



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, KARANJA & KOOME, JJ.A.)**

**CIVIL APPEAL NO. 30 OF 2013**

**BETWEEN**

**SAMMY MWANGANGI & 10 OTHERS.....APPELLANTS**

**VERSUS**

**COMMISSIONER OF LANDS.....1ST RESPONDENT**

**JAMES KAMAU WAINAINA.....2ND RESPONDENT**

**RAPHAEL MUIGAI MWANGI.....3RD RESPONDENT**

**PAUL KAHUTI KONDIA.....4TH RESPONDENT**

**(an appeal from the part of the judgment and decree of the High Court of Kenya at Nairobi,  
(Okwengu J.) dated 9th July 2012**

**In**

**HCCC No. 298 of 2003**

**CONSOLIDATED WITH**

**HCCC No. 394 of 2004**

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**JUDGEMENT OF THE COURT.**

1. This is an appeal by the aggrieved plaintiffs, now the appellants, against the decision of **Okwengu J.** (as she then was) delivered on 9th July, 2012 whereby she dismissed the plaintiff’s suit and ruled in favour of the 9th and 10th defendants (3rd and 4th respondents herein).
2. The appellants lay claim to a parcel of land situate in Embakasi described as **LR. No 209/11543** and **LR. No. 209/11546** (the suit land). It is common ground that the suit land has at all material times been Government land which the appellants sought to have alienated to them.
3. The genesis of the dispute giving rise to this appeal goes back to the year 1923 where the appellants claim that they were living on the suit land since then with the belief that the land belonged to them and

their ancestors, until the year 1994 when they were notified by the Area Chief that said suit land was Government land.

4. The 3rd and 4th respondents consequently filed a counter-claim against the appellants claiming that they hold an absolute and indefeasible title having purchased the property on 18th September, 1997 from Kimakwe Enterprises Ltd. It is also alleged that in February, 2002 the appellants unlawfully entered into the suit land and constructed temporary structures and further purported to sell the land to some unknown persons.

5. It is the appellants' assertion that the Government through its agents gave them permission to settle and develop the suit land which exercised was supervised by the Commissioner of Lands (1st respondent). They purported that the 1st respondent secretly and fraudulently demarcated the suit premises into various parcels of land and allocated the same to the 2nd, 3rd and 4th respondents.

6. The learned Judge found that the 3rd and 4th respondents had proved the two titles were rightfully registered in their names and that the appellants failed to establish the said titles were fraudulently obtained or that they have any registered or unregistered interest in the two properties. She further issued injunctive orders restraining the appellants, their families, servants or agents from continuing in occupation of the two properties and they be evicted henceforth.

7. Aggrieved by part of the judgment, the appellants preferred an appeal to this Court seeking orders that; *the judgment and decree of the High Court be set aside; there be judgment in favour of the plaintiffs; the 9th and 10th defendants' counterclaim be dismissed; respondents bear the costs of this appeal and in the lower court.* Its memorandum of appeal dated 5<sup>th</sup> February, 2013 raises nine (9) grounds of appeal set out as follows;

**i. That the Honourable Judge erred in law and fact when she held that the 9th and 10th defendants were Trustees of Mwituria Self Help Group and proceeded to declare the said group to have been duly registered when there was no evidence to prove the same.**

**ii. That the Honourable Judge erred and misdirected herself when she held that whether Mwituria Self Help group was a registered entity was not an issue in the suit when the same had been part of the issues framed, agreed and filed by parties.**

**iii. That the Honourable Judge erred in law and fact when she held that Kimakwe Enterprises which had allegedly sold the suit land to the 9th and 10th defendants had capacity to own land before it had come into existence.**

**iv. That the Honorable Judge erred in law and fact when she failed to appreciate that the certificate of titles in dispute had been back dated to defeat the plaintiffs' interest in the land.**

**v. That the Honourable Judge erred in law when she held that the appellants had failed to prove fraud when the evidence on record was glaringly clear that the certificates of titles were irregularly and illegally obtained.**

**vi. That the Honourable Judge erred and misdirected herself when she heavily relied on the evidence of Edwin Mukolo Wafula, a Lands Registrar which evidence was tainted with inconsistencies and contradictions.**

