Sangale v Shibiro (Civil Appeal E082 of 2021)
[2022] KECA 1221 (KLR) (4 November 2022) (Judgment)

Neutral citation: [2022] KECA 1221 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL E082 OF 2021

PO KIAGE, M NGUGI & F TUIYOTT, JJA

NOVEMBER 4, 2022

BETWEEN

AYAGA SANGALE ..... APPELLANT

AND

MARY KHASONA SHIBIRO ..... RESPONDENT

(An appeal from the Judgment of the Environment & Land Court of Kenya at Kakamega (Matheka, J.) dated 23rd February, 2021 and Decree issued on 24th February, 2021 in ELC Case No. 501 OF 2014)

JUDGMENT

Judgment of Kiage, JA

1. The appellant, Ayaga Sangale, challenges the decision of the Environment and Land Court (ELC) dated February 23, 2021that declared the respondent the owner of land parcel No. Tiriki/shamakhokho/1103 (suit land) by virtue of adverse possession and ordered him to transfer the said land to her.

2. The salient facts of the case were that, the suit land was part of the larger parcel of land known as Tiriki/shamakhokho/198 (Original parcel of land) which was owned by Shitoko Livoywa (Shitoko), father of among others, Boaz Minyata (Boaz) (both are now deceased). Boaz, was the respondent's father-in-law. In the year 1999, the original parcel of land was, through Succession Cause Kakamega High Court Case No. 589 of 1995, sub-divided into four portions and transferred to the beneficiaries of the late Shitoko Livoywa's estate. One of them, the suit land, was registered in the name of Boaz.

3. In June 2009, Boaz sold and transferred the suit land to the appellant. As a result, in the year 2014, the appellant sought to evict the respondent from the land. The respondent contested her eviction, arguing that she had been in occupation of the land since the year 1978 when she got married to Boaz's son (deceased) and thus, by virtue of adverse possession, she was entitled to the suit land. Boaz while

acknowledging selling the suit land to the appellant, claimed that he had invited the respondent to move and join him on another parcel of land where he resided and she had agreed to that invitation.

4. Matheka J., considered the suit and rendered herself as follows in her judgment;

> "... all indications are that a constructive trust arose as between the plaintiff and the 1st defendant. It is also strange that the 2nd defendant would go ahead and purchase land when he was well aware that the plaintiff had established her home there for over 30 years! For these reasons, I find that the plaintiff has established her case on a balance of probabilities that she has been in exclusive, continuous and uninterrupted possession, occupation and open use of the said suit land for a period in excess of 12 years. I find that the plaintiff has established her case on a balance of probabilities against the 2nd defendant and make the following orders..."

5. Being dissatisfied, the appellant filed a memorandum of appeal containing seven (7) lengthy grounds, contrary to Rule 86(1) (now Rule 88(1)) of the *Court of Appeal Rules* which requires that grounds of appeal be set out in a concise manner without narrative. In summary, the grounds are that the learned judge erred in law and in fact by;

   a. Not being fastidious (sic) in the examination of all facts and evidence laid before court.

   b. Not making a proper finding on whom the respondent made a claim for adverse possession.

   c. Making a finding that the respondent had proved her claim for adverse possession.

   d. Finding that the appellant did not hold good title by virtue of the respondent's claim for adverse possession.

   e. Finding that there was constructive trust between the respondent and the 1st defendant.

6. During the hearing of the appeal, learned counsel, Mr. Mwale appeared for the appellant and orally highlighted the previously filed written submissions. There was no appearance for the respondent, and neither were there submissions filed on her behalf.

7. Mr. Mwale admitted that at all times the respondent stayed on the suit land as a daughter-in-law to Boaz. As she was not a beneficiary to the estate of the late Shitoko, she could not be included in the succession proceedings. Counsel contended that for purposes of the claim of adverse possession, time started running in the year 2009 when the appellant acquired title to the suit land, as the respondent never lodged the claim earlier on when the suit land was part of the estate of her father-in-law, nor in the estate of Shitoko. He further asserted that pursuant to Order 37 rule 7 of the *Civil Procedure Rules,* for a claim of adverse possession to succeed, the land has to be clearly identified by a title deed extract and in this case, the title deed extract showed the appellant as the registered owner of the suit land. Counsel accused the respondent undue delay in lodging her claim for adverse possession. She instituted the claim in the year 2014 after the appellant had been registered as owner of the suit land. He asserted that, 'delay defeats equity' and, 'when two equities are the same, the first in time prevails.'

8. Relying on various decided cases, Counsel outlined the ingredients of a claim for adverse possession viz, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition. To counsel, the respondent never proved that she dispossessed the appellant and discontinued his possession of the suit land for over 12 years, starting from 2009 when he acquired proprietary interest in the suit land.

9. Counsel affirmed that the appellant was a bona fide purchaser for value, who acquired the title to the suit land legally upon following the requisite procedures and requirements. For this proposition, he relied on *Katende v Haridar & Company Limited* [2008] 2 EA 173, a decision of the Court of Appeal in Uganda where the court defined a bona fide purchaser. In the end, Mr. Mwale urged that the appeal be allowed with costs and the impugned decree be set aside.

10. I have carefully read and considered all the submissions made before us and the authorities cited by counsel. I have also perused the record of appeal. As a first appellate court, our jurisdiction is to consider the entire record in a fresh and exhaustive manner as to draw our own independent inferences of fact. We do so bearing in mind and making due allowance that we did not have the advantage the trial judge had of hearing and observing the witnesses in live testimony. See *Peter v Sunday Post Limited* [1958] EA 424, *Selle v Associated Motor Boat Company Limited* [1968] EA 123.

11. I think, this appeal turns on the sole issue, whether the claim for adverse possession by the respondent was established. The appellant resists the respondent's claim arguing that she never proved that she had dispossessed him of the suit land nor that he discontinued his possession for 12 years since, according to him, time started running in the year 2009 when he obtained proprietary rights over the land. The learned trial judge upon evaluating the law on trusts, determined that there was a constructive trust between the respondent and Boaz, her deceased father-in-law, who sold the suit land to the appellant. The learned judge was also convinced that the respondent had established that she had been in exclusive, continuous, uninterrupted possession and open use of the suit land for a period in excess of 12 years.

12. I concur with the reasoning of the learned judge. Indeed, by the appellant's own admission, at all times the respondent had been in occupation of the said land. His only contention is that she was not a beneficiary to the estate of the original owner of the land, who was the father to her father-in-law. I think, with respect, that his argument that time for the adverse possession claim started running in 2009 when he acquired proprietary interest over the land is also misplaced. I need only repeat what Tuiyott JA recently stated in *Kasongo & another v Ochieng & 2 others*(Civil Appeal 123 of 2017) [2022] KECA 145 (KLR) (11 February 2022) (Judgment);

> "The law on this matter, as correctly submitted by the appellants is that, for purposes of reckoning the 12-year period, time starts to run from the time the claimant dispossesses the true owner or from the time the true owner discontinues his possession of the land (see the decision in *Mwatando Mwagambo Wasanga v Ngaruko Mwangombe & 10 others* in Environment and Land Court Malindi Cause No 238 of 2013 (OS)). Therefore, the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or discontinued his possession. In this assessment the court must consider two questions; whether the owner has been dispossessed openly or willingly and; whether the claimant has been in uninterrupted possession of the land for 12 years with an intention to own it.
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> ...
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> I have no hesitation in accepting that the law in this regard is as affirmed by the Court of Appeal in *Githu v Ndeet*e [1984] KLR where the appellate Judges held that "the mere change of ownership of land which is occupied by another under adverse possession does not interrupt such adverse possession". To hold otherwise would mean that the right of an adverse possessor can be defeated by the registered owner simply effecting a change of ownership." [Emphasis mine]

12. The respondent had been in occupation of the suit land from as far back as the year 1978, to the appellant's knowledge. His acquisition of the land in 2009 could not possibly interrupt time from running nor defeat her claim in any way. Quite plainly, his assertion that he was a bona fide purchaser for value of the suit land is not plausible, having bought the land with the knowledge that the respondent was residing thereon.

    Ultimately, I would dismiss this entire appeal with costs.

13. As Mumbi Ngugi and Tuiyott, JJ.A are of the same opinion, it is so ordered.

Judgment of Mumbi Ngugi JA

14. I have read in draft the judgment of my brother Kiage, JA. with which I am in full agreement and there would be no utility in my adding anything thereto.

Judgment of Tuiyott, JA

15. I have had the advantage of reading in draft the judgment of Kiage, JA, with which I am in full agreement and have nothing useful to add.

Dated and delivered at Kisumu this 4th day of November, 2022.

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P. O. KIAGE

JUDGE OF APPEAL

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MUMBI NGUGI

JUDGE OF APPEAL

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F. TUIYOTT

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR