Sigei v Chepkwony (Environment and Land Appeal E002 of 2023)
[2024] KEELC 4827 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4827 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT AND LAND APPEAL E002 OF 2023

MC OUNDO, J

JUNE 20, 2024

BETWEEN

ELIZABETH CHEBET SIGEI ..... APPELLANT

AND

KIPTANUI ARAP CHEPKWONY ..... RESPONDENT

(Being an appeal from the Judgement of the Principal Magistrate's Court of Kenya at Bomet delivered by Hon. K. Kibelion on 25th January, 2023 in Bomet ELC No. 10 of 2021)

JUDGMENT

1. What is before me for determination on Appeal is a matter which was heard and determined by Hon. K. Kibelion, Principal Magistrate vide his Judgement dated 25th January, 2023 where the learned Magistrate, upon considering the evidence of both parties, dismissed the Originating Summons dated 30th April, 2021 for failure by the Plaintiff to adequately satisfy the court that it had acquired land parcel No. Kericho/Chepseon/482 by adverse possession for reasons that the Plaintiff had been occupying the said parcel of land under the Defendant 's permission after a successful purchase and payment of consideration and secondly that there had been unresolved recurrent disputes over the Plaintiff's occupation which had caused interruption in the said occupation of the suit land.

2. The Appellant, being dissatisfied with the Judgement of the trial Magistrate has now filed the present Appeal based on the following grounds in her Memorandum of Appeal:

    i. That the learned trial Magistrate erred in law and in fact by finding that the doctrine of adverse possession did fail due to element of interruption and went further to state that the said interruption did occur in the year 2002, 20 years back from the time of filing the instant suit.

ii. That the learned trial Magistrate erred in law and in fact by wrongly evaluating the evidence on record and thereby arriving on a wrong conclusion that the doctrine of adverse possession by the Appellant was not adequately satisfied.

iii. That the learned trial Magistrate erred in law and in fact by holding that no sale agreements were produced to prove sale yet the said agreements were produced and further that the minutes for the year 2002 referred to the sales between the Appellant and the Respondent.

iv. That the learned trial Magistrate erred in law and in fact by failing to appreciate the number of years the Appellant had been in possession of the land.

3. The Appellant thus sought that the instant appeal be allowed and the judgement of the Leaned Magistrate delivered on 25th January, 2023 be set aside and she be awarded cost.

4. The Appeal was admitted on 30th October, 2023 and directions issued for the same to be disposed of by way of written submissions.

Appellant's submission

5. The Appellant vide his written submissions dated 15th December, 2023 framed her issues for determination as follows; -

i. Whether the learned Magistrate erred in law and fact by finding that the doctrine of adverse possession did fail due to the element of interruption and whether the interruption if any in the year 2002 which is 20 years ago amounts to interruption.

ii. Whether the learned trial Magistrate erred in law by wrongly evaluating the evidence on record and thereby arriving on a wrong concussion.

iii. Whether the sale agreement was produced to prove sale.

iv. Whether the time covered by the appellant amounts to adverse possession.

6. The Appellant first reiterated the evidence that had been adduced before the trial court to the effect that she Appellant and her family had been in occupation of the land parcel No. Kericho/Chepseon/482 registered to the Respondent from the year 1981 as supported by the evidence adduced in the trial court.

7. That whereas the Respondent had alleged that there had been no agreement between himself and the Appellant's deceased husband, he had never the less admitted that the Appellant's deceased husband had given him money in exchange for the release of his son who had been arrested for an offence of theft by a servant. That it was not in dispute that the suit land was registered in the name of the Respondent as all the witnesses including the Respondent herein had testified to that effect.

8. That whereas the Respondent had testified that he had reported the matter to the chief wherein a panel of elders had sat in the year 2002 to resolve their dispute, nonetheless whereas the Appellant was not asked to vacate from the suit land, he (Respondent) had been asked to refund a sum of Kshs. 50,000/= being monies that he had received from the Appellant's deceased husband. That it had been 20 years since the panel's decision and the Appellant was still in possession of the Respondent's parcel of land.

9. She placed reliance on the provisions of Sections 37 and 38 of the *Limitation of Actions Act* to submit that the learned Magistrate had erred when he held that although the Appellant had come into the occupation of the suit land vide purchase of the same from the Respondent, yet the sale agreement had not been produced to demonstrate the same. That the said assertion was not a requirement for based on

then principle on adverse possession since the Appellant had proved that she had lived on the suit land continuously for 41 years which was more than 12 years, and within which period, the Respondent neither written any Demand Letter or made any application to any court of law to evict her.

10. That further, the Respondent had admitted to owing the Appellant some amount of money which had not been paid to date and no apparent steps had been taken towards the payment of the same and which formed the disputes dating back to the years 1991 and 2002 alluded to by learned trial Magistrate. That it had not been true that she had declined to receive a refund of Kshs. 50,000/= advanced to her by the Respondent and no proof to the contrary, had been submitted in evidence at the hearing before the trial court.

11. She relied on the definition of adverse possession as found in the Black's Law Dictionary, 10th Edition as well as on the provisions of Section 7, 13, 16, 17 and 38 of the *Limitation of Actions Act* to submit that she had qualified as an adverse possessor to land parcel No. Kericho/Chepseon/482 (the suit land) belonging to the Respondent by virtue of having been in occupation and possession of the same without any interference and interruption for more than 12 years.

12. Further reliance was placed on the decided case of Wilson Kamau v Nganga Muceru Kamau [2020] eKLR, where the court had cited the case of Kasuve v Mwaani Investments Limited & 4 others 1 KLR 184, to submit that she had been in occupation of the suit land from the year 1981, from the time her late husband bought it land from the said Respondent, until his demise, wherein he had left the Appellant and her children in occupation of the same, without any interruption from the Respondent. That time thus started running from the year 1981 when the Appellant and her husband took possession of the land until the title was extinguished in the year 1993.

13. That she (Appellant) had developed the suit land and sired her now grown children therein without any interference or re-entry to the suit land by the Respondent for the recovery of the same. The Appellant thus submitted that having proved her case on a balance of probabilities that the Appeal should succeed as against the Respondent.

Respondent's submissions

14. In response to the Appellant's appeal and in opposition thereto, the Respondent vide his written submissions dated 15th December, 2023, gave brief history of the matter in question evidenced in the trial court before framing his issues for determination as follows: -

    i. Whether the Appellant has locus standi to institute the instant suit on behalf of her deceased husband against the deceased Respondent.

    ii. Whether the trial Magistrate erred in finding that the doctrine of adverse possession failed due to interruption.

    iii. Whether the trial Magistrate erred in holding that no sale agreements were produced to prove the alleged sale between the Appellant's late husband and the late Respondent.

15. On the first issue for determination, as to whether the Appellant had the locus standi to institute the instant suit on behalf of her deceased husband against the deceased Respondent, the Respondent submitted in the negative stating that the Appellant had not produced any grant of Representation to represent Samwel Sigei. That whereas the Appellant had testified during her evidence in chief that her husband had bought the suit land from the Respondent, she had neither produced a sale agreement to prove the same, nor a grant of representation to file the instant suit on behalf of her late husband. That further, she had failed to substitute the Respondent who had passed away on 12th June, 2023 thus the instant appeal had abated. (as per the annexed death certificate.) Reliance was placed on the

decided case in Beatrice Wambui Kiarie v Beatrice Wambui Kiarie & 9 others [2018] eKLR, to submit that the Appellant having failed to produce any grant of representation or an indication on the steps that she had taken to substitute the Respondent, the instant proceedings were a nullity and ought to be dismissed.

16. On the second issue for determination, as to whether the trial Magistrate had erred in finding that the doctrine of adverse possession failed due to interruption, it was the Respondent's submission that the doctrine of adverse possession had not been proved by the Appellant since her alleged stay on the suit land had been with Respondent's permission. That further, the said stay had been interrupted on several occasions whereby meetings had been held to deliberate on the matter to have the Appellant hand over the land to the Respondent. That the Appellant had also failed to annex an extract of the title deed to the Originating Summons thus being in violation of the rules.

17. In conclusion, the Respondent submitted that the trial Magistrate had decided correctly that the Appellant was not entitled to the order of adverse possession as there had been no uninterrupted stay without permission coupled with the lack of production of any evidence of sale. That finally, the fact that there had been no substitution of the Respondent who had passed away in the pendency of the Appeal made the instant proceedings a nullity.

18. That the Appellant had approached the court with unclean hands as she had forcefully taken possession of the Respondent's land thereby denying him possession of the same despite several attempts made by him to refund the money owed to her. That she should not thus be allowed to benefit from her illegal action. That in the interest of justice, the prayers sought in the instant Appeal be disallowed and that the Respondent's estate be granted the cost of the suit.

Analyses and determination.

19. I have considered the record of Appeal herein, the judgment by the trial Magistrate, the written submissions by learned Counsel as well as the applicable law and the authorities cited. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial Magistrate, of seeing and hearing the witnesses as they testified. (See Seascapes Ltd vs. Development Finance Company of Kenya Ltd [2009] KLR, 384. I also remind myself that this Court will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. (See Ephantus Mwangi & Another vs. Duncan Mwangi Wambugu [1982-88] 1 KAR 278.

20. According to the trial proceedings herein, the Appellant/Plaintiff had sought for orders that she be registered as proprietor of 0.8 (zero decimal eight) hectares comprised in LR No. Kericho/Chepseon/482 having acquired the title by virtue of being in adverse possession of the same for more than years.

21. Her suit was opposed by the Respondent/Defendant , who was categorical that there had not been a sale agreement entered between him, the Appellant/Plaintiff and her deceased husband. That instead in early 1991, he had borrowed money from the Appellant's husband to pay his son's employer from whom it had been alleged had stolen money from him. That had then allowed the Plaintiff's husband to stay on the land until such a time that he could refund the money. That subsequently the Plaintiff's husband had violently retained the land refusing to take back the money owed to him.

