



REPUBLIC OF KENYA



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Mberia alias Ginson Kiragu Njagi v (Deceased) & another (Civil Appeal 204 of 2019) [2024] KECA 1415 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1415 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 204 OF 2019
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
OCTOBER 11, 2024**

BETWEEN

GINSON KIRAGU MBERIA ALIAS GINSON KIRAGU NJAGI APPELLANT

AND

**KARANI JOHN RIMERIA (SUED AS LEGAL REPRESENTATIVE OF
THE ESTATE OF RIMBERAIA KANYI ALIAS RIMBERIA KANYA
(DECEASED) 1ST RESPONDENT**

STANLEY BUNDI RIMBERIA 2ND RESPONDENT

(An appeal from the entire judgment and decree of the Environment and Land Court of Kenya at Chuka (P.M. Njoroge, J.) delivered on 29th May, 2019 in ELC Case No. 306 of 2017)

JUDGMENT

Background

1. Ginson Kiragu Mberia alias Ginson Kiragu Njagi (the appellant) approached the Environment and Land Court (ELC) claiming to have acquired title in respect of 3 acres or thereabouts of land parcel No Mwimbi/Murugi/180 (the suit property) under the *Limitation of Actions Act* by way of adverse possession. The suit property which measures about 10 acres was registered in the name of Stanley Bundi Rimberia (the 1st respondent.) The claim was raised in an Originating Summons dated 18th December, 2017 and amended on 12th June, 2018. It is the appellant's case that he has openly lived on the suit property since 1973 without any interruptions from the registered owner (Kanyi).

Karani John Rimberia (sued as legal representative of the Estate of Rimberia Kanyi (Kanyi) alias Rimberia Kanya (deceased)) is the 2nd respondent herein.



2. In supporting the claim, the appellant swore an affidavit on 18th December, 2017 averring that the suit property was initially registered in the name of Kanyi, who was a brother to the appellant's father, Njagi Mathew Kanyi (Njagi).
3. From the record, Njagi filed a suit in the High Court being HCCC No 30 of 1987 at Meru against his brother, Kanyi. The High Court (S.O. Oguk, Ag. J.) found that the registered owner, Kanyi was holding the suit property in trust for the family and consequently it was ordered that the suit property be sub-divided and 3 acres therefrom be transferred to Njagi.
4. That notwithstanding, the appellant averred that he had been in exclusive possession of 3 acres of the suit property and had caused substantial development on the suit property for a period of over 12 years. The registered owner of the suit property, Kanyi, died in 1988 and his sons, the respondents herein filed a Succession Cause being HC Succession Cause No 536 of 2009 at Meru in the matter of the Estate of their father, Kanyi. That upon confirmation of the grant, the respondents were registered as the proprietors of the suit property. The appellant filed summons for revocation of the grant which has been pending for hearing and determination in HC Succession Cause No 536 of 2009 at Meru.
5. The 1st respondent opposed the Originating Summons by filing a Statement of Defence dated 4th April, 2018 together with a written statement. He confirmed that the appellant was his cousin. His contention was that the suit was bad in law as he was not the registered owner and the issues raised were also raised and were pending in High Court Succession Cause No 536 of 2009 at Meru. The 1st respondent further contended that the appellant lacked locus standi to file the suit. Further, that the 1st respondent was not the legal representative of the registered owner of the suit property, Kanyi; that the judgment in HCCC No 30 of 1987 relied upon by the appellant was stale and unenforceable against the respondents or the Estate of Rumberia Kanyi. According to the respondents, the appellant was a trespasser who forcefully entered the suit property upon the demise of the registered owner.
6. On analysis of the evidence, the ELC held in part as follows:
 - “ 35. Adverse possession must be proved through cogent evidence. I find that the plaintiff has not proved that he is entitled to three (3) acres out of Land Parcel No Mwimbi/Murugi/180 by way of adverse possession.
 36. I issue judgment for the defendants against the plaintiff in the following terms:
 - a. This suit is hereby dismissed.
 - b. Any inhibition or restraining orders by way of injunction or any restriction that may have been placed against Land Parcel No Mwimbi/Murugi/180 forthwith.
 - c. The plaintiff and any persons acting at his behest or remaining on the suit land at his behest should vacate the suit land within three (3) months after delivery of this judgment AND should he not do so, he will be evicted from the suit land AND the Commanding Officer (OCS) Chogoria Police Station is directed and empowered to ensure compliance with this order.
 - d. Costs shall follow the event and are awarded to both defendants.”
7. Dissatisfied by that judgment and orders of the ELC, the appellant filed the instant appeal. He lodged a notice of appeal on 6th June, 2019 against the entire judgment. The appellant prays for an order setting



aside the judgment of the ELC and for an order that the suit property be declared his property by virtue of adverse possession. The memorandum of appeal dated 5th August, 2019 cites the following grounds of appeal, that the ELC erred in law and fact: in failing to evaluate the evidence on record and the law to find that a claim for adverse possession was merited upon admission by the respondent who testified in court; by failing to evaluate the law on adverse possession vis-a-vis the evidence adduced in court; by issuing orders of eviction against the appellant whereas the respondent had not filed any counterclaim or sought for such eviction orders by way of any pleadings; in failing to consider that the originating summons had been amended indicating that the defendants/respondents had been sued in their capacity as the legal representatives of the estate of Rimberia Kanyi – Deceased (Kanyi); and in determining the issue of implementation of the judgment of Meru High Court Civil Case No 30 of 1978, a matter which was not the issue before court and thus failed to determine the issue of adverse possession, which was the claim before the Court.

Submissions by Counsel

8. At the hearing of the appeal, the appellant was represented by learned counsel Ms. Linda Kiome who had filed written submissions, which she briefly orally highlighted. There was no appearance by counsel for the respondents, Messrs Mokua Obiria & Associates Advocates who had filed written submissions.
9. Ms. Kiome submitted that in cross-examination the respondents confirmed that the appellant had occupied and lived on the suit property for a long time. Counsel submitted that it was on record that the appellant took possession of the suit property upon the death of his father in 1989. Counsel further submitted that the appellant had been in occupation of 3 acres of the suit property while the rest of the family occupied the remainder of the suit property. Counsel submitted that the appellant had developed the 3- acre portion of the suit property.
10. Counsel submitted that there was a long-standing dispute between the families of the appellant and the respondents. Counsel asserted that there was no contention that the appellant was in actual possession and occupation of the suit property which fact was collaborated by the evidence of the respondents who informed the court that the appellant was utilizing about 7 acres of the suit property.
11. Counsel further submitted that the ELC erred in law and in fact by issuing orders of eviction against the appellant while the respondent had not sought orders of eviction. Counsel asserted that it is a principle of law that parties are generally confined to their pleadings and there was therefore no basis for the ELC to issue an eviction order, which was never pleaded in the defence.
12. Counsel further submitted that the ELC failed to consider that the originating summons had been amended indicating that the respondents had been sued in their capacity as the legal representative of the estate of Rimberia Kanyi alias Rimberia Kanya – Deceased (Kanyi). Counsel asserted that at the time of filing suit, the registered owner of the suit property was deceased. Counsel submitted that the respondents had filed an application seeking grant of the necessary letters to administer the property of their deceased father, Kanyi.
13. Counsel further submitted that the ELC erred in law and fact in determining the issue of implementation of the judgment of Meru High Court Civil Case No 30 of 1987 a matter that was not the issue before the court and thus failed to determine the issue of adverse possession. Counsel submitted that the ELC therefore had no jurisdiction to hold as it did. Counsel urged us to allow the appeal with costs and order that 3 acres of the suit property be declared the property of the appellant by virtue of adverse possession.



14. Counsel for the respondent submitted that they strenuously oppose the appeal for lack of merit. Counsel asserted that the appellant did not prove his case with respect to a claim for adverse possession to the required standard of proof.

Determination

15. This is a first appeal thus this Court is obligated to re-evaluate the evidence and the entire record and arrive at its own conclusion. Reliance is put on this court's decision in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR that:-

“... an appeal to this Court from a trial by the High Court is by way of retrial ... this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

16. Considering the foregoing highlight of the pleadings and evidence together with the impugned judgment, the main issue for determination in this appeal is whether the appellant is entitled to 3 acres of the suit property.

17. From the record the 1st respondent admits in his written statement, that the appellant is his cousin. On the other hand, the appellant has explained in his sworn affidavit in support of the summons that his father, Njagi and the respondents' father (Kanyi) were siblings. Thus, it is common ground that the appellant and the respondents are cousins.

18. The suit property was registered in the name of Kanyi as the 1st registered owner as evidenced by a copy of the green card. As at the time of filing the suit, the suit property was still in the name of Kanyi as per the copy of official search. The respondents denied the appellant's claim for reasons inter alia that they are not the registered owners of the suit property and have not been appointed as legal representatives of their father, Kanyi, the registered owner. The respondents confirm filing of HC Succession Cause No 536 of 2009 at Meru in respect of the Estate of their deceased father (Kanyi) but maintained that the Case had not been determined and was still pending hearing and no grant of letters of administration had been issued to them and the appellant's suit was therefore premature.

19. The appellant's occupation on the suit property is not in dispute. The 1st respondent in his statement and evidence on cross-examination confirmed that the appellant is in occupation of the suit property and stated in evidence as follows:

“DW I - the Meru Succession Cause is being led by me and John Karani. Kiragu, the plaintiff, entered the land after my father died 1989. He invaded the land thereafter. He came with a court order and occupied nearly 7 acres and left a small portion for the others. He is cheating when he says that he is only using 3 acres. He is lying. He is using more than 7 acres.

...”

20. The appellant claimed to have been born on the suit property in the year 1948 and has lived thereon since then. On the other hand, the 1st respondent contended that the appellant moved into the suit property in 1989 when the registered owner, Kanyi died in 1988. In the circumstances, at the time of filing the Originating Summons in 2017, the appellant had lived on the suit property for a period of over 12 years.



21. The appellant narrated and produced a copy of a judgment and decree indicating that his father previously sued his sibling, the respondent's father, over the suit property in High Court case No 30 of 1987 at Meru.

The nature of the claim as per the said judgment was that the respondents' father (Kanyi) had registered the suit property solely in his name leaving out the appellant's father (Njagi) yet the land was their family land. Judgment was entered on 1^{0th} October, 1988 in favour of the appellant's father (Njagi) holding that the respondents' father (Kanyi) was registered as proprietor of the suit property holding in trust for the family and ordered for subdivision and transfer of 3 acres of the suit property to the appellant's father (Njagi). What is evident is that the appellant took possession and occupation of the 3 acres of the suit property.

22. From the record, the suit property was registered in the year 1966 in the name of the respondents' father (Kanyi) as the 1st registered owner. Both the family of the appellant and the respondents lived on the suit property and some members of their family were buried thereon. The respondents did not give any evidence regarding how the suit property came to be registered in their father's name. Taking into account that the appellant and the respondents are cousins and the history of the suit property as per the evidence of the parties and the judgment in HCCC No 30 of 1987, it is not in doubt that the suit property is the ancestral land of both parties although registered in the name of the respondents' father (Kanyi).
23. Although the judgment in HCC No 30 of 1987 at Meru cannot be implemented due to time bar, the declaration of existence of customary trust over the suit property against the registered owner of the suit property cannot be extinguished by time. The trust continues to exist and binds every registered proprietor of the suit property and/or his Estate until the land is shared among all those entitled to it under the said trust. Thus, despite the suit property being registered in the name of the deceased, the registration was subject to the customary trust in favour of the appellant's family in accordance with Section 28 of the *Registered Land Act* (repealed) and now Section 25 of the *Land Registration Act*.
24. Reliance is placed on the holding of the Supreme Court of Kenya in the case of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR at paragraph 52 of the decision that:-
- “... a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act.”
25. Further, in the case of *Mbui Mukangu v Gerald Mutwiri Mbui* [2004] eKLR this Court considered customary trust as:-
- “a concept of intergenerational equity where land is held by one generation for the benefit of succeeding generations.”
26. Having made a finding that the suit property is a family/ancestral land of both parties herein, the question for consideration is whether the appellant is entitled to 3 acres of the suit property by way of adverse possession? We are not short of judicial pronouncement on the matter that a claim for adverse possession cannot stand over family land. Entitlement to a family land is a right of each member of the family.



27. This Court in the case of *Samuel Kihamba v Mary Mbaisi* [2015] eKLR in a similar claim of adverse possession by close relatives held:-

“Could the doctrine of adverse possession apply against the parties to the suit before the learned Judge who were related by being mother and step-son? We think not. We ... must state that it would create havoc for families and the society of Kenya generally if the principle of adverse possession applied within families against close relatives.”

28. By parity of reasoning, we find that the appellant is entitled to 3 acres of the suit property by virtue of his entitlement to the same being family land.

29. In view of the foregoing, the appeal is allowed and the judgment and orders of the ELC are hereby set aside. The order that commends itself to us on costs is that each party will bear its own costs, the parties being close relatives.

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

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

