Munyanya v Keya (Civil Appeal E009 of 2023)
[2024] KECA 1831 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1831 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL E009 OF 2023

JM NGUGI, PO KIAGE & M NGUGI, JJA

DECEMBER 20, 2024

BETWEEN

MOHAMED MUNYANYA ..... APPELLANT

AND

MICHAEL KEYA ..... RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Kakamega (Ohungo, J.) dated 22nd November, 2022 in ELCA Case No. E003 of 2021)

JUDGMENT

Judgment of Joel Ngugi, JA

1. The litigation herein began with the respondent filing a suit against the appellant herein in March 2015. The suit was Butere Principal Magistrate's Court, Case No. 15 of 2015. It was a claim for trespass in which the respondent sought the following prayers:

    i. An order of eviction of the appellant from land parcel no. Marama/Shinamweyuli/2967.

    ii. An order of permanent injunction restraining the appellant, his agents, servants or anybody claiming through him from trespassing, laying claim, tiling cultivating or in any way interfering with the respondent's land parcel no. Marama/Shinamweyuli/2967.

    iii. Costs of the suit.

    iv. Any other relief.

2. In his plaint dated 4th March, 2015, the respondent claimed that he was the registered owner of the whole of land parcel no. Marama/Shinamweyuli/2967 measuring 0.16 hectares (suit property). He averred that the appellant had trespassed onto the suit property and was wasting and making use of it without his consent, whereas he (respondent) continued to suffer great economic loss for which

he held the appellant responsible. He further averred that the appellant's unlawful actions denied him(respondent) his legal rights of possession and peaceful use of his parcel of land thereby occasioning him great loss and damage.

3. In his defence and counter claim dated 14th December, 2018, the appellant stated that he owns a parcel in Ibokolo Sub-location Marama Central, measuring approximately 0.23 hectares, which he purchased from one Eliakim Shibia Musa (deceased) in 2002, and which was hived off from land parcel no. Marama/Shinamweyuli/4 whose acreage was 0.8 hectares. He averred that he had been in peaceful occupation and possession of the said land from 2002 until the filing of the suit in 2015. He further averred that the parcel he occupied was subdivided from land parcel no. Marama/Shinamweyuli/1944 and 1945 on 28th May, 2008 by the deceased; and he was to be given a title deed for the portion he bought upon further subdivision of Marama/Shinamweyuli/1944, but the deceased died in 2009 before the said subdivision and transfer in his favour could be effected.

4. He claimed that the respondent had all along been aware that he was the beneficial owner of the portion of land he occupied since 2002; and the respondent also knew that a dispute existed between the appellant and the administrator of the estate of the deceased. Therefore, the respondent was not an innocent purchaser for value. He further claimed that by the time the respondent was purchasing the suit property, he (appellant) had been in peaceful and uninterrupted occupation thereon for a period of over twelve (12) years. Thus, the appellant contended that the respondent's title deed was acquired irregularly, unprocedurally and unlawfully, hence null and void for all purposes.

5. Lastly, the appellant claimed that the suit property does not exist on the ground and that in case it does, then it is not on the portion of land that he occupies. Consequently, he sought for judgment against the respondent in the following terms:

    i. A declaration that the respondent's title deed in relation to Marama/Shinamweyuli/2967 is null and void.

    ii. A declaration that the appellant is the beneficial owner of the land parcel he occupies to be hived off from the mother title land parcel number Marama/ Shinamweyuli/1944.

    iii. An order that the administrator of the estate of the late Eliakim Shibia Musa to conduct a sub-division and transfer of the parcel the appellant is occupying in the names of the appellant.

    iv. Costs of the counter claim.

6. The suit went to trial. At the conclusion of the trial, the learned magistrate found that the respondent's suit had merit and allowed it as prayed by the respondent in his plaint; and dismissed the appellant's counter claim in its entirety.

7. The appellant was aggrieved by that decision and lodged an appeal to the Environment and Land Court (ELC) vide Kakamega Environment and Land Court, Appeal No. E003 of 2021, through a Memorandum of Appeal dated 29th January, 2021. The said Memorandum of Appeal was later replaced with an Amended Memorandum of Appeal dated 7th February, 2022. The appeal was canvassed through written submissions.

8. At the ELC, the appellant laid down twelve (12) grounds of appeal which were condensed into three (3) issues in his written submissions as follows:

    a. Whether the appellant had acquired the suit property by adverse possession.

    b. Whether the trial magistrate disregarded the appellant's evidence and whether there were irregularities in the respondent's title to render it null and void.

c. Whether the trial court's finding on the mental capacity of the original owner and his capacity to contract was justified, well founded or tenable in law.

9. After analyzing and considering the appeal, submissions and annexures thereto, the learned judge coined three (3) issues for determination namely:

a. Whether the respondent's title to the suit property is null and void.

b. Whether the appellant established adverse possession.

c. Whether the reliefs sought by the parties should issue.

