lease agreement between the parties herein.

22. The learned Judge presumed that the sale agreement was entered into on 12th July 1995 and therefore the time for obtaining the consent of the LCB expired after six months on 11th January 1996 and thus the sale agreement became void. The learned Judge pointed out that the appellant ought to have taken measures to repossess the suit land within 12 years of 11th January 1996 and having failed to do so, the learned Judge held that the respondent had been on the land for more than 12 years.

23. The learned Judge relied on the evidence of PW3 who testified that the respondent was the only person she had seen on the suit land for 20 years. She also did not know the appellant. The learned Judge observed that there was very little possibility of any person remaining on the appellant's land for a period of more than 18 years without permission unless there had been acquiescence on the part of the owner.

24. Furthermore, the learned Judge held that there was no evidence of physical re-entry on the suit land by the appellant whether forceful or peaceful, or any suit for the recovery of the suit land between 1995 to 2014 when the suit was filed. Consequently, the learned Judge found that the respondent's occupation of the suit land was open, peaceful, and uninterrupted, and it continued for a period in excess of 12 years.

25. Subsequently, judgment was entered in favour of the respondent against the appellant for prayers (a), (b), (d) and (e) of the originating summons, and the deputy registrar of the court was directed to execute the necessary transfer documents on behalf of the appellant.

26. Aggrieved by the judgment of the court, the appellant appealed to this Court raising the following grounds:

> "a) The learned Judge erred in failing to apply the provisions of Order 37 Rule 7 of the Civil Procedure Rules.
>
> b. The learned Judge erred in failing to consider the appellant's submissions.
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> c. The learned Judge erred in failing to analyze and consider the principles of adverse possession.
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> d. The learned Judge erred in failing to consider that there was a Charge over the suit land by the bank in favour of the appellant.
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> e. The learned Judge erred in failing to analyze all the exhibits produced.
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> f. The learned Judge erred in failing to consider the caution placed on the suit land in 2014 by the respondent.
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> g. The learned Judge erred in finding in favour of the respondent despite her permissive entry to the suit land.
>
> h. The learned Judge erred in relying on the wrong principles of law and misapplying the law on adverse possession.
>
> l. The learned Judge erred in awarding the respondent costs."

27. When the appeal came up for hearing on 24th April 2024, Mr. Muhia, learned counsel appeared for the appellant, whereas Mr. Omollo, learned counsel appeared for the respondent. Counsel relied on their written submissions which they briefly highlighted.

28. Arguing for the appellant, Mr. Muhia submitted that although the court held that the respondent had acquired the suit land by adverse possession, the suit was based on an attempt to enforce an agreement for sale. As that was the case, counsel pointed out that the respondent failed to pay the purchase price, but she was allowed onto the suit land as a tenant and paid rent amounting to Kshs. 300,000/-.

29. Counsel submitted that the respondent's occupation of the suit land was with the express authority of the appellant. This was evidenced by the respondent's action of lodging a caution over the suit land in 2014 as a purchaser. He faulted the learned Judge for holding that the respondent had acquired the suit land through adverse possession. In rebuttal, counsel argued that the respondent had failed to address the caution which she had registered on the suit land as well as the LCB consent.

30. In her written submissions dated 30th June 2023, the appellant submitted that Section 7 of the *Limitation of Actions Act* prohibits the institution of any action for the recovery of land after the expiry

of 12 years. She went on further to state that Section 38 of the same Act provides that a person claiming title to land by adverse possession of land registered under any of the Acts cited in Section 37 of the Act may apply to the High Court to be registered as the proprietor of the said land. She then listed the essential elements necessary to sustain a claim for acquiring land by adverse possession stating that it was incumbent upon the respondent to prove the same.

31. On whether the respondent's occupation of the suit land was non-permissive, the appellant submitted that she allowed the respondent to occupy the suit land as a lessee and received Kshs. 300,000/- as payment for the Lease.

32. The appellant pointed out that the respondent did not contest her allegations that ongoing negotiations were prevailing during the intervening period between 1996 and 2014. She submitted that there was no contention that money was paid whether it was through a sale or a lease, and therefore, the respondent took possession of the suit land with the express permission of the appellant.

33. The appellant cited the case of Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR, in which this Court held that where one claims a title by virtue of agreement and adverse possession, the plea for adverse possession is not available. She submitted that as late as June 2014 the respondent still laid claim over the suit land as a purchaser and lodged a caution thereon. The appellant was of the view that since the respondent sought to rely on both acquiring title by purchase and adverse possession, the claim for adverse possession was not tenable.

