



**Gomba v Owuor (Environment and Land Appeal 62 of 2022)
[2024] KEELC 642 (KLR) (13 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 642 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 62 OF 2022
GMA ONGONDO, J
FEBRUARY 13, 2024**

BETWEEN

RICHARD ONG'OU GOMBA APPELLANT

AND

JOHN ODHIAMBO OWUOR RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. B. Omwansa, SPM in Oyugis SPMC Environment and Land Case No. 102 of 2018 delivered on the 13th July, 2022.)

JUDGMENT

1. The present appeal was precipitated by the judgment of the trial court (Hon. B.O. Omwansa, SPM) where the learned magistrate reasoned that the plaintiff who is the respondent herein had proved his claim against the appellant who was the defendant therein as required by law and that the claim fully rebutted the latter's counter claim.
2. The appellant was dissatisfied with the said judgment and through Gogi and Associates Advocates, mounted the appeal by way of the memorandum of appeal dated 20th December 2023 and filed on even date based on the grounds infra;
 - a. The Learned Trial Magistrate erred both in fact and in Law in dismissing the Appellants Counterclaim.
 - b. The Learned Trial Magistrate erred both in law and in fact in failing to consider the Appellants submissions to come to a conclusion that the Respondents claim was baseless. The court decision is therefore unsustainable and baseless in the circumstances.
 - c. The Learned Trial Magistrate erred in Law and in fact, by failing to dismiss the Respondent's suit with costs to the Appellant.
3. Thus, the appellant has sought the following orders;



- a. The judgment and/or order of the Learned Trial Magistrate dated 13th July 2022, be set aside and/or quashed.
 - b. The Honourable Court be pleased to allow the Appellants Suit dated 28th February 2019.
 - c. That the Honourable Court be pleased to substitute an order dismissing the Respondent's counter-claim in the subordinate court vide the Original Oyugis SPMC Environment and Land case No.102 of 2018.
 - d. Costs of the Appeal herein and those incurred in the subordinate court be borne by the Respondent.
 - e. Any such and/or further orders that the Honourable Court shall deem just and expedient in the circumstance.
4. On 22nd May 2023, the court directed that the appeal be heard by way of written submissions pursuant to directions of 22nd May 2023.
 5. Consequently, learned counsel for the appellant filed submissions dated 27th November 2023 making reference to the grounds of appeal and implored the court to dismiss the respondent's claim in the trial court and allow the appellant's counter claim. Counsel set out the background of the matter including the parties' respective pleadings and the testimonies of witnesses before the trial court. Counsel submitted, inter alia, that it is common ground that the appellant has been in open, peaceful and uninterrupted occupation of the suit property namely Title No. West Kasipul/Kodera Karabach/50 for more than 12 years hence, established adverse possession over the same.
 6. Furthermore, it was submitted that the time for limitation period accrued from 1969 to 1985. Counsel cited sections 7 and 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya, the case of Mate Gitabi-vs-Jane Kabubu Muga & others Nyeri Civil Appeal No. 43 of 2015 and that of Mtana Lewa-vs-Kahindi Mwagandi (2015) eKLR, to buttress the submissions.
 7. On the other hand, Kisaka & Associates Advocates for respondent filed submissions dated 22nd January 2024 mentioning the grounds of appeal, the orders sought herein and that the trial court's judgment was well anchored herein. Counsel opposed the appeal and framed triple issues for determination in line with the said grounds.
 8. Further, counsel submitted, among others things, that the appellant did several surveys in respect of the boundaries of the suit property and the reports thereof confirmed the appellant's encroachment into the suit property. That the appellant never moved the court as envisaged under section 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya and cannot claim adverse possession over the suit property. That the appeal is improperly before court thus, it should be dismissed with costs. To buttress the submissions, reliance was made on Daniel Kimani Ruchine & others-vs-Swift Rutherford & Co Ltd & another (1977) KLR and Jandu-vs-Kirplal & another (1975) KLR, among other authoritative pronouncements.
 9. It is noteworthy that the respondent sued the appellant before the trial court by way of a plaint dated 16th October 2017 for;
 - a. An eviction order against the defendant by himself, his family member anybody acting upon the defendant's instructions from the suit property herein.
 - b. Cost of the suit.
 - c. Any other relief this court would deem fit to grant to the plaintiff.



10. Briefly, the respondent's lamentation is that he is a beneficiary of the suit property registered in the name of his father, Henry Owuor (Deceased) and that he obtained Letters of Administration in respect of the estate of the deceased. That the appellant encroached into the suit property and proceeded to erect semi-permanent structures thereon without the consent of the respondent.
11. In his statement of defence and counter claim dated 28th February 2019, the appellant stated, *inter alia*, that the suit property and two other parcels of land, title numbers West Kasipul/Kodera Karabach/67 and 147, share a common boundary. That the respondent uprooted and destroyed boundary features planted during land adjudication process in early 1970s. That therefore, the appellant filed Oyugis SPMC Misc Civil Application No. 44 of 2015 for an order for ascertainment and determination of boundary of the three parcels of land resulting into a determination thereof. That the appellant has acquired two acres of land where his homesteads are situate by adverse possession. He denied the respondent's claim.
12. In that regard, the appellant sought;
 - a. A declaration that the Counter -Claimer has acquired two (2) acres out of the suit property by adverse possession.
 - b. An order that the defendant to counter -claim do transfer to the Counter -claimer two (2) acres from the suit property and the defendant to the counter-claim do execute all manner of documents to effect transfer, in default, the Executive Officer of this Honourable court to execute the same.
 - c. In the alternative, an Order for the rectification of Register of the suit property by directing that the registration of the late Henry Owuor the father of the Defendant to the Counter -Claim be cancelled and two (2) acres thereof be transferred unto the name of the counter-Claimer.
 - d. Costs of the Counter -claim.
13. The defence to counter claim dated 14th March 2019 by the respondent and the reply to defence to counter claim dated 15th August 2019, by the appellant /counter claimers are both borne in mind. Essentially, the respondent denied the counter claim and the parties substantially reiterated their respective pleadings.
14. On 10th January 2022, the appellant's counsel, Mr. Ochillo orally applied for an amendment of the statement of defence and counter claim that two acres as stated in the appellant's pleading to read one acre. H. Kisaka learned counsel for the respondent responded thereto that the parties had been granted leave of the court to file their documents and the amendment sought could have been done at that point. After hearing counsel for the respective parties, the trial court allowed the application accordingly.
15. In the foregone, the issues for determination are compressed to whether the appeal is tenable based on the grounds set out in the memorandum of appeal.
16. It is settled law that the appellate court has jurisdiction to review with caution, the evidence of the trial court in order to determine whether the conclusion originally reached upon that evidence should stand; see *Peters-vs-Sunday Post* (1958) EA 424 at 429 and *Kenya Ports Authority-vs-Kuston (K) Ltd* (2009) 2 EA 212. Thus, I proceed to exercise the said jurisdiction as hereunder.
17. In his testimony, the Respondent (PW1) relied upon his statement and further stated that he sued the appellant over a boundary as the latter had encroached into the suit property in 1995. That the appellant lodged Oyugis SPC Misc Civil Application No. 44 of 2015 where the District surveyor and



the Land Registrar were directed to ascertain the boundaries of the suit property and the two other parcels of land.

18. Furthermore, PW1 relied on PExhibits 1 to 12 which include; copy of the area map and a copy of Land Registrar's letter concerning determination of the said boundaries. That the Land Registrar's report dated 8th November 2016 indicated that the appellant encroached into the suit property to the extent of half an acre.
19. PW2, Paul Owuor Omog, a brother to the respondent, relied on his statement as part of his testimony that the appellant encroached into the suit property. He testified, *inter alia*, that the trespass was in terms of occupation as captured in two shaded space shown in PExhibit 12.
20. PW3, Selephina Anyango relied upon her statement and told the court that PW1 is her half-brother. That the appellant committed trespass into the suit property and a boundary dispute arose thereby.
21. The appellant (DW1) based part of his testimony on his statement and told the trial court that he did not know his parcel of land where he stays peacefully and no issues thereof. That he has stayed thereat for 10 years and that the deceased never took him to court.
22. Also, DW1 relied on a copy of green card of the suit land, a copy of green card of LR No. West Kasipul/ Koderia Karabach/67 and photographs as DExhibits 1, 2, 3 (a) to (c) respectively. He therefore, urged the court to give him the suit property and dismiss the suit with costs. Under cross examination, DW1 stated thus;

“I have not filed a case to get title by adverse possession.....”

23. DW2, Agnes Akumu, the 5th wife of DW1, relied on her statement as part of her evidence. She told the court that she did not know the parcel in dispute and there is no dispute thereof. That she has her homestead on the land where she has stayed for 20 years and has never been removed therefrom.
24. DW3, Edward Atindo Ngochi, a neighbour to the appellant and the respondent-based part of his testimony on his statement herein. He stated that a homestead of DW1 stands where it is to-date and has stayed thereon over 30 years.
25. The trial court's findings were that by Oyugis SPMC Misc Civil Application No. 44 of 2015, the appellant approached the court to direct the Land Registrar to ascertain the boundaries. That the application was allowed accordingly and thereafter, the Land Registrar filed the report in court.
26. Moreover, the court observed that;

”.....In the view of this court, it is not proper to start authoring the boundaries, this is a preserve of the land registrar. The land registrar had done his work and there is no indication that any appeal was lodged against the Land Registrar's finding.....”

27. The Land Registrar's finding contained in his Report dated 8th November 2016 is that the appellant encroached into the suit property. That the appellant erected his homestead inside the suit property which belongs to the deceased and utilized by PW1. Indeed, PW1 is the legal representative of the deceased by virtue of PExhibit 2 as held in *Rajesh Chudasama-vs-Sailesh Chudasama* (2014) eKLR and the said finding is in consonant with the special procedures as provided for under sections 18 and 19 of the *Land Registration Act*, 2016 (2012) and I subscribe to the decision in *Speaker of National Assembly-vs-Karume* (1992) KLR 21.



28. Evidently, the boundary dispute in connection with the suit property and the two other parcels of land, was resolved as disclosed in the Land Registrar's report, the testimonies of PW1, PW2 and PW3. There was no appeal preferred from the report.
29. The pleading as well as the evidence of DW1 and evidence of DW2 imputed that DW1 acquired the suit property by adverse possession. I bear in mind the doctrine of adverse possession under section 28 (h) of the Land Registration Act, 2016 (2012) and a long range of authorities including Lewa, Ruchine and Jandu cases (supra) and Wambugu-vs-Njuguna (1983) KLR 172. DW1 denounced his adverse claim over the suit property as stated at paragraph 22 hereinabove.
30. It is crystal clear that the current dispute concerns boundaries and it was determined in favour of the respondent as stated in paragraphs 18, 19, 20, 26 and 28 hereinabove. In the circumstances, adverse possession claim by the appellant would fail. Therefore, the trial court was justified in dismissing the counter claim and entering judgment in terms of the plaint.
31. Further, the appellant's submissions could not aid him in this appeal as submissions are marketing language and do not constitute evidence at all; see Daniel Toroitich Arap Moi versus Mwangi Stephen Murithi and another (2014) eKLR applied in this court's decision in the case of Michael Okworo Wanga versus Joseph Omol Kowiti and another (2023) eKLR.
32. It is therefore, the finding of this court that the learned trial magistrate correctly applied himself to the facts and law in reaching the impugned judgment. There is no reason to disapprove the judgment which is sound at law and proceed to uphold the same.
33. The upshot is that this appeal is devoid of merit. The same is hereby dismissed with costs to the respondent.
34. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 13TH FEBRUARY 2024

GEORGE M. A ONGONDO

JUDGE

PRESENT

D. Gogi learned counsel for the appellant

H. Kisaka learned counsel for the respondent

T. Luanga and M. Obunga, court assistants

