



REPUBLIC OF KENYA



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**Mbusya & another v Matili (Civil Appeal 265 of 2018)
[2022] KECA 604 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KECA 604 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 265 OF 2018
RN NAMBUYE, W KARANJA & J MOHAMMED, JJA
MAY 13, 2022**

BETWEEN

BEATRICE MWOVI MBUSYA 1ST APPELLANT

MAINGI MWOVI 2ND APPELLANT

AND

JOHN MAINGI MATILI RESPONDENT

(Being an appeal from the judgment and Decree of the Environment and Land Court at Machakos (Angote, J) dated 26th of January, 2018 in ELC Case No. 46 of 2011)

JUDGMENT

1. John Maingi Matili (the respondent) sued Beatrice Mwovi Mbusya and Maingi Mwovi (the appellants) before the Environment and Land Court (ELC) vide an Originating Summons (OS) dated 21st February, 2011 under the then Order XXXVI Rule 3(C) of the *Civil Procedure Rules* and section 27 of the *Limitation of Actions Act* for an order that the court be pleased to order him be registered as the owner of Land parcel number Machakos/Ulu/31 (the suit land) by virtue of adverse possession. The grounds in support of the summons were that he has stayed on the suit land from 1974 to date without any interruption and that the land initially belonged to his father the late Matili Wangue (deceased) which land was transferred after the land adjudication process.
2. In support of the OS was an affidavit sworn by the respondent whereby he largely restated the grounds on the face of the OS. He also deposed that he was born in 1954 and he has been living on that piece of land since then; that the land was given to his late father by a settler after his retirement and that his possession is uninterrupted and he has, therefore, acquired ownership of the said land by adverse possession.
3. In response to the OS the appellants filed a replying affidavit dated 23rd March, 2011 sworn by Maingi Mwovi the 2nd appellant who deposed that the suit land was originally owned by the late Matili



- Wangue, the respondent's father who sold and legally transferred the same to the second appellant's late father the late Jackson Mwovi Mbusya through a series of land transactions way back in 1969, 1970, 1971 and 1972. According to the appellants, the respondent never settled on the land in 1966 as he had deposed but rather on a small portion of the said land as a licensee of the administrators to the estate of their father.
4. According to the appellants, the respondent had continued to waste the suit land. They implored the court to issue orders of permanent injunction and eviction as sought. In his further supplementary affidavit dated 26th August, 2016 the 2nd appellant annexed a letter from the Ministry of Water Development/Nolturesh pipeline water project addressed to his late father Jackson Mwovi Mbusya dated 10th April, 1989 where his father's consent was being sought to allow the contractor to enter the said parcel of land to lay the pipes/reservoir. There is also a compensation form from Kenya Power and Lighting Company in regard to the suit land confirming that his late father was the owner.
 5. The OS was heard by way of *viva voce* evidence. The respondent's case was that he was a son of Maingi Matili and he had been living on his father's land, Parcel No. 31 in a settlement scheme known as Ulu. He asked the court to adopt his written statement dated 1st August, 2016. His evidence was that his father was left on the land when the white settlers left in 1963 and in 1976 the land was apportioned. Jackson Mwovi attempted to evict them in 1996 to no avail but he had since died. He said he was born on the suit land and has lived there to date. The land had been registered in the name of Mwovi Mbusya yet his father never sold the land to him and that the appellants have never lived on the suit land. On cross-examination, the respondent stated that his father never took out a title deed and only had an allotment letter. He went on to state that the appellants were cultivating the land but they had never lived on it. He asked the court to grant the orders sought in the Summons.
 6. Samuel Kavoo Muasya (PW2) asked the court to adopt his written statement dated 24th February, 2005. It was his evidence that he worked as a clerk for F.O.B Wilson plantation and he knew Matili Maingi who was a tractor driver and that he was aware Matili was given plot No. 31 Ulu and that the late Mwovi was his cousin and he had also been allocated land within the farm. In his written statement however, he had stated that the late Mwovi was never allocated any land since he was not an employee of Wilson plantation.
 7. On his part, in opposing the claim, the 2nd appellant Maingi Mwovi (DW1) adopted his written witness statement. It was his case that the respondent's father sold and legally transferred the suit property to the 2nd appellant's late father, Jackson Mwovi Mbusya.
 8. After considering the evidence adduced by both parties, the learned Judge held that the respondent had satisfied the court that he had been in continuous and uninterrupted possession of the suit land since 1974 when it was registered in favour of the 2nd appellant's father. The said possession had been open, notorious and with the knowledge of the registered owners and without their permission and so the learned Judge found in favour of the respondent and ordered that the respondent be registered as the proprietor of the suit land pursuant to section 38 of the *Limitation of Actions Act*.
 9. Aggrieved by the decision of the learned Judge, the appellants moved to this Court vide a notice of appeal dated 5th February, 2018. In their memorandum of appeal dated 2nd August, 2018 the appellants have proffered several grounds whereby they fault the learned Judge for, inter alia: finding that the respondent had proved his case on adverse possession of the suit land when the appellants had demonstrated that the respondent was a mere licensee on a small portion of the suit land which he had been allowed to occupy by the 2nd appellant's late father; awarding the entire suit property to the respondent while the pleadings and evidence was that the respondent's father was permitted by the late Jackson Mwovi Mbusya to occupy a small portion of the suit land which the court could have



ordered to be hived out if at all adverse possession was proved; The appellants pray that their appeal be allowed with costs.

10. Both parties filed written submissions which they adopted at the plenary hearing where learned counsel Mr. Muloki and Mr. Kiprono appeared for the appellants and the respondent respectively. In their submissions, the appellants urged that the respondent in his OS alleged fraud but failed to particularize and prove the same. It is their submission that the late Jackson Mwovi obtained ownership of the land from the respondent's father Matitli Wangu who sold it to him. That is corroborated by the evidence of PW2 who confirmed this fact and further testified that the respondent and the family moved out of the suit land once they sold the same to the appellant's father. The appellants maintained that the respondent had not proved that he had lived on the said parcel of land for more than 12 years. The appellants urged the Court to note that the respondent had contradicted himself by stating that he had been living on the said parcel since 1955 yet in the originating summons he stated that he has been living there since 1974. Citing the case of *Peter Njau Kairu v. Stephen Ndung'u Njenga & Another* [1988] eKLR where the court rejected untruthful adverse possessor's claim due to his material falsehoods, the appellants maintained that the respondent's OS ought to have been dismissed.
11. On adverse possession, the Court has been urged to find that the same cannot apply to a person who has been on the land with the consent of the owner.

Further, that from the records at the Land Adjudication and Settlement office it is clear that the land belonged to the late Jackson Mwovi and a title deed issued on 16th May, 1974. That the respondent's family was allowed to live on the suit land after the sale and they continued to occupy only a portion of the suit land, yet the learned Judge awarded the entire portion to the respondent.
12. Finally, the Court is urged to allow the appeal and in the unlikely event that the appeal succeeds albeit partially, it be to the extent of the portion occupied by the respondent. Further that an order of eviction be granted in the event the respondent is found not to have succeeded in his claim for adverse possession. The Court was referred to the decisions in *Kimoi Ruto & Another v. Samuel Kipkosgei Keitany & Another* [2014] eKLR and *Charles Kiplagat Bosuben v. Willy Kipkemboi Kigen & 2 Others* [2016] eKLR.
13. On his part, the respondent in his submission stated that the suit was transferred to the 2nd appellant's father through fraud. Further, that the respondent and his family had lived on the said land peacefully from 1974 until 1996 when the second appellant's father in a bid to evict them had them charged with forcible detainer but the charges were dismissed by the court and they continued to live on the suit land. He maintained that from 1996 to 2011 when the OS was filed, 12 years had already expired and so the respondent had acquired the land by adverse possession, and the trial court had not therefore erred in allowing the OS.
14. Both counsel made brief oral highlights. Mr Maluki emphasised that the respondent had lived on a small part of the suit land as a licensee. Counsel drew the Court's attention to the appellant's replying affidavit where the appellant had deposed that the respondent occupied a distinct parcel of the land which was separated from the land occupied by the appellants by the Mombasa/Nairobi Highway. It was his strong position that adverse possession had not been proved, and even if the same had been proved, it ought to have applied only to the portion occupied by the respondent not the entire parcel. He stated that the respondent had not had peaceful possession or occupation of the land as there were court cases against him. He urged the Court to allow the appeal.
15. On his part, Mr Kiprono urging for the dismissal of the appeal adopted his submissions and further reiterated that the respondent was not a licensee of the 2nd appellant's father and that his occupation



of the land was open and hostile. He also maintained that the learned Judge had not erred in awarding the respondent the entire suit property.

16. This being a first appeal, this Court has a duty to 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. See *Peters v. Sunday Post Ltd* [1958] EA 424 where the court held:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.”

See also *Gitobu Imanyara & 2 others v. Attorney General* [2016] eKLR.

Upon reading the record of appeal, the rival submissions and case law, particularly as cited by the parties, we decipher only 2 issues calling for our determination. Whether the respondent had proved adverse possession and whether the respondent occupied the entire suit land or a portion of it.

17. The respondent denied being a licensee on the suit land. It was his case that his father the late Matili Wangue was allocated the suit land by one Wilson and that since 1966 he has lived on the parcel of land uninterrupted. The 2nd appellant avers that his father the late Jackson Mwovi Mbusya bought the entire suit land from Matili Wangue and had the same transferred to him, however he allowed the late Mwovi Mbusya to continue occupying a small portion of the said suit land. We note that the learned Judge made a finding that indeed the 2nd appellant’s father had bought the property in question and the same had been lawfully transferred to him. There being no cross-appeal on that finding, we cannot revisit that issue. It is also not disputed that the respondent continued to live on the suit property even after his late father sold the same to the 2nd appellant’s father.
18. Did the respondent acquire the suit land by way of adverse possession? The doctrine of adverse possession is one of the ways used to claim ownership of land in Kenya. It is also, in our view, one of the most misunderstood concepts and one that has been applied/misapplied to dispossess rightful owners of their properties. It is also a concept that has unfortunately interfered with the hitherto magnanimous and laudable African tradition of relatives allowing their less fortunate ones to have shelter on their land for fear that a decade plus two years later, they will be engaged in endless litigation on adverse possession.
19. 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 twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

Section 13 of *Limitation of Actions Act* thus provides that:

- “1) a right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date,



a right of action does not accrue unless and until some person takes adverse possession of the land.

2. where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- 3 3)..."

The respondent therefore had to prove that he had been in possession of the suit land in whose favor the period of limitation of could run. This Court in *Kasuve v. Mwaani Investments Limited & 4 Others* 1 KLR 184 held that:

“In order to be entitled to land by adverse possession, the claimant must prove that he had been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”

20. As stated earlier, the learned Judge found that the suit land was registered in the 2nd appellant’s father’s name on 16th May, 1974. However, the late Mwovi Mbusya allowed the respondent’s father to continue living on the suit land and even after his death in 1991 his children, including the respondent continued to occupy the suit land. Though the late Jackson had been registered as the owner to the suit land he did not take any action to evict the respondent’s family from the land. Even assuming that they were licensees then, that licence was revoked in 1996 when the respondent and others were charged in court with the offence of forcible detainer.
21. From 1996, their occupation of the suit land became hostile to the registered owners of the suit land or those claiming title under them, including the appellants, notwithstanding the fact that the 2nd appellant was registered as the owner of the suit property on 28th June, 2002. We also note that from the record, the 2nd appellant’s father died in 1991, and so the appellants were the ones behind the attempted eviction of the respondent from the land through criminal proceedings in 1996. After 1996, the appellants did not take any other action to evict the respondents until 2011 when the OS was filed. This was fifteen years after the respondent’s occupation of the appellant’s land became hostile. Clearly, by virtue of section 38 of the *Limitation of Actions Act*, the respondent was entitled to be registered as the owner of the portion in question.

This court in *Mtana Lewa v. Kabindi Ngala Mwangandi* [2005] eKLR held as follows:

“adverse possession is essentially a situation where a person takes possession of land, 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 12 years.”

The learned Judge cannot be faulted to that extent.

22. This brings us to the second issue as to whether the adverse possession was in respect of the entire parcel or on the portion occupied by the respondent. From the proceedings before the trial court, there is no doubt that the respondent occupies only a small portion of the suit land and not the entire 20 acres. It is deposed by the 2nd appellant that the respondent occupied only a portion of the property and the respondent has not controverted that deposition. From the respondent’s evidence, it is also stated that the appellants cultivate the land in question although they do not live there. We are not persuaded that the respondent occupies the entire land. Indeed, he said he has built 3 houses on the portion



he occupies. It is also in evidence that the portion he occupies is on the other side of the Mombasa/ Nairobi Highway, across the road from the larger portion occupied by the appellants. How then would he be justified in taking the entire portion which his late father lawfully sold and transferred to the 2nd appellant's father? That in our view would be gross injustice and an affront to the appellants' constitutional right to own property.

23. We have no hesitation in finding that the learned Judge erred in finding that the entire suit land should be transferred to the adverse possessor of the small identifiable, uncontested portion. Accordingly, this appeal succeeds to the extent that the learned Judge's order that the entire suit land be registered in the respondent's name is hereby set aside. We order that the small portion on the other side of the Nairobi/ Mombasa road, where the respondent has been occupying be transferred to the respondent and the portion on the opposite side of the road be registered in the appellants' names.

In view of the partial success of the appeal, we order that each party bears its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