22. The matter proceeded for hearing wherein the Plaintiff had testified that after her late husband had purchased suit parcel of land No. Kericho/Chepseon/482 from its registered owner one Kiptonui arap

Chepkwony the Defendant therein for Ksh 25,000/=, she had lived on the same from 1981 wherein they had developed the land by planting tea. That the Defendant had then relocated to Olenguruone but had later returned in 1991 wherein there had been a meeting and they had agreed that should he want his land back, then he would have to pay them double the price. That the Defendant had then left again and returned in the year 2022. At the hearing the Plaintiff, had marked the copy of the title as PMFI, the search certificate as PMFI 3, and the minutes dated 16th April 2022 as PMFI 4. Her evidence was supported by that of the village elder Saret Village, who had testified as PW2 and who had added that the interruption of the Plaintiff's occupation on the suit land had begun after the death of her husband wherein the Defendant's sons lay claim to the suit land alleging that the same had not been purchased from their further. That before that, the couple had been living peacefully on the suit land from the year 1981. The Plaintiffs testimony was further supported by the evidence of PW3, PW4 and PW5 who confirmed that after the Plaintiff's deceased husband had bought the suit land from the Defendant, they had lived on the same un-interrupted from the year 1981.

23. At the close of the Plaintiff's case, the Defendant had testified to the effect that although he was the owner of the suit land, he no longer lived on the same as the Plaintiff and her husband had grabbed it from him and settled therein and this had been after he had borrowed money from them. That subsequently the Plaintiff's husband had refused to receive a refund of the money and had instead chased them away and had remained in occupation of the land. He confirmed that there had been a meeting held in the year 2012 to resolve the matter wherein he had been asked to refund Ksh 50,000/=, but the Plaintiffs husband had declined to receive the same.

24. His evidence had been supported by that of his son who testified as DW2, as well as the evidence of DW3 and DW4, to the effect that he, the Defendant, had borrowed Ksh. 23,900/= from the Plaintiffs husband to secure his elder son's release after having been arrested on a crime he had allegedly committed. That the land had been given as security and despite a resolution by the Elders that the Defendant pays Ksh. 50,000/= as a refund, the Plaintiff and her husband had declined to receive the said money and had proceeded to developed the land. That an attempt to evict them from therein had failed because of lack of funds.

25. At the close of the defense case, judgment had been delivered on the 25th January 2023 dismissing the Originating Summons therein and directing each party to bear costs. The said judgment is therefore formed the subject of this Appeal.

26. With the said background in mind, I find the one issue arising for determination as follows:

    i. Whether the Appeal is properly before court.

27. Section Order 24, Rule 4 of the Civil Procedure Rules, is quite clear on the procedure to be followed in case of death of one of several Defendants or of sole Defendant as follows:

> "(1) Where one of two or more Defendant s dies and the cause of action does not survive or continue against the surviving Defendant or Defendant s alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit.
>
> (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased Defendant .

(3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased Defendant."

28. The said provision of the law is applicable to appeals under Order 24, rule 9 of the Civil Procedure Rules which stipulates as herein under:

''In the application of this Order to appeals, so far as may be, the word "Plaintiff" shall be held to include an appellant, the word "Defendant " a respondent, and the word "suit" an appeal.''

29. It is apparent from a reading of subsection (1) of Order 24, Rule 4 of the Civil Procedure Rules above, that an application to substitute the legal representative in place of a deceased Defendant may be made by any party to the proceedings. It may very well even be made by the deceased's legal representative. The rule does not limit the duty to move court in this regard to the Plaintiff alone. Rule 9 of Order 24 is expressly clear that this provision of the law also applies to Appeals.

30. In this case, the Appeal was filed vide a Memorandum of Appeal dated 7th February 2023 wherein during the pendency of the Appeal, the Respondent herein passed away on the 12th June 2023 as per the annexed Death certificate. He has however not been substituted with his legal representative as at the time I write this judgment. The Appeal herein, I find thus seeks orders against a dead person for which such an order cannot competently be made as a writ issued against a dead person at the date of issue is incurably bad and cannot be cured by amendment. As at the time of delivery of the Judgment, the Appeal against the Respondent would have abated.

31. Lord Denning in MacFoy v United Africa Co. Limited [1961] 3 All ER 1169, held that

> " If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the court declare it to be so...."

32. The Court of Appeal in the case of Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR held as follows;

''There are three stages according to these provisions. As a general rule the death of a Plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the Plaintiff or within such time as the court may in its discretion for "good reason" determine, an application must be made for the legal representative of the deceased Plaintiff to be made a party. The "good reason" therefore relates to application for extension of time to join the Plaintiff's legal representative to the suit.

Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.''

33. There having been no application made to extend time to join the Respondent's legal representative to the Appeal, I find that this Appeal has abated with the effect that it ceases to exist in the eye of the law.

DATED AND DELIVERED AT NAIVASHA VIA MICROSOFT TEAMS THIS 20TH DAY OF JUNE 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE