



**Oyaro v Mwangeka & another (Environment and Land Appeal  
E022 of 2022) [2023] KEELC 18297 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18297 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL E022 OF 2022**

**NA MATHEKA, J**

**JUNE 21, 2023**

**BETWEEN**

**ESTHER KEMUNTO OYARO ..... APPELLANT**

**AND**

**MICHAEL MWANGEKA ..... 1<sup>ST</sup> RESPONDENT**

**JANE MWANGEKA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Appellant herein being dissatisfied with the judgment and decree of the Honourable D Wangeci PM delivered on the April 28, 2022, hereby appeals to this court against the entire decision mentioned above on the following grounds;
  1. That learned Trial Magistrate erred in law and fact by finding that the Respondent have been in continuous and open possession of the suit piece of land known as Voi CR 13016/257 when there was no established and/or concrete evidence to support the allegation.
  2. That the learned Trial Magistrate erred in law and fact by finding that the transfer of the suit property measuring 0.67 HA by Voi Development Company to Appellant was invalid and/or nullified by the Respondent rights over the suit parcel of land by way of adverse possession where there was no evidence from the land to affirm that indeed the transfer was unlawful.
  3. That the learned Trial Magistrate erred in law and fact by constructively dispossessing the Appellant of her parcel of land being the absolute owner by finding that the certificate of title was extinguishes by adverse possession by the Respondents.
  4. That the learned Trial Magistrate erred in law and fact by finding that the Respondents were entitled to be registered as the absolute proprietors of the suit parcel of land without addressing



the proprietary rights of the Appellant who has a valid title deed of the property and thereby infringing the Appellants constitutional rights to own property.

5. That the learned Trial Magistrate erred in law and fact by entering into the arena and assuming the duties of the Registrar of Lands by cancelling a valid titled and without giving away to the Appellant absolute owner of the suit property.
2. The Appellant prays;
    - a. That the appeal herein be allowed,
    - b. That the Judgment by Hounarable D Wangeci (PM) delivered on the April 28, 2022 in Voi PMCC No 25 of 2018 (OS) be set aside and be substituted with an order dismissing the Respondents suit.
    - c. That Costs of and /or incidentals to this appeal be provided for.
    - d. That any other and/or further order that this Honourable court deems fit and just to grant.
  3. This court has considered the appeal and submissions therein. This is an appeal from a judgement delivered on April 28, 2022 by D Wangeci Principal Magistrate in Voi PMCC 25 of 2018 (OS) Micheal Mwangeka and Jane Mwangeka vs Esther Kemunto Oyaro. The learned magistrate was satisfied that the Respondents had proved their case and that they had been in continuous, open and adverse possession over LR Voi CR 13016/257 measuring 0.67ha. The Appellant dissatisfied with the judgement, filed a Memorandum of Appeal dated May 24, 2022 seeking to set aside the judgement and for an order dismissing the Respondent's suit. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and make a determination as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in *Mbogo and another vs Shah* (1968) EA 93 where it was held that;

"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do."
  4. In the Respondent's Originating Summons dated 24 September 2018, the Respondent sought to be declared that they are entitled to be registered as proprietors of the suit land by virtue of adverse possession. The 1<sup>st</sup> Respondent in his affidavit in support of the originating summons as well as in his examination in chief as PW1 stated that he moved into the suit land which is situated in Maboani in 2002. He moved into the suit land while it was bushy and infested with elephants, after which he cleared the bush with the help of Oliver Mwakisha Mwaniki (PW2) his neighbor. He planted trees to mark boundaries, built a house and lived there with his family peacefully until the Appellant emerged in April 2017 to claim ownership of the suit property. The Appellant on the other hand, maintained that she is the registered proprietor of the suit land having bought it vacant and devoid of any occupant on June 19, 2014 from Voi Development Company and produced a Certificate of Title that was issued to her on March 20, 2017.
  5. The Learned Magistrate, analyzed various authorities which have well elaborated the doctrine of adverse possession. I find that the Respondents have established that they were in occupation over the



suit property for over 12 years. The Court of Appeal in Wilson Kazungu Katana & 101 others vs Salim Abdalla Bakshwein & another (2015) eKLR stated that;

The claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. In the Wanje case, the Court went further and took the view that in order to acquire by statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use.”

6. From the facts, the Appellant only became a registered owner of the suit property on March 20, 2017 after purchasing the same in 2014. The Appellant only acquired the right of immediate possession at the time she became the registered owner of the suit land in 2017 and not 2002 when the Respondents moved into the suit land. I find that from the evidence on record the Respondent were already in possession of the suit land for 12 years and before the Appellant interrupted their peaceful, continuous, exclusive use and actual possession of the suit land. I find that the Appellant acquired the suit land knowing very well it was occupied and has adduced no evidence that the same was vacant in 2017. Section 107 of the Evidence Act Cap 80 of the laws of Kenya states that;

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

7. In Mbogo & Another vs Shah (1968) EA 93, the Court, (Sir Newbold, P) stated at page 96;

A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice.”

6. In the case of Nkuba vs Nyamiro (1983) KLR 403, the same court stated that;

A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

7. The Learned Magistrate did not err in law and in facts as the Respondents demonstrated by evidence that they came into possession in 2002 when he moved into the land put up a house and carried out farming activities and later connected water. This court finds that the period of limitation began running in 2002 when the Respondents moved into the suit property. In conclusion, I find that this appeal is not merited and is dismissed with costs.

8. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21<sup>ST</sup> DAY OF JUNE 2023.**

**N.A. MATHEKA**

**JUDGE**