**vii. That the Honourable Judge erred and misdirected herself when she held that the respondents had no duty to prove how certificates of titles to the suit land had been obtained.**

**viii. That the Honourable Judge erred and misdirected herself in law and fact when she failed to appreciate that the respondents' acts of obtaining the certificates of title without paying requisite fees to government was enough proof of fraud.**

**ix. That the Honourable Judge erred in law and fact when she proceeded to order that the plaintiffs be evicted from the suit land.**

8. During the plenary hearing, **Dr. Khaminwa**, learned counsel for the appellants expressed the view that the rules of natural justice were never applied as they were not given a hearing before the land in question was allocated to other parties. It was his submission that the Commissioner of Lands ought to have accorded the appellants a hearing before allocating the land to other individuals. He further submitted that the appellants had acquired the land by way of adverse possession and that under International law, a mass eviction of 1500 people would be a violation of their human rights and amount to violence.

9. In their written submissions the appellants contended that the titles presented by the respondents were issued under the provisions of **Registration of Titles Act Cap 281(repealed)** stating that **Section 6** of the aforesaid Act is clear as to how land can be acquired under the Act.

10. They further contended that the 2nd appellant testified that he was born on the property, that the property was owned by several European settlers who had constructed a church on the property. They stated that one of the allegations of the said witnesses was challenged or contradicted during cross examination and maintained that the land was owned by other parties before the issuance of the titles by the 1st respondent.

11. The appellants faulted the learned Judge for holding that the property was Government land having fallen under the provisions of the **Government Lands Act Cap 280 (repealed)**. They argued that it was totally unrealistic to expect the 2nd appellant to be able to have access to the instruments of title that the settlers had for the property.

12. The appellants contend that the nature of the land ownership before the irregular and illegal titles were issued was never adequately challenged and/or presented before the court. They further contended that the Land Registration Officer, **Mr. Edwin Wafula** testified that he did not see the mother title neither did he receive any letters of allotment for the property. He also admitted that the process followed was not proper.

13. The appellants faulted the learned Judge for finding that they did not establish any directive from the Government that the land should be allocated to them when in fact in their testimony they detailed how on several occasions they approached the Area Chief, District Officer, Provincial Commissioner, Surveyor from the City Council and the Local Area Member of Parliament to implement the directive.

14. They submitted that the learned Judge failed to take into consideration that interest in property is not restricted to a registrable interest. To support this argument the appellants relied on this Court's holding in **Commissioner of Lands Vs Kunste Hotel Ltd [1995-1998] 1 EA 1**.

15. It was their further submission that the 1st respondent was well aware of the appellants' interest in the land and if that was not the case then it could have been revealed by **Mr. Wafula** who stated that **"I do not have anything in my record to confirm whether anyone else claimed the same parcel"**. They asserted that that information was also indicated in letters addressed to the Minister of Lands and Settlement dated 6th April, 1998 and 12th March, 1999 hence the 1st respondent cannot allege that it was uninformed since the certificate of title issued to 3rd and 4th respondents as Trustees of Mwituria Self Help Group became valid on 22nd October, 1999.

16. The appellants faulted the learned Judge for holding that due to the inability of the appellants to disprove the validity of the titles, any claim that they had was rendered a nullity. They submitted that the Judge erred in holding that the titles were valid because the same were purchased from an entity called Kimakwe Enterprises Ltd and that the letters of allotment were invalid because as at 21st March, 1995 there did not exist a legal entity that could be in a position to convey and/or transfer valid legal title to another legal entity.

17. They maintained that Kimakwe Enterprises Ltd was registered as a business on 13th August, 1997

while the letters of allotment were issued on 21st March, 1995. They cited this Court in **Alloys Moseti Mataya t/a Diplo General Enterprises v Kisii Hotel Ltd & Anor [2014]** which held that “...as a business name, Diplo General Enterprises had no capacity to hold property”.

18. The appellants asserted that the letters of allotment and the subsequent sale agreements executed between Kimakwe Enterprises and the respondents were irregular and should be declared ultra-vires for the reason that an entity that cannot own an interest cannot proceed to transfer the same to another.

19. It is the appellants’ view that the learned Judge denied them the opportunity to fully canvass their case by denying them the opportunity to call other witnesses. Reliance was placed on this Court’s decision in **Prime Salt Works v Kenya Industrial Plastics Ltd [2001] 2 EA 528** which stated “**The appellant was clearly deprived of the opportunity of getting its tackle in order and being able to present its case in the fullest sense.**” The appellants pray that this Court upholds the appeal.

20. **Mr. Ndundu**, learned counsel for the 1st respondent (Commissioner of Lands) opposed the appeal and submitted that a claim for adverse possession was never filed. He stated that when the appellants applied to the Commissioner of Lands for allocation of the suit land on 6th April, 1998, the same was not available for allocation as the land had already been acquired by private individuals and letters of allotment issued hence there was nothing for the 1st respondent to allot. The claim that the land is their ancestral land was therefore untenable. He cited **Wreck Motor Enterprises Vs Commissioner of Lands & 3 others [1997] eKLR** where this Court stated that;

“...the act is very specific on this protection and sanctifies the title. In such circumstances it is too late and irrelevant whether or not the Commissioner of Lands ignored the appellants’ application for the suit plot. No evidence was brought to court to prove that the land was their ancestral land.”

21. The 1st respondent also contended that no evidence was adduced in court to prove the allegation of fraud in accordance with Section 2 of the **Registration of Titles Act (repealed)**. Further, in **Wreck Motors Enterprises Vs Commissioner of Lands [supra]** this Court affirmed the sanctity of title under **Section 23 of the RTA Act** except on grounds of fraud or misrepresentation which the appellants failed to prove. That the duty was on the appellants to show that there was indeed concealment of material facts by the defendants that were induced to their detriment.

22. They also cited **R.G. Patel Vs Lalji Makanji [1957] E.A** where this Court stated that;

“...allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probability is required.”

The 1st respondent urged this Court to dismiss the appeal with costs.

23. Opposing the appeal, **Mr. Maina**, learned counsel for 3rd and 4th respondents argued that they were innocent purchasers for value without notice and hence their titles cannot be impeached. Further, that **Section 41 of Limitation of Actions Act** provides that one cannot claim adverse possession from government alienated land.

24. He submitted that Mwituiria Self Help Group does exist as evidenced by the certificate of registration produced. Counsel further submitted that the issue framed with regard to the group was whether the respondents were Trustees of the said group and it was even admitted by the appellants that 3rd and 4th respondents were sued as Trustees of the group.

25. It was their argument that the allegations of backdating the grant were not proven, and the letters of allotment dated 21st March,95 indicated that the leases to the same were to run for 99 years from 1st April,95. The titles that were subsequently issued to the 3rd and 4th respondents were leaseholds that run for a period of 99 years from 1st April,95 thereby conforming with the letters of allotment that were

issued with respect to the suit land.

26. They emphasized that no evidence was produced to demonstrate the titles to the 3rd and 4th respondents were issued irregularly. As officials of Mwituiria Self Help Group, the 3rd and 4th respondents entered into an agreement with Kimakwe Enterprises for the purchase of the suit land on 18th September, 1997 after it was registered on 13th August, 1997 as a business name. The burden of proving the non existence of the said enterprise as at the time of allocation rested on the appellants.

27. The 3rd and 4th respondents submitted that their evidence proved there were no people residing on the suit land as it was vacant at the time of they purchased the same. Upon their entry into the land, they attempted to make the roads in the suit land with a grader and the people from a village called Suranga came and threatened to burn the grader.

28. They emphasized that the 3rd and 4th respondents were issued with allotment letters in 1999 after allotment had been done in 1995. Prior to the said allocation by Government, the land was unalienated Government land. They urged that the appellants' action in the High Court seeking to acquire land owned by the Government as late as 1995 by adverse possession was misconceived and the Judge rightly dismissed the claim.

