



**Imbo v Kadho & 8 others (Environment and Land Appeal
E022 of 2023) [2024] KEELC 5174 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5174 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E022 OF 2023**

GMA ONGONDO, J

JULY 4, 2024

BETWEEN

DAVID ONENA IMBO APPELLANT

AND

PETER ODINDO KADHO 1ST RESPONDENT

JARED OWUONDAH KADDOH 2ND RESPONDENT

DANIEL KADDOH KADDOH 3RD RESPONDENT

HERMANUS OGUTU KADDOH 4TH RESPONDENT

JOSEPH OCHIENG KADDOH 5TH RESPONDENT

JOSEPH OBIERO NYACHELE 6TH RESPONDENT

JEREMIAH OKIKO ONYIEGO 7TH RESPONDENT

LUCAS ODHIAMBO KADDOH 8TH RESPONDENT

SAMUEL ANYANGO KADDOH 9TH RESPONDENT

*(Being an appeal from the judgment and decree of Hon. Nicodemus
Moseti - Principal Magistrate, delivered on 5th April 2023 in Mbita
Principal Magistrate's Court Environment and Land Case No. 14 of 2019)*

JUDGMENT

1. This appeal arises from the trial court's judgment delivered on the 5th April 2023 by the Honourable Nicodemus Moseti - Principal Magistrate, in Mbita Principal Magistrate's Court Environment and Land Case No. 14 of 2019 wherein he held that the plaintiff/appellant failed to prove his case on a



- balance of probability against the defendants/respondents and dismissed the appellant's case with costs to the respondents.
2. The appellant was aggrieved thereby and mounted this appeal by way of a memorandum of appeal dated 28th April 2023 and filed herein on even date. The Appeal is anchored on grounds 1 to 9 as set out on the face thereof and the same include:
 - a. That the Honourable Trial Magistrate erred in law and fact in dismissing the Appellant's case despite the overwhelming evidence presented by the Appellant in support of this case.
 - b. That the Honourable Trial Magistrate erred in law and fact in dismissing the Appellant's suit while evidently not having considered any of the elements or merits of the Appellant's case.
 - c. That the Honourable Trial Magistrate erred in law and fact and grossly misdirected himself in finding and holding that the Appellant had failed to prove that he was the proprietor of the suit parcels before registration.
 - d. That the Honourable Trial Magistrate grossly misdirected himself in finding and holding that the Appellant had failed to prove that he had acquired the suit parcel of land by way of adverse possession.
 - e. That the Honourable Trial Magistrate erred in law and fact in failing to find in favour of the Appellant that the Appellant's occupation of the suit parcel of land was notoriously, continuous just because PW1 and PW2 in cross-examination stated that they were not aware of it.
 - f. That the Honourable Trial Magistrate erred in law and fact in expanding the burden of proof placed upon the Appellant and requiring him to prove matters and facts that were beyond his scope of knowledge.
 - g. That the Honourable Trial Magistrate erred in law and fact in essentially shifting the burden of proof placed upon the Appellant from one of the balance of probabilities to that of beyond reasonable doubt, and in clear disregard of evidence tendered by the Appellant showing that he has been occupying the suit parcel over 38 years.
 - h. That the Honourable Trial Magistrate grossly misdirected himself in failing to deliberate on the issue of fraud raised by the Appellant yet the same had been pleaded.
 - i. That the Honourable Trial Magistrate misdirected himself in failing to consider the statement of the Appellant and only putting heavy reliance on the PW1 and PW2 statement while ignoring that of the Appellant.
 3. Wherefore, the appellant prays that:
 - a. Appeal be allowed.
 - b. The Judgment and Decree of the trial court dated 5th April, 2023 be set aside.
 - c. The Appellant be awarded the costs of this Appeal and in the Subordinate Court
 4. The appeal was heard by way of written submissions pursuant to this court's directions of 28th February 2024.
 5. The appellant in person filed submissions dated 14th June 2024 referring to the grounds of appeal as well as the plaint dated 8th September 2021, among others and submitted that it was pretty clear that the appellant has been in open and notorious possession of the suit land parcels reference



numbers Kasgunga/Kamreri/2607, 3233, 3243, 3241, 3240, 3314, 3313 and 3244 registered in the respondents' name. That he became aware of such registration in the year 2014. That the respondents did not controvert the issues raised by him in this appeal.

6. Further, the appellant submitted that the trial court relied only on the evidence of PW2 who stated that he was not aware of the adverse possession claim. That the learned trial magistrate failed to consider that the appellant had proved his case against the respondents on a balance of probabilities. To buttress the submissions, the appellant relied upon *Mtana Lewa-vs-Kahindi Ngala Mwagandi (2015) KLR* and *Gabriel Mbui-vs-Mukindia Maranya (1993) eKLR* and others on adverse possession. Thus, he submitted that there was an error in the impugned judgment and implored the court to allow the appeal with costs.
7. The respondents' counsel, Aluoch Odera and Nyauke Company Advocates, filed submissions dated 1st March 2024 terming the record of appeal defective and bad in law as it contains documents that did not form part of the trial court's record. That therefore, the appellant has attempted to produce new evidence on appeal against the law.
8. Furthermore, counsel submitted that the Land Adjudication officer was not named herein yet there are attached actions of the officer in the *Government Proceedings Act*. That the appellant did not produce documents including maps and adjudication records at the trial court to prove his case. That the appellant is claiming ownership of the suit parcels of land and adverse possession over them at the same time. That so, the appellant's position cannot be salvaged at law.
9. In the foregone, the issues for determination are as captured in the grounds of appeal and boil down to:
 - a. Whether the appellant proved adverse possession claim against the respondents in this matter, and
 - b. Subject to issue (a) hereinabove, what orders can be granted in this appeal to meet the ends of justice?
10. It is important to note that the instant appeal being the first one from the trial court, I have the jurisdiction to review the evidence of the trial court in order to determine whether the conclusion originally reached upon that evidence should stand. However, this is a jurisdiction which should be exercised with caution; see *Peters-vs-Sunday Post (1958) EA 424 at 429*.
11. At the trial court, the plaintiff/appellant generated the suit by way of an amended plaint dated 8th September 2021 against the defendants/respondents, seeking the following orders;
 - a. A declaration that the extension of parcel Nos. Kasgunga/Kamreri/2607, 3239, 3243, 3241, 3242, 3240, 3314, 3313 and 3244 (the suit parcels of land herein) to cross the access road to the lower side be notified and the lower part do remain as part of land parcel No. Kasgunga/Kamreri/2653 belonging to the plaintiff and the County Land Registrar and County Land Surveyor Homa Bay be culpable to rectify the original boundaries as at during the adjudication period.
 - b. A permanent injunction restraining the defendants themselves, their servants, employees, agents and/or by anybody deriving any authority from them erecting, planting and/or interfering with the boundaries of the suit parcels as was created during adjudication prior to registration in the year 1983.
 - c. A declaration that the plaintiff has acquired the whole of the lower part of the suit parcels of land as part of land parcel Kasgunga/Kamreri/2653 by adverse possession.



- d. Costs and interest of the suit.
- e. Any other relief this honourable court may deem fit and just to grant.
12. The plaintiff/appellant (PW1) contended that he is the registered owner of land parcel number Kasgunga/Kamreri/2653 measuring approximately twelve Hectares (12 Ha) in area. That the respondents have trespassed onto his parcel to the extent of 11.6 Ha. Thus, he sought eviction orders as against the respondents.
13. PW1 relied on his statement on record which was adopted as his evidence in chief. He produced the following documents namely; a copy of title deed for land parcel number Kasgunga/Kamreri/2653, a certificate of official search in respect of land parcel number Kasgunga/Kamreri/ 2653 and a copy of green card (PExhibits 1 to 3 respectively).
14. During cross-examination, PW1 admitted that the acreage of his land parcel is 0.546 Ha as per PExhibit 3. That he is the first registered owner thereof. He conceded that he had neither produced a surveyor's report nor a map to show that the portion he claims the respondents have encroached on initially belonged to him.
15. Sylvester Oyugi (PW2) relied on his statement dated 24th November 2021 which was adopted as his evidence-in-chief. He testified that the parties did not have a boundary dispute. During cross-examination, PW2 stated that the dispute before court was a boundary dispute.
16. The suit was opposed by the respondents vide an amended statement of defence dated 4th January 2012. They prayed for dismissal of the suit with costs.
17. DW1, Peter Odido Kado, the 1st respondent herein, testified that the 2nd and 6th respondents are deceased, having passed on before institution of the suit. He denied encroaching onto the appellant's parcel of land and stated that the appellant had not approached the Land Registrar to resolve any existing boundary dispute.
18. On cross-examination, he stated that the suit parcels of land originated from land parcel number Kasgunga/Kamreri/2067. He denied altering the boundary during subdivision.
19. It is noteworthy that the learned trial magistrate set out the parties' respective cases, framed two issues for determination, analysed them and arrived at his decision based on reasons. So, the impugned judgment was in line with Order 21 Rule 4 of the Civil Procedure Rules, 2010.
20. In his judgment, the learned trial magistrate observed, inter alia;
- “...The plaintiff had a duty to prove that he was the owner of land parcels comprising of Kasgunga/Kamreri/2607, 3239, 3243, 3241, 3242, 3240, 3314,3313 and 3244 and that registration of the said parcels was fraudulent. He did not produce an adjudication record and/or a final record to prove his allegations neither did he prove fraud...”
21. The appellant contends that the trial Magistrate dismissed his case despite the overwhelming evidence he presented in support thereof. I note that one of the prayers sought by the appellant was a rectification of the original boundaries of the suit parcels of land as at during the adjudication period. This court is cognizant of Sections 18 and 19 of the [Land Registration Act](#) 2016 (2012) which gives the Land Registrar authority to fix boundaries to registered land. It is noteworthy that in the instant appeal, the parties did not lodge a dispute for determination by the Land Registrar as provided for under Sections 18 and 19 (supra).



22. The appellant also sought a declaration that he had acquired the whole of the lower part of the suit parcels of land by way of adverse possession. In *Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Bakshwein and another (2015) eKLR*, the Court stated that adverse possession dictates thus;
 - a. The parcel of land in dispute must be registered in the name of a person other than the applicant,
 - b. The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner,
 - c. The applicant must be in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.
23. Additionally, the applicant must show that such possession was without the permission of the owner; see *Richard Wefwafwa Songoi -vs- Ben Munyitwa Songoi (2020) eKLR*.
24. It is observed that the suit parcels of land are registered in the name of the respondents herein. However, it is my considered view that the appellant did not tender sufficient oral and/or documentary evidence to indicate that he has been in open and exclusive possession of the suit parcels of land for a period in excess of twelve years and that such possession was without the permission of the respondents herein. In particular, PW2 averred that he did not know that the appellant was making a claim for adverse possession and he stated that:

“...I am not aware that the plaintiff is applying for adverse possession...”
25. This court is not unaware that the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue; see Sections 107 to 109 of the *Evidence Act*, Chapter 80 Laws of Kenya.
26. The standard of proof in civil matters including the instant case, is on a balance of probabilities. In that regard, having taken into account the entire evidence on record in this appeal, the facts of the case as well as the legal principles stated above, it is my finding that the appellant who was the plaintiff before the trial court did not prove his claim to the requisite standard. The learned trial magistrate correctly relied on the evidence on record and applied the principles of law in a correct manner herein.
27. In conclusion, it is the considered view of this court that the learned trial magistrate’s judgment is faultless at law. I proceed to uphold the same in entirety.
28. Wherefore, the instant appeal originated by way of a memorandum of appeal dated 28th April 2023 and duly filed on even date, be and is hereby dismissed.
29. By dint of the proviso to Section 27(1) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya that costs follow the event within the discretion of the court, the appellant to bear the costs of this appeal and the court below.
30. It must be noted that this judgment was not delivered on 18th June 2024 as scheduled because it was declared Judiciary National Day of Mourning following demise of a colleague and then the trial Judge was away on urgent official duties including training organized by the Kenya Judiciary Academy and requisite notice issued accordingly.
31. Orders accordingly.

DELIVERED, DATED AND SIGNED VIRTUALLY AT HOMA-BAY THIS 4TH DAY OF JULY 2024.



G.M.A ONG'ONDO

JUDGE

Present;

Ms Aluoch Odera learned counsel for the respondents

T Luanga court assistant

Appellant-Absent

