Watuko v Busolo & 3 others (Civil Appeal 129 of 2017) [2022] KECA 171 (KLR) (18 February 2022) (Judgment)

Neutral citation: [2022] KECA 171 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 129 OF 2017

AK MURGOR, S OLE KANTAI & HA OMONDI, JJA

FEBRUARY 18, 2022

BETWEEN

ISMAEL BUSOLO WATUKO (SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF RAMADHAN WANYONYI BUSOLO) ..... APPELLANT

AND

EMMANUEL WEKESA BUSOLO (SUED AS ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPH BUSOLO) 1ST RESPONDENT

FRANCIS BUSOLO WESONGA ..... 2ND RESPONDENT

PHYTHIAS WAFULA WESONGA ..... 3RD RESPONDENT

PIUS BUSOLO WESONGA ..... 4TH RESPONDENT

(An appeal against the Judgment of the Environment and Land Court of Kenya at Bungoma (Mukunya, J.) dated 4th October, 2017 in ELC No. 154 of 2013 (O.S.))

JUDGMENT

1. The appellant (Ramadhan Wanyonyi Busolo) had filed an Amended Originating Summons in Bungoma (OS) ELC. No.154 of 2013 as the administrator and Legal Representative of the estate of Ramadhan Wanyonyi Busolo (his late father), against the four respondents, based on adverse possession. His prayer was for the court to decide whether he had been in open, peaceful and continuous occupation on part of land parcel No. East Bukusu/South Kanduyi, for 12 years, and thus entitled to be registered as the owner. He sought for the determination of the following issues;

   (1) Whether or not he had been in occupation of land parcel originally known as East Bukusu/South Kanduyi/3877 and now known as East Bukusu/South Kanduyi/11421, 11422, 11423, 11424 and 11425; openly, continuously, exclusively and peacefully for a period of over 12 years.

(2) Whether or not the respondents' title over the said parcels of land had been extinguished by operation of the law.

(3) Whether he should be registered as the proprietor of the said parcels of land numbers East Bukusu/South Kanduyi/11421, 11422, 11423, 11424 and 11425 in the place of the respondents herein, under the doctrine of adverse possession.

(4) Who should pay the costs of the suit.

2. Upon hearing the matter, the trial court dismissed the claim on grounds that it did not meet the threshold for adverse possession as the evidence disclosed that the appellant's occupation had been interrupted several times, due to court cases over the same. Further, that the registered owners had sub-divided the land several times, and resold to third parties.

3. The appellant's case was that his late father (Ramadhan Wanyonyi Busolo), herein referred to as Ramadhan, was born on the suit land in 1924, and lived there, until his death on 31st October, 2010. That the land parcel number East Bukusu/South Kanduyi/3877 was registered in the name of Wesonga Busolo alias Benjamin Wesonga Busolo (now deceased) who was (the father of the respondents) and a step-brother of Ramadhan. Ramadhan and Wesonga were sons of one Busolo Otuko, meaning that the respondents are the appellant's cousins, by virtue of their fathers being step brothers. The appellant's position is that land parcel number East Bukusu/South Kanduyi/3877 originally belonged to Busolo Otuko, but at the time of registration, the land was solely registered in the name of Wesonga. However, the registration did not stop Ramadhan from staying on the land. He lived on this land and later in the fifties, married Lucia Nakhumicha, and they were blessed with four children and several grandchildren. Presently, Lucia Nakhumicha and other family members still live on the suit land, having built houses, planted trees, bananas, maize and other crops on the suit land. The appellant's witness Wamalwa Bundu Otuko (PW2) stated:

> " The land is still there. There are two families living there. The children of Benjamin near the road and next to Nakumatt Supermarket and the family of Ramadhan Wanyonyi Busolo who lives near the river..... it is about 5 acres. When I was born Ramadhan Wanyonyi Busolo was living there near the river. I know the children of Ramadhan Wanyonyi Busolo the plaintiff. They have homes there and have planted trees thereon."

4. The appellant maintained that later, Wesonga died and succession of the estate was done without the knowledge of Ramadhan, leading to land parcel number East Bukusu/South Kanduyi/3877 being secretly subdivided into several parcels. Ultimately the land occupied by the family of Ramadhan was allocated land parcel numbers East Bukusu/South Kanduyi/11421, 11422, 11423, 11424 and 11425. He maintained that these titles are actually one parcel without any boundaries between the titles and measure a total of 1.96 Ha.

5. That in 1995, the late Ramadhan filed Bungoma HCCC No.162 of 1995 (O.S) for adverse possession, but it was struck out on grounds that a copy of the green card was not annexed to the Originating Summons. Thereafter, the appellant filed Bungoma Environment & Land Case No.154 of 2013 as administrator and legal representative of the estate of Ramadhan Wanyonyi Busolo.

6. The 3rd respondent (Pythias Busolo) told the trial court that following their father's death, Ramadhan went to the suit land in 1978 to inherit his step mother one Mary Nanjala Bunywa, then he begun transferring his family including his wife Lucia Nakhumicha onto the parcel. Ramadhan then sold the parcel he had been living on at Kiwanja Ndege. According to this witness, they lodged a complaint to the assistant chief of Township, and when the matter was not resolved, they reported to the chief

of Kanduyi. He however had no documents to support such reporting. Eventually they filed a case in Bungoma Court, seeking eviction, and explained that the delay was due to the fact that they had not conducted succession proceedings.

7. On cross examination, he confirmed that the mother of Ramadhan (one Mafrida) lived and was later buried on the suit land in the 80's and the family of Wesonga had no objection to that. That even the appellant's brother and the wife of the appellant's brother died and were buried on the suit land with no objection was filed in court. It was his evidence however, that when Ramadhan died, they objected to him being buried on the land by filing a case in court, but before they could obtain the orders, they found that he had already been buried. They then filed Bungoma CMCC 786 of 2010 seeking orders of exhumation, and the matter is still pending in court.

8. The 2nd and 3rd respondents while confirming that Ramadhan and his family were in occupation of the suit land, maintained that the appellant having been in occupation of the suit land chose to sleep on his rights. That, they could not have included the Ramadhan family in the succession cause as they were not beneficiaries. Further, that by virtue of Ramadhan and Wesonga being step brothers, their respective mothers were given separate pieces of land.

   The trial court upon considering the evidence, held that the appellant did not meet the threshold for adverse possession, as the occupation was interrupted several times by cases which had been filed, and there was even an eviction case still pending. That the possession was disrupted by the sub-divisions made time and again by the owners, and the resultant sub-divisions had even been sold. The trial court found no evidence to show that the five plots claimed by the appellant and his family were the same portions which had been sub-divided.

9. Being aggrieved by the decision, the appellant contested it on grounds that the learned trial Judge erred in allowing the respondents to depart from their pleadings, that the peaceful possession was disrupted by filing of several court cases as well as subdivision and subsequent sales of the subdivided portions, that appellant ought to have challenged the succession cause filed by the respondents or challenged the adjudication process instead of filing this claim, that the appellant had entered with the permission of the owner, and did not make a finding on the entry date.

10. The parties canvassed this appeal through written submissions. The appellant submits that there was no evidence that Bungoma CMCC No. 114 of 1981 existed, nor was it pleaded neither was there any evidence to demonstrate its existence. That whereas the respondents claimed that after case No. HCCC No.162 of 1995 was dismissed, they filed HCCC No. 45 of 2004 which was transferred to Lower Court Case Number 786 of 2010, it is on record that case number HCCC No. 162 of 1995 was determined in 2013, so it cannot be factually correct that HCCC No. 42 of 2004 was filed after the determination of HCCC No. 162 of 1995. That in any event, no pleadings or court orders from either HCCC No. 45 of 2004 or CMCC No. 786 of 2010 were produced in court.

11. It is the appellant's contention that not all suits should be held as being against him, as it is only those suits filed against the person claiming for adverse possession that can be construed to be against him. That any suit filed by him as a means of enforcing his rights ought to be viewed in his favour, and not interpreted as amounting to interruption. Further, that the issue of changing occupation of the land never arose either in pleadings or evidence, and it was therefore erroneous for the court to hold that there was no evidence to show that the appellant's occupation never changed.

12. In this regard, the appellant draws from in Civil Appeal No. 219 of 2013 IEBC & Another v Stephen Mutinda Mule & 3 Others, where this court cited with approval the decision of the Nigerian Supreme

Court in Adetoun Oladeji (NIG) Ltd V Nigeria Breweries PLC S.C 91/2002 where Judge Pius Aderemi J.S.C expressed himself thus;

> " It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and should be disregarded."

13. It is also contended that the trial Judge made a decision without any regard to the evidence adduced by the appellant taking into consideration irrelevant matters and failing to take into consideration relevant matters particularly that the appellant gave evidence to show that he had occupied the land for over 12 years without any interruption. That the respondents having conceded that the appellant's father with his entire family stay on the suit land, then the claims about entry into the land in 1978 were an afterthought intended to mislead the court. It is pointed out that the trial court did not give any reason why it believed this afterthought and disregarded the appellant's evidence.

    The decision of the learned trial Judge is faulted as being based on an affidavit of a suit that had been struck out and was merely an annexure to the Supporting affidavit to the O.S in Bungoma HC. Environment & Land Case No.154 of 2013 as proof that there was a similar suit earlier filed and struck out on technicalities and not been determined on merit.

14. In arguing that these are issues of fact in which this Court ought to interfere, the appellant cites the decision in Civil Appeal No.22 of 2013 Peter Mbiri Michuki v Samuel Mugo Michuki (2014) eKLR, where this Court held that it will interfere with the findings of fact of a trial Judge if they are based on no evidence.

15. The appellant also pokes holes at the finding that he ought to have challenged the Succession Cause filed by the respondents, arguing a suit for adverse possession has no place in a Succession Cause. That in any case, for a party to get property in a Succession Cause the court must first decide whether or not he has acquired adverse possession rights on the suit property.Closely related to this is the appellant's lament that the learned trial Judge erred in holding that his recourse was to complain to the Adjudication Committee, because such failure cannot bar a litigant from laying a claim for adverse possession. It is contended that although the appellant was not the registered proprietor of the suit land, he did not leave the land just because the adjudication committee excluded him, and in any event, no one sent him away. That it is the respondent who infact "failed" to complain to the adjudication committee, and ought to have pursued recourse before the High Court under Limitations of Actions Act for a claim under adverse possession.

16. As regards the issue on whether the appellant entered the suit land by permission, it is submitted that no such evidence was adduced, and it is contended that Ramadhan's stay on the suit land as of right (because the land originally belonged to his father), cannot and should not be construed against him. That in any event his father Otuko was not the registered owner and thus had no capacity to grant Ramadhan any sort of permission. The appellant faults the trial Judge for failing to make a finding on the date of entry of the appellant on the suit land. In this regard, the appellant maintains that his father (Ramadhan) was born on the suit land in 1924, lived there and even married his wife while there and got his children while on the suit land. Upon death, he was also buried there, and to this date Ramadhan's widow Lucia Nakhumicha still lives on the suit land.

17. That the court did not make a finding on when the appellant's father entered the suit land, yet appeared to agree with the respondent's version on the date of entry, albeit without giving reasons for agreeing with the respondent. That if the respondents' assertions that the appellant went to the suit land in

1978 is to be believed, it follows that by 1990, the appellant had stayed on the suit land for over 12 peaceful and uninterrupted years and therefore from 1990, the respondents' title to the suit land had been extinguished.

18. As regards computation of timelines, the appellant contends that in matters of adverse possession, time is the major issue and for a court to determine adverse possession it ought to pronounce itself on the issue of time. He relies on the case of *Peter Mbiri Michuki v Samuel Mugo Michuki (2014) eKLR*; at paragraph 29 where the court stated;

> " On our part, we are of the view that there are four alternative timelines that could be used to compute when time began to run for purposes of the Plaintiff's claim for adverse possession. These are 1964, 1970, 1971 or 1978.... from whichever year adverse possession is computed, as at the time of filing the originating summons..... twelve years had lapsed and the plaintiff's right and claim based on adverse possession had risen, accrued and vested."

19. This Court is urged to take note that the subdivision of the suit land by the respondent was done secretly, and never done on the ground, so the appellants were never dispossessed of the portion they occupied. The respondents in opposing the appeal contend that the trial court was unable to positively answer the key question as to whether the appellant had been in open, continuous, exclusive and peaceful occupation of land parcel originally known as East Bukusu/South Kanduyi/3877 and now known as East Bukusu/South Kanduyi/11421,11422, 11423, 11424 and 11425 for a period over 12 years.

20. That the trial court examined the evidence regarding occupation of the 5 acres of land since 1924, and found that it was not believable, and in any event the adjudication committee had already dealt with that issue. The respondents maintain that their father was away in Kabras, but returned at the time of adjudication to make a claim. It is reiterated that the land was then registered in their father's name and not in the name of the appellant's father. That if the appellant's father had a viable claim it should have been dealt with then and the 5 acres registered in his name.

21. The respondents argue that the evidence demonstrates that the applicant and his father were permitted to be on the land through permission of their parents, and cannot be trespassers. In this regard, the respondents point to the evidence of the appellant's witness Wamalwa Bundu Otuko did not support appellant's story, as upon cross examination he said the appellant's father had his house at Uwanja wa Ndege but moved to inherit Benjamin's wife when the latter died. That the evidence of this witness in effect confirmed the position stated by the respondents. They urged for the dismissal of the appeal with costs in their favour.

22. In dealing with an appeal from the decision of the High Court exercising its original jurisdiction, the duty of this Court is set out in Rule 29 of the Court of Appeal Rules, which requires us to re-appraise the evidence presented before the trial court and draw inferences of fact. Further, as was held in *Selle v Associated Motor Boat Company Ltd [1968] EA 123*:

> " This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect."

23. The key issue in this appeal hinges on the doctrine of adverse possession and when time started running without interruption. Some of the statutory provisions that underpin the doctrine are set out in Section 7 of the *Limitations of Actions Act Cap 22* to the effect that:

> An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person

Section 13 of the Act further provides that:

(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land;

24. Adverse possession commences in a situation where an intruder who is in wrongful occupation makes a claim of ownership against a right of the true owner by alleging that due to clear and unequivocal evidence he/she has been in possession was not permissible, open, with the knowledge of the true owner, and excluded the true owner from the enjoyment of his property. The onus is on the person claiming adverse possession to prove, in the words of Kneller J. (as he then was) in *Kimani Ruchine v/s Swift, Rutherford & Co. Ltd (1980) KLR 1*0 that: -

> "The plaintiffs have to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the plaintiffs must show that the company 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;"**

25. The key test is that the owner of the land must have been dispossessed or has discontinued possession of the property. *Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430* the Court of Appeal stated that:

> "…to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances."

26. In other words, adverse possession kicks in when an intruder has stayed in the property publicly, but without the permission of the registered owner. From the evidence presented at the trial, it is clear that the appellant's family have been in occupation of the land in question. However, the issue in contention is whether this occupation has been continuous and uninterrupted. To demonstrate that the occupation has not been peaceful, and has been the subject of interruption, reference has been made to past disputes filed in court involving the same parcel, and holes poked at the manner in which the trial court considered these past cases. The respondents had filed in the magistrate's Court CMCC No. 114 of 1981 seeking to evict the appellant, and the case was eventually referred to the Land Disputes Tribunal, but never concluded. Of course HCCC No. 162 of 1995 was also filed seeking declaration of ownership based on adverse possession over the same parcel, but it was struck out on a technicality raised at a preliminary stage. From the record, another matter was filed being HCCC No. 45 of 2004

which morphed into Bungoma CMCC No. 8786 of 2010 In the case of *Joseph Gahumi Kiritu Vs Lawrence Munyambu Kabura CA No 20 OF 1993* Justice Kwach JA. stated:

> "The passage from Chesire's Modern Law of Real Property to which Porter JA. made reference in Githu Vs Ndeete is important and deserves to be read in full. .....Time which has begun running under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. ..... He must either make a peaceable and effective entry, or sue for recovery of the land."

27. As regards computation of time, a period of twelve years applies in an action brought to have right of possession and time begins to run as soon as the owner is dispossessed of the land or has discontinued possession unless of course the true owner files a suit to recover the disputed parcel. We are in agreement with the trial court that there is no evidence that the respondents have ever been dispossessed of the land by the appellant's family who merely came to join them and live there. Indeed, what emerges from the evidence is that the appellant's family were permitted onto the land, to enable the father fulfil customary social obligations of marrying (inheriting) the widowed Mary Nakhumicha.

28. We also note that at some point, the real owners moved onto the land and subdivided it. Although the appellant claimed that the subdivisions and resale carried out by the respondents did not affect them, no evidence was presented to the trial court to demonstrate that the five plots are the portions occupied by the appellant's family, and not the subdivisions of the original parcel No. East Bukusu/South Kanduyi/3877. Indeed, just as the trial court queried, if the appellant's father was on the land by virtue of a birth right then why didn't he stake his claim in the Succession Cause by seeking nullification/revocation of the grant, if the succession process was done secretly. We too wonder why Ramadhan did not find it prudent to draw to the attention of the adjudication committee, that he was being disinherited through adjudication, so as to have the 5 acres registered in his name. In the case of *Francis Gitonga Macharia v Muiruri Waithaka [1977] Civil Appeal No.110 of 1977 LLR (CAK)*, it was held that: "Limitation period, for purposes of adverse possession only starts running after registration of the land in the name of the respondent"

29. From the foregoing decision then, when did time begin to run? Was it in 1924 when the patriarchs were said to have been on the land? Was it in 1978 when Ramadhan purportedly moved onto the land to inherit his step-mother? It would appear that at least by 1978 the appellant's family had moved onto the land, but before the expiry of 12 years, i.e. in 1981, Bungoma SPMCC No. 114 of 1981 was filed. According to DW1 file No. 114 of 1981 was transferred to the Land Disputes Tribunal and is still pending. That in effect interrupted the first computation period, and the mere fact that the suit was not mentioned in the pleadings, does not negate its existence. We take judicial notice that the applicant in his supporting affidavit states that such a suit was indeed filed in Bungoma. When the appellant's father filed HCCC No. 162 of 1995, it was contested, and got a technical knock-out. Thereafter the respondents filed another suit, being HCCC No. 45 of 2004 which was then transferred to the lower court as CMCC No. 768 of 2010. Clearly, the moment the respondents contested the presence of the appellant's family by filing a suit, the occupation cannot be said to have been peaceful and uninterrupted, and the computation of time got interrupted. We were however unable to verify from Bungoma court the existence of file No. 114 of 1981 as the archivist indicated that those are very old records and may have been most likely destroyed as most registers prior to the year 2009 were destroyed.

30. Then there were the sub-divisions which took place on the land, and the appellant in his evidence confirmed that those subdivisions did affect the portions occupied by his family when parcel No 3877 was subdivided in 1984 to produce Nos. 6854 and 6855. That 6854 which was in the names of the respondents was again subdivided to produce 9703 and 9704, and this subdivision continued in its amoebic binary lifestyle finally resting with Nos. 10424 and 10427. The appellant stated as follows:

> "II claim five title numbers11421, 11422, 11423, 11424 and 11425...They came from title No 1024..."

31. Indeed, it is as a consequence of that subdivision which begun in 1984 that he sought registration in respect of parcels of land numbers East Bukusu/South Kanduyi/11421, 11422, 11423, 11424 and 11425 instead of the original No. East Bukusu/South Kanduyi/3877.

32. We find that the trial court properly addressed its mind to factors that affect/establish adverse possession, and analysed the evidence, and arrived at a proper decision to the effect that the occupation had not been peaceful, and had been disrupted by the subdivisions carried out by the owners. The upshot is that the appeal lacks merit and is dismissed with costs to the respondents.

DELIVERED AND DATED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR