



REPUBLIC OF KENYA



Otieno v Ngani (Civil Appeal 67 of 2018) [2023] KECA 273 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 273 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 67 OF 2018
K M'INOTI, S OLE KANTAI & F TUIYOTT, JJA
MARCH 17, 2023**

BETWEEN

MILKA AKINYI OTIENO APPELLANT

AND

CHARLES ODONGO NGANI RESPONDENT

*(Being an Appeal from the Judgment of the Environment and Land Court
at Kisii (Mutungi, J.) dated 6th October, 2017 in ELC No. 1151 of 2016)*

JUDGMENT

JUDGMENT OF F TUIYOTT JA

1. Land parcel No. Kamagambo/Koluoch/1000 (the suit land) is registered in the name of Milka Akinyi Atieno (Atieno), the appellant herein. The controversy in this appeal, as was at trial, is whether or not a portion measuring 1 acre of that land (the disputed portion) should be hived off from the register of the suit land and registered in favour of Charles Odongo Ngani (Ngani), the respondent.
2. Ngani moved the High Court at Kisii in proceedings which were later transferred to the Environment and Land Court (ELC) through originating summons in which his case was that in the year 1984, his late father Zakayo Ngani (Mzee Zakayo) purchased one acre of the suit land from one Ongoma Ochuka (Mzee Ochuka) but the process of transfer of the purchased portion was not complete by the time both parties died. Mzee Ochuka was the father-in-law of Atieno. In his pleadings before court, Ngani averred that upon the purchase, his late father and himself moved onto one portion of the land and developed it, including building a house. In his testimony to court he stated that he moved into the land sometimes in 1990 and has since been in possession and use of that portion of land. He further explained that he sought the parcel of land in his own name and not in the name of his late father because his father gifted him the land while still alive.
3. Atieno resisted the claim and it was her case that in the course of his life, her father-in-law Mzee Ochuka executed a transfer of the suit land in her favour but the transfer had not been effected by the time of his



death on June 3, 2010. She however obtained letters of administration to the estate of Mzee Ochuka and a transfer in her favour was perfected on September 20, 2011. It was her testimony before court that Ngani entered into a portion of the suit land in 2010 and used old iron sheets to put up a house to give an impression that it had existed for a long time. It was also her evidence that the portion occupied by Ngani is less than one acre and further that he owns a separate parcel of land measuring 10 acres.

4. In holding in favour of Ngani, Mutungi, J. in a judgment delivered on October 6, 2018 concluded:

“In the instant case the plaintiff has in my view proved by evidence that he has been in possession of the disputed portion of land since 1990 and he has constructed a permanent home and has been using the disputed portion of land. The defendant admits the plaintiff has built on the parcel of land but states he entered the land in 2010 and that is when he constructed the house. I did not believe her. By her own evidence she stated neither her deceased father in law nor herself raised any issue when the construction was taking place. The defendant belatedly wrote a demand letter on October 3, 2016 only after she had acquired title to the suit property which included the portion claimed by the plaintiff. As per the burial permit dated July 3, 2010 annexed to the defendant’s bundle of documents Ongoma Ochuka died on June 30, 2010 and up to the time he died he had not taken any action to recover the land occupied by the plaintiff. His title to the portion occupied by the plaintiff had become extinguished after the expiry of 12 years at least from 1990 so that as at the time of the transfer of the land to the defendant in 2010 he did not have title to the portion of 1 acre that the plaintiff occupied.”

5. Atieno is before us on a first appeal. In it she contends that the learned trial Judge erred by:

- a. totally failing to appreciate the very well settled principles of the law on adverse possession and wrongly applying the legal principles that he sought to rely on;
- b. erroneously finding that the respondent was entitled to a portion of the appellant’s piece of land by way of adverse possession;
- c. erroneously finding that the respondent had adversely occupied a portion of the appellant’s property and went ahead to arbitrarily allocate the respondent 1 acre thereof without any prior survey to establish the exact portion that could have been occupied by the respondent if at all; and
- d. upholding the evidence tendered on behalf of the respondent in respect of the claim filed and ignoring the law, the evidence and the submissions on this subject tendered by the appellant thereby arriving at a wrong decision.

6. At the hearing of the appeal, learned counsel Mr. Omiti appearing together with learned colleague Miss Marube appeared for the appellant while learned counsel Miss Opondo represented the respondent. Both relied on their written submissions which they highlighted at plenary.

7. Counsel for Atieno reminds the Court that to succeed in a claim of adverse possession, a claimant must prove the following elements: open and notorious use; intention to possess; continuous and uninterrupted use for a period of /or exceeding twelve (12) years, use to the exclusion of the registered owner, actual possession, and non-permissive and adverse possession. He cited to us the decisions in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, *Kenya Tea Development Authority v Jackson Gichuhi Karanja & another* [2006] eKLR, *Wambugu v Njuguna* [1983] KLR 172.

8. Atieno submits that the trial court erred in making a finding in the absence of cogent evidence to support Ngani’s claim for adverse possession. Aspects of apparent weaknesses of the claimant’s



evidence were given. It is asserted that neither Ngani nor his witness were able to confirm how long Ngani had allegedly occupied the suit property. Related is that there was contradictory evidence as to when Ngani took possession. Ngani's evidence was that he took possession in the year 1990 after he was given the land by his father whereas PW2's testimony was that Ngani and his father were in occupation since 1987. It was argued that this contradictory testimony suffered further setback as it was controverted by Atieno whose evidence was that Ngani moved into the property in the year 2010 after the death of Atieno's father in law.

9. On another matter, the appellant contends that the claim for adverse possession could not stand in the face of Ngani's claim that the property was purchased by his father from Atieno's father in law. An argument is made that the two claims are mutually exclusive and once one is raised the other is automatically extinguished. See *Christopher Kioi & another v Winnie Mukolwe & 4 others* [2018] eKLR, *M'Mbaoni M'Ithara v James Mbaka* [2019] eKLR, *Muchanga Investment Ltd v Safari Unlimited (Africa) Ltd & 2 others* [2009] eKLR.
10. In addition to that argument, the appellant submits that the trial court wrongly concluded that the respondent's claim was based on an oral sale agreement which became invalid for lack of consent of the Land Control Board yet it was not one of the issues raised for determination before the court.
11. Ngani's case was also assailed as contradictory. On the one hand, that the property was given to him as a gift by his father and on the other, staking a claim for adverse possession.
12. It is the appellant's further contention that property which is subject of a claim for adverse possession must be identifiable by clear boundaries and demarcation. In support of this argument the appellant refers this court to the decision of the ELC in *Peter Okoth v Ambrose Ochido Andogo & Benedict Odhiambo Oketch* [2021] eKLR. The trial court is faulted for finding that Ngani had established a claim for 1 acre when he neither produced survey evidence nor was a site visit conducted by court to ascertain the area occupied by him.
13. In response, counsel for the respondent states that the evidence adduced at trial was that Mzee Ngani purchased the suit property in the year 1983 and took possession in the year 1987. In addition, that the respondent settled on the suit land in 1990 when he built a small house thereon and later permanent houses. That this evidence was not controverted by Atieno. We are told that the evidence of the respondent and his witness were consistent. The respondent submits that he adduced evidence that he had been in actual open, peaceful and uninterrupted occupation for a period exceeding 21 years.
14. It is contended for the respondent that his occupation was pursuant to a sale agreement which became void upon the lapse of the statutory period of 6 months when the consent of the Land Control Board was not obtained (*Isaac Cypriano Shingore v Kipketer Togom* [2016] eKLR).
15. Regarding the area occupied, we were told that a copy of the letter from the Land Control Board dated August 7, 2022 which stipulated that consent was sought for subdivision of 0.4 ha is in consonance with evidence of the respondent as to area occupied.
16. This is a first appeal and our remit is to re-appraise the evidence and to draw our own conclusion. In doing so we are well aware of our handicap that, unlike the trial court, we did not see or hear the witnesses testify and due allowance must be given because of this. (See *Selle v Associated Motor Boat Company Limited* (1968) EA 123).
17. The grounds of appeal and arguments for and against the appeal reveal the following to be the issues requiring resolution:
 - a. Did the respondent lead sufficient evidence to prove the claim for adverse possession?



- b. Did the alleged sale agreement between the appellant's father-in-law and the respondent's father defeat the respondent's claim for adverse possession?
 - c. Did the respondent, with certainty and specificity, prove the area he occupied?
18. The essentials of a successful claim for adverse possession have been restated by our courts time without number. For example, this court in *Richard Wefwafwa Songoi* (*supra*) observed:

“The law and requirements for adverse possession was reiterated in the case of *Mbira v Gachubi* (2002)I EALR 137 where it held that:

“... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption...”

19. The evidence of Ngani was that he and his late father occupied the piece of land on the basis of an oral agreement for the sale and purchase of the land between his father and the appellant's father-in-law in 1983. Mzee Zakayo and Ngani entered the land at different times. According to PW2, Mzee Zakayo took possession of the land in 1987. Ngani himself came onto the land three years later in 1990 and started constructing his house which he completed in the year 1998. The evidence of the two witnesses was not shaken in cross-examination, and I am unable to discern any inconsistency in the two dates of entry; in 1983 and in 1990 as it was in respect to two different people.
20. In replying to the originating summons, Atieno was silent as to when Ngani entered the suit land. However, in her oral evidence she states that Ngani entered into the land in 2010 and built a house thereon using old iron sheets so as to give the impression that it was an old house. This aspect of her evidence, just like the testimony of the respondent's witnesses, was unshaken in cross-examination.
21. In a sense therefore, the trial court had two sets of conflicting evidence. In believing the version of the respondent, the trial court's mind appears to have been influenced by two things. One, it was plausible that the respondent had taken possession of the disputed portion at the time he had stated in furtherance of the oral agreement. Second, the trial Judge found that photographs of the developments made by Ngani were houses he had built on their portion of land. On my part I reach the conclusion that the decision by the trial court to believe the account of Ngani cannot be faulted. In her oral testimony Atieno readily accepts that the structures built by Ngani are in the suit land yet in her written statement she stated as follows:

“That the plaintiff built a house on his brother's parcel, however a portion measuring 30 meters intrudes inside my parcel.”

This inconsistency is telling, if Atieno was, at one point of the proceedings, unwilling to accept that Ngani had built a house on the disputed land then how is she to be believed when she says that Ngani only took possession of the land in 2010 and not as he claims in 1990? The obvious inconsistency did not help the credibility of Atieno's testimony.

22. As to whether Ngani occupied his land on his own right or as a beneficiary to the estate of Mzee Zakayo, the evidence of Ngani is that his father had, in his lifetime, gifted him the land and that he



took possession of the land in 1990. This is consistent with what he deposed in the affidavit in support of the originating summons;

“That I know on my own knowledge that notwithstanding the fact that it is my father whom purchased the subject land in the year 1984, the same relinquished his interests to me immediately and I am the one who had been in sole and/or exclusive possession, occupation and use of a portion of the land otherwise known as LR. No. Kamagambo/Kaluoch/1000, hitherto registered in the name of the late Ongoma Ochuka. Copy of official search confirming such registration is hereto annexed and marked as Exhibit CN 3.”

23. I turn to another aspect of the appeal. It is common knowledge that a claim of adverse possession cannot prevail if the claimant asserts possession on the basis of permission of the owner pursuant to a covenant of sale or lease. In *Christopher Kioi* (*supra*), this court stated:

“But even if it were accepted that Kioi took possession of the suit property pursuant to the alleged agreement for sale, that in itself would negate a claim based on adverse possession because the possession would have been with the consent of Kituri. As this court stated in *Samuel Miki v Jane Njeri Richu* CA No 122 of 2001: “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 pursuance of an agreement of sale or lease or otherwise.”

24. The evidence is that possession of Ngani came after Mzee Ochuka gave Mzee Zakayo possession of the disputed land pursuant to an oral agreement (valid within the provisions of the *Law of Contract Act* as it then prescribed). To that extent the possession and occupation of Ngani was initially with the permission of the registered owner. If that was all to the matter, then Ngani’s claim would be in troubled territory. However, it is undisputed that the agreement was a controlled transaction that required the consent of the relevant Land Control Board. This consent, was not granted and pursuant to the provisions of sections 6 and 8 of the *Land Control Act*, the transaction would, at the end of six months of its making, not only be void but anyone enforcing it would be attempting to enforce an illegality. At the end of the six months, the registered owner was incapable of granting authority to occupy as the permission had come to an end by operation of the law. The parties here find themselves where others have been before and I am content to come to the same conclusion that this court reached in *Issac Cypriano Shingore* (*supra*) where it held:

“We have reviewed the evidence. There is no question that the respondent entered into possession of the property in June 1982 based on a sale agreement entered into with the widow of the registered owner. At that time, the property was registered in the name of appellant’s father Mayenya Irodanga. The widow did not have capacity to enter into that agreement for sale. Consent of the relevant land control board was also not obtained. The result is that if the agreement for sale was not void ab initio for lack of capacity on the part of the widow, it became void by operation of law for want of the consent of the relevant control board. And as this court said in *Samuel Miki Waweru v Jane Njeri Richu* (*supra*) “the continuation of possession by the respondent thereafter could not be referable to the agreement of sale... as it was an independent possession adverse to the title of the original owner.”

25. I turn to the last issue as to whether Ngani successfully proved that he had adverse possession of one (1) acre. I very much doubt that the appellant’s counsel would have pressed on with this issue had



he noticed that his client had unwittingly made concession in her affidavit in reply to the originating summons when she deposed:

“That I further seek for order of eviction against the plaintiff from occupying parcel LR/No. Kamagambo/Koluoch/1000 measuring one hectare”

Although she adverts to one hectare, she, in all probability, meant one acre. Either way, one hectare is much bigger than the one acre that was adjudged in favour of Ngani.

26. At the end I see no other outcome to this appeal. It is without merit and I would propose that it be dismissed with costs.

JUDGMENT OF M'INOTI, JA

27. I have had the advantage of reading in draft the Judgment of my brother Tuiyott, JA. I agree with the reasoning and proposed outcome. As Kantai, JA is also of the same view, the Judgment of the Court is that this appeal is dismissed with costs to the Respondent. It is so ordered.

JUDGMENT OF KANTAI, JA

28. I have seen in draft the Judgment of my brother Tuiyott, JA. I am in full agreement and I have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

F. TUIYOTT

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

