



Njoroge (Appealing as representatives of the Estate of the Late Geoffrey Gikaru Njoroge) v Kenatco Transport Co Limited (In Receivership) (Civil Appeal E037 of 2021) [2023] KECA 1288 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KECA 1288 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E037 OF 2021
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
OCTOBER 27, 2023**

BETWEEN

SAMUEL GIKARU NJOROGE (APPEALING AS REPRESENTATIVES OF THE ESTATE OF THE LATE GEOFFREY GIKARU NJOROGE) APPELLANT

AND

KENATCO TRANSPORT CO LIMITED (IN RECEIVERSHIP) ... RESPONDENT

(Being an appeal against the judgement/decree of the Environment and Land Court at Mombasa delivered by Justice C.K. Yano on 11th February 2021 in Civil Suit No 265 of 1996 as consolidated with Civil Suit No 266 of 1996)

JUDGMENT

1. This is an appeal from the judgement/decree of the Environment and Land Court at Mombasa delivered by Justice C.K. Yano on February 11, 2021 in Civil Suit No 265 of 1996 as consolidated with Civil Suit No 266 of 1996. Civil suit No 265 of 1996 was filed by the Respondent herein against Geoffrey Gikaru Njoroge, the Appellant's deceased father, while civil suit No 266 of 1996 was filed by the Respondent against one James Gicho Makumi. In both cases, the Respondent sought vacant possession, mesne profits, costs and any other relief the court may deem fit to grant.
2. In Civil suit No 265 of 1996, the Learned Judge allowed the prayers sought by the Respondent herein against the Appellant for vacant possession and mesne profits and dismissed the Appellant's counterclaim for adverse possession.
3. The background to the appeal, in brief, as pleaded by the Respondent, was that the Respondent was the registered proprietor of the land known as Plot No 2360 Section/X1/MN (hereafter the suit land); that the Appellant's deceased father, Geoffrey Gikari Njoroge (hereinafter "the deceased"), was an employee of the Respondent who was permitted by the Respondent to reside on the suit land at a monthly



rent of Kshs 800/-; and that there was a condition that the deceased was to vacate the suit land upon termination of his employment with the Respondent.

4. On November 1, 1983, the Respondent went into receivership and the deceased's employment was terminated. However, the deceased continued in occupation of the suit land. Aggrieved by the deceased's failure to vacate the suit land, the Respondent, after issuance of a notice to the deceased to vacate the suit land, thereafter filed Mombasa Civil Suit 265 of 1996 seeking the following remedies against the Appellant;
 - a. Vacant possession and eviction of the appellant
 - b. Mesne profits from 1st November 1983 until delivery of vacant possession
5. On the part of the Appellant vide his defence and counterclaim dated June 7, 1996, he claimed that he was entitled to the suit land by way of adverse possession. He revealed that the deceased stopped paying rent in 1977 when he left employment but continued residing in the suit land for 19 years from 1977 to 1996, when the suit was instituted. In his counterclaim he sought a declaration to that effect as well as an order that the Respondent executes a transfer of the suit premises to him. It was also the Appellant's case that the cause of action arose in 1977 and yet the suit was filed in 1996 therefore the suit was time barred.
6. Before this suit was filed there was an earlier suit being Civil Case No 374 of 1978 in which the Respondent sued the Deceased seeking similar reliefs as the reliefs sought in the suit appealed from. According to the Appellant, that case was dismissed in 1988 for want of prosecution.
7. As already indicated the Respondent's case was allowed while the Appellants' case was dismissed. Aggrieved by the said decision the Appellant lodged this appeal based on the following grounds:
 1. The learned judge erred in law and fact by reaching a finding that there was no evidence when the Appellant's tenancy was terminated.
 2. The learned judge erred in law and fact by reaching a finding that the Appellant was in occupation as a licensee, employee and/or tenant.
 3. The learned judge erred in law and fact by failing to find that the Appellant had acquired the suit property by way of adverse possession.
 4. The learned judge erred in law and fact by concluding that the Respondent was entitled to rent and mesne profit despite an admission that they no longer had interest in the suit property
 5. The learned judge erred in law and fact by failing to find that the suit as against the Appellant was statute barred.
 6. The learned judge erred in law and fact by failing to consider that the suit property had since been transferred to another party and as such the final prayers of eviction could not issue.
 7. The learned judge erred in law and fact when he failed to consider the evidence adduced, the Appellant's arguments, submissions and authorities when arriving at his decision.
8. At the hearing of the suit, the case for the Respondent was presented by Paul Chelanga who testified that he was the Recoveries Manager of National Bank of Kenya and the Respondent's Receiver



- Manager. According to him, the Bank had extended banking facilities to the Respondent which the Respondent failed to pay hence the appointment of the Receiver Manager. However, by the time of his testimony, the properties in dispute had been sold and transferred to third parties hence technically the Bank had no interest in them. In his evidence the occupants of the suit properties were rent paying tenants.
9. It was his evidence that the Respondent went into receivership in the 1980's/90's and according to him, at the time the Bank was seeking the properties in 2012/2013, they were vacant and were sold to Wanje Holdings Ltd and two certificates of search were produced showing that Wanje Holdings Ltd was the current owner of the suit properties. He however admitted that there were 4 identifiable houses on two plots.
 10. On his part, the Appellant relied both on his witness statement and that of his deceased father. According to him, the Respondent was his late father's employer from 1974 till 1977 when the deceased left employment. According to him, during the deceased's employment, they were living on the suit premises and that he was already born at the time of his father's employment having been born in 1971. In his testimony, the suit portion of land has two bedroomed houses divided by a wall. He however admitted that his deceased father stopped paying rent in 1977 upon him leaving the employment but averred that they continued staying on the property.
 11. In cross-examination, he stated that his father passed away on December 9, 2014. According to him, his father told him that he completed paying for the house hence his reason for stopping the payment of rent. However, the property was not transferred to the deceased as a result of a court case. It was his evidence that from 1977 to 1996 when this suit was filed 19 years had lapsed.
 12. The learned judge in the impugned judgement on the issue of adverse possession considered *inter alia* the cases of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR, *Delamere Estate v Ndugu Njai & Others* [2006] eKLR, and *Wellington Lusweti Barasa & 75 others v Lauders Limited & Another* [2014] eKLR and found that the appellant took possession of the suit land under licence of the owner by virtue of his employment and as a rent paying tenant. The court was not convinced that the appellant's possession was adverse to that of the registered owner and held that a person who occupies as a licensee cannot claim land under adverse possession.
 13. On the issue of mesne profits, the court considered the case of *Mistry Valji v Janendra Raichand & 2 others* [2016] eKLR and calculated the profits using the amount that the appellant paid as at the time of taking possession. The Learned Judge ordered that the appellant vacates the suit land or be evicted and awarded the Respondent mesne profits from November 1, 1983 at a flat rent rate of Kshs 800 per month until date of the judgement or until vacant possession is given.
 14. The Learned Judge however made no finding on the issue of limitation of time.
 15. On May 8, 2023, we heard this appeal on this Court's virtual platform. Learned Counsel Mr Nyange appeared for the Appellant, while there was no appearance for the Respondent despite having been duly served, neither did the Respondent file any submissions. The Appellant's submissions in summary were that pursuant to Section 7 of the *Limitation of Actions Act* as well as the case of *M'rinkanya & Another v Gilbert Kabeere M'mbijiwe & Another*, Civil Appeal 124 of 2008, the Respondent's suit was time barred and was not entitled to the prayers sought in its plaint and therefore the same were erroneously given; that the award of mesne profits was not supported by evidence since there was no proof that the Appellants were paying a monthly rent of Kshs 800 and that they stopped paying rent on November 1, 1983; that possession became adverse when the Appellant's employment was determined in September 1977 and therefore because the Appellant was in occupation of the suit land for 19 years



before the suit was filed; and that he satisfied the conditions to warrant a finding of adverse possession in his favour. The Appellant relied on the case of *Wambui v Njuguna* (1983) KLR 172.

Analysis And Determination

16. This being the first appeal, in *Selle vs. Associated Motor Boat Co.* [1968] EA 123 that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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, the 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

17. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties. The Court’s mandate as re-affirmed in *Abok James Odera t/a A. J. Odera & Associates vs. John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR is:

“...to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

18. In his judgement, the Learned Judge found that there was no dispute that the Respondent was previously the registered owner of the suit premises which the Appellant’s father occupied by virtue of employment as rent paying tenant up to 1977. It was also not in dispute that following the default by the Respondent to settle the debt it owed to National Bank of Kenya, the suit property was sold to Wanje Holdings Ltd. According to the Learned Judge, the Appellant or his predecessor in title came into the suit premises by virtue of their employment with the Respondent and were paying rent to the Respondent and there was no evidence when the tenancy expired. However, notwithstanding the fact that the Appellant stopped paying rent, they continued in possession as rent paying tenants. It was his finding that under the rule of permissive possession, one’s occupation cannot be said to have become adverse simply by refusal to continue paying rent since there was no material to show that the tenancy was determined. Therefore, it could not be said that the defendant’s possession was hostile to that of the registered owner.

19. We do not understand the Learned Judge’s position to be that once entry is by permission or consent, a claim to land by adverse possession cannot be sustained. If the deceased went into possession as rent paying employee and the tenancy was to come to an end upon the determination of the employment, barring nothing else, it would follow that the deceased’s continued occupation of the suit property would have been adverse to that of the respondent from the time the employment was terminated since the deceased would no longer lawfully and with the respondent’s consent be occupying the suit plot. This is our understanding of *Sisto Wambugu v Kamau Njuguna* 1 KAR 217; [1983] KLR 172; [1976-1985] EA 608.

20. In other words, a perfectly consensual or permissible entry or occupation of land may turn adverse where the occupant, after the condition upon which initially entry was granted lapses, remains thereon



peacefully, openly and continuously and without interruption for a period of not less than 12 years, adversely to the title of the registered owner.

21. In the above case, however, the Court was clear in its mind that it is not sufficient to prove that the claimant has been in possession for the requisite number of years. Rather, what ought to be proved is that the titleholder has been dispossessed or has discontinued his possession for the statutory period. However, it matters not that the proprietor of the land is unaware that time has started running against him since as was held by this Court in *Ithongo v Thindiu* [1981] KLR 197, a right to land is extinguished, in the absence of fraud, after the statutory period although the owner is unaware that adverse possession has been taken. This is because ignorance on the part of the owner whether of his right or of infringement of his right does not prevent the operation of the statute. See *Rains v Buxton* [1880] 14 CH D 537; *Rustomjee on Limitation and Adverse Possession* at 1380.

22. What constitutes 'adverse possession' was described in the case of *Jandu vs Kirpal & another* [1975] EA 225 in which the court relied on the definition adopted in the case of *Bejoy Chundra v Kally Posonno* [1878] 4 Cal 327 at p 329; it was held that;

“By adverse possession I understand to be meant possession by a person holding the land on his own behalf, [or on behalf] of some person other than the true owner, the true owner having immediate possession. If by this adverse possession the statute is set running, and it continues to run for twelve years, then the title of the owner is extinguished and the person in possession becomes the owner.”

23. This Court in *Ndolo v Kitutu & 8 others* (Civil Appeal 394 of 2018) [2022] KECA 1289 (KLR) (18 November 2022) (Judgment) cited AIR 2008 SC 346 *Annakili v A Vedanayagam & Ors*, a decision of the Supreme Court of India in which the essential elements of adverse possession were considered and in which it was held that:

“Claim by adverse possession has two elements:

1. the possession of the defendant should become adverse to the plaintiff; and
- (2) the defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi as is well known is a requisite ingredient of adverse possession. It is now settled principle of law that mere possession of land would not ripen into possessory title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in the said capacity for the prescribed period under the Limitation Act. Mere long possession for a period of more than 12 years without anything more do not ripen into a title.”

24. Similarly, in *Alfred Welimo v Mulaa Sumba Barasa*, CA No 186 of 2011, this Court expressed itself thus:

“It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it; for as Robert Megarry aptly observed in his Megarry’s manual of the Law of Property, 5th ed. page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So, the mere fact that the appellant abandoned possession of the suit property and went to live at Ndalu scheme by and of itself



does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with animus possidendi (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land....”

25. In *Ndolo v Kitutu & 8 others* (*supra*), the Court concluded that:

For a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted use of the land. The physical fact of exclusive possession and the animus possidendi to hold as owner to the exclusion to the actual owner are important factors in a claim for adverse possession. The principles stated in the above holding are also encapsulated in the local legislation referred to elsewhere in this judgment. The direct import of these two provisions is, firstly, that a person dispossessed of land cannot bring an action to recover land after the expiration of twelve years from the date on which the right of action accrued, which is the date of dispossession. Secondly, after the expiration of the said twelve years the title of the registered owner shall be extinguished. Thirdly, the person in adverse possession is entitled to a title by possession.

26. In this case however, the Appellant’s evidence was that the deceased was claiming the suit land as the owner thereof having completed payment of the purchase price. There is no evidence of the agreement for sale and when payment was to be made and when, if at all, it was made. The law is clear that the claimant’s possession of the land only becomes adverse to that of the owner upon the determination of the licence and as long as he is in possession with the permission of the owner whether as a tenant or as an intending purchaser, time does not begin to run against the owner. Since determination of when time begins to run is such a crucial factor in claims to land by way of adverse possession, the claimant must cogently prove the time when time begun to run. Where there is no certainty as to when time begun to run, the claimant is unlikely to succeed in his claim.

