Njoroge & 3 others v Mukiri (Environment and Land Appeal E053 of 2023) [2024] KEELC 5651 (KLR) (30 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5651 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL E053 OF 2023

JG KEMEI, J

JULY 30, 2024

BETWEEN

DAVID MBURU NJOROGE ..... 1ST APPELLANT

WILLIE NGOTHO NJOROGE ..... 2ND APPELLANT

JOHN NGUNGA NJOROGE ..... 3RD APPELLANT

SIMON NJOROGE NGANGA ..... 4TH APPELLANT

AND

SIMON NJOROGE MUKIRI ..... RESPONDENT

(An Appeal from the judgement of Hon J Orwa SRM at Kikuyu rendered on the 23/5/2023 in MCEL NO 29 OF 2019)

JUDGMENT

1. Aggrieved by the Judgment of the Honourable Court delivered on the 23/5/23 , the Appellants filed this appeal on the following grounds;

    a. That the Learned trial Magistrate erred in law and in fact in finding the Plaintiff/Respondent's suit is time barred whose limitation framework is provided under Section 7 of the *Limitation of Actions Act*.

    b. That the learned trial Magistrate erred in law and in fact in finding that the Appellants' occupation of the parcel No KARAI/GIKAMBURA/T.531 (suit land) has not been peaceful therefore their adverse possession is not available.

    c. That the learned trial magistrate erred in law and in fact as it lacked jurisdiction to deal with a matter which had already been decided by the same Court in 2015, the matter which was decided by the trial Court was res judicata.

d. That the learned trial Magistrate erred in law and in fact in disregarding the Appellants defence.

2. Consequently, the Appellants sought the following orders on appeal;

a. That this appeal be allowed and the judgement of the trial Court be set aside with costs.

b. The costs of the appeal be borne by the Respondent.

c. Such further or other orders as this Honourable Court may deem just and expedient to grant.

3. On the 25/4/2024 parties elected to canvass the appeal by way of written submissions. I have read the submissions on record filed by the parties.

4. Counsel by the Appellant submitted that the Appellants have lived on the suit land with their families for many years. That parcel No. Karai/Gikambura/T.531 and Marmanet/North Rumuruti Block 2/ (Ndurumo) 4375 (called the Rumuruti land) are family lands and therefore held by the Respondent under customary trust. They submitted that though the Respondent claims to be the registered owner of the Rumuruti land, he has already settled his sons from the 1st wife and therefore the land is unavailable for the Appellants. That the third property namely KARAI/GIKAMBURA/71 (Karai land) is subject to a dispute between the Respondent and his younger brothers and is still registered in the name of the Respondents father namely Mukiri Githu, deceased.

5. It was further submitted that the Respondent allocated Rumuruti and Karai lands to the 1st wife's family only leaving out the children of the second wife and mother of the Appellants. In addition, that he now wants to sell the suit land occupied by the Appellants leaving them destitute. That the Court erred in ordering their eviction from the land as they were born and bred on the land and that they do not have any other land to move to despite customary rights that have accrued to them, the land having been family land. The Appellants relied on the case of Godfrey Kagia Githire Vs George Ndichu Kagia & Others (2008) eKLR where the Court stated as follows;

> " It was with this in mind that the High Court held that the end of justice would not be served if the defendants were evicted from their fathers land. Moreover, it would also have been against public interest and good order for it to have issued an order of eviction against the defendants. That would have perpetuated poverty homelessness and social disorder."

6. Counsel for the Respondent submitted that the trial Court did not err in holding that the Appellants' occupation was not peaceful and therefore adverse possession was not founded in favour of the Appellants. That the Appellants have engaged in disputes with the Respondent leading to cautioning the land and claims of assault against the Respondent forcing him to report the claims to the Police. That their occupation was not only forceful but intended to dispossess the Respondent of his land.

7. On the question of res judicata, counsel for the Respondent submitted that though the Respondent filed a case against the Appellants in 2011 PMCC No 302 of 2011, the same was dismissed for want of prosecution and therefore the current suit cannot be said to be res judicata.

8. Counsel for the Respondent submitted that the Appellants failed to place before the Court cogent evidence in support of fraud and therefore the claim of fraud is without any basis in law.

9. Further counsel for the Respondent absolved the Court of any blame in holding that the adverse possession was not founded.

10. Having considered the grounds of appeal, the trial Court record and written submissions placed before the Court, the issues that commend themselves for determination are;

a. Whether the Appellants proved a claim of title under adverse possession

b. Whether the Appellants are entitled to title under customary trust

c. Whether the suit in the trial Court was res judicata

d. Whether in the overall the trial Court disregarded the defence of the Appellants in its judgment.

e. Costs of the appeal.

11. As a first appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is enunciated by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate Court which is to: '... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.'

12. Besides, that duty has been affirmed in numerous decisions of the superior Courts. Notably in the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was pronounced thus:

> "... this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this 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 allowance in this respect..."

13. Bearing the above principles in mind the Court shall now embark on the assessment of the appeal noting that this Court did not see or interact with the witnesses before the trial Court.

