Kigorwe & another v Ibua (Civil Appeal 176 of 2019)
[2022] KECA 70 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 70 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 176 OF 2019

DK MUSINGA, RN NAMBUYE & S OLE KANTAI, JJA

FEBRUARY 4, 2022

BETWEEN

CYPRIAN KIGORWE ..... 1ST APPELLANT

SOLOMON GITUNDU ..... 2ND APPELLANT

AND

FRANCIS MAWATHI IBUA ..... RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court of Kenya at Meru (Kemei, J.) dated 8th April, 2019 in ELC Case No. 72 of 2004 (OS))

JUDGMENT

1 Two suits were filed at the High Court of Kenya at Meru. In High Court Originating Summons No. 72 of 2004 Francis Mawathi Ibua (the respondent herein) sued Cyprian Kigorwe (the 1st appellant) in a claim for adverse possession over Title No. L.R. Nyaki/Giaki-Kiburine/556 ("the suit property"). In the second suit – High Court of Kenya at Meru (Environment and Land Division) Case No. 105 of 2014 Solomon Gitundu (the 2nd appellant) sued the respondent in a suit where he prayed for a declaration that he was registered as the absolute proprietor of parcels of land Title No. Nyaki/Giaki-Kiburine/478 and the suit property; that the respondent be evicted with assistance of police from the two properties; that a permanent injunction be issued to restrain the respondent from entering both properties and that he be awarded damages. The two suits were consolidated and heard by Kemei, J. who in a Judgment delivered on 8th April, 2019 found that the respondent had proved adverse possession in respect of the suit property. The 2nd appellant was ordered to transfer 9 acres out of the suit property to the respondent within 30 days in default the Deputy Registrar of the Court was ordered to execute all documents to effect transfer and the respondents counter-claim in ELC No. 105 of 2014 was dismissed.

2 Those are the orders that provoked this appeal. There are 7 grounds of appeal taken by the appellants in the Memorandum of Appeal drawn for them by M/S Maitai Rimita & Company Advocates. The appellants fault the learned Judge for considering material and evidence that "…. had been brought after the pre-trial despite the court's order of 9th April, 2018", that the Judge erred in law and fact by finding that the respondent had occupied the suit property for more than 12 years; that the Judgment was against the weight of evidence; that the Judge should have found that developments on the suit property were done pending hearing of the case; that the Judge reached the wrong decision; that the respondent's case was not in consonance with the provisions of Order 37 rule 7 *Civil Procedure Rules* and, finally, that the whole Judgment was bad in law.

3. When the appeal came up for hearing before us on a virtual platform on 8th December, 2021 both parties in the appeal had filed written submissions and learned counsel Miss Maitai Rimita for the appellants and Miss Mbogo for the respondent informed us that they fully relied on those submissions and did not wish to highlight the same.

4. The appellants submit that the trial Judge erred in relying on photographs that had been filed in the case after a pre-trial conference against an order made on 9th April, 2018 and that it was not ascertained when those photographs had been taken. They further submit that the Judge erred in considering the respondent's case which, according to the appellants, had been improperly filed. The appellants finally submit that the Judge erred in finding that the respondent had lived on the suit property for more than 12 years when the title was registered in 1993 and the suit filed in the year 2004, a period of 11 years.

5. In opposing the appeal the respondent in the submissions states that photographs were produced in evidence during the hearing without objection by the appellants. On the ground whether adverse possession had been proved the respondent submits that it had been proved, that the respondent entered the land in 1970 and had been in continuous occupation without interruption; that the land was first registered in 1977 before being subdivided; the respondent supports the Judge for holding that substantive justice prevailed over procedural justice in that the respondent's pleading headed "Notice of Motion" was understood by all to be "Originating Motion"; the respondent prays that we dismiss the appeal.

6. This is a first appeal from a decision of the High Court in first instance. We are required to re-appraise the evidence and reach our own conclusion bearing in mind that we did not see or hear the witnesses, an advantage that the trial Judge has. It was held by this Court in *Peters v Sunday Post* [1958] EA 424 of the duty of a first appellate court:

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness."

7. When the hearing commenced before the Judge, the respondent testified and called one witness. They both adopted witness statements that had been filed in court. In the respondent's statement filed on 5th October, 2018 the respondent stated that the 1st appellant was the registered owner of the suit property; that the 1st appellant had transferred the suit property to the 2nd appellant during the pendency of the suit; that he had settled on the land in 1970 with his mother, brother and sisters and had developed the same by building a home and planting crops and trees; his children had been born on the suit property. He further stated that his stay on the suit property was uninterrupted and it was not until August, 2004 when he had received a letter from the appellants' lawyer asking him to vacate the suit property. According to him the suit property was a subdivision of L.R. No. Nyaki/Giaki-Kiburine/479 which was a subdivision of L.R. No. Nyaki/Giaki-Kiburine/164 which was the

original land registered in the name of the 1st appellant in 1977. He further testified that when the 2nd appellant bought the suit property he knew that the respondent was in occupation of it and:

> "…. He is not a (sic) honest purchaser. He knew of my interest and was only acting in this case to defeat my interest in the land.
>
> The truth of the matter is that the defendant herein and the plaintiff in ELC No. 105 of 2014 have never entered the land any time at all. I have always been the one in exclusive possession of the land…."

8 He produced in evidence photographs showing his family on the land, houses, cow and mango trees which he claimed to have planted in the year 1976.

9. Saverio Kebere Mwikamba, called as a witness by the respondent adopted a witness statement filed in Court on 5th October, 2018 stated that he knew the respondent who lived in their home as he built his home on the suit property in 1970. According to him the respondent settled on the suit property with his (respondent's) family and he (the witness) had visited that home many times. He knew that the respondent had planted many trees on the suit property including mangos, gravelia amongst other trees. As the respondent's neighbor he had never seen any of the appellants visit the suit property at all.

10. The 1st appellant adopted a witness statement filed in Court on 15th January, 2018 where he stated that he had sold the suit property to the 2nd appellant; that the same was excised from L.R. No. Nyaki/Giaki-Kiburine/164 and that the respondent had refused to vacate the land. In cross-examination he stated that he sold the suit property to the 2nd appellant in 2013; that he had informed the respondent of that development but could not recall when he did so, and in his own words:

> "I found him on the shamba…. I was aware he was on the land. I knew that he was in occupation. I could see the houses on the land. the houses are still on the land. he is in occupation of the land, by force …."

He denied that the respondent had been on the land for 40 years.

11. The 2nd appellant stated that after conducting due diligence he had purchased the suit property which he had found as idle unoccupied land. When he went to the land in January, 2014 he found the respondent and his family on the land and he saw crops and thickets growing on the land. He did not see any buildings on the suit property and the 1st appellant had not informed him that there was a case in court concerning the suit property.

12. We have considered the whole record and the submissions made by the parties in respect of the adverse positions they take in the case.

13. The learned Judge identified issues for determination and considered them on the evidence given by the parties and reached the conclusion that the respondent had proved that he had lived on the suit property for a period of over 12 years and was entitled to orders of adverse possession prayed for in the pleadings.

14. The appellants complain that the Judge considered evidence that was given after a pre-trial conference held on 9th April, 2018. We note that the respondent filed two sets of List of Documents on 5th October, 2017 when various documents (photographs) were filed. The respondent testified in court on 16th October, 2018 when he produced those photographs in evidence and he was cross-examined by the appellants in that respect. The complaint that documents produced after a conference has no basis in those circumstances and we dismiss it.

15. The main issue for determination in this appeal is whether it was proved to the required standard that the appellant had lived on the land openly and uninterrupted for a period of 12 years.

16. The various land laws contained in the *Limitation of Actions Act* (Cap 22 Laws of Kenya) have since been repealed and replaced by the *Land Registration Act* (Act No. 3 of 2012). Section 104 of the latter Act has a saving clause to the effect that the register maintained under any of the repealed Acts shall be deemed to be the land register for the corresponding registration unit established by the new Act. Section 28 of the new Act recognizes as overriding interests:

> "(h) rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by presumption."

17. Section 38(1) of the *Limitation of Actions Act* provides:

> "Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land."

18. The learned trial Judge cited Gicheru, JA. in the case of *Kweyu v Omuto* Civil Appeal No. 8 of 1990 (ur):

> "In deciding the issue of adverse possession, the primary function of the court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is a matter of legal conclusion to be drawn from the finding of facts."

19. This Court in the case of *Richard Wefwafwa Songoi v Ben Munyitwa Songoi* [2020] eKLR stated:

> "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. There is also the case of *Alfred Welimo v Mulaa Sumba Barasa* C.A. 186 of 2011 (ur) where this Court expressed as follows:

> "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...."

21. The appellants submit that the respondent did not prove open uninterrupted possession of the suit property for a period of 12 years. From our perusal of the record it was proved that the original parcel of land Nyaki/Giaki-Kiburine/164 was registered in 1977 in favour of the 1st appellant. That parcel was subdivided resulting in two parcels of land – Nyaki/Giaki-Kiburine/478 and 479 in 1987. Parcel number Nyaki/Giaki-Kiburine/479 was then subdivided to create two new parcels of land – Nyaki/Giaki-Kiburine/555 and Nyaki/Giaki-Kiburine/556 (the latter is the suit land).

22. It was proved in evidence that the respondent entered the suit property in 1970, he has occupied the same with his family since then without any interruption or interference by the 1st appellant. The 1st appellant sold the suit property in or about 2004 to the 2nd appellant in an apparent effort to defeat the rights of the respondent, an adverse possessor who had occupied the suit property for a period well in excess of the period recognized by the Limitation of Acts Act. Like the trial Judge we find that the respondent was entitled to the 9 acres of land he claimed. The appeal has no merit and we dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

D.K. MUSINGA, (P)

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JUDGE OF APPEAL

R.N. NAMBUYE

.....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR