M'Igweta & another v Gikundi (Environment and Land Appeal E104 of 2021) [2023] KEELC 15657 (KLR) (22 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15657 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E104 OF 2021

CK YANO, J

FEBRUARY 22, 2023

BETWEEN

JUSTUS MANYARA M'IGWETA .... 1ST APPELLANT

JULIUS KATHURIMA M'IGWETA .... 2ND APPELLANT

AND

CHARLES GIKUNDI .... RESPONDENT

JUDGMENT

1. Vide the plaint dated July 5, 2018, the respondent filed suit against the appellant claiming an order for establishment of the boundary of parcels No Nyaki/Mulathankari/635 and 612 and an order of eviction of the appellants and demolition of their structures that were alleged to have encroached on the respondent's land Parcel No Nyaki/Mulathankari/635. The 1st appellant is the registered owner of land parcel No Nyaki/Mulathankari/612 while the 2nd appellant who is his brother has constructed a permanent house on the 1st appellant's land but which is said to have encroached on the respondent's land.

2. The appellants filed a joint statement of defence and 2nd appellant's counterclaim dated October 4, 2018 in which the 2nd appellant acknowledges that his permanent building stands in a portion of land measuring 0.24 hectares inside the hedge demarcating parcel No 612 and 635. In the counterclaim, the 2nd appellant stated that he has been in exclusive and notorious occupation of the 0.24 hectares and claimed to have acquired the right of ownership of the same from parcel No Nyaki/Mulathankari/635 by virtue of prescription.

3. Upon hearing and determination, the trial magistrate found and held that the respondent had proved his case on a balance of probabilities and that the 2nd appellant had failed to prove his counterclaim. Consequently, judgment was entered as follows:

> " 1. The 2nd defendant's counterclaim is dismissed.
>
> 2. An order is issued directing the land registrar and the district surveyor to excise a portion of 0.37 acres out of LP No Nyaki/Mulathankari/612 and register it in the plaintiff's name.
>
> 3. A declaration is issued that the portion of 0.37 acres encroached upon by the 2nd defendant out of LP No Nyaki/Mulathankari/635 belongs to the 1st defendant and an order is issued to the relevant authorities to register the 1st defendant's name.
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> 4. The land to be excised under order (2) above shall include the entire width of LP No Nyaki/Mulathankari/612 that borders the road extending inwards into the said LP No Nyaki/Mulathankari/612 to cover the land space in the middle of the common boundary between land parcel No Nyaki/Mulathankari/612 and 635 (to the north) and the common boundary between LP No Nyaki/Mulathankari/612 and the "encroached area" (to the south.)
>
> 5. Orders (2) and (3) above are stayed pending the discharge of charge registered over LP No Nyaki/Mulathankari/635.
>
> 6. Costs of the plaintiff's suit and the 2nd defendant's counterclaim are awarded to the plaintiff"

4. Being dissatisfied with the said judgment, the appellants preferred this appeal on the following grounds:

    1. That the trial court erred in fact and in law by couching issues for determination which ultimately were aimed at reaching a pre-determined conclusion

    2. That the trial court erred in fact and in law by failing to appreciate that the 1st appellant had been in exclusive possession and occupation of a portion of land measuring 0.37 acres in LR No Nyaki/Mulathankari/635 since 1973 and the 2nd appellant subsequently constructed a permanent house on the said portion by 1990 and by the time the appellants preferred a suit against the respondent in 2009 the statutory period of 12 years had already lapsed.

    3. That the trial court erred in law and in fact by wrongly interpreting that a claim for adverse possession can only arise when a possessor is aware he is in possession of someone else's land without permission of that person and to the detriment and adverse interest of the owner.

    4. That the trial court erred in law and in fact by demonstrating his partiality when despite holding that there was encroachment on P/No 635 by the appellant's for a period in excess of 12 years he still went ahead to hold that a claim of adverse possession falls.

    5. That trial court exhibited his bias, partiality and prejudice against the 1st appellant by castigating him for not seeking remedial action with the respondent upon realization of the encroachment and further condemning him to pay costs for other suits not handled by the trial court.

6. That the trial court erred in law and in fact by importing facts which were neither in the pleadings or in the evidence while making the holding on how and where the respondent would be compensated for the encroachment, which ultimately demonstrates close consultations between the learned magistrate and respondent outside the court.

7. That the entire judgment was impartial, biased, prejudicial and made with a pre-determined outcome evidently with the influence of the respondent, which renders the same a sham.

5. The appellants pray that the appeal be allowed, that judgment of the trial court be set aside and substituted with orders that "a declaration the 2nd appellant has acquired a right of ownership over a portion of land measuring 0.37 acres in LR No Nyaki/Mulathankari/635 by virtue of prescription/ adverse possession, and he District Surveyor and Land Registrar (Imenti North land registry) to exercise a portion measuring 0.37 acres from LR No Nyaki/Mulathankari/635 and register the same in the name of the 2nd appellant, and that the costs of the appeal and of the suit in the trial court be granted to the appellants."

6. The appeal was canvassed by way of written submissions. The appellants filed their submissions dated November 14, 2022 through the firm of Kaumbi & Co Advocates while the respondent filed his submissions dated November 22, 2022 through the firm of MMboos Mutunga & Co Advocates.

The Appellants Submissions

7. The appellants argued on grounds 2, 3 and 4 of the appeal together and submitted that it is not disputed that the 1st appellant acquired P/No 612 in 1975 whereas the respondent acquired P/No 635 in 1988. That in his defence and counterclaim, the 2nd appellant states that he constructed a permanent house on P/No 612 in the year 1990 where he lives to-date. That for all that period of time since 1990 up until the year 2009, the 2nd appellant guided by the physical boundaries of the land parcel believed he was occupying P/No 612 until a survey report revealed that his house had in fact encroached on P.No 635 by 0.37 acres.

8. It is the evidence of the appellants that since the respondent acquired P/No 635 in 1988, he has never utilized, used or possessed the portion measuring 0.37 acres exclusively occupied by the 2nd appellant and submitted that by dint of section 7 and 17 of the *Limitation of Actions Act* cap 22, the respondent could therefore not institute any pleadings to recover the said land after the lapse of 17years, and that the plaint dated July 5, 2018 is therefore marred with laches. It is the submissions of the appellant that prayer (3) in the plaint which contemplates recovery of the portion of land in P/No 635 encroached and occupied by the 2nd appellant is time barred and cannot be considered by the court. The appellants relied on the case of *Chevron (K) Ltd Vs Harrison Charo wa Shutu* [2016] eKLR.

9. The appellants submitted that pursuant to section 38 of the *Limitation of Actions Act* they sought a declaration that the 2nd appellant had acquired a portion measuring 0.37 acres in P/No 635 registered in the name of the respondent herein through adverse possession. The appellants relied on the case of *Wambugu Vs Njuguna* (1983) KLR 172 and submitted that the respondent has never possessed or occupied the 0.37 acres of land P.No 635 occupied by the 2nd appellant since he acquired the title in 1988 which demonstrates dispossession or discontinuation of possession and faulted the trial court for inferring that adverse possession can only arise when the encroachment is well within the trespasser's knowledge.

10. Regarding ground 5, 6 and 7 of appeal, the appellants submitted that having determined that the respondents right to recover the portion of land under the possession of the 2nd appellant in P/No 635 lapsed after 12 years from the time when such right accrued, then the appellants were under no

obligation to seek remedial action with the respondent as suggested by the learned trial magistrate. The appellants submitted that they were surprised with order (4) in the judgment which the respondent was compensated stating that there is no such prayer in the plaint and wondered how the trial court got the details in respect of boundaries shared with the portion in P/No 621, adding that parcel No 621 has never been mentioned in any pleadings or in evidence. The appellants submitted in as much as it is factual that P/No 612 shares a boundary with P/No 635 on the northern side, it is astonishing how the court got the information yet it was never mentioned in the pleadings, evidence or submissions, and submitted that there was impartiality in the court's decision since courts are supposed to be guided by pleadings on record. The appellants urged the court to allow the appeal and grant the prayers sought.

The Respondent's Submissions

11. The respondent submitted that the trial court correctly found that the claim of adverse possession of the respondent's land had not been proved. That in a claim of adverse possession, one had to prove that he had been in possession of the land peacefully, continuously, exclusively without resistance from the owner and for a period of 12 years. That in this case, the trial court correctly found that there was Meru ELC case (OS) No 152 of 2009 filed in the year 2009 and in which judgment was given on May 23, 2018 and thus time stopped running in the claim for adverse possession in a subsequent suit. That the 1st appellant never tendered any evidence of the alluded structures burnt in the 1990s in the respondent's land.

12. The respondent further submitted that the trial court correctly found that the 1st appellant (sic) was an innocent occupier/possessor of the respondent's parcel No 635 without knowledge since he reasonably believed that he was in occupation of the 2nd appellant (sic) land LR No 612. That the trial court correctly found that for the doctrine of adverse possession to succeed, a claimant ought to be aware that he was in possession of the respondent's land without his permission and to his detriment and adverse interest. That the court correctly found that the 1st appellant realized that he was in the respondent's land in 2009 when the respondents land was about to be auctioned, and the appellants immediately sued the respondent for adverse possession among other prayers which was concluded in 2018.

13. The respondent further submitted that the trial court correctly found that the appellants had encroached on the respondent's land LR No 635, adding that the parties vide orders dated July 12, 2019 consented to a joint surveyor report dated September 4, 2019 and therefore the encroachment aspect was never an issue having been admitted in defense and counterclaim, that the encroachment was unlawful.

14. It is the respondent's submissions that it is not fair for the appellants to castigate or claim bias or impartiality or prejudice against the trial court simply because the judgment was not in their favour. That the trial court took notice that the 1st appellant (sic) was an innocent occupier of the area he had encroached on the respondent's land, based on the report filed and that the trial was conducted in open court and at no time did the appellants allude to any influence and did not file any application for recusal. The respondent urged the court to find that the appeal lacks merit and dismiss it with costs.

Analysis And Determination

15. I have considered the record of appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusion reached by the learned magistrate were justified on the basis of the evidence presented and the law. (see *Selle & another v Associated Motor Boat Company Limited & others* [1968]1EA 123.

16. In *Mwangi v Wambugu* [1984] KLR 453, it was held that-;

> " an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misrepresentation of the evidence, or where the court clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence."

17. In the subordinate court, the respondent's claim was that of encroachment by the appellants on land parcel No Nyaki/Mulathankari/635 while the appellants defence and counterclaim was pegged on orders of prescription and a claim for adverse possession. The issues for determination in this appeal as I can deduce from the grounds of appeal are;

    i. Whether the 2nd appellant had proved his claim for adverse possession.

    ii. Whether the decision of the trial court was against the weight of the evidence.

    iii. Whether the trial court was justified in issuing orders that were not sought.

18. In this case, there is no dispute that land parcel No Nyaki/Mulathankari/635 is in the name of the respondent while land parcel No Nyaki/Mulathankari/612 is registered in the name of the 1st appellant. It is also not in dispute that the two parcels share a boundary. There is also no dispute that the 1st appellant had permitted the 2nd appellant to put up a building on parcel No Nyaki/Mulathankari/612.

Whether the 2nd appellant had proved his claim of adverse possession over a portion of parcel No Nyaki Mulathankari/635

19. From the evidence on record, it is clear that when putting up his building the 2nd appellant was under the belief that he was constructing the same on parcel No Nyaki/Mulathankari/612 which had been granted permission to do by the 1st appellant. However, it turned out that the said structure had infact encroached on the respondent's parcel No Nyaki/Mulathankari/635. From the material on record, this revelation came about in the year 2009 when the respondent's said land was about to be auctioned by a chargee, namely Barclays Bank of Kenya Limited. The intended sale of parcel No Nyaki/Mulathankari/635 included the portion on which the 2nd appellant had apparently put up permanent buildings. It therefore dawned on the appellants that the appellants (and specifically the 2nd appellant) had been in occupation and possession of a portion of the respondent's land, hence the counterclaim for adverse possession, which was however dismissed by the trial court, prompting this appeal. The issue therefore is whether the claim for adverse possession had been proved.

20. In deciding whether or not the 2nd appellant had proved his claim for adverse possession to the required standard in Civil cases, the 2nd appellant must prove that he had been in occupation of the said portion of land for over twelve (12) years, that such possession and occupation was *nec vi, nec clam, nec precario*, that is without force, without secrecy, without permission, that such possession and occupation was open, peaceful and continuous without interruption from the registered owner and that such occupation was adverse, i.e inconsistent with the right of the registered owner.

21. In respect of the instant case, the occupation of a portion of the respondent's land by the 2nd appellant is not denied. The 2nd appellant contends that he had acquired a portion measuring 0.37 acres in parcel No Nyaki/Mulathankari/635 registered in the respondent's name, that his occupation thereof had extinguished the respondent's rights thereto and therefore is entitled to the same by adverse possession.

22. It is however, important to note that the respondent had neither authorized nor consented to the entry and/or occupation of the said portion of land. Consequently, the entry onto the said portion of land was thus carried out and perfected without the authority of the respondent. To the contrary, evidence was tendered and/or adduced by the parties showing the circumstances under which the 2nd appellant entered upon and took possession of the suit property. For clarity, it was stated that the 2nd appellant entered upon the suit property under the guise and/or assumption that same was LR No Nyaki/Mulathankari/612. Nevertheless, the correct position as to the details of the land which was under occupation by the 2nd appellant became apparent in the year 2009 when it transpired that what was under the 2nd appellant's occupation was actually a portion of LR No Nyaki/Mulathankari/635 and not LR No Nyaki/Mulathankari /612. This was following the intended sale by the Barclays Bank of Kenya Limited as chargee who wanted to sell the property including the 2nd appellant's permanent building. In my view, upon the said discovery that the 2nd appellant's occupation was on LR No 635 and not 612, the 2nd appellant and by extension the appellants herein, thus required the permission and or consent of the respondent to continue occupying and or possessing the suit property. However, no such consent was ever sought for nor granted and in this regard the actions and occupation by the 2nd appellant amounted to trespass.

23. Indeed the respondent in a bit to assert his right of ownership filed suit against the appellants for their eviction and demolition of the structures on his parcel of land. Whereas the 2nd appellant filed a counterclaim for adverse possession, it is my view that he could not lay such a claim for the entire duration because he knew and /or believed all along that the land he was in occupation of was LR Nyaki/Mulathankari/612 that belongs to the 1st appellant who had given him permission and/or consent to construct the said structures and not on the respondent's land. In other words, the 2nd appellant in my view, could not lay a claim for adverse possession when he believed that he owned the land or that it was the land of the 1st appellant who had given him permission to occupy and take possession of the land. In a nutshell, the 2nd appellant herein having hitherto believed that the portion of land he was in occupation belonged to the 1st appellant could not turn around and lay claim on account of adverse possession against the respondent. Such a claim, in my opinion, was contradictory and self-defeating.

24. But even assuming that the 2nd appellant could raise a claim for adverse possession, time for claiming adverse possession was interrupted by the filing of proceedings filed by the appellants in MRU ELC No 152 of 2009(OS) thereby defeating and./or interrupting the running of time. Moreover, the claim for adverse possession was only filed as a response to the respondent's claim for trespass.

25. I have also perused the judgment in the Meru Civil case No 152 of 2009 (OS) which is found at page 31-37 of the record of appeal herein. That case was against the respondent herein as the 1st defendant, and Barclays Bank of Kenya as the 2nd defendant. In the said judgment, the court found that the case against the respondent herein was dismissed vide the court's ruling of February 15, 2012 which ruling was never set aside. The claim for adverse possession against the said Bank was also dismissed on May 23, 2018 with costs to the respondent herein.

26. In view of the foregoing, I am not persuaded that the counterclaim for adverse possession in Meru CM ELC case No 204 of 2018 could stand and I see no reason why this court can interfere with the findings and decision of the learned magistrate with regard to this issue.

27. Further, and in addition to the above, this court also takes Judicial notice that a judgment in Meru ELC No 59 of 2019 (OS) Julius Kathurima M'igweta v Charles Gikundi was delivered by the court on 23rd November, 2022. In that suit the 2nd appellant herein was the plaintiff while the respondent was

the defendant. It was also a claim of adverse possession over the same parcel of land as the one in Cmc case No 204 of 2018 and this appeal. In the said judgment, this court dismissed the 2nd appellant's suit with costs to the respondent.

28. In view of the foregoing, and from the material on record, it is clear to this court that the issue of adverse possession has been determined by the court in the previous suits, including case No 152 of 2009 (OS)and ELC Case No 59 of 2019 (OS).

29. The law on res judicata is provided for in section 7 of the *Civil Procedure Act* which provides that;

> " 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."

30. Section 28 of the *Environment and land court Act* also bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined. *Res judicata* originated from the Roman Law "ex captio res judicata" which means "one suit and one decision is enough for any single dispute"

31. Once a final judgment has been announced in a suit, the subsequent judges who are confronted with a suit that is identical to or substantially the same as the earlier one, they would apply the doctrine of *res judicata* to preserve the effect of the first judgment and strike out the present suit. This is to prevent injustice to the parties of a case supposedly finished, but perhaps mostly to avoid unnecessary waste of time and prevent abuse of the court process.

32. There is no dispute that the parties in Meru case No 152 of 2009 (OS), ELC 204 of 2018 and ELC No59 of 2019 (OS) are the same and the claim in 152 of 2009 (OS) and the counterclaim in ELC 204 of 2018 are the same. I am in agreement with the learned trial magistrate's finding that time stops running for any party in a suit in a claim for adverse possession when a suit is filed. And as correctly found by the trial court, time stopped to run for the 2nd appellant between the year 2009 and 23rd May 2018, and could not include that period in calculating his adverse possession claim. Moreover, it is also doubtful whether the claim could stand, the same having been dismissed by the court in the earlier case No 152 of 2009 (OS). There is no doubt that the claim for adverse possession if any was also *res judicata* and an abuse of the court process. It is therefore my finding that the trial magistrate rightly dismissed the claim for adverse possession and I have no reason to interfere with that finding.

Whether the trial court was justified in issuing orders that were not sought and whether the decision was against the weight of the evidence

33. It is trite that issues for determination in a suit generally flow from the pleadings unless the pleadings are amended in accordance with the *Civil Procedure Rules*. In order to determine the issues between the parties, the trial court need to look at the plaint and the defence and counterclaim.

34. In the plaint dated July 5, 2018, the respondent's claim was for an order for the District Surveyor to visit the parcels Nos Nyaki/Mulathankari/635, and 612 and establish the boundaries of the two parcels, and an order for the demolition of the appellants' structures and eviction. The 1st and 2nd appellants did not dispute that they had encroached upon the respondent's parcel No Nyaki/Mulathankari/635. Indeed the 2nd appellant laid a claim for adverse possession which was dismissed. I am therefore in agreement with the 1st and 2nd appellant submissions that the trial court misdirected itself by granting a prayer

which was not sought in the plaint which was to the effect that a portion of LR No 612 be curved out to compensate the respondent for the portion occupied by the 2nd appellant in LR No 635. To my mind the respondent did not make any claim for compensation. All that the respondent sought was the establishment of the boundaries between the two parcels and the eviction of the appellants who had encroached on the respondent's land as well as the demolition of the structure thereon.

35. Section 78 (2) of the *Civil Procedure Act* provides that-:

> (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

36. The purpose of the above provisions is to enable an appellate court to intervene where there is manifest misdirection by the trial court either on point of law or fact which if allowed to stand can lead to grave injustice.

37. In view of the above provisions, it is my finding that the part of judgment passed by the learned magistrate on September 9, 2021, and specifically orders (2) (3) (4) and (5) thereof are not supported by the pleadings. They cannot be allowed to stand.

38. From the material placed before me, there is no dispute that the respondent is the registered owner of the property known as LR No Nyaki/Mulathankari/635. There was a survey report filed which confirmed that the 1st and 2nd appellants had encroached on a portion of the said land measuring approximately 0.37 acres.

39. Section 24 (a) of the *Land Registration Act* provides that the registration of a person as the proprietor of land vests in that person the absolute ownership of the land together with all rights and privileges associated with that status. Section 26 (1) of the said *Act* provides that the certificate of title issued by the registrar upon registration or to a purchaser of land upon transfer shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner thereof and that the said title shall not be challenged save on ground of fraud or misrepresentation to which the holder is shown to be a party or where the title is acquired illegally, unprocedurally or through a corrupt scheme .

40. In this case, the appellants did not challenge the respondent's title over the suit property on any of the grounds mentioned above. However, the 2nd appellant made a claim of adverse possession on a portion of the respondent's land, but that claim was dismissed by the trial court and the decision has been upheld by this court. Therefore, as the absolute proprietor of the said land, the respondent is entitled to enjoy rights and privileges associated with such ownership which includes exclusive use, possession and enjoyment thereof without interference by the appellants or any third party. The respondent asserted that the appellants are on his land without authority. The 2nd appellant's counterclaim having been unsuccessful, I am satisfied that the respondent has proved that the appellants entered the respondent's land and are thereon unlawfully. The appellants having unlawfully entered the respondent's property without the permission of the respondent, are trespassers on the said land and the respondent was entitled to the orders of demolition and eviction as prayed in the plaint. Accordingly, I do find that as rightly submitted by counsel for the 1st and 2nd appellant, the trial court had no business crafting orders in the form of compensation other than those sought in the pleadings. The orders (2) (3) and (5) in the judgment that suggested that a portion of land was to be excised from the 1st appellant's land to cover the space similar in size to the portion of the respondent's land that was unlawfully occupied by the 2nd appellant was in my view without any legal basis and was not supported by the pleadings, evidence or submissions and cannot stand. To that extent, the appeal herein partly succeeds.

41. Consequently, I hereby set aside the judgment of the trial court and substitute it with the following orders-;

1. That the 2nd appellant's counterclaim is dismissed.

2. The 1st and 2nd appellants and/or their agents, servants or other persons claiming through them be and are hereby ordered to demolish the structures in and to vacate and deliver vacant possession to the respondent of the respondent's land LR Nyaki/Mulathankari/635 within 120 days from the date of service of the decree herein upon them, in default the respondent shall be entitled to an order of eviction and removal of the appellants from the said land and demolition of the structures standing thereon at the 1st and 2nd appellants' cost under the supervision of the Officer Commanding Meru Police Station (OCS).

3. Costs of the suit in the lower court is granted to the respondent to be borne by the 1st and 2nd appellants.

4. And since the appeal is partly successful in view of the above orders, I order that each party shall bear its own costs of this appeal.

42. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 22ND DAY OF FEBRUARY, 2023.

In presence of

C.A Kibagendi

Mutunga for respondent

No appearance for Kaumbi for appellants

C.K YANO

ELC JUDGE