10. In dealing with the first issue, the learned Judge relied on the provisions of section 26 of the *Land Registration Act* (LRA) and held that if the appellant seriously wanted to interrogate the manner in which the deceased or his estate subdivided parcel no. Marama/ Shinamweyuli/1944, he should have joined the administrator of the deceased's estate to his counterclaim but he did not do so. He agreed with the learned trial magistrate that the appellant had failed to demonstrate that the respondent's title to the suit property was tainted by any irregularity, unprocedural process or corrupt scheme. As such, the learned Judge concluded, the respondent's title could not be nullified under section 26 of the *Land Registration Act*.

11. On the second issue, the learned judge stated that the appellant claimed, without any specific prayer, that he was entitled to the suit property through adverse possession. He relied on this Court's decision in Mtana Lewa vs. Kahindi Ngala Mwagandi [2015] eKLR and Mombasa Teachers Co-operative Savings & Credit Society Limited vs. Robert Muhambi Katana & 15 Others [2018] eKLR, wherein the ingredients of adverse possession were discussed. He also relied on the case of Muchanga Investments Ltd vs. Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR, with regard to when time begins to run for purposes of adverse possession where a person originally entered the suit property by permission under a sale agreement. Guided by the three authorities, the learned Judge held that the appellant possessed and occupied the suit property pursuant to a sale agreement, which meant that his presence thereon was with permission from the seller. However, time for purposes of adverse possession could only begin to run upon full payment of the purchase price which occurred on 19th May, 2008. Thus, from 2008 when the appellant claimed to have completed payment of the purchase price to 2015 when the suit was filed, a period of twelve (12) years had not passed. In the premise, the learned Judge found that the claim for adverse possession was not established.

12. In conclusion, the learned judge held that the respondent's title remained unchallenged, despite the appellant's emphatic claim that he was in possession and even sought title to the suit property by way of adverse possession. He determined that the learned trial magistrate could not be faulted for granting the respondent the reliefs that he sought. Ultimately, he found that the appeal was devoid of merit and dismissed it with costs to the respondent.

13. Aggrieved by the decision of the Environment and Land Court, the appellant filed a Notice of Appeal dated 23rd November, 2022, and a Memorandum of Appeal dated 23rd January, 2023, in which he raised seven (7) grounds of appeal. These are that the learned judge erred in law:

1. In relying singularly on section 26(1)(a) of the *Land Registration Act* in finding that the appellant had not impeached the respondent's title Marama/Shinamweyuli/2967, yet the aforesaid section contains sub-section (1)(b) which the appellant had established thus:

a. The respondent's title had been obtained from the subdivision of Marama/Shinamweyuli/2082 which had been obtained from unprocedural subdivision of Marama/Shinamweyuli/1944.

b. The respondent's title had been obtained prior to the removal of all restrictions and cautions that were in place in the subdivisions of Marama/Shinamweyuli/1944.

c. The respondent's title had been obtained after investigations by the Director of Criminal Investigations had established that all the subdivisions of Marama/Shinamweyuli/1944, including the respondent's title had been obtained fraudulently and should be cancelled.

2. In singularly relying on section 26(1)(a) of the *Land Registration Act* to hold that the title of the respondent had not been impeached, yet Article 40(6) of the *Constitution*, 2010 does not protect any title found to have been unlawfully acquired.

3. By misconstruing the law on trespass by finding that the appellant had trespassed the respondent's alleged land, yet the appellant was in occupation and possession of the property by authority of the owner.

4. By misconstruing the concept of constructive and resulting trust, thereby failing to find that the appellant had crystallized interest in Marama/Shinamweyuli/2967 and hence the same could not be transferred to the respondent.

5. By shifting the burden of proof to the appellant by making the finding that impeachment of the respondent's title could only be allowed if the administrator of the estate of Eliakim Shibia Musa had been joined in the counter claim.

6. In misconstruing inherent powers of the court as provided for under section 3A of the *Civil Procedure Act*, 2010 as read together with Article 159(2)(e) of the *Constitution* of Kenya.

7. In completely disregarding the appellant's pleadings, evidence, submissions and authorities cited thereby committing a miscarriage of justice.

14. Consequently, the appellant prayed that: the appeal be allowed with costs to the appellant; the judgment and decree granted in Kakamega Environment and Land Court, Appeal No. E003 of 2021 be set aside with costs to the appellant; the respondent's plaint in Butere Principal Magistrate's Court, Environment and Land Court Case No. 15 of 2015 be dismissed with costs to the appellant; and the appellant's counterclaim in Butere Principal Magistrate's Court, Environment and Land Court Case No. 15 of 2015, be allowed as prayed with costs to the appellant.

15. During the virtual hearing of the appeal, learned counsel, Mr. Ochieng Teddy, appeared for the appellant and learned counsel, Mr. Idi Nandwa, appeared for the respondent. Both parties filed written submissions and relied entirely on them.

16. In addressing the grounds of appeal, counsel for the appellant argued them in four (4) clusters as follows:

a. Grounds 1, 2, 5 and 6.

b. Ground 3

c. Ground 4

d. Ground 7

17. As regards grounds 1, 2, 5 and 6, counsel relied on section 26(1) of the LRA and the case of Jonah Omoyoma vs. Bonface Oure & 2 Others [2021] eKLR and Elijah Makeri Nyangw'ara vs. Stephen Mungai Njuguna & Another [2013] eKLR, wherein the court held that there are two instances whereby a title could be impeached or challenged. These are: first, when the title is obtained by fraud or misinterpretation to which the person must be proved to be a party; and second, when a certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. Counsel also considered the import of Article 40 of the *Constitution* vis a vis section 26 of the LRA and relied on this Court's decision in the case of Henry Muthee Kathurima vs. Commissioner of Lands & Another [2015] eKLR, wherein it was held that Article 40(6) of the *Constitution* does not allow any illegally acquired title to remain indefeasible. Counsel contended that this position obtained support from the law under section 26(1)(b) of the LRA. Thus, counsel argued that despite appreciating the position of the law in his judgment, the learned judge proceeded to misinterpret it by insisting that the only way the appellant would have impeached the respondent's title was by joining the estate of the deceased to the suit.

18. In furtherance of this argument, , counsel argued that the appellant had established that the respondent's title was acquired illegally, unprocedurally and through a corrupt scheme as the evidence (green cards) he presented that Marama/Shinamweyuli/2967 emanated from Marama/Shinamweyuli/2082, an irregular and unprocedural subdivision of Marama/Shinamweyuli/1944, including the green card of Marama/Shinamweyuli/4, was unchallenged. Counsel further argued that the record is clear that Marama/Shinamweyuli/4 was closed on 28th May, 2008 after its subdivision gave rise to Marama/Shinamweyuli/1944 and 1945. However, page 75 of the record shows that Marama/Shinamweyuli/2052 is a subdivision of parcel no. Marama/Shinamweyuli/1944; and a closer look at the green card creating Marama/ Shinamweyuli/2052 indicates that its title was opened on 12th April 2000. Thus, this leads to the conclusion that from the green card of Marama/Shinamweyuli/2052, parcel no. Marama/Shinamweyuli/1944 could only have been created on or before 12th April, 2000. Hence, a juxtaposition of the two green cards can only lead to either of the following conclusions:

    a. The green card of Marama/Shinamweyuli/1944 as presented by the respondent (plaintiff in subordinate court), as to it being created on 28th May, 2008, is false; or

    b. The green card of Marama/Shinamweyuli/2052 as presented by the appellant, indicating that Marama/Shinamweyuli/1944 was created earlier than 12th April, 2000, to show that parcel no. Marama/Shinamweyuli/2967 was fraudulently and illegally acquired is true.

19. Counsel explained that having been presented with the above evidence as to the two separate green cards indicating different non-congruent dates on the formation date of Marama/Shinamweyuli/1944 the grant parent of Marama/Shinamweyuli/2967, it behooved the court to nullify the title as evidence had been presented to demonstrate illegality and the unprocedural manner of obtaining Marama/Shinamweyuli/2967.

20. Further, counsel argued that it is a principle of law that where a caveat exists in a parcel of land, the same cannot be sold or transacted upon until such a time that the caveat is removed. In this regard, counsel submitted that the learned judge was presented with evidence that the appellant placed a caveat on the suit property before its sale to the respondent. But despite the said evidence that barred any transaction, he ignored the same by holding that the only possible way to prove that the title of the respondent was null and void was by joining the family of the deceased who subdivided the property, which was a wrong interpretation of the law, leading to a wrong finding.

21. In addition, counsel argued that by the instruction of the respondent, the Director of Criminal Investigations (DCI) conducted investigations on the suit property; after which the following, among others, were established:

    a. The family of the deceased (Eliakim Shibia Musa) took advantage of his mental illness and sold and subdivided his property without his consent.

    b. The sale of Eliakim Shibia Musa's property by his family to other parties had affected the rights of persons who had genuinely bought the property from the said Eliakim Shibia Musa. (See pages 238 to 248, more so page 241 of the Record of Appeal)

22. Making reference to the above stated, counsel contended that upon the recommendation of the DCI that all the subdivisions of the original parcel Marama/Shinamweyuli/4 be revoked and a fresh process be undertaken, the evidence of irregularity and unprocedural acquisition of the suit property was well documented and available to the court, and was never challenged. As such, faced with the above stated evidence, section 26(1)(b) of the LRA had been satisfied. Hence, once established, the learned judge was under a duty to interpret the entire section 26 of the LRA and find that the indefeasibility of the respondent's title could not stand as illegality and unprocedural nature of acquiring the same had been established, notwithstanding failure to bring on board the estate of the deceased. In any event, counsel argued, section 3A of the *Civil Procedure Act*, 2010 and Article 159(2) of the *Constitution* gave the learned judge wide inherent jurisdiction to deal with any injustice, and he relied on this Court's decision in Kenya Power & Lighting Company Limited vs. Benzene Holdings Limited t/a Wyco Paints [2016] eKLR. In that decision, the court held that the inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice. Therefore, the learned judge had the power to determine the issue of validity of the respondent's title, even in the absence of the estate of the deceased. Hence, he should not have turned a blind eye to injustice when it was visible to its eyes that the process of subdivision, acquiring and sale of the suit property was done irregularly.

23. In addressing ground 3, counsel argued that it is without doubt that the appellant entered into a sale agreement with the deceased, Eliakin Shibia Musa, which fact was acknowledged by the learned judge in his judgment. However, this begged the question why the learned judge held that the appellant had trespassed and agreed with the trial court that it cannot be faulted for granting the respondent the reliefs sought. In this regard, counsel submitted that contrary to the trial court's holding that the appellant was a trespasser and had occupied the suit property unlawfully and wrongly, the learned judge confirmed that his occupation was with the authority of the seller by virtue of the sale agreement between him and the deceased. Therefore, upon completion of the whole of the purchase price, the appellant's occupation of the suit property was a matter of right and with authority. Hence, there was no basis for the court to find that the appellant trespassed, having taken the position that he had fully paid the purchase price for the suit property.

24. In this regard, counsel argued that the holding of the learned judge was approbating and reprobating at the same time, whereby on one hand he acknowledged that the appellant indeed occupied the suit property by virtue of the sale agreement and on the other hand, he termed him a trespasser of a property he was occupying as of right. In other words, for the court to have held that the appellant was a trespasser, it must have found that he was in default or breach of agreement; which breach or default would have created the unlawful or wrong occupation of the property. However, there was no such finding by the learned judge; but only such finding which stated that the appellant had fully paid the purchase price and was hence in compliance with the terms of the sale agreement, which justified his occupation.

25. Thus, having failed to justify the appellant's intrusion, counsel argued that the court misinterpreted the law on trespass and relied on the case of John Kiragu Kimani vs. Rural Electrification Authority [2018] eKLR, wherein the court relied on Clark & Lindsell on Torts, 18th Edition on page 923, which defines trespass as "any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the plaintiff to prove that the defendant invaded his land without any justifiable reason". Counsel stated that even if, for argument's sake, the court was to be right that the appellant was a trespasser, which argument is denied, the only time the appellant would have been said to be a trespasser was when he first occupied the suit property in 2002 before completion of payment of the purchase price. As such, his alleged unjustified occupation could only be counted from 2002; and if that was the case, then the appellant had indeed established the principle of adverse possession as the only time the alleged owner tried evicting him was in 2015, when the respondent filed the case in the lower court. Counsel relied on this Court's decision in Kasuve vs. Mwaani Investments Limited & 4 Others 1 KLR 184, to buttress his assertion that the appellant had been in exclusive and open possession of the suit property for a period of over twelve (12) years.

26. On ground 4, counsel relied on this Court's decision in Twalib Hatayan Twalib Hatayan & Another vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR, wherein it was held that: "...A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing and arises where the intention of the parties cannot be ascertained....thus it is meant to guard against unjust enrichment....A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee...which trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention....Therefore, unlike constructive trusts where unknown intentions may be left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial..."

27. Making reference to the above stated authority, counsel contended that the learned judge acknowledged that the appellant had paid the total purchase money, therefore, the appellant had accrued a resulting trust over the suit property, while the estate of the deceased had constructive trust to ensure that the certificate of title was handed over to the appellant. In the circumstances, the deceased's estate had breached the constructive trust by proceeding to allegedly sell the property to the respondent, as the resulting trust of the appellant did not permit them to pass good title to the respondent.

28. Lastly, on ground 7, counsel submitted that the learned judge abdicated his role as the first appellate court, as illustrated in the well-known case of Okeno vs. Republic EA 32. Counsel contended that: the respondent knew that the appellant had purchased the suit property as they come from the same village and they both knew the owner who was the deceased (See page 62 of the record of appeal); and there was an illegal and unprocedural mutation and transmission of the suit property by Sara Mbakaya (PW2), the administrator, whereby she commissioned the fraudulent mutation and transmission of land parcel no. Marama/Shinamweyuli/2082 out of which she curved out 0.05ha and transferred it to one stranger, Judith Ambale Likuyi. (See pages 298, 310, 311, 312 and 313 of the record of appeal). Also, out of the estate's residual entitlement on land parcel no. Marama/Shinamweyuli/2082 measuring 0.12 acres, all was sold as above. (See pages 296 to 320 of the record of appeal)

29. In light of the above stated, counsel contended that as the only heir of the deceased estate, Sara Mbakaya (PW2) had only 0.12 acres but she sold over and above her share of the deceased estate to several people.

Further, counsel submitted that the Consent on Distribution Form 37 General Form in the succession process resulted in a residual parcel of 0.12 acres, which is 0.05ha of the deceased estate as evidenced on pages 297 and 298 of the record of appeal. The said entire parcel was sold to another person as land parcel no. Marama/Shinamweyuli/2968 as evidenced on the green card of Marama/Shinamweyuli which is on page 265 of the record of appeal. Hence, it meant that the deceased's estate remained with no residual land to sell, and that is how the respondent turned onto the appellant's land as he entered into a sale agreement without due process and ascertaining the exact size and location as seen in the sale agreement.

30. Lastly, counsel argued that the court failed to consider all the irregular mutations as attached to the evidence presented which showed that the titles were not properly extracted.

31. Opposing the appeal, the counsel for the respondent opted to first make submissions on its opposition to the inclusion of the appellant's Supplementary Record of Appeal and documents filed at the Kakamega Environment and Land Court at pages 219 to 333 of the record of appeal, before delving into the grounds of the appeal. This was for the reason that the said documents were introduced at the first appellate court through the Supplementary Record of Appeal but they were never relied on at the trial court; they were not produced by the makers; and neither did the respondent's counsel get an opportunity to cross examine the makers.

32. Additionally, counsel pointed out that the prayers sought by the appellant, specifically prayers (c) and (d), were with regard to a case that was unknown to the respondent as there had never been a land dispute between the respondent and the appellant at the Chief Magistrate's Court at Kakamega ELC Case No. 15 of 2015. In this regard, during the hearing of the appeal, the appellant sought leave of the Court to amend the said prayers to read Butere Chief Magistrate's Court and not Kakamega Chief Magistrate's Court, as the first matter was handled at Butere and not Kakamega. The Court allowed the amendment of the said prayers as it posed no prejudice to either party.

33. On grounds 1, 2, 5 and 6, counsel submitted that the suit property, which was the respondent's land and measured 0.16 hectares, did not even satisfy the land claimed to have been purchased by the appellant. On the claim that the suit title was acquired illegally vide the two green cards for land parcel no. Marama/Shinamweyuli/4 and Marama/Shinamweyuli/2052, counsel argued that the first green card at page 45 of the record of appeal was pursuant to the appellant's list of documents at page 35; and the second green card was pursuant to the appellant's further list of documents at page 71 of the record of appeal. Additionally, the only green card filed by the respondent in respect of the suit property was at page 22 of the record. Thus, paragraph 15 of the appellant's submissions is therefore meant to mislead the Court as the respondent never filed any of the said documents; he only presented the green card of his land.

34. Further, counsel submitted that the mere production of two conflicting green cards does not establish an illegality as the appellant may have most likely committed an illegality for this reason. To this end, counsel contended that the appellant claimed to have bought 0.8ha out of Marama/Shinamweyuli/4 on 12th April, 2002; which he paid through five instalments to different persons other than the deceased, the last one being on 19th May 2008. Thereafter, he presented to court as evidence the green card to Marama/Shinamweyuli/2052 to show that Marama/Shinamweyuli/1944 was created on 12th April, 2000. Counsel posed the question that if that was the case, why did the appellant purchase a portion of Marama/Shinamweyuli/4 when the said title at the time of the alleged purchase had been closed on subdivision of Marama/Shinamweyuli/1944 and 1945, by which time the respondent had not come onto the suit property. Counsel also posed the question, who at the time was performing the said illegalities? He urged that the appellant should have summoned the Land Registrar to attend court and explain the discrepancy in the green cards he presented before court if at all.

35. Turning to the issue of contract, counsel submitted that the present suit was based entirely on the elements of contract under the law of contract, specifically, the capacity to contract. In this regard, counsel argued that the record shows, at pages 142 to 148, that the deceased was a person of unsound mind and the society considered him a child. Therefore, there was no consensus ad idem on any agreement purported to have been sanctioned by the deceased when he was still alive. Counsel argued that whereas the appellant claimed that there was no breach of the sale agreement, the respondent maintains that if at all any agreement existed, the same was void at the first instance.

36. As regards the issue of the caveat that was placed on the suit property prior to its purchase by the respondent, counsel argued that the record of appeal at pages 72 to 74 shows letters from the Land Registrar in the months of April, June and July 2013, referenced: NOTICE OF INTENTION TO REMOVE A CAUTION UNDER SEC 73(2) OF LRA ACT, 2012, all of which pertained to the suit property. Counsel stated that the said letters were in the possession of the appellant and were filed by him but he never responded to them. In any event, the sale agreement by the respondent, of the suit property, was made on 27th August, 2013. Therefore, the inference is that the proper procedure was followed in the removal of the caution before the sale agreement and the allegations made by the appellant based on that ground are untenable.

37. On another note, counsel submitted that it was unconscionable that the appellant contended that the first appellate court failed to exercise its inherent powers to determine the validity of the title in the absence of the administrator of the deceased estate. Whereas on the other hand, the appellant filed a counter claim seeking an order that the administrator of the deceased estate conduct a subdivision and transfer the parcel occupied by the plaintiff to him (plaintiff). To this end, counsel argued that the manner in which the appellant drafted this particular prayer would have left the court in a quagmire on how to award the same as the plaintiff was the appellant herein. As it were, counsel urged that the appellant failed to enjoin the administrator of the deceased estate and therefore, the order would have been issued ex parte without affording the administrator any opportunity to defend herself. Counsel submitted that inherent powers can only correct an injustice and not occasion one.

38. In answering the appellant's contention of the ground on adverse possession, counsel argued that the said prayer was not specifically pleaded by the appellant (then defendant) at the lower court. Therefore, submission on the same could not stand the light of day and the appellant's occupation of any land belonging to the deceased is denied and would only amount to trespass. Counsel further argued that the learned judge rendered himself on the issue of adverse possession and when time starts to run for purposes of the same; and that the claim by the appellant fell short as he did not satisfy the requirements of adverse possession.

39. Lastly, counsel argued that the appellant faulted the learned judge for failure to find that a constructive trust had been established. Counsel insisted that the appellant did not raise that issue at the lower court and at the first appellate court. As such, the appellant could not litigate new issues at this stage. Counsel argued that the establishment of a constructive trust had never been an issue on trial between the parties and further, the same could only be established against the estate of the deceased, which would require the administrator to be enjoined as a party to the proceedings.

40. Ultimately, counsel urged that the appellant failed to establish the requisite ingredients for impeachment of the respondent's title as provided for under section 26(1) of the LRA. He urged the Court to find that the appellant's case has always been flimsy and that there is no tenable evidence to warrant any orders sought by him. Consequently, counsel prayed that the appeal be dismissed with costs to the respondent.

41. This is a second appeal. The standard of appellate review in a second appeal such as this one was stated in Mwita v Woodventure (K) Limited & another (Civil Appeal 58 of 2017) [2022] KECA 628 (KLR) (8 July 2022) (Judgment), where the Court of Appeal, through the lead judgment of Mumbi Ngugi, JA, while referring to a second Appeal stated:

> This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of Stanley N. Muriithi & Another v Bernard Munene Ithiga [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR in which it was held that:
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> > In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.'"

42. Having exhaustively considered the record of appeal, the judgment of the two lower courts, the appellant's grounds of appeal and the rival submissions of the parties, two related issues present themselves for determination in this appeal:

    a. First, whether the evidence and the law justified the nullification of the respondent's title to the suit property under section 26 LRA and Article 40(6) of the *Constitution*.

    b. Second, whether, in the absence of nullification of the respondent's title, the appellant could benefit from a finding that he was in adverse possession of the suit property.

43. Before delving into the merits of the appeal, it is important to rule on a preliminary issue raised by the respondent: his opposition to the inclusion of the appellant's Supplementary Record of Appeal and documents filed at the Kakamega Environment and Land Court. This matter was canvassed at length during the plenary hearing during which counsel for the respondent conceded that he never objected to the inclusion of the Supplementary Record of Appeal at the ELC. That was the appropriate juncture to raise his objection. As it is, we note that the appellant filed a Notice of Motion dated 24th May, 2021, and one of the orders sought was for leave to file and serve his supplementary grounds of appeal and a supplementary record of appeal out of time; and for the same to be deemed as properly filed and served. By a ruling dated 25th January, 2022, the learned Judge granted the appellant leave to file and serve his supplementary record of appeal as prayed. That ruling was never appealed against. As such, the respondent's opposition in this regard is untenable in the circumstances.

44. Turning to the first issue for determination, the question is whether the appellant reached the threshold stipulated in section 26 of the LRA for the nullification of the respondent's title.

45. Section 26 of the LRA provides that a certificate of title shall be taken by all courts as prima facie evidence that the person named as a proprietor of land is the absolute and indefeasible owner of such land, except in the following circumstances: one, if the proprietor was party to the fraud or misrepresentation leading to issuance of the certificate of title; or, two, where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

46. At the magistrate's court, the appellant's significant problem was simply that he presented no evidence whatsoever to impeach the respondent's title. He presented evidence tending to prove that he was

a purchaser for value from the deceased – but none whatsoever to challenge the title held by the respondent. Needless to say, the learned magistrate found no basis for impeaching the respondent's title under section 26 of the *Land Registration Act*.

47. At the ELC, however, it is true, as discussed above, that somehow, the appellant was able to persuade the learned Judge to admit a supplementary record of appeal – without doing due analysis of whether additional evidence should have been admitted or not. In any event, through that modality, the appellant was able to place before the ELC new information aimed at showing either fraud or irregularity in the respondent's title.

48. The evidence that the appellant was able to make available for consideration at the ELC is, in essence, the entire investigations file on a fraud case the appellant had reported to the Directorate of Criminal Investigations (DCI) in which he named the administrator of the deceased's estate (PW2) as the main suspect. The complaint was, of course, of a criminal nature. The appellant wanted the administrator charged with defrauding him the suit property. Ultimately, the Investigating officer, after looking at the entirety of the documents available to him, fell short of recommending criminal prosecution. Instead, he recommended, outside his remit, that the titles that emanated from the mother title be revoked.

49. The question that arises at this level of the litigation is whether this new evidence placed before the ELC at the appellate level is sufficient to reverse the trial court's finding that there was no evidence sufficient to impeach the respondent's title under section 26, LRA. Even after carefully considering this new evidence, I am unpersuaded that it reaches the high threshold required to prove fraud, irregularity, unprocedural process or corrupt scheme sufficient to torpedo the indefeasibility of title under section 26, LRA.

50. The ELC found fault in the appellant's attempts to defeat the respondent's title in his failure to join the administrator of the deceased's estate to the suit. I think that the learned Judge was correct. This is not merely a technical argument. It is obvious that the appellant always perceived the controversy regarding the suit property to be between him and the administrator of the deceased's estate. That he chose to challenge the right of the estate to the suit property without joining the administrator is fatal to his claim. It is not merely venial omission; it goes to the root cause of his claim.

51. Yet, there is more. To prove fraud, irregularity, unprocedural process or a corrupt scheme in order to succeed in impeaching a property owner's title is not a bludge. Indeed, our decisional law has held constantly that the evidential burden is more than that of a run-of-the mill civil case: it is above the balance of probabilities standard; but below the beyond reasonable doubt standard. The reason for this is clear: to accuse a person of fraud or corrupt scheme is to accuse them of criminal doing – and when the impact of that accusation would result in the impeachment of their property, it follows that very cogent evidence should be demanded by the court.

52. In the present case, the cogent evidence was simply missing. The appellant was unable to demonstrate with solid evidence that the respondent was party to fraud or misrepresentation which should be penalized by taking away the suit property from him. Neither was he able to prove any corrupt scheme. All he was able to do at the ELC was to raise doubts about whether he had purchased the suit property from the deceased. Those doubts do not rise to the level of the kind of evidence required to impeach title to real property under our laws.

53. I will now turn to the appellant's contention that he proved ownership; and was, hence, entitled to a favourable judgment.

54. Ownership by adverse possession has been given statutory underpinning in sections 7, 13, 17 and 38 of the Limitations of Actions Act (Cap 22 of the Laws of Kenya). Section 7 of the Act states that:

> " 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."

55. Section 13, on the other hand, stipulates:

> 1. A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.
>
> 2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.
>
> 2. For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land".

56. Section 17 goes on to provide as follows:

> " Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished".

57. Finally, Section 38(1) and (2) states that:

> (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.

58. Courts, on the other hand, have judicially developed the elements which must be satisfied before a claimant can succeed in an action for adverse possession. The leading cases from this Court in this regard include: Titus Mutuku Kasuve vs. Mwaani Investments Limited & 4 others [2004] eKLR; *Titus Kigoro Munyi vs. Peter Mburu Kimani, Civil Appeal No. 28 of 2014*; Wambugu vs. Njuguna [1983] KLR 172) and Karuntimi Raiji vs. M'makinya [2013] eKLR.

59. The principles distilled from these cases are that in order to establish a claim of adverse possession, the possession must be:

a. Adverse to the interests of the owner – meaning that the claimant is in possession as owner in contradistinction to holding in recognition of or subordination to the true owner or to a recognized superior claim of another;

b. Actual - as opposed to constructive possession where the test is the degree of the actual use and enjoyment of the parcel of land involved by the claimant or his agent, tenant or licensee;

c. Open and notorious - meaning that the possession must be open and conspicuous to the common observer so that the owner or his agent on visiting the land might readily see that the owner's rights are being invaded. Differently put, the possession must be manifest to the community;

d. Without force - meaning that the possession and occupation must have been achieved peaceably not through actual or threatened violence;

e. Exclusive - meaning that the possession must be of such exclusive character that it will operate as an ouster of the owner of the legal title. Differently put, the claimant must demonstrate that she wholly excluded the owner from possession for the required period;

f. Continuous and uninterrupted for the period of twelve years - meaning that the title owner did not re-enter the property under circumstances showing her intention to assert dominion against the adverse user for at least twelve years. (See Joseph Ndafu Njurukani & 2 Others vs. Emily Naliaka Barasa, Kisumu Civil Appeal No. 149 of 2022)

60. As rehashed above, the learned judge concluded that the appellant had failed to establish three of the six elements: that his possession was adverse to the interest of the owner; he obtained possession without permission of the owner; and that he had possession for a period of at least twelve years.

61. The learned judge observed that the trial court did not address the issue of adverse possession which was advanced by the appellant but not specifically pleaded. Nevertheless, he found that nothing turned on the appeal as the appellant did not satisfy all the requirements for a favourable finding, and that, therefore, his claim for adverse possession was not established.

62. I agree with the learned judge that, indeed, the appellant not only failed to specifically plead adverse possession in his pleadings but also failed to meet all the requirements for that finding. The failure to specifically plead adverse possession is not just a technical one as the appellant attempted to make out in his submissions. It is a substantively fatal failure. This is because it bereaves the adversary of the opportunity to marshal the kind of evidence he needed to do to defeat the claim. Adverse possession is not the kind of claim that a party can make by "implication" as the appellant alludes in his submissions and his appeal to Article 159(2)(d) of the *Constitution*.

63. The failure to file a counter-claim or state a claim for adverse possession is not simply a failure in a formal or technical process. It goes to the root of a fair litigation process. It cannot be cured by "implication" as the appellant urged. While litigants are not expected to plead their cases with mathematical precision and mere inelegance in pleading is not to be harshly punished by denying claims, as an incident of the constitutional right to fair hearing in Article 50 of the *Constitution* of Kenya, 2010, a party who hopes to get a remedy from the court must give sufficient notice to the other party. The party cannot, by subterfuge or otherwise, hope that his pleadings raise sufficient "implication" for the other party to

respond. As this Court has variously said, parties are bound by their pleadings. This Court, in Caltex Oil (Kenya) Limited v Rono Limited [2016] eKLR, has stridently stated the rule thus:

> "If a party wishes the court to determine or grant a prayer it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders."

64. Most recently, this Court stated the justification for the rule in Ayiera v Kimwomi & 3 others (Election Petition Appeal E001 of 2023) [2023] KECA 1021 (KLR) in the following words:

> "This is not just a technical rule which fetishizes procedural narcissism; it is a substantive rule of law that plays the functional role of ensuring every litigant is informed in advance of the case he has to meet, so that he may effectively prepare and challenge the same. It is a substantive rule of law that ensures fairness and upholding of the principles of natural justice in the proceedings by ensuring that parties have proper notice of each other's cases. It is a fundamental facet of fair trial that banishes trial by ambush."

65. Additionally, as the learned Judge found, the appellant was not able to establish that he entered the suit premises without permission. In fact, the evidence he adduced, as the appellate court correctly analyzed, was in the opposite direction: he admitted that he was permitted to enter and take possession of the suit property by the deceased. As such, his possession cannot be said to have been adverse to the owner of the title until the date he claims to have completed paying the purchase price.

In addition, by his own admission, that was on 19th May, 2008. This would mean that by the time he was filing his counterclaim - on 14th December, 2018 – the requisite twelve years for adverse possession had not lapsed. Consequently, the learned Judge was eminently correct in concluding that, on the facts, the appellant had not succeeded in establishing a claim under the doctrine of adverse possession.

66. Having failed in these two primary claims, it follows that the ineluctable conclusion is that the appellant's appeal must fail. Conversely, I find that both lower courts correctly found that the respondent's title to the suit property was unimpeached.

67. The upshot is that, in my view, the appeal wholly lacks merit. I would propose that it be dismissed with costs to the respondent.

Judgment of Kiage, JA

1. I have had the advantage of reading in draft the judgment of my brother Joel Ngugi, JA.

2. It is clear from his analysis of the relevant law as applied to the established facts on record that this appeal must fail.

3. I have been troubled by what seems to be, arguably an unhappy outcome given the appellant's stringent insistence that he did purchase the subject property from which, by force of law, he must be kept off. The problem, as I perceive it, is not the law. It lies squarely in the manner in which the appellant's case was first framed and presented at the initial stages. Parties are bound by their pleadings as the courts have repeatedly stated – especially in the context of an adversarial justice system where courts can only decide on the basis of what is placed before them.

4. The failure to join the administratrix of the estate of the deceased vendor of the property – as the appellant maintains – was also a major failing on the part of the appellant's then legal advisors as it is

untenable to expect that any substantive orders would have issued against a non-party. Such a move would run afoul the sacrosanct principle that no party shall be condemned unheard. Those initial and fundamental errors proved fatal beyond salvaging, notwithstanding the gallant advocacy before us by Mr. Ochieng Teddy, the appellant's learned counsel. As things stand, no claim was presented against her, none has been decided upon, and no orders can issue. I need say no more.

5. As Mumbi Ngugi, JA also agrees, the dispositive orders in this appeal shall be of those proposed by Joel Ngugi, JA.

Order accordingly.

Judgment of Mumbi Ngugi, JA

1. I have had the benefit of reading in draft the judgment of my brother, Joel Ngugi, JA., which I entirely agree with and have nothing useful to add.

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

JOEL NGUGI

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JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR