



**Oswago v Ododa (Environment and Land Appeal 35 of 2020)  
[2022] KEELC 14678 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14678 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT AND LAND APPEAL 35 OF 2020  
MN KULLOW, J  
OCTOBER 31, 2022**

**BETWEEN**

**ISACK MBUGE OSWAGO ..... APPELLANT**

**AND**

**MARTIN SHIKUKU ODODA ..... RESPONDENT**

**JUDGMENT**

**A. Introduction**

1. This appeal emanates from the judgment and decree of Hon EM Nyagah delivered on June 2, 2016 in Migori CMCC No 462 of 2014, in which the plaintiff's claim against the defendant was allowed as prayed. The grounds in the memorandum of appeal are that: -
  - i. The learned trial magistrate erred in law and in fact by failing to hold that the appellant had acquired adverse possession of the suit land.
  - ii. The learned trial magistrate erred in law and in fact in failing to hold that the respondent's title was adverse to the appellant's occupation of the suit land.
  - iii. The learned trial magistrate erred in law and in fact in holding that proprietorship by registration is the only proof of ownership of land.
  - iv. The learned trial magistrate erred in law and in fact in ignoring and/or failing to analyse in totality the evidence tendered by the appellant and his witnesses.
2. A brief background to bring the appeal into perspective is that; the plaintiff/ respondent instituted the suit *vide* a plaint dated November 19, 2014 seeking against the defendant/appellant, an order of eviction from the land in dispute No Suna East/ Wasweta I/ 7203 and costs of the suit. It was the plaintiff's claim that he is the registered proprietor of the suit parcel measuring 0.09 Ha. However, the defendant without any color of right of ownership, trespassed and encroached into the suit land



without consent and proceeded to construct illegal structures thus denying the plaintiff the right to use the property.

3. The defendant/appellant in response to the plaint filed a statement of defence dated December 16, 2014 wherein he denied the allegations of trespass made by the plaintiff and further stated that he has resided on the suit property continuously and for an uninterrupted period since 1985. It was thus his claim that he has by virtue of the said occupation, acquired adverse possession and interest over the plaintiff's title over the suit land.
4. The suit was heard and judgment was delivered on the June 2, 2016 whose effect was to allow the plaintiff's claim against the defendant and order for the eviction of the defendant and his family from the suit property hence the instant appeal.
5. This appeal was transferred from the High Court to this court, which is vested with the requisite jurisdiction to hear and determine the same given to the subject of the appeal. On July 6, 2020, directions were issued that the appeal be canvassed by way of written submissions. However, I do note that only the appellant filed his submissions dated May 21, 2020 which I have taken into consideration in arriving at my decision. Be that as it may, I will proceed to render my decision as hereunder.

### **appellant's Submission**

6. He submitted on the 4 grounds of appeal collectively; it was his submission that he had been in open, continuous occupation of a portion of the suit land measuring 30 by 50 meters for uninterrupted period of over 12 years, the same was reiterated during the hearing when his witnesses narrated the genesis of his occupation of the suit land since 1989 together with his family. Further, it was his submission that during the said period, they had buried their relatives thereon without any objection from the respondent and his family.
7. He further submitted that his testimony together with that of his witnesses was never challenged in cross-examination which demonstrated that the respondent was aware of the appellant's occupation.
8. It is his contention that the trial magistrate failed to address the evidence tendered on adverse possession placed before him for consideration. It is his submission that the trial magistrate ought to have discussed the evidence and the merits thereof while delivering his judgment
9. He relied on the cases of *JKN & 2 Others v TMN & 2 Others [2019] eKLR* and *Gulam Mariam Noordin v Julius Charo Karisa* Civil Appeal No 26 of 2015 in support of his case.

### **Analysis and Determination**

10. I am of the considered view that the main issue for determination is whether this court should interfere with the exercise of discretion by the trial court by setting aside and substituting its judgment delivered on June 2, 2016 and I will proceed to discuss the same on account of;
  - i. Jurisdiction by the trial court to determine claims of adverse possession
  - ii. Whether the appellant is entitled to the orders sought in the memorandum of appeal.
11. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion and the same does not entail taking on board matters which were never brought to the trial court's attention or were not subject of the said court's consideration. See the Court of Appeal decision in *Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR*.



12. Further, the Court of Appeal in *Selle v Associated Motor Boat Co [1968] EA 123* held as follows: -

“this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

13. At the centre of the dispute between the parties herein is the ownership of suit property No Suna East/ Wasweta I/ 7203, measuring approx. 0.09Ha. The appellant contends that he is the rightful owner of the suit property having acquired the same by virtue of adverse possession. He maintains that he adduced evidence in support of his claim on adverse possession which was further buttressed by the testimony of his witnesses who testified that he had been living on the suit parcel since 1989 and thus had acquired rights and interests over the suit parcel adverse to the respondent’s title and rights over the same. The respondent in the lower court maintained that he was the registered proprietor of the suit land and produced a copy of certificate of official search to prove the said assertions.

14. The appeal herein is centred on the issue of adverse possession; the appellant maintains that he has acquired the suit land by virtue of adverse possession and further that the trial court did not take into consideration his evidence on adverse possession in arriving at his judgment. I will now proceed to determine whether the trial court was vested with the requisite jurisdiction to determine a claim on adverse possession and to re-evaluate each of the party’s claim from the trial court record and the subsequent judgment in determining whether the trial magistrate exercised his discretion correctly.

15. On whether the trial court had the requisite jurisdiction to determine claims of adverse possession, section 38 (1) of the *Limitation of Actions Act* provides as follows: -

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. An order made under subsection (1) shall on registration take effect subject to any entry on the register which has not been extinguished under this act.
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.

16. section 38 above only specifies the High Court as the court before which a person who claims to have become entitled to land by adverse possession may seek an order that he be registered as the proprietor of the land. However, upon the establishment of the Environment and Land Court pursuant to article 162 (2) (b) of the *Constitution*; the term High Court under section 38 of the *Limitation of Actions Act* should be construed to mean the Environment and Land Court.



17. In the case of *Njoki Wainaina v Josephat Thuo Githachuri & 3 others; National Land Commission & another (Interested Parties) [2021] eKLR* Oguttu Mboya J. had this to say on whether the magistrate's courts are properly vested with the requisite jurisdiction to determine claims on adverse possession;
- “Nevertheless, I beg to point out that the cause of action pertaining to adverse possession, is neither covered by the provisions of the *Environment and Land Court Act*, 2011, the *Land Registration Act*, 2012, nor the *Magistrates Court Act 2015*. For clarity, the cause of action on adverse possession is premised on section 7, 9, 17, 37 & 38 of the *Limitation of Actions Act*, chapter 22, Laws of Kenya and thus the operative act, for purposes of determining jurisdiction, is the said *Limitation of Actions Act* and not otherwise...”
18. Further, in the case of *Jesee Njoroge Gitau v Kibuthu Macharia & another [2019] eKLR*, M C Oundo J held as hereunder;
- “It is clear from the above provisions of the law that the magistrate's courts have no jurisdiction to try matters where a party is seeking adverse possession. Indeed, if both matters had been filed in this court, the best order suited to issue upon this application would have been an order for consolidation of both the matters. However, this is not the case in question.”
19. From a look at the record of appeal, I do note that at page 15 of the record of appeal; the appellant rightfully stated that he was aware that the trial court lacked jurisdiction to confer rights arising as a result of adverse possession since that is the preserve of the Environment and Land Court. The appellant thus ought to have filed a suit as prescribed by the statute and the rules in the Environment and Land Court in the first instance to determine the claims of adverse possession as alleged. Jurisdiction is key and a court cannot make a step further without jurisdiction. The trial magistrate could not pronounce himself on the issue of adverse possession on account of want of jurisdiction.
20. The supreme court in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR*, where the court observed as hereunder;
- “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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.”
21. Guided by the decisions cited above, I find that the trial court did not have the requisite jurisdiction to entertain and determine a claim on adverse possession made by the appellant.
22. Further and without prejudice to the foregoing, I have noted that the appellant's claim on adverse possession is hinged on a sale agreement entered into sometimes in April 1989. Respectfully, I must point out that adverse possession must start with a wrongful disposition of the rightful owner and be non-permissive, actual, visible, exclusive, hostile and continued over the statutory period. The appellant having entered into a sale of land agreement with the owner of the suit land means that his entry into the suit land was consensual and/or permissive and thus adverse possession cannot arise.



23. The plaintiff's claim in the lower court was on trespass and in view of the foregoing, I find that the learned trial magistrate exercised his discretion properly in allowing the plaintiff's claim. The analysis and subsequent decision was purely made upon examination of the full facts of the case, the evidence adduced in court and the relevant statutory provisions governing the same. I find no need to interfere with the said decision. It is therefore my considered opinion that the appellant herein is not entitled to the reliefs sought in the memorandum of appeal.

**Conclusion**

24. In conclusion, I accordingly find that the appeal is not merited and is therefore dismissed with no orders as to costs. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 31<sup>ST</sup> DAY OF OCTOBER, 2022.**

**MOHAMMED N KULLOW**

**JUDGE**

**In presence of; -**

.....appellant

.....respondent

Tom Maurice – Court Assistant