29. They further asserted that no evidence was produced by the appellants to show they were authorized by Government to reside on the suit land. They alleged that the Provincial Commissioner, the District Commissioner and the Area MP Mr. Mwenje authorized them to enter the suit land. Their letter to the Ministry of Lands was allegedly written in 1998. No proof of receipt of the said letter was exhibited neither did they produce any letter by the Government to the effect that a response was made by relevant Government Ministry.

30. It was their submission that the appellants did not call any evidence to support the allegations that the titles were improperly acquired neither did they deem it fit to call any evidence from the Lands office to prove their claims. They urged this Court to dismiss the appeal with costs.

31. Having considered these submissions together with the authorities relied on, and indeed the entire record before us, we identify the issues for determination as follows:-

**a) Whether the occupation of the suit land by the appellants amounted to adverse possession.**

**b) Whether the suit property was lawfully allocated to the respondents.**

32. This being a first appeal, our role is to re-evaluate the evidence on record and draw our independent conclusion as to whether the learned Judge's decision was properly arrived at. The only caveat however is that we must always bear in mind that unlike the trial court we neither saw nor heard the witnesses testify, and give allowance for that. This was succinctly propounded by this Court in the case of **Kenya Ports Authority v Kuston (Kenya) Ltd, (2009) 2 EA 212** in the following words; ***"This being a first appeal to this Court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect..."***

33. It is not in dispute that the suit property otherwise known as **LR. No 209/11543** and **LR. No. 209/11546** is Government land. This is also acknowledged by the appellants in their letter addressed to the Minister for Lands dated 6.4.98 at paragraph 7 where they stated as follows:-

**"Since we are settled on Government Land, we use sewer water..."**

It is trite law that one cannot claim adverse possession against Government land by virtue of **Section 41** of Limitation of Actions Act.

34. It is noteworthy that under the Government Lands Act (now repealed), which was enacted to regulate

the leasing and other depositions of Government Land it is only the President and/or the Commissioner of Lands who were authorised to make grants or disposition over unalienated Government land.

35. It is a well settled principle that a claim for adverse possession can only be maintained against a registered owner; nor can one claim adverse possession against public land. See **Wambugu v. Njuguna** [1983] KLR 172. Therefore for the appellants to succeed in their claim for adverse possession to the suit land by statute of limitations, the burden was on them to prove the following conditions, on a preponderance of evidence; that their possession of the suit land was adverse to the true owner's title; that it was without the authority or permission of the true owner and without use of force; that, without colour of right they had been in actual, open, peaceful, uninterrupted, notorious and exclusive possession for a period of at least 12 years.

36. Adverse possession must be proved as a fact and cannot be assumed as a matter of law from mere exclusive possession, however long. We reiterate that the burden was on the appellants to prove all the elements of adverse possession as explained above.

37. Of the 11 original claimants only 4 testified. Their evidence was that they were all born in the suit land and that their father was a worker to a European farmer who allowed them to live on the suit land. They explained that even after the ownership of the land changed hands they and their whole clan continued to live on the land before it subsequently devolved to the Government.

38. It is necessary to state that at the time when the suit was filed, the land claimed by dint of adverse possession had been registered under the **Registration of Titles Act (repealed)**. We reiterate that if the land is registered in favour of the Government the doctrine of adverse possession would not apply to it and the claim would fail.

39. It must follow that without evidence in support of the claim by the appellants, the veracity of their claims cannot be ascertained. Despite their assertion that they have lived on the suit land for decades, the appellants provided no iota of evidence of any steps taken in decades, when they claim to have occupied the suit land in order to acquire it. They only moved to court when threatened with eviction in 1990. Even then, we observe and agree with the respondents that the appellants did not claim adverse possession before the trial court.

40. The appellants submitted that being a sisal farm their families draw their livelihood from the suit property and that it has been doing so since time immemorial. However, and as we have already stated, the suit property is Government land and was at the time of allocation, unalienated Government land.

41. In other words from 1995 no claim of adverse possession could be advanced as the suit land had devolved to the Government. (See **Section 41 (a) (1)** of the Limitations of Actions Act.

42. With regards to the second issue of whether the titles were illegally obtained, according to the 3rd and 4th respondents' pleadings and evidence, it is apparent that Kimakwe Enterprises was allocated the suit property by the Government by way of a letter of allotment dated 21st March, 1995 subject to payment of the requisite fees towards the standard premium and other charges, which titles were subsequently issued to them as Trustees of Mwituiria Self Help Group.

43. Under the repealed Constitution and the Government Lands Act, the Government could allocate to individuals unalienated Government land. However, such alienation could only be effected legally after the planning process was completed. It is during the planning process that the Physical Planner is supposed to ascertain if indeed the land in question is available for allocation and advise the Commissioner of Lands accordingly.

44. In a similar situation to what the appellants are now claiming, this Court in the case of **Michael Githinji Kimotho -Vs- Nicholas Murathe Mugo, Nairobi Civil Appeal No. 53 of 1995** it held as follows:

**“If the appellant had been in occupation of the suit land as a squatter without any right or title to the suit land in his favour, he was obviously in no position to resist the respondent's claim. Though the appellant had for a long time been in occupation of the suit land which was government land before it was allocated to the respondent, this could not have helped him in resisting the respondent's claim where the latter is registered as owner of the land. Similarly, if he, the appellant, had carried out any development on the suit land, he did so at his own peril and he could not expect any compensation in that respect. Even if for argument sake the suit land had been erroneously allocated to the respondent the appellant as a squatter in the suit land had no locus standi and the so called erroneous allocation could not be an answer to the respondent's claim for his eviction. His position as a trespasser could not have given him any protection against the respondent's claim for possession as the registered owner of the suit land.”**

45. We note that like any other land acquisition processes there are procedures that ought to be followed before a Grant can be issued lawfully. From the record, letters of allotment were issued to the respondents on 22nd March, 1993 and 21st March, 1995. The survey plan was authenticated by the Director of Surveys. Deed plans dated 22nd April, 1998 was then prepared by the commissioner of lands and notifications of approval of development permission dated 12th July, 2001 and 25th April, 2002 from the physical and planning department were approved. The Grants were eventually registered in favour of the respondents by the Commissioner of Lands as I.R 82867 and I.R 81888 in respect of the two titles. That was the process undertaken to obtain the titles.

46. In the case of **Munyu Maina v Hiram Gathiha Maina, Civil Appeal number 239 of 2009**, the Court of Appeal held as follows:-**“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”**

47. It is thus our considered view that the respondents have successfully shown how they acquired their title by producing all the documents that must be in place before a Grant could be issued and registered in their favour.

48. The 3rd and 4th respondents have sufficient evidence to prove that they acquired the suit property lawfully. Indeed, we agree with the learned Judge that no evidence was called by the appellants to show the 3rd and 4th respondents acquired the titles unlawfully to enable this court order for their cancellation.

49. The letter by the area chief dated 17th July, 2002 addressed to the appellants chairman ascertained the position that the appellants were the trespassers and stated that **“you are occupying the above mentioned parcel of land illegally. They have got a title deed and are true owners of the parcel of land.** None of those letters called into question the respondents’ title.

50. Having found that the respondents were allocated the suit property lawfully, their titles cannot be impeached. In view of the fact that the appellants failed to prove the allegations of fraud in the acquisition of the title, consequently they failed to prove their case on a balance of probabilities. For all the foregoing reasons, having re-evaluated the evidence before us, we are not persuaded that the learned Judge erred in arriving at the conclusion she made. The judgment now impugned was based on sound law and evidence, and the same cannot be impeached.

51. Before we conclude, we wish to observe that Dr, Kaminwa, empathic as always with the less fortunate in society submitted that evicting 1,500 families from the property in question would be inhumane and an affront to the appellants’ rights. It is our view however that the respondents also have a constitutional right to own and utilize their property within the confines of the law, without interference from the appellants. We note further that there is in place law pertaining to evictions, and evictions do not need to be violent or inhumane. Moreover, the appellants have the option of vacating the property voluntarily and

need not wait to be evicted. In all, this appeal fails and is hereby dismissed with costs to the respondents.

*Dated and delivered at Nairobi this 9th day of February, 2018*

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. KOOME**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original*

**DEPUTY REGISTRAR**