Chigamba & 2 others v Noormohamed & 8 others (Civil Appeal 126 of 2019) [2022] KECA 535 (KLR) (6 May 2022) (Judgment)

Neutral citation: [2022] KECA 535 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 126 OF 2019

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

MAY 6, 2022

BETWEEN

CHIGAMBA BADI CHIGAMBA .... 1ST APPELLANT

JUMA MDUI .... 2ND APPELLANT

JAPHET MURAMBA MWATSUMA .... 3RD APPELLANT

AND

KASSAM RAMZAN NOORMOHAMED .... 1ST RESPONDENT

HUSSEIN RAMZAN NOORMOHAMED .... 2ND RESPONDENT

ABDALLA RAMZAN NOORMOHAMED .... 3RD RESPONDENT

SALEH MOHAMED RAMZAN NOORMOHAMED .... 4TH RESPONDENT

NJERU MGAO KIBETU .... 5TH RESPONDENT

PATRICK NABISWA .... 6TH RESPONDENT

MARY KASHI HAMISI .... 7TH RESPONDENT

HAMISI MOHAMED THOYA .... 8TH RESPONDENT

DANIEL BAYA KAYAMBA .... 9TH RESPONDENT

(Being an Appeal from judgment of the Environment and Land Courtof Kenya at Mombasa (L. N. Waithaka J.) delivered on 9th May 2019 in ELC case no. 995 of 2006 (O S.))

JUDGMENT

1. Chigamba Badi Chigamba, Juma Mdui, Japhet Muramba Mwatzuma the 1st to 3rd Appellants herein, where the plaintiffs in a suit filed in the Environment and Land Court (ELC) by way of an Originating

Summons dated 23rd October 2006, together with the 5th to 9th Respondents herein, Njeru Ngao Kibetu, Patrick Nabiswa, Mary Kashi Hamisi, Hamisi Mohamed Thoya, and Daniel Baya Kayamba. The Appellants and their co-plaintiffs sued the 1st to 4th Respondents in the said suit, claiming that they were entitled by way of adverse possession to Plots Nos 1482/11/MN and 1483/11/MN (both originally known as plot 344/11/MN and hereinafter referred to as "the suit properties") measuring 433.42 acres, which were registered in the 1st to 4th Respondents' names. The Appellants claimed to have been in open and uninterrupted possession of the said properties for over 20 years, developed the said parcels of land, and were thus entitled to have the land registered in their names. The Originating Summons was supported by an affidavit sworn on 25th October 2006 by the 2nd Appellant.

2. The 4th Respondent in response filed a Defence and Counter claim dated 10th March 2008, wherein he disputed the Appellants' allegations, and averred that he had entered into an agreement with the said plaintiffs and other members of the public on 14th March 1985 and allocated them portions of the land, but which they had since refused to take, and that he was therefore under no obligation to give them land. He accordingly prayed for vacant possession of the suit properties in his counterclaim. Also on record was a supplementary affidavit filed on 7th October 2014 sworn by one Suleiman Swaleh Fadhili, who annexed a power of attorney from the 4th Respondent, and who detailed the transactions involving the suit property from 1966 when it was subdivided into two plots, namely plot number 1482/II/MN and 1483/II/MN. In addition, that there were further subdivisions of 1483/II/MN, which was the plot owned by the Respondents, which were later sold to various third parties. According to the deponent only a few of the said sub-divided plots were still in the 4th Respondent's name, and were invaded by squatters in September 2013.

3. Directions were given that the affidavits filed by the parties would be regarded as pleadings, and that the hearing of the originating summons would proceed by way of viva voce evidence. The Appellants called three witnesses to testify, who included the 1st and 2nd Appellants, while the 4th Respondent called one witness. The ELC (L.N. Waithaka J.) found in its judgment that the orders sought by the Appellants could not be maintained because they claimed the entire original parcel of land that ceased to exist in view of the subdivision of the land to parcels 1482 and 1483, and further that the appellants occupied less than 15 acres of the said land. The court was not satisfied that the Appellants had proved that their use and occupation of the suit land extinguished the rights of the owners of the land, and therefore could not claim that the subdivided land was held in trust for them, and noted that some of the structures on the land were newly erected hence incapable of supporting the appellant's claim for adverse possession.

4. Therefore, that the Appellants did not make a case to warrant the orders sought, while the 4th Respondent had proved his case, and the trial Judge accordingly ordered that the Appellants be evicted from the suit land.

5. The Appellants being aggrieved with the said judgment lodged this appeal, in which they have raised ten grounds of appeal in their Memorandum of Appeal dated 26th September 2019. The said grounds challenge the judgment of the ELC in three main areas, firstly that there was a misapprehension by the trial Court of the elements of adverse possession; secondly that the trial Court did not consider the evidence adduced on the Appellant's adverse possession; and lastly, that the Respondents' counterclaim was not proved.

6. We heard the appeal on 8th February 2022, and the Appellants were represented by learned counsel Ms Okimaru and Mr. Kubo, and the 4th Respondent by learned counsel Mr. Makaya Oweya. During the hearing, Ms. Okimaru applied to have the appeal against the 1st to 3rd Respondents and 5th to 9th Respondents withdrawn as the Appellants were only seeking orders against the 4th Respondent,

which order we granted. The counsel for the Appellants and 4th Respondent proceeded to canvass their separate positions, while relying on submissions dated 24th January 2022 and 21st July 2021 respectively.

7. As this is a first appeal, our duty as stated by Rule 29(1) of this Court's Rules is to re-evaluate, re-analyze and re-consider the evidence adduced before the trial court, and draw out our own conclusions thereon. This Court's role in this regard was expressed in *Selle & Another vs Associated Motor Boat Co. Ltd. & others* (1968) EA 123 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 demeanour of a witness is inconsistent with the evidence in the case generally"

8. In arriving at our own conclusions of fact and law, we will only depart from the findings by the ELC if they are not based on the evidence on record, or where the said court is shown to have acted on wrong principles of law, as held in Jabane vs Olenja [1986] KLR 661.

9. After a perusal of the record of appeal, the memorandum of appeal and submissions filed thereon, we have identified two issues arising in this appeal. The first is whether the elements of adverse possession were proved to the required standard by the Appellants, and secondly whether the remedies sought by the Appellants and 4th Respondent were deserved.

10. On the first issue, the Appellants' counsel relied on the case of *Samuel Kihamba v Mary Mbaisi* (2015) eKLR to urge that the record speaks to the fact that the appellants enjoyed peaceful uninterrupted possession of the suit land and dispossessed the Respondents of the land; that going by the case of *Gulam Miriam Noordin v Julius Charo Karisa* (2015) eKLR, the developments on the suit land were evidence of dispossession of the owner of the suit land. It was pointed out that the 4th Respondent offered to relocate the Appellants and he was aware of the Appellants' possession of the suit land. It was therefore the argument of counsel that the court erred in narrowing down the evidence of adverse possession to the structures and ultimately rejecting the claim for adverse possession.

11. The counsel for the 4th Respondent on his part urged, while placing reliance on the case of M*ount Elgon-Beach Properties Limited vs Kalume Mwanongo Mwangaro & Another* (2019) eKLR , that the appellants' failure to present evidence and proof of the size of the portion they occupy as well as the exact location disentitled them to the claim for adverse possession. Counsel submitted that the Appellants had not proven the ingredients of adverse possession; cited was the case of *Kasuve v Mwaani Investments Limited & 4 Others* (2004) 1 KLR. It was further argued that the Appellants failed to prove possession; failed to point out their houses and that the houses on the land were built less than 5 years from the date of trial.

12. In *Teresa Wachika Gachira vs Joseph Mwangi*, [2009] eKLR, it was held that the onus is on the person claiming adverse possession to prove continuous and exclusive use of the land in question nec vi, nec clam, nec precario. (neither by force, not secretly and without permission). In addition to the fact and nature of occupation of the land, the person claiming adverse possession requires to prove the duration

of such occupation and specifically that they have been in occupation of the land for over twelve years. As explained by Makhandia JA in *Mtana Lewa vs Kahindi Ngala Mwagandi* [2015] eKLR:

> "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. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, which is in these terms:-
>
> "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."

