Kioko v Muoki & another (Civil Appeal 366 of 2018)
[2024] KECA 190 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KECA 190 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 366 OF 2018

HA OMONDI, A ALI-ARONI & GWN MACHARIA, JJA

FEBRUARY 23, 2024

BETWEEN

JUSTUS MUTIE KIOKO ..... APPELLANT

AND

MBELE MUOKI ..... 1ST RESPONDENT

DENNIS MUOKI ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Order of the Environment and Land Court of Kenya at Machakos (Angote, J.) dated 4th May 2018 in ELC Case No. 60 of 2010)

JUDGMENT

1. The background to this appeal stems from a suit filed in the Environment and Land Court (ELC) in Machakos against Justus Mutie Kioko, the appellant, by Mbele Muoki and Dennis Muoki, the 1st and 2nd respondents respectively, who claimed that they were jointly registered as proprietors of land parcel Makueni/Unoa/58 in trust for themselves and other beneficiaries subsequent to a grant which was confirmed on 30th November 2009. The 1st respondent informed the court that in 2004 they petitioned for Grant of Letters of Administration of Estate of Muoki Muasya (deceased) in Machakos Succession Cause No. 76 of 2004 Re: Estate of Muoki Muasya; in their capacities as widow and son of the late Muoki Muasya respectively; and were issued with a grant on 14th October 2004, which was confirmed on 30th November 2009. The property in question was the only asset.

2. The 1st respondent further testified that in Succession Cause No. 76 of 2004, the court ordered that parcel No. Makueni/Unoa/58, the suit land be registered in the joint names of the respondents and that since then the suit property has been registered as such.

3. Apparently, the appellant had moved into occupation of the said parcel in 1984; and at the hearing of the succession cause, he filed an objection claiming ownership of the property on grounds that he had

purchased it from the 2nd respondent and his brother, in 1984, being two years after the death of the registered owner Muoki Muasya; and before the grant of letters of administration was confirmed. The High Court sitting as a succession court found that the appellant did not have lawful interest in the suit property, and that the purported sale amounted to intermeddling with the deceased's estate. The appellant was advised to pursue a refund of his money from those who had illegally received it.

4. Despite the said ruling the appellant refused to vacate the suit land and embarked on such hostilities as, barring her (the 1st respondent) access to the land; driving her out of the land, in what was tantamount to an eviction process. This is what led to the filing of the suit in the ELC, with the respondents seeking that the appellant be ordered to give vacant possession of the whole parcel; and that an order of eviction be issued against the appellant, his agents and/or servants.

5. The 1st respondent lamented to the ELC, that despite her husband being buried on the suit land, the appellant had barred her from living on it, and on cross examination she confirmed that the appellant had been living on the suit land for many years and that she filed suit in the Land Disputes Tribunal in 2000 and that the tribunal ruled in her favour.

6. The appellant filed a defence contending that the grant of representation issued to the respondents was obtained through fraud and non-disclosure; that in 1984, he had paid to the 2nd respondent and his brother Kshs.29,000/-, so as to take possession of the parcel in question; and in any event, the family patriarch had sold the parcel to a third party, who allowed the appellant to occupy, on condition that he refunded the third party the amount paid to the patriarch; and to pay to the 2nd respondent, and his brother, the outstanding balance. He also filed a counterclaim, seeking orders of injunction to bar the respondents, their servants or agents, from interfering with his quiet possession of the property; and in the alternative, that judgment be entered against the 2nd respondent and the estate of Muoki Muasya in the sum of Kshs. 29,000/- together with interest accruing thereon at the prevailing commercial rates from 14th November 1984 until payment in full. He also sought costs of the suit and the counterclaim.

7. The appellant failed to attend court at the hearing, thus he did not testify.

8. {{term{refersTo |title See} vide} a judgment dated 4th May 2018, the trial court having carefully considered the party's pleadings, testimony, and evidence on record entered judgment in favour of the respondents, finding that they had proved their claim on a balance of probabilities and accordingly dismissed the appellant's counterclaim as it remained unprosecuted, thus the orders sought for an injunction and/or refund of the purchase price as against the 2nd respondent could not issue.

9. The learned Judge's rationale was that the evidence before the court clearly showed that the suit land was registered in the names of the respondents and that the said registration was done on the basis of the court order in High Court Succession Cause No. 76 of 2004. The court also noted that the green card did not show that the suit land was ever registered in favour of the appellant; that the appellant never appealed the ruling in the Succession Cause No. 76 of 2004, as such it was not available to the appellant to raise the issue of ownership that was raised and determined in the Succession Cause 76 of 2004.

10. Aggrieved by the decision of the trial court, the appellant filed his memorandum of appeal challenging the judgment on 13 grounds, some being repetitive, we shall condense them as follows: that the learned Judge misdirected himself on a point of law by:- considering a plaint filed after 27 years for recovery of land contrary to provisions of the *Limitation of Actions Act*, Cap 22 Laws of Kenya; relying on a succession cause which was filed 20 years in 2004, to arrive at his decision, which was in violation of sections 7, 17, and 22 of the statute of limitation, and the doctrine of laches: failing to consider the appellant's unregistered interests as a bona fide purchaser for value, that after the lapse of 12 years, the learned Judge should have taken into account the doctrines of equity and adverse possession, that in

declining to grant an adjournment as requested by the appellant's counsel, the learned Judge denied him the right to be heard, and did not properly exercise his discretion as there was no basis to infer that the appellant's failure to attend court was intended to delay the case; and that his defence and counter-claim were not well considered.

11. The appellant argues that the trial court erroneously dismissed his defence and counterclaim without giving him a chance to be heard. A look at the proceedings attests that when the matter came up for hearing on 27th October 2016, there was no appearance for the appellant, the respondent's counsel confirmed that service of a hearing notice had been effected, and he even filed a return of service. The the trial court noted that the service was proper, but unfortunately, on this date the matter could not be reached. When the matter came up again for hearing on 26th January 2017 the appellant's advocate stated: "I am not ready to proceed. I have lost touch with my client. I do not have instructions. The subject matter is in ELC Makueni. Let it be transferred to Makueni.", and she requested for an adjournment stating that she had not seen her client since 2014. The court declined to allow the adjournment as the advocates on record had almost two years before the hearing date was fixed to file the application to cease acting and it ruled that the matter proceeds to hearing.

12. The appellant also argues that the Grant and Letters of Administration had been obtained through fraud and lack of disclosure of material facts, as the letter from the chief was a forgery, and that the 1st respondent was never a wife to the deceased; further, that he had pleaded adverse possession since the appellant had been in possession of the suit land for more than 30 years, and, as such the defence of limitation period suffices. The appellant also submits that the claim for adverse possession can be brought by way of counterclaim.

13. The 1st respondent in opposing the appeal reiterates that she anchored her case on the outcome of the Machakos High Court Succession Cause which made a final determination on the appellant's claim to the parcel on 9th October 2009; and that by dint of section 47 of the *Law of Succession Act*, and rule 47 of the *Probate and Administration Rules*, the jurisdiction of the High Court is not subject to limitation of time; and that having failed to attend court for the hearing, the appellant cannot now seek to reopen the case, simply because the outcome was not in his favour. We are thus urged to dismiss this appeal, with costs.

14. This being a first appeal and as has been reiterated in several decisions of this Court, it is this Court's primary duty to evaluate the evidence on record in order to come to its own independent conclusion on evidence and the law, as per rule 31(1) (a) of the *Court of Appeal Rules*. This duty has been reiterated in *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Company Advocates* [2013] eKLR.

15. In our considered view, the main issues in this appeal are twofold; namely who is the registered owner of the suit land; and whether the claim was statute barred by effluxion of time.

Who is the registered owner of the suit land?

The crux of the appellant's case is that he bought the suit land and paid some money for the same; that this Court should declare him the owner of said property and dismiss the judgment of the ELC. In the alternative, the appellant prays that he gets a refund of the purchase price of the suit property at current market value together with compensation for the developments made on it.

16. We take note that the appellant did not participate in the hearing; neither did he file a list of documents nor witness statements in step with pre-trial compliance. It is the respondent's evidence that *vide* Succession Cause No. 76 of 2004, they were issued with Grant on 14th October 2004; and the same was confirmed on 30th November 2009 and produced as P. EX 1 & 2 respectively. The appellant had

instituted objection proceedings and the probate court subsequently ordered,*vide* ruling dated 9th October, 2009 (P.EX 5) that the suit property be registered in the joint names of the respondents, as the appellant had no legal interest in the suit land. The Title Deed in the joint names of the respondents was produced as P.EX 3 and the green card as P.EX 4.

17. It is the respondent's evidence that *vide* Succession Cause No. 76 of 2004 they were issued with Grant on 14th October 2004 and the same was confirmed on 30th November 2009 and produced as P. EX 1 & 2 respectively. The appellant instituted objection proceedings and the probate court subsequently ordered *vide* ruling dated 9th October 2009 (PEX 5) that the suit property be registered in the joint names of the respondents as the appellant had no interest in the suit land. The appellant did not testify at the hearing. As such, his defence and counterclaim remained mere assertions; his own advocate confessed having lost touch with him for a prolonged period of time. The trial court cannot be faulted for proceeding in the manner that it did.

18. What was then up for determination by the trial court was whether or not the appellant had any interest in the suit property. From the evidence on record, the suit land was jointly registered in the names of the respondents, in trust for themselves as well as the other beneficiaries of the estate of the deceased. Prior to that, the suit land was registered in the name of the deceased Muoki Musya on 2nd August 1967. The green card does not show the suit property ever having been registered in the appellant's name.

19. In the ruling of the probate Court with regard to ownership of the suit property, the court noted that in his evidence, the appellant admitted that he did not buy the suit property from the deceased, but rather from the 2nd respondent and his brother, who at the time had no interest in it as succession had not been done. The upshot of this ruling is to the effect that the appellant had no lawful interest in the suit land and that he could now pursue a remedy for refund, which he did not do.

20. We detect no error of law or principle in the ruling of the learned trial Judge as regards that the issue of ownership of the suit property had been settled by the probate court, and that the appellant could not raise the same issue again as it was res judicata; he should have appealed. The respondents were registered as owners of the suit property *vide* a valid court order. The *Land Registration Act* is very clear on issues of ownership of land. Sections 24 (a) and 26(1) are instructive. They provide that the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, un-procedurally or through corrupt scheme. The appellant was not able to prove this.

Was the respondent's suit time barred?

21. On this issue, the appellant draws from the provisions of section 7 of the *Limitation of Actions Act*, to submit that the suit was time barred as the respondents had more than 20 years notice of the appellant's interest over the land and before filing suit. Section 7 provides 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. In considering this argument, we must pay regard to the date that the issue of ownership got settled; indeed, this issue walks along with the claim on adverse possession.

22. One of the elements of the doctrine of adverse possession is that there must be sufficient degree of physical contact on the land and that possession must be actual, notorious, exclusive and continuous and apparent and manifest to the actual landowner. The appellant admits that he bought the suit property, not from the deceased the original owner, but from the 2nd respondent and his brother in 1984 after the death of the deceased in 1982 and before succession was done in the year 2004. It is this

Court's view that once the probate court made a finding that the appellant had no legal interest in the suit land,*vide* the ruling of 9th October 2009, the appellant declined to vacate the suit land forcing the respondent to file suit in the High Court, *vide* plaint dated 24th March 2010. So then 9th October 2009 is the date that the cause of action for the respondents arose, making it a period is less than a year and so the respondents were well within time to file suit. It is trite that upon the death of the deceased, the suit property becomes part of his estate and it could only be dealt with under the *Law of Succession Act* and be administered by the deceased's personal representative(s).

23. It is clear from the record that succession of the estate was not done until 2004, meaning that the deceased's estate, including the suit property, were not available for distribution and/or sale before then. That then was the basis of the reasoning of the ruling of 9th October 2009 that the appellant had no lawful interest at all in the suit property. The appellant's claim for adverse possession then fails, as there was no proper title to be passed on to the appellant. Surely there was no way in which the learned trial Judge could have ignored the outcome of the succession cause, and we conclude there was no error in law of fact, or misapplication of any legal principles by the trial Judge in arriving at the decision he did in his judgment. Ultimately, we hold that this appeal lacks merit, and is dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

H. A. OMONDI

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JUDGE OF APPEAL

LI-ARONI

.....

JUDGE OF APPEAL

G. W. NGENYE – MACHARIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.