27. In the case before us it seems that the deceased originally went into occupation of the suit land as a rent paying tenant by virtue of his employment by the Respondent.

According to the Appellant’s evidence, based on the deceased’s information, upon determination of the employment there was some arrangement to purchase the suit land, though the details are rather sketchy. That being the position, it was incumbent upon the Appellant to adduce satisfactory evidence regarding the existence of the said agreement and its terms so that the Court could determine when time begun to run since, as we have stated above, mere possession for the statutory period does not justify inference of adverse possession but rather that the titleholder has been dispossessed or has discontinued his possession for the statutory period.

28. From the record, there was an attempt by the Respondent in 1978 to wrestle the land from the Appellant when the Respondent instituted Civil Case No 374 of 1978. According to the Appellant, that case was dismissed in 1988. This Court in *William Gatuhi Murathe v Gakuru Gathimbi* Civil Appeal No 49 of 1996 held that time stops when the owner asserts his rights or when there is an admission by the other party and that assertion of rights occurs either when the owner takes legal proceedings or makes effective entry. That being the position though the time started running, according to the Appellant, in 1977 when the employment of the deceased came to an end, the running of time was interrupted a year later in 1978 when the said suit was filed and it was not until 1988 that the running of time resumed. After that the present suit was filed in 1996, 8 years later. It follows that there was no uninterrupted occupation by the deceased or the Appellant of the suit land for a continuous period of 12 years in order for the claim to the suit land by way of adverse possession to succeed.



29. The Respondent however averred that since the suit property had changed hands to a third party, the Appellant's claim could not succeed. With due respect, if the Respondent had lost title to land by way of adverse possession, it would have not mattered that a third party obtained title after the period of limitation had run its course since where a party has lost its interest in land through adverse possession, a third party who purchases part of the said land from him cannot acquire a better title to that of the proprietor whose title had been extinguished by adverse possession. See *Eliud Nyongesa Lusenaka & Another v Nathan Wekesa Omocha* Civil Appeal No 134 of 1993 and *Peter Thuo Kairu v Kuria Gacheru* [1988] KLR 297; [1988-92] 2 KAR 111; [1986-1989] EA 215.
30. Nothing, however, turns on that issue in light of our finding above.
31. As regards the related issue of limitation, it is true that by a plaint dated 20th April, 1978, the Respondent sued the deceased seeking vacant possession, eviction, mesne profits, damages for trespass and incidental costs. That cause of action was the same as the cause of action the subject of this appeal. It is submitted that the said suit was dismissed in 1988 and that the suit the subject of this appeal was filed 1996. It is therefore clear that as far back as 1978, the Respondent knew that a cause of action for recovery of land from the deceased had accrued to it. Section 7 of the *Limitation of Actions Act* provides that:
- “An action may not be brought by any person to recover land after the end of 12 years from the date which the right of action accrued to him or if it first accrued to some person through whom he claims to that person.”
32. It is clear that by the time the present suit was filed in 1996, the Respondent's right to bring the action to recover the suit land had become stale. While the original suit was brought well within time, the present suit was clearly filed outside the limitation period. We associate ourselves with this Court's position in *M'kiara M'rinkanya & Another vs. Gilbert Kabeere M'mbijiwe & another* [2007] 2 KLR 93; [2008] 1 EA 200 that section 7 of the *Limitation of Actions Act* bars the bringing of action for recovery of land after the end of 12 years from the date in which the right of action accrued. We are therefore of the view and hold that that the Respondent's suit was unmaintainable. The other reason why the reliefs issued in favour of the Respondent ought not to have been issued was that by the time of the judgement, the Respondent was no longer the registered proprietor of the suit land, the same having been acquired by Wanje Holdings Ltd and any orders issued in favour of the Respondent were incapable of being executed.
33. Having considered the material placed before us we are of the view that both the Respondent's suit and the Appellant's counterclaim were legally unmaintainable and ought to have been disallowed.
34. In the premises we allow this appeal, set aside the order allowing the respondent's claim against the appellant and substitute therefor an order striking out the said suit. We however find no reason to interfere with the order dismissing the counterclaim. In other words, none of the parties herein is entitled to the reliefs sought either in the plaint or in the counterclaim and as the suit property is now registered in the name of Wanje Holdings Limited who was not made a party to these proceedings, we wish to say no more.
35. As none of the parties has been wholly successful, we make no order as to the costs both of this appeal and in the court below.
36. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER, 2023.



S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