13. Also see in this regard the decisions in *Jandu vs. Kirplal & Another* (1975) EA 225 and *Wambugu vs. Njuguna* [1983] KLR 173. In the present appeal, PW1 (the 2nd Appellant herein), PW2 (the 1st Appellant herein) and PW3 all testified to having been born on the suit property - PW1 in 1953, PW2 in 1957, and PW3 in 1963; and having resided thereon with various members of their family. In addition, that other deceased members of their families who previously resided on the suit property including their parents and children are also buried on the land. PW1 in this respect produced copies of his father's identity card and photograph as proof of this fact, and pointed out various homesteads, structures and graves on the suit property belonging to the Appellants, during a site visit conducted by the trial Court of the suit property on 15th May 2009.

14. We need to point out at this juncture that this Court, in a recent decision delivered in *Eliakim Masale vs Ilale Mohamed & 4 Other*, Mombasa Civil Appeal 135 of 2019, noted that identity cards are only proof of the date and district of birth, but not of the holder's actual residence at the time of birth or proof of the time of entry into or occupation of a property. Further, that a photograph, being a static and inert representation of facts, can only objectively identify a certain person, item, or place at the particular period of time when the photograph is taken, and has limited evidentiary and probative value of as regards the facts of duration of occupation, or the continuous occupation of a property that is the subject of a claim by adverse possession.

15. It was further observed in the said case that corroboration of the fact and length of occupation by independent verifiable and reliable evidence is necessary in cases of adverse possession, to be able to meet the threshold required of a balance of probabilities to divest a registered owner of his or her property. This requirement is also necessary to avoid the risk of collusion as regards the fact and duration of possession of the property.

16. Coming back to the evidence adduced by the Appellants, there were also inconsistencies in the evidence of PW1, PW2 and PW3 as regards the portion of the suit property they occupied, and number of families on the suit property. PW1 insisted that the entire 433 acres of the suit property was occupied by the plaintiffs in the suit, and indicated that there were "more than 9 families" residing thereon, and that the area he occupied was about "10 to 12 acres". He also testified on cross examination that he was forced in 1985 to sign an agreement and accept 1/8 of an acre. PW2 testified that he was residing on land situated in plot 1483 on approximately 6 acres, and that the 1st 2nd 4th, 5th, 6th, 7th and 8th plaintiffs also resided on the plot. He also testified on cross examination that the 4th Respondent came to the land in the 1980's and brought some animals thereon.

17. PW3's testimony was that the land occupied by the plaintiffs was about 450 acres, and that there were 'more than 200 families" on the land, and further that "my neighbours are Mzee Chigamba (the 1st Appellant). He lives about 10 metres from me. Mzee Juma Mdui (the 2nd Appellant) is also my neighbor. He lives about 200 metres from me". On cross examination he testified that his family lived on "8- 10 acres". He also testified that the 4th Respondent tried to claim the land in the early 1980. The report of the site visit was included in the court proceedings, and the trial Judge noted therein that he was shown the beacon dividing plots 1482 and 1483 during the site visit, and observed that about 15 acres of plot 1482 was occupied, while plot 1483 was largely uninhabited.

18. Lastly, it is also notable that the copy of title annexed by the Appellants as proof that the Respondents are the registered owners, shows that the initial transfer of plot 344/11/MN was made to the Respondents on 27th January 1966, and the transfer made to the Respondents on 18th December 1984 was of a sub-division of the said plot being plot 1483.

19. As indicated before, it is settled that the nature of physical possession required to be demonstrated by an adverse possessor is complete and exclusive physical control over the subject land for the requisite period of twelve years. This requirement was confirmed by the decisions in *Buckinghamshire CC vs Moran* (1990) Ch 623 and *JA Pye (Oxford) Ltd vs Graham* (2003) 1 AC 419, in addition to the possession being open, peaceful and adverse, that is not by consent of the true owner. The elements required to be proved in this regard are explained in the text by *Kevin Gray and Susan Francis Gray on Elements of Land Law, 5th Edition at page 1184 -1185*:

> "The factum or corpus of possession required to be shown by the successful squatter necessarily involves evidence of complete and exclusive physical control over the land claimed. The duration of the squatter's occupation, its exclusivity and the acts of user relied upon must normally be verifiable by a physical survey of the land. Adverse possession may be asserted in respect of only part of the land titled in the paper owner, the latter remaining in effective possession of the remainder of his land. Provided that the squatter is in exclusive factual possession of an identifiable portion of the land, it is irrelevant but the owner of the paper title has not been wholly dispossessed"

20. It is thus our conclusion that the evidence adduced by the Appellants in this regard did not demonstrate and prove to the required standard the duration of their possession, the identifiable portions of land that they each possessed in terms of location and size, nor exclusivity of possession of the land they claimed, arising from insufficient evidence and inconsistencies and contradictions in their evidence as regards each of these elements. It is also notable that from the evidence adduced, some of the alleged possessors of the suit property did enter into agreements with the 4th Respondent to be allocated certain plots, including PW1 as evidenced by his testimony, and their possession cannot therefore be said to be adverse. The findings by the ELC that the Appellants did not prove the elements of adverse possession were therefore not in error.

21. On the second issue as regards the remedies sought, it was the Appellants' counsel submission while citing the case of *Gabriel Mbui vs Mukindia Maranya* (1993) eKLR that the sub- division and registration of the suit property did not extinguish the rights of persons claiming adverse possession. It was submitted while placing reliance on the case of *Mwangi Githu vs Livingstone Ndeete* (1980) eKLR that the new registered owners of the suit land held the same in trust for the appellants who had overriding interests over the suit land; and that the trial court erred in failing to find so. Counsel posited that there was basis to distribute the suit land to the appellants because in the case of *Lazaro*

Kabebe vs Ndege Makau & Another (2017) eKLR the court found that the appellant was entitled to a portion of the suit land by virtue of adverse possession.

22. It was therefore the argument of counsel that the 4th Respondent's interest in the suit land ought to be severed and handed over to the appellants. Counsel was of the opinion that there was heavy reliance on the case of *Wilson Kazungu Katana & 101 others vs Salim Abdalla Bakhswein & Another* (2015) eKLR where the court was not able to identify the suit land without a copy of the title; and submitted that in the instant appeal, the court was availed a copy of a title to the suit land. Lastly, the counsel challenged the grant of eviction orders against the Appellants on the basis of the 4th respondent's counterclaim, as the 4th Respondent's title had been extinguished by adverse possession, and also since the 4th Respondent had denied being the registered owner of the suit property, and therefore lacked locus to seek orders of eviction in relation to the said property.

23. The counsel for the 4th Respondent in turn submitted that in the absence of any order granting the Appellant adverse possession, they automatically became trespassers without any colour of right, and the orders of eviction were proper. Counsel relied on the decision to this effect in the case of *Mombasa Teacher Cooperative Savings & Credit Society Limited vs Robert Muhambi Katana & 155 Other* (2018) eKLR ,where the squatters were ordered to vacate the subject premises.

24. Our view on this issue is that the Appellants could only be registered as owners of the suit property or portions thereof if the title of the Respondents was extinguished by their adverse possession, and we have already found that the evidence adduced by the Appellants did not meet the required threshold in this regard. In addition, the 4th Respondent did bring evidence and copies of title documents that the land claimed had since been subdivided and disposed of to third parties, and the intervention proposed by the Appellants of severing off the land was therefore not available or capable.

25. On the remedy of vacant possession sought by the 4th Respondent, it is notable in this respect that the said remedy was sought on the basis that the 4th Respondents had better title and right to possession of the land as opposed to the Appellants. Having found that the Appellants had not proved their right to possess the land adversely, the ELC did not err in granting the 4th Respondent physical possession by way of eviction orders. We also note that the 4th Respondent did, in paragraph 17 of his supplementary affidavit, indicate the plots that are still registered in his name, namely plots number 1863, 1864, 3185, 3186, 3187, 3188 and 3189, which were derived from plot 1483, and availed copies of the titles thereof. The orders of eviction granted by the ELC therefore required to be qualified to this extent.

26. The Appellants appeal is therefore found not to be merited, and is hereby dismissed, save for the clarification as to the property that is the subject of the eviction orders granted by the ELC, namely plots number 1863,1864, 3185, 3186, 3187, 3188 and 3189 that are owned by the 4th Respondent. The Appellants shall meet the costs of this appeal.

27. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MAY 2022.

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is atrue copy of the original.

Signed

DEPUTY REGISTRAR