



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lipanga & another v Anjila (Civil Appeal 113 of 2018)  
[2023] KECA 579 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KECA 579 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 113 OF 2018  
PO KIAGE, F TUIYOTT & JM NGUGI, JJA  
MAY 12, 2023**

**BETWEEN**

**STEPHEN LIKAMI LIPANGA ..... 1<sup>ST</sup> APPELLANT**

**PATRICK MAJIMBO LIKAMI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LIVINGSTONE NGAIRA ANJILA ..... RESPONDENT**

*(Appeal from the judgment and decree of the Environment and Land Court of Kenya at Kakamega (Matheka, J.) dated 11th July, 2018 in ELC No. 340 of 2010)*

**JUDGMENT**

**JUDGMENT OF KIAGE, JA**

1. By this appeal, the appellants who were defendants in the Environment and Land Court at Kakamega, challenge the judgement and decree of Matheka, J by which the learned judge found that the respondent had proved his case on a balance of probabilities and granted him the orders sought. The respondent had lodged a suit against the appellants seeking the following orders;
  - a) A declaration that the plaintiff is the lawfully registered absolute proprietor of Land Parcel No Butsotso/Shikoti/1281.
  - b. An eviction order against the defendants, their agents, servants, employees from Land Parcel No. Butsotso/Shikoti/1281 and a permanent injunction restraining the defendants, their agents, servants, employees or any other person claiming through them once evicted from trespassing and/or laying claim to Land Parcel No Butsotso/Shikoti/1281.
  - c. Costs of the suit.
  - d. Interest on (a) and (b) above at court rates.



2. The salient facts of the case were that the respondent was the registered proprietor of land parcel no. Butso/So/Shikoti/1281 (the suit land). He claimed that he bought the suit land from one Christantus Muleka Ikocheli (the vendor) who was the son and administrator of the estate of the original owner, Teresina Linani Ikocheli (Teresina). When he purchased the land, he claimed, he found the appellants, who were father and son, occupying it together with other persons who were defendants in the trial court. The respondent contended that the appellants had unlawfully and without his consent trespassed onto the suit land, demarcated it and apportioned themselves various portions thereof which they put to their use.
3. The appellants denied trespassing on the land stating that they had been in occupation of it since the year 1964 or thereabouts and, accordingly, the respondent's claim was time-barred. They contended that the respondent had no good title to the suit land as he had acquired the same from a person who had no good title to pass. The appellants alleged that the respondent's acquisition of title to the suit land was by fraud for reasons that, the land was purchased secretly and with full knowledge that the appellants and their families resided thereon; the land was purchased from a person who had no power to dispose it off; no inquiry was made as to the status of the appellants with regard to the suit land before purchasing it; and legal proceedings for acquisition of title to the land were not followed.
4. During trial, the respondent gave a sworn statement and called 2 witnesses. The 1<sup>st</sup> appellant chose to rely on his written statement. The record bears evidence for the 2<sup>nd</sup> appellant. The learned judge evaluated the evidence adduced and delivered the impugned judgment granting the respondent the reliefs sought.
5. The appellants were aggrieved and after filing a notice of appeal they followed it up with a memorandum of appeal raising 8 grounds, later condensed to 4 issues for determination as follows:- Whether at the time the respondent purchased the suit property the appellants were in occupation of the land. If the answer to the foregoing issue is in the affirmative whether the respondent was entitled to the orders sought for eviction. Whether the respondent was an innocent purchaser for value without notice. Whether fraud was properly pleaded and particularised.
6. The parties had filed written submissions which were highlighted by counsel at the hearing of the appeal.
7. Learned counsel Mr Shitsama appearing for the appellants, challenged the appellants' eviction arguing that the respondent did not prove his case on a balance of probabilities. He submitted that both the respondent and the vendor of the suit land admitted that when the respondent purchased the land the appellants were in occupation. In counsel's view, since it was established that the 1<sup>st</sup> appellant was in possession of the land since the year 1985 upto the year 2003 when the suit was filed, his rights over the land were in the nature of an overriding interest pursuant to section 28 of the [Land Registration Act, 2012](#).
8. It was argued that the respondent was not an innocent and/or bona fide purchaser for value, without leading evidence to prove that fact. Reference was made to sections 107(1), 109 and 112 of the [Evidence Act](#) for the contention that he who pleads the existence of a fact must prove it, and when any fact is especially within the knowledge of any party to proceedings, the burden of proving or disproving that fact is upon him. Counsel questioned the fact that two agreements were made in selling the suit land, one in the year 2003 and another in 2006. He wondered how the learned judge determined which agreement to rely on. Mr. Shitsama pointed out the entries in the land register (the green card) which seemed erroneous. The entries indicate that the vendor was registered as proprietor of the suit land on January 7, 2004, and the respondent was registered proprietor on June 23, 1999.



9. It was further argued that the respondent purchased the suit land from someone who had no good title. Citing sections 82(a) and 45 of the *Law of Succession Act*, counsel contended that a personal representative of an estate is not empowered to alienate or sell the property of the deceased person before distribution. He asserted that since the 1<sup>st</sup> appellant moved onto the suit land in the year 1985 and stayed there till the year 2003 when the respondent sued him, a period of over 18 years had lapsed hence the suit was time barred by dint of section 7 of the *Limitation of Actions Act*. Moreover, counsel submitted, a claim for adverse possession was raised by the appellants but the learned judge overlooked it, even though neither the respondent nor the vendor had ever been in possession of the land.
10. On the authority of the decision in *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (Deceased) v Stephen Njoroge Macharia* [2020] eKLR, counsel identified attributes of a *bona fide* purchaser for value namely, the said purchaser must prove that he holds a certificate of title; purchased the property in good faith; had no knowledge of the fraud; purchased for valuable consideration and without notice of any fraud; was not party to any fraud; and the vendor had an apparent valid title. Counsel insisted that in this case the respondent could not claim that he purchased the suit land in good faith without notice of any fraud.
11. The learned judge was faulted for ignoring the issue of fraud as pleaded by the appellants. It was contended that even though the learned judge found that the green card had no contradictions, the entries therein did not make sense. Further, no transfer documents were presented in court to establish the respondent's legal acquisition of the suit land. In conclusion, counsel urged the Court to set aside the orders of the trial court and allow orders for adverse possession, stating that the 1<sup>st</sup> appellant is now deceased and had been buried on the suit land.
12. In opposition to the appeal, learned counsel Mr Nandwa gave a brief background to the case noting that the first registered owner of the suit land was Josina Linani who later registered a change of names to be known as Teresina Linani Ikochele. Upon the death of Teresina, the land devolved to her son who sold it to the respondent. Counsel submitted that the 1<sup>st</sup> appellant forcefully moved onto the land in the misdirected belief that Teresina, who was his step-sister, was not entitled to the land as a woman.
13. Mr Nandwa asserted that even though the 1<sup>st</sup> appellant had been in occupation of the suit land since 1985, that occupation was not adverse to that of the land owner as he was permitted to occupy the land by the proprietors. Further, the respondent had offered 0.25 of an acre to the appellants upon their request, which comprised the area they occupied to settle on but he withdrew that offer when they refused to accept it.
14. Counsel resisted the 1<sup>st</sup> appellant's claim that the suit land was held by Teresina, his step-sister, in trust for him, contending that it came out during the hearing that the 1<sup>st</sup> appellant had refused to pursue his own parcel, and he owned a different parcel of land where he had buried his wife. Mr Nandwa contested the claim for adverse possession pointing out that an originating summons suit by the appellants claiming adverse possession was withdrawn and as such there was no cause of action for adverse possession before the trial court.
15. As to whether the respondent was an innocent purchaser for value without notice, it was asserted that the burden of proof lay upon the appellants, to demonstrate that the acquisition of the suit land by the respondent was fraudulent as alleged, and they failed to do so. Moreover, it was submitted, if the fraud allegations were valid, the appellants failed to initiate any criminal proceedings on the respondent over the same. In the end, counsel urged that the appeal be dismissed with costs.



16. As this is a first appeal, I recall the holding in *Peters v Sunday Post Limited* [1958] EA 424;

An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

17. Having considered the appeal and the opposing submissions, I think the single issue that falls for determination is whether the respondent was entitled to the orders granted by the trial court. In her judgment, the learned judge declared the plaintiff as the lawfully registered absolute proprietor of the suit land. She further ordered the defendants, their agents, servants and employees to vacate the land within 3 months from the date of the impugned judgment and in default eviction notice to issue.

18. The appellants contest the respondent’s ownership of the suit land arguing that since it was established that they occupied the said land from the years 1985 to 2003 when the suit was lodged, they had an overriding interest over the land in the nature of adverse possession pursuant to section 28 of the *Land Registration Act, 2012*. The respondent refutes that claim asserting that the 1<sup>st</sup> appellant occupied the land forcefully on the premise that the original owner, as a woman, was not entitled to the land. Further that the 1<sup>st</sup> appellant was allocated his own portion of land but failed to pursue it. To the respondent therefore the appellants occupied the suit land by way of permission from the proprietors.

19. The learned judge, upon considering the two facts of adverse possession, that is, whether or not the title holder has been disposed or has discontinued his possession for the statutory period, came to the conclusion that the 1<sup>st</sup> appellant occupied the suit land with the permission of the respondent. I am of a similar mind as the learned judge and would add this Court’s sentiments in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, where the Court observed;

“30. The law and requirements for adverse possession was reiterated in the case of *Mbira v Gachuhi* (2002) IEALR 137 where it was 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....”

20. I agree with the learned judge’s finding particularly after analysing the evidence of the vendor (PW2) which was uncontroverted. He stated;

...It was my grandfather’s land Lupanga. Teresina got hers and 1<sup>st</sup> defendant was to get his portion which was left and he never did. 1<sup>st</sup> defendant asked to move in there while he pursued his land. 1<sup>st</sup> defendants land is PExh. 4 as per the official search the land belongs to the plaintiff”.

21. It would seem that the 1<sup>st</sup> appellant sought to be allowed to stay on the suit land but eventually refused to move out. It is clear to me that such conduct cannot possibly be what was contemplated as an overriding interest under section 28 of the *Land Registration Act*. Moreover, there is no evidence that the appellants pursued an adverse possession cause of action in the trial court.

22. The appellants fault the learned judge for failing to consider their contention that fraud was involved in the sale of the suit land. To them, the respondent was not a bona fide purchaser for value since he



must have noticed the fraud. I note that even though the learned judge may have disregarded that issue, no credible evidence was led to substantiate the claim. No report was made to the Police to investigate the matter and neither were criminal proceedings lodged against the suspects. I associate myself with the holding of this Court in *Moses Parantai* (*supra*). The court held;

"In the instant case, the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit land in the name of Janet all the way to the respondent. That the trio were parties to the fraud or had knowledge of it. We note just like the trial court that no criminal charges or proceedings were laid against Janet, Joseph and the respondent over the transfer and registration of the suit land... We are persuaded just like the trial court that if the appellants were aggrieved and felt defrauded, they had recourse under the law to report the matter to the police for their further investigations and appropriate action. Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities. No evidence was tendered to this end by the appellants. They did not call any witness from the land office to verify their allegations. The officials at the land's registry are the custodians of land records and would have been in a better position to explain the concerns raised by the appellants." (Emphasis mine).

23. In the end I see no reason to interfere with the learned judge's findings. The appeal is therefore devoid of merit and I would accordingly dismiss it with costs.

As Tuiyott and Joel Ngugi, JJA are of the same opinion, it is so ordered.

#### **JUDGMENT OF TUIYOTT, JA**

1. I have had the advantage of reading in draft the judgment of Kiage, JA with which I am in full agreement and have nothing useful to add.

#### **JUDGMENT OF JOEL NGUGI, JA**

1. I have had the benefit of reading in draft the judgment of Hon Kiage, JA I entirely agree with his findings and I have nothing useful to add.

**DATED AND DELIVERED AT KISUMU THIS 12<sup>TH</sup> DAY OF MAY, 2023**

**PO KIAGE**

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**JUDGE OF APPEAL**

**F TUIYOTT**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

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



*Signed*

**DEPUTY REGISTRAR**

