



REPUBLIC OF KENYA



KENYA LAW
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**Galehu v Komba (Environment and Land Appeal E003 of 2021)
[2023] KEELC 16506 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 16506 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL E003 OF 2021
AK BOR, J
FEBRUARY 28, 2023**

BETWEEN

WAKO GALEHU APPELLANT

AND

HADIJA KOMBA RESPONDENT

JUDGMENT

1. The Respondent filed suit before the Chief Magistrates Court at Nanyuki seeking the eviction of the Appellants from the land known as Nanyuki Municipality Block IX/382 (“the suit property”) which she claimed was allocated to her by the Commissioner of Lands as unsurveyed industrial plot number H. Nanyuki Municipality. The Respondent pleaded that the Appellants had trespassed onto the suit property by entering it and remaining on the land without her authority. Further, that they had put up structures without her authority and failed to comply with her demand to vacate the suit property.
2. In their defence, the Appellants contended that they were the rightful owners of unsurveyed Plot no. H. Nanyuki Municipality and denied trespassing onto the Respondent’s land. The Appellants went on to state that the property they occupied was on a riparian zone and that the Respondent could not claim to be its rightful owner.
3. The suit proceeded to hearing and Honourable Mr B. Mararo, Principal Magistrate, delivered his judgment on November 23, 2021 and issued an eviction order directing the Appellants to vacate the suit property within 45 days failing which the Respondent would be at liberty to apply for forceful eviction.
4. Being aggrieved by that judgment, the Appellants filed the memorandum of appeal on December 21, 2021 faulting the Learned Magistrate for finding that the Respondent was allocated the suit land in 1993 when she was only 15 years old; failing to consider the fact that the suit property is in a riparian zone and was thus Government property; and lastly that the trial court failed to consider that the



Appellants were the rightful owners of the suit property through adverse possession having lived on it from 1982 up to 2018 when the Respondent started laying claim to the land. The Appellants urged the court to set aside the judgment of the Learned Magistrate.

5. The appeal was canvassed through written submissions. The Appellants contended that the Respondent was only 15 years old when she was registered as the owner of the suit property and that that was an illegality because Section 27 of the [Land Act](#) requires that a child can only hold title to land through a trustee and that a similar position is reflected in Section 47 of the [Land Registration Act](#). The Appellant relied on [In re HEA \(Minor\)](#) [2019] eKLR where the court restated that a child was capable of holding title to land through a trustee. The court found that the child who was of minority age could not enter the transaction or give consent.
6. The Appellants contended that Article 67 of the [Constitution](#) was clear that riparian reserves should not be allocated to anyone. They cited the decision in [Aloys Mataya Moseti v National Environment Management Authority and another](#) (2020) eKLR where the court found that the petitioner was not entitled to the riparian land adjacent to the suit property and that in effecting its mandate, the National Environment Management Authority (NEMA) could not be deemed to be in breach of the petitioner's right to ownership of property because riparian land could not be privately owned by the petitioner. The court also observed that Section 12 of the [Land Act](#) prohibited the allocation of public land along watersheds, rivers and streams and that Section 2 defined the riparian reserve.
7. The Appellants contended that the doctrine of adverse possession applied to them if the suit property were to be registered because they had lived on the suit property *nec vi, nec clam, nec precario* for the last 40 years and had developed the land, planted trees, built fixtures and had no other place to call home. They argued that if ownership of the suit land were to be granted, then it would be given to them.
8. The Respondent submitted that her eligibility to own land by whatever capacity was not an issue in the pleadings and it was not an issue for trial. Further, that had the Appellants desired to have the ownership of the suit property by the Respondent set aside, they would have specifically pleaded that aspect as a counterclaim in the suit or brought a different suit specifically for that purpose. The Respondent contended that when sitting on appeal, this court cannot be called upon to make a finding on an issue which was not part of the pleadings.
9. The Respondent relied on [Caltex Oil \(Kenya\) Limited v Rono Limited](#) [2016] eKLR where the Court of Appeal found that the trial court wrongly made an award that had not been pleaded relating to damages and urged this court to apply that reasoning in this appeal.
10. The Respondent contended that Sections 27 and 47 of the [Land Act](#) and the [Land Registration Act](#) respectively did not imply that registration of a minor as the owner of land in the absence of a trustee nullified the minor's right to that land.
11. She pointed out that the essence of those legal provisions was to have a trustee in place who would shoulder liability and obligations in respect of the land but that those provisions empowered a minor to be registered as the owner of the land. The Respondent contended that the issue of her minority was introduced for the first time by the Appellants in their submissions before the trial court and that it was not even a matter of evidence.
12. The Respondent contended that even if she were a minor in 1993 when the letter of allotment was issued to her, she was registered as the owner of the suit property on 29/11/2016 and it is not claimed that by then she was not of age. She contended that Sections 47 and 27 of the [Land Registration Act](#) and the [Land Act](#) respectively applied to registered land and not to allotment of land *per se*.



13. Regarding the claim that the suit land fell on a riparian zone, the Respondent contended that the Appellants did not seek her deregistration as the owner of the land based on the allegation that it was riparian land. She pointed out that the Appellants lacked capacity to make such a claim and that in any event, such a claim would not constitute a defence to her claim over the land.
14. The Respondent pointed out that the report prepared by the district surveyor which the Appellants seems to base their appeal on was filed pursuant to a court order specifically directing the surveyor to investigate the ownership and occupation of the suit property.
15. The Respondent invited the court to look at the extracted order and argued that the surveyor went beyond the terms of reference given by the court when he observed that plot H fell within the riparian zone. The Respondent pointed out that the surveyor never testified and was not cross examined. Further that the court was not called upon to adopt the surveyor's report hence it was not of any evidential value.
16. The Respondent distinguished the facts in the *Aloise Matanya Moseti* case on the basis that in that case the claim to a riparian reserve was specifically pleaded and that there was possibly credible evidence of the suit land being on a riparian reserve.
17. Regarding the Appellant's claim of adverse possession, the Respondent contended that since she was registered as the owner of the suit property in 2016, the limitation period of 12 years under Section 7 of the *Limitation of Actions Act* could only run against her from 2016 when she was registered as the owner of the suit property but not prior to that when the suit land was simply under an offer for allocation.
18. In their supplementary written submissions, the Appellants contended that the Respondent's age only to the fore during the trial and that they did not know this before and could not therefore have pleaded that fact. That it only emerged during cross-examination that the Respondent was born in 1976 which meant that she was still a minor when the suit property was allocated to her in 1993. The Appellants contended that the allotment of the suit property to the Respondent who at the time was a minor was irregular and illegal because there was no trustee.
19. The Appellants pointed out that they pleaded in their defence that they were the rightful owners of the suit land and that they indicated in paragraph 6 of the defense that the suit was fatally defective.
20. They urged that the issue of the suit land being a riparian reserve was not in dispute since they raised this issue in their defence and that there were two reports to that effect. They stated that on 28/1/2019, parties consented to have the County Surveyor visit the land and file a report on ownership and occupation of the suit property. According to them, the surveyor's statement was adopted by the court on 4/5/2021.
21. They also contended that the report from the Ministry of Lands and Physical planning dated October 2016 formed part of the court record. They reiterated that the suit land was owned by the government and that the Respondent's claim to it was mysterious and they contended that she must have obtained the documents in her possession through dubious means.
22. The Appellants contended that the Respondent did not request to cross-examine the surveyor during the trial and that it cannot therefore be an issue that the surveyor was not called upon for cross-examination.
23. The Appellant relied on Nyamira ELC No. 35 of 2021- Joseph Nyangau Monyenche v Nyamusi Nyamboga and 2 others where the court observed that no request had been made for cross examination



- of the authors of the two reports or for the reports to be expunged and that it was therefore too late in the day for the court to be asked to call the authors of the reports for cross examination.
24. Regarding the issue of adverse possession, the Appellants submitted that the Respondent did not dispute that they had lived on the suit property uninterrupted for 40 years since 1982 and that they had developed the land and put up their homes on it.
 25. The Appellants pointed out that the Respondent only provided the letter of allotment, beacon certificate and certificate of official search to prove ownership. They maintained that the limitation period of 12 years should not be computed from 2016 as the Respondent contended.
 26. They also invited the court to note that the Respondent stated on cross examination that she had mistakenly lived on Plot G since 2009. They urged the court to find that the right of action accrued to the Respondent in 1993 when the allotment was made to her and that the claim for adverse possession by the Appellants is therefore valid.
 27. The issue for determination is whether the court should grant the orders sought in the appeal. The Appellants' attack on the judgment delivered by the Learned Magistrate is based on four main grounds. These are that the Respondent irregularly obtained title over the suit land; that they own the land having lived on it for over 40 years; that in any event it is riparian land; and that they are entitled to the land based on adverse possession.
 28. The Learned Magistrate observed that the Appellants failed to call the surveyor to ascertain that the suit land fell on a riparian reserve and that that was a matter for the National Land Commission to determine. He went on to question the sincerity of the Appellants who were pursuing their individual interest and not public interest regarding the aspect of the land being on a riparian reserve.
 29. The court notes that the report prepared by the District Surveyor referred to plot H which had not been registered by 11/10/2016. The report stated that the position of Nanyuki Municipality Block 11/220 was pointed out. However, the suit property is Nanyuki Municipality Block 11/382. The surveyor pointed out that Plot G had people settled on it who were doing some farming activities and that the surrounding fences did not correspond with the positions of the beacon marks. The report stated that plot H fell within the riparian reserve.
 30. The report dated 24/6/2019 prepared by the County Surveyor indicates that part of the plot fell within the riparian reserve since it borders the Likii River. In this court's view, a proper survey ought to be carried out to ascertain the riparian reserve in accordance with the relevant laws including the [Survey Act](#) and the Environmental Management and Coordination Act.
 31. If the court understood the Appellants correctly, then their argument is that the Respondent should be prevented from taking possession of the suit property because the County Surveyor indicated in his report that it was a riparian reserve but, at the same time, they should be left to continue staying on the suit land. If the land is riparian land as the Appellants contend, then nobody should occupy it because the [Land Act](#) prohibits allocation of riparian land. By extension, the Appellants cannot claim adverse possession of the suit land if it is a riparian reserve for it would constitute public land.
 32. The issue of the Respondent being allocated the suit land while she was a minor was only taken up on appeal and is not an issue which fell for determination by the trial court. Nothing turns on this issue because at the time the Respondent was registered as the proprietor of the suit property in 2016 she was not a minor. The Appellants could have amended their pleadings and made this an issue for determination before the trial court.



33. The court notes that what was before the Learned Magistrate was a claim for trespass in which the Respondent sought the eviction of the Appellants from the suit land. The Appellants claimed that they were the rightful owners of the suit land in their defence. The Respondent produced the letter of allotment, beacon certificate and certificate of official search to prove ownership. The Appellants did not tender any evidence in support of their claim of ownership of the land. The Learned Magistrate cannot be faulted for making the finding that he did regarding the ownership of the suit property.
34. Appeal dismissed with costs to the respondent.

DELIVERED VIRTUALLY AT NANYUKI THIS 28TH DAY OF FEBRUARY 2023.

K. BOR

JUDGE

In the presence of: -

Mr Mwangi Kariuki for the Respondent

Ms. Stella Gakii - Court Assistant

No appearance for the Appellant

