Nkoroi v Nyaga & 2 others (Civil Appeal E073 of 2022)
[2023] KECA 1601 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1601 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL E073 OF 2022

W KARANJA, J MOHAMMED & LK KIMARU, JJA

SEPTEMBER 22, 2023

BETWEEN

MARGARET IGOKI NKOROI ..... APPELLANT

AND

DAVID NYAGA ..... 1ST RESPONDENT

FRANK KINYUA DAVID ..... 2ND RESPONDENT

NICHOLAS NTWIGA NYAGA ..... 3RD RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court of Kenya at Isiolo (Njoroge, J.) dated 24th May, 2022 in E.L.C. Case No. 001 of 2021 (Formerly Chuka ELC (O.S) Case No. 7 of 2020)

JUDGMENT

1. On 22nd July, 2020, the appellant, Margaret Igoki Nkoroi, took out Originating Summons before the Environment and Land Court, (ELC), against the respondent in this matter seeking the following orders and declarations:

    i. Whether the Applicant is entitled by virtue of adverse possession to an order under Section 38 of the *Limitation of Actions Act* to be registered as an absolute proprietor of 0.8 acres of Land Parcel No Mwimbi S Mugomango700 (and the resultant Parcels Nos. Mwimbi S Mugomango2408 and 2409 upon subdivision of Parcel No Mwimbi S Mugomango700) held by Frank Kinyua David and Nicholas Ntwiga Nyaga respectively;

    ii. Whether the titles held by the 2nd and 3rd Respondent on the aforesaid Parcels Nos. Mwimbi S Mugomango 2408 and 2409 stand extinguished by virtue of adverse possession in favour of the Applicant;

    iii. Whether the Applicant is entitled to costs of the suits.

2. The property in dispute is parcel number Mwimbi S Mugomango700 (hereinafter 'suit property') measuring 1.13 Ha.

3. The appellant's case before the ELC was that the 1st respondent, David Nyaga, her elder brother, and that their late father, Shadrack Nkoroi, during adjudication had the the suit property measuring 1.3 Ha (2.825 acres) registered in the name of the 1st respondent on 18th November, 1970, to hold in trust for himself and the appellant. The appellant averred that when she left her matrimonial home in 1978, their late father instructed the 1st respondent to allocate her a portion of the suit property where she was to construct her home. The 1st respondent allocated her 0.8 acres of the suit property where she built a permanent home and other developments. She had lived there since 1978. The appellant deposed that the respondent settled on the remainder of the suit property.

4. The appellant stated that she lived peacefully with the respondent, until sometime in March, 2020, when she discovered that the 1st respondent had in March 2012, without her knowledge or consent, fraudulently subdivided the suit property into two equal portions being parcels numbers Mwimbi S Mugomango2408 and Mwimbi S Mugomango2409. The 1st respondent transferred plots 2408 and 2409 to his two sons, the 2nd and 3rd respondents. She averred that during the subdivision, the 1st Respondent disregarded the portion measuring 0.8 acres that she had been allocated, and where she had enjoyed exclusive uninterrupted occupation and had undertaken extensive developments for a period of over forty-one (41) years.

5. The appellant averred that having occupied her portion of the suit property continuously and uninterrupted for a period of over twelve years, she had acquired good title over the said portion measuring 0. 8 acres by prescription of adverse possession. She stated that the respondents have now prevented her from further developing her portion of the suit property, and have threatened to evict her and her two children from her home. The appellant therefore urged the trial Court to cancel the registration of land parcels Mwimbi S Mugomango2408 and 2409, and revert to the original title Mwimbi S Mugomango700, and further make an order that her portion measuring 0.8 acres be excised therefrom.

6. In opposing the Originating Summons, the 1st respondent filed a replying affidavit dated 18th August, 2020, on his behalf and that of the 2nd and 3rd respondents. He averred that he was the registered proprietor of the suit property since adjudication and demarcation, and that he did not hold the same in trust for their family. The 1st respondent deponed that his late father, Shadrack Nkoroi, had nine children, including the appellant and himself. Before his late father died in 1982, he had gifted him and his brother, John Kobia, land parcels number Mwimbi S Mugomango700 (suit property) and Mwimbi S Mugomango708 respectively. The 1st respondent averred that when his late father died, he built a permanent house on the suit property for his ageing mother.

7. According to the 1st respondent, sometime in 1978, the appellant left her matrimonial home after her husband deserted her. The 1st respondent invited her to stay with him on the suit property, so that she could assist his wife take care of their ageing mother. The 1st respondent deposed that the agreement between him and the Appellant was that she was to eventually settle on their father's land parcel number Mwimbi S Mugomango699 which was adjacent to the suit property. When their mother died in 2001, the 1st respondent stated that he asked the appellant to move out and settle on parcel number 699. She agreed. The 1st respondent averred that between years 2002 and 2010, the appellant moved into parcel number 699 and developed the same extensively by constructing shops and rental houses. All this time, she was still staying at the suit property in the house that the 1st respondent had built for their mother.

8. The 1st respondent reiterated that the exhibits marked MIN2, annexed to the appellant's supporting affidavit showing the house, cows sheds, stores and tanks alleged to belong to the appellant, were actually properties which the 1st respondent had constructed for his late mother. The 1st respondent averred that sometime in 2012, with full knowledge of the appellant, he subdivided the suit property into the resultant parcel numbers 2408 and 2409 which he transferred to his sons, the 2nd and 3rd respondents. The 1st respondent deponed that the appellant, while living on the suit property, did not make use of more than 0.15 acres of the suit property, and that the suit lodged before the ELC in 2020 was an afterthought, as the subdivision of the suit property took place in 2012.

9. The case was heard by way of viva voce evidence. After hearing the parties, the learned trial Judge, in the judgment found that the appellant had failed to prove her claim for ownership of 0.8 acres of the suit property by way of adverse possession. The learned Judge determined that the appellant's entry into the suit property was by permission of the registered owner, who was the 1st respondent. He found that the 1st respondent had never been dispossessed of the suit property at any point in time, and further, that the appellant's claim that their late father gave the suit property to the 1st respondent to hold in trust for her did not amount to a claim of adverse possession. He thereby dismissed the appellant's suit.

10. Aggrieved by this decision, the appellant lodged this appeal citing six grounds in her memorandum of appeal. In summary, the appellant faulted the learned Judge for failing to find in her favour despite the overwhelming evidence that she had adduced. She took issue with the learned Judge's finding that the 1st respondent, had on several occasions, asked her to vacate the suit property, which finding she asserted was false. She faulted the learned Judge for failing to take into account the fact that she held the portion of the suit property uninterrupted from 1978 up to 2012, a period of 30 years, when the 1st respondent secretly sub-divided the suit property and transferred the same to the 2nd and 3rd respondents. She was aggrieved by the learned Judge's finding that she had her share of the ancestral land on LR Mwimbi S Mugomango699, which property was not issue in the proceedings before the ELC. The appellant was aggrieved by the fact that the learned Judge disregarded her evidence and that of her witnesses, and relied on the evidence of the 1st respondent which was uncorroborated. In the premises therefore, she urged this Court to allow her appeal.

11. The appeal was canvassed by way of written submissions. Counsel for the appellant submitted that sometime in 1978, the appellant and the 1st respondent's late father allocated 0.8 acres out of the suit property to the appellant to settle on, which parcel she has since extensively developed. Counsel stated that the first attempt by the 1st respondent to interrupt the appellant's adverse possession was in 2012, when he secretly sub-divided the suit property and transferred the same to the 2nd and 3rd respondents, without the appellant's knowledge. Counsel submitted that by this time, the appellant had been in possession of the portion of the suit property in excess of twelve years.

