



Stephen (Suing as the administrator and representative of the Estate of Oure Omolo Ogaloolo) v Omuko & 2 others (Both sued as administrators, representatives and/or beneficiaries of the Estate of Oluoch Ojuko and in their respective personal capacities) (Environment and Land Appeal E006 of 2023) [2025] KEELC 222 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KEELC 222 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E006 OF 2023
AY KOROSS, J
JANUARY 24, 2025**

BETWEEN

GEORGE OMOLO STEPHEN (SUING AS THE ADMINISTRATOR AND REPRESENTATIVE OF THE ESTATE OF OURE OMOLO OGALOOLO) APPELLANT

AND

MARGARET ANYANGO OMUKO 1ST RESPONDENT

JOYCE AKUMU ODERO 2ND RESPONDENT

TOBIAS TABU ODERA 3RD RESPONDENT

BOTH SUED AS ADMINISTRATORS, REPRESENTATIVES AND/OR BENEFICIARIES OF THE ESTATE OF OLUOCH OJUKO AND IN THEIR RESPECTIVE PERSONAL CAPACITIES

(appeal from the judgment of SPM Hon. J.P. Nandi, which was delivered on 30/12/2022 in Bondo PM ELC Case No. 4 of 2020 (OS))

JUDGMENT

[Both sued as administrators, representatives and/or beneficiaries of the estate of Oluoch Ojuko and in their respective personal capacities]

[This is an appeal from the judgment of SPM Hon. J.P. Nandi, which was delivered on 30/12/2022 in Bondo PM ELC Case No. 4 of 2020 (OS)]



Background of the appeal

1. To contextualise the appeal, before the trial court, George Omolo Stephen (Stephen) who was the appellant's administrator sued the respondents as administrators or representatives of the registered owner of the land parcel no. North Sakwa/Maranda/1436 (suit property) who is Oluoch Ojuka (Ojuka).
2. Ojuka is alleged to have disappeared or died in the 1960s. The respondents were also sued in their personal capacities. From the record, only the 2nd and 3rd respondents are Ojuka's legal representatives.
3. In an amended originating summons (OS) dated 24/11/2021, it was contended the ingredients of adverse possession had been met because the appellant had occupied and farmed the suit property since 1971 and upon his demise on 11/07/1984, his children, including Stephen, continued to farm to the date of filing suit.
4. Consequently, the following reliefs were sought: -
 - a. A declaration that the appellant had acquired the suit property which measured 2.2 ha or thereabouts by adverse possession, and therefore, the respondents' beneficial interest and that of Ojuka's title had been extinguished by Section 17 of the [Limitation of Actions Act](#).
 - b. The appellant be registered as the proprietor of the suit property in place of Ojuka.
 - c. At their own cost, the respondents do transfer the suit property to the appellant and the deputy registrar of the court does undertake to transfer, sign, execute or endorse any relevant documents and/or instruments of transfer.
 - d. Permanent injunction be issued prohibiting the respondents, their respective agents, employees, servants, personal representatives and/or assigns from evicting, removing, dispossessing, alienating and/or interfering in any manner with the appellant's ownership and or possession of the suit property.
 - e. Costs of the suit be borne by the respondents.
5. The amended OS was opposed by the 1st respondent's replying affidavit deposed on 27/05/2020. This affidavit was sworn with the authority of the 2nd respondent. The 3rd respondent did not oppose the motion.
6. By it, the appellant's assertions that he occupied the suit property were denied. She asserted that if it were true, nothing could be easier than for the appellant to substantiate his allegations with pictorial evidence.
7. Instead she asserted that at times, the suit property would be left vacant or farmed by Ojuka's family.
8. The matter proceeded to a hearing and the appellant testified as PW1 and produced documents respectively marked as Pex.1-7. His evidence was led by Rose Akinyi Oyoo (PW2), Ruth Auma Otieno (PW3) and Joseph Anyango Amenya (PW4). As for the respondents, only the 1st respondent testified as DW1.
9. After hearing the parties, the matter was reserved for judgment. In the impugned judgment that the learned trial magistrate rendered, he framed the issue for determination as to whether the appellant had met the threshold of adverse possession and warranted the grant of the orders sought. He found the negative and dismissed his case.



Appeal to this court

10. Dissatisfied by the impugned judgment, the appellant filed his memorandum of appeal dated 20/01/2023 which faulted the learned trial magistrate on 5 grounds.
11. Being aware of the shortcomings of the grounds as they were not concise and repetitive, in submissions dated 15/06/2024 filed by his law firm on record M/s. Achola Jaoko & Co. Advocates, he collapsed them into a singular ground of whether the learned trial magistrate erred in finding the appellant had not met the threshold of adverse possession.
12. Accordingly, the appellant implored this court to allow the appeal, set aside the impugned judgment, and allow reliefs sought in the amended OS and costs of the appeal and the lower court suit.

Submissions.

13. As directed by the court, the appeal was canvassed by written submissions. The appellants' submissions were highlighted earlier herein and he argued the appeal on the summarised ground.
14. The respondents who were represented by the law firm of Ms. Rukungu Mwongela Yashim & Co. Advocates did not file any submissions.
15. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the appellant's counsel's arguments on the particular issue and also consider provisions of the law and judicial precedents that were relied upon to advance the arguments.

Issues for determination

16. Being a 1st appeal, the power of this court is set out in Order 42 Rule 32 of the Civil Procedure Rules. Being steered by the principles enunciated in the well-cited case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, this court will not interfere with the impugned judgment save this court satisfies itself the learned trial magistrate misdirected himself thus arrived at an erroneous decision, undoubtedly exercised his discretion wrongly and occasioned injustice by such erroneous exercise.
17. Turning to the matter at hand, I have carefully considered the records, appellant's submissions, provisions of law relied upon, and judicial precedents cited and the issue for resolution is the condensed ground of appeal as contained in the appellant's submissions.

Analysis and Determination

18. The doctrine of adverse possession is statutorily underpinned in our *Limitation of Actions Act*. The relevant provisions are found in Sections 7, 13 and 38 thereof.

Section 7 provides that:

“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.”

Section 13 states that: -

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where



under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”

Lastly, Section 38 (1) elucidates that: -

- “(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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.”

19. The principles of law on adverse possession are settled in Kenya and the burden is usually on the adverse possessor to strictly prove all the elements of adverse possession to the required standards.
20. The appellant’s submissions extensively dealt with the principles of adverse possession whose principles are settled and reliance was placed on the Court of Appeal decision of Samuel Kihamba v Mary Mbaisi [2015] eKLR where the court expressed itself thus: -

“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land.”

21. An analysis of the law and judicial precedents as applied in the impugned judgment displays the learned trial magistrate did appreciate the law on adverse possession. On juxtaposing the evidence against the principles, the learned trial magistrate reasoned the appellant had not proved his occupancy and ultimately found the appellant had not proved his case.
22. The appellant faulted this finding and submitted the appellant proved possession and this was substantiated by orders issued in Bondo ELC no. E035 of 2021 which was between the 3rd respondent as plaintiff and appellant herein as defendant.
23. I have looked at the orders issued in Bondo ELC no.E035 of 2021 on 23/09/2021 which issued amongst others temporary restraining orders against the appellant.
24. This decision of Bondo ELC no. E035 of 2021 does not in any way help the appellant’s case since a court cannot injunct what has already happened as held in Stanley Kirui v. Westlands Pride Limited (2013) eKLR. Instead, it lends credence that the appellant was never in occupation of the suit property.
25. In any case, they were interlocutory orders and a final finding of that case was yet to be made.



26. This court is aware that the appellant's application for leave to introduce new evidence was declined by a ruling of this court rendered on 29/02/2024.
27. Pointedly, it must be borne in mind that claims of adverse possession are matters of facts that are observed on the land and it was incumbent upon the appellant to prove such facts as it is settled law that he who alleges must prove.
28. On evidentiary burdens, courts are usually guided by Sections 107-109 of the Evidence Act. The appellant's occupancy having been rebutted, the legal and evidential burden shifted to the appellant to prove he was indeed in occupation.
29. Because it was the appellant who desired to be deemed an adverse possessor and as required by Section 107(1) of the Evidence Act, the burden lay upon him to substantiate his allegations as they were essential to his case.
30. The appellant contended he had farmed on the suit property since 1971 and it was expected for him to show by evidence including photographs of the crops and trees he planted, proof of the earnings he had earned from the suit property or a survey report to show the extent of his occupation as he seemed to own a neighbouring land. However, all these were not forthcoming.
31. Having failed to prove occupation, it is unnecessary to consider the other principles of adverse possession. For the reasons herein, I concur with the findings of the learned trial magistrate that the appellants did not prove his claim of adverse possession to the required standards.
32. Consequently, for the reasons and findings stated herein above, I find the appeal is not merited and I hereby dismiss it. It is trite law costs follow the event and I award costs to the respondents.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 24TH DAY OF JANUARY 2025.

HON. A. Y. KOROSS

JUDGE

24/01/2025

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

In the Presence of:

Mr. Jaoko for the appellant

N/A for the respondent

Court assistant: Ishmael Orwa

