Thathi (As Personal Representative of the Estate of Thathi Francis Muruariua) v Waithanje & 2 others (Civil Appeal 6 of 2018) [2023] KECA 1414 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1414 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 6 OF 2018

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

NOVEMBER 24, 2023

BETWEEN

RESTITUTAH MICERE THATHI ..... APPELLANT

AS PERSONAL REPRESENTATIVE OF THE ESTATE OF THATHI FRANCIS MURUARIUA

AND

WANGARI WAITHANJE ..... 1ST RESPONDENT

JACOB KARIUKI ..... 2ND RESPONDENT

GATAVI WAITHANJE ..... 3RD RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court at Embu (B.N. Olao, J.) dated 21st April, 2017inELC Case No. 244 of 2014)

JUDGMENT

1. The 1st respondent Wangari Waithanje is the mother of the 2nd respondent Gatavi Waithanje. She is the widow of the late Waithanje Muriria who was the uncle of the deceased Eugenio Thathi Francis Muruariua who was the defendant in Embu HCCC 130 of 2007 (OS) which became ELC No 244 of 2014 (OS) at Embu. Eugenio Thathi Francis Muruariua (hereinafter referred to as the "appellant") was also the defendant in Embu District Land Disputes Tribunal Case No 12 of 2004. The 3rd respondent is the son of the 2nd respondent and grandson of the late Waithanje Muriria. The appellant was aggrieved by the decision of the ELC case rendered on April 21, 2017 by B.N. Olao, J. He filed this appeal. His widow Restitutah Micere Thathi became the personal representative of his estate and took over the appeal.

2. The background of this dispute is that the 2nd respondent sued the appellant in Embu Land District Disputes Tribunal claiming land parcel Kagaari/Weru/1256 (the suit property), measuring about 7

acres. She claimed that her late father had bought it but that it had been registered in the name of the appellant. The appellant claimed to have been the one who had bought the suit property and got registered as proprietor. He opposed the claim. The Tribunal resolved the dispute in favour of the 2nd respondent, and directed the appellant to transfer the suit property to her. The appellant moved to the High Court at Embu in Misc Application No 2 of 2007 and had the decision quashed on the basis that the Tribunal had no jurisdiction to decide a dispute relating to ownership of registered land.

3. In the ELC Case the 1st, 2nd and 3rd respondents filed originating summons dated October 9, 2007 (as amended on March 1, 2008), primarily seeking that they be registered as the proprietors of the suit property by virtue of adverse possession, having been in continuous and uninterrupted possession for over 12 years. Secondly, they asked that the appellant be directed to execute the transfer of the suit property to them, failing which the Deputy Registrar be ordered to execute on his behalf. It was their sworn evidence in support of the summons that the 1st and 2nd respondents had resided on the suit property since 1966 and 1979,respectively, while the 3rd respondent had been born on the suit property in 1974, and that the three had enjoyed continuous and uninterrupted occupation since; and that the registration of the suit property in the name of the appellant was on the basis that he was a trustee.

4. The appellant opposed the suit. His defence was that he had purchased the suit property from one Murani Ndoro in 1966 for Kshs 2,500/=. He denied the claim by the respondents that the late Waithanje had bought the suit property as alleged. He stated that at the time the late Waithanje was 65 years old, unemployed, and not in a position to buy the suit property. He denied that the respondents had been in continuous and uninterrupted occupation of the suit property from 1966, and stated that he had since been in occupation of the suit property which he had been cultivating. He swore that, on humanitarian basis, he had allowed the 1st respondent to live on, and cultivate, the suit property. He stated that the 2nd respondent was married and residing elsewhere with her husband, and that the 3rd respondent was living in Runyenjes. Lastly, he deponed that the 2nd respondent and her children had forcefully invaded the suit property, occupied 6 acres of it, and begun to cultivate. This had led him to report to the area chief and at Runyenjes Police Station. This had happened prior to the dispute at the Tribunal.

5. The trial judge received viva voce evidence from the parties and their witnesses. The court found for the respondents. It was found that the respondents were entitled to the suit property by way of adverse possession, having taken possession of the suit property in 1966, and the 12 years having elapsed in 1979. An order of transfer was made.

6. The appellant was dissatisfied with the judgement and decree of the trial Judge and filed this appeal which his widow as legal representative took over. He raised the following grounds in the Memorandum of Appeal dated January 11, 2018:-

> " 1) That the learned judge erred by failing to find that the matter was barred by the doctrine of *res judicata* under section 7 of the *Civil Procedure Act*.
>
> 2. That the learned judge erred in law by failing to find that the matter was barred by section 8(3) & (5) of the *Law Reform Act*, Cap 26 and Order 43 Rule 1 (1) (aa) of the *Civil Procedure Rules, 2010*.
>
> 3. That the learned judge erred in law and fact by failing to find that the respondents' possession was by consent.
>
> 4. That the learned judge erred in law and fact by failing to find that the time for purposes of adverse possession began to run in 2006.

