



**Wahome v Rwario & 2 others (Civil Appeal 134 of 2018)
[2024] KECA 1548 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1548 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 134 OF 2018
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
OCTOBER 25, 2024**

BETWEEN

GATHONI WAHOME APPELLANT

AND

KABUCHI RWARIO 1ST RESPONDENT

JAMES MAINA KIAMBUI 2ND RESPONDENT

PETER MUREBU KIAMBUI 3RD RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court at Nyeri (Waithaka, J.) dated 29th May 2017, in ELC Case No. 677 of 2014 Formerly Nyeri H.C.C.C No. 155 of 1991 (O.S))

JUDGMENT

1. The appellant instituted a civil suit against the respondents, before the High Court of Kenya at Nyeri, vide originating summons dated 17th July 1991, seeking to be declared the rightful owner of L.R. No. Kiine/Kiangai/1643 (hereinafter ‘suit property’), by virtue of the application of the doctrine of adverse possession. The registered owner of the suit property at the time was James Kanja Kibuchi (2nd defendant), who died during the pendency of the suit before the superior court. He was not substituted and is therefore not a party in this appeal. The 1st respondent is the 2nd defendant’s father in the suit before the superior court.
2. It was the appellant’s case that she entered the mother parcel of land L.R. No. Kiine/ Kiangai/640 in 1965, after purchasing the property from the 1st respondent for Kshs.1350. She averred that she was in exclusive possession of the mother parcel of land until 1990 when James Kanja Kibuchi (2nd defendant) subdivided the Parcel Number 640 into two portions measuring 1 acre and 2 acres each, and thereafter sold the 1-acre plot. She asserted that she was left with the suit property (parcel number 1643)



- measuring 2 acres, over which she now claimed proprietary interest by way of adverse possession. The appellant averred that she has extensively developed the suit property by constructing three semi-permanent houses, where she resides with her family, and planted tea bushes, bananas, eucalyptus trees as well as other crops.
3. In response, the 1st respondent filed a replying affidavit dated 15th August 1991, where he deponed that the claim against him was misconceived as he was not the registered owner of the suit property. He averred that the appellant and her late husband entered the suit property as intending purchasers, but that they were unable to pay the purchase price. It was subsequently agreed between the parties that they would vacate the suit property.
 4. The 1st respondent deponed that after the appellant's husband died, he gave the appellant another chance to purchase the suit property for Kshs.120,000. He averred that the appellant agreed to his offer in 1986, but she was unable to raise the money, claiming that she could only do so after her son completed school. The 1st respondent averred that since he needed the money urgently, he decided to sub-divide the mother parcel of land into two, and sold one of the resultant plots measuring 1 acre to a third party. The 1st respondent contended that he has never received any payment from the appellant and her husband for purchase of the suit property.
 5. James Kanja Kabuchi (2nd defendant) filed a replying affidavit dated 15th August 1991. He deponed that he was the registered proprietor of the mother Parcel of Land No. 640, and that he did not consent to the appellant entering the suit property in 1965, since at that time he was still a minor. He averred that upon attaining the age of majority, he sub-divided the mother parcel of land into two, sold 1 acre of the property, and remained with the suit property. He contended that the sub-division was done openly, and that the appellant never objected to the same. He averred that the appellant's claim was legally untenable, as any agreement entered for the sale of the suit property was done when he was still a minor. He asserted that if indeed the appellant purchased three acres of the suit property, she would have pursued a claim against the 1-acre plot that was sold to a third party. She did not.
 6. The appellant filed a supplementary affidavit dated 2nd September 1991 in rebuttal. She averred that she entered the suit property with her husband, and that he died in 1971, and was buried on the suit property. She reiterated that they paid full purchase price of Kshs.1350.00 to the 1st respondent for the three acres. They took possession immediately. She asserted that since no Land Control Board consent was obtained at the time of purchase, her possession of the suit property since 1965 was adverse to that of the 1st respondent and James Kanja Kabuchi (2nd defendant).
 7. The appellant denied the assertion that the 1st respondent offered to sell the suit property to her for Kshs.120,000. She averred that 1st respondent was a necessary party to the suit as he was the one involved in the dealings with respect to the suit property. She asserted that the sub-division of the suit property was done without her knowledge, and that she subsequently registered a caution against the title of the suit property to prevent any further dealings.
 8. During the pendency of the suit before the superior court, the 2nd defendant caused the suit property (Kiine/Kiangai/1643) to be sub-divided into two: Kiine/Kiangai/2345 and 2346. He sold the resultant plots to the 2nd and 3rd respondents respectively. Consequently, the 2nd and 3rd respondents were added as parties to the suit by an order of the court issued on 20th June 2002. The 2nd respondent claimed to be an innocent purchaser for value without notice having bought Parcel Number 2345 lawfully from the 2nd defendant, devoid of any restrictions, and that his rights over the said parcel was indefeasible and inalienable. The 3rd respondent despite being served did not participate in the proceedings.



