M'Mikua v Muchiri & another (Civil Appeal 164 of 2017)
[2024] KECA 1882 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1882 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 164 OF 2017

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

DECEMBER 20, 2024

BETWEEN

M'MUTHAURA M'MIKUA ..... APPELLANT

AND

EUSTACE R MUCHIRI ..... 1ST RESPONDENT

PETER KINYANJUI MWAI JOHN KIRIGU MWAI (LEGAL REPRESENTATIVES OF THE ESTATE OF NAHASHON MWAI GATERE (DECEASED) ..... 2ND RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court of Kenya at Meru (C. Cherono, J.) dated 28th September 2017 in E.L.C. Case No. 50 of 2008(0.S))

JUDGMENT

1. The subject matter of this appeal is a piece of land known as Land Reference No. EX-Lewa Settlement Scheme/831 sub-divided into LR. EX-Lewa Settlement Scheme/1216 and 1217 (suit land). The suit before the Environment and Land Court (ELC) was filed by M'Muthaura M'Mikua (appellant) by way of an originating summons in which he required Eustace R. Muchiri and Peter Kinyanjui Mwai and John Kirigu Mwai (Legal Representatives of the Estate of Nahashon Mwai Gatere (Deceased), the respondents, to transfer to him the suit lands which he claimed to have

   acquired by virtue of adverse possession. This claim was predicated on Section 38 of the *Limitation of Actions Act*, which provides: -

   > (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) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act."

2. The said suit was filed on the 24th April, 2008; the appellant was seeking a determination of several questions; whether the 1st and 2nd respondents are currently the registered owners of L.R. No. EX-Lewa Settlement Scheme/831 and now subdivided into EX- Lewa Settlement Scheme/1216 and 1217; whether he has had open, exclusive and notorious occupation and possession of the 10.026 Ha comprised of L.R. No. EX-Lewa Settlement Scheme/831 and now subdivided into L.R. No. EX-Lewa Settlement Scheme/1216 and 1217 in excess of 12 years with full knowledge of the respondents; whether the appellant is in such open and exclusive possession of the 10.026 Ha comprised of L.R. No. EX-Lewa Settlement Scheme/831 currently subdivided into 1216 and 1217; whether the respondents who are the registered owners of L.R. No. EX-Lewa Settlement Scheme/831 now currently subdivided into parcel numbers 1216 and 1217 have ever been in use, possession or occupation of the 11.026 Ha claimed by the appellant in the last 12 years; whether the subdivision of L.R. No. EX-Lewa Settlement Scheme/831 into 1216 and 1217 and transfer of parcel number 1217 to the 2nd respondent was irregular and fraudulent or invalid in Law;whether the interest over the subject matter has vested in the appellant by adverse possession and or prescription prior to his action;and whether the appellant's rights as envisaged under section 30 (f) of the Registered *Land Act* Cap 300 Laws of Kenya vested the interest of land parcel measuring 10.026 Ha comprised of L.R. No. EX-Lewa Settlement Scheme/831 and now currently subdivided into 1216 and 1217 to the appellant.

3. The claim was supported by the appellant's affidavit sworn on 24th April, 2008 where he deposed that; at all material times he has been a farmer farming in L.R. No. EX-Lewa Settlement Scheme/831 now subdivided into parcel numbers 1216 and 1217; he has been in occupation of the suit land since 1974 even before it was registered in the names of the respondents in 1991; he has made a lot of developments on this land with the developments valued over Ksh.

4. 3 Million which includes livestock; he had previously in 1988 bought the same parcel of land from the 1st respondent who delayed to transfer the same to him; subsequently in the year 2007 after the 1st respondent realized the development he had done and the fact that he had gained interest of the land by operation of law, the 1st respondent signed a transfer form to transfer the original land to him; that the 1st respondent has clandestinely and without notifying him removed the caution he had lodged and subdivided the subject matter into L.R. No. EX- Lewa Settlement Scheme/1216 and 1217; and had already transferred L.R. No. EX-Lewa Settlement Scheme/1217 to the 2nd respondent and had approached several unsuspecting buyers and made an application to the Land Control Board to alienate the subject matter completely to third parties.

5. The suit was opposed by the 1st respondent who is the registered owner of the suit land. He contended that he permitted the appellant to occupy portions of the suit land out of compassion and kindness; he deponed that it was true that he sub-divided his land L.R. No. EX-Lewa settlement scheme/831 into two portions and that although he did not require any consent from the appellant to do so, he informed the appellant, out of courtesy due of his relationship with him before doing so; that in 1985 he was allocated by the Government of Kenya a piece of land measuring 50.5 Ha. at Timau through the Settlement Fund Trustee and after he paid all the money which was required by SFT the land was registered in his name on 17th December, 1990 and became L.R. No. EX-Lewa Settlement Scheme/2.

6. According to the respondent, at the time of the allocation he was a civil servant working in Nairobi and he found it very difficult to work on the land and that is when he approached the appellant and

requested him to help him in running the land and they verbally agreed to keep cattle and sheep and cultivate the land jointly and that is how the appellant entered his land through his own invitation and he allowed him as a partner, cum- manager, or overseer of the land as opposed to a purchaser or a trespasser;that apart from the 1st few years of farming the appellant started reporting only losses to him and in 1991 he decided to sub-divide the land into three portions and retained L.R. No. EX-Lewa/831 measuring 25 acres which comprised the area with development and sold the rest; that it cannot be true that the appellant purchased L.R. No. EX-Lewa/831 in 1988 for the reasons that L.R. No. Ex-Lewa/831 was not in existence in 1988 and by that time he had no title to the land, and that being the case he could not sell any land; that L.R. No. Ex-Lewa/831 came into existence in 1991 after he sub-divided L.R. No. Ex- Lewa/2 into 3 portions;that the appellant did not settle on the land in 1974 as at that time the land was in the hands of the colonial owner, but it was him that invited the appellant to the land in 1985 after he was allocated the same and he allowed him into the land in good faith purely for the purposes of running and managing the land for our joint benefit.

7. That in March, 2006 he informed the appellant that he wanted to sell the land and the appellant requested him to give him the first option to buy which he agreed; that he verbally agreed with the appellant that he would sell the land at Kshs.120,000.00 per acre making a total purchase price of Kshs.3,000.00,000.00 and as the appellant had no money at that time he requested to be given up to September, 2006 to get the money to enable them enter into a formal sale agreement. The appellant failed to pay the money as agreed and that was the reason why the appellant never applied for consent of the Land Control Board or attempted to transfer the land to himself as he could not do so because he was holding the title deed.

8. He averred that sometimes in May, 2007 the appellant informed him that he would not be able to pay within the period they had agreed and requested to be given more time which the 1st respondent refused and he informed the appellant that the main reason for selling the land urgently was to get money to settle a matter he had with the 2nd respondent; and as the appellant was unable to buy the land he sub-divided the land into two portions of 10 ½ acres and 14 ½ acres; that L.R. No. L.R.EX-Lewa Settlement Scheme/1217 which was 10 ½ acres was transferred to the 2nd respondent in settlement of H.C.C.C No. 115 of 1990 where the 2nd respondent had sued him.

9. The parties also gave oral evidence before the trial court. The appellant told the court that he had lived on the suit land since 1971 and that the original number of the suit land was L.R. No. EX-Lewa Settlement Scheme/2 which the 1st respondent sold to him but did not transfer to him. He stated that he had lived on the land for more than 20 years and later learnt that the 1st respondent was selling the land in secret and which he had divided into L.R. No. EX-Lewa Settlement Scheme/1216 and 1217 and that he was still in occupation of L.R. No. EX-Lewa Settlement Scheme/831 which was the whole land before sub-division and where he was farming.

10. He stated that he learnt that the 1st respondent had transferred L.R. No. EX-Lewa Settlement Scheme/1217 to the 2nd respondent after he sold it to him on 27th March, 2008 and that at that time he was the one in occupation. He prayed that he be recognised as the owner of the land by adverse possession as he had lived there for more than 12 years.

11. In cross examination he stated that he had entered on the land in 1971 by invitation of the 1st respondent who was the registered owner.

12. Upon hearing the matter, the ELC (C. Cherono, J.), held that the appellant's entry into the 1st respondent's land was as a licencee. The learned Judge found that the appellant had attached a sale agreement indicating that he bought the suit land from the 1st respondent at a consideration of Kshs.90,000.00 and it was, therefore, clear that the appellant's entry into the suit land was by consent

of the 1st respondent and he could not, therefore be an adverse possessor. According to the learned Judge, if the appellant had entered into the sale agreement with the 1st respondent as he claimed, then he ought to have sued the 1st respondent for specific performance of the contract. The learned Judge, after analyzing the evidence before her and the law concluded as follows;

> " The evidence adduced by the parties does not show that the plaintiff in this case is a squatter or a trespasser in the 1st plaintiff's land. As a purchaser, he must have been given possession of the suit property by consent. For all the reasons above given, this suit must fail and the same is hereby dismissed. I direct each party to bear his own costs."

13. These are the orders that precipitated this appeal that is predicated on some 14 grounds of appeal, which generally fault the learned Judge for not finding there was evidence of adverse possession. We do not need to reproduce the said grounds for purposes of this judgment, but we have considered them keenly, as amplified in the submissions filed by the parties.

14. During the plenary hearing of this appeal, both Mr. Nyamu Nyaga learned counsel for the appellant and Mr. Kimathi for the respondent relied on their respective written submissions and made no oral highlights.

15. We have considered the said submissions and the law particularly as espoused in the authorities cited in the submissions.

16. This is a first appeal and that being so, pursuant to rule 31(1)a of the Court of Appeal Rules, we have a duty to re-evaluate the evidence adduced before the trial court and arrive at our own independent conclusion. See also Selle & Another -vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123.

17. Upon considering the record of appeal in its entirety, and the rival submissions by both counsel the single issue we discern for our determination is whether the appellant was entitled to the order that he be registered as proprietor of the suit lands having acquired it by adverse possession. Did the appellant prove before the trial court that he had obtained title to the suit property by adverse possession?

18. The law on adverse possession is well settled. In order for a claim of adverse possession to be proved, the following ingredients must be demonstrated.

    i. The date on which the claimant came into possession.

    ii. What was the nature of his possession.

    iii. That the fact of his possession was known to the other party.

    iv. How long his possession continued and

    v. That the possession was open and undisturbed for the requisite 12 years.

19. Did the appellant's claim meet the above parameters?

20. On the date of entry, evidence adduced before the trial court was that sometime in 1985, the respondent was allocated by the Government of Kenya a piece of land measuring 50.5 Ha. at Timau through the Settlement Fund Trustee and after he paid all the money which was required by SFT the land was registered in his name on 17th December, 1990 and became L.R. No. EX-Lewa Settlement Scheme/2. It was his evidence that as he was a civil servant and wasn't able to be on the ground most of the time, he invited the appellant as a manager/supervisor to take care of the farm.

21. According to the appellant, he was living on the said land from 1971, even before it was allocated to the respondent. It is worth noting, however, that adverse possession does not apply to Government

land, and so time could only start running against the respondent from 17th December 1990 when the land was transferred from the settlement Fund Trustee to the 1st respondent. Although the appellant states that he entered the land in question in the 1970s (long before the 1st respondent appeared at the scene), time for purposes of adverse possession could only run against the 1st respondent after the land was transferred to him by the Government. We will, therefore, take the appellant's date of entry and possession into the suit land as December 1990.

22. On the nature of the entry, we note that the appellant admitted before the trial court that he was invited to the suit property by the respondent. We can, therefore, safely conclude that the appellant entered into the suit property as a licensee. That being the case, unless the circumstances changed, even if he remained on the property for a lifetime, his occupation/possession was never adverse to the respondent's ownership of the land, unless the licence or permission was withdrawn.

23. In an attempt to demonstrate that the licence was withdrawn at some point, the appellant claimed that he entered into a Sale agreement for the sale of the said property with the respondent in 1988, a fact the respondent strongly denied. We don't think we should give much attention to this point because, as we have pointed out earlier, the 1st respondent became the registered owner of the suit property in 1990, and he could not have entered into an agreement to sell what he did not have.

24. Conversely, the 1st respondent maintained that when he needed to sell part of the land sometime in 2006 to take care of some financial obligations, he informed the appellant of his intention and invited him to purchase the property on priority basis, but the transaction never materialized as the appellant was not able to raise the purchase price. We think the 1st respondent's version of the story is the correct one as it is supported by the evidence on record. In as much as we didn't have the opportunity to see the 1st respondent testify and assess his demeanor, his evidence appears more credible that that of the 1st respondent.

25. Even assuming, arguendo, that the appellant ceased being a licensee in 2006 when the contract of sale fell through, after the 1st respondent failed to apply the for the Land Control Board consent to transfer the suit property to him, his claim was inchoate as 12 years had not passed before he filed the OS before the ELC in 2008.

26. See the case of Wambugu vs Njuguna, (1983) KLR 172 at holding 4, where this Court held:

> "Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist."

27. Further in the case of Samuel Miki Waweru vs Jane Njeri Richu, *CA No 122 of 2001*, (unreported) this Court said:

> "It is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of or in provisions of an agreement of sale or lease or otherwise. Further as the High Court correctly held in Jandu -vs- Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been given. The principle to be extracted from the case of Sisto Wambugu -vs- Kamau Njuguna, 1982 – 88 1 KLR 217 relied on by Mr. Gitonga, learned counsel for the appellant, seems to be that a purchaser of land under a contract of sale who is in possession of the land with the permission of the vendor pending completion cannot lay

a claim of a license or possession of such land only after the period of validity of the contract unless and until the contract of sale has first been repudiated as required by the parties in which case, adverse possession starts from the date of the termination of the contract."

28. It was the appellant's duty to establish that although he was originally a licensee on the suit property, that status changed after he entered into a sale agreement for the purchase of the suit land and after the 1st respondent failed to obtain the consent of the Land Control Board to transfer the suit property to him. On the evidence we find that he remained on the land defiantly, as a trespasser.

29. What was also lacking in the appellant's evidence which is the tapestry that would bind him to the land was the time when permission ceased and adversity started to run. It bears repeating that even if the appellant occupied the suit lands pursuant a valid sale agreement (in this case there was no proof of a valid sale transaction), time does not start running for purposes of adverse possession, until the agreement is terminated. Therefore, the claim of adverse possession was not proved and the learned Judge was right in holding so.

30. Simply put, the undisputed occupation of the suit property by the appellant did not amount to adverse possession thereof as claimed.

31. For the aforesaid reasons we find no justification for interfering with the judgement by the Environment and Land Court and the orders made therein. We find no merit in this appeal which we hereby dismiss with costs to the respondents.

DATED AND DELIVERED AT NYERI THIS 20TH DAY OF DECEMBER 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR