



**Andete v Walala (Environment and Land Appeal 13 of 2020)  
[2022] KEELC 2393 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2393 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL 13 OF 2020**

**DO OHUNGO, J**

**MAY 31, 2022**

**BETWEEN**

**PATRICK ASHALI ANDETE ..... APPELLANT**

**AND**

**SAMWEL SHANGWE WALALA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Senior Resident Magistrate Court at Butere (F. Makoyo, Senior Resident Magistrate) delivered on 17th March 2020 in Butere SRMCC No 3 of 2016 Samwel Shangwe Walala v Patrick Ashiali Andete)*

**JUDGMENT**

1. The background of this appeal is that on January 21, 2016, the respondent herein filed a suit in the Subordinate Court against the appellant through plaint dated January 20, 2016. He averred that he was the registered proprietor of the parcel of land known as Marama/Shinamwenyuli/568, the suit property. The respondent further averred that he purchased the suit property by mutual understanding on August 19, 1988 and through two handwritten agreements dated March 18, 2000 from the late Wabuna Luka Wanyama (aka) Casim Wabuna Wanyama (deceased) upon which he assumed vacant possession. That in the year 2005 the appellant and the deceased started interfering with the suit property by initiating new sugarcane farming contracts on it. The respondent further averred that the deceased filed Bungoma High Court Civil Case Number 93 of 2005 against him and that he filed a counter claim for eviction against the deceased but the counter claim abated following the deceased's death. He therefore prayed for eviction of the appellant and permanent injunction restraining the appellant from dealing with or in any way interfering with the suit property.
2. The appellant filed a statement of defence on March 2, 2016 wherein he stated that he is a grandson of Wabuna Luka Wanyama, that he had been residing on the suit property since the 1990s and that he started growing sugarcane on it in the year 2004. Without filing any formal counterclaim, he



prayed that the respondent's suit be dismissed and that judgment be entered in his favour for adverse possession, costs and interest.

3. Upon hearing the matter, the subordinate court (F. Makoyo, Senior Resident Magistrate) delivered judgment on March 17, 2020. The learned magistrate found merit in the respondent's case and therefore allowed it in the following terms:
  - a) That an order for the eviction of the defendant from land parcel number Marama/Shinamwemyuli/568 is hereby issued. The defendant is required to vacate the suit property within nine (9) months of the date of service of the orders of this Court;
  - b) That the plaintiff shall serve upon the defendant the orders herein within 14 days of the date of delivery of this judgement and shall file an affidavit of service within 14 days of the said service;
  - c) That a permanent injunction do hereby issue against the defendant whether by himself, his agents, employees, servants and/or any other person claiming through the defendant restraining him from ploughing, cultivating, fencing off, dealing, constructing on, wasting, alienating, disposing of, leasing and/or in any way interfering with the plaintiff's use of land parcel number Marama/Shinamwemyuli/568;
  - d) That the plaintiff shall have costs of the suit.
4. Aggrieved by the judgment, the appellant filed this appeal, praying that the appeal be allowed with costs, the judgment be set aside and that an order be made that the appellant has acquired title to the whole of the parcel of land known as Marama/Shinamwemyuli/568 by adverse possession and that the said property be registered in his name. The following grounds of appeal are listed on the face of the Memorandum of Appeal:
  1. That the Learned Trial Magistrate erred in fact and law in deciding in favour of the Respondent against the evidence on record.
  2. That the Learned Trial Magistrate erred in fact and law in rejecting the evidence of the Appellant against the evidence on record.
  3. That the Learned Trial Magistrate erred in fact and law in failing to make a finding that, indeed, the Appellant had acquired title to the whole of the parcel of land no. Marama/Shinamwemyuli/568 by adverse possession when there was clear evidence in this regard on record.
  4. That the appellant is clearly aggrieved by the decision/ judgement aforementioned.
5. The appeal was canvassed through written submissions. The appellant filed his submissions on December 8, 2021. He submitted that he had proved that he had acquired title to the suit property by adverse possession since he had been on the suit property since 1990 and that the respondent's rights had been extinguished by operation of the law. He contended that the appeal has merit and urged the court to allow it.
6. The respondent filed his submissions on January 31, 2022 and relied on his submissions filed in the subordinate court. In responding to the appellant's allegation that the respondent was not in the land since 2005, the respondent submitted that from the record of appeal it is evident as that Wabuna Luka Wanyama (deceased) who had sold him the land sued him in Bungoma High Court Civil Case Number 93 of 2005 and that he filed a counter claim seeking eviction of the deceased from the suit property and that the appellant is now advancing the interests of the deceased.



7. The respondent further submitted that the appellant did not demonstrate that he had been on the land continuously, uninterrupted for more than 12 years and that by filing a counter claim in Bungoma High Court Civil Case Number 93 of 2005 there was interruption of the running of time. Further, that the appellant admitted in cross examination that he was substituted as the plaintiff in Bungoma High Court Civil Case Number 93 of 2005 in place of the deceased and that the said suit was in relation to the suit property herein. He thus contended that this appeal should be dismissed with costs.
8. This being a first appeal, my mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore make due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. See [\*Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates\* \[2013\] eKLR.](#)
9. I have carefully considered the grounds of appeal and the parties' respective submissions. Only one issue arises for determination in this appeal: whether the appellant established that he acquired the suit property through adverse possession.
10. From the material on record, there is no dispute that the respondent is the proprietor of the suit property. The appellant admitted as much in his defence and it is on that account that he sought adverse possession against the respondent.
11. As a registered proprietor, the respondent is entitled to the privileges and benefits under Section 24 of the [\*Land Registration Act\*](#). Further, section 26 of the Act obligates the court to accept the respondent's certificate of title as conclusive evidence of proprietorship. The said sections provide as follows:
  24. Interest conferred by registration  
Subject to this Act—
    - (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; ....
  26. Certificate of title to be held as conclusive evidence of proprietorship
    - (1) 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 ...
12. The appellant did not seek nullification of the respondent's title. The only challenge he raised against the respondent's claim for eviction and permanent injunction was his claim for adverse possession. If he failed to establish adverse possession then it would logically follow that the respondent's claim must succeed.
13. The Court of Appeal restated the essentials of adverse possession in [\*Loise Nduta Itotia v Aziza Said Hamisi\* \[2020\] eKLR](#) as follows:  
In line with the Act, Kneller, J. (as he then was) in the case of *Kimani Ruchire v Swift Rutherford & Co Ltd* [1980] KLR 10, outlined some tenets of adverse possession thus; "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 persuasion). 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 purposes or any endeavours to interrupt it or by way of recurrent consideration.”

14. Further, it is trite law that the filing of a claim for recovery of possession interrupts the running of time. In *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR the Court of Appeal stated:

... If there was any time running in their favour towards adverse possession, it was interrupted when the suit was filed in March 2002. As this Court stated in *Joseph Gachumi Kiritu vs Lawrence Munyambu Kabura* [1996] eKLR:

“Time which has begun to run 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 a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him.

...He must therefore make a peaceable and effective entry, or sue for recovery of land.”

15. The record shows that the respondent filed the suit that is the genesis of this appeal on January 21, 2016 and that among other reliefs in his plaint, he sought eviction of the appellant from the suit property. Even if there was any time running in favour of the appellant, the respondent effectively reset the countdown to zero years on January 21, 2016 when he filed the claim for eviction or repossession. As at March 2, 2016 when the appellant filed his defence with a claim for adverse possession, the requisite 12 years of uninterrupted adverse occupation were far from being met.
16. Even if I were to be wrong on the effect of the respondent’s claim for eviction in the suit in the subordinate court, I note that there is no dispute that the suit property was the subject of litigation in Bungoma High Court Civil Case Number 93 of 2005, a case which was filed by the appellant’s grandfather against the respondent herein and in which he sought revocation of the respondent’s title to the suit property. The appellant conceded that he substituted his said grandfather and hence became the plaintiff in the said case. He further conceded that the respondent filed a counterclaim in the said matter. A perusal of the counterclaim which was filed on July 3, 2012 shows that the respondent sought eviction of the appellant from the suit property. Consequently, time stopped running as at July 3, 2012 such that by March 2, 2016 when the appellant filed his claim for adverse possession, only slightly less than 4 years had lapsed, a far cry from the requisite 12 years of uninterrupted adverse occupation.
17. A party who claims adverse possession must inter alia show on what date he came into possession, the nature of his possession, whether the fact of his possession was known to the other party, for how long his possession has continued and that the possession was open and undisturbed for the requisite 12 years. See *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR. Besides generally claiming that he entered into the suit property in 1990, the appellant did not offer any proof of the date he came into possession. He seems to have bundled his claim for possession with that of his grandfather. He must prove his own date of entry and cannot rely on his grandfather’s alleged date of entry. I find that the appellant did not prove the date he came into possession.
18. As the learned magistrate correctly pointed out, the respondent produced a sugar cane farming contract in respect to the suit property between himself and Mumias Sugar Company dated August 31, 2004. If the respondent was in possession as at August 31, 2004, it follows that by January 21, 2016 when



the respondent filed the suit in the Subordinate Court seeking eviction of the appellant, the appellant had not been in possession for 12 years.

19. In view of the foregoing discourse, the learned magistrate cannot be faulted for not finding merit in the appellant's claim for adverse possession and for finding in favour of the respondent. This appeal lacks merit and I therefore dismiss it with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 31<sup>ST</sup> DAY OF MAY 2022.**

**D. O. OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

No appearance for the appellant

No appearance for the respondent

**Court Assistant: E. Juma**

