



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO, (P), MUSINGA & J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 65 OF 2016

BETWEEN

PETER GICHUKI WANJOHI.....APPELLANT

AND

JULIAH MUMBI MUTURI.....RESPONDENT

(Being an appeal against the Judgment and Decree of the Environment and Land Court of Kenya at Nyeri (Lucy Waithaka, J.) dated 9th June 2016

in

E.L.C Cause No. 211 of 2013.)

JUDGMENT OF THE COURT

1. There were two substantive issues of law that were framed for determination by the trial judge in the Environment and Land Court (ELC) at Nyeri in *ELC Case No. 211 of 2013*. They were: -

“(1) Whether the claim for adverse possession can subsist against the estate of a deceased person; and

(2) If the answer to (1) above is in the affirmative, whether a claim for adverse possession can subsist against a person not sued as an administrator or trustee of the estate of a deceased person.”

2. The trial court (*L. N. Waithaka, J.*) answered the first issue in the affirmative. On the second issue, the learned judge delivered herself as hereunder-

“35. With regard to the 2nd issue, I hold the view that to sustain a claim for adverse possession against the estate of a deceased person, the respondent must be sued in their capacity as an administrator of the estate of the deceased or there must be a claim that the respondent holds the title to the suit property in trust for the adverse possessor. Otherwise, where a respondent is not sued as an administrator of the estate of the deceased or as holding the title in trust for the applicant by virtue of adverse possession, I hold the view that the applicant has to prove its case against the current title holder. I say this because allowing the applicant to advance a case against a person not sued as an administrator of the estate of a deceased person would amount to condemning the estate of the deceased person unheard.

36. Having determined that the applicant’s claim must be gauged against the title held by the current registered proprietors of the suit property and cognizant of the fact that the suit herein was filed merely 8 years after the title held by the respondents was obtained, I find and hold that by the time the current suit was filed, the title held by the respondents had not been extinguished by the applicant’s alleged adverse possession of the suit property.”

3. The facts that gave rise to this appeal are simple and straight forward. *Peter Gichuki Wanjohi*, the appellant herein, filed an originating summons against the respondent claiming that he was entitled to be registered as the proprietor of a parcel of land known as *L.R No. Laikipia/Tigithi/Matanya Block 3 (Matanya Central) 126*, “the suit property” under the doctrine of adverse possession.

4. The appellant stated in his affidavit in support of the originating summons that he had resided on the suit property since 1973; that the suit property, originally known as **Plot No. 1586**, had been allotted to his late grandmother, Murugi Gichuki, by Matanya Estates Limited; that in 2008 he was issued with a clearance certificate in his name after the demise of his grandmother; that both his grandmother and father were buried on the suit property; and that he had built a permanent home and fully developed the suit property, which he had occupied openly and peacefully until 2013 when the respondent and her family members destroyed his crops that he had planted thereat.
5. **James Gichuki Ngatia**, PW2, a neighbour of the appellant, testified that he knew the appellant's late grandmother; that since 1973 the appellant and his family members had been living on and cultivating the suit property openly, peacefully and without interference from anyone whatsoever.
6. The respondent's case on the other hand was that the suit property was owned by her late husband, **Smith Muturi**; that upon his death in 1999 the land was transferred to her by transmission on 9th September 2005; that from 2005 to 2013 was barely 8 years and therefore since 12 years had not lapsed, a claim based on adverse possession of the land was unsustainable.
7. The respondent testified that since 1969 when her husband purchased the suit property, they had not utilized the land, but her husband had planted some trees on it; that in 2013 when she visited the land with her daughters they found a residential house built and some other developments thereon.
8. As earlier stated, the learned judge dismissed the appellant's suit for the reason that it was filed 8 years after the suit property was registered in the name of the respondent and therefore the claim under the doctrine of adverse possession had not crystallised.
9. Being aggrieved by the said judgment, the appellant preferred this appeal. The main grounds of appeal are that the learned judge erred in law: in holding that in order to sustain a claim for adverse possession against the estate of the deceased the respondent had to be sued in her capacity as an administrator of the estate of the deceased; in holding that in order to sustain a claim for adverse possession there must be a claim that the respondent holds the title to the suit property in trust for the adverse possessor; by failing to appreciate that at the time the suit was filed the suit property was no longer part of the estate of the deceased husband of the respondent; by failing to appreciate that the running of time under the doctrine of adverse possession is cumulative against both the original owners and their successors in title; and in her construction of statutory and common law principles of adverse possession.
10. On those grounds, the appellant urged us to set aside the impugned judgment and substitute therefor an order allowing his claim in the originating summons.
11. The appeal was by consent canvassed by way of written submissions. We have carefully considered the submissions. The main grounds of this appeal are that the learned judge erred in law in holding that in order to sustain a claim for adverse possession against the estate of the deceased the respondent had to be sued in her capacity as an administrator of the estate of the deceased; and that the learned judge erred in law in her computation of time in a claim of land under the doctrine of adverse possession. We shall consider the two grounds together.
12. It is not in dispute that the respondent was not sued as the administrator of the estate of Smith Muturi, her deceased husband, who passed away in 1999. The respondent was issued with letters of administration of the deceased's estate on 26th September 2000.
13. In ***Peter Thuo Kairu v Kuria Gacheru [1988] 2 KAR 111*** this Court held that a claim for adverse possession subsists not only against the present holders but also their predecessors in title. The appellant and his grandmother occupied the suit property way back in 1973 and remained in exclusive possession, openly and without any interruption until 2013 when he filed the suit.
14. Likewise, in ***Githu v Ndeete [1984] KLR 776 [1986]***, this Court held that "***the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession.***" That being the law, we do not agree with the learned judge that to sustain a claim for adverse possession, the respondent had to be sued as an administrator of the deceased's estate. Under the doctrine of adverse possession, a claimant's claim to the land runs against the title and not necessarily against the current holder of the title. Whether the respondent is an administrator of her deceased person's estate or not, the critical factor that must be demonstrated by a claimant is that he has been in adverse possession of the suit property for a period exceeding twelve years.
15. The learned judge erred in holding that the appellant's claim had to be gauged against the title held by the respondent, even though it was evident that the appellant had been in adverse possession of the suit property for nearly 26 years during the lifetime of the respondent's deceased husband. Death of a registered proprietor of land or transfer thereof does not stop time from running for purposes of a claim of land by way of adverse possession. If that were the correct position in law, we doubt whether any claim of land based on adverse possession would ever succeed, so long as a respondent is able to avoid such a claim by simply selling or transferring land that is under such a claim. The transferee would only require to demonstrate that the land in question had been registered in his or her name less than 12 years before the suit was instituted, even if the claimant had been in adverse possession of the land for over 12 years before the transfer was effected.
16. We agree with the appellant that the running of time under the doctrine of adverse possession is cumulative against both the original owner and the successor(s) in title. From 17th June 1994 when the suit property was registered in the name of the respondent's late husband to 17th October 2013 when the appellant filed the Originating Summons is more than 19 years.
17. This Court's decision in ***Titus Kiguro Munyi v Peter Mburu Kimani [2015] eKLR*** that was heavily relied upon by the trial court and the respondent in submitting that in computing time in a claim for land under the doctrine of adverse possession, the Court should only consider the time the suit property was registered against the current proprietor is distinguishable. In that case, the court established that although the appellant claimed to have entered the unregistered land in dispute in 1970 when it was communally held by a clan, he had testified that it was only in 2010 that the respondent (who had acquired the land in 1978 as the first registered proprietor), became aware of the appellant's occupation of the suit land and immediately took legal steps to assert his rights over the land. This Court held: -

“...time for adverse possession could not run against the respondent prior to the year 1978 as he had no proprietary interest in the suit property. However, it must be noted that under Section 7 of the Limitation of Actions Act, the law relating to prescription affects not only present holders of the title but their predecessors. (See Peter Thuo Kairu -v- Kuria Gacheru, (1988) 2 KLR 111.”

18. We think the learned judge misapprehended the ratio *decidendi* in the above cited authority and thereby made the wrong conclusion. In this appeal, the appellant had been in open, peaceful and uninterrupted possession of the suit land for over 12 years during the lifetime of the respondent’s deceased husband; had extensively developed the land; and had even buried his deceased grandmother and father thereon. From 1973 when the appellant occupied the suit land to 1999 when the respondent’s husband passed away, the deceased ought to have known about the appellant’s occupation and taken appropriate action but did not do so.

19. We have said enough, we believe, to demonstrate that this appeal is for allowing, which we hereby do. We therefore set aside the trial court’s decision and substitute therefor an order allowing the appellant’s claim as prayed in the originating summons dated 16th October 2013. Each party shall bear its own costs of the appeal.

Dated and delivered at Nairobi this 29th day of January, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR