



**Ochuodho v Achacha (Environment and Land Appeal E001 of 2021)
[2022] KEELC 2223 (KLR) (22 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2223 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E001 OF 2021
GMA ONGONDO, J
JUNE 22, 2022**

BETWEEN

SOLOMON OMOLO OCHUODHO APPELLANT

AND

MOSES ODHIAMBO ACHACHA RESPONDENT

(Being an appeal from the ruling of Hon. B. O. Omwansa - SPM delivered on the 25th August, 2021, in Oyugis Principal Magistrate's Court Environment and Land Case No. 14 of 2020)

JUDGMENT

1. The appellant, Solomon Omolo Ochuodho, through Ngala Awino & Company Advocates, commenced the present appeal by way of a Memorandum of Appeal dated 3rd September, 2021 and duly filed on 6th September, 2021. The appeal arose from the ruling delivered on the 25th August, 2021 by the Honourable B. O. Omwansa, Senior Principal Magistrate in Oyugis Principal Magistrate's Court Environment and Land Case No. 14 of 2020.
2. The Appeal is anchored on six (6) grounds as set out on the face of the memorandum of appeal, *inter alia*, that the trial magistrate erred in law and in fact by failing to take into consideration that as at the date of filing the originating summons dated 25th June 2012, the respondent was no longer living in and/or utilizing the suit land having been evicted, that the learned trial magistrate erred in law and in fact by failing to take into account the admissions of the respondent having filed several suits regarding the suit land to which most were dismissed with some issuing orders for eviction, and that the learned trial magistrate erred in law and in fact by failing to appreciate that the appellant was the registered owner of the suit land. In that regard, the appellant prayed that the appeal be allowed with costs and the judgment of the learned trial magistrate be set aside.
3. Together with the memorandum of appeal, the appellant filed an application by way of Notice of Motion dated 3rd September, 2021. He sought, among other orders; that the honourable court be



pleased to grant an order of stay of execution of the ruling delivered on 25th August, 2021 and all consequential orders arising therefrom pending the hearing and determination of this appeal.

4. The honourable court found the said application meritorious. It proceeded to grant orders of stay of execution of the ruling delivered on 25th August, 2021 as sought in the application through a ruling delivered on 10th November, 2021.
5. On 24th September, 2021, the respondent through G.S. Okoth & Company Advocates, filed a Memorandum of Cross Appeal dated 14th September, 2021. The same is anchored on four (4) grounds as stated on its face which include; that the trial magistrate erred in law by failing to adhere to and apply the provisions of Section 27 (1), (2) (proviso) of the *Civil Procedure Act*; and that the learned trial magistrate erred in law in failing to provide any reasons in his judgment why the costs of the suit cannot follow the event as provided by law.
6. So, the respondent urged the honourable court to quash the order of the trial court on the issue of costs and thereafter order the defendant cum appellant to pay the costs of the original suit and the costs of this appeal to the respondent/cross appellant.
7. On 2nd February, 2022, the appellant's counsel filed a record of appeal dated 1st February, 2022. The court ordered and directed that the appeal be argued by way of written submissions.
8. Accordingly, Learned Counsel for the appellant filed submissions dated 18th February, 2022 on 11th March, 2022. Counsel identified twin issues for determination namely, whether the trial magistrate erred in holding that the respondent had proved ownership of the suit land namely L.R. No. Kanyaluo/Kamenya/1130 by adverse possession and whether the trial magistrate failed to appreciate that the appellant was the registered owner of the suit land.
9. In discussing the issues, learned counsel submitted, inter alia, that there was no adverse possession as the respondent who was the plaintiff in the trial court never established the principles applicable for such a claim to succeed as there was no peaceful possession and parties had been litigating over the suit land since 2006. That possession was also not uninterrupted. Counsel also stated that the appellant is the registered owner of the suit land and has a legal right and beneficial interest over the same. Counsel relied on the case of *Mohan Lal v Irza Abdul Gaffar*, 1996, 1 SCC 639 cited in the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR.
10. Learned counsel for the respondent filed submissions dated 4th April, 2022 on 8th April, 2022. Counsel identified one issue for determination, namely, what constitutes acquisition of title by adverse possession? Counsel relied on Section 6(1) of the *Land Control Act* (Chapter 302 Laws of Kenya), Sections 7 and 16 of the *Limitation of Actions Act* (Chapter 22 Laws of Kenya) and Article 40 of *the Constitution* of Kenya, 2010. Further, counsel relied on the case of *Abednego Otundo v Laban Masinjira* [2021] eKLR and *Wilson Njoroje Kamau v Nganga Muceru Kamau* [2020] eKLR, to fortify his submissions. He urged the honourable court to dismiss the appeal with costs to the respondent.
11. No submissions were filed in relation to the cross- appeal.
12. In the foregone, the issues for determination are as captured in the grounds of appeal and compressed thus:
 - a. Whether the appellant has demonstrated that the appeal is tenable to warrant grant of the orders sought in the memorandum of appeal;



- b. If the answer to (a) is in the negative, whether the respondent has demonstrated that the cross-appeal is tenable to warrant grant of the orders sought therein; and
 - c. Who should bear the costs of this appeal?
13. I have duly perused the pleadings, court proceedings inclusive of evidence as well as the judgment of the learned trial magistrate. It is noteworthy that it is the duty of this court to reconsider the evidence on record afresh and come to its conclusions and inferences; see *Selle and another v Associated Motor Boat Co. Ltd. and others* [1968] EA 123 and *Williamson Diamonds Ltd v Brown* [1970] EA 1.
 14. This matter was initially placed for hearing before the Land Dispute Tribunal before moving to various courts; Homa Bay Chief Magistrate's Court and Kisumu and Kisii High Courts. There was also Migori Environment and Land Court and the court directed that the file be transferred to Oyugis Senior Principal Magistrate's courts for hearing and determination of the issues raised vide amended originating summons dated 25th June 2012.
 15. By the said amended originating summons filed on 2nd July 2012 at Kisii High Court, one Moses Odhiambo Achacha (the respondent herein) sued Benedict Joab Omolo and Loice Akinyi Omolo as the legal representatives of Solomon Omolo Ochuodho (deceased). He sought the determination of various issues concerning the suit land measuring one (1) acre, including: whether Solomon Omolo Ochuodho who had acquired the suit land as the administrator of the estate of Nyakiti Oyudo is liable to settle debts owed to the creditors of the said deceased; whether the plaintiff entered into a written agreement with the deceased proprietor of the suit land and whether he took possession of the portion purchased, which possession had by the 14th July, 2010 when the plaintiff was disposed become adverse to the interest and title of the deceased proprietor and the administrator of the estate?
 16. PW1 and PW2 testified that the plaintiff purchased the suit land measuring approximately one (1) acre from Sebastian Nyakiti Oyudo (deceased). They produced in evidence, a sale of land agreement dated 6th September, 1983.
 17. On his part the appellant filed a replying affidavit dated 31st January, 2011. He averred in part that the respondent has not enjoyed peaceful possession of the suit land hence has not met the requirements for adverse possession. The appellant also stated that the suit land has been the subject of several cases.
 18. DW1 testified that the sale agreement produced by the plaintiff was fake. However, he admitted that at the time the alleged agreement was executed, he was a minor.
 19. In his judgment, the learned trial magistrate identified three issues for determination thus: whether the applicant purchased the suit property, whether the applicant has satisfied the demands of ownership by way of adverse possession, and whether the respondent has /had the duty as the administrator of the estate of the deceased to make good of any debts. The learned trial magistrate analyzed the issues and found in favour of the applicant.
 20. The ingredients of adverse possession are well established. In the case of *Mtana Lewa v Kabindi Ngala Mwangandi* (2005) eKLR , the Court of Appeal held that:

“ Adverse Possession is essentially a situation where a person takes Possession of land, 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 12 years.”
 21. It is also a well settled principle that a party claiming adverse possession ought to prove that this possession was “nec vi, nec clam, nec precario,” that is, peaceful, open and continuous. That the



- possession should not have been through force, nor in secrecy and without the authority or permission of the owner; see *Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui* [2017] eKLR.
22. In his judgment, the learned trial magistrate noted that time started to run as from the time the consent from the Land Control Board was not obtained, that is 1984 up to 2003 when a complaint commenced on the suit land. That the complaint was subjected to dispute resolution in 2006 before the Land Disputes Tribunal.
23. The sale of land agreement was executed on 6th September, 1983. The vendor passed on in the year 1997.
24. The learned trial magistrate reasoned in part:
- “...it cannot be justifiable to denude one a right which he has been enjoying initially with a proper understanding with the demised owner on the basis that he had no title...”
- On the issue of multiplicity of suits, I note that the suit land was initially the subject of dispute at the Land Disputes Tribunal. In its verdict delivered on 7th April 2006, the tribunal found in favour of the appellant directing that the appellant acquires the entire suit land. However, on appeal by the respondent to the Provincial Land Appeals Committee at Kisumu in Case No. 288 of 2006, it was held that the portion bought by the respondent be carved out from the suit land.
25. The appellant challenged the appeal vide Civil appeal No. 50 of 2007 lodged at Kisumu High Court. The honourable court allowed the appeal and held that the proceedings of both the Land Disputes Tribunal and the Appeals Committee were a nullity by dint of Section 3 of the Land Disputes Tribunal Act No. 18 of 1990.
26. In Senior Resident Magistrate’s Court at Homa bay Civil Case No. 38 of 2006, the respondent instituted a suit against the appellant by way of originating summons dated 11th May, 2006. The main issue for determination was whether the respondent had purchased the suit land from Nyakiti Oyudo (deceased). He had sued the appellant as the legal administrator of the estate of the deceased vendor. The honourable court dismissed the suit since there were parallel proceedings ongoing at the Land Disputes Tribunal. The court also noted that it lacked jurisdiction to grant the orders sought in the plaint.
27. In Oyugis Principal Magistrate’s Court Civil Suit No. 4 of 2010 the appellant sought orders of eviction against the respondent. The court struck out the respondent’s statement of defence and eviction orders issued against him.
28. It is my considered view that the issues that were heard and determined by the learned trial magistrate in Oyugis Principal Magistrate’s Court Environment and Land Case No. 14 of 2020, are the subject of this appeal. Clearly, the issues had not been previously determined in a court of competent jurisdiction.
29. On the issue of costs as raised in the memorandum of cross-appeal, the same follow the event pursuant to the proviso to Section 27 (1) of *Civil Procedure Act* (supra). The court’s discretion thereof is given.
30. I subscribe to the decision of the Supreme Court of Kenya in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR where the honourable court directed each party to bear its own costs despite dismissing the application. I therefore, find that the learned trial magistrate exercised the court’s discretion judiciously.



31. The rule of evidence is clear that “He who alleges must prove”. This is grounded in law under Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya. On that account, did the respondent discharge this duty before the trial court as held in *Ahmed Abdulkarim v Member for Lands and Mines* [1958] EA 436 at 441?
32. Taking into consideration the entire evidence availed in this case, and applying the facts of the case and legal principles, it is clear that the respondent who was the plaintiff before the trial court proved his case to the requisite standard as noted in Lewa, *Kanyagia, Abdulkarim Cases* (*supra*). Further, the grounds of appeal are untenable. It is the finding of this court that the learned trial magistrate’s judgment is sound at law. I hereby uphold the same.
33. In the result, both the instant appeal and cross-appeal are hereby dismissed.
34. Each party shall bear its own costs.
35. Orders accordingly.

G.M.A ONG’ONDO

JUDGE

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 22ND DAY OF JUNE 2022.

G.M.A ONG’ONDO

JUDGE

Present

1. G. S. Okoth, learned counsel for the respondent
2. Okello, Court Assistant

