



**Kamau v Kirumba & another (As Personal Representatives of the Estate of Kirumba Ngiri Deceased) (Civil Appeal 367 of 2018) [2022] KECA 779 (KLR) (10 June 2022) (Judgment)**

Neutral citation: [2022] KECA 779 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 367 OF 2018  
DK MUSINGA, HM OKWENGU & MA WARSAME, JJA  
JUNE 10, 2022**

**BETWEEN**

**PETER MBURU KAMAU ..... APPELLANT**

**AND**

**LABAN KARANJA KIRUMBA ..... 1<sup>ST</sup> RESPONDENT**

**WILFRED KIRUMBA NJENGA ..... 2<sup>ND</sup> RESPONDENT**

**AS PERSONAL REPRESENTATIVES OF THE ESTATE OF KIRUMBA NGIRI  
DECEASED**

*(Being an appeal against the Judgment and Decree of the Environment and Land at Nairobi (Milimani) (B.M. Eboso, J.) delivered on 31st May, 2018 in Milimani ELC No. 1153 of 2007 (OS))*

**JUDGMENT**

- [1] This is an appeal arising from the Judgment of the Environment and Land Court (ELC) (Eboso, J.) in which the learned Judge made orders declaring Peter Mburu Kamau (the appellant) entitled to be registered under section 38 of the *Limitations Act* as proprietor of L.R. No. Githunguri/Githiga/T.593, and ordered the Land Registrar to register the appellant as a proprietor of that property. The learned Judge also dismissed the appellant's claim under the doctrine of adverse possession, for 40/70 share of L.R. Githunguri/Githiga/12 (suit property).
- [2] At the time the appellant filed the suit, the suit property was registered in the name of three persons as follows:
- (a) Raymond Kirumba Ngiri .....40/70 Share
  - (b) Hannah Wanjiru Wanjau.....15/70 Share
  - (c) Maria Nyaguthi Thuku..... 15/70 Share



- [3] In his originating summons, the appellant had sought for orders that he is entitled to be registered as proprietor of 40/70 share of the suit property that was owned by Kirumba Ngiri, and the whole of L.R. No. Githunguri/Githiga/T.593 under the doctrine of adverse possession. He claimed that since 1958 he had been openly, peacefully, and as of right, in occupation of the said properties and had therefore been in occupation for a period of over 12 years.
- [4] The appellant, who was dissatisfied with the part of the judgment dismissing his claim in regard to the 40/70 share in the suit property, appealed against this part of the judgment, raising 9 grounds in his memorandum of appeal.
- [5] The grounds included that the learned Judge having erred in law and fact: in holding that the appellant was not in an adverse possession of the suit property for a period of 12 years preceding the suit; in holding that the appellant is a co-owner with and trustee on behalf of the registered proprietor for 15/70 share in the suit property; in holding that the appellant as administrator is entitled to be registered either as trustee, owner or absolute owner of 15/70 share of the suit property; in lumping together the appellant's legal status as a personal representative and his personal legal capacity; in erroneously failing to consider his personal legitimate claim of adverse possession on account of his duties as an administrator; in basing the judgment on an issue which was not pleaded, raised or canvassed by either of the parties before him; in omitting to appraise and appreciate the evidence of historical background relating to possession, registration of the suit property and past litigation between the parties, and those who claim the suit property; in omitting to address and resolve the real issue in controversy between the parties in relation to the suit property; in misconstruing the extent of substantive justice in the case relating to redress for a historical wrong during first registration; in erroneously delivering distributive justice devoid of sound legal principles; and in relying on a judgment that is against the weight of the evidence.
- [6] The appellant, who was represented by Njoroge Baiya & Co. Advocates, relied on written submissions. The appellant submitted inter alia, that the learned Judge erroneously confined his consideration of the appellant's claim to a claim solely based on his capacity as a personal representative of the estate of the late Maria Nyaguthi contrary to the pleadings by the appellant, and the affidavit sworn in support of the originating summons in which the appellant made it clear that he was pursuing the claim in his own capacity, (even though he was also the administrator of the estate of the late Maria Nyaguthi); that the learned Judge was wrong in holding that as administrator of the estate of the late Maria Nyaguthi, the appellant stepped into her shoes and is entitled to be registered either as trustee, owner or absolute owner of the 15/70 undivided share which belonged to the late Maria Nyaguthi.
- [7] Despite having been duly served, the respondents did not file any submissions nor did they appear at the hearing of the appeal. That notwithstanding, we are required to consider this appeal on its merits. We note that during the trial, the respondents had opposed the appellant's originating motion through a replying affidavit that was sworn by Edward Njenga Kirumba.
- [8] The respondents had claimed that in 1982, Kirumba Ngiri (deceased) asserted ownership of the suit property and recalled the tenancy at will status accorded to Hannah Wanjiru and Maria Nyaguthi (deceased), who were in occupation of the suit property. They further stated that the dispute was referred to the village elders and later to court in 1984, through High Court Civil Suit No. 1617 of 1984; that this action interrupted the appellant's claim to adverse possession of the suit property; that Kirumba's suit was dismissed in 2001; and that the appellant thereafter filed the originating summons for acquisition of the suit property through adverse possession in 2003.
- [9] The learned Judge found that Kirumba Ngiri, Hannah Wanjiru and Maria Nyaguthi were common owners of undivided shares in the suit property in the ratio of 40/70, 15/70 and 15/70 respectively,