34. As to when time started running for purposes of adverse possession, the appellant faulted the learned Judge for holding that there was an agreement for sale but refused to entertain the possibility of a lease agreement. She submitted that once the respondent wrote to the appellant demanding the effecting of the transfer to her name, time stopped running. (See: Gabriel Mbui v Mukindia Maranya [1993] eKLR).

35. The appellant submitted that the respondent by intimating in her submissions that she was no longer relying on the agreement but on adverse possession, time could only start running seven days after her letter dated 11th September 2014 demanding the transfer of the suit land to the respondent's name and the suit having been filed on 3rd November 2014, 12 years had not lapsed. She faulted the learned Judge for ignoring the said letter.

36. The appellant submitted further that there were ongoing negotiations regarding the suit land from 2003 to 2006 as was conceded to by the respondent, there was correspondence between the respondent and her relatives, hence the respondent could not claim that she had been in quiet, continuous, and peaceful occupation of the suit land.

37. The appellant further submitted that the respondent had failed to prove that she was in exclusive occupation of the suit land with the intention of excluding the appellant. On 17th November 1999, the appellant registered a Charge over the suit land which was discharged on 7th July 2003. The respondent was aware and she did not object to the same.

38. In conclusion, the appellant submitted that Section 22 of the *Land Control Act* prohibits the continued occupation of property where consent ought to have been obtained but was not. She contended that the consent adduced was obtained more than 20 years after the alleged agreement yet the court failed to make a determination on the same.

39. Opposing the appeal, Mr. Omollo submitted that the suit having commenced by way of originating summons, was based on rights acquired prescriptively and not by way of purchase. He argued that the

respondent proved that she had entered the suit land and that she was in occupation which was open and peaceful.

40. Counsel submitted that although initially there was an agreement, the appellant denied the same, and her claim for a lease agreement was not proved. When the respondent entered the suit land, it was not pursuant to the sale agreement. In any event, the appellant should have interrupted the occupation physically or through a court order.

41. In her written submissions dated 13th January 2024, the respondent submitted that she took possession of the suit land in late 1996 independent of both the agreement for sale and the purported lease. At the time, her entry was non-permissive, and she enjoyed an open and peaceable occupation of the suit land. To buttress this submission, the respondent relied on the case of Samuel Kihamba v Mary Mbaisi [2015] eKLR.

42. The respondent contended that Section 22 of the *Land Control Act* was not applicable in the circumstances as this case was filed under Section 28(h) of the *Land Registration Act*.

43. This being a first appeal, it is our mandate 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 occasion to see or hear the witnesses, and we make due allowance for the same. In the case of Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR the Court restated this requirement 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 reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited (2000) 2EA 212 wherein the Court of Appeal held, inter alia, that: - "On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

44. We have carefully and anxiously considered the record of appeal, the grounds thereof, the rival submissions, and the law. The main issue for determination is whether or not the respondent was entitled to the suit property, by adverse possession.

45. It is common ground that the appellant and the respondent are well-known to each other by virtue of being members of the same organization. The appellant even described the respondent as her best friend. PW2 told the court that when the appellant introduced the respondent to him and his mother, he referred to her as her friend.

46. One would wonder why this friendship was so significant in this matter. It follows, therefore, that in transactions relating to people who are very familiar with each other, most of the formalities required are not followed strictly due to the friendship involved. There is always room that formalities can be done at a later date. In this instance, we can only presume that the impasse regarding either the sale agreement or the lease agreement arose out of this friendship.

47. Nonetheless, it resulted in the originating summons by the respondent seeking to be declared the owner of the suit land by adverse possession.

48. Article 40 as read with Article 64 of *the Constitution* allows citizens to acquire and own property; land, through a freehold or a leasehold tenure. Article 65 on the other hand allows non- citizens to acquire and own property; land, through a leasehold tenure. However, one can also acquire land through the doctrine of adverse possession.

49. The appellant contended that the trial court erred in finding that the respondent was in adverse possession of the suit land for the statutory period of 12 years, while the respondent maintained that she had enjoyed continuous, uninterrupted, and peaceful occupation of the suit land for over 20 years.

50. The Black's Law Dictionary, Ninth Edition defines "adverse possession" thus:

> " 1. The enjoyment of real property with a claim of right when the enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open and notorious.
>
> 2. The doctrine by which title to real property is acquired as a result of such use or enjoyment over a specific period of time."

51. The term "adverse possession" has a specific legal definition. It doesn't mean that anyone who occupies land belonging to someone else for a certain period automatically becomes the owner through adverse possession. The law prohibits unlawful occupation of private, community, or public land, and gives the owner the right to evict such individuals, while also stipulating the procedure for such eviction.

52. In the case of Elphas Cosmas Nyambaka v Charles Angucho Suchia [2020] eKLR, this Court held that:

> "Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a period of 12 years or more. The process spirals into action fundamentally by default or inaction on the part of the registered owner of the parcel of land. The essential requirements being that the possession of the adverse possessor is neither by force or secrecy nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the registered owner."

53. The law on adverse possession is provided for under the *Limitation of Actions Act*. Section 7 of the Act provides:

> " 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 first accrued to some person through whom he claims, to that person."

54. Section 13 of the Act provides that:

> " (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, 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 ceases 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.

3. For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land."

55. While Section 17 of the Act extinguishes the rights of a registered owner where there is a successful claim for adverse possession, Section 38 of the Act on the other hand provides that:

"(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land."

56. This Court in the case of Richard Wefwafwa Songoi v Ben Munyifwa Songoi, (supra), raised the following issues which ought to be established by the person claiming adverse possession; the date when they came into possession of the suit land, the nature of their possession of the suit land, whether the fact of their possession was known to the owner of the suit land, for how long the possession has continued, and whether the possession was open and undisturbed for the requisite 12 years.

57. The respondent herein stated that she entered the suit land in 1996, after purchasing the suit land from the appellant. Therefore, the respondent's entry onto the suit land was known to the appellant and she had been in continuous possession of the suit land for 18 years.

58. The question then is whether the respondent's occupation of the suit land was uninterrupted. In the case of Samuel Kihamba v Mary Mbaisi [2015] eKLR, this Court stated 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. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land."

59. Similarly, in the case of Mate Gitabi v Jane Kabubu Muga & Others, Civil Appeal No. 43 of 2015 (unreported) this Court held that:

"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 secrecy, without force, and without license or permission of the land owner, with the intention to have the land."

60. In this instance, the respondent although in open and exclusive occupation of the suit land, entered therein with the permission of the appellant. During the period of her occupation of the suit land, the respondent cannot be seen to say that her occupation was quiet and peaceful. She did not rebut the appellant's claim that from 2003 to 2006 the two parties had a dispute over the suit land which their mutual organization and the appellant's family members tried to intervene and resolve. In any event, the respondent herself lodged a caution over the suit land in 2014. This was satisfactory evidence that

all was not well with her occupation of the suit land and that she was apprehensive that her rights as a purchaser of the suit land might be threatened.

61. The law and requirements for adverse possession were reiterated in the case of Mbira v Gachuhi, [2002] IEALR 137 where it was held that:

> "..... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non- permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...."

62. It follows that adverse possession contemplates two concepts; possession and discontinuance of possession. The proper way of assessing proof of adverse possession is whether or not the appellant had been dispossessed or had discontinued her possession for the statutory period, and not whether or not the respondent proved that she had been in possession for the requisite number of years.

63. The respondent also claimed that the appellant had never visited the suit land after she took possession thereof. We find that this was not sufficient evidence of the appellant's dispossession of the suit land or that she had given up her entitlement to the suit land. The appellant continued to make use of the suit land even without her physical occupation thereof as seen when she took a Charge over the said land in 1999. In the case of Christopher Kioi & Another v Winnie Mukolwe & 4 Others [2018] eKLR, this Court held that:

> " The appellants have laid great emphasis on the fact that Kituri did not use the suit property in his lifetime, but that in itself is not conclusive evidence of dispossession because where the owner has little use of his land, others may use it without that possession amounting to dispossession or being inconsistent with the owner's title."

64. It follows, therefore, that from her actions of lodging a caution over the suit land in 2014 as a purchaser, the respondent did not establish that she was in occupation of the suit land without the appellant's permission, she had a clear mind and intention of dealing with the suit land as if it was exclusively hers, and in a manner that was in clear conflict with the appellant's rights. Therefore, we find that the respondent did not prove that the appellant was dispossessed of the suit land at any given time, as evidenced by the Charge the appellant registered over the suit land in 1999, and it was discharged in 2003.

65. Our analysis and appreciation of the facts established on the record leads us to the inevitable conclusion that the learned Judge erred in finding that the 12 years for adverse possession had been proved.

66. In the result, we find that the appeal is merited. We allow the appeal and set aside the judgment of the trial court; and we issue the orders that:

    a. The appellant is the lawful and registered owner of the suit land.

    b. The respondent did not acquire title to the suit property by adverse possession.

67. As costs follow the event, the respondent shall bear the costs of this appeal and of the suit before the trial court.

    Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed Deputy Registrar