9. The case was heard by way of viva voce evidence. It was the appellant's testimony that her late husband bought the mother Parcel of Land No. Kiine/Kiangai/640, measuring 3 acres from the 1st respondent in 1965, for Kshs.450.00 per acre, and paid a total purchase price of Kshs.1,350.00. She stated that they took possession of the suit property in 1966, and that she has lived on the property since then to date. She averred that when they bought the land, it was just a bush. She has extensively developed the suit property. She testified that in 1991, she learnt that the 1st respondent and his son had caused the mother Parcel of Land Kiine/Kiangai/640 to be sub-divided into Kiine/Kiangai/1643 (2 acres) and 1644 (1 acre), and sold Parcel Number 1644 to a third party, which prompted her to lodge the claim before the superior court.
10. The appellant testified that she registered a caution against the title in respect of L.R No. Kiine/Kiangai/1643 (suit property), which she occupied, but somehow during the pendency of the suit, in 2001, the 2nd defendant sub-divided the suit property further into two plots which he sold to the 2nd and 3rd respondents. The appellant urged that her claim was with respect to the suit property, measuring two acres, which she has been in continuous and uninterrupted possession thereof. Upon cross-examination, the appellant stated that the property was registered in the name of 1st respondent's son, James Kanja Kibuchi, but that since he was a minor, the sale agreement, which was oral, was entered into between her husband and the 1st respondent.
11. PW2, Peter Kinyua Maina, told the court that he lives in the same neighbourhood as the appellant, and that the appellant has resided on the property since 1966. He stated that the appellant's husband died and was buried on the suit property. PW3, Peter Maina, is the appellant's son. He told the court that he was born on the suit property in 1970, and has lived there all his life. He stated that he has constructed his home on the suit property.
12. The 1st respondent testified as DW1. It was his evidence that the mother parcel of land number 640 was registered in his son's name, James Kanja Kabuchi (2nd defendant) before he was born. He explained that he did so because the law at the time did not allow one to be registered as owner of two parcels of land during the land demarcation period, and that he was already a registered owner of a different parcel of land.
13. The 1st respondent testified that he entered into an agreement for the sale of the said property with the appellant's late husband, and that the appellant and her husband took possession of the property and started utilizing the same. He stated that the suit property could not be transferred to the appellant and her husband at the time, as the registered owner (2nd defendant) was a minor. The 1st respondent testified that the appellant's late husband died before settling the purchase consideration with respect to the suit property.
14. It was his further testimony that he tried to get the plaintiff to pay the balance of the purchase price to no avail. He stated that the appellant has been in occupation of the suit property from 1968 to date, despite not paying him the purchase price. He admitted that the appellant's husband died in 1970 and was buried on the suit property. He testified that he allowed his son, the 2nd defendant, to sub-divide the mother parcel, and sell one acre of the property to a third party in 1990. He however stated that he was not aware if his son had sold the remainder of the suit property to the 2nd and 3rd respondents.
15. DW2, Joshat Kamuri Rwario, is a brother to the 1st respondent.
He testified that the appellant and her late husband entered the suit property with intention of buying it, but that her husband died before he could pay the purchase price. It was his testimony that in 1986, the 1st respondent extended an offer to the appellant to purchase the suit property for Kshs.120,000.00, but that the appellant was unable to pay the amount.