5. That the learned judge erred in law by entertaining the amended originating summons without leave of court."

7. When the appeal came before us, Mr. Gachuba was acting for the appellant and Mr. Kathungu represented the respondents. Both counsel opted to fully rely on their written submissions, which they briefly highlighted. Mr. Gachuba's position was that the trial court had committed three errors which he wanted this court to consider and correct. The first was that, the court failed to recognise that the suit before it was res-judicata. His argument was that the 2nd respondent had obtained a judgment from the District Land Disputes Tribunal which had been quashed by the High Court, and that, instead of appealing the High Court decision, had instead filed the ELC claim subject of this appeal. Counsel relied on section 7 of the *Civil Procedure Act*, and several decisions, including *Njue Ngai –v- Ephantus Njiru Ngai & Another* [2016]eKLR, *Lalchand Radha Kishan*, AIR 1977 S.C. 789 and *Africa Oil Turkana Limited (previously known as Turkana Drilling Consortium Ltd) & 3 Others v-Permanent Secretary, Ministry of Energy and 17 others* [2016]eKLR.

8. The second error, according to counsel, was that the respondents, not having appealed against the decision of the High Court in quashing the District Land Disputes Tribunal's decision, had acquiesced to the order of Judicial review; that they had become estopped by acquiescence and abandonment to institute the originating summons. Reliance was placed on section 8(3)(5) of the *Law Reform Act* as read with Section 75(1)(h) of the *Civil Procedure Act* and Order 43 rule (1)(1)(aa) of the *Civil Procedure Rules*. Then, the decision in *Kuria Mbae –v- the Land Adjudication Officer, Chuka and Another*, Nairobi HC Misc. Appli. No 257 of 1983.

9. The last error, it was submitted, regarded the finding that the respondents had acquired the suit property by adverse possession. According to counsel, it had not been proved that the respondents had had a peaceful, open and continuous occupation of the suit land for over 12 years. It was pointed out that, whereas the evidence was that the late Waithanje was the father of the 1st respondent, the trial court had indicated in the judgment that he was the husband of the 1st respondent. On the question of adverse possession and what was required to prove it, counsel relied on *Wanje and Others v A.K. Saikwa & Others* [1984]eKLR and *Samwel Miki Waweru –v- Jane Njeri Richu* [2007]eKLR.

10. The response by Mr. Kathungu was that the issues of res- judicata and section 8(3)(5) of the *Law Reform Act* were never raised by the appellant before the trial court and cannot therefore be urged before this court. On the question of adverse possession, counsel submitted that the respondents had proved their case before the trial court. Counsel referred this court to the decision in *Joseph Kithinji M'Eringo & Another –v- Christine N. Mbiti* [2021]eKLR.

11. We have carefully considered the entire record of appeal, the grounds therein, the rival submissions by counsel and what they orally highlighted. Being the first appellate court, we are aware of our mandate to re-evaluate and re-assess the entire evidence that was placed before the trial court, and be able to arrive at our own independent conclusions thereon. While doing this, we remain conscious of the fact that the trial court saw and heard the witnesses, an advantage we do not have as the appellate court. The Court in *Selle –v- Associated Motor Boat Co. Ltd & Others* [1968] EA123 ably outlined what the jurisdiction of the first appellate court is.

12. Our reading of the record shows that the only issue that the parties pleaded, and submitted on, before the trial court was whether the respondents' occupation of the suit property was adverse. In the written submissions by the appellant's counsel in the trial court, he indicated the issue to be determined to be:-

"Whether the occupation of the suit land is adverse."

The trial court, in response to parties' evidence and their submissions, indicated as follows:-

> "I have identified the following issues to be crucial in the determination of this dispute:-
>
> 1. whether the plaintiffs are on the suit land at the invitation of the defendant and;
>
> 2. whether the plaintiffs have infact used the suit land nec vi, nec clam, nec precario (no force, no secrecy, no force) in order to entitle them to orders of adverse possession – *Kimani Ruchire –v- Swift Rutherfords & Co. Ltd* 1980 K.L.R.10."

13. In *Galaxy Paints Company Ltd –v- Falcon Guards Ltd* [2000]eKLR, the Court of Appeal observed as follows:

> "It is trite law, and the provisions of O. XIV of the Civil Procedure Rules, are clear that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of O. XX rule 4 of the aforesaid rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court's determination."

14. We have looked at the appellant's response to the originating summons as amended. He did not raise the issue that the suit was res-judicata. He did not raise the issue that, by dint of section 8(3)(5) of the *Law Reform Act* or section 75(1)(h) of the *Civil Procedure Act* or Order 43 rule 1(1) (aa) of the *Civil Procedure Rules*, the suit was subject of estoppel by acquiescence or abandonment. The trial judge was not asked to deal with these defences, and did not make a determination on them. As was submitted by Mr. Kathungu for the respondents, this court would not have the jurisdiction to deal with the two issues. We decline the invitation to address these issues on appeal.

15. That would leave us with the question whether the respondents proved before the trial court that they had become entitled to the suit property by adverse possession.

16. In *Mtana Lewa –v- Kahindi Ngala Mwagandi* [2015]eKLR. Justice Asike-Makhandia made reference to the provisions of sections 7, 13, 17, 37 and 38 of the *Limitation of Actions Act* when he noted that –

> "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 its title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. It must be adequate in continuity, publicity and in extent to show that possession is adverse to the title owner."

17. In *Mate Gitabi –v- Jane Kabubu Muga & 3 Others,* Nyeri Civil Appeal No 43 of 2015 this Court pronounced itself in the following terms:

> "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 secrecy, without force, and without licence or permission of the land owner, with the intention to have the land.

There must be apparent dispossession, of the land from the owner. These elements are contained in Latin maxim nec vi, nec clam, nec precario... "

18. It is trite if the person claiming to have become entitled to the land by adverse possession has been on the land forcefully, secretly or with the permission of the owner, his claim cannot succeed.

19. In the instant appeal, the trial Judge, having reviewed the evidence that he had received from the witnesses, proceeded as follows:-

> " I am persuaded that the plaintiffs have proved their case against the defendant as required in law. The plaintiffs' occupation of the suit land is well in excess of the twelve
>
> (12) years limitation period provided in law and the defendant's rights to the same was extinguished as far back as 1979. And although the 2nd plaintiff moved away in 1979 when she got married, her rights to the land by way of adverse possession had already crystallised."

20. The appellant complained about this finding. In grounds 3 and 4 of the appeal, he claimed –

> 3. That the learned Judge erred in law and fact by failing to find that the respondent's possession was by consent.
>
> 4. That the learned Judge erred in law and fact by failing to find that the time for purposes of adverse possession begun to run in 2006."

21. The record shows that there was no dispute that the land in dispute, that is Kagaari/Weru/1256, had since 1966 been registered in the name of the appellant. The appellant's evidence before the trial court was that he bought the land from one Murani Ndoro in 1966, took possession and planted coffee. In 1980 he invited his uncle, the late Waithanje, to come and live on the land. Waithanje came with his wife (the 1st respondent) and his daughter (the 2nd respondent) who had a son (the 3rd respondent). The 2nd respondent got married and moved to Runyenjes to stay with her husband. In 2006, the 3rd respondent came and chased him away from the land. He reported to police. Since then he has not lived on the land. He did not call witnesses.

22. The respondents testified, and called a neighbour, Njuki Kanini as a witness. Njuki's land neighbours the disputed land. Their evidence was that the late Waithanje was the one who bought the suit property from Murani Ndoro in 1966,and settled his wife (1st respondent) and daughter (2nd respondent) thereon. They stated that the appellant has never lived on the suit property or cultivated it. The 3rd respondent was born on the land in 1974 and has lived thereon since. In 1979, the 2nd respondent got married and moved to stay with her husband but that she continued to cultivate the parcel. It was surprising to them to find that the appellant was the registered owner. Hence the suit. They stated that the late Waithanje died in 1967 before he had processed the registration of the suit property. Lastly, they stated that the late Waithanje was using the appellant during the transaction to buy the land. Njuki testified that he has always known the suit property to belong to Waithanje, and that the appellant has never lived on the suit property.

23. When the appellant was cross-examined, he stated as follows:-

> " It is true that the husband of the 1st plaintiff liked me a lot. It is not true that the husband to the 1st plaintiff was using me in the land transaction. It is me who invited him to my land. It is not true that the husband to 1st plaintiff gave me money to buy land for him and that I

bought it for myself. It is true that I have not tried to evict the plaintiffs from the land subject of this suit .....I used to plough the land but I have not lived there. They chased me from ploughing the land. That may have been in 2006 "

He admitted that the late Waithanje died in 1967. He was living on the suit property with his family. About the 2nd respondent, the appellant stated: -

" She got married while living on my land around 1979 then she moved to her husband's land in Runyenjes. She does not plough it but leased it to someone else "

24. This is the evidence that the trial judge considered and made the findings that he did. He had the benefit of seeing the witnesses and gauging their demeanour. On our independent evaluation of the evidence, we have no reason to depart from the findings. We accept that the family of the late Waithanje moved and settled on this land in 1966 following its purchase by Waithanje. They have lived thereon openly and peacefully since then. The 3rd respondent was born herein, and has continuously lived there since 1974. The 2nd respondent got married in 1979 and moved to stay with her husband elsewhere but continued to use the suit property. The appellant has never lived on the suit property since 1966, and therefore the respondents' occupation was exclusive. The trial court dismissed the claim that the respondents were living on the suit property at the invitation of the appellant, and accepted that he had knowledge of the occupation. In his own admission, he did nothing to get them out of the suit property. We find that it was correctly found that the respondents had acquired the suit land by adverse possession.

25. The 5th ground that he learned Judge erred in law by entertaining the Amended Originating Summons without leave of the Court was, according to the record, never an issue in the trial court, and therefore cannot be raised on appeal.

26. We, consequently, dismiss the appeal with costs for lack of merit.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF NOVEMBER 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.

Signed

DEPUTY REGISTRAR