



**Kamia & another v King’oo & 11 others (Civil Appeal 377 of 2019)
[2024] KECA 1669 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1669 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 377 OF 2019
SG KAIRU, LA ACHODE & AO MUCHELULE, JJA
NOVEMBER 22, 2024**

BETWEEN

**ANTHONY KUVIKA KAMIA 1ST APPELLANT
DAVID NZOMO KAMIA (ADMINISTRATORS OF THE ESTATE OF AMOS
KAMIA NGUKU) 2ND APPELLANT**

AND

**SIMON KILINGE KING’OO 1ST RESPONDENT
ROBERT KYALO MUEMA 2ND RESPONDENT
BENSON MAKAU MWANGANGI 3RD RESPONDENT
PETER MBINDYO MUTINDA 4TH RESPONDENT
JOSEPH KIVULA WAMBUA 5TH RESPONDENT
JULIUS MUTUKU KYENGO 6TH RESPONDENT
DORCAS HEDRICK KIOKO 7TH RESPONDENT
PATRICK MAINGI MUTIE 8TH RESPONDENT
TITUS MAKAU KING’OLA 9TH RESPONDENT
MUTHEU MASUNI 10TH RESPONDENT
PATRICK WAMBUA 11TH RESPONDENT
MUTISYA KAMIA 12TH RESPONDENT**

*(Being an appeal against the judgment of the Environment and Land Court at
Machakos (A.O. Angote, J.) dated 25th January 2019 in ELC No. 243 of 2015)*



JUDGMENT

1. This Court in *Mtana Lewa -vs- Kahindi Ngala Mwangandi* [2015]eKLR) stated that:-

“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. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that the possession is adverse to the title owner.”
2. Where possession is consensual or contractual in its inception, it cannot be called adverse. (See *Gabriel Mbui -vs- Mukindia Maranya* [1993]eKLR). The termination of the licence, consent or contract may turn the possession into an adverse possession. The termination gives the owner of the land the right to re-enter the land to re-assert his rights or take steps to evict the possessor. (See *Sisto Wambugu -vs- Kamau Njuguna* [1983]eKLR).
3. Section 38(1) and (2) of the *Limitation of Actions Act* (Cap. 22) provides as follows:

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”
4. It is trite that the right to claim adverse possession accrues when the person against whom the claim is brought is the registered proprietor of the land in question. (See *Francis Gitonga Macharia -vs- Muiruri Waithaka* [1998]eKLR). Time for the purposes of a claim for adverse possession begins to run from the time of such registration.
5. It is against these legal principles that we shall engage with this appeal. In doing so, we recognize that, as the first appellate Court, our responsibility is to re-appraise the evidence that was tendered before the trial court and reach our independent conclusions on the facts and on the law. We are not bound by the findings of fact made by the trial Judge, but should be slow to interfere with the findings unless we determine that they were based on no evidence or on a misapprehension of the evidence or where it can be demonstrated that the Judge acted on wrong principles in arriving at the finding in issue. (See *Mwanasokoni -vs- Kenya Bus Services Ltd* [1985] KLR 931). Moreover, where there is conflict of primary facts between witnesses and where the credibility of the witness is crucial, this Court will hardly interfere with a conclusion made by the trial Judge after weighing the credibility of witnesses. (See *Hahn -vs- Singh* [1985] KLR 716).
6. There was no dispute that what is now known as LR No. Mavoko Town/Block 3/2668 (the suit property) was always the property of the deceased Amos Kamia Nguku. The deceased died on 30th June 1979, leaving his widow Rebecca (since deceased), and his sons Munyaka Kamia (since deceased),



Anthony Kuvika Kamia (1st appellant), David Nzomo Kamia (2nd appellant), among other members of the family.

7. It was not disputed that sometimes between 1993 and 2004, the respondents Simon Kilinge King'oo (1st respondent), Robert Kyalo Muema (2nd respondent), Benson Makau Mwangangi (3rd respondent), Peter Mbindyo Mutinda (4th respondent), Joseph Kivula Wambua (5th respondent), Julius Mutuku Kyengo (6th respondent), Dorcas Herick Kioko (7th respondent), Patrick Maingi Mutie (8th respondent), Titus Makau Kingola (9th respondent), Mutheu Masuni (10th respondent), Patrick Wambua (11th respondent) and Mutisya Kamia (12th respondent) bought each a portion of the suit property from either the deceased's widow or from either of the children. The suit property was not registered in the name of the deceased until on 28th April 2006, long after he had passed on.
8. Following the death of the deceased, Machakos H.C. Succession Cause No. 365 of 2012 was filed in which the appellants became the legal representatives of the estate.
9. In the originating summons dated 11th December 2015 and filed in the Environment and Land Court at Machakos, the respondents sued the appellants and their siblings claiming to have become entitled to the suit property by adverse possession and wanting that the Land Registrar, Machakos, to be directed to register them as the owners of the respective portions that they had bought. The basis of their claim was that they had bought the respective portions of the suit property in which they had occupied, settled and developed, quietly, continuously and without interruption for over 12 years, and therefore had become entitled by adverse possession. The appellants opposed the summons on various grounds, some of which were that the purchase was not from the deceased but from persons who had no letters of administration in respect of the deceased and who, therefore, had no legal capacity to sell the portions; that the transactions amounted to intermeddling with the estate of the deceased; that the suit had been brought 30 years or so after the death of the deceased which was late; and that the respondents had pleaded that they had been allowed into the suit property, and therefore the claim for adverse possession could not lie.
10. In a judgment delivered on 25th January 2019, the learned O.A. Angote, J. allowed the originating summons and declared that the respondents had become entitled by virtue of adverse possession to their respective shares in the suit property. It was directed that the Machakos Land Registrar does register the respondents as owners of the respective portions of the suit property, and that each party bears his/her own costs. In reaching the decision, the learned Judge found that, although the respondents had occupied the portions following purchase, and therefore with permission of the sellers and that the actions of respondents amounted to intermeddling, the appellants had since 2001, or earlier, known about the occupation by the respondents and had even chased them away in 2004, but no legal steps had been taken by the appellants to evict the respondents. This is what the learned Judge stated:-

“24. That may be so. However, where a party enters the land by way of purchase, even where the said purchase is null and void, time will start running in respect of a claim for adverse possession if the occupation is adverse to the use of the land and the interests of the registered owner, or his predecessor in title. It does not matter that the said occupation is illegal in the first place.

25. ...

26. The Interested Parties having denied that the Plaintiffs are not entitled to the estate of the deceased as beneficial owners, the plaintiffs' interest in the suit land became *adverse to the interest of the beneficial owners*.



27. ...
28. The Plaintiffs having settled on the suit land as early as 1993 and without the permission of the Administrators of the estate of the registered proprietor of the suit land, an inference that the occupation was adverse to the interest of the estate and its beneficiaries is drawn.
29. Indeed, notwithstanding the fact that the Interested Parties applied and were granted the letters of administration in the year 2012, the time for purpose of adverse possession started running as against the registered proprietor immediately the Plaintiffs occupied the suit land....
30. ...
31. ...
32. ...
33. Therefore, the mere fact that the occupation of the suit land by the Plaintiffs is contrary to the provisions of the Law of Succession Act cannot in itself defeat a claim for adverse possession. The Plaintiffs having occupied the suit land for twelve (12) years uninterrupted and without the permission of the registered owner or the administrators of the Estate of the registered owner, I find that they are entitled to the suit land by way of adverse possession.”

11. This is the decision that aggrieved the appellants and led them to come before this Court in this appeal. Their grounds of appeal were as follows:-

- “ 1) The Honourable Judge erred in both law and fact in failing to note and to appreciate the fact that the subject parcel of Land, Parcel No. Mavoko Town Block 3/2668, belonged to a deceased person, Amos Kamia Nguku (herein after referred to as the deceased) who was said to have died on 30th June 1979; and that the respondents herein purported to have “bought” the said land after the deceased’s death and from persons who were not the deceased’s legal representatives.
2. The Honourable Judge erred in both law and fact in failing to note and to appreciate the fact that the persons from whom the respondents purported to have “bought” the deceased’s land had no capacity to sell or to even purport to sell the deceased’s said land, and that both the purported sellers and the purported buyers (the respondents herein) were simply intermeddling with the deceased’s estate and therefore committing an offence known in law (Section 45 of the Law of Succession Act).
3. The Honourable Judge erred in law and fact in failing to note and to appreciate the fact that an intermeddler CANNOT pass a valid title in whatever manner, to another intermeddler.
4. The Honourable Judge erred in law and fact by failing to note and to appreciate the fact that the doctrine of adverse possession of land CANNOT run in favour of an intermeddler or an illegal occupant of land or a trespasser.



5. The Honourable Judge erred in law and fact in failing to note and to appreciate the fact that the respondents could NOT, and CANNOT be permitted to benefit from their illegalities regarding the subject land.
 6. The Honourable Judge erred in law and in fact by making a finding that was totally against the facts before him, the law, the doctrines of equity and the principles of common law.
 7. The Honourable Judge erred in law and in fact by failing to safeguard the sanctity of title to land.”
12. During the hearing of the appeal, learned counsel Mr. Nzei was for the appellants and learned counsel Mr. Kasimu was for the respondents. Each counsel had filed written submissions, and was allowed to highlight his submissions.
 13. It was submitted on behalf of the appellants that the respondents had bought the respective portions from persons who were not the registered proprietors of the suit property, and who did not hold letters of administration of the estate of the owner, who was long dead at the time of the transactions. First, that the transactions were null and void and that they amounted to intermeddling; and that the respondents could not derive benefit from such illegal transactions. Secondly, that if the respondents occupied the portions on account of their having been bought, the occupation, however long was with the permission of the sellers who belonged to the family of the deceased and therefore the claim for adverse possession could not lie.
 14. In the continued submissions on behalf of the appellants, it was urged that the deceased became the registered proprietor on 28th April 2006; that at the time of the sale transactions, and occupation, between 1993 and 2004, the suit property was unregistered, which meant that the time for the purposes of adverse possession begun to run at the time of registration and therefore twelve (12) years had not passed at the time the suit was filed in 2015. We were asked to find that, on the evidence and the law, the respondents had not proved their case, and therefore, we should allow the appeal by overturning the decision by the learned Judge.
 15. The respondents opposed the appeal which they sought that it be dismissed with costs. It was submitted on their behalf that, although they bought the portions from members of the family of the estate believing they were the rightful owners, they later discovered that the suit property was registered in the name of the deceased; that, therefore, the deceased had not allowed their occupation. Secondly, that it had not been disputed that their occupation was far well over 12 years, starting to account from 1993. Thirdly, that the occupation was adverse to the interests of the registered owner, or the appellants who subsequently became the holders of letters of administration for the estate of the deceased. Even if it were to be found that the respondents’ occupation was illegal, either because the portions were bought from the people who were not the registered owners or that they were not bought from holders of letters of administration, such illegality in occupation was adverse to the rights of the owner of the suit property.
 16. We have reconsidered the evidence that was tendered before the trial court, the impugned judgment and the rival submissions. We are called upon to determine whether the learned Judge was correct in the finding that the respondents had made a case, on the evidence and the law, that they had become entitled to their respective portions of the suit property by adverse possession.
 17. In Francis Gitonga Macharia -vs- Muiruri Waithaka (supra), the appellant had filed originating summons claiming a parcel of land by adverse possession. According to the evidence, he had occupied



the parcel of land sometime in March 1974 but by the time the respondent was not yet the registered proprietor. The respondent became the registered proprietor on 16th December 1974. The Court of Appeal agreed with the High Court that by the time the suit was filed on 15th April 1986, a period of twelve (12) years had not run, and, consequently,

“the appellant’s claim based on adverse possession was premature and therefore incompetent.”

18. This position that the right to claim adverse possession accrues when the person against whom the claim is brought becomes the registered owner of the land in question has been reiterated by this Court in various decisions, including *Jane Jeptoo Sawe -vs- Estate of Sysvester Kimagut Sang* [2018] eKLR.
19. In *Titus Kigoro Munyi -vs- Peter Mburu Kimani* [2015]eKLR, it was held that for a claim of adverse possession to succeed, it must be proved that the registered owner had knowledge of the occupation.
20. In the instant appeal, the respondents bought the respective portions between 1993 and 2004. The suit property, from which the portions came, belonged to the deceased Amos Kamia Nguku, but was still unregistered. The deceased had died on 30th June 1979. He was not the seller, and could not have known about the sale or that the respondents had gone into occupation. The suit property became registered in the name of the deceased on 28th April 2006. In our considered view, time for the purpose of adverse possession, begun to run on 28th April 2006. The originating summons was filed on 11th December 2015. By this time the respondents had been in occupation of the suit property for nine (9) years. It follows that, twelve (12) years had not run. The respondents’ claim was, consequently, premature.
21. It is for these reasons that we find that the learned Judge erred in finding that the respondents had proved their claim in the originating summons. The appeal is merited, and is allowed.

The judgment and decree of the learned Judge is hereby set aside and, in its place, there will be a judgment dismissing the originating summons with costs.
22. The appellants will be paid the costs of the appeal by the respondents.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

L. ACHODE

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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.