16. The 3rd respondent, James Maina Muthi (DW3), told the Court that he entered into a written sale agreement with the 2nd defendant on 29th August 2000, for sale of L.R. Kiine/Kanga/1643 (suit property), for a consideration of Kshs.1 million. He averred that he paid full price and was issued a title to the said property. He stated that he sub-divided the suit property into two equal plots; Kiine/Kiangai/2345 and 2346.
17. Upon cross-examination, the 3rd respondent stated that when he purchased the suit property from the 2nd defendant, he discovered that the appellant lived on the said property, and had constructed homes and cultivated crops. He testified that he was not aware that prior to the purchase, the appellant had sent a letter to his wife, informing her that the suit property was subject of an ongoing court case. He only came to know about the said letter during the trial. It was his testimony that at the time of transfer, no restrictions had been registered against the title of the suit property.
18. DW4, Elizabeth Wambui Maina, the wife to the 3rd respondent, gave a similar account of events as the 3rd respondent. Upon cross-examination, it was her evidence that they visited the suit property prior to purchasing it, and that when they inquired about the developments thereon, the 2nd defendant informed them that there were licensees who lived on the suit property, but that they would vacate the premises upon conclusion of the transfer process.
19. After hearing the parties, Waithaka, J. found that the case against the 2nd defendant (James Kanja Kibuchi) had abated, as he had died on 29th March 2009. He had not been substituted within the one-year period stipulated by the law. The learned Judge found that the plaintiff's claim of adverse possession was unsustainable as against the 1st to 3rd respondents, as they were not the registered proprietors of the suit property.
20. Aggrieved by this decision, the appellant proffered four (4) grounds of appeal before this Court. In summary, the appellant faulted the learned Judge for finding that her claim of adverse possession could not be sustained as against the 2nd and 3rd respondents, who were the registered owners of LR No. Kiine/Kiangai/2345 and 2346 respectively, at the time the case was heard before the superior court. She was aggrieved that the learned Judge found that her claim of adverse possession had not been established on a balance of probabilities. She took issue with the fact that the learned Judge failed to acknowledge that, at the very least, she was entitled to compensation for the developments she carried out on the suit property. As such, the appellant invited us to allow the appeal, set aside the decision of the superior court, and substitute it with an order of this Court vesting land Parcels No. Kiine/Kiangai/2345 and 2346 her, having acquired title by adverse possession.
21. The appeal was canvassed by way of written submissions. Mr. Muchira learned counsel for the appellant faulted the learned Judge for finding that the appellant's claim survived against the 1st, 2nd and 3rd respondents, and in the same breath, holding that her claim against the said respondents was unsustainable as they were not the registered proprietors of the suit property. Counsel submitted that the 2nd and 3rd respondents were duly joined as parties to the suit by an order of the court, by virtue of the fact that they were the current registered owners of the suit properties, having purchased the same from the original owner, the 2nd defendant. He submitted that when the 2nd defendant died, he was not the registered owner of the suit property as he had sub-divided the suit property, and transferred the same to the 2nd and 3rd respondents. Counsel pointed out that the appellant availed copies of the register with respect to the suit property which confirmed the said transactions. He maintained that the appellant's claim for adverse possession was therefore sustained as against the 2nd and 3rd respondents.
22. Counsel for the appellant further submitted that it was not contested that the appellant entered the suit property in 1965, and is still in occupation to date, and that she has carried out extensive developments