14. The background of this case is that the Respondent, aged about 90 years old is the registered owner of three parcels of land namely Karai/Gikambura/T.531, Karai/Gikambura/71 and Marmanet/North Rumuruti Block2(Ndurumo)/4375. He led unchallenged evidence that parcel 71 is ancestral land having been bequeathed to him through confirmation of grant issued on 19/12/2012 in the estate of Mukiri Githu, his deceased father in CMCC No. 30 of 2010

15. The Respondent married two wives; Eunice and Ruth. Ruth died and was buried on parcel 71, their ancestral land at Karai. Eunice moved to Rumuruti in 1980's with her children and has since become blind.

16. The 1st -3rd Appellants are the sons of the Respondent from the 2nd wife, Ruth and the 4th Appellant is his grandson, therefore the parties are closely related.

17. The Respondent led evidence in the trial Court that in the 1980s seeing that his family had largely grown in numbers he asked his two wives to relocate to Rumuruti where he had acquired a larger parcel of land than the one acre at parcel 531. Eunice his first wife complied and relocated with her children and settled at Rumuruti. Ruth, the 2nd wife refused to relocate and remained at parcel 531 with her children, some of whom are the Appellants. Upon her demise she was buried at the ancestral land on parcel 71. It is commonly acknowledged that other relatives were also interred on parcel 71. Upon the demise of Ruth her children were asked to relocate to either Rumuruti or parcel 71 but they refused and continued to live on the suit land constructing houses and intimidating and issuing threats

to the Respondent with the purpose of coercing him to leave the land to them. The quest to have the Appellants relocate from the suit land gained currency in 2011 but instead the Appellants lodged a caution on the land against the wishes of the Respondent; demolished his old house on the property; sublet the land to a third party; threats of assault and bodily harm were made on the Respondent by the Appellants when he refused to adhere to their demands. All these were being done while the Respondent was ill and hospitalised with cancer and other ailments for which he claims the Appellants failed to assist him meet the medical costs but instead busied themselves with schemes on how to seize the land from the octogenarian.

18. It was the case of the Respondent that at his old age, the Appellants should be ordered to relocate to either parcel 71 or Rumuruti where he has allocated them land. That he is old and sickly and requires to reside on the land to be near medical care in his old age. He urged the Court to grant his orders.

19. The Appellants led evidence that they are in occupation of the suit land having acquired rights vide either adverse possession having been born bred and lived there for over 50 years. That they have constructed their houses and settled either their children or grandchildren. That according to the ground the land is subdivided into two depicting two houses of Ruth and Eunice and therefore the Respondent is estopped from claiming the land.

20. In addition, the Appellants claim that the suit land is ancestral land having been handed down to the Respondent by their grandfather and that he held the same in trust for the Appellants. The Appellants further stated that the Respondent fraudulently caused the Rumuruti land to be registered in his name yet he never purchased it. That it was purchased by their step brothers and therefore the land is held in trust for them.

21. In answer to the claim of alternative lands, the Appellants claim that the Respondent has allocated the Rumuruti land to their step brothers and that the Karai land is embroiled in a legal dispute between the Respondent and his younger brothers and that they truly have nowhere to go if the Court grants the orders of eviction. That they lodged the caution on the land to stop the Respondent from selling the land without their consent and thus rendering them destitute. They also denied assaulting the Respondent and that the police found no evidence of assault leading to their release from the police station.

Adverse possession

22. It was the Appellants case that they have occupied the land for over 60 years and therefore have acquired title by way of adverse possession by effluxion of time. Section 7 of the *Limitation of Actions Act* provides as follows;

> " An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

23. The essence of adverse possession under the *Limitation of Actions Act*, cap 22 Laws of Kenya, is that the registered proprietor of land is prohibited from bringing an action to recover land after 12 years from the date when the cause of action accrued. Upon the expiry of that period the proprietor's title to the land is extinguished by operation of the law and any person who has been in occupation of the land peacefully, openly and as of right for the prescribed period is entitled to bring an action in the High Court to be declared the owner of the land.

24. In the case of Richard Wefwafwa Songoi Vs. Ben Munyifwa Songoi (2020)eKLR in which the Court stated as follows:-

> " A person claiming adverse possession must establish the following: on what date he came into possession; what was the nature of his possession; whether the fact of his possession was known to the other party; for how long his possession has continued and that the possession was open and undisturbed for the requisite 12 years."

25. In this case it is not disputed that the Respondent lived on the suit land with his family until sometime in 1980s when he acquired the Rumuruti land and with the growing family sought to relocate to a larger parcel of land. The Appellants and their mother refused to relocate and remained on the land. The Court finds this occupation to have been with the permission of the Respondent. Fast-forward to 2011, the Respondent demanded that the Appellants vacate the land but they refused and lodged a caution on the land. This in the Courts view is the time that the cause of action arose because this is the time the consent of the Respondent was withdrawn. Though the Respondent filed suit in 2011, the said suit was dismissed for want of prosecution. The time between 2011 to 2019 when the suit was filed cannot meet the threshold of 12 years required for one to acquire title by adverse possession.

26. In the case of Kimani Ruchine Vs Swift Rutherford & Co. Ltd (1980) KLR 10 the Court stated as follows:

> " ... The plaintiffs have to prove that they have used this land which they claim as of right. Nec vi, Nec Clam, Nec Precario (no force, secrecy or persuasion) ... show that the company had knowledge of possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it or by way of recurrent consideration."

27. The second compelling reason why the claim of adverse cannot succeed is because of the dispute and wrangles between the parties. Claims of assault and threats of personal injury upon the Respondent were reported as shown by the two police reports on record which go along way to show that the occupation of the land by the Appellants was not the least peaceful.

Customary trust

28. Customary trust is a concept through which land may be acquired in Kenya. It is anchored in statute. It is an overriding interest in land which need not be registered on the register. It subsists on and binds the land. Article 60 (1) (a) of *the Constitution* alludes to this concept when it refers to intergenerational and intra-generational equity. In the case of Mbui vs Mukangu vs Gerald Mutwiri Mbui C.A No. 281 of 2000 the Court of Appeal stated that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. .... If land was passed down from the family member to another, the presumption of trust subject to evidence is high.

29. Section 28 (b) of *Land Registration Act* provides as follows;

    a. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register.

    b. ...

    c. Trusts including customary trusts;

30. Similarly in the case of *Peter Gitonga Vs. Francis Maingi M'Ikiara Meru HC.CC NO. 146 OF 2000* it was stated that:-

> "A "trust" can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this; "Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged." (emphasis is mine).

31. Finally, the concept of customary trust has found firm approval in the Supreme Court of Kenya in the case of Issack Kieba M'Inanga Vs. Isaaya Theuri M'Linturi & Anor SCOCK No 10 of 2015 where the Lord Justices of the Supreme Court held as follows;

> "Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding were for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are: the land in question was before registration, family, clan or group land; the claimant belongs to such family, clan, or group; the relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; the claim is directed against the registered proprietor who is a member of the family, clan or group". (Emphasis mine).

32. The legal burden to proof the existence of customary trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must proof that the suit properties were ancestral clan land; that during adjudication and consolidation, one member of the family was designated to hold on behalf of the family; that the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. See the case of Issack Kieba above

33. The Respondent led unchallenged evidence that he purchased the suit land. The Appellants claimed that each of the 10 sons of the Respondent contributed Kshs 300/- each for the processing of the title. On that basis therefore they aver that the title having been registered in the name of the Respondent was held in trust for them. That notwithstanding DW1 and DW2 led evidence that the suit land was not inherited by the Respondent unlike parcel No 71 whose roots are traced to Mukiri Githu, the father of the Respondent. The Court was not presented with any evidence to support customary trust and in the circumstances the Court finds that the trial Court cannot be faulted on this ground. Customary trust was not proven.

Res judicata

34. Section 7 of the *Civil Procedure Act* provides as follows;

> "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit

between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation. — (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a Court shall be determined irrespective of any provision as to right of appeal from the decision of that Court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

35. In this case the Respondent led evidence that due to ill health he was unable to prosecute the suit PMCC No 302 of 2011 to its logical conclusion and was dismissed for want of prosecution. For resjudicata to be founded the suit ought to have been heard and determined by a competent Court. In this case the previous suit was not heard and determined and therefore cannot be assaulted by the doctrine of resjudicata. This ground is dismissed.

36. Having assessed the whole evidence and the judgement of the trial Court I fail to find any grounds that support that the defence of the Appellants was disregarded.

37. I agree with the trial Court that the Respondent being the registered owner of the land is entitled to the rights and privileges found in Section 24 and 25 of the *Land Registration Act*. The Appellants being the able-bodied sons and grandson of the Respondent ought to look for their own properties. It is a disgrace that they are powered by greed for the land as shown by the overt tactics to seize the land from their father including assault and physical threats to the old man. There is no law that forces a man to transfer land to his children intervivos. Infact, so ungrateful are the Appellants that the old man is forced to rent third party properties because his old house was demolished. Needless to state that the interest of the Appellants is land and not the care for the father who is old and sick.

38. Article 57 of *the Constitution* of Kenya provides as follows;

> " The State shall take measures to ensure the rights of older persons— (a) to fully participate in the affairs of society; (b) to pursue their personal development; (c) to live in dignity and respect and be free from abuse; and (d) to receive reasonable care and assistance from their family and the State."

39. I find that the Respondent is entitled to live his senior years in dignity. He is an old member of society that requires reasonable care and assistance from his family and not harassments and threats least of

all from his own flesh and blood who are expected to care for him and assist him live a dignified life in his sunset years.

40. In the circumstances of this case, I find that the Respondent has provided alternative lands, that is parcel 71 and Rumuruti lands, for the Appellants to relocate and therefore I do not find that they will be left destitute in any way.

41. In the end I find the appeal unmerited. It is dismissed with costs to the Respondent.

42. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 30TH DAY OF JULY 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

1st, 2nd, 3rd and 4th Appellants – Absent but served. (See Affidavit of Service sworn on 29/7/2024)

Ms. Ngigi for the Respondent

Court Assistants – Phyllis/Oliver