



REPUBLIC OF KENYA



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Muriithi v Muriithi (Civil Appeal 88 of 2018)
[2024] KECA 1866 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1866 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 88 OF 2018
W KARANJA, J MOHAMMED & LK KIMARU, JJA
DECEMBER 20, 2024

BETWEEN

HEZEKIAH MURIITHI APPELLANT

AND

}JOSEPH MURIUKI MURIITHI RESPONDENT

(Being an appeal from the Judgment of the Environment at Kerugoya (B.N. Olao, J.) dated 26th January 2018 in ELC Case No. 519 of 2013 Consolidated with ELC No 47 of 2016)

JUDGMENT

1. By an Originating Summons (OS) dated 12th April 2016 filed by Joseph Muriuki Muriithi, the respondent, against Hezekiah Muriithi Njoka, the appellant, in Kerugoya ELC Case No. 47 of 2016 the appellant sought orders, inter alia;

“That the applicant be declared to have become entitled by adverse possession of over 12 years to all that parcel of land registered under the Land Act No. 6 of 2012, the Land Registration Act No. 5 of 2012 and the Registered Land Act Cap. 300 (repealed) and comprised in the title No. Inoi/Mbeti/308; That the said applicant be registered as the sole proprietor of all the said parcel of land known as L.R. No. Inoi/Mbeti/308; That the Land Registrar Kirinyaga do register the applicant as proprietor of L.R. No. Inoi/Mbeti/308.”

2. The Originating Summons (OS) was supported by an affidavit sworn by the respondent, to which were annexed various correspondences, the Green Cards to land parcels No. Inoi/Mbeti/219 and Inoi/Mbeti/308 and a ruling delivered in Nyeri High Court Civil Case No. 38 of 1990 (OS) by M.S.A Makhandia, J. (as he then was) between Joseph Muriuki Muriithi (as plaintiff) and Wakera Kabui alias Wakera Wakabari and Muriithi Kariuki (as defendants).



3. In the affidavit the respondent deposed, inter alia, that; he and his family including his brothers and their family have been in occupation of Land Parcel No. Inoi/Mbeti/308 (the suit land) since 1959 and have buried both their parents thereon. That the suit land is a sub-division of Land Parcel No. Inoi/Mbeti/219 which had been registered in the names of one Kabui Mugo to hold in trust for the respondent's father, Muriithi Karunga who was then in detention and who was also a step brother to Kabui Mugo. That Kabui Mugo died in 1963 before the original land could be shared and his wife and mother instituted succession proceedings without the respondent's knowledge and shared out the land. When the respondent learnt about this, he lodged a complaint with the Chief and it was decided that Land Parcel No. Inoi/Mbeti/219 be shared equally between Wambia Karunga (the mother of Muriithi Karunga) and Wainoe Karunga (the mother of Kabui Mugo.)
4. That whereas the family of Wainoi Karunga resides on Land Parcel No. Inoi/Mbeti/309 after selling the suit land which was meant for the respondent's father, the respondent has remained in adverse possession of the suit land since 14th July 1978 together with his brothers and their families. That the respondent filed Nyeri HCCC No. 38 of 1990 (OS) against Wakera Kabui and Muriithi Kabui claiming the suit land by adverse possession but that suit was dismissed on technicality. That John Muriithi Kariuki sold the suit land to the appellant on 13th March 2001 but by that time, the respondent had already acquired it by prescription of the law and has been in continued and uninterrupted possession thereof since 1959 when it was originally Land Parcel No. Inoi/Mbeti/219 and apart from a crop of 2,880 coffee stems and 200 tea bushes, there are also 6 semi-permanent houses, 4 chicken coops and a bore hole.
5. In response to that OS, the appellant herein, filed a replying affidavit in which he deposed, inter alia, that he purchased the suit land from John Muriithi Kariuki and obtained title after all the necessary requirements including consent had been granted and he then issued a letter dated 25th March 2001 asking the respondent to vacate and also issued a notice to that effect dated 24th April 2001. That the respondent's occupation of the suit land was interrupted by a letter dated 23rd May 1990.
6. That the appellant is an innocent purchaser of the suit land and before he purchased it, an order of eviction had been issued against the respondent in Embu RMCC Case No. 34 of 1984 which had been filed against him by Wambia Karunga and that, in fact, the respondent had been evicted by the firm of S.K. Auctioneers on 23rd May 1990. The respondent had then filed Nyeri High Court Civil Case No. 38 of 1990 (OS) against Wakera Wakabari and Muriithi Kariuki which was however dismissed. He then tried to have this suit dismissed but that application was disallowed. The appellant obtained title to the suit land on 13th March 2001 and thereafter filed this suit to assert his right and, therefore, the respondent cannot claim to have acquired the suit land nec vi, nec clam nec precario as alleged. That the alleged adverse possession by the respondent since 14th July 1978 cannot therefore apply since the respondent was only registered as proprietor thereof in the year 2001 and that is when time started running and the OS is, therefore, frivolous, vexatious and an abuse of the court process.
7. Hezekiah Muriithi Njoka, the appellant had also filed Kerugoya ELC Case No. 519 of 2013 on 22nd January 2009 against Joseph Muriuki Muriithi, the respondent seeking, inter alia, orders;
 - a) An order compelling the defendant by himself, his agents and/or servants from further trespassing on the suit land;
 - b. General damages for trespass and the inconvenience caused to him by the continued illegal occupation of the suit land;



