



REPUBLIC OF KENYA



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**Baaru v Kanyora & another (Civil Appeal 135 of 2019)
[2024] KECA 1389 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1389 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 135 OF 2019
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
OCTOBER 11, 2024**

BETWEEN

ANN WAMUYU BAARU APPELLANT

AND

TERESIA WANGARE KANYORA 1ST RESPONDENT

SOLOMON KANYORA NGATIA 2ND RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Nyeri (L.N. Waitbaka, J.) dated 18th May 2017 in ELC Case No. 593 of 2014)

JUDGMENT

1. By an Originating Summons dated November 29, 2001 and taken out by Ann Wamuyu Baaru, the appellant against the respondents, the appellant sought determination of the following questions;
 - a. Whether she had acquired land parcel Magutu/Marigu (“hereinafter referred to as the suit property”) by adverse possession;
 - b. Subject to the outcome of (a) above whether the land Registrar should be ordered to rectify the register in respect of the suit property to reflect her as the registered proprietor of the suit property;
 - c. Whether the respondent should be compelled to meet the costs of the suit?
2. The Originating Summons was supported by an affidavit sworn by the appellant on 29th November 2001, where she deponed that she is the daughter of Githinji Maina, now deceased; that Githinji Maina, his wife, Joan Wanjugu Githinji and herself entered and occupied the suit property on or around 1959; that at the time they entered the suit property, it was registered in the name of Kanyora s/o Ngatia; that their entry and occupation of the suit property was not permitted by the registered owner; that



- they enjoyed peaceful and exclusive use of the suit property from the time they took possession of it on or about 1959; that they effected developments on the suit property (put up a homestead on the suit property and planted crops, both cash and food crops thereon); and that their occupation of the suit property had become adverse to that of the registered proprietor of the suit property as early as 1971.
3. On his part Cornelius Kanyora Ngatia alias Kanyora s/o Ngatia (now deceased) in reply and opposition of the Originating Summons deposed that; the appellant is not a daughter of Githinji Maina; he allowed Githinji and his wife Joan Wanjugu Githinji, the appellants' purported parents to occupy the suit property as licensees; the appellant never lived in the suit property during the lifetime of her purported parents; only Githinji Maina's wife was secretly buried in the suit property by the appellant's husband, Baaru Ngatia; he is a stranger to the averments that the appellant and his purported parents had lived in the suit property exclusively and without interruption by anybody; the homestead and crops found in the suit property belonged to his father; the purported parents of the appellant were merely allowed to take care of the suit property and the developments thereon; neither the appellant nor her purported parents acquired title to the suit property by adverse possession.
 4. Cornelius Kanyora Ngatia, alias Kanyora s/o Ngatia, the defendant at the trial court passed on during the pendency of the suit and was substituted with the administrators of his estate, Teresia Wangare Kanyora and Solomon Ngatia Kanyora, the respondents herein through orders made on 14th May, 2010.
 5. The appellant, testified before the trial court as PW1 and stated that the suit property is hers; that she has lived therein since 1959; that her purported parents adopted her as their child because they had no children of their own; that they enjoyed peaceful use and possession of the suit property and that her purported parents were buried in the suit property when they passed on.
 6. In cross examination, the appellant denied being an imposter and stated that she had been living in the suit property since 1964; she denied having illegally buried her purported parents in the suit property and stated that the respondent(deceased) only came to the suit property after she filed the suit herein. She claimed that she still lives in the suit property, although other evidence showed that she lives in Karatina town.
 7. PW2, Julius Kamau Joshua Karuguthi, testified that he is a retired veterinary officer and a friend of the appellant's husband, Baaru. He corroborated the appellant's testimony that she used to live in the suit property with her purported parents. He occasionally visited them in the suit property to treat their animals.
 8. PW3, Benson Muchina Baaru testified that he is a son of the appellant. He informed the court that he was born in 1968 and brought up in the suit property. He stated that they have made developments in the suit property.
 9. The respondents on the other hand called four witnesses. DW1 Dadson Ikuu Ngatia, testified that he was a brother of Cornelius Kanyora Ngatia alias Kanora s/o Ngatia (deceased), he informed the court that the original owner of the suit property was his father, Joseph Ngatia Mweri (deceased) who gave the suit property to Cornelius Kanyora Ngatia alias Kanyora s/o Ngatia (deceased).
 10. According to DW1, the appellant's purported parents were allowed to live in the suit property by Cornelius Kanyora Ngatia alias Kanyora s/o Ngatia (deceased's) father because they were assisting him pick the coffee he had planted thereon.



11. Based on the report of the Criminal Investigation Department (CID) contained in the letters from the CID dated 18th November, 2005 and 6th December, 2005 he stated that it is not true that the appellant has lived in the suit property since 1959 or at all.
12. He acknowledged that the appellant's purported parents lived in the suit property and that the appellant's purported mother was buried in the suit property. Concerning his claim that his father used to pick coffee from the suit property, he stated that he had no documents capable of proving that fact. He further stated that his father had put up a temporary grass thatched house in which he used to live.
13. DW2, James Mureithi Ngatia, testified that he is a brother to Cornelius Kanyora Ngatia alias Kanyora s/o Ngatia (now deceased) and DW1. Like DW1, he stated that the suit property was given to Cornelius Kanyora Ngatia alias Kanyora s/o Ngatia (deceased) by their father. He stated that the appellant's purported parents lived in the suit property with the permission of Cornelius Kanyora Ngatia alias Kanyora s/o Ngatia(deceased) who had requested them to assist him in taking care of the suit property.
14. DW3, Robert Muchemi Ngatia, a brother of Cornelius Kanyora Ngatia alias Kanyora s/o Ngatia (deceased) stated that Cornelius Kanyora Ngatia alias Kanyora s/o Ngatia (deceased) left Githinji as the caretaker of the land. He stated that the land was given to him by their father. The house in the suit property was built by their father. Like the other defence witnesses, he stated that the appellant has never lived in the suit property. He further stated that they occasionally visited the suit property to pick coffee. He stated that the appellant's purported father did not at any time claim the suit property. His father introduced the appellant's purported father as his caretaker.
15. DW4 Solomon Ngatia Kanyora, a son of Cornelius Kanyora Ngatia alias Kanyora s/o Ngatia (deceased) stated that Cornelius Kanyora Ngatia alias Kanyora s/o Ngatia (deceased) worked in the Ministry of Lands. After his father passed on, his mother and he were appointed as administrators of his estate. His father's estate includes the suit property. He relied on the affidavit by his father dated 29th March, 2005. During his father's lifetime, they occasionally visited the suit property. He stated that he has never seen the appellant but knew Joan Wanjugu. He could not remember when his father was registered as the proprietor of the suit property. He recalled visiting the property in 1991 to 1992.
16. He stated that they used to get reports from their aunt who lives in the adjacent parcel of land and is aware that the appellant never lived in the suit property. Githinji and Joan lived in the suit property. He is aware that Joan had lodged a caution in 1986.
17. Upon considering the evidence, the trial Judge held as follows:-
 - “ 39. Whilst I entertain no doubt that the plaintiff's occupation of the suit property had become adverse to the title held by the defendant's father, noting that the defendant is not sued as an administrator of the estate of his father, whose title to the suit property had been extinguished by her adverse possession of the suit property, and given that the plaintiff does not claim that the defendant holds the suit property in trust for her, I entertain serious doubt whether the plaintiff can sustain her claim against the title held by the defendant. I say so because as at the time the plaintiff brought the current claim against the defendant she had only been in adverse possession of the title held by the defendant for about 5 years.....
 42. Whilst the evidence on record shows that by the time the defendant got registered as the proprietor of the suit property in 1996, the plaintiff and her purported parents had become entitled to be registered as the proprietors



of the suit property by adverse possession, to find that the title held by the defendant had by extension been extinguished by the plaintiff's occupation of the suit property will not be factually correct. The true position in law is that the defendant holds the suit property in trust for the plaintiff who had become entitled to the suit property by adverse possession. However, since the plaintiff's claim is not based on trust, I will say no more about it.

43. The upshot of the foregoing is that the plaintiff's claim against the title held by the defendant in as far as is based on adverse possession is unsustainable. Consequently, I dismiss it but with no orders as to costs."

18. Aggrieved by the judgment of the trial court, the appellant appealed to this Court through the memorandum of appeal dated 14th June 2019 on grounds that the learned Judge erred in law and fact; by finding that the appellant cannot sustain a claim for adverse possession against the title held by the respondents despite finding that the appellant had satisfied the elements for adverse possession; when she disregarded the evidence on record and found that the trust can only be upheld if pleaded; that the change of ownership of the suit property stopped time from running under the statute of Limitation of Actions Act; and that the learned Judge failed to appreciate the submissions of the Learned Counsel for the appellant by finding in favour of the respondent herein.
19. When the appeal came up for hearing on a virtual platform, learned counsel Muchiri Wa Gathoni appeared for the appellant and highlighted the submissions dated 29th March 2023. Learned counsel Mr. Gathiga Mwangi appeared for the respondents and highlighted the submissions dated 8th May 2023.
20. With regards as to grounds 1 and 3, it was submitted that the learned Judge erred in law and in fact in finding that the appellant has a claim under adverse possession but cannot sustain it because time stopped running upon change of ownership in 1996. Counsel submitted that this finding was not supported by the law applicable and the evidence on record because it is trite law that in matters of adverse possession all a party needs to prove is that she has been living in the property for more than 12 years without permission of the registered owner and with no interruption from the registered proprietor of the suit property. Counsel relied on Samuel Kihamba -vs- Mary Mbaisi [2015]eKLR in support of that proposition.
21. Counsel further submitted that the appellant has proven her entitlement to the suit property with facts that she and her deceased parents had occupied the land since 1959 openly and without licence or permission from the registered proprietor and that after being adopted by her adoptive parents she had moved into the suit property in 1964, and that through her evidence she was able to show that she benefitted from the suit property from the cash crops planted on the suit property by her deceased parents and that the said interest passed to her upon her parents death.
22. It was further submitted that despite the respondents carrying out succession over the suit property and a grant having been confirmed in 2010 they have never entered the land or interfered with the occupation of the appellant and that they did not even enter the land to claim ownership when the owner of the property was changed in 1996 and that in fact the parties would never have met had it not been for the institution of this claim in 2001. Counsel submitted that it is clear that the appellant has been in exclusive and uninterrupted occupation of the said suit property.
23. It was further submitted that the appellant indeed had a recognizable right to the suit property having lived on the land independently and with her parents for more than 12 years since 1964 with no interruption from the registered proprietors. Counsel thus submitted that based on the foregoing the



learned Judge's findings that time stopped running once there was a change of ownership had no basis in law or facts. Reliance was placed on *Githu v Ndeete* [1984] KLR, *Titus Mutuku Kasuve v Mwaani Investments Ltd & 4 others* [2004] eKLR, and *Karuntimi Raiji v M'itunga* [2013] eKLR.

24. Further, it was submitted that it matters not if the respondents changed ownership five (5) years prior to the appellant filing her claim because the point was that by the time they were changing ownership the appellant had already acquired adverse possession of the suit property since the right had accrued during the lifetime of Kanyora Ngatia and Cornelius Kanyora Ngatia and that the 2nd respondent acquired the said liability upon inheriting the property.
25. It was further submitted that an adverse possession claim is brought against the registered proprietor of a suit property and that the only time the appellant would have sued the late Cornelius Kanyora as an administrator of his father, Kanyora Ngatia was if the latter was still registered as the owner. Further that a party claims adverse possession against a suit property and not against the registered proprietor of the land. Thus, counsel submitted that the appellant's claim to the land runs against the title and not necessarily against the current holder of the title and as such the right continues to accrue despite countless change of owners.
26. On ground 2, the learned Judge was faulted for asserting that trust can only be upheld if pleaded. Counsel submitted that courts have held that a trust can never be implied unless it is of absolute necessity and that the courts will not imply a trust save in order to give effect to the intentions of the parties, thus that there are strong reasons in this case to imply a trust.
27. Counsel emphasised that the appellant provided evidence showing that she was raised on the suit property and also proved that despite the suit property being registered in another person's name no one tried to evict her or her parents much less from using the land. Thus, that even though the appellant did not explicitly plead the issue of trust she provided a vital overriding interest. And that living on the land for more than 30 years falls within the category of a matter of absolute necessity and that the same is an issue capable of influencing the Court to imply that the 2nd respondent and all other previous owners were registered as proprietors to the suit property in trust for the appellant.
28. Further, it was submitted that section 37 of the Limitations of Actions Act was instructive in this matter and that it is clear that the 2nd respondent automatically holds the title in trust for the appellant as she has proven that she has acquired prescriptive rights over the suit property by adverse possession. Additionally, that the appellant cannot be denied her rightfully and legally obtained right to the suit property and we were urged to imply the existence of a trust and declare that the registered proprietor of the suit property holds the title to the land in trust for the appellant.
29. Finally on ground 4 it was submitted that the learned Judge failed to appreciate the appellant's submissions which gave a clear analysis of the case and that the court failed to appreciate the carefully explained proof showing that the appellants case had met the threshold for a claim under adverse possession. It was submitted that the source of dispute was a claim of adverse possession and that the appellant has clearly proven her right over the suit property subject to section 38 of the *Limitation of Actions Act*. We are urged to declare that this issue falls within the category of matters of absolute necessity on matters that can influence this Court to imply a trust and thus declare that the registered owner holds the title to the suit property in trust for the appellant. We are urged to allow the appeal as prayed.
30. The respondents maintained that the appellant's evidence adduced in court could not sustain a claim for adverse possession because as she stated in court, her deceased husband had built her a stone house



at the shopping centre in Karatina which clearly shows that the appellant does not live or reside in the suit property.

31. Further it was submitted that the learned Judge correctly upheld the law as stated under Order 2 Rule 10 which is couched in mandatory terms that the particulars of trust must be pleaded. Counsel relied on *Gichuki v Gichuki* [1982] KRL and *Mbothu & 8 others v Wairimu & 11 others* [1986] KRL. The respondent reiterated the findings by the trial court, and urged us to dismiss this appeal as unmerited.
32. This being a first appeal, and as has been reiterated in several decisions of this Court, it is this Court's primary duty to re-evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as mandated by rule 31(1)(a) of the Court of Appeal Rules. This duty has been reiterated in *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Company Advocates* [2013] eKLR.
33. We have re-evaluated and reconsidered the record before us in its entirety along with the rival submissions by learned counsel. In our view, the only issue that falls for determination before us is whether, based on the evidence adduced before the trial court, the learned Judge erred in finding that the appellant had failed to prove that she was entitled to the suit property by way of adverse possession.
34. What constitutes 'adverse possession' was described in the case of *Jandu v Kirpal & Another* [1975] EA 225 in which the court, while relying on the case of *Bejoy Chundra v Kally Posonno* [1878] 4 Cal 327 at p 329, held that:

“By adverse possession I understand to be meant possession by a person holding the land on his own behalf, [or on behalf] of some person other than the true owner, the true owner having immediate possession. If by this adverse possession the statute is set running, and it continues to run for twelve years, then the title of the owner is extinguished and the person in possession becomes the owner.”

35. This Court in *Mtana Lewa v Kahindi Ngala Mwamgandi* [2005] eKLR in almost similar parlance explained that:

“Adverse Possession is essentially a situation where a person takes possession of land, 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 certain period, in Kenya 12 years.”

36. In *Alfred Welimo v Mulaa Sumba Barasa*, CA No 186 of 2011, this Court went a step further and emphasized that:

“It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it; for as Robert Megarry aptly observed in his *Megarry's manual of the Law of Property*, 5th ed. page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So, the mere fact that the appellant abandoned possession of the suit property and went to live at Ndalu scheme by and of itself does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with *animus possidendi* (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land...”



