



REPUBLIC OF KENYA



**Nyakora v Okune (Environment and Land Appeal E029 of 2022)
[2023] KEELC 462 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 462 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E029 OF 2022**

E ASATI, J

JANUARY 26, 2023

BETWEEN

GODWIN CRISPIN NYAKORA APPELLANT

AND

ABDALA OGOLA OKUNE ALIAS FRANCIS OGOLA OKUNE .. RESPONDENT

*(Being an appeal from the decision of the Honourable Amos Kiprop Makoross,
dated and delivered on 24.5.2022 in Tamu SRM's Court ELC No.E3 of 2020)*

JUDGMENT

Introduction

1. The Appellant was the Plaintiff in Tamu SRMC E&L Case No E3 of 2020 (herein called the suit) wherein he had sued the Respondent for an order of permanent injunction restraining the Defendant from interfering with, trespassing onto and/or occupying land parcel known as Kisumu/ Fort-ternan/953 (the suit land), general damages and costs. The Respondent defended the suit vide the amended defence filed on December 22, 2020 and prayed that the Plaintiff's claim be dismissed.
2. The appellant's case before the trial court was that he bought the suit land in the year 2011 and the Respondent who was residing on the land was given notice to vacate but failed to do so. He therefore filed the suit seeking the court's intervention. The Respondent on the other hand claimed that he was on the land as of right arising from purchase and subsequent adverse possession. The suit was heard by the trial court which found in favour of the Respondent and awarded him the land vide its judgement delivered on May 24, 2022.
3. Aggrieved by the judgement, the Appellant preferred this appeal vide the Memorandum of Appeal dated June 20, 2022 seeking for orders that the appeal be allowed, the judgement and the orders of the lower court delivered on May 24, 2022 be set aside and for costs of the appeal.



4. The appeal was canvassed by way of written submissions. The Appellant vide his written submissions dated October 18, 2022 submitted that the Respondent's entry onto the suit land was not adverse but permissive in nature as the Respondent claimed to have entered the land as an employee of the registered owner and remained thereon on the basis of a land sale agreement between himself and the registered owner. The appellant relied on the case of Stephen Mwangi Gatunge vs Edwin Onesmus Wanjau where it was held that for a claim of adverse possession to suffice, the claimant must demonstrate that the same was non-permissive and non-contractual. He submitted further that the actual date when time began to run in favour of the Respondent was not ascertained. That it was not permissible in law for the Respondent to plead for adverse possession and purchase at the same time. That there was no evidence that the land sale agreement took place and hence the trial court erred in concluding that the Respondent met the threshold of adverse possession.
5. Written submissions dated October 21, 2022 were filed on behalf of the Respondent by the firm of OJ Okoth & Company Advocates acting for him. Counsel submitted that the Respondent had proved that he purchased the suit property from the late Tom Jakosoko Bwayi in the year 1999 and as such, the title claimed by the appellant and the registration of the land in his name was improperly and fraudulently obtained with no legal backing.
6. That since the suit land is registered in the name of the appellant and the Respondent had had open, peaceful, exclusive possession thereof in an adverse manner to the title of the appellant and since the Respondent has been in occupation for a period in excess of 12 years, the Respondent had acquired title by adverse possession. That the trial court had inherent jurisdiction to grant the orders it did grant. Counsel prayed that the judgement by the trial court be upheld.

Analysis and determination.

7. This being a first appeal, this court has an obligation and liberty to revisit the evidence adduced before the trial court, analyse it independently and come to its own conclusion and thereby determine whether or not the trial court erred in its findings and decision.
8. The evidence placed before the trial court by the appellant who testified as PW1 was that he bought the suit land and got registered as owner on May 16, 2011 while the Respondent was in occupation as a caretaker. That the Respondent was notified of the sale and asked to vacate the land and leave it for the appellant but failed to comply. He testified vide his witness statement dated October 19, 2020 which was adopted as his evidence in chief that that he entered into a land sale agreement with Tom Jakosoko Bwayi for the purchase of the suit land. That the suit land was subsequently transferred to his name. He produced 11 exhibits in support of his case inclusive of the land sale agreement.
9. On cross-examination, he stated that he did not know for how long the Respondent had been on the land. He denied that the suit land had ever been sold to the Respondent.
10. The appellant called one witness who testified as PW2 and his evidence was that he is the one who bought the certificate of official search for the appellant and confirmed that the suit land was registered in the name of the seller and that he accompanied the appellant to the land to view it before the sale. That when they went to view the land there was an old man on the land one Abdala. That the seller informed the old man that he was selling the land to the appellant.
11. The Respondent's evidence comprised of his own testimony and that of 4 witnesses. The Respondent testified that he used to work for TOM BWAYI as the farm manager at a salary of Kshs 8400 per month. That he bought a portion of land measuring 1 ½ of land parcel No Kisumu/Fort-ternan/953 from the said Tom Bwayi at an agreed purchase price of Kshs 150,000 which was to be paid by way of deductions



