



**Adoyo v Oburu & another (Environment and Land Appeal
E15 of 2022) [2023] KEELC 17807 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17807 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E15 OF 2022**

SO OKONG'O, J

JUNE 8, 2023

BETWEEN

MONICA ADHIAMBO ADOYO APPELLANT

AND

MONICA ATIENO OBURU 1ST RESPONDENT

**STEVEN OWUOR OUDU (SUED AS LEGAL REPRESENTATIVES OF THE
ESTATE OF REGINA AJODE OUDU - DECEASED) 2ND RESPONDENT**

*(Being an Appeal from the judgment and decree of Hon. Temu
delivered on 22nd October 2020 in Nyando SPMCELC No. 44 of 2019.)*

JUDGMENT

- 1 The Appellant filed a suit against Regina Ajode Oudu, deceased (hereinafter referred to only as “the Respondent”) at the Senior Principal Magistrate’s Court at Nyando being SPMCELC No. 44 of 2019 (hereinafter referred to as “the lower court”) seeking the following reliefs;
 - a. An order for the eviction of the Respondent from land parcel Title No. KISUMU/BORDER/236 measuring 2.6 Ha. (hereinafter referred to as “the suit property”).
 - b. An order of a permanent injunction restraining the Respondent from occupying, cultivating, selling, mortgaging, trespassing and/or constructing on the suit property.
 - c. Costs of the suit and interest.
 - d. Any other relief that this court may deem fit to grant.
- 2 The Appellant averred that at all material times, she was the absolute registered owner of the suit property and that the Respondent without any colour of right built structures and settled on the suit property. The Appellant filed a list and bundle of documents comprising among others; a Certificate



of Death for her deceased husband, Zephania Adoyo, a title deed for the suit property, and a certificate of official search in respect of the property some of which the Appellant also produced as exhibits at the trial.

- 3 The Respondent filed a defence in the lower court denying the Appellant's claim in its entirety. The Respondent averred that the suit property was sold to her deceased husband, Beard(sic) Oudu by the Appellant's deceased husband, Shepenia(sic) Adoyo Madanji on 28th December 1983 at Kshs. 2,500/- which was paid in full. The Respondent averred that the Appellant was aware of the said sale and that the filing of the suit by the Appellant several years after the sale was in bad faith the suit having been filed after the death of the Appellant's husband and the Respondent's husband who were the parties to the said sale transaction. The Respondent filed together with her defence a list and bundle of documents which included a copy of the Certificate of Death for her husband, a copy of the Limited Grant that was issued to her in respect of his estate and a copy of the sale agreement in respect of the suit property between her deceased husband and the Appellant's deceased husband. The Respondent prayed that the Appellant's suit be dismissed with costs.
- 4 Both parties appeared in the lower court in person. At the trial, the Appellant testified that she was the registered owner of the suit property and that the Respondent who was her neighbor was staying on the suit property illegally. The Appellant told the court that when the Respondent's husband died, he was buried on the suit property. On cross-examination, the Appellant stated that the Respondent's deceased husband did not purchase the suit property from the Appellant's deceased husband. The Appellant stated that her deceased husband who was a drunkard was cheated into giving away the suit property to the Respondent's deceased husband. The Appellant stated that she could not chase away the Respondent from the suit property because the Appellant's husband was very harsh and could not allow her to do so. The Appellant stated that at the time the Appellant's husband died on 11th January 2003, the Respondent had stayed on the suit property for over 20 years. Upon examination by the court, the Appellant stated that she had never occupied the suit property and that it was the Respondent who was occupying the entire parcel of land.
- 5 In her defence, the Respondent told the court that the suit property was purchased by her deceased husband from the father of the Appellant's deceased husband. She stated that after purchasing the land, they moved in and had occupied the same for over 40 years. The Respondent stated that the Appellant had refused to give them a title deed for the suit property but had instead demanded that they move out of the property.
- 6 The lower court heard the matter and in a judgment delivered on 22nd October 2020, the court made a finding that the Appellant's suit was time-barred. The lower court also made a finding that the Respondent had acquired title to the suit property by adverse possession having occupied the suit property since 1983. In conclusion, the lower court made the following orders;
 1. A declaration that the title in the name of the Appellant in respect of the suit property had been extinguished by the limitation period of 12 years under the *Limitation of Actions Act*.
 2. An order that the Respondent had become entitled to the suit property by way of limitation of actions as against the Appellant who was the registered owner of the suit property.
 3. An order that the Land Registrar Nyando/Awasi does register the Respondent as the absolute proprietor of the suit property in place of the Appellant.
 4. An order that the Land Registrar Nyando /Awasi be directed that the order made by the court would be deemed as an instrument of transfer of ownership of the suit property from the Appellant to the Respondent.



7 The Appellant was aggrieved by the said judgment and lodged the present appeal. In her amended memorandum of appeal dated 11th November 2022, the Appellant challenged the lower court's judgment on the following grounds;

1. The Learned Magistrate erred in law and fact when having found that the Respondent's occupation of the suit property was not consequent to and did not amount to trespass, he failed to determine whether the Respondent went into and took possession of the property consequent to the sale thereof or consequent to the consent of the Appellant's deceased husband in consequence whereof, he reached erroneous conclusions on fact and law on the merits of the Appellant's entire claim.
 2. The Learned Trial Magistrate erred in law and fact in failing to find and to hold that the Appellant's claim before him was proven in law and in failing to grant all the reliefs sought.
 3. The Learned Trial Magistrate erred in law and fact when he ordered that the Respondent be registered as the proprietor of the suit property in the place of the Appellant without jurisdiction, he having found and held that the Respondent was and had been in adverse possession of the land for a period in excess of 12 years.
 4. The Learned Trial Magistrate erred in law and fact when he found and held that the Respondent was and had been in adverse possession of the whole of the suit property for a period in excess of 12 years he having found and held in error that the Respondent was not a trespasser on the property.
 5. The Learned Trial Magistrate erred in law and fact in finding and holding on the evidence led at the trial that the Appellant's suit before the subordinate court was statute barred.
 6. The Learned Trial Magistrate erred in law and fact in finding for the Respondent and making orders in favour of the Respondent against the Appellant in the absence of a counterclaim.
 7. The Learned Trial Magistrate erred in law and fact when he misapprehended the issues that were before him for determination, the evidence led before him on those issues and the law.
 8. The Learned Trial Magistrate misapprehended the Appellant's pleaded case vis-à-vis the law.
 9. The Learned Trial Magistrate decided the suit before him and granted orders against the weight of the evidence led at the trial contrary to the law and all known principles.
- 8 The Appellant urged the court to allow the appeal, set aside the lower court judgment and substitute it with an order granting the reliefs that were sought by the Appellant in the lower court. The Appellant also prayed for the costs of the appeal and of the lower court. Regina Ajode Oudu died on 14th July 2021 after the judgment of the lower court and was substituted by the current Respondents who are the legal representatives of her estate. The Appeal was heard by way of written submissions. The Appellant filed her submissions on 17th February 2023 while the Respondents filed their submissions on 24th February 2023.

Analysis and Determination:

- 9 I have considered the pleadings and proceedings of the lower court, the judgment of the court, the grounds of appeal put forward by the Appellant, and the submissions by the parties. From the Appellant's grounds of appeal, the issues arising for determination in this appeal in summary are; whether the lower court erred in dismissing the Appellant's suit, whether the lower court erred in entering judgment for the Respondent for the reliefs that were not sought and what are the appropriate



orders to make in the matter. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions on the issues that were raised for determination before the lower court. However, the court has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. See, *Verani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269 and *Selle v. Associated Motor Boat Co. Ltd.* [1968] E.A 123 on the duty of the first appellate court. The court will also not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v. Sunday Post Ltd.* [1958] E.A 424 and *Makube v. Nyamuro*[1983] KLR 403.

- 10 I will consider the Appellant's grounds of appeal one after the other. I find no merit on ground one of appeal. The Appellant's case in the lower court was that the Respondent had trespassed on the suit property and wanted the Respondent evicted therefrom. The lower court having found that the Respondent was not a trespasser on the property, it was not necessary for the court to determine whether the Respondent acquired the property through purchase or a license from the Appellant's deceased husband.
- 11 On ground two of appeal, I am in agreement with the lower court that the Appellant did not prove her case of trespass against the Respondent. The Respondent led uncontroverted evidence that she had occupied the suit property for over 40 years as at the time she was giving evidence in 2020. The Appellant told the court in her testimony that since the death of her husband, the Respondent had occupied the suit property for over 20 years as at the time the Appellant was giving evidence. According to the Certificate of Death for the Appellant's husband which was on record, he died on 11th January 2003. This means that by her own admission, at the time the Appellant filed a suit for the eviction of the Respondent from the suit property in 2019, the Respondent had been in occupation of the property for 16 years. I wish to reiterate that the Respondent's evidence that she entered the suit property with her deceased husband in 1983 was not controverted by the Appellant. It is therefore my finding that the lower did not err in its finding that the Appellant's suit was time-barred. The Appellant's claim was therefore not proved. Due to the foregoing, I find no merit in ground two of appeal.
- 12 On grounds three, four and six of appeal, I am in agreement with the Appellant that the lower court had no jurisdiction to order that the Appellant's title to the suit property be cancelled and the suit property registered in the name of the Respondent. The Respondent did not file a counter-claim for adverse possession and did not seek any orders from the court apart from that for the dismissal of the Appellant's suit. The issue was not even raised in the Respondent's defence in the lower court. The lower court had no jurisdiction to determine issues that were not pleaded and to grant reliefs that were not sought. The court should have left the Respondent to file a proper suit for adverse possession. In *Chevron (K) Limited v. Harrison Charo Wa Shutu* [2016] eKLR, the Court of Appeal observed as follows:

*The courts, have since this decision, held that a claim by adverse possession can be brought by a plaintiff. See *Mariba v Mariba* Civil Appeal No. 188 of 2002, counter-claim or defence as was the case here. See *Wabala v Okumu* (1997) LLR 609 (CAK). In *Gulam Mariam Noordin v Julius Charo Karisa*, Civil Appeal No 26 of 2015, where the claim was raised in the defence, this Court in rejecting the objection to the procedure, stated the law as follows;

“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating



summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of *Wabala v Okumu* [1997] LLR 609 (CAK), which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in *Bayete Co. Ltd v Kosgey* [1998] LLR 813 where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.”

- 14 On ground five of appeal, I find no error in the lower court’s holding that the Appellant’s suit was time-barred. Section 7 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya provides as follows:
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.”
- 15 In *Edward Moonge Lengusuranga v. James Lanaiyara & Another* [2019] e KLR, it was held as follows;
Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the first Defendant having bought the suit land in the year 1999 (as per Paragraph 6 of the Plaintiff) and taken possession of the same, the Plaintiff herein could only seek to recover it from the 1st Defendants, but only if he did so within twelve years after the Sale Agreement.”
- 16 In *Gathoni v. Kenya Co-operative Creameries Ltd.* [1982] KLR 104, Potter JA stated the rationale of the Law of Limitation as follows: -
The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”
- 17 Further in *Rawal v. Rawal* [1990] KLR 275 the court held as follows: -
The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand and on the other hand protect a defendant after he had lost evidence for his Defence from being disturbed after a long lapse of time. See also the case of *Melita –vs- Shah* (1965) EA 321 cited with approval by Bosire, J in the above case.”
- 18 The lower court suit was filed on 31st October 2019. As stated earlier in the judgment, the Appellant admitted in her testimony in the lower court that the Respondent had occupied the suit property for 20 years since the death of the Appellant’s husband. There is no dispute that the Appellant’s husband died on 1st January 2003. The Appellant included his Certificate of Death among her bundle of documents filed in the lower court. The Appellant’s evidence before the lower court meant that the Respondent was in occupation of the suit property as at 1st January 2003. A suit filed against the Respondent 16 years later in 2019 for her eviction from the suit property was time-barred under section 7 of the *Limitation of Actions Act*.
- 19 Even if the date of the death of the Appellant’s husband was to be ignored for the purposes of computing the period of the Respondent’s occupation of the suit property, the Appellant gave her evidence in the lower court in 2020. In her testimony, she stated that the Respondent had occupied the suit property for 20 years. Going backward 20 years from 2020 when the Appellant gave her evidence takes us to the year 2000. Assuming that the Respondent entered the suit property in 2000, a suit filed for her eviction in 2019 was several years out of time. As I have also mentioned earlier, the Respondent’s evidence that she entered the suit property in 1983 was not controverted by the



Appellant. The Respondent did not require a document to prove that she entered the suit property in 1983. It was up to the Appellant to challenge her testimony in that regard. I, therefore, find no merit in ground five of appeal.

- 20 On grounds seven and eight of appeal, I am in agreement with the Appellant that the lower court somehow failed to appreciate precisely the issues that were before it for determination. The only issue that was before the lower court for determination was whether the Respondent was a trespasser on the suit property and whether the Appellant was entitled to an order for her eviction from the property. The court should have determined those issues and left it there. No one called upon the court to express itself on the Respondent's right to claim the suit property by adverse possession and to grant an order for the cancellation of the Appellant's title and registration of the property in the name of the Respondent. As I have already stated above, the court fell into error when it determined issues that were not before it and granted reliefs that were not sought.
- 21 On the last ground of appeal, I am of the view that the lower court's finding that the Appellant's suit was time-barred was based on the evidence on record. I am however in agreement with the Appellant that the findings made by the court that the Respondent had acquired the suit property by adverse possession and the reliefs that the court granted to the Respondent had no basis in the pleadings and evidence before the court. Since adverse possession was not an issue before the court no party led evidence in respect thereof.

Conclusion:

- 22 The upshot of the foregoing is that the Appellant's appeal succeeds in part. The judgment of the lower court made on 22nd October 2020 is set aside and substituted with an order dismissing the Appellant's suit in the lower court with costs to the Respondents. Each party shall bear its own costs of the appeal.

DELIVERED AND DATED AT KISUMU ON THIS 8TH DAY OF JUNE 2023

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of:

Mr. Okoth for the Appellant

N/A for the Respondent

Ms. J. Omondi-Court Assistant

