



REPUBLIC OF KENYA



KENYA LAW
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**Onyango v Indimuli (Environment and Land Appeal 6 of 2022)
[2025] KEELC 1449 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1449 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 6 OF 2022**

**EC CHERONO, J
MARCH 20, 2025**

BETWEEN

CHARLES ONYANGO APPELLANT

AND

HARRISON MUNALA INDIMULI RESPONDENT

*(Being an appeal from the judgment and decree delivered on 12/01/2022
by Hon.S.O.Mogute (PM) in Bungoma CMELC 44 OF 2018.)*

JUDGMENT

1. This appeal is a result of the judgment of the lower court between Charles Onyango -the Appellant herein as the defendant and Harrison Munala Indimuli -the Respondent herein as the plaintiff.

Background.

2. The suit before the trial court was instituted by the Respondent vide a plaint dated 22/08/2018 where he averred that he was the sole registered owner of Land Parcel No. East Bukusu/ South Kanduyi/18609 measuring 0.14ha (hereinafter referred to as “the suit land”) having purchased it from one Grace Okwara Olando. That the suit land was hived from Land Parcel No. East Bukusu/ South Kanduyi/15715. It was his case that the Appellant, without any colour of right entered the suit land and put up structures thereby curtailing his access and right to his proprietary rights. He sought for judgment against the Respondent for;
 - a. Order of permanent injunction restraining the defendant, his servants, agents and anybody acting under his instructions from encroaching, trespassing onto or interfering with the plaintiff’s land parcel no. Land Parcel No. East Bukusu/ South Kanduyi/18609.
 - b. An order of eviction to remove the defendant, his agents, servants, relatives and properties from the plaintiff’s Land Parcel No. East Bukusu/ South Kanduyi/18609.



- c. Costs of the suit.
 - d. Any other relief this honourable court deems fit and just to grant.
3. The Appellant filed a defence dated 10/01/2019 and a counter-claim dated 16/07/2019 where he averred that he has been in actual occupation of the suit land for over 10 years as a bonafide purchaser. That the Respondent's title deed must have been obtained fraudulently and unlawfully. In his counter-claim, he averred that he is the lawful owner of land measuring 120ft x 75ft comprised in the suit land having purchased it on 29/08/2001 from one Ben Manyonge who had acquired it as an inheritance as a son to the said Grace Okwara Olando vide an agreement dated 06/12/1999.
 4. He further averred that he has developed the piece of land and has notoriously occupied it for over 19 years and that the Respondents title is subject to his overriding interest as an adverse possessor. He sought for judgment against the Respondent for;
 - a. A declaration be and is hereby made declaring the defendant as the land owner of land measuring 120ft x 75ft forming part of Land Parcel No. East Bukusu/ South Kanduyi/18609.
 - b. That the plaintiff to execute land transfer forms and all documents to vest title to land measuring 120ft x 75ft forming part of Land Parcel No. East Bukusu/ South Kanduyi/18609 in the name of the defendant Charles Onyango failure to which the executive officer of this honourable court be mandated to do so on behalf of the plaintiff.
 - c. A permanent injunction restraining the plaintiff either by himself or any person acting through him from encroaching, alienating or in any way interfering with the defendant's lawful use and occupation of the suit parcel of land.
 - d. That the suit and counter-claim at normal court rates.
 5. During the hearing, both parties testified as the sole witnesses in support of their respective cases where they adopted their respective witness statements and produced documents contained in their list of documents in support of their cases.
 6. After hearing the parties and their witnesses and upon considering the the facts as pleaded and the evidence placed before it, the trial Court entered judgment in favour of the Respondent/Plaintiff in terms of the prayers sought in the plaint and dismissed the Appellants/Defendant's counter claim. Costs were also awarded to the Respondent/Plaintiff. The Appellant was aggrieved with the said judgment and preferred the present appeal.
 7. In his Memorandum of appeal, the Appellant raised nine (9) grounds of appeal as follows:
 - a. The learned trial magistrate erred in fact and in law when he allowed the plaintiff's claim contrary to the provisions of Section 7,13 &17 of the Limitation of Actions Act hence occasioning a miscarriage of justice.
 - b. The learned trial magistrate erred in fact and in law by finding against the overwhelming weight of evidence adduced by the appellant.
 - c. The learned trial magistrate erred in fact and in law when he failed to decree that the appellant having lived on the suit parcel of land for a period of over 19 years acquired prescriptive rights thereto by way of adverse possession.
 - d. The learned trial magistrate erred in fact and in law when he failed to hold or take cognizance of the fact that the appellant's occupation of the parcel of land L.R. NO. E.bukusu/



S.Kanduyi/18609 was open, peaceful and continuous to the exclusion of the respondent for a period exceeding 12 years.

- e. The learned trial magistrate erred in fact and in law when he failed to hold or take cognizance of the fact that the respondent was merely holding the suit land in trust for the appellant having acquired title with full knowledge of the appellants occupation.
 - f. The learned trial magistrate erred in fact and in law when he failed to hold or take cognizance of the fact that the respondents title to land parcel no. E.Bukusu/S.Kanduyi/18609 has been extinguished by operation of the law and his claim being barred by the *Limitation of Actions Act*.
 - g. The learned trial magistrate erred in fact and in law when he failed to take cognizance of the fact that the respondent and his family never lived, stayed, used or possessed the suit land prior to the acquisition of the land by the appellant hence occasioning a miscarriage of justice.
 - h. The learned trial magistrate erred in fact and in law when he failed to decree that the appellant having lived on the suit parcel of land for over 19 years was entitled to be registered as the owner of that parcel of land measuring approximately 12ft by 75ft forming part of LR NO. E. Bukusu/S.Kanduyi/18609.
8. The appellant therefore prays for the following orders;
- a. That judgment against the appellant be set aside and an order be made allowing the appellants appeal.
 - b. That the appellants be awarded both costs for the appeal and costs of the suit and counter - claim in the trial court.
9. When this appeal came for directions, the parties agreed to dispose of the same by way of written submissions. However, at the time of writing this judgment, neither of the parties had filed submissions.

Analysis and determination.

10. This is a first appeal, hence it is the duty of this court to re-evaluate the evidence and draw its own conclusions – See *Selle –Vs- Associated Motor Boat Co. Limited* 1968 E.A. 123.
11. Having reviewed the pleadings before the trial court and the memorandum of appeal, I am of the considered view that the nine (9) grounds of appeal can be consolidated into one primary issue to wit; whether this court should allow the appeal and set aside the judgment and decree by the trial court.
12. The Appellant’s case is that he has acquired ownership of a portion of land Measuring 120ft x 75ft comprised in L.R NO.E.Bukusu/S.Kanduyi/18609 by operation of the law. In determining whether the Appellant proved his claim for adverse possession of the suit property before the trial court, this court is minded that it should not lightly differ with the findings of the trial court which had the benefit of seeing and hearing the witnesses. It should only interfere with those findings if they were not based on evidence, or on a misapprehension of the evidence or if it is demonstrated that the Learned Magistrate acted on wrong principles in reaching the finding he did. (See *Mohamed Mahmoud Jabane vs. Highstone Butty Tongoi Olenja* (1986) eKLR).
13. The Respondent (who instituted the primary suit) argued that he is the registered owner of the suit land having purchased the same from one Grace Okwara Olando vide an agreement dated 05/06/2016 produced as P-Exhibit 1. He testified that he was thereafter issued with a title deed produced as P-



Exhibit 2 in his name on 23/02/2017. He also produced a copy of certificate of official search dated 20/07/2018 as P-Exhibit 3 to prove that indeed he is the registered owner of the suit land. The suit land is a sub-division of L.R.NO. E.Bukusu/S.Kanduyi/15715 as per the mutation forms (P-Exhibit 4) dated 23/09/2014 undertaken by the said Grace Okwaro Olando. It was his case that the Appellant occupied the land in the year 2017 and put up structures and denied him access into the land.

14. The Appellant in his statement of defence claims that he is entitled to 120ft x 75ft comprised in the suit land and that the Respondents title was fraudulently and unlawfully obtained. However, in his counter-claim which the trial court noted was filed out of time and without leave alleged that he has gained overriding rights over the Respondent's title as an adverse possessor and that the title is being held by the Respondent in trust for him. He testified that he purchased 120ft x 75ft comprised in the suit land from one Ben Manyonge vide an agreement dated 29/08/2001 produced as D-Exhibit 2 &3. That the said Ben Manyonge had been given the land by Grace Okwaro Oland as per an agreement dated 06/12/1999 produced as D-Exhibit 4. He also produced copies of green cards for L.R NO.E.Bukusu/S.Kanduyi/1421 and 15715 and stated that the latter is a sub-division of the former as D-Exhibit 5 & 6. He equally produced copies of photographs as D-Exhibit 1. It was his argument that he has occupied the portion of the suit land for over 19 years.
15. From the evidence presented, there is no doubt that the Respondent is the registered owner of the suit land. There is also no dispute that the suit land is a sub-division of L.R No. E.Bukusu/S.Kanduyi15715 which is a sub-division of L.R No. E.Bukusu/S.Kanduyi 1421. It is not in contention that at all material times, the two properties were registered in the name of Grace Okwara Olando.
16. The rights of a registered owner of property are clearly set out under sections 24, 25 and 26 of the [Land Registration Act](#) 2012, which provide as follows; -

24."Subject to this Act

(a)The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."

17. Further, Section 25(1) of the same Act provides that for such a registered owner, his/her rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. However, ownership of such title is not absolute as the said Certificate of title can be impeached under certain circumstances as contemplated in Section 26 of the [Land Registration Act](#) which provides as follows;

"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—(a)on the ground of fraud or misrepresentation to which the person is proved to be a party; or(b)where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

18. Therefore, in my considered view, once the Respondent proved that he is the holder of the certificate of title for the suit land, he was deemed as the absolute and indefeasible owner of the suit land and the burden shifted to the Appellant to prove otherwise.



19. Notably, the Appellant in his statement of defence pleaded fraud on the part of the Respondent but during the hearing, he did not lead any evidence to that end. It is settled law that fraud must be pleaded and distinctly proved and that it is untenable to leave fraud to be inferred from pleadings. (see in *Vijay Mojaria vs. Nansingh Madhusingh Darbar & Another* (2000) eKLR). The allegations of fraud particularised by the Appellants seemed to have been abandoned since they remained unsubstantiated.
20. As mentioned elsewhere in this judgment, the Appellants contention in the memorandum of appeal is that he had become the lawful owner of a portion of the suit land by operation of the land i.e. having been in notorious and open occupation of the same for a period over 12 years. The doctrine of adverse possession was aptly defined in *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015) eKLR where the Court of Appeal held that;

“ Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force of stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”
21. It is clear from those principles that the onus lies on the person claiming title by adverse possession to prove the essential elements before an order is granted in his or her favour. Regarding the issue of possession, the Appellant claims to have purchased the land from Ben Manyonge, whom he alleged was the lawful owner of the disputed portion. He further alleged that he has been in possession of the land for the past 17 years.
22. It is trite that for a claim of adverse possession to suffice, the claimant must first demonstrate that his occupation was non-permissive non-consensual or without license. (See *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] eKLR, where the Court enumerated the elements required to prove adverse possession as follows:

“ Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, *nec vi nec clam nec precario*.”
23. Ordinarily, entry and occupation pursuant to a sale agreement as is the case here is by permission of the proprietor/seller and does not therefore constitute adverse possession. However, once a purchaser completes paying the purchase price, his possession and occupation of the property ceases to be with consent of the proprietor/seller and becomes hostile. In such a scenario, time for purposes of adverse possession starts to run in favour of the purchaser from the moment final payment of the purchase price is paid. The Court of Appeal in *Nairobi Appeal No. 73 of 1982; Public Trustee v Wanduru Ndegwa* [1984] eKLR, found that Limitation of action begun running from the date of final payment. In the case of *Hosea v Njiru & Others* [1974] EA 526, Simpson J, following *Bridges v Mees* [1957] 2 All ER 577, held that once payment of the last instalment of the purchase price had been effected, the purchaser’s possession became adverse to the vendor and that he henceforth, by occupation for twelve years, was entitled to become registered as proprietor of it.
24. In my considered view, the Applicant ought to show how and when his possession ceased to be “permissive” (with the license of the proprietor/seller) and became adverse/hostile. The ingredient of



unpermitted occupation is usually expressed as “hostile” possession, to emphasize that “hostility” is the very marrow of adverse possession. Notably, the agreements (D-Exhibits 2 and 3) do not specify when the Appellant was to take vacant possession of the suit property.

25. Further, it appears that, despite the passage of time, the transaction remained incomplete as the Appellant has not proved that he settled the indicated balance of Kshs. 15,000/= which was to “be paid at any time.” Additionally, the suit property was never transferred to the Appellant. In my considered view, it was incumbent upon the Appellant to call Ben Manyonge as a witness to confirm that full payment was made. Without such evidence, the court will rely on the available testimony, which indicates that the consideration for the sale of the disputed portion has not been paid in full.
26. What I find in this case is a possessor without prove of adverse possession and possession which is not necessarily exclusive with the requisite intent. The grounds of appeal have therefore not been proved to the required standard.
27. The upshot of my finding is that this appeal lacks merit and the same is hereby dismissed with costs.
28. Orders accordingly.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF MARCH, 2025.

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HON.E.C CHERONO

In the presence of;

1. Appellant-present
2. Respondent/Advocate-absent.
3. Bett C/A