- c. An order for eviction of the defendant from the suit land.”
8. The appellant’s claim was founded on the pleadings that he was the registered proprietor of the suit land having purchased it from John Muriithi Muriuki and yet the respondent continued to occupy it in contravention of the appellant’s rights despite demand and notice to vacate.
 9. In a short defence however, the respondent averred that he has acquired the suit land by way of adverse possession and put the appellant to strict proof of his claim adding, further, that the court has no jurisdiction to entertain a claim based on trespass.
 10. These two suits were consolidated by a consent of the parties dated 25th October 2015. Directions were then taken that the plaint in Kerugoya ELC Case No. 519 of 2013 be the plaint in the consolidated suit and the Originating Summons in Kerugoya ELC Case No. 47 of 2016 be the counter claim.
 11. The evidence of the appellant, before the trial court was that he is the owner of the suit land having purchased it in 2001 from John Muriuki Kariuki and obtained the title deed but he has been unable to take possession because the respondent chased him away alleging that he (respondent) had filed Nyeri High Court Civil Case No. 38 of 1990 which was, however, dismissed in 2007 but the respondent has still refused to vacate thus necessitating the filing of the suit. With regard to the respondent’s Originating Summons, the appellant stated that the respondent was evicted from the suit land by auctioneers and his house demolished but he and his family returned and have prevented the appellant from accessing it.
 12. On his part, the respondent asked the court to rely on his Originating Summons and documents filed in support thereof in support of his counter-claim and asked the court to dismiss the appellant’s suit.
 13. Upon considering the evidence, the learned Judge (B.N. Olao, J.) in his judgment framed 3 issues for determination:
 - “ a) Whether or not the registration of the plaintiff as the proprietor of the suit land was always subject to any prescriptive rights enjoyed by the plaintiff;
 - b. Whether the defendant met the threshold of orders to have acquired the suit land by adverse possession; and
 - c. Whether the defendant’s occupation of the suit land was infact interrupted by the various suits and eviction orders which are part of the record herein.”
 14. After hearing the parties and considering the evidence placed before the court in its entirety, the learned Judge held, inter alia, that, the plaintiff was not entitled to the orders sought in his plaint in which he sought to evict the defendant from the suit land on the basis that he is a trespasser who should also pay him damages. Found, instead that the plaintiff’s registration as the proprietor of the suit land was always subject to the defendant’s overriding interests as an adverse possessor thereof and that those interests had crystallized. The court, accordingly, dismissed the plaint, but allowed the counter-claim and found that the defendant was entitled to orders to have become entitled to the suit land by way of adverse possession.
 15. The orders were summarized as follows:
 - “ 1. The plaintiff’s suit against the defendant is dismissed.



2. The defendant's counter-claim is allowed and he is entitled to be registered as the proprietor of land parcel No. INOI/MBETI/308 having acquired it by way of adverse possession.
 3. The Land Registrar Kirinyaga do register the defendant as proprietor of the land parcel No. INOI/MBETI/308 in place of the plaintiff.
 4. The plaintiff shall meet the defendant's costs of the dismissed suit and the counter-claim."
16. Being aggrieved by those orders, the appellant moved to this Court on appeal raising seven (7) grounds of appeal: The learned Judge was faulted for, inter alia, holding that the filing of Embu High Court Civil Suit No 1 of 2009 did not stop time from running as the respondent's claim to the suit land had long crystallized; in holding that the respondent had been in exclusive possession and occupation of the suit land since 1959 even when it was still part of the original land parcel No. Inoi/Mbeti/219 with the knowledge of the appellant without interruption despite there being Embu Civil Case No. 34 of 1984 at the Resident Magistrates Court Embu; in making a finding that the appellant was not entitled to orders seeking to evict the respondent from the suit land and holding that the respondent had proved his counterclaim as contained in the originating summons; in determining issues of equitable rights which were not matter before court for determination as opposed to dealing with the orders of eviction of the respondent and whether the respondent had acquired the land by way of adverse possession and in failing to consider the submissions made by the appellant, thus arriving at the wrong conclusion.
 17. Parties filed their respective submissions which they relied on wholly during the plenary hearing of the appeal where the appellant was represented by learned counsel, Mr. Mwaura and the respondent was represented by Mr. Magee.
 18. By way of summary, with regards to grounds 1,2,3,6 and 7 the appellant submitted that the learned Judge erred in fact and in law in holding that the filing of Embu High Court Civil Suit No 1 of 2009 did not stop time from running as the respondent's claim to the suit had long crystallised. It was stated that the respondent bought Land Parcel No. Inoi/Mbeti/308 from John Muriithi Kariuki, had the land control board consent approval and was registered as absolute owner of land on 13th March, 2001 and had filed the instant suit on 29th January, 2009.
 19. It was submitted, further, that the twelve-year period was not over between obtaining of title by the appellant and the filing of the suit for eviction and that, moreover, the filing of the suit for the recovery of land stopped time from running for the purposes of section 38 of the *Limitation of Actions Act* under which a person may claim to have become entitled to land by adverse possession.
 20. It was submitted that the respondent in their submission relied on the case of Githu -vs- Ndeete [1984] KLR 776 where it was held that 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 and that assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land.
 21. Further it was submitted that the learned Judge erred in fact and in law in holding that the respondent had been in exclusive possession and occupation of the suit land since 1959 even when it was still part of the original Land Parcel No. Inoi/Mbeti/219 with the knowledge of the appellant without interruption despite there being Embu Civil Case No. 34 of 1984 at the Resident Magistrates Court, Embu where the then Resident Magistrate on 4th April, 1990 made a finding that the respondent must be evicted from the land pursuant to Civil Case No. 34 of 1984 at the Resident Magistrates Court at Embu.



22. With regards to ground 6 and 7 of the appeal, it was submitted that the authorities relied by the appellant in support their case were merited and well founded and therefore the trial Judge erred in law in disregarding, failing to consider and or adequately appreciate the authorities and the submissions filed by the appellant together with the evidence adduced by the appellant. The appellant relied on this Court's decisions in William Gatuhi Murathe vs Gakuru Gathimbi [1998] eKLR; Wambui Gikwa -vs- Paul Kimani Muraba [2016] eKLR; Lazaro Kabebe -vs- Ndege Makau & another [2017] eKLR; and Grace Wairimu Sorora -vs- Chaka Limited & 6 others [2017] eKLR.
23. We are urged to allow the appeal.
24. This being a first appeal, our mandate is as circumscribed by Rule 31(I) a of the Court of Appeal Rules 2022, which is to re- appraise the evidence adduced before the trial court and to draw inferences of law and fact and arrive at our own conclusions on the same; See also *Selle & Another -vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123.
25. In our considered view, the germane issue in this appeal is whether the respondent acquired title to the suit property by adverse possession. One of the essential elements of the doctrine of adverse possession is that there must be sufficient degree of physical contact on the land and that possession of the land must be actual, notorious, exclusive and continuous; apparent and manifest to the actual land owner.
26. For a claim based on adverse possession to succeed, a person must establish the following: on what date he came into possession; what was the nature of his possession; that the fact of his possession was known to the other party; how long his possession continued and that the possession was open and undisturbed for the requisite 12 years. See *Kisumu Civ. App. No. 110 of 2016 Richard Wefwafwa Songoi -vs- Ben Munyifwa Songoi* [2020]eKLR.
27. This Court in its decision in Civil Appeal No. 27 of 2013 *Samuel Kihamba -vs- Mary Mbaisi* [2015]eKLR gave guidance on what is to be considered when determining the nature of possession in the following terms:

“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 landowner, with intention to have the land. There must be an apparent dispossession of the land from the landowner.”
28. From the evidence on record, the Green Card which was produced as an exhibit showed that the title to the original land parcel No. Inoi/Mbeti/219 was closed on 14th August 1982 upon sub-division and Wakera Kabui became the registered proprietor of the suit land on the same day. The respondent however continued living on the suit land together with his siblings and their families.
29. It is clear, therefore, that as far back as 1959 even before the suit land was registered in the names of Wakera Kabui, the respondent, his siblings and their families were in possession and occupation of the suit land even when it was still part of the original Parcel No. Inoi/Mbeti/219. The Green Card to the land parcel No. Inoi/Mbeti/219 shows that it was registered in the names of Kabere Mugo (Kabui Mugo) who was the step brother to Muriithi Karunga the respondent's father and held the said land in trust for the said Muriithi Karunga who was in detention at that time. This has not been rebutted by the appellant who instead just stated how he acquired the suit land in 2001 and the various suits that had been filed against the respondent.
30. Like the trial court we make a finding of fact that the appellant, his siblings and their families have always been in exclusive possession and occupation of the suit land as far back as 1959 even when it



was part of land parcel No. Inoi/Mbeti/219 and registered in the names of his uncle Kabere Mugo (Kabui Mugo) and later in the names of Wakera Kabui .There was no evidence to suggest that the respondent's possession and occupation of the suit land was in any way with the consent of the then registered owners. If anything, copies of the letters produced as exhibits show that the area Chief had been engaged severally in arbitrating over the original land parcel No. Inoi/Mbeti/219.

31. It is our finding, therefore, that the appellant's registration as the proprietor of the suit land has always been subject to the respondent's overriding interest as a party in occupation thereof since 1959.
32. It is on record that there have been various cases filed with respect to the suit land. The first such case appears to have been Embu Resident Magistrate's Court Civil Case No. 34 of 1984 involving Wambia Karunga as plaintiff and Wainoi Karunga, Wakera Kabere and John Muriithi Kariuki as defendants. That court ordered the eviction of the defendants in a ruling dated 4th April 1990. The defendant herein was not a party and neither was any of his siblings mentioned in paragraph eleven (11) of his supporting affidavit. In any case, by the time that suit was filed in 1984, the plaintiff, his siblings and their families had been in possession and occupation of the suit land for some twenty-five (25) years well in excess of the statutory period of twelve (12) years. That case could therefore not have interrupted the respondent's possession and occupation of the suit land as it came too late, after the respondent's rights had already crystallized. In effect the respondent was in continuous, uninterrupted and exclusive possession of the property.
33. Like the trial court we observe that the registered proprietor of the suit land, one John Muriithi Kariuki sold it to the appellant in 2001 but the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession. This is so because adverse possession runs against the title and not the registered owner. We find that the change of ownership of the suit land from John Muriithi Kariuki to the appellant did not interrupt the respondent's possession and occupation of the suit land which remained open, exclusive and with the knowledge of the appellant. Whether time for purposes of adverse possession is computed from 1959 (when the appellant says he started living on the original land parcel No. Inoi/Mbeti/219) or from 1978 (when it is alleged by the appellant that Wakera Kabui fraudulently acquired through succession land parcel No. Inoi/Mbeti/219), it becomes clear that, either way, the respondent's occupation of the suit land was well in excess of the twelve (12) years period provided for in law by the time the appellant bought the suit land.
34. By the time the appellant's case in Embu High Court Case No. 1 of 2009 was filed, the respondent's claim to the suit land by way of adverse possession had long crystallized and the respondent had already acquired the suit land by way of adverse possession by the time the appellant moved to Court.
35. The sum total of the foregoing is that we are satisfied that the respondent proved his counter-claim before the trial court to the required standard and the counterclaim was properly allowed. The appellant failed to prove his case and based on the evidence placed before the trial court, his claim was properly dismissed. We find no fault with those findings by the learned Judge. This appeal is without merit and we dismiss it with costs to the respondent.

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

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED



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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

