



REPUBLIC OF KENYA



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**Njuguna v Gathuita (Civil Appeal 207 of 2018)  
[2023] KECA 1610 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1610 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 207 OF 2018  
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA  
SEPTEMBER 22, 2023**

**BETWEEN**

**BENSON IRUNGU NJUGUNA ..... APPELLANT**

**AND**

**FRANCIS KIMANI GATHUITA ..... RESPONDENT**

*(Being an appeal from the judgment of the Environment and Land  
Court of at Murang'a (Kemei, J.) dated 10th May, 2018 in ELC  
Cause No. 199 of 2017 (Formerly Nyeri H.C.C.C. 55 of 2012 (O.S))*

**JUDGMENT**

1. The respondent, Francis Kimani Gathuita, took out Originating Summons dated 16<sup>th</sup> January, 2012, before the Environment and Land Court (ELC), against the appellant, Benson Irungu Njuguna, seeking orders to the effect that he had acquired prescriptive rights to parcel number LOC.18/KIRERE/647 (suit property) through adverse possession.
2. The respondent's case before the ELC was that in 1982, he bought the suit property from one Njoroge Kinuthia, the appellant's father, now deceased, at an agreed price of Kshs. 27,000/=. He paid this purchase consideration in full. He averred that the sale agreement was reduced to writing in 1991, but a consent from the Land Control Board for sale of the suit property was never obtained. He asserted that since 1988, he had been in actual possession and occupation of the suit property, and had considerably developed the same by planting coffee, banana and avocado trees. The respondent averred that in 1995, the appellant filed Succession Cause No. 144 of 1995 before the Murang'a Law Courts in which suit sought to administer the estate of his late grandfather, Kinuthia Wageche. The said estate comprised of the suit property. The respondent objected to the confirmation of the grant of letters of administration being issued to the appellant, on account that he had purchased the suit property. His objection was dismissed by the probate court; which decision was upheld an appeal by the High Court at Nyeri. It was the respondent's case that the appellant had never set foot on the suit property, and that he had



been in continuous and uninterrupted possession of the same for over 30 years. He maintained that he had acquired rights over the title of the suit property by virtue of adverse possession.

3. In opposing the Originating Summons, the appellant filed a replying affidavit dated 20<sup>th</sup> June, 2012. The appellant's case was that he was the registered owner of the suit property with exclusive right to the property as of 5<sup>th</sup> February, 1998. The suit property was previously registered under the name of the late Kinuthia Wageche, who was his grandfather. He averred that the suit property was both ancestral and family land and was bequeathed to him pursuant to succession proceedings in Murang'a Succession Cause No. 144 of 1995, which decision was affirmed by the High Court on appeal, in Nyeri Civil Appeal No. 81 of 1998. The appellant averred that he and his siblings have possession of the suit property where they cultivate various crops albeit with interference from the respondent. According to the appellant, the suit filed by the respondent before the ELC was res judicata, in so far as it purported to delve into the issues of validity of the alleged agreement for sale of the suit property and ownership of the suit property, which issues were settled by the probate court, and affirmed on appeal by the judgment of the High Court in Nyeri (Sergon, J.) delivered on 18<sup>th</sup> November, 2011.
4. The case was heard by way of viva voce evidence. After hearing the parties, the learned Judge, in a judgment dated 10<sup>th</sup> May, 2018, found that the respondent had sufficiently proved his claim of ownership of the suit property by way of adverse possession. The learned Judge determined that the respondent had been put in possession of the suit property by an unlawful owner, Njoroge Kinuthia, hence his entry was non-permissive. The learned Judge found that adverse possession started running against the title from 1981, and that in 1993, the respondent had earned prescriptive rights over the suit property, way before the grant of letters of administration was issued to the appellant by the probate court in 1995. The learned Judge observed that though the appellant was registered as the owner of the suit property in 1998, pursuant to the grant issued by the probate court, the change of ownership of land which is occupied by another under adverse possession does not interrupt such person's adverse possession. The learned Judge determined that the case before her was not res judicata, as the respondent's claim to the suit property by way of adverse possession was neither determined by the probate court nor the High Court on appeal. She therefore allowed the respondent's suit as prayed.
5. Aggrieved by this decision, the appellant lodged this appeal citing seven grounds in his memorandum of appeal. In summary, the appellant faulted the learned Judge for deciding in favour of the respondent whose claim for adverse possession failed to meet the required legal threshold, and was not supported by the evidence on record. He took issue with the fact that the learned Judge failed to consider that the respondent's case before the court was premised on an unproven, illegal and time barred agreement for sale of land. He averred that the respondent's claim before the ELC was res judicata, as the parties' interests and rights over the suit property had been fully canvassed in Murang'a Succession Cause No. 144 of 1995, and affirmed on appeal by the High Court in Nyeri Civil Appeal No. 81 of 1998. The appellant faulted the ELC for allowing a claim that was tainted with fraud and illegality, thereby disinheriting the appellant and his siblings of their ancestral land. In the premises, he urged this Court to allow his appeal as prayed.
6. The appeal was canvassed by way of written submissions. Counsel for the appellant submitted that the assertion by the respondent that he has been in continuous occupation of the suit property since he purchased the same in 1982 was misleading, and was contrary to the court proceedings in Murang'a Succession Cause No. 144 of 1995, Estate of Kinuthia Wageche. Counsel averred that the respondent was an objector in the said succession cause. The Probate Court found that the suit property was always registered in the name of Kinuthia Wageche, (appellant's grandfather), and was never at any point transferred to Njoroge Kinuthia, the appellant's father. Counsel submitted that the Probate



court observed that Njoroge Kinuthia never acquired title to the suit property, and could therefore not transfer the same to the respondent as alleged.

7. Counsel further submitted that, during the succession proceedings, when the alleged vendor, Njoroge Kinuthia was still alive, he denied having sold the suit property to the respondent. Counsel asserted that Njoroge Kinuthia had leased the suit property to the respondent for a period of six years. Counsel averred that the respondent appealed against the decision of the Probate Court in Nyeri Civil Appeal No. 81 of 1998 Francis Kimani Gathuita vs Benson Irungu Njuguna, where the High Court affirmed the decision of the Probate court. Counsel faulted the learned Judge for disregarding a judgment of a court of concurrent jurisdiction, and reiterated that the issue of ownership rights over the suit property stood *res judicata* before the ELC. He therefore urged this Court to allow the appellant's appeal as prayed.
8. On the other hand, Counsel for the respondent, in opposing the appeal, submitted that the respondent sufficiently established his claim for adverse possession. Counsel averred that it is not disputed that the respondent paid the full price for the suit property, and that the purpose of the sale agreement produced in evidence was to show how the respondent was placed in possession of the suit property. Counsel asserted that the respondent's possession of the suit property was with knowledge of the owner, and has been continuous since purchase. On whether the matter was *res judicata* before the Environment and Land Court, Counsel averred that the Probate Court dealt with succession of the estate of Kinuthia Wageche - Deceased, where the respondent was a creditor to the estate, and that the court never dealt with the claim of adverse possession which was the issue before the ELC. In the premises, counsel for the respondent urged this court to affirm the decision of the ELC in its entirety.
9. This being a first appeal, it is the duty of this Court to analyze and re-assess the evidence on record and reach its own conclusions. In *Selle vs. Associated Motor Boat Co.* [1968] EA 123, the court expressed itself as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan* (1955), 22 E.A.C.A 270.”
10. Having evaluated the record of appeal, as well as submissions by parties to the appeal, we find that the appeal turns on the following issues:
  - i. Whether the suit as filed before the Environment and Land Court was *res judicata*; and,
  - ii. whether the respondent sufficiently proved his claim of adverse possession.
11. The doctrine of *res judicata* was the subject of discussion by the Supreme Court in *John Florence Maritime Services Limited & Another vs. Cabinet Secretary Transport and Infrastructure & 3 Others* [2021] eKLR. The Court observed as follows:

“For *res judicata* to be invoked in a civil matter, the following elements must be demonstrated:

  - a. There is a former judgment or order which was final;



- b. The judgment or order was on merit;
- c. The judgement or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d. There must be between the first and second action identical parties, subject matter and cause of action.”

12. It is not disputed that the appellant filed Murang’a Succession Cause No. 144 of 1995 (Estate of Kinuthia Wageche -Deceased) where the suit property comprised part of the estate that was being administered. The respondent was an objector in the said succession cause. He was claiming ownership rights over the suit parcel of land on the basis that he had purchased the same from one Njoroge Kinuthia, who was a son to the Kinuthia Wageche - Deceased. The Probate Court found that the objector failed to provide sufficient evidence to show that he had purchased the suit parcel of land and thereby dismissed his objection.

13. The respondent appealed the decision of the Magistrate’s court before the High Court at Nyeri in Civil Appeal No. 81 of 1998, Francis Kimani Gathuita vs Benson Irungu Njuguna. At the material part of the judgment, the High Court held thus:

“After a careful re-evaluation of the evidence, it has turned out that the appellant purported to purchase land from a person who was not authorized in law to deal with the deceased’s property. The transaction between the appellant and the seller cannot bind the Estate of the deceased. The appellant cannot therefore be regarded as a creditor. The trial magistrate was right to dismiss the appellant’s protest.”

14. The respondent, on 16<sup>th</sup> January, 2012, filed the suit before the ELC claiming ownership of the suit parcel of land by invoking the doctrine of adverse possession. We find that the issues raised by the respondent in the suit before the ELC, particularly on the validity of the alleged agreement for sale of the suit property as well as ownership of the suit property of land were dealt with in the Succession Cause, which decision was affirmed by the High Court on appeal. We determine that these issues were res judicata before the ELC.

15. We further hold that it was not open for the respondent to litigate his claim over the suit parcel of land by installments. Res judicata is applicable in situations where the affected party is required to present all the issues touching his claim before the court so that all the issues can be adjudicated once and for all. The Supreme Court in Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017 ] eKLR held as follows:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in public interest for swift, sure and certain justice.”



In the English case of *Henderson v Henderson* [1843-60] All ER 378, the court observed that:

“...where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case.”

16. It was clear from the record of the court in the Succession case that the respondent had the opportunity to put forward the whole of his case including the allegation that he may have acquired the suit parcel of land by adverse possession. The respondent vigorously presented his case before the Magistrate’s court claiming the suit property and when he did not succeed, he filed an appeal to the High Court sitting at Nyeri. The appeal was ultimately unsuccessful. It was then that the respondent filed suit before the ELC.
17. Our re-evaluation of the argument made by the parties in respect to whether the suit before the ELC was *res judicata* leads us to the conclusion that indeed the suit was *res judicata*. From the facts of this appeal, there is no dispute that the suit parcel of land was registered in the name of Kinuthia Wageche - Deceased, the father of Njoroge Kinuthia, the person that the respondent said he purchased the suit parcel of land from. Clearly, the said Njoroge Kinuthia lacked legal capacity to enter into any sale of any part of the suit parcel of land before obtaining a grant of letters of administration intestate under the *Law of Succession Act*. As correctly observed by the High Court in the appeal that the respondent lodged to challenge the decision of the Magistrate’s court, the respondent purchased the suit property from a beneficiary of the estate of Kinuthia Wageche-Deceased and not the deceased himself. Therefore, he could not qualify to be considered as a creditor to the estate of the deceased.
18. That could have been the end of the matter but for the respondent’s decision to cloth himself with the title of an adverse possessor and subsequently filed suit before the ELC. This Court agrees with the appellant that the moment the respondent filed the suit, the same became *res judicata* because the issues touching on the ownership of the suit property had been substantively adjudicated upon by courts of competent jurisdiction. We are not persuaded by the submission made by the respondent that he could not have presented a case of adverse possession in the succession case because that court did not have jurisdiction to consider the claim. This was a disingenuous argument because the succession case was decided before the 2010 Constitution was promulgated. It is that Constitution and the *Environment and Land Court Act (Act No19 of 2011)* that divested the High Court jurisdiction from adjudicating land matters. Nothing prevented the respondent, at the time, from pleading all the issues relating to his alleged claim over the suit property before the succession court. It was clear to this Court that the respondent was litigating by installments in the hope that he would not attract the application of the doctrine of *res judicata*. He failed in that attempt.
19. For completeness of the record, we shall address the issue whether the respondent proved his claim that he had acquired title of the suit parcel of land by adverse possession. This Court in the case of *Kim Pavey & 2 Others v. Loise Wambui Njoroge & Another* [2011] eKLR cited with approval the case of *Wambugu v. Njuguna* (1983) KLR 173, where this Court held that:

“In order to acquire by Statute of Limitation title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or having discontinued his possession of it. Dispossession of the proprietor that defeats his action are acts which are consistent with his enjoyment of the soil for the purpose of which he intends to use it for a



continuous 12 years. The Limitation of Actions on possession contemplates two concepts; dispossession and discontinuous of possession. The proper way of assessing proof of title is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved he has been in possession for the requisite number of years.”

20. From the foregoing, a party claiming adverse possession has to prove that they have occupied the land in question openly without license or permission of the land owner, with the intention to have the land, and that they have dispossessed the registered owner of the suit property for the statutory period, as opposed to merely establishing that they have been in possession of the suit property for twelve years. In the instant appeal, the respondent’s case was that he took possession of the suit property in 1988.
21. In his testimony before the ELC, the respondent told the court that he bought the suit property from the appellant’s father in 1982, but took possession of the same in 1988, when he started cultivating on the land. In the Succession Cause, the respondent who was an objector told the court that he entered the suit property and started cultivation in 1988, before buying the suit land in 1991. The respondent further admitted that one Muriithi was using the suit property before he took possession in 1988. The respondent’s witness, Paul Gathuku, who gave evidence before both the Succession court and the ELC, stated that the respondent took possession of suit property in 1988. Further, that the learned Judge erred by making a finding that the respondent took possession of the suit property in 1981, and that adverse possession started running against the title from 1981, which is contrary to the evidence on record.
22. The respondent averred that he has enjoyed exclusive and uninterrupted possession of the suit property since 1988 to date. The appellant on the other hand told the court the he had been cultivating on the suit property, albeit with interference from the respondent, and that both he and the respondent have been cultivating on the suit property.
23. It is our considered view that the respondent failed to establish that he had continuous and uninterrupted possession of the suit property. The record shows that the respondent’s occupation of the suit property was under challenge by the appellant by way of litigation in respect of the suit property. The Succession Cause No. 144 of 1995 was determined on 18<sup>th</sup> November, 1997 in favour of the appellant. The respondent’s claim to the suit property was dismissed. The respondent appealed the decision and the appeal was determined in 2011 vide the judgment in Nyeri Civil Appeal No. 81 of 1998. The respondent’s claim to the suit property was dismissed in both instances. It is our finding that during the subsistence of the Succession cause and the appeal, the respondent’s claim to the suit property was interrupted and discontinued. From 1988 to 1997, the statutory period of twelve years had not lapsed.
24. In the end, we find that the learned Judge erred in finding that the respondent proved his claim for adverse possession on a balance of probabilities.
25. The upshot is that the appeal is merited and is hereby allowed. The judgment and decree of the ELC delivered on May 10, 2018 is hereby set aside and substituted by a decision of this Court dismissing the said suit with costs. Costs of the appeal shall be paid by the respondent.

**DATED AND DELIVERED AT NYERI THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**



**L. KIMARU**

.....

**JUDGE OF APPEAL**

**A. O. MUCHELULE**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