of the salary. That later the seller asked him to vacate the land as it had been bought by someone else. He produced 3 exhibits inclusive of the land sale agreement. He testified further that he has lived on the land since 1999 and even buried his child on it. DW2, the wife of DW1, narrated how they settled on the portion of the suit land. DW3 testified that as a Bishop he accompanied the Respondent and his family when they were going to settle on the suit land in 1999. That he prayed over the home. That Tom Bwayi (the Seller) later informed him that he was selling the land to someone else. That he disagreed with the seller. He testified that the seller had been on the land for a period of more than 12 years. DW4 and DW5 testified that they knew that the Respondent had settled on the suit land since 1999.

12. On the basis of this evidence the trial court found that:
 - a. The issue for determination was whether the Defendant was in lawful occupation of the land or otherwise, or put differently whether the Defendant has satisfied the conditions necessary to create an interest under the doctrine of adverse possession.
 - b. The agreement dated October 12, 1999 between the deceased seller (Tom Jakosoko Bwayi) and the Respondent coupled with the continuous stay of the Defendant on the land is sufficient proof on a balance of probabilities that the Defendant had had an open, exclusive and continuous occupation of the suit land for over 12 years.
 - c. There was sufficient evidence in the form of a title deed, copy of green card and search to show that the suit land is registered in the name of the appellant.
 - d. The period of limitation begun to run in 1999 when the Defendant took possession of the suit land and time stopped running on May 19, 2011 at which point a period of 12 years had elapsed
13. The trial court consequently concluded that there was evidence that the Defendant had acquired an interest in the suit land by way of adverse possession and entered judgement in favour of the Defendant (Respondent herein) as follows:
 - a. The plaintiff's suit fails.
 - b. A declaration that the title in the name of the Plaintiff over the suit land has been extinguished by the Defendant's adverse possession thereof for a period of more than 12 years.
 - c. That an order do issue to the Land Registrar Nyando/Muhoroni to register the Defendant as the absolute proprietor of land parcel No Kisumu/fort-Ternan/953 in place of the Plaintiff
 - d. Each party to bear their own costs.
14. The appellant's complaint against these findings and final orders of the trial court is comprised in the grounds of appeal set out in the Memorandum of appeal. The grounds of appeal are that the trial court erred in law and fact:
 - i. By thinking that the appellant had accepted the allegation that the Defendant had been in occupation of land parcel Kisumu/Fort-Ternan/953 since 1999.
 - ii. By failing to note that the registered owner of the land as indicated in the land registry green card is the appellant Godwin Crispin Nyakora
 - iii. In failing to note that the appellant became the owner of the land on May 16, 2011 as shown in the copy of the green card and in paragraph 9 of the Judgement.
 - iv. By failing to see that when the Respondent failed to vacate the suit land the appellant had taken necessary steps to effect legal entry onto the suit land by filing suits first at Tamu SRMCC no



30 of 2014 and Tamu SRMC E&L No E3 of 2020 the subject of this appeal, and giving the Respondent verbal notices, written summons through the local administration which were defied by the Respondent.

- v. In failing to do simple mathematics and find out that from May 16, 2011 when the land was registered in the appellants name only 3 years had elapsed and hence this did not qualify the Respondent to acquire the said land by adverse possession as the law stipulates 12 years for one to qualify.
 - vi. In disagreeing with the maxim that a person who claims adverse possession cannot at the same time claim to have purchased the land through labour.
 - vii. By failing to note that the witnesses of the Respondent contradicted his testimony and their own testimonials. The Respondent says he has lived on the suit land since 1999 as per paragraph 17 of the judgement while DW3 said the Defendant had lived on the land from the year 1998 in paragraph 18 of the judgement and DW4 and DW5 testified that the Respondent had been in occupation for 12 years without giving the specific period in question.
 - viii. Failed to note from the green card that the land reference Kisumu/Fort-Ternan/953 was not existing in 1999 and was registered for the first time in land registry office on September 7, 2010 and claims that the Respondent lived on the suit land is day dreaming
 - ix. By failing to note that the deceased Tom Jakosoko Bwayi was not the owner of the land parcel Kisumu/Fort-Ternan/953 as per the case that was filed against the Respondent by Tom Jakosoko Bwayi on November 19, 2011 vide Nyando SRMCC- NO 59 OF 2011.
15. In my view, these grounds of appeal raise one broad issue for determination in this appeal namely; whether or not the trial court erred in disallowing the appellant's claim and in finding that the Respondent had acquired title to the suit land by adverse possession.
16. The Respondent claimed to have entered the suit land in the first instance as an employee of the owner of the land whereby the owner of the land permitted him to be on the suit land as a farm manager and subsequently remained on the land on the basis of a land sale agreement between himself and the land owner/seller. His exhibit D1 was the said land sale agreement. I have read the exhibit keenly. The sold parcel of land is described in the agreement as plot no 953 Fort-Ternan Scheme. This is the suit land herein. The appellant however denied the existence of such agreement and indicated in one of his grounds of appeal that the parcel number for the suit land had not been created as at the date of the said agreement. Both the green card and title deed produced by the appellant as exhibits showed that the register in respect of the suit land was opened on September 7, 2010 in the name of Tom Jakosoko Bwayi. It could therefore not be possible to have the parcel number of the suit land more than a year before it was created so as to transact in. Secondly, the Respondent never mentioned the agreement in previous cases filed over the suit land. The record shows that there existed a previous suit namely Tamu SRMCC no 30 of 2014 filed by the appellant against the Respondent. The Respondent in his defence in that suit as shown on page 125 of the Record of appeal, explained how he got possession of the suit land as follows:

- ' 3. The Defendant denies the contents in number 3 of the Plaintiff since the original owner (the late Tom Bwayi Jakosoko) was the one who gave the express authority to the Defendant to live and develop the parcel of land.



4. Plaintiff number 4 as stated by the Plaintiff is ambiguous to the Defendant because the said parcel of land was given to the Defendant in 1998 while the Plaintiff states that he bought in the year 2011.'

The Respondent was vehement in that defence that the land was given to him by the owner

17. Thirdly, the Respondent made no mention of the agreement or the fact that he bought the suit land in his first pleadings filed in the suit before the trial court. However, in his Replying Affidavit sworn on November 9, 2020 in reply to the appellant's application for interlocutory orders at the beginning of the suit, the Respondent stated that he had been living on the suit land together with his family since January 1999 when he was employed by one Tom Jakosoko Bwayi as the farm manager. That Tom Jakosoko failed and/or ignored to pay him his salary. That during those years he decided to manage the farm without demanding salaries from the said Tom Jakosoko Bwayi. That in the year 2008 Tom Bwayi allocated him a portion of the suit land measuring 1 ½ acres. That on February 18, 2011 Mr Tom Bwayi sold the suit land to the Plaintiff (appellant herein). The Respondent did not mention the sale agreement. From the record, the sale agreement only with the amended Defence.
18. With all these gaps I find that the Respondent did not prove the existence of a land sale agreement between him and the original owner. The Respondent only entered onto the suit land on the permission of the original owner as an employee.
19. But even assuming that there was such land sale agreement as claimed, then the appellant's entry onto the suit land could still not be adverse. It could only become adverse after the sale contract fails or is repudiated. The Respondent stated that on February 18, 2011 the owner sold the same land to the appellant herein and asked him (Respondent) to move out. This is the time that the permission ceased and time began to run in favour of the Respondent. The Court of Appeal in *Christopher Kioi and Another v Winnie Mukolwe & 4 others [201] eKLR* held that:

' A purchaser of land under a contract of sale who is in possession of land with the permission of the vendor can only lay claim to the land after the period of validity of the contract, unless and until the contract has been repudiated, in which case adverse possession starts from the date of termination of the contract.'

