Nyaga v Kivinda & another (Civil Appeal 191 of 2019)
[2024] KECA 1346 (KLR) (4 October 2024) (Judgment)

Neutral citation: [2024] KECA 1346 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 191 OF 2019

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

OCTOBER 4, 2024

BETWEEN

STANLEY MBOGO NYAGA ..... APPELLANT

AND

NICHOLAS NGUTHI KIVINDA ..... 1ST RESPONDENT

ANTHONY NDII ..... 2ND RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Embu (Angima, J.) dated 21st March, 2019 in ELC Case No. 112 of 2014 (Formerly Kerugoya ELC Case No. 515 of 2013)

JUDGMENT

1. The appellant took out originating summons dated April 25, 2006, against the 1st respondent, seeking a declaration that he had acquired rights to L.R. No. Nthawa/Gitiburi/2444 (hereinafter 'suit land') by virtue of being in adverse possession. The appellant further sought orders directing the respondents to transfer the suit land to him, failure to which the court's Executive's Officer be mandated to execute all the necessary documents facilitating transfer of the suit land to the appellant.

2. In support of the Originating Summons, the appellant averred that his late father, Nyaga Murete Mwoga, bought the suit land from the Nditi clan in 1971, and was subsequently registered as the absolute owner of the suit land on first registration. The appellant contended that his father lived on the suit land until his demise. He deponed that he was born and raised on the suit land, and that he has exclusively occupied the said property for a period of over twelve (12) years. He averred that his father's name was improperly de-registered as the rightful owner of the suit land, by virtue of a court order issued in Siakago Civil Application No. 7 of 1995, and that neither himself, nor his late father, were parties to that suit. The appellant contended that the de-registration of his late father, as the legal

owner of the suit land, was fraudulent and invalid, as the Land Control Board consent had not been procured.

3. The 1st respondent filed a replying affidavit dated 27th November 2006, in response to the appellant's suit. The 1st respondent swore that he was registered as the legal owner of the suit land on 31st July1996, as the first registered owner. He averred that he remained as the absolute registered owner of the suit land up until 15th May 2006, when he sold the property to the 2nd respondent. He deponed that he instituted Civil Case No. 37 of 2004, before the High Court at Embu, where he was issued with orders of eviction of the appellant from the suit land. The 1st respondent averred that the said decision of the court remained unchallenged since no appeal against the same was filed.

4. The 2nd respondent was enjoined as a party to the suit by an order of the court (Khaminwa, J.) dated 27th July 2006, on the basis that the 1st respondent had sold and transferred the suit property to him.

5. From the record, it is apparent that the appellant was not able to prosecute the case before the trial court as he was said to be unwell, and had lost his memory. His brother, Stanley Mbogo Nyaga, stepped in and prosecuted the case on his behalf, vide an application dated 27th November 2017, which was allowed by the court.

6. The case was heard by way of viva voce evidence. Stanley Mbogo Nyaga (PW1) adopted his witness statement dated 17th May 2018, as his sworn testimony. In the statement, he stated that his late father, Nyaga Murete Mwoga, purchased L.R. No Nthawa/Gitiburi/886 from Nderava Ndivero, a member of the Nditi Clan, and was registered as the legal owner on first registration. He maintained that he and his siblings have been in occupation of the mother parcel of land for a period of over 50 years, and that they were born on the said land. He averred that the mother parcel of land was subject to an appeal before the Minister during adjudication, where the appeal was decided in favour of the Nditi Clan, against their late father.

7. According to PW1, the Nditi clan filed a suit before Siakago Magistrate's Court in Civil Case No. 7 of 1995, against the appellant's Mbuya clan, where they obtained an order for rectification of the register, and their father was subsequently de-registered as the owner of the mother Parcel No. 886. He testified that they were not informed of the said suit. They did they participate in the same. He stated that the mother parcel of land was later sub-divided into five parcels of land namely L.R. No. Nthawa/Gitiburi/2440, 2441, 2442, 2443 and 2444. Parcel No. 2444 (the suit land) was registered in the 1st respondent's name. The appellant maintained that the eviction orders against the appellant, obtained by 1st respondent in Embu HCCC No. 37 of 2014, were granted ex-parte, by Lenaola J. (as he then was). The appellant's application to set aside the ex-parte order, was granted by Khaminwa, J.

8. The 1st respondent testified as DW1. It was his testimony that the suit land was excised from Parcel No. 886, after the mother parcel of land was sub-divided into five parcels of land, following a land adjudication process, which culminated to an appeal before the Minister. He testified that by the decision of the Minister, he was allocated the suit land (Parcel No. 2444), and was registered as the legal owner on 31st July 1996. He stated that when he took possession of the suit property, he found that the appellant had constructed a temporary house thereon.

9. It was the 1st respondent's evidence that he issued a written notice to the appellant to vacate the suit land, but that the appellant failed to comply. He therefore filed Embu HCCC No. 37 of 2004, which suit sought eviction orders against the appellant. Judgment was entered in his favour. He was granted the eviction order that he had sought. The 1st respondent stated that he sold the suit land to the 2nd respondent in 2006. He testified that he had not been served with a copy of the court order which the appellant allege set aside the judgment of the court in Embu HCCC No. 37 of 2004.

10. The 2nd respondent gave evidence as DW2. It was his testimony that he is the current registered owner of the suit land, after purchasing the same for the 1st respondent in 2006. He stated that the suit land was not encumbered at the time of purchase, and that the Land Control Board issued a consent for transfer of the suit parcel of land to him.

11. In a judgment dated 21st March 2019, Angima J. dismissed the appellant's claim of adverse possession. The learned Judge found that the appellant's suit was premature, as the statutory period of 12 years had not expired, by the time the appellant filed his suit claiming proprietary rights to the suit land by prescription. The learned Judge determined that the 1st respondent had asserted his rights as the registered owner of the suit property when he instituted Embu High Court Civil Case No. 37 of 2004, and obtained orders to evict the appellant from the suit property. Accordingly, the learned Judge dismissed the appellant's suit for lack of merit.

12. The appellant, aggrieved by this decision, lodged this appeal.

    He has proffered eight (8) grounds of appeal. In summary, he faulted the learned Judge for: failing to consider that the appellant's father was the registered owner of the suit property; failing to take into account the appellant's written submissions; wrongly computing the time for purposes of adverse possession; failing to find that the 2nd respondent's right to the suit land was flawed, as he purchased the suit land during the pendency

    of the suit before the superior court; failing to consider the fact that the appellant and his family reside on the suit land and that they have nowhere else to go; arriving at wrong conclusion which was contrary to the law, facts and evidence tendered.

13. The appeal was canvassed by way of written submissions.

    During the hearing of the appeal, the court was informed that the 1st respondent died during the pendency of the appeal, and that he was never substituted. The appeal against him was, therefore, marked as abated.

14. The appellant was represented by the firm of M/s Gicheru & Company Advocates. It was submitted on behalf of the appellant that the appellant and his family have been in occupation of the suit property for over 50 years, and that his father was de-registered as the owner of the suit land, vide an order of the court in Siakago Magistrate's Court Civil Case No. 7 of 1995. Counsel maintained that the appellant remained on the suit land from 1995 to 2006, when he filed the suit before the superior court, seeking to be declared the legal owner of the suit land by the application of the doctrine of adverse possession.

15. Counsel urged that the period between 1995 and 2006 is twelve (12) years, and therefore the appellant's suit was not pre- mature. Counsel was of the view that the learned Judge failed in his role as an impartial arbiter, by aiding the respondents' case, when he determined that time for purposes of determining whether the appellant had been in adverse possession started running on 8th November 1995, yet the respondents did not make out such a case for themselves. He faulted the learned Judge for failing to consider that Embu HCCC No. 37 of 2004, where the appellant obtained eviction orders, was still pending before the said court, and therefore this case did not affect the computation of time for the purpose of determining the question of adverse possession.

16. Counsel for the appellant faulted the learned Judge for disregarding the evidence on record, which established that the appellant's father was the registered owner of the mother parcel of land being Parcel No. 886, which was later sub-divided into five parcels, including the suit land. He submitted that the appellant produced the respective green card to prove this fact, and urged that the de-registration of the

appellant's father as the rightful owner of the said property was done fraudulently, as the appellant's father had been condemned unheard.

17. He explained that the appellant's father was the rightful owner of the suit land by virtue of Sections 27 (a), 30 and 143 of the Registered *Land Act* (now repealed), and submitted that the respondents failed to establish that the registration of the appellant's father as the owner of the mother parcel of land was fraudulent or illegal, to warrant de-registration.

18. It was counsel's submission that the failure by the learned Judge to consider the appellant's written submissions infringed upon his constitutional right to fair trial. He contended that the suit land was sold to the 2nd respondent to frustrate the appellant's case in Embu HCCC No. 37 of 2004. Counsel faulted the superior court for failing to make a determination, on the fact that the 2nd respondent's acquisition of the suit land from the 1st respondent was invalid. He urged us to allow the appeal and grant the prayers sought in the appeal.

19. In rebuttal, Mr. Okwaro for the 2nd respondent submitted that the 1st respondent was registered as the proprietor of the suit land on 31st July 1996, after the Land adjudication and demarcation process had been completed. He urged that prior to 1995, there did not exist a title, with respect to the suit land, as the same was undergoing the process of land adjudication. It was his submission that the 1st respondent instituted Embu HCCC No. 37 of 2004, seeking eviction orders against the appellant, who was in occupation of the suit land. He asserted that a decree was issued in favour of the 1st respondent on 7th March 2005, and thereafter, warrants requiring the appellant to give vacant possession were issued on 31st October 2005. One year later, in April 2006, the appellant instituted the present suit before the superior court.

20. Counsel for the respondent was of the view that time ceased running, when the 1st respondent asserted his rights as the owner of the suit land, by obtaining eviction orders against appellant. He explained that the appellant failed to establish that his occupation of the suit land was open, continuous and uninterrupted, for a period of twelve years. Counsel urged that during his testimony, PW1 told the Court that he was not able to identify the specific parcel of land that was occupied by the appellant, after the mother parcel of land was sub-divided into five parcels of land. Counsel urged that a claim for adverse possession runs against a title, and therefore, since the suit land was undergoing adjudication process, time started running after the 1st respondent was registered as the owner of the suit land in 1996. It was his submission that the appellant's claim was pre-mature. He invited us to dismiss the appeal for lack of merit.

21. This being a first appeal, it is our duty to analyze, and re-assess the evidence on record, and reach our own independent conclusions. In John Teleyio Ole Sawoyo vs David Omwenga Maobe [2013] eKLR this Court held:

> "This being a first appeal, we have the duty to reconsider both matters of fact and of law. On facts, we are duty bound to analyze the evidence afresh, re- evaluate it and arrive at our own independent conclusion, but must bear in mind that the trial court had the advantage of hearing the witnesses testify and seeing their demeanour and should make allowance for the same. In the case of Mwangi vs Wambugu [1984] KLR 453 at page 461, Kneller JA (as he was then) stated:
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> > 'This is a first appeal so this Court is obliged to reconsider the evidence assess it and make appropriate conclusion about it, remembering we have not seen or heard the witnesses and making allowance for this; (Selle & Another –vs-

Associated Motor Boat Company Ltd & Others [1968] EA 123, 126 (CA Z) and Williamson Diamonds Ltd –vs- Brown [1970 EA 1.12] (C A T)'."

22. Having re-evaluated the record of appeal, as well as submissions by parties to the appeal, we find that the issue to be determined by this Court, is whether the appellant sufficiently proved his claim of adverse possession, with respect to the suit parcel of land.

23. The appellant contended in his grounds of appeal that the learned Judge failed to consider that his late father was the original owner of the suit land, and that the appellant and his family have been in continuous occupation of the same for a period of over fifty years. We find no traction with this argument by the appellant. The learned Judge noted that the appellant was brought up on the mother parcel of land, L.R No. Nthawa/Gitiburi/886, which was later sub-divided into five parcels, including the suit land, subject of this appeal. The learned Judge correctly determined that his occupation of the suit land at the time was not adverse to that of respondents.

24. A party claiming adverse possession has to prove that they have occupied the land in question openly, without license or permission of the land owner, with the intention to have the land, and that they have dispossessed the registered owner of the suit property for the statutory period, as opposed to merely establishing that they have been in possession of the land for twelve years. This Court, in Bakari Sheban & 39 Others v Said Bin Rashid Khamis [2017] eKLR, held thus:

> " Like any other civil claim, the burden was on the appellants to prove on a preponderance of evidence that their occupation of the suit property was adverse, in the sense that that occupation was hostile, open, actual, uninterrupted, notorious, exclusive and continuous for a period of 12 years. See Kweyu V Omutut (1990) KLR 709.
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> In that decision the Court also stated that; 'The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely...the intention of the dispossessor is to appropriate and use the land as his own, to the exclusion of all others, irrespective of any semblance or shadow of actual title or right'."

25. It is therefore vital, in a claim of adverse possession, that the adverse nature of the applicant's possession be sufficiently established as a fact. The question we must therefore answer is when did the appellant's occupation of the suit land become adverse?

26. From the evidence on record, the mother parcel of land was subjected to the adjudication process, after which the appellant's father's name was entered in the adjudication register, as the owner of the said parcel of land on 28th April 1984. However, members of the Nditi clan filed an appeal before the Minister, and the appeal was determined in favour of the 1st respondent's Nditi clan. The appellant testified that by an order of the court in Siakago Magistrate's Court Civil Suit No. 7 of 1995, his late father's name, as the proprietor of the mother parcel of land, was removed from the adjudication register.

27. Thereafter, the mother parcel of land was sub-divided into L.R. Nos. Nthawa/Gitiburi/2440, 2441, 2442, 2443 and 2444. Parcel number 2444, which is the subject matter in this appeal, was registered in the name of the 1st respondent on 31st July 1996.

28. It is settled that when dealing with a claim of adverse possession, with respect to land that was subjected to an adjudication process, time does not start running until the ascertainment of rights through the adjudication process is complete, and a title to the land is issued.

29. This Court, in the case of Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR, observed as follows:

> " The ultimate question still remains whether the respondent had been in possession of the suit premises for over 12 years, as at the time the suit to evict him was instituted in 2008, and whether his possession was adverse to that of the appellant? It is a settled principle that a claim for adverse possession can only be maintained against a registered owner. See *Sophie Wanjiku John v Jane Mwihaki Kimani Nairobi ELC Civil Suit No. 490 of 2010*... The relevant period would therefore be between 1994, the date of registration of the appellant as the proprietor, and 2008 when the suit was filed." (emphasis ours)

30. It is our considered view that the appellant's occupation of the suit property, became adverse to that of the 1st respondent in 1996, when the suit land was registered in the 1st respondent's name. Time which had begun to run, for the purposes of adverse possession, stopped when the legal owner asserts his proprietary rights, or when his right is admitted by the adverse possessor.

31. This Court in Mwangi Githu v Livingstone Ndeete [1980] eKLR observed thus:

> " Time ceases to run under the *Limitation of Actions Act* 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; see Cheshire's Modern Law of Real Property, 11th edition at p 894. In my view the giving of notice to quit cannot be an effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*."

32. It was the 1st respondent's evidence that when he was allocated the suit parcel of land, he found the appellant in possession of the same. The 1st respondent stated that he issued the appellant with a notice to vacate the suit property. However, the appellant failed to vacate the premises. The 1st respondent instituted Civil Suit No. 37 of 2004, before the High Court of Kenya at Embu, seeking eviction orders against the appellant, which orders were granted.

33. Filing of a suit for recovery of land stops time from running, for the purposes of Section 38 of the *Limitation of Actions Act*, under which a party may claim to have become entitled to land by adverse possession. Twelve years had not lapsed in 2004, when the 1st respondent asserted his rights as the owner of the suit parcel of land by filing Civil Suit No. 37 of 2004.

34. The appellant instituted his claim of adverse possession before the superior court, vide Originating Summons dated 25th April 2006. Since time started running afresh in 2004, only two years had lapsed when the appellant filed his claim. Even if time had not stopped running, the appellant's claim for adverse possession would still have been premature, as only ten years had lapsed since the suit land was registered in the 1st respondent's name in 1996. The statutory period of twelve years had not expired.

35. We agree with finding of the learned Judge that the appellant's claim to the suit land, by way of adverse possession, was premature and untenable in law.

36. The appellant faulted the learned Judge for failing to make a finding on whether the de-registration of their late father's name, as the owner of the suit parcel of land, vide an order of the court in Siakago Civil Suit No. 7 of 1995 was fraudulent, and further, whether the title, with respect to the suit land, held by the 2nd respondent, was valid. We find that these questions, which relate to a claim of ownership of the suit land, on the basis of a fraudulent registration, were not in issue in the suit lodged before the superior court. The learned Judge observed as much. The appellant's claim to the suit land was

pegged on adverse possession, which is usually instituted against the registered proprietor of the land in question.

37. It is our considered holding that for a claim of adverse possession to succeed, the claimant must first concede and admit the title of the registered owner of the property in question. The appellant cannot claim to be the lawful owner of the suit parcel of land, and in the same breath, contend rights to the suit land by way of adverse possession.

38. We are persuaded by the decision of Angote, J. in the case of Haro Yonda Juaje v Sadaka Dzengo Mbauro & Another [2014] eKLR where the learned Judge observed as follows:

> " One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired, and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff's averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered *Land Act* and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister."

39. We agree with the above reasoning of the learned Judge. The appellant's claim to the suit land by way of adverse possession cannot co-exist with a claim challenging the title held first by the 1st respondent, and subsequently transferred to the 2nd respondent for being fraudulently obtained.

40. The final issue raised by the appellant was that the learned Judge failed to consider his written submissions in making his final determination. The learned Judge, noted as follows in the judgment:

> " The record shows that the 1st defendant filed his submissions on 27th February 2019 whereas the 2nd defendant filed his on 6th March 2019. There is, however, no indication on record of the plaintiff having filed any submissions."

41. We note that the appellant indeed filed written submissions before the superior court, dated 22nd November 2018. In the submissions, the appellant stated that his late father purchased the mother Parcel of Land No. 886, and that he was born on the suit land, and had resided there for a period of over sixty years. He further pointed out the respondents had not occupied the suit parcel of land, and that the issuance of a notice to vacate was not sufficient to stop time from running. The appellant did not cite any authorities. Interestingly, the appellant noted that the question of whether the purchase of the suit land by the 2nd respondent was valid, was not an issue in the suit before the superior court, and that the court need not dwell on the same. It is therefore curious of him to change the tune in this appeal, and fault the learned Judge for failing to make a determination on the same.

42. It is our finding that the learned Judge erred in failing to consider the appellant's written submissions. It may have been an oversight on his part. However, we find that no miscarriage of justice was occasioned upon the appellant, as all the issues raised in his written submissions, were ultimately considered by the learned Judge in the final judgment.

43. In these circumstances, it is our finding, upon our re-evaluation of the evidence on record, that the appellant did not discharge both the legal and evidential burden to prove his claim of adverse possession of the suit parcel of land. The superior court did not err in dismissing his claim.

44. We, therefore, find no merit in this appeal. We order that it be dismissed with costs to the 2nd respondent. The appeal against the 1st respondent is marked as abated.

45. 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.