but that the appellant had from 1988 when Maria died, been in possession of the 40/70 portion of the suit property as well as Maria's share. The court found that the appellant could not acquire the 40/70 portion share of Kirumba Ngiri by adverse possession, because upon the demise of Maria, he stepped into her shoes as an administrator of her estate, and consequently became a co-owner in the undivided property, that is, the suit property. The learned Judge held that in common law, a co-owner of an undivided share of land is considered to be a trustee of other co-owners, and cannot claim the title of other co-owners by adverse possession. The appellant's claim of adverse possession in regard to the 40/70 share of the suit property was thus dismissed.

- [10] This being a first appeal, this Court has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying, and therefore give due allowance for that. This duty is now well settled having been reiterated in several decisions. For instance, in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, this Court stated that:

“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 allowances in this respect”.

(See also *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123).

- [11] In exercising that duty, we have identified two issues for determination. These are: whether the appellant's right of adverse possession in 40/70 share in the suit property had crystallized at the time the appellant filed the originating summons; and whether the appellant being the administrator of Maria's estate, could claim by adverse possession, the portion of other proprietors who were holding shares in the suit property as tenants in common with Maria.

- [12] According to *Halsbury's Laws of England*, 4<sup>th</sup> Edition Volume 28, paragraph 768:

“No right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land.”

- [13] This Court in *Wilson Kazungu Katana & 101 others v. Salim Abdalla Bakshwein & another* [2015] eKLR, defined what constitutes adverse possession as follows: -

“First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner. This concept of adverse possession has been the subject of many discourses and decisions of this Court. Suffice to mention but two, *Kasuve v Mwaani Investments Limited & 4 others* [2004] 1KLR 184 and *Wanje v Saikwa (2)* (supra). In the first decision, the court was emphatic that in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. In the *Wanje* case, the Court went further and took the view that in order to



acquire by statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use. Further, the court opined that a person who occupies another's persons land with that person's consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal.”

[14] In *Wambugu v Njuguna* (1983) KLR 173, this Court held, inter alia, that:

“In order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purposes of which he intended to use it....

The *Limitation of Actions Act* on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be, whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he has been in possession for the requisite number of years.

...

Adverse possession means that a person is in possession in whose favour time can run. Not all persons in possession can have time run in their favour. For example, time can run in favour of a tenant at will by virtue of section 12 of the Limitations of Actions Act, but time cannot run in favour of a licensee.”

[15] Adverse possession has therefore been defined as a method of gaining legal title to real property by actual, open, hostile and continuous possession of the land to the exclusion of its true owner. As per the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya, that hostile and continuous possession must have continued for a period of at least 12 years. Thus, for one to succeed in a claim of acquisition of land by adverse possession, the person must show that he/she either entered the land or has remained on the land without the consent of the owner, and that he/she has been in exclusive physical possession of the land, and exhibited an unequivocal intention to dispossess the owner. The burden of proving all these is on the person asserting adverse possession.

[16] In the present case, a perusal of the record of appeal shows that the appellant entered the suit property through an invitation from Maria Nyaguthi who had adopted him after the demise of his mother in 1946. Although it was clear as to what portions each occupant of the suit property was to utilize, the property was not subdivided. The suit filed by Kirumba claiming the whole of the suit property as against Maria and Hannah abated as against Maria Nyaguthi in 1989, one year after her demise. The suit was eventually dismissed for want of prosecution in 2001. The appellant filed the Originating Summons in 2003, two years after the dismissal of the said suit.

[17] We find that Maria is the one who was in adverse possession of Kirumba's share and time for claiming adverse possession stopped running when Kirumba filed the suit asserting ownership to the suit property. The appellant's adverse possession could only start running after 1989 following the death of Maria, and the abatement of the suit that was filed against her by Kirumba. As long as the suit remained in existence, Kirumba was still asserting ownership. We come to the conclusion that the appellant herein has not established that he was in uninterrupted possession of the suit property, or



that by the time he filed his suit in 2003, he had been in adverse occupation for a period exceeding 12 years. Consequently, we find that the appellant's claim for adverse possession in regard to the suit property was not properly established and, therefore, rightly dismissed.

[18] Furthermore, it is clear that the suit property was registered in the names of three people as proprietors in common as follows:

- (a) Raymond Kirumba Ngiri .....40/70 Share
- (b) Hannah Wanjiru Wanjau.....15/70 Share
- (c) Maria Nyaguthi Thuku..... 15/70 Share

[19] The issue is, whether the appellant being the administrator of Maria's estate, could claim the portion of Kirumba Ngiri by adverse possession. Kirumba, Hannah and Maria were tenants in common holding unequal shares. In *Kursbed Begum Mirza v Jackson Kaibunga* [2017] eKLR, this Court describes tenancy in common as follows:

“By definition, a tenancy in common is a tenancy by two or more persons, in equal or unequal undivided shares, with each person having the right to possess the whole property but no right of survivorship. The central characteristic of a tenancy in common is that each tenant is deemed to own by himself, a physically undivided part of the entire parcel. (See Black's Law Dictionary, 9<sup>th</sup> Edn and Thomas F. Bergin & Paul G. Haskell, 'Preface to Estates in Land and Future interests 54, 2<sup>nd</sup> Edn, 1984).”

[20] The repealed *Registered Land Act*, which was in operation at the time the appellant filed his suit in 2003 also recognized land ownership as tenants in common. Section 103 of that Act stated as follows: -

“103(1) Where any land or lease is held in common, each proprietor shall be entitled to a undivided share in the whole, and on the death of a proprietor, his share shall be administered as part of his estate.

- (2) No proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with a consent in writing of the remaining proprietor or proprietors of the land but such consent shall not be unreasonably withheld.”

21. Thus, in ownership in common, the doctrine of survivorship does not apply and as such, the share of one tenant is not affected by the death of one of the co-owners. The share of the deceased co-owner does not devolve to the remaining co-owners, but devolves to the estate of the deceased co-owner. This means that Maria's share devolved to her estate, whose legal representative was the appellant.

In that capacity, the appellant's position in regard to the suit property was that of a co-owner, that is, holding the undivided share held by Maria while at the same time possessing the whole property without the right of survivorship. We are satisfied that the High Court correctly found that as a co-owner, the appellant could not claim adverse possession against the other co-owner(s).

22. The appellant maintained that he brought the suit in his own personal capacity and not in his capacity as a representative of the estate of Maria. However, the appellant was on the suit property by virtue of his relationship with Maria, and can only be said to have remained in occupation in his personal capacity after Maria died. In any case, as we have stated earlier in this judgement, the suit filed by Kirumba and later dismissed for want of prosecution in 2001, interrupted the appellant's 12-year timeline, which is a necessary ingredient in a claim for adverse possession. Time only started running



from the time of the dismissal of the suit filed by Kirumba to the time the appellant filed the originating summons in 2003, and this fell short of the required 12 years.

23. From the above analysis and findings, we find no merit in this appeal. It is accordingly dismissed. Given the circumstances of this case, and the respondents not having actively participated in the appeal, we do not find it appropriate to award any costs. The appeal is therefore dismissed with no orders as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF JUNE, 2022.**

**D. K. MUSINGA (P)**

**JUDGE OF APPEAL**

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**HANNAH OKWENGU**

**JUDGE OF APPEAL**

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**M. WARSAME**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

