



Ndegwa v Njoroge (Legal representative of the Estate of Esther Wanjiru Njoroge) & 2 others (Civil Appeal 6 of 2019) [2024] KECA 1365 (KLR) (4 October 2024) (Judgment)

Neutral citation: [2024] KECA 1365 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 6 OF 2019
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
OCTOBER 4, 2024**

BETWEEN

WILLIE MWANGI NDEGWA APPELLANT

AND

**FRANCIS KAMAU NJOROGE (LEGAL REPRESENTATIVE OF THE ESTATE
OF ESTHER WANJIRU NJOROGE) 1ST RESPONDENT**

**FRANCIS KAMAU NJOROGE ALIAS FRANCIS KAMAU
IRUNGU 2ND RESPONDENT**

MUTARI NJOROGE 3RD RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court of Kenya at Murang'a (Kemei, J.) dated 8th November, 2018 in ELC Case No. 269 of 2017 (O.S.))

JUDGMENT

1. Esther Wanjiru Njoroge, moved the Environment and Land Court, by Originating Summons dated 21st May 2013, seeking orders that the respondents be registered as the absolute owners of land parcel number Loc.8/Theri/37 (suit property) by operation of the doctrine of adverse possession. The suit property was registered in the appellant's name, having acquired the property vide a confirmation of grant, with respect to the estate of Ndegwa Thuo Kinja alias Haron Ndegwa Thuo Kinja (deceased), in Murang'a Senior Principal Magistrate's Court Succession Cause No. 75 of 2011.
2. In support of the Originating Summons, the 1st respondent averred that she is in possession of the suit property, together with her four children, among them the 2nd and 3rd respondents. She deponed that together with her late husband, Njoroge Mutari, they took possession of the suit property in 1963, having purchased the same from Gakuru Mutari (also known as Ndegwa Thuo Kinja alias Haron Ndegwa Thuo Kinja). She averred that Gakuru Mutari died before transferring the suit property



- to them. She deponed that the late Gakuru Mutari's wife, Gladys Wanjiru Ndegwa, and his son Willie Mwangi Ndegwa (appellant), filed SPM Succession Cause No. 75 of 2011, with respect to the deceased's estate, subsequent to which the suit property was registered in the appellant's name.
3. The 1st respondent averred that the appellant could only have obtained the said title, as a trustee for the respondents' family, as the title to the suit property, in the name of Gakuru Mutari, had been long been extinguished by way of adverse possession, by the time Gakuru Mutari died in 1995. She averred that the appellant did not inform them when he and his mother petitioned the court with respect to Gakuru Mutari's estate, yet they were well aware that the respondents were in possession of the suit property. She asserted that the appellant has been threatening to evict them from the suit property. The 1st respondent urged the superior court to cancel the title issued to the appellant, and direct that the suit property be registered in the names of the respondents. Esther Wanjiru Njoroge died in the course of the trial, on 5th May 2015, and was substituted by the 2nd respondent, the legal representative of her estate.
 4. The appellant filed a replying affidavit dated 10th January 2014, in response to the originating summons. He deponed that it was true that he acquired the suit property on transmission vide Murang'a SPM Succession Cause No. 75 of 2011. According to the appellant, the respondents entered into the suit property on license granted by the original owner, Gakuru Mutari. He averred that a license in law remains as so, and cannot crystalize into a claim of adverse possession.
 5. He asserted that after he acquired ownership of the suit property, he revoked the said license and issued an eviction notice to the respondents on 15th August 2013. He deponed that he is the absolute registered owner of the suit property, and the fact that he has never been in occupation of the said property did not confer proprietary interest upon the respondents. He averred that the respondents have other properties that they can settle on upon eviction, and the fact the 1st respondent buried her husband on the suit property does not confer her proprietary interest with respect to the said property.
 6. The case was heard by way of viva voce evidence. The 2nd respondent (PW1) told the court that the original owner of the suit property, Ndegwa Thuo Kinja (alias Gakuru Mutari), was a brother to their late father, Njoroge Mutari. It was his evidence that Gakuru Mutari sold the suit property to his late father, after which they took possession of the same in 1963, and have since been in occupation. He stated that they have constructed homes, cultivated subsistence crops, and buried their parents on the suit property.
 7. PW2, Wilson Njuguna Kungu, adopted his statement dated 20th January 2018, as his evidence in chief. In the statement, PW2 stated that he has grown up with the respondents, and that they have been the sole occupants of the suit property. He averred that the appellant's father, Gakuru Mutari, entered into an informal agreement with his brother, Njoroge Mutari, where he agreed to sell the suit property for a consideration of Kshs.1,200. Upon cross-examination, PW2 stated that both families of the appellant and respondents were well known to him, and that he was present when the appellant's father sold the suit property to the respondents' father in 1963.
 8. The appellant testified as DW1. In his witness statement dated 8th January 2014, the appellant averred that his father Ndegwa Thuo Kinja (Gakuru Mutari) was the registered owner of the suit property until his death on 29th August 1995. The appellant stated that his father never sold the land to the 2nd respondent's father, Njoroge Mutari, as alleged. It was his evidence that his late father allowed his brother, Njoroge Mutari, to settle with his family (the respondents) on the said property, since the land Njoroge Mutari had inherited from his father was sloppy and rocky. He averred that his late father and his uncle Njoroge had an agreement that Njoroge would not erect permanent structures on the suit property. The appellant averred that when Njoroge died, his late father allowed the respondents to



- bury him on the suit property. It was his testimony that the respondents failed to avail evidence of the alleged sale of the suit property. He wondered why the respondents never had the property transferred to them during the lifetime of his late father.
9. The appellant testified that after the death of his father, he and his mother petitioned the Senior Principal Magistrate's Court at Murang'a for letters of administration, with respect to his estate. He averred that no objections were raised, and vide a grant issued to them by the court, the suit property was transferred to him. He asserted that he has requested the respondents to vacate the suit property on several occasions, and that, during those instances, they had not claimed ownership of the suit property. He maintained that the respondents' claim for adverse possession with respect to the suit property was misplaced.
 10. John Gitau Ndegwa, the appellant's elder brother, testified as DW2. It was his evidence that in 1957, he moved with his parents to Kitale, where his late father was working at the time, and that his late father left the suit property in the care of his brother, Njoroge Mutari. DW2 recalled that they later settled in Rift Valley, but that his late father would from time to time check on the suit property which is situated in Murang'a. He stated that when his paternal uncle Njoroge Mutari died, a clan meeting was held, where it was decided that he would be buried on the suit property, as he had been taking care of the said land. This was because his land was rocky and hilly. That during his father's lifetime, the respondents never claimed to own the suit property. He testified that they had asked the respondents to vacate the suit property on several occasions, but to no avail. He maintained that his late father never sold the suit property to his paternal uncle Njoroge Mutari.
 11. After hearing the parties, the superior court (Kemei, J.), in a judgment dated 8th November 2018, determined that the respondents had sufficiently established their claim for ownership of the suit property by adverse possession. The learned Judge further directed the title to the suit land issued to the appellant be cancelled, and a fresh title be registered in the names of the respondents.
 12. Aggrieved by this decision, the appellant lodged this appeal. He laid out ten grounds in his memorandum dated 14th January 2019. In a nutshell, the appellant was of the view that the respondents failed to establish their claim of adverse possession, with respect to the suit property, to the required standard of proof on a balance of probabilities. He was aggrieved that the learned Judge failed to acknowledge that he got ownership of the suit property vide a certificate of confirmation of grant, issued by a competent court, in Murang'a SPM Succession Cause No. 75 of 2011. He faulted the learned Judge for failing to find that the respondents ought to have filed an objection within the succession proceedings under Section 76 and Rule 44 of the *Law of Succession Act* and rules for revocation or annulment, for their claim of adverse possession to be determined.
 13. He faulted that the decision of the learned Judge, which entertained the respondent's claim of adverse possession, after the probate court had determined that the suit land formed part of his late father's estate, and subsequently transmitted title of the suit property to the appellant. In his view, this was tantamount to the Environment and Land Court sitting on appeal, with respect to the decision of the court in Murang'a SPM Succession Cause No. 75 of 2011.
 14. The appellant faulted the learned Judge for failing to acknowledge that the respondents sued him in his individual capacity, as opposed to his capacity as the administrator of the estate of the deceased, yet the respondent's claim for adverse possession was against the estate of Ndegwa Thuo Kinja (deceased). He was aggrieved that the learned Judge found in favour of the respondents, given that a cause of action based on a sale of land cannot crystallize to become a case for adverse possession.
 15. The appellant was of the view that the learned Judge came to the wrong conclusion by failing to assess whether the title holder had been disposed by the adverse possessor for the statutory period, as opposed



- to whether the respondents had been in possession for the requisite number of years. He took issue with the fact that the learned Judge failed to consider the fact that the respondents were in possession of the suit property with the leave and license of the registered owner at the time, and as such their claim was untenable in law.
16. The appeal was canvassed by way of written submissions. Mr. Kirubi, learned counsel for the appellant submitted that the learned Judge failed to consider the fact that the two parties were related, as the appellant's late father and the 1st respondent's late father were brothers, and that the respondent occupied the suit property with the permission of the appellant's father. He explained that courts frown upon relatives who are allowed to stay on a property as licensees, only to turn around and claim the property as adverse possessors. Counsel asserted that the respondents lodged their claim before the superior court, barely four months after the decision of the Probate court, which gave ownership of the suit property to the appellant, and as such, their claim was pre-mature. He was of the view that the respondents fell short of proving that they had occupied the suit property openly, without the license of the registered owner, and that they dispossessed the registered owner for the statutory period of time.
 17. It was Mr. Kirubi's submission that the respondents improperly sued the appellant in his individual capacity, and not as the legal representative of the estate of his deceased father. Counsel cited *Titus Mutuku Kasuve v. Mwaani Investments Ltd & 4 Others* [2004] eKLR, and submitted that a suit to recover land by way of adverse possession was not maintainable against beneficiaries of an estate. He urged that the respondents ought to have staked their claim during the pendency of the succession cause, and not after it had been heard and determined. In the premises, counsel urged us to allow the appeal as prayed.
 18. In contrast, counsel for the respondents, Mr. Mbutia, submitted that the fact that the respondents were in actual possession of the suit property was not contested. He stated that the respondents had resided on the suit property since 1963, and had developed the same by constructing their homes and planting crops thereon. They had also buried their deceased relatives on the said property. Counsel maintained that the learned trial Judge was correct in holding that it was tenable that the appellant's father abandoned the suit property 55 years prior thereto, for reasons that he had sold it to his brother. Counsel urged that the sale of the suit land was by oral agreement, which was allowed by the Law of Contract at the time.
 19. Counsel for the respondent submitted that the respondents took possession of the suit property in 1963, and that the statutory period of 12 years had already expired when the appellant's father died in 1995. He explained that the title to the suit property issued to the appellant's father was extinguished by operation of law in 1975. He submitted that any purported subsequent transmissions and transfers of the suit property were invalid.
 20. It was his view that the appellant held title to the suit property in trust for the respondents. In response to the appellant's contention that a claim based on sale of land cannot crystallize into a claim based on adverse possession, counsel cited *Peter Mbiri Michuki vs Samuel Mugo Michuki* [2014] eKLR, and submitted that time for purposes of adverse possession should be calculated from the date of payment of the purchase price, and after the purchaser has taken possession of the property.
 21. Counsel for the respondents urged that the probate court lacked jurisdiction to determine the respondents' claim of adverse possession, and that the appellant's contention that the respondents ought to have staked their claim to the suit property in the succession proceedings was baseless. Counsel for the respondents urged this Court to affirm the decision of the superior court in its entirety.



22. This being a first appeal, it is the duty of this Court to analyze and re-assess the evidence on record and reach its own conclusions. In *Selle vs. Associated Motor Boat Co.* [1968] EA 123, the Court expressed itself as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that 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 allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan* (1955), 22 E.A.C.A 270.”

23. Having evaluated the record of appeal, as well as submissions by parties to the appeal, we find that the appeal turns on the following issues:

- i. Whether the respondents sufficiently proved their claim of adverse possession; and
- ii. whether entertaining the respondent’s claim, equated to the ELC sitting on appeal, with respect to the decision of the probate court in Succession Cause No. 75 of 2011.

24. This Court in the case of *Mtana Lewa v. Kahindi Ngala Mwangandi* [2015] eKLR described the term ‘adverse possession’ as follows:

“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 certain period, in Kenya, is twelve (12) years.”