37. It is important to reiterate that possession per se, even over a long period of time, does not ipso facto confer title by way of adverse possession to the person claiming adverse possession. The physical possession must be exclusive and hostile to the rights of the registered owner. It is imperative, therefore, that the possessor remains in occupation without the permission of the registered owner. See this Court's decision in *Ndolo v Kitutu & 8 others* (Civil Appeal 394 of 2018) [2022] KECA 1289 (KLR).
38. It is in that context that the appellant's claim must be considered.
- Having reconsidered the entire record, the rival submissions of counsel and the law, we are of the view that this appeal stands or falls on the question as to whether the appellant's parents' possession of the suit property was with permission of the registered owner, or the same was permissive. If we find the possession, or occupation to have been with permission of the registered owners, then it matters not how long the appellant and her late parents had lived on the said property. The said possession cannot have been adverse to the rights of the registered owners.
39. The appellant's claim is that her deceased "adoptive parents" were in occupation of the suit property since 1959 and upon their deaths the appellant continued in occupation thereof without interference, and was in the same position when she sued the respondents in 2001. She claims that she is entitled to be registered as owner of the suit property, which was initially registered in the name of Kanyora S/o Ngatia and subsequently in the names of Cornelius Kanyora Ngatia (deceased), and finds statutory expression in sections 7, 13, 17 and 38 of the *Limitation of Actions Act*.
40. The burden was on the appellant to prove on a balance of probabilities that she had been in adverse possession of the suit property (See *John Kinyua v Simon Gitura CA. No. 265 of 2005*). Possession is a question of fact depending on the circumstances of each case. (See *Wali's Cyaton Bay Holiday Camp Ltd v Shell-Mex & BP Ltd* [1975] QB 94). The appellant was also obliged to prove not mere possession of the suit property, but possession that was nec vi, nec clam, nec precario, that is to say, peaceful, open, and continuous. (See *Kimani Ruchine v Swift, Rutherfords Co. Ltd.* [1980] KLR 1500 and *Karnataka Board of Wakf v. Governemnt of India & Others* [2004] 10 SCC 779).
41. The appellant's contention is that her adoptive parents Githinji Maina and Joan Wanjugu Githinji (deceased) entered the suit property on or about 1959 but she started living on the suit property in 1964 when she was adopted. The question that begs an answer is, if indeed the appellant found her deceased adoptive parents living on the said land, how did she know whether or not they were there with permission of the registered owners?
42. On their part, the respondents maintained that Githinji Maina (deceased) was allowed to stay on the suit property as a caretaker to the property by Cornelius Kanyora Ngatia alias Kanyora s/o Ngatia (deceased). As is clear from the above authorities, it does not suffice to simply aver that the claimant was in possession for more than 12 years. It does not matter either that the appellant's adoptive parents were buried on the suit property. It is not uncommon for registered owners of land in the rural areas to give grave sites for the repose of their employees or relatives who have nowhere else to be buried.
43. Where the claimant's entry into the land was as a licensee, there must be evidence of the point at which the licence was terminated and the continued possession became adverse to that of the owner.
- There was no such evidence. There are two conflicting versions by the parties on this issue. On one hand, the appellant claims that her parents entered the land in 1959. On the other hand, the respondents claim the appellant's parents came into the suit property with the permission of Cornelius Kanyora Ngatia alias Kanyora S/o Ngatia (deceased's) father because they were assisting him pick the coffee he had planted thereon.



44. The onus was on the appellant to prove on a balance of probabilities that she and her parents moved to the suit property without permission of the registered owners.
45. Quite apart from what we have stated above, the totality of the evidence on record does not prove the kind of notorious, open, exclusive, and continuous possession of the suit property hostile to Cornelius's title that would be required to satisfy a claim for adverse possession. The appellant has laid great emphasis on the fact that Cornelius 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. As this Court stated in *Peter Njau Kairu v Stephen Ndung'u Njenga & Another C.A. 57 of 1997*, CA such evidence must be stringent and straightforward because a property owner should be deprived of his title only in the clearest of cases.
46. We also find it rather curious that the appellant's adoptive parents never laid claim over the suit property during their lifetime, and the appellant also raised the claim about 5 years after the last of her adoptive parent was dead and buried, and after the land had already been transferred to the late Cornelius Kanyora. Could they have failed to claim adverse possession because they knew they were occupying the land with permission of the registered owner? The appellant's occupation of the suit property was pegged to that of her late adoptive parents because they are the ones who invited her to live with them on the said land. If their occupation of the suit property was with permission of the registered owners, then the appellant's occupation could only become adverse upon the death of the said parents. That being so, time could only start running in her favour after the death of her last parent, which was less than 12 years before she filed her suit.
47. As found by the learned Judge, the fact that the appellant and her late adoptive parents had lived on the suit property for over 12 years was proved, but in our view, the circumstances surrounding the said possession were not clear and the appellant was, therefore, unable to prove her claim based on adverse possession.
48. Regarding the appellant's complaint that the learned Judge erred by failing to determine whether the respondents' title to the suit property had been extinguished and whether the respondents held the suit property in trust to the appellant, it is trite that a trial court is obliged to determine all the issues that have been pleaded and framed before it for determination. (See *Mohammed Eltaff & 3 Others v Dream Camp Kenya Ltd, CA No. 318 of 2000*). The issue of trust was never pleaded and it was not one of the points framed before the trial court for determination. Indeed, the issue of trust was mentioned by the learned Judge in her judgment and she stated, and rightly so, in our view that the issue had not been pleaded and she would not therefore, make any findings on it.
49. Ultimately, we are satisfied that there is no basis upon which we can differ with the conclusion by the learned Judge. Accordingly, this appeal lacks merit and is dismissed with costs to the respondents. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 11TH DAY OF OCTOBER, 2024.

W. KARANJA

JUDGE OF APPEAL

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JAMILA MOHAMMED

JUDGE OF APPEAL



.....

A. O. MUCHELULE

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

