



**Odino v Otero & another (Environment and Land Appeal
E019 of 2024) [2025] KEELC 4635 (KLR) (11 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4635 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E019 OF 2024**

**A NYUKURI, J
JUNE 11, 2025**

BETWEEN

MICHAEL INDIMULI ODINO APPELLANT

AND

TIMOTHEO ODONGO OTERO 1ST RESPONDENT

JAFRED AMEYO ODONGO 2ND RESPONDENT

JUDGMENT

Introduction

1. Michael Indimuli Odino the appellant in this appeal, has challenged the judgment of Honorable E. Wasike (Principal Magistrate), delivered on 23rd April, 2024 in Butere MCELC Case No. 89 of 2018 as consolidated with Butere MC ELC OS No. 18 of 2023. In the impugned judgment, the learned trial magistrate found that the plaintiff had proved his ownership claim while the defendant had failed to prove his claim of adverse possession over the disputed property.

Background

2. By a plaint dated 20th August, 2018 Timotheo Odongo Otero and Jafred Ameyo Odongo sued Michael Indimuli Odino claiming that they were the registered proprietors of the parcel of land known as Marama/Lunza/1757 which parcel shares a common boundary with the defendant's parcel of land known as Marama/Lunza/3424.
3. They stated that in 2014, the defendant interfered with the common boundary between the two parcels of land and in 2015, the defendant trespassed into the plaintiff's land and built one house inside the plaintiff's parcel No. 1757 and another house on the common boundary. They complained that despite interventions by the local administration and County surveyor, the defendant's commitment



to remove the said houses, he has failed to remove them. The plaintiffs sought for eviction of the defendant from Parcel No. Marama/Lunza/1757 (suit property) together with costs.

4. By a defence dated 24th September, 2018, the defendant denied the plaintiff's claim and averred that there is a road between his parcel and the plaintiff's parcel. He stated that in 2016 he received summons regarding a boundary dispute hearing slated for 18th March, 2016. That he could not attend the said hearing because he had another case being Butere Criminal case No. 18 of 2015 which he needed to attend, on the said date. That the boundary dispute was determined by the land registrar and surveyors in his absence and in the absence of the 2nd plaintiff. He stated that he complained to the District Land Registrar and was advised to appeal to the Chief Land Registrar in Nairobi which he did. Further that having been arrested thereafter he committed himself before police officers to demolish his house and that the commitment was done under duress and threats of imprisonment.
5. The defendant stated that the 2nd plaintiff had instituted case ELC No. 215 of 2017. He sought for the dismissal of the plaintiff's claim. The defendant also filed Kakamega MCELC Case No. 18 of 2023 claiming a portion of the suit property measuring 0.1 acre by adverse possession. This claim was denied by the plaintiff. The two suits were consolidated on 17th October 2023.
6. The suit was heard by way of oral evidence. The plaintiff presented one witness while the defendant presented three witnesses.

Plaintiff's evidence

7. PW1 was Jafred Ameyo Odongo the 2nd plaintiff. His testimony was contained in his witness statement dated 20th August, 2018 which he adopted as his evidence in chief and produced a list of documents filed. His evidence was that his home is on parcel No. Marama/Lunza/1757, as his father the 1st plaintiff allocated that land to him in 1979. He stated that the defendant was his neighbour and owned parcel No. Marama/Lunza/3424 which parcel shares a common boundary with parcel No. Marama/Lunza/1757.
8. He asserted that in 2014, the defendant destroyed the common boundary between parcel Nos. Marama/Lunza/1757 and 3424 prompting him to report the incident to the chief and District Officer in vain. That in 2015, the defendant built a house on the common boundary and another house on parcel Marama/Lunza/1757 without the plaintiff's permission.
9. He averred that on 18th March, 2016, he engaged the Land Registrar and surveyor, who visited the suit properties and established that the defendant had built a house on the plaintiff's parcel Marama/Lunza/1757 and another house on the common boundary between the two parcels. According to him, the Land Registrar and Surveyor directed the defendant to remove the two houses within six months, a directive the defendant disobeyed.
10. He stated that he lodged a complaint of Criminal trespass against the defendant upon which the defendant voluntarily agreed to remove the two houses in six months which led him to withdraw the criminal charges against the defendant. That the defendant failed to act as he had promised prompting the filing of this case.
11. On Cross-examination, he stated that his land was parcel No. Marama/Lunza/1757 and that he began living there in 1979. Further that the defendant purchased a neighbouring parcel long after he had settled on his parcel. He conceded that they both purchased land from one person, one Michael Indimuli. He stated that he realized the boundary dispute in 2016. He denied allegations that there was a road between his land and the defendant's land. He stated that there was a road in his land which is not a public road and which he uses.



12. He insisted that the defendant built a house on the common boundary and that the surveyor's report did not address the issue of the road. He stated that the defendant demolished his houses which were on the boundary and on the plaintiff's land. He maintained that the defendant had encroached on his land in 2016. In cross examination he stated that there is no road separating his land from the defendant's land and stated that the road in his land is not the boundary. That the defendant demolished his houses in 2017 and that now he does not occupy any of his land. That marked the close of the plaintiff's case.

Defendant's evidence

13. DW1 was Michael Indimuli Odino who adopted his witness statement dated 24th September, 2018 as his evidence in chief. His testimony was that he was the owner of parcel Marama/Lunza/3424 and that a road separates his parcel from parcel Marama/Lunza/1757 as per mutations of 30th March, 2012. He confirmed having received summons from the Land Registrar Kakamega on 15th March, 2016 requiring him to attend the Land Registrar for determination of a boundary dispute on 18th March, 2016. He stated that on 16th March 2016 he wrote to the land registrar requesting for a change of date since he had another case at Butere for the same date.
14. He complained that the Land Registrar visited the site in his absence. That he made a complaint/appeal to the Chief Land Registrar in Nairobi but is yet to get any response. He further stated that he did not agree with the Land Registrar's report, since the road separating his parcel from the plaintiff's land is on a registered map. He insisted that the uncertainty was where the plaintiff's boundary borders parcel Marama/Lunza/1826. He stated that the local administrators and the plaintiffs were harassing him, having him locked up in police cells and forcing him to sign agreements under duress. He sought for a fresh boundary determination which he asked be done in his presence and that the boundary of the plaintiff's land and parcel No. 1826 be ascertained.
15. In cross examination, he stated that he was not utilizing the plaintiff's land as stated in his defence. He also stated that he was claiming a quarter an acre from parcel No. 1752 which has never been PW1's land and that his claim was for adverse possession. He stated that he had not availed an official search. In reexamination, he stated that he was utilizing the land he bought in 1990.
16. DW2 was Josea Onyimbo. He adopted his witness statement dated 13th October, 2023 as his evidence in chief. On cross examination, he stated that the parties in this case are his neighbours and that each of them uses their portion. Further, that none of the parties have trespassed on another's land. He stated that he was present when the surveyor visited the land and established the boundary and that the boundary was inside DW1's land. That there was a road being used by the public but that PW1 closed it. He stated that a road separates PW1's land and DW1's land.
17. DW3 was Peter Andeyi Andati. His testimony was that he knew both parties in the suit as their parcels abut each other. In cross examination, he stated that he was aware of the boundary dispute and that he was present when the surveyor visited the land and established the boundary. That the boundary was inside DW1's land. In re-examination he stated that DW1 had constructed a house on the boundary. That marked the close of the defence case.
18. Upon consideration of pleadings, evidence and submissions, the trial court found that the plaintiffs had proved that the defendant had trespassed on their land and the boundary; that each party was now in their portion of land and that the defendant failed to prove adverse possession. Consequently, the learned magistrate ordered that the defendant be evicted and restrained from interfering with the plaintiff's land. The court dismissed the defendant's claim of adverse possession and awarded costs of the suit to the plaintiff.



19. Aggrieved with the judgment of the trial court, the appellant who was the defendant before the trial court, appealed against the same vide a Memorandum of Appeal dated 7th May, 2024 citing the following six grounds of appeal:
- a. The Trial Magistrate erred in Law by not analyzing the evidence on record and hence wrong Judgment.
 - b. The Trial Magistrate erred in law by not considering the survey report dated 7/12/2022 in full while making this Judgment.
 - c. The Trial Magistrate erred in law by not considering that the two parcels of land have a six meter road separating them hence case of trespass and eviction couldn't arise.
 - d. The Trial Magistrate erred in law by not putting into consideration of the Lower Court Order dated 1/7/2021 of ascertaining of the uncertain boundary between land parcel No. Marama/lunza/1757 and Marma/lunza /1824, 1825, 1826 which was not complied with and or addressed by the surveyors.
 - e. The Trial Magistrate erred in law by in consideration of the map on the physical planning record that show clearly no common boundary between the suit lands.
 - f. The Trial Magistrate erred in law by stating the defence witnesses were present during the survey of the report dated 25.5.2016 which is not the case.
20. Consequently, the appellant sought orders that judgment of the lower court be set aside and costs of the appeal be awarded to him.
21. The appeal was canvassed by way of written submissions. On record are submissions filed by the appellant dated 14th October, 2024 and those filed by the respondent dated 3rd February, 2025.

Appellant's submissions.

22. The appellant submitted that the trial court erred in failing to appreciate the weight of the evidence on record which showed that he bought the suit property in 1988 and settled thereon in 1990. He stated that save that the respondent bought his parcel in 1979, they both purchased their respective parcels from one person and that the boundaries were intact up to 2016, a period of 26 years. He argued that for this period, the respondents never raised trespass or boundary disputes.
23. Further, the appellant faulted the trial court's finding arguing that the trial magistrate was wrong in failing to find that there was a 6-meter road separating the two parcels of land contrary to defence evidence at pages 105, 106 and 125 of the record. He faulted the respondents' and surveyor's assertion that the parties' parcels shared a common boundary.
24. The appellant also argued that the trial court erred in accepting the surveyor's report dated 07.12.2022 which was contrary to the orders of 01.07.2021 as the order required the surveyor to ascertain the boundaries of parcel Nos. Marama/Lunza/1757 and 1824, 1825 and 1826.
25. It was further submitted by the appellant that the learned trial magistrate erred in stating that the defence witnesses were present during the survey process on 25.05.2016 when they were not present as per the surveyor's report dated 25.05.2016. He maintained that the survey was carried out in his absence as he was attending to Butere Criminal Case No. 18 of 2015. He argued that he sought for resurvey leading to the order of 01.07.2021 but that resurvey was not carried out in compliance with the said court order.



26. The appellant also contended that the surveyor's report of 25.05.2016 indicated existence of official 6 meter road while the surveyor's report of 07.12.2022 failed to mention the said road and that the discrepancy demonstrated bad faith and influence. The appellant faulted the trial court for declining the request to visit the locus in quo arguing that the refusal was arbitrary. The appellant argued that before the surveyor's report of 07.12.2022, the respondents went ahead to fence of the portion in regard to the appellant's trespass. That although this issue was raised, the trial court failed to address it. That despite granting stay pending appeal, the respondents went ahead to block the 6 meter road, fenced part of the land and cut down the appellant's trees.

Respondents' submissions.

27. Counsel for the respondents' submitted that the trial court properly analyzed evidence before him and reached a right conclusion and judgment that the respondent had not proved his case to the required standard. Counsel argued that the respondents proved their claim of eviction having produced a surveyor's report dated 25th May, 2016 confirming that the appellant had built a house on the common boundary as shown at page 66 of the record.
28. It was contended for the respondent that in filing a claim for adverse possession, the appellant was confirming the respondent's claim that he was in possession of land measuring 0.1 hectares belonging to the respondents. Counsel argued that the lower court was right in dismissing the appellant's claim on adverse possession as the same was not proved.
29. On the second ground of appeal, counsel submitted that the trial court rightly considered the survey reports filed. Counsel observed that in the surveyor's report of 07.12.2022, the surveyor advised parties to respect the boundaries fixed as per the surveyor's report dated 25.05.2016. Counsel argued that the appellant failed to give plausible arguments in support of the second ground of appeal.
30. Counsel also argued that the appellant was the author of his own fate since his claim of adverse possession confirmed the respondent's claim of trespass. On the fourth ground of appeal, counsel submitted that the appellant was misleading the court as the order of 01.07.2021 was implemented and a resurvey was done leading to the report dated 07.12.2022. It was also contended for the respondents that there was no merit in the fifth ground of appeal and it ought to be dismissed.
31. Regarding the sixth ground of appeal, counsel submitted that the court rightly found that the appellant's witnesses were present during the survey process as their evidence in cross examination confirmed their presence during the survey process. Counsel urged the court to dismiss the appeal.

Analysis and determination

32. The court has carefully considered the appeal, the entire trial court record and the parties' rival submissions. The role of this court as a first appellant court is to rehear the dispute. It therefore must re-assess, re-evaluate and re-analyze the facts and the law and make its own independent conclusions. This position was stated in the case of *Selle & Another –vs- Associated Motion Boat Co. Ltd & Others* (1968) EA 123.
33. Having considered the grounds of appeal, it is clear that the issue for determination is whether the trial magistrate was wrong in concluding that the respondents had proved trespass against the appellant and whether the trial court was wrong in concluding that the appellant had failed to prove his claim of adverse possession against the respondents.



34. It is not in dispute that the respondents' parcel No. Marama/Lunza/1757 abuts the appellant's parcel No. Marama/Lunza/3424. The latter was a subdivision of parcel 2301 and was registered on 21st May 2012 while the respondents parcel was registered on 2nd September 1982.
35. The respondents produced a report dated 25th May 2016 by the District Surveyor Kakamega which showed that the appellant's house was on the common boundary of the two parcels. This was subsequent to the summons by the land registrar served on the appellant on 15th March 2016 requiring him to attend the boundary dispute hearing on 18th March 2016. This demonstrates that the land dispute was determined by the land registrar under section 19 (1) of the Land Registration Act. Although the appellant alleges that he could not attend the boundary dispute hearing as he was unavailable on 18th March 2016 attending a criminal case in Butere law courts, there is nothing to show that he sought to set aside the determination or that he appealed against the same as provided for in Regulation 40 (6) of the Land Registration (General) Regulations.
36. In the premises, I find and hold that the appellant was bound by the boundary dispute determination by the land registrar dated 25th May 2016.
37. During hearing of this matter, on the application by the appellant dated 14th April 2021, on 1st July 2021, the court ordered the land registrar and surveyor to re-establish the boundary between his parcel and the respondents' parcel and also the respondents' parcel and parcel Nos. 1824, 1825 and 1826. Pursuant to that order, the land Registrar visited the locus in quo on 27th October 2022, in the presence of all the parties, the area chief and assistant chief and other witnesses. The Land Registrar could not survey parcel 1826 as it belonged to persons not parties to the dispute. The land registrar was able to establish the boundary between the appellant's land and the respondents' land and the boundary was planted in the presence of all the parties. It appears that the land registrar in planting the boundary between the parties herein created a road between the two parcels. The appellant was dissatisfied with the new boundaries and sought to have the exercise by the land registrar nullified, but the application was dismissed on 5th September 2023. Although the order of 1st July 2021 required establishment of boundaries between parcel 1757 and the appellant's parcel 3424, and establishment of the respondent's parcel 1757 and parcels 1824, 1825 and 1826; the latter boundary and parcels were not disputed and the owners thereof were not parties to this suit and therefore it is my finding that the failure to establish the boundaries for parcels 1824, 1825 and 1826, did not adversely affect the dispute or the rights of the parties herein since the owners thereof were not party to this dispute. And the record shows that the owner of 1826 declined the resurvey on the ground that he was not party to the dispute. On that basis, it is my view that no injustice was suffered by the appellant on the basis that land not in dispute was not resurveyed.
38. From the determination of the land Registrar as supported by the surveyor's report of 25th May 2016, it is clear that the appellant had trespassed on the respondent's land. The appellant failed to present a contrary report that would show that there was no trespass. Besides, in his case Butere MC Case No. 18 of 2023, the appellant categorically stated that he was in occupation of 0.1 acres of parcel Marama/Lunza/1757 since 1990 and had acquired it by way of adverse possession. Therefore, the appellant cannot be heard to speak from both sides of the mouth, on one hand stating that he is not on parcel Marama/Lunza/1757 and on the other hand alleging to have acquired part of it by adverse possession. In the premises, I find and hold that the trial court was right in finding that the appellant had trespassed on the respondents' parcel No. Marama/Lunza/1757.
39. On the appellant's complaint that the trial magistrate wrongly stated that defence witnesses were present during the survey exercise that led to the report of 25th May 2025, it is my view that the record is clear that the defence witnesses in cross examination conceded to have been present during the survey



exercise and therefore, the learned trial magistrate cannot be faulted for recording what was said by witnesses.

40. Regarding the appellant's claim of adverse possession, a claim for adverse possession is anchored on provisions of the *Limitation of Actions Act*. Sections 7, 13, 17 and 38 of the Act provides as follows;

Section 7 states as follows;

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 provides as follows;

1. A right of action to recover land does not accrue unless the land is in the possession of some persons 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 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.”

Section 17 provides that;

“Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

Section 38(1) and (2) 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 of this Act, or land comprised in a lease registered under any of these 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 sub-section (1) of this Section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”
41. Essentially, upon expiry of 12 years, a person who has had open, and continuous possession of land registered in the name of another person may apply to this court for an order that he has become entitled to that land by adverse possession.
42. The principles of establishing adverse possession are now well settled. In the case of *Mtana Lewa vs. Kahindi Ngala Mwangandi* [2015] eKLR, the court described adverse possession in the following terms;

Adverse possession is essentially a situation where a person takes possession of land and 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, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the Adverse Possession is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, which is in these terms;

“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.”

43. Similarly, in the case of *Mbira vs. Gachuhi* [2002] IEALR 137, the court held as follows;

“.....a person who seeks to acquire title to land by the method of Adverse Possession for the applicable Statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption.”

44. Therefore, for a claimant to succeed in a claim for land under the doctrine of Adverse Possession he/she must demonstrate that they have been in possession of the land in issue peacefully, openly, continuously, without force, publicly and without the owner’s permission for a period of over 12 years. The claim must be against the title holder and the Adverse Possessor’s claim ought to have been hostile to the true owner of the land.

45. In the case of *Gabriel Mbui v. Mukindia Maranya* [1993] eKLR, the court described adverse possession as follows;

The non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner’s enjoyment of land for purposes of which the owner intended to use it.

46. The rationale for adverse possession was stated in the case of *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR where the Court of Appeal cited with approval the case of *Adnam v Earl of Sandwich* (1877) 2 QB 485 where it was held as follows;

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”

47. In the instant case, while the appellant pleaded that he has been in occupation of the suit property since 1990, the respondent maintained that the trespass began in 2016. The record however shows that no evidence of occupation from 1990 was presented by the appellant. In addition, the appellant confirmed having demolished the houses he had built inside parcel No. 1757. I therefore agree with the findings of the trial court that the appellant failed to prove that he had been in peaceful, uninterrupted, open



and continuous possession of part of the respondents' land for a period of 12 years. In the premises, I find and hold that the trial court was right in concluding that the respondent proved trespass against the appellant, while the appellant failed to prove adverse possession against the respondents.

48. The upshot is that I find no merit in this appeal which I hereby dismiss with costs to the respondents.

49. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 11TH DAY OF JUNE, 2025

A. NYUKURI

JUDGE

In the presence of;

Mr. Michael Indimuli Odino the appellant in person

No appearance for the respondents

Court Assistant: M. Nguyai