- thereon. Counsel urged that it was inconceivable that the 1st respondent would allow the appellant to occupy the suit property, and even bury her late husband on the said property, without having paid any amount of the purchase consideration as alleged. He urged that time started running in 1965, when the appellant took possession of the suit property.
23. Counsel for the appellant faulted the learned Judge for failing to determine the appellant's claim of adverse possession, as against the title held by the 2nd and 3rd respondents, even though she found that the said respondents had acquired their portions of the suit property irregularly. He was of the view that a mere change of ownership of land, occupied by another under adverse possession, did not interrupt such a person's adverse possession. It was his submission that the appellant tendered a valuation report, which established that the developments she had carried out on the suit property were valued at Kshs.3,150,000, and that the 2nd and 3rd respondents would benefit from unjust enrichment, in the event their titles to the suit property were to be upheld.
24. In rebuttal, Mr. Wachira learned counsel for the 1st respondent, submitted that a claim of adverse possession must be made against the registered owner of the land, and as such, the claim against the 1st respondent was misconceived as he has never held title to the suit property. It was counsel's submission that in Kerugoya SRM Civil Case No. 28 of 2001, vide an application lodged by the appellant, the said court nullified the sub-division of the suit property, and transfer of resultant plots to the 2nd and 3rd respondents, by a ruling delivered on 29th November 2002. He was of the view that their titles having been cancelled by an order of the court, the appellant's claim for adverse possession against 2nd and 3rd respondents was unsustainable. Counsel urged that since the appellant's claim was pegged on the fact that her husband purchased the suit property from the 1st respondent, she could not assert that she had obtained rights to the suit property by way of adverse possession. He stated that the appellant did not advance any claim for compensation in her pleadings before the superior court. Counsel invited us to dismiss the appeal for lack of merit.
25. Counsel for the 2nd respondent, Mr. Kahiga, on his part, submitted that the alleged agreement for sale of the suit property, between the appellant and the 1st respondent, was invalid for reasons that the 1st respondent was not the registered owner of the suit property. It was his submission that since the 2nd defendant, who was the registered owner of the suit property, was a minor at the time the appellant entered the suit property, the appellant's occupation of the suit property was with the permission of the 1st respondent, and that it only became adverse in 1985, when the 2nd defendant attained the age of maturity. Counsel urged that the appellant's claim before the superior court, having been lodged in 1991, was pre-mature, as only six years had lapsed from 1985. Mr. Kahiga reiterated that the 2nd respondent was a bona fide purchaser for value without notice of any fraud, and that he held a clean title to Plots No. Kiine/Kiangia/2345 and 2346.
26. The 3rd respondent did not participate in this appeal despite being duly served with the hearing notice.
27. This being a first appeal, our duty was well stated in *Abok James Odera T/A A.J. Odera & Associates v. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where this Court held thus:
- “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-analyze 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.”
28. Guided by the foregoing principles, grounds of appeal, as well as the parties' submissions, we find that the issues arising for our determination are:



- i. Whether the appellant's claim of adverse possession, with respect to the suit property, was sustainable against the 1st, 2nd, and 3rd respondents;
 - ii. whether the appellant sufficiently established her claim of adverse possession; and
 - iii. what orders are to issue in respect of the claim lodged by the appellant.
1. From the evidence adduced before the trial court, the uncontroverted facts were that the appellant's late husband purchased the mother parcel of land i.e. Plot No. Kiine/Kiangai/640, measuring 3 acres, from the 1st respondent in 1965. The appellant testified that the agreement was oral. The 1st respondent confirmed in evidence that he indeed entered into the said agreement with the appellant's late husband. The appellant's late husband paid the agreed purchase price of Kshs.1,350.00 (Kshs.450 per acre) to the 1st respondent, after which they took possession of the suit property in 1966. Although the 1st respondent claimed that the appellant's late husband did not pay the full purchase consideration, what is common ground is that the 1st respondent allowed the appellant's late husband and his family to take possession of the suit parcel of land. When the appellant's husband died in 1970, he was buried in the suit parcel of land.
30. What is also not in dispute is that since the death of her husband, the appellant and the members of her family have been in occupation of at least two acres of the suit parcel of land from 1966 to date. They have undertaken extensive developments on the suit parcel of land without hindrance or objection from the 1st respondent, or when he was alive, the son of the 1st respondent who was the 2nd defendant in the suit before the trial court.
 31. From the 1st respondent's testimony, it was clear that the suit parcel of land was owned by the 1st respondent. However, due to the conditions that then prevailed that barred a person who was already registered as the owner of another parcel of land after the adjudication and consolidation process within the same adjudication area, the 1st respondent decided to register the suit property in the name of his minor son. Again, what is without doubt is that it was established to the required standard of proof that the 1st respondent was the beneficial owner of the suit parcel of land. His deceased son did not have legal capacity at the time to be registered as the owner of the suit parcel of land unless a trust was created in his name.
 32. It was uncontested evidence that sometime in 1986, when the 1st respondent's late son attained the age of majority, the 1st respondent demanded from appellant a re-negotiation of what he claimed was the unpaid purchase consideration. The renegotiation resulted in a stalemate as a result of which the 1st respondent and his son (the registered owner) caused the suit parcel of land to be subdivided into two portions measuring respectively, two acres and one acre. The one acre was sold to a third party while the remaining two acres was left in the appellant's possession. This act by the 1st respondent prompted the appellant to file present suit in 1991.
 33. Again, it was instructive that the 1st respondent made no effort to secure the eviction of the appellant and members of her family from the suit parcel of land. During the pendency of this suit- to date, the appellant is still in possession of the suit parcel of land.
 34. In respect to the first issue, we are required to determine whether from the above facts, the appellant established that she had acquired title to the suit parcel of land by adverse possession.
 35. Did the appellant sufficiently prove that she was entitled to ownership of the suit property by adverse possession? Adverse possession entails possession which is inconsistent with, and in denial of the title



of the legal owner of the property in question. The elements required to be established for one to succeed in a claim for adverse possession were aptly stated by this Court in *Kim Pavey & 2 Others v. Loise Wambui Njoroge & Another* [2011] eKLR, where the Court cited with approval the case of *Wambugu v. Njuguna* (1983) KLR 173, as follows:

“In order to acquire by Statute of Limitation title to land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it or having discontinued his possession of it. Dispossession of the proprietor that defeats his action are acts which are consistent with his enjoyment of the soil for the purpose of which he intends to use it for a continuous 12 years. The Limitation of Actions on possession contemplates two concepts; dispossession and discontinuous of possession. The proper way of assessing proof of title is 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 he has been in possession for the requisite number of years.”

36. The thrust of the respondents’ opposition to the appeal is that the appellant’s claim for adverse possession is unsustainable since the 1st respondent was not, at the material time, the registered owner of the suit property. Time could not therefore run against him. This is the position that the trial court took when dismissing the appellant’s suit.
37. Our re-evaluation of the evidence, however, leads us, with due respect, to disagree with finding made by the trial court. The uncontroverted evidence which was conceded even by the 1st respondent himself is that he was the real and the beneficial owner of the suit parcel of land. At the time the suit property was sold to the appellant’s husband, it was registered in the name of the 1st respondent’s son. Being a toddler, the son had no legal capacity to own property. Indeed, according to the appellant, the excuse the 1st respondent gave when he was asked why he was delaying in transferring the suit property to the appellant, was that he was at the time waiting for his son to reach the age of majority so that he could transfer the suit parcel of land to the appellant. In the fullness of time, it became apparent that the 1st respondent had reneged on his promise.
38. We therefore have no difficulty in holding that time ran against the title held by the 1st respondent as the real and the beneficial owner of the suit property. Time, for the purposes of the appellant’s claim for adverse possession, started running against the 1st respondent in 1966. By the time the appellant filed the suit in 1991, she had been in continuous and uninterrupted possession of the portion of the suit parcel of land measuring two acres for a period of twenty-five years.
39. The evidence adduced before the trial court indeed established to the required standard of proof on a balance of probabilities that the appellant and her family occupied the suit parcel of land without hindrance from the 1st respondent and members of his family for twenty years before the 1st respondent purported to renege on his undertaking to transfer the suit property to the appellant upon his son (James Kanja Kabuchi) attaining the age of majority.
40. In the premises therefore, we hold that the appellant established her claim for adverse possession for the two-acre portion of the suit parcel of land that she is currently occupying with members of her family.
41. The appeal has merit and is hereby allowed as result of which the judgment of the trial court dismissing the appellant’s suit is set aside and substituted by a judgment of this Court declaring the appellant to be the lawful owner of the parcels of land now registered as Land Reference No. Kiine/Kiangai/2345 and 2346 which were unlawfully transferred to the 2nd and 3rd respondents. The registration of the 2nd and 3rd respondents as the respective owners of the above parcels of land is ordered cancelled and in their place the appellant shall be registered as the owner thereof.



42. The appellant shall have the costs of the suit both before the trial court and before this Court. The costs shall be paid by the 1st and 2nd respondents, the 3rd respondent having not participated in this appeal.

43. It is so ordered.

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