12. Counsel for the appellant cited *Wambugu v Njuguna* [1983] eKLR and *Kasuve v Mwaani Investments Limited & 4 others* [2004] eKLR where he urged that the two Courts held that, in order to establish a claim of adverse possession, one has to prove that they have been in exclusive and uninterrupted possession of the suit property for a period of twelve years. Counsel for the appellant explained that the appellant had proved her claim of adverse possession on a balance of probabilities. Counsel observed that the lack of participation in the proceedings before the ELC by the 2nd and 3rd respondents ought to have been resolved in her favour. He faulted the learned Judge for relying on the uncorroborated evidence of the 1st respondent to determine the case. He therefore invited this Court to set aside the judgment of the ELC, and enter judgment in her favour as prayed in the Originating Summons.

13. The Respondents' counsel, in opposing the appeal, submitted that the evidence adduced by the appellant and her witnesses was marred with contradictions. Counsel stated that the appellant lodged the suit before the ELC over thirty years after she allegedly took possession of the portion of the suit property, because she knew that she was in possession of the suit property only as a licensee.

He asserted that the appellant never made any steps to register the claimed portion of the suit property in her name. Counsel submitted that the appellant failed to adduce sufficient evidence to prove the allegation that she occupied 0.8 acres of the suit property, or that she had dispossessed the respondent of the same. Counsel explained that the 1st respondent welcomed the appellant to live on the suit property after she left her matrimonial home, and that the appellant was aware that she eventually had to move out to another parcel of land adjoining the suit parcel of land. The appellant had, therefore, occupied the said property with consent of the registered owner, the 1st respondent. In the circumstances, the respondent urged this Court to affirm the decision of the ELC in its entirety.

14. This being a first appeal, it is the duty of this Court to re-analyze and re-assess the evidence on record, in light of the grounds of appeal and the submission made during the hearing of the appeal, and reach its own independent conclusions. In *Selle v 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 v Ali Mohamed Sholan* (1955), 22 E.A.C.A 270)."

15. The issue arising for determination by this Court is whether the appellant sufficiently proved her claim of adverse possession. This Court in *Mtana Lewa v Kahindi Ngala Mwagandi* [2015] eKLR described the term 'adverse possession' as follows:

> " Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years."

16. Though persuasive, we find the definition of adverse possession in *Gabriel Mbui v Mukindia Maranya* [1993] eKLR apt. The Court stated that:

> " ...it is possible to define "adverse possession" more fully, as the non- permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes for which the owner intended to use it."

17. It is not in dispute that the parties to this dispute are relatives. The 1st respondent is the appellant's older brother, while the 2nd and 3rd respondents are children of the 1st respondent. It is also not disputed that

the 1st respondent was the registered owner of the suit property as of 18th November, 1970. Further, it is clear that the appellant has been in occupation of a portion of the suit property since 1978. This Court has been called upon to determine whether the appellant sufficiently proved her claim of adverse possession over 0.8 acres of the suit property.

18. The elements to be proved in a claim of adverse possession have been pronounced in various decisions of this Court. In *Samuel Kihamba v Mary Mbaisi* [2015] eKLR, this Court observed thus:

> " Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vim, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land. See *Eliva Nyongesa Lusenaka & another v Nathan Wekesa Omacha* Kisumu Civil Appeal No 134 of 1993 (ur). These prerequisites are required of any claimant, irrespective of whether the claimant and the respondent are related or whether the claim relates to familyancestral land."

19. Further, 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 leave 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 land for twelve years. The appellant's case is that she has enjoyed exclusive and uninterrupted possession of 0.8 acres of the suit property from 1978 to date, which culminates to a period of over forty years. The respondent on the other hand explained that he was the registered proprietor of the suit property, and that the appellant's possession of the suit property was by his consent and permission.

21. In a claim for adverse possession involving close relatives such as this one, the Court is mindful and takes judicial notice of the fact that in the African culture, it is not uncommon for people to accommodate their relatives on their land for a long period of time. The Court has to determine if the registered proprietor of the land gave consent to their relative to take possession of the suit property, and if so, whether such consent was withdrawn, and if withdrawn, when. The party claiming adverse possession in such an instance bears the burden of proof to establish that such consent was withdrawn, and that they continued to inhabit the suit property beyond the requisite statutory period that entitles them to ownership by adverse possession.

22. It was clear from the evidence adduced that the appellant entered into the suit property with the consent and permission of the 1st respondent. The appellant does not dispute this fact. During the hearing of the case before the ELC, the Appellant on being cross- examined told the Court that the 1st respondent allowed her to live on the suit property. She averred in her pleadings and also in her testimony before the ELC, that she had lived harmoniously with the 1st respondent and his family from 1978 up until 2020, when she discovered that the appellant had sub-divided the suit property in March, 2012, and allocated the same to the 2nd and 3rd Respondents. No evidence was led by the appellant to the effect that she trespassed into the suit property.

23. If one occupies land by permission and consent or licence of the registered owner, such a person does not accrue any right of adverse possession in contrast to said owner. In the case of *Samuel Miki Waweru v Jane Njeri Richu* [2007] eKLR the Court of Appeal observed as follows:

> "It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. Further as the High Court correctly held in *Jandu v Kilpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been given."

24. Similarly, the Supreme Court of India in *Karnataka Board of Wakf v Government Of India* & [2004] 10 SCC 799 observed as follows with regard to permissive possession in a claim for adverse possession:

> "Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well- settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period."

25. In this case, the appellant's possession of the portion of the suit property cannot be said to have been in advancement of assertion of a hostile title in denial of the registered owner's title, by virtue of the fact that she occupied the same with the permission of the 1st respondent.

26. The appellant further claimed that the 1st respondent was holding the suit property in trust for himself and the appellant. Her case before the ELC was that their late father, Shadrack Nkoroi, during the adjudication process had the suit property registered in favour of the 1st respondent to hold in trust for himself and the appellant. The appellant claimed that when she left her matrimonial home sometime in 1978, their late father instructed the 1st respondent to allocate her a portion of the suit property, measuring 0.8 acres, where she would construct her home. It was the Appellant's case that the 1st respondent acceded to the same and allocated her the said portion of the suit property where she had since lived with her children to date.

27. Claims based on trust and adverse possession are mutually exclusive. The appellant cannot adduce evidence to prove trust in a claim of adverse possession. A claim of trust presupposes that entry and occupation of the suit property by the appellant was consensual and permitted, and on account of this, an alleged trust relationship cannot be a basis for entitlement to land by adverse possession. We agree with the observations by the learned trial Judge in that regard. The appellant ought to have lodged a separate claim for the suit property on the basis of trust, as opposed to trying to advance the same in a claim for adverse possession.

28. Having established that the appellant entered the suit property with permission of the 1st respondent, the appellant bore the burden of establishing that such consent was withdrawn, and if so, when. Evidence adduced in this case showed that the 1st respondent, in March, 2012, sub-divided the suit property resulting into two equal parcels, Mwimbi S Mugomango2408 and 2409, which he subsequently transferred to the 2nd and 3rd respondents. This fact is not in dispute. Therefore, the time that the appellant may have been said to be in adverse possession of the suit property, if at all, was from the time the 1st respondent transferred the suit property to the 2nd and 3rd respondents. The suit before the ELC was filed in August 2020, which is approximately eight years from the time the suit property was transferred to the 2nd and 3rd respondents. We agree with the learned trial Judge's finding that the appellant's claim for adverse possession is not sustainable in the circumstances.

29. For the above reasons, it is our finding that the appellant failed to prove her claim of adverse possession on a balance of probabilities. In the end, the appeal fails. It stands dismissed but with no orders as to costs.

DATED AND DELIVERED AT NYERI THIS 22ND DAY OF SEPTEMBER, 2023.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR