Wesonga & another v Naika (Environment and Land Appeal E047 of 2021) [2023] KEELC 719 (KLR) (14 February 2023) (Judgment)

Neutral citation: [2023] KEELC 719 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ENVIRONMENT AND LAND APPEAL E047 OF 2021

DO OHUNGO, J

FEBRUARY 14, 2023

BETWEEN

BENARD NALIANYA WESONGA ..... 1ST APPELLANT

JOHN ANDA WERIMO ..... 2ND APPELLANT

AND

JOHNSON MANYA NAIKA ..... RESPONDENT

(Being an appeal from the judgment and decree of the Senior Resident Magistrate Court at Mumias (Hon. W.K. Cheruiyot, Senior Resident Magistrate) delivered on 22nd October 2021 in Mumias MCELC No. 7 of 2020 consolidated with Mumias MCELC No. 2 of 2021)

JUDGMENT

1. The first appellant filed plaint dated February 17, 2020 in the subordinate court against the respondent herein. He averred in the plaint that he was the registered proprietor of land parcel number S/Wanga/Musanda/978 (the suit property) and that the respondent had unlawfully and without any probable cause taken possession of the suit property. He therefore prayed for an order of vacant possession and permanent injunction restraining the respondent, his agents, and servants from entering, staying on, occupying and or using the suit property.

2. The respondent filed his defence on August 12, 2020 wherein he averred that he purchased the suit property in the year 2001 from the second appellant, paid the full consideration and that he had been utilising the suit property since purchase peacefully, exclusively and with full knowledge of the second appellant for seventeen years thereby acquiring it by adverse possession. The respondent therefore prayed that the first appellant's suit be dismissed with costs.

3. Prior to filing his defence, the respondent filed a separate suit by originating summons dated March 2, 2020, against one Joseph Anda Werimo. He averred in the originating summons that he had acquired the suit property by adverse possession and sought determination of whether Joseph Anda Werimo's

title to the suit property had been extinguished. In this appeal, the second appellant's is indicated as John Anda Werimo but that seems to be a typographical error. It seems to me that the second appellant is Joseph Anda Werimo, respondent in the originating summons.

4. The two matters were consolidated and heard together. Upon the hearing, the subordinate court (Hon W K Cheruiyot, Senior Resident Magistrate) delivered judgment on October 22, 2021 dismissing the first appellant's suit and allowing the respondent's originating summons thereby ordering the respondent to be registered as the owner of the suit property. The second appellant was condemned to pay costs of the suit.

5. Aggrieved by the judgment, the appellants filed this appeal on October 28, 2021 and listed the following grounds in their memorandum of appeal:

    1. The learned trial magistrate erred in law and in fact in dismissing the plaintiff's case when the plaintiff had adduced sufficient evidence to prove his case on a balance of probabilities.

    2. The learned trial magistrate erred in law and in fact in holding that the respondent had proved his case to the required standard in the absence of sufficient evidence to arrive at such a finding.

    3. The learned trial magistrate erred in law and in fact in holding that the respondent had proved a claim for adverse possession in the absence of a copy of register for the suit parcel.

    4. The learned trial magistrate erred in law and in fact in holding that the failure by the respondent to produce the copy of register for the suit parcel was a procedural technicality that could be cured by article 159 of the *Constitution*.

    5. The learned trial magistrate erred in law and in fact in failing to find that the respondent's counterclaim as drawn and filed did not raise any claim against the current registered proprietor of the suit parcel to sustain a claim for adverse possession.

    6. The learned trial magistrate erred in law and in fact in ordering for the cancellation of the plaintiff's title to the suit parcel when there was no claim by the counter-defendant against the plaintiff over the suit parcel.

    7. The learned trial magistrate erred in law and in fact in entertaining and basing his decision on a counter-claim between two defendants in the suit which procedure is alien to the law.

    8. The learned trial magistrate erred in law and in fact by ignoring the evidence on record regarding the occupation and use of the suit parcel.

    9. The learned trial magistrate erred in law and in fact in proceeding to base his judgment on matters that were never pleaded, proved nor raised during trial.

6. The appeal was canvassed through written submissions. The appellants filed their submissions on June 20, 2022 and submitted that the first appellant being the registered proprietor of the suit property had established a genuine case demonstrating a right which had been infringed by the respondent and that the counterclaim as contained in the originating summons flouted mandatory provisions of the law by failing to produce a certified copy of register of the suit property. The appellants relied on order 21

rule 6 of the *Civil Procedure Rules* and the cases of *Essolly Enterprises Limited v Benjoh Amalgamated Limited [2019] eKLR* and *Musa Kipkoskei Labatt v Laban Kipkebut Barkoton [2019] eKLR*.

7. Citing section 13 of the *Limitations of Actions Act*, the appellants further submitted that a party cannot claim adverse possession when he has been dispossessed of the suit parcel and where there are injunctive orders restraining him from using the parcel in question. They added that the respondent conceded in cross examination that he is no longer in occupation of the suit parcel pursuant to court orders and as such the learned trial magistrate erred in law when she held that the respondent's claim was valid despite being dispossessed by the actions of the first appellant and thereafter barred therefrom by a court order. The appellants therefore prayed that the appeal be allowed.

8. The respondent filed his submissions on October 3, 2022 and argued that the evidence tendered by the appellant during trial was not sufficient as the appellant was unable to prove that the land was acquired legally and further that the appellant failed to prove that he conducted due diligence since the respondent was openly utilizing the land at the time of purchase with full knowledge of the appellants. That failure to annex a copy of the register is a procedural technicality which does not go to the merits of the case and is further curable by article 159 of the *Constitution*.

9. The respondent further argued that he annexed both a certificate of search and a copy of the title deed of the suit property and that consequently, the originating summons do not offend order 21 rule 6 and order 37 rule 7 (2) of the *Civil Procedure Rules*. He also argued that the learned magistrate found that the sale to the first appellant was unlawful and proceeded to cancel the first appellant's title. That the originating summons filed by the respondent was treated as a counter claim since it was against the second appellant. The respondent therefore urged that the appeal be dismissed with costs.

10. I have carefully considered the grounds of appeal and the parties' respective submissions. This is a first appeal and this court's mandate is therefore to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR*.

11. The issues that arise for determination are what was the effect of the consolidation and whether the parties were entitled to the reliefs that they sought.

12. There is no dispute that the two suits were consolidated by consent of parties. The principles that guide consolidation of suits were identified in *Stumberg and another v Potgeiter 1970 EA 323* thus:

> Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered.

13. Hence, the whole idea behind consolidation is to achieve efficiency and convenience in terms of cost, time, and effort by collapsing two or more suits into one, provided that common questions of law or facts arise in them.

14. The two cases that led to this appeal have one common thread: the suit property is the same in both. In the suit commenced by the first appellant through the plaint dated February 17, 2020, he sought eviction of the respondent on the basis that he was the registered proprietor of the suit property. The respondent's defence was inter alia that he had acquired the suit property by adverse possession.

In the originating summons, the respondent reiterated his claim of adverse possession. In view of the consolidation by consent and the common questions of possession and title that arose across the suits, the learned magistrate correctly deemed the originating summons as a counterclaim. The parties were fully aware of the claims involved and the appellants' contention that adverse possession was not claimed against the first appellant does not hold.

15. The mission of the court is to do substantive justice and there have been instances when the courts have ordered that litigants be registered as proprietors even when they raised adverse possession only in the defence without a formal counterclaim. See, for example, the decisions of the Court of Appeal in *Gulam Miriam Noordin v Julius Charo Karisa [2015] eKLR* and *Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR*.

16. The first appellant's case is that he purchased the suit property from the second appellant on November 16, 2018. The second appellant confirmed that in his testimony. Beyond that, the second appellant conceded that he had previously sold the suit property to the respondent through a sale agreement made in September 2002 and that he received the full purchase price. He also admitted that he handed over the title deed to the respondent on September 3, 2002, in furtherance of the sale transaction. Yet in the face of all that, he went ahead and obtained a new title deed on the false allegation that his title deed was lost and proceeded to transfer the suit property to the first appellant in the year 2019. In those circumstances, the first appellant's title could not form a valid basis for granting eviction against the respondent who had purchased the property long before the first appellant. The first appellant was clearly not entitled to the reliefs that he sought.

17. The respondent claimed to have acquired the suit property by adverse possession. The law and principles relating to adverse possession are well settled and are founded on sections 7, 13, 17 and 38 of *Limitation of Actions Act*. In the case of *Wines & Spirits Kenya Limited & another v George Mwachiru Mwango [2018] eKLR*, the Court of Appeal discussed the circumstances under which the cause of action accrues as follows:

So when does the cause of action accrue? Section 13 provides that:

"(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this act referred to as adverse possession....." ...

Further, under section 17, if the registered proprietor fails to recover the land within 12 years of uninterrupted adverse occupation, the proprietor's title to the land stands extinguished. The legal implication of the doctrine was well summarized by this court in the case of *Benjamin Kamau Murima & Others v Gladys Njeri, C A No 213 of 1996* where it was held that:

"The combined effect of the relevant provisions of sections 7, 13 and 17 of the *Limitation of Actions Act*, chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land."

...

(13) Having the above pre-requisites in mind, it therefore follows that the onus is on the person or persons claiming adverse possession to prove that they have used this land which they claim as of right. This is the Latin maxim of nec vi, nec clam, nec precario (which means that the occupation of the land must have no force, no secrecy, no evasion). Accordingly, the respondent herein was beholden to not only show his uninterrupted possession, but also that the 1st appellant had knowledge (or the means of knowing) actual or constructive of the possession or occupation. The possession must be continuous. It must not be broken for any

temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; (See Wanyoike Gathure v/s Berverly (1965) EA 514, 519, per Miles J.)

(14) Consequently and as rightly submitted by the appellants' counsel, the burden of proof in adverse possession lies primarily with the adverse possessor who wishes to rely on the doctrine. ...

18. While submitting that the first appellant is the registered proprietor of the suit property, the appellants went ahead to argue that the counterclaim for adverse possession flouted mandatory provisions of the law by failing to produce a certified copy of register of the suit property. I note however that the first appellant buttressed his testimony that he is the registered proprietor of the suit property by producing a copy of the title deed in his name. In those circumstances and in view of the provisions of section 26 (1) of the *Land Registration Act* which require the court to take the certificate of title as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner as well as the provisions of article 159 (2) (d) of the *Constitution* which requires the court to administer justice without undue regard to procedural technicalities, the first appellant cannot turn around and claim that there has been noncompliance with order 21 rule 6 and order 37 rule 7 (2) of the *Civil Procedure Rules* or that he is not the registered proprietor of the suit property.

19. Overall, the magistrate's findings on adverse possession were correct. The first appellant conceded that the respondent was in possession, which is why he sought his eviction. The second appellant's testimony as to possession and running of time did not discount the respondent's testimony. As noted earlier, there is no dispute that the second appellant sold the suit property to the respondent through a sale agreement made in September 2002 and that the respondent paid the full purchase price on September 2, 2002. There was evidence that the respondent had been in possession of the suit property since he purchased it in September 2002. His possession became adverse the moment he paid the entire purchase price. The first appellant only came into the picture on November 16, 2018, by which time the respondent had long clocked the requisite period of 12 years. As between the respondent and the second appellant, the respondent's testimony on possession was more reliable than the second appellant's since the latter had clearly attempted to mislead the trial court as regards the circumstances in which he transferred the suit property to the first appellant. I find that the respondent had established adverse possession.

20. I am satisfied that the first appellant was not entitled to the relief that he sought in his plaint. On the other hand, the respondent established adverse possession and was entitled to relief.

21. In view of the foregoing, this appeal is bereft of merit. I dismiss it with costs to the respondent.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF FEBRUARY 2023.

D O OHUNGO

JUDGE

Delivered in open court in the presence of:

The first appellant in person

No appearance for the second appellant

Mr Okali holding brief for Mr Namatsi for the respondent

Court Assistant: E Juma