In *Jandu v Kurpal [1975] EA 25* it was held that possession does not become adverse before the end of the period for which permission to occupy has been granted.

20. The next important point is whether the possession was uninterrupted. The appellant submitted herein that the Respondent did not have exclusive, open and continuous uninterrupted possession of the suit land. The evidence on record shows that on May 19, 2011, the original registered owner filed a suit against the Respondent vide the Plaint dated May 18, 2011 (see pages 117-119 of the record of appeal). The case number was NyandoS PMCC no 59 OF 2011 wherein the original owner sought eviction, injunction, costs and interest. The original owner complaint against the Respondent as stated in the Plaint was that the Defendant who was a squatter within the suit parcel had been unlawfully leasing out portions of the land to various people without his authority and collecting monies from the said persons. That the Respondent had harvested the original owner's sugar cane, delivered it to Muhoroni Outgrowers' Company Ltd and was paid Kshs 40,000 for it. The original owner further stated in the plaint that he had dismissed the Respondent and ordered him out of the farm whereupon the Respondent requested to be allowed to vacate in April 2011 when schools had closed but later refused to move out.



21. When the appellant became registered owner of the land he also sued the Respondent vide Tamu SRMCC no 30 of 2014 seeking to assert his rights as registered owner.
22. One of the ways that time stops to run under the doctrine of adverse possession is by the registered owner taking steps to assert his rights. It is now trite law that the filing of a suit asserting rights over the land stops time from running under the doctrine of adverse possession. The Court of Appeal in *Civil Appeal No 121 of 2006 Benson Mukuwa Wachira vs Assumption Sisters of Nairobi Registered Trustees [2016]* affirming the decision in *Amos Wer Murigu v Marata Wangari Kambi & Others* held that
 - ' As regards assertion of title, it is not enough for a proprietor to merely write to the trespasser (to vacate). A letter by the proprietor even if it is through an Advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser, but because eviction is not always possible without breach of peace, institution of suit against a trespasser does interrupt and stop time from running.'
23. Time against the title of the first registered owner stopped to run on May 19, 2011 when he filed suit. The trial court found so. See paragraphs 25 and 51 of the judgement. Had the Respondent acquired adverse possession as at this date? My analysis of the evidence on record answers this question in the negative. Firstly, because the Defendant's entry onto the suit land was by permission of the owner and on the basis of an alleged contract of sale hence time could only start to run either when the permission was withdrawn or the contract expired or repudiated. The permission was withdrawn in early 2011 when the owner sold the land to the appellant and asked him to vacate. Secondly the date of entry onto the suit land is not clear from the Respondent's evidence. The evidence mentions various dates inclusive of 1998, April 12, 1999 (date of the agreement) and 2008.
24. There was no evidence that the Respondent had had open, peaceful, continuous, uninterrupted occupation or possession of the suit land in the manner envisaged by law for a claim of adverse possession to succeed. All the evidence showed that for the period the Respondent was on the suit, he had the permission of the owner to do so. The evidence also show that the appellant is the registered owner of the suit land. Under the provisions of the *Land Registration Act* a title to land can only be impeached on very specific grounds provided therein. None of the grounds were proved in the trial court.
25. In *Mkuba vs Nyamuro [1983]KLR 403-415* cited in *Rufus Kangethe Kamau vs Grace Njeri Kamau [222]eKLR* it was held that the Court of Appeal will not normally interfere with the findings of fact by a trial court unless it is based on no evidence, or on misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion. Given the evidence adduced, I find respectfully, that the findings and final decision of the trial court were not supported by the evidence.
26. Under section 27 of the *Civil Procedure Act*, costs of any action, cause or other matter, or issue shall follow the event.
27. I find further that the appeal has merit and allow it as follows:
 - a. Appeal is allowed
 - b. Judgement of the trial court dated May 24, 2022 is set aside.
 - c. Judgement is entered in favour of the appellant as prayed in the plaint



d. Costs of the appeal are awarded to the appellant.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED VIRTUALLY THIS 26TH DAY OF JANUARY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

E. ASATI

JUDGE

In the presence of:

Maureen: Court Assistant.

Appellant present in person

Achieng Advocate for the Respondent.