25. The elements to be proved in a claim of adverse possession were aptly stated by this Court in the case of *Samuel Kihamba v. Mary Mbaisi* [2015] eKLR, where the Court held 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. See *Eliva Nyongesa Lusena & Anor v Nathan Wekesa Omacha Kisumu Civil Appeal No. 134 of 1993 (ur)*. These prerequisites are required of any claimant, irrespective of whether the claimant and the respondent are related or whether the claim relates to family/ancestral land.”

26. It is common ground that the parties in this appeal are related.

The appellant’s father, Gakuru Mutari, and the 1st respondent’s husband (and father to the 2nd and 3rd respondents), Njoroge Mutari, were brothers. They are both deceased. It is also not contested that the respondents entered the suit property in 1963. They have been in occupation since then. The suit property was originally registered in the name of Gakuru Mutari in 1962. It was transferred to the appellant in 2013, after he inherited the estate of his late father, vide Succession Cause No. 75 of 2011. The main issue of contention is whether the respondents’ established that their possession of the suit property was adverse to that of the registered owner, Gakuru Mutari.



27. According to the respondents, they entered the suit property after Gakuru Mutari sold the same to Njoroge Mutari, in 1963, for a consideration of Kshs.1,200. The respondents testified that the agreement for the sale of the suit property was oral. This evidence was corroborated by that of their witness, PW2, who told the court that he was present when the sale agreement was entered into in 1963. The appellant on the other hand was adamant that his late father never sold the suit property to his brother, Njoroge Mutari, but rather that the respondents occupied the suit property with the permission of his father.
28. The evidence on record is that the appellant's father relocated from Murang'a to Kitale, and did not re-enter the suit property from 1963, until his demise in 1995. Even after his demise, the respondents continued to occupy the suit property, and have done so to date. The respondents have constructed homes and cultivated crops on the suit property. They buried both their parents on the said property. Njoroge Mutari, the respondents' father, who died in 1988, and the 1st respondent (the respondents' mother), who died in 2015, were both buried on the suit property. The appellant and his witness both admitted that they have never resided or farmed on the suit property.
29. Although the appellant contended that Gakuru Mutari never sold the suit property to Njoroge Mutari, and that Njoroge Mutari and his family only resided on the suit property with the permission of Gakuru Mutari, we hold the same view as the learned trial Judge that his act of abandoning the suit property and leaving it to Njoroge Mutari for over thirty years, until his demise in 1995, was consistent with the respondents' assertion that he had indeed sold the suit property to his brother. This evidence of sale was corroborated by the evidence of PW2, who was present when Gakuru Mutari sold the suit property to Njoroge Mutari for Kshs.1,200.
30. For a purchaser in possession of a parcel of land that has been purchased, time, for the purpose of determining whether he has acquired title by adverse possession, starts running on payment of purchase consideration, and when the said purchaser takes possession of the said property. This was the holding of this Court in *Public Trustee vs Wanduru Ndegwa* [1984] eKLR where the Court observed thus:

“Of course, calculated from the date of payment of the purchase price on March 16, 1967, and on the basis of it, the full span of twelve years' adverse possession and more had already run when the suit was filed on April 2, 1979. The true owner ceased to be in possession on March 16, 1967. His possession was discontinued on that day. Discontinuance of possession occurs where the person in possession goes out and another person takes possession if that possession is continuous and exclusive (as the learned judge found it to be so in this case) 28 Halsbury 4th Edition paragraph 769. Under section 9 of the Act the right of action accrues on the date of dispossession or discontinuance.

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.’

A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run under section 10(1) of the English Limitation Act, 1939 (closely akin to our section 7) as against the vendor: *Bridges v Mees* (1957) 1 Ch 475 at 484; referred to with approval by



this Court in *Mwangi Githu v Livingstone Ndete and Others, CA No 24 of 1979* (unreported).”

31. In this appeal, the respondents took possession of the suit property in 1963, after payment of the purchase consideration. Twelve years lapsed in 1975. We hold the same view as the learned trial Judge that Gakuru Mutari’s rights to the suit property were extinguished in 1975. This is so because prior to 1975, Gakuru Mutari had not taken any steps to assert his right as the registered owner of the suit property.
32. On the other hand, the respondents occupied the suit property openly, exclusively, and with the intention to have the land, having dispossessed the registered owner. The fact of the use of land, that is the construction of the homes, cultivating subsistence crops, and burying their deceased relatives on the property, was proof that the respondents used the suit property in total conflict to the rights of the then registered owner, which was well within the knowledge of the said owner.
33. Even if we were to agree with the appellant’s assertion that the respondents occupied the suit property with the permission of their late father Gakuru Mutari, it was the appellant’s evidence that after the demise of their father, they asked the respondents to vacate the premises on several occasions. This meant that the respondents’ occupation of the suit property became adverse, when the appellant asked them to vacate the suit property after the demise of their father in 1995. From 1995, twelve years expired in the year 2007.
34. During this period, the estate of the deceased (Gakuru Mutari) and the appellant did not take any steps to assert their rights with respect to the suit property. This Court, in the case of *Gulam Miriam Noordin v Julius Charo Karisa* [2015] eKLR, observed as follows:

“When would time stop running? In *Joseph Gabumi Kiritu v Lawrence Munyambu Kabura Civil Appeal No.20 of 1993*, this Court held that:

‘Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him....He must therefore make a peaceable and effective entry, or sue for recovery of land’.”
35. The appellant did not avail any evidence to establish that any such action was taken in this case. The succession case was filed in court in 2011, four years after the respondents had acquired title by adverse possession. Any attempt to recover the suit property after 2007 was time barred by virtue of the proviso to Section 7 of the Limitations of Actions Act.
36. It was the appellant’s assertion that time started running in 2013, when he became registered as the new owner of the suit property, after inheriting the suit property from his late father. This was however, not supported by the evidence that was adduced before the trial court. It is well settled that with respect to Section 7 of the Limitations of Actions Act, the law relating to prescriptive rights affects both the current title holders of the property in question as well as their predecessors in title. The appellant’s registration as the new owner of the suit property, was subject to the rights a prior purchaser in adverse possession had acquired, which in this case were the respondents.
37. This Court had an opportunity to consider this issue in the case of *Kairu v. Gacheru* [1988] eKLR. In the case, the respondent took possession of the suit premises in 1968. The appellant purchased the suit premises from the previous registered owner (Mwangi) in 1978. The appellant faulted the learned



trial Judge for failing to appreciate that the respondent's adverse possession of the suit premises was interrupted by acquisition of title and assumption of possession by the appellant of the suit premises. The Court had this to say:

“ True, the appellant obtained title from Mwangi which he registered in October 1978. But his claim that he then entered into the suit premises, in December 1978 to interrupt the respondent's acquisition of prescriptive title was rejected by the judge. Indeed, the court found that the appellant sought to enter the suit land in the latter half of May 1980. He found, and in my opinion, correctly, that at that date, the 12-year period of limitation had run out and the title of the appellants as well as that of his predecessor in- title was extinguished. That, in my opinion, is a correct appreciation of the relevant law.”

38. We find, in this appeal, that time, for purposes of adverse possession, did not stop running when a change of ownership occurred with respect to the suit property. Further, the appellant was properly sued as the registered owner of the suit property.
39. Turning to the next issue, the appellant urged that the respondents ought to have staked their claim with respect to the suit property in the succession proceedings, by lodging an objection to the confirmation of the grant, or by seeking to revoke the confirmed grant, under the Law of Succession Act. He submitted that the superior court, in entertaining the respondents' claim for adverse possession, equated to the court as sitting on appeal, with regard to the decision of the probate court, in Succession Cause No. 75 of 2011.
40. The respondents explained that the succession proceedings were conducted without their knowledge, and that they only discovered that the suit property was registered to the appellant, when he threatened to evict them from the suit property. This assertion was not disputed by the appellant. Secondly, pursuant to Article 165 (5) of the Constitution, a probate court lacks jurisdiction to entertain matters relating to use and occupation of, and title to land. The Constitution places such jurisdiction in the Environment and Land Court. The primary duty of a probate court is to facilitate distribution of the estates of deceased persons to the rightful beneficiaries or heirs. Therefore, the respondents' claim of adverse possession was an issue that the probate court was bereft of jurisdiction, regardless of whether the respondents had raised the same issue before the said court or not. This ground of appeal must therefore fail.
41. We have said enough to demonstrate that we see no merit in the appellant's appeal. The same is hereby dismissed with costs to the respondents.
42. Orders accordingly.

DATED AND DELIVERED AT NYERI THIS 4TH 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.

