



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: KOOME, WARSAME & KIAGE, JJA)**

**CIVIL APPEAL NO. 94 OF 2016**

**BETWEEN**

**ESTHER WAMWERE NYORI.....APPELLANT**

**VERSUS**

**JOSEPH MAINA WACHIRA.....RESPONDENT**

*(Being an appeal from the Judgement and Decree of the Environment and Land Court*

*at Nyeri (Lady Justice L.N. Waithaka) dated on 26th July, 2016*

*in*

*ELC Case No. 449 of 2014)*

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**JUDGMENT OF THE COURT**

1. This is an appeal against the judgement and order of the Environment and Land Court (Waithaka, J.) dated 26th July 2016, dismissing the appellant's claim for adverse possession in the parcel of land known as **LR No. Thegenge/ Ihithe/53**, (the suit property).
2. A brief background to this appeal is that **Esther Wamwere Nyori (the appellant)** filed summons dated 31st July, 2012 for a declaration that she acquired the suit property by adverse possession or in the alternative that the suit land is registered in trust for her benefit. In her suit against Esther Mwhaki Macharia (legal representative) and **Joseph Maina Wachira (the respondent)** in the Environment and Land Court in ELC No. 449 of 2014, the appellant claimed that she has been in exclusive possession of the suit property since 1958 to the time when the legal representative filed succession proceedings to administer the deceased' estate.
3. The suit property was registered in the name of the late David Muchiri Theuri alias Gitari s/o Theuri in a first registration in 1958. Thereafter Esther Mwhaki Macharia (legal representative) and daughter to the deceased, succeeded her late father's estate. Pending the appellant's suit, Esther Mwhaki sold the suit property to one Martha Muthoni Karungi who later transmitted the suit land to her grandson, the respondent herein, who was registered thereafter as the proprietor to the suit property on 31st March 2014.
4. Upon registration, the respondent issued a notice to the appellant requiring her to vacate the suit property. The appellant was aggrieved by the said action, hence filed the case subject of this appeal. Upon hearing the matter, the trial court (Waithaka, J) found that the appellant failed to establish adverse interest and entitlement to the suit land against the respondent as the claim could only succeed or fail against the estate of the deceased. As a result, the trial court entered judgement in favour of the respondent.
5. Being dissatisfied, the appellant lodged a Memorandum of Appeal dated 20th December, 2016 on 4 principle grounds, namely that the learned Judge erred in;

**a. Holding that the legal representative in the deceased' estate was a mandatory party in the claim and whose exclusion invalidated the claim;**

**b. Holding that the appellant's claim was subject to or was affected by the administration of the deceased' original proprietor's estate ;**

**c. Failing to consider the uncontroverted evidence of adverse possession in the suit land;**

**d. Delivering a judgement that was against the weight of evidence and the law.**

6. The parties agreed to the disposal of the appeal by way of written submissions together with lists of authorities in support and against the appeal.

7. On the first ground, the appellant submitted that if at all the legal representative was a necessary party to the proceedings in the trial court, it should have been at the instance of the respondent who in the appellant's view, had the onus of salvaging his title from the appellant's claim.

8. While relying on **section 16 of the Limitations of Actions Act, Cap 22, Laws of Kenya**, for the second ground the appellant's submissions were that where a cause of action has accrued to a person during his life, the limitation period continues to run notwithstanding his death and it runs continuously even though there is an interval before a grant of probate or administration is obtained. The appellant further relied on **section 17 of the Limitation of Actions Act, Cap 22, Laws of Kenya** in urging that the registered title to the suit property was extinguished upon the expiration of the period prescribed for a person to bring an action to recover land. To support her proposition, the appellant referred to the decisions in **Bridges v Mees (1957) 2 ALL ER, 526** and **Perry v. Cissold (1907) AC, 73** in arguing that the effect of barring the true owner's right is to make the possessor's title absolute and any purchaser of the same holds that title subject to and as a trustee of the adverse possessor.

9. On the last two grounds, the appellant argued that the trial court ignored evidence in support of the appellant's adverse interest in the suit land and in particular, the sale agreement between herself and the original proprietor. The appellant's case was that her sale agreement along with evidence of her exclusive possession of the suit land were not controverted by the respondent during trial. The appellant based her claim on the sale of land which remained executory on the part of the original proprietor, who failed to transfer the land to the appellant in spite of receiving the full purchase price.

10. The appellant referred to **the Bridges case (supra)** in submitting that such a title holder becomes a bare trustee of the purchaser and after 12 years in possession, the purchaser's title is barred under the relevant law on limitation of time. In addition, the respondent bore the burden of proving the allegations that the appellant entered the suit land with permission from the original proprietor to cultivate the suit land and that the appellant was a niece to the deceased. In concluding, the appellant submitted that there is overwhelming evidence in favour of her adverse interest in the suit property and as such that the Court is enjoined to set aside the judgement of the trial court in its entirety.

11. The respondent in turn submitted that the appellant's decision to remove the legal representative was fatal to her case in the trial court since the property in question devolved from the original proprietor to the hands of the legal representative. According to the respondent, the issue before the trial court was not whether or not the appellant's claim for adverse possession was valid but whether the administrator given a chance to oppose the claim for adverse possession.

12. The respondent submitted further, that the adverse claim against the suit land was not proved to the required standard. Moreover, the respondent challenged the credibility of the sale agreement between the appellant and the deceased, contending that it fell short of the requirements for a contract for sale of land as the document was neither signed by the parties to the contract, nor attested, and the agreement did not identify the item for purchase and or the date it was drafted. Following those defects, the respondent concluded that the appellant was merely a licensee on the suit property and consequently the appellant's claim based on adverse possession was premature and therefore incompetent. In closing, the respondent prayed that this appeal be dismissed with costs.

13. This being a first appeal, our role as set out in **Rule 29 (1)** of the Rules of this Court is by way of a retrial. We are obliged to reconsider the evidence that was adduced before the High Court, evaluate it and come to our own conclusion. Our primary role as a first appellate court therefore is to re-evaluate, re-assess and re-analyze the evidence on the record and then determine whether the conclusions reached by the learned judge are to stand or not and give reasons either way. (*See Selle & Another v. Associated Motor Boat Company Limited & Others [1968] E.A. 123.*) and *Sumaria & Another v. Allied Industries Ltd (2007) KLR 1*)

14. In arriving at its findings, the trial court determined the matter on a single issue which is whether the appellant could prosecute her claim for adverse possession against the original proprietor of the suit land without giving him or his legal representative an opportunity to defend the case against him and his estate. The trial court's view was that the legal representative ought to have been afforded an equal footing to defend the case levelled against her. This was against the backdrop of whether the case against the respondent was maintainable after the appellant withdrew her case against the legal representative.

15. Furthermore, the trial court observed that the appellant's possession and occupation was not adverse to the title to the suit property held by the respondent since the appellant failed to provide evidence to support that the title held by the original proprietor of the suit land was extinguished by her adverse claim thereof.

16. As was rightly pointed by the trial court the claim of the appellant was that the title to the suit property was extinguished by their adverse possession, therefore the property should revert to them. In this matter the claim against the original owner was discontinued or withdrawn by the appellant, hence the claim of adverse possession cannot subsist or be used to defeat the title or ownership of the subsequent owner, who was unaware of the possession of the appellant.

17. The consequences of the withdrawal of the case against the personal representative of the original owner was that the estate of the deceased person was not given an opportunity to defend the case against them. The trial court in addressing its mind held:-

***“There being no dispute that the plaintiffs’ possession and occupation is not adverse to the title held by the 2nd defendant, I agree with the 2nd defendant’s submission that the only way the plaintiffs can establish their case against him is by showing that***

***the title held by the 2nd defendant's predecessor in entitlement had become extinguished by their adverse possession thereof. The question that begs for an answer is whether the plaintiffs' can prosecute their claim for adverse possession against the previous registered owner of the suit property without giving him or his legal representative an opportunity to defend the case against him or his estate. My view of that question is that, they cannot".***

18. We agree with the trial that the original owner or his personal representatives was a proper party without whom the reliefs sought could not be granted. The said parties were entitled to be given an opportunity to contest the claim of adverse possession. In our view it is an indispensable requirement of justice that a court shall hear both sides, so as to decide the case of each side from an informed position. It was the responsibility of the appellant to maintain the case against the original owner or his personal representative and the moment, the appellant decided to withdraw the claim against the said party, then the cause of action of adverse possession was not available against the respondent.

19. In the premises, we totally agree with the learned trial court, that the claim of adverse possession cannot succeed against 3rd parties, who were unaware of the status of the suit property, in the absence of any encumbrances.

20. It is a fact, that since the original owner passed on, the property exchanged hands three (3) times, therefore a party who was not a party to the alleged action or omission, cannot be made to suffer or have his/her title extinguish without proper basis or reason. The failure of the appellant to sustain the claim of adverse possession against the original owner or his personal representative is fatal to its claim. Consequently, the appeal has no merit and it is hereby dismissed with costs to the respondent.

***Dated and delivered at Nairobi this 19th day of May, 2021.***

**M. K. KOOME**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**