



REPUBLIC OF KENYA



**Okun v Deya & another (Environment and Land Appeal E022 of 2023)
[2025] KEELC 200 (KLR) (27 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 200 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E022 OF 2023
SO OKONG'O, J
JANUARY 27, 2025**

BETWEEN

JOSEPH MICHAEL OLIECH OKUN APPELLANT

AND

ROSA ATIENO DEYA 1ST RESPONDENT

KISUMU COUNTY LAND REGISTRAR 2ND RESPONDENT

*(Being an appeal from the judgment of Hon. E.A. Obina SPM delivered
on 11th May 2023 in Kisumu Chief Magistrate's Court ELC No.
69 of 2019, Rosa Atieno Deya vs. Joseph Oliech Okun & Another)*

JUDGMENT

Background

1. This appeal challenges the judgment delivered by Hon. E.A. Obina SPM on 11th May 2023 in Kisumu CMC ELC NO. 69 OF 2019(hereinafter referred to only as “the lower court”). The 1st Respondent instituted a suit against the Appellant and the 2nd Respondent in the lower court as a legal representative of the estate of Deya Ouko, deceased through a plaint dated 7th June 2019. The 1st Respondent averred that at all material times to the suit, she was the wife of Ouko Deya, deceased (hereinafter referred to only as “the deceased”) who died on 12th July 2006. The 1st Respondent averred that the deceased was at all material times to the suit, the registered proprietor of all that parcel of land known as Kisumu/Kadongo/76 measuring approximately 0.30 Ha. (hereinafter referred to only as “the suit property”).
2. The 1st Respondent averred that she conducted a search on the suit property on 26th July 2018 to ascertain its ownership status and established that the property had been transferred and registered in the name of the Appellant on 28th October 2010 and a title in respect thereof issued to the Appellant on the same day. The 1st Respondent averred that she was not satisfied with the results of the search



and sought a copy of the register for the suit property to ascertain the history of the transactions relating to the suit property. The 1st Respondent averred that upon obtaining and perusing an extract of the register of the suit property on 31st December 2018, she learnt that on 18th December 2009, she allegedly caused the suit property to be transferred to her name and that she subsequently transferred the property to the Appellant on 28th January 2010. The 1st Respondent averred that the suit property was transferred by the 2nd Respondent and the Appellant to the Appellant fraudulently. The 1st Respondent averred that the said transfer was effected without her knowledge and consent. The 1st Respondent averred that she had not taken out a grant of letters of administration in respect of the estate of her deceased husband, Deya Ouko and as such she had no capacity to transfer the suit property that was registered in the name of the deceased to the Appellant. The 1st Respondent averred that the Appellant had constructed rental houses on the suit property and had divested the 1st Respondent of the use of the suit property.

3. The 1st Respondent sought judgment against the Appellant and the 2nd Respondent for; a declaration that the 2nd Respondent had no statutory power to transfer the suit property to the Appellant without the consent and/or knowledge of the 1st Respondent; eviction of the Appellant from the suit property; the cancellation of entries numbers 2nd, 3rd, 4th and 5th in the register of the suit property and the property be returned to the name of the deceased, Deya Ouko. The 1st Respondent also prayed for the costs of the suit together with interest.
4. The Appellant filed a statement of defence and a counterclaim against the 1st Respondent on 21st August 2019. The Appellant denied the allegations in the plaint. The Appellant averred that he was the registered and legal proprietor of the suit property having bought the same from the 1st Respondent's husband, Deya Ouko, deceased (deceased). The Appellant averred that the 1st Respondent appended her signature on the agreement for sale as a witness. The Appellant averred that the 1st Respondent was aware of the transfer of the suit property to the Appellant and was present when the Appellant obtained consent from the Land Control Board for the transaction.
5. The Appellant averred that he acquired the suit property legally and procedurally. The Appellant averred that the 1st Respondent and her deceased husband signed the agreement of sale of the suit property freely without undue influence, coercion or threat. The Appellant averred that the 1st Respondent had never reported the alleged forgery to the police. The Appellant averred that he had not trespassed on the suit property and that it was the 1st Respondent who denied him the right to use the suit property yet he was the rightful owner thereof.
6. In his counter-claim, the Appellant averred that he was the legal owner of the suit property having purchased the same from the deceased, Deya Ouko on or about 21st January 2006 at an agreed price of Kshs. 110,000/- which he paid in full. The Appellant averred that the 1st Respondent was a party to the agreement and even appended her signature to the agreement and was present when payments were made.
7. The Appellant averred that although the 1st Respondent facilitated the transfer of the suit property into the Appellant's name, the 1st Respondent was claiming not to know how the suit property was transferred to the Appellant and was planning to sell the suit property to a third party. The Appellant averred that he had lived on the suit property for 13 years and had acquired the same under the doctrine of adverse possession.
8. The Appellant prayed for judgment against the 1st Respondent for: a refund of the purchase price in the sum of Kshs. 110,000/- plus interest from 2006 until payment in full; a declaration that the Appellant was the rightful owner of the suit property; an order directing the 1st Respondent to execute a transfer



of the suit property in favour of the Appellant failure to which the Executive Officer of the court be directed to execute the same on his behalf, and an order of a permanent injunction restraining the 1st Respondent, her agents, employees and or servant from in any way interfering with the suit property. The Appellant also prayed for the costs of the suit together with interest at court rates.

9. The 1st Respondent filed a reply to defence and a defence to the Appellant's counter-claim. The 1st Respondent reiterated the contents of her plaint and denied that the suit property was sold to the Appellant by her deceased husband. The 1st Respondent denied further that she was a party to the agreement as a witness.
10. The 2nd Respondent entered appearance and filed a statement of defence through the Attorney General. The 2nd Respondent denied the 1st Respondent's claim in its entirety and averred that if the suit property was transferred to the Appellant then the same was effected with the knowledge of the 1st Respondent.
11. The lower court heard the suit and the counter-claim and delivered a judgment on 11th May 2023. In its judgment, the lower court framed three main issues for determination namely; whether the Appellant purchased the suit property and was lawfully registered as the owner thereof, whether the 1st Respondent had proved her case to the required standard, and whether the Appellant's counter-claim had merit. The lower court considered all the issues together. The lower court stated that the suit property was registered in the name of Deya Ouko, deceased(deceased) and that the same could only have been transferred from the name of the deceased to that of the 1st Respondent after succession had been done in respect of the estate of the deceased and a grant of letters of administration issued. The court agreed with the 1st Respondent that since the 1st Respondent had not undertaken succession proceedings in respect of the estate of the deceased, she could not have transferred the suit property to her name and subsequently to the Appellant. The court held that the 2nd Respondent did not have the power to transfer the suit property to the Appellant without legally accepted supporting documents and without the consent or knowledge of the 1st Respondent. The lower court ordered that the title deed held by the Appellant in respect of the suit property be cancelled if that had not been done and the property restored into the name of Deya Ouko, deceased. The lower court gave the Appellant the liberty to pursue his claim to the suit property in the succession proceedings concerning the estate of the deceased. The court issued an injunction restraining the Appellant from entering the suit property until the conclusion of the succession proceedings. The lower court dismissed the 1st Respondent's prayer for mesne profits and the Plaintiff's counter-claim. The 1st Respondent was awarded the costs of the suit.

The appeal

12. The Appellant was aggrieved by the decision of the lower court and preferred the present appeal. In his Memorandum of Appeal dated 31st May 2023, the Appellant challenged the lower court's judgment on the following grounds;
 1. The Honourable Magistrate erred in law and fact by incorrectly applying the law on adverse possession and completely ignoring the issues before him thereby arriving at an erroneous finding.
 2. The learned Trial Magistrate erred in law and fact by failing to find that the Appellant was the absolute owner of the suit property having purchased the same in 2005, built a permanent house and remained in occupation for over 12 years.



3. The Honourable Magistrate erred in law and fact in failing to consider submissions and arguments of counsel for the Appellant and in failing to consider and apply case law cited which precedents were binding upon the court and hence arrived at a wrong decision.
 4. The Honourable Magistrate erred in law and fact by incorrectly applying section 26(1) of the [Land Registration Act](#) 2012 on the standard required for proof of proprietorship of land.
 5. The learned Trial Magistrate erred in law and fact in dismissing the Appellant's strong and powerful counterclaim without any justification or reasonable cause.
 6. The Honourable Magistrate was biased in his decision making as the 1st Respondent did not prove her case on a balance of probability.
 7. The Honourable Magistrate ignored the solid evidence given by the Appellant.
 8. The decision was against the weight of the evidence.
 9. The Honourable Magistrate did not consider the contradictions in the Respondent's case and thus arrived at an unjust decision.
13. The Appellant prayed that the appeal and the Appellant's counter-claim in the lower court be allowed and the costs of the lower court suit and this court be awarded to the Appellant.
 14. The Appeal was argued by way of written submissions. The Appellant filed submissions dated 23rd September 2024. The Appellant cited *Kirunyu v. Joreth Limited & another* (Environment & Land Case 920 of 2012) [2024] KEELC 1150 (KLR) (29 February 2024) (Judgment) and submitted that an adverse possession claim need not be brought only by way of an Originating summons. The Appellant submitted that the Appellant proved in the lower court that he had been peacefully in possession of the suit property, staying and cultivating it for several years and as such had acquired prescriptive rights over the same. The Appellant urged the court to declare that he had acquired the suit property by adverse possession. The Appellant cited *Lawrence Mukiri v. Attorney General & Others* [2013] eKLR and *Ali Wanje Ziro v. Abdulbasit Abeid Said & another* [2022] eKLR in support of his submission that he was the absolute owner of the suit property and that the 1st Respondent failed to establish valid grounds upon which his title could be impeached. The Appellant submitted that no evidence was placed before the lower court by the 1st Respondent to warrant the impeachment of the Appellant's title. The Appellant submitted that there was no evidence that the Appellant acquired the suit property through fraud or misrepresentation.
 15. The Appellant submitted that he produced sufficient evidence to show that indeed he entered into a sale of land agreement with the 1st Respondent's husband. The Appellant submitted that; he produced photographic evidence, brought a witness to court and produced duly executed transfer forms. The Appellant submitted that the only thing he did not do was to bring the deceased seller to court to confirm to the court that he indeed sold the suit property to the Appellant. The Appellant urged the court to allow the appeal and the Appellant's counterclaim in the lower court as prayed.
 16. The 1st Respondent filed submissions dated 3rd December 2024. The 1st Respondent submitted that the Appellant and the 2nd Respondent did not explain to the lower court how land that was registered in the name of a deceased person was transferred to the Appellant before a grant of letters of administration in respect of the estate of the deceased was issued by the court. The 1st Respondent submitted that the suit property devolved to the estate of the deceased upon his death and the purported dealings with it by the Appellant amounted to intermeddling with estate property in violation of Section 45 of the [Law of Succession Act](#), Chapter 160 Laws of Kenya.



17. On the issue of adverse possession, the 1st Respondent submitted that the Appellant’s adverse possession claim was inconsistent with his contention that he was the lawful registered owner of the suit property. The 1st Respondent submitted that the Appellant had to concede first that he held an invalid title and that the suit property was lawfully owned by the deceased before his adverse possession claim could be considered which he never did. In support of this submission, the 1st Respondent relied on *Haro Yonda Juaje v. Sadaka Dzenge Mbauro & Kenya Commercial Bank* [2014] eKLR. The 1st Respondent urged the court to dismiss the Appeal with costs.

Analysis and determination

18. I have considered the pleadings and the proceedings of the lower court, the judgment of the court, the grounds of appeal filed by the Appellant and the submissions by the advocates for the parties. This being a first appeal, this court has to reconsider and re-evaluate the evidence on record and draw its own conclusions on the issues that were raised for determination before the lower court. In *Kenya Ports Authority v. Kuston (Kenya) Limited* [2009] 2EA 212 the Court of Appeal stated that:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

19. See also, *Verani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269, *Selle v. Associated Motor Boat Co. Ltd.* [1968] E.A 123 and *Abok James Odera t/a Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR on the duty of the first appellate court.
20. 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.
21. From the grounds of appeal, I am of the view that the main issues arising for determination in this appeal are, whether the lower court erred in its finding that the Appellant did not acquire the suit property lawfully and as such did not hold a valid title to the property, and whether the lower court erred in failing to make a declaration that the Appellant had acquired the suit property by adverse possession.
22. Section 26(1) of the *Land Registration Act*, 2012 provides that:

“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.”

23. It is not in dispute that the suit property was at all material times registered in the name of the 1st Respondent’s deceased husband, Deya Ouko. It is also not disputed that the deceased died in 2006 and that it was not until 2017 that the 1st Respondent applied for a grant of letters of administration in respect of his estate in Kisumu Chief Magistrate’s Court Succession Cause No. 119 of 2017. From the evidence on record, the grant of letters of administration that was issued to the 1st Respondent in that succession cause was confirmed on 19th July 2019. From the evidence on record, the suit property was purportedly transferred from the name of the deceased and registered in the name of the 1st Respondent on 18th December 2009. The suit property was subsequently transferred from the 1st Respondent to the Appellant on 28th January 2010. It is common ground that these two transactions took place after the death of the first registered owner of the suit property Deya Ouko and before a grant of letters of administration in respect of his estate was issued by the court.
24. I agree with the lower court that the purported transfer of the suit property to the 1st Respondent and subsequently to the Appellant was illegal and should not have been registered by the 2nd Respondent. The transaction amounted to intermeddling with the property of a deceased person which is criminal offence under Section 45(1) and (2) of the *Law of Succession Act*, Chapter 160 Laws of Kenya. The Appellant told the lower court that he purchased the suit property from the deceased who died before transferring the suit property to him. He told the court that the property was transferred to him by the 1st Respondent. Since the 1st Respondent acquired the property illegally in contravention of Section 45(1) of the *Law of Succession Act*, Chapter 160 Laws of Kenya, she did not have a valid title in the suit property which she could pass to the Appellant. Her title was a nullity having been acquired illegally. The purported title acquired by the Appellant from the 1st Respondent was similarly null and void since its root was tainted with the same illegality. The Appellant’s title was in the circumstances impeachable under Section 26 of the *Land Registration Act*, 2012. I therefore find no error in the lower court’s order that the title held by the Appellant be cancelled and the land restored to the name of the deceased, Deya Ouko.
25. On the issue of adverse possession, it is now settled that the Magistrate’s Court has no jurisdiction to determine claims based on adverse possession. This was made clear by the Court of Appeal recently in the case of *Sugawara v. Kiruti* (Sued in her Capacity as the Administratrix of the Estate of Mutarakwa Kiruti Lepaso alias Mutaragwa Kiruti Lepaso alias Mutaragwa Kiroti Leposo and in her own Capacity) & 3 others (Civil Appeal No.E141 of 2022) [2024] KECA 1417 (KLR) (11th October 2024) (Judgment) in which the court stated as follows:

“ 44. The controversial question of jurisdiction of the Magistrates’ Courts in claims for adverse possession emanates from sections 37 and 38 of the *Limitation of Actions Act* where it is specifically provided that such claims are to be heard by the “High Court”.

45. In particular, section 38 of the *Limitation of Actions Act* provides:

“(1) (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the



proprietor of the land or lease in place of the person then registered as proprietor of the land.

- (2) ...
- (3) ...
- (4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.
- (5) ...”

46. In other words, reference is to the “High Court” as the court to which such cases are heard, and given the dictates of *the Constitution* set out above, this should be construed to mean the “Environment and Land Court”, as being the court donated with jurisdiction to hear and determine matters pertaining to adverse possession of land. The effect of this interpretation is that, it is only the Environment and Land Court established under Article 162(2) (b) that is mandated to hear these cases. So that, notwithstanding the expansion of the jurisdiction of environment and land usage to Magistrates Courts, it is distinctive that under section 9 (a) of the Magistrates Courts Act, various matters are specified for determination, but claims for adverse possession are not included.

47. In the case of Republic vs Karisa Chengo & 2 Others [2017] eKLR this Court held that:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

48. It is our view that, if it was intended that claims for adverse possession be determined by the Magistrates’ Court, nothing would have been easier than for Parliament to have expressly enacted such a provision. So that in view of the express provisions of the law, a strict interpretation of section 38 would mean that hearing and determination of such matters is specifically limited to the Environment and Land Court to the exclusion of Magistrates’ Court.”

26. Given that decision by the Court of Appeal, I do not need to consider whether or not the lower court erred in not making a finding that the Appellant had acquired the suit property by adverse possession.

Conclusion

27. In the final analysis and for the foregoing reasons, I find no merit in the Appellant’s appeal. The appeal is dismissed with each party bearing its own costs.

DELIVERED AND SIGNED AT KISUMU ON THIS 27TH DAY OF JANUARY 2025

S. OKONG’O



JUDGE

Judgment delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Mwamu for the Appellant

Mr. Munuang'o for the 1st Respondent

N/A for the 2nd Respondent

Ms. J.Omondi-Court Assistant

