



**Owino v Opiyo (Environment and Land Appeal E002 of 2023)  
[2024] KEELC 13593 (KLR) (4 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13593 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E002 OF 2023  
GMA ONGONDO, J  
DECEMBER 4, 2024**

**BETWEEN**

**KENNEDY OMONDI OWINO ..... APPELLANT**

**AND**

**ZACHARIA ODONGO OPIYO ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. Celesa Okore,  
Principal Magistrate, delivered on 22nd December 2022 in Oyugis Senior  
Principal Magistrate's Court Environment and Land Case No. 20 of 2019)*

**JUDGMENT**

1. This appeal emanates from the trial court's judgment delivered on the 22<sup>nd</sup> December 2022 by the Honourable Celesa Okore, Principal Magistrate, in Oyugis Senior Principal Magistrate's Court Environment and Land Case No. 20 of 2019 where she held, inter alia:

“...I find and hold that the plaintiff has proved his case on a balance of probabilities against the defendant. Judgment is hereby entered in favour of the plaintiff against the defendant and orders issued as follows:

- a. An order of eviction be and is hereby issued against the defendant, his family, agents, assigns and/or anyone acting on his instructions from the plaintiff's land parcel number Central Kasipul/Kamuma/176.
  - b. Each party shall bear its own costs...”
2. Aggrieved thereby, the appellants through the firm of M/s Agure Odero and Company Advocates mounted this appeal by way of a memorandum of appeal dated 5<sup>th</sup> January 2023 and filed herein on



10<sup>th</sup> January 2023. The Appeal is anchored on grounds 1 to 3 as set out on the face thereof and they include:

- a. The Learned Principal Magistrate erred in fact and in Law that the suit property was registered much later when already the Appellant had lived there for over 40 years. The learned Magistrate misconstrued the most fundamental facts, thus relying on some attractions on the side agreement, thus denying the Appellant right of adverse possession as by Law.
  - b. The Learned Magistrate erred in law and in fact in holding that the suit Land belongs to the Respondent based on a succession cause filed later by the Respondent excluding the interest of the Appellant despite the Appellant having lived there for over 40 years and by virtue the same parcel was sold to him by the Respondent's late father
  - c. The learned Magistrate erred in law and in fact, when the Appellant viz paragraph 6 of the Defence had demonstrated, having been in occupation of the land, cultivating and erected a homestead since 1976 as the same was sold to him by the Respondent father, wherefore, the subsequent Registration was irregular, illegal and unconstitutional in exclusion of the Appellant's interest thereof.
3. So, the appellant prays that:
- a. This Appeal be allowed.
  - b. The judgement and orders of the learned Principal Magistrate dated 22<sup>nd</sup> December 2022 be set aside and in its place an order for a retrial to allow the Appellant amend his Defence to include a proper counter claim with costs to the Appellant.
  - c. Costs of the appeal be awarded to the appellant
4. The appeal was heard by way of written submissions pursuant to this court's directions of 21<sup>st</sup> November 2023.
5. The appellants' counsel filed submissions dated 31<sup>st</sup> October 2024 and stated that the appellant has lived on Land Parcel Number Central Kasipul/Kamuma/176 (the suit land herein), since 1976. That his possession of the suit land has been open, continuous and without the permission of the registered owner. That therefore, he has acquired title thereto by way of adverse possession. To buttress the submissions, reliance was placed on various authorities including the case of Peter Thuo Kariu -vs- Kuria Gacheru (1988) 2 KAR 111.
6. The respondent did not file any submissions herein.
7. It is important to remember that the instant appeal being the first one from the trial court in the matter, I am obliged to review the record of the trial court, evaluate it and arrive at own conclusions in this appeal; see Mwanasokoni -vs- Kenya Bus Services Ltd (1982-88) 1KAR 278 applied in other cases, inter alia, Titus Ong'ang'a Nyachio-vs-Martin Okioma Nyauma and 3 others (2017) eKLR.
8. In the foregone, the issues for determination are as captured in the grounds of appeal and boil down to whether the appellant:
- a. Has proved that he has acquired title to the suit land by adverse possession and
  - b. Is entitled to the orders sought in the memorandum of appeal.



9. By way of a plaint dated 21<sup>st</sup> March 2017 filed at the trial court, Zacharia Odongo Opiyo, the respondent herein sued the initial defendant, Alfayo Owino Nyakoye (deceased), whose estate is represented by the appellant herein for;
  - a. An order of eviction.
  - b. Cost of the suit with interest.
  - c. Any other relief that the Honourable Court may deem fit and just to grant.
10. Initially, the suit had been lodged at the Environment and Land Court in Migori. On 11<sup>th</sup> March 2019, the same was transferred to Oyugis Senior Principal Magistrate's Court for hearing and determination in line with Articles 6(3) and 48 of *the Constitution* of Kenya, 2010.
11. The plaintiff/respondent contended that he is the lawful beneficiary of the suit land following Succession Cause No. 22 of 2007. That the continued occupation of the same by the appellant is illegal and unlawful and the appellant ought to vacate the suit land.
12. PW1, Zacharia Odongo Opiyo, relied on his statement on record which was adopted as his evidence in chief. He produced in evidence, a title deed in respect to the suit land, a copy of official search certificate and a copy of grant of letters of administration to the estate of Joseph Apiyo Nyakoye (deceased 1 herein) (PExhibits 1 to 3 respectively). Upon cross-examination, he stated that he did not include the appellant's father as one of the beneficiaries to the estate of deceased 1. That the appellant did not lodge an objection in the succession cause.
13. The initial defendant, through Odingo and Company Advocates, opposed the claim vide a Statement of defence dated 22<sup>nd</sup> September 2017 wherein he stated that he purchased the suit land from his late brother, deceased 1, in 1976. That he built his homestead thereon and has been staying there till date. That therefore, the plaintiff's title to the suit land has been extinguished by virtue of adverse possession. Thus, he urged the court to dismiss the suit with costs.
14. DW1, Kennedy Omondi Owino, the appellant herein, relied on his statement on record, which was adopted as part of his evidence. He produced a sale agreement dated 23<sup>rd</sup> October 1976, a copy of the death certificate for the initial defendant and demand letter dated 21<sup>st</sup> February 2017 (DExhibits 1 to 3 respectively). Under cross-examination, he admitted that he did not raise an objection in the succession cause in respect to the estate of deceased 1. That his late father had a separate parcel of land, where they stay. That he was born in 1976, the year when his late father (the initial defendant) entered into a sale agreement with deceased 1 herein.
15. DW2, John Okelo Apiyo, relied on his statement on record, which was adopted as part of his evidence. On cross-examination, he stated that although he witnessed the execution of PExhibit 1, he was aged 15 years at the time. In re-examination, he stated that the respondent is his biological brother and that he carried out succession to the estate of his late father without involving all the family members. That the appellant is entitled to the suit land.
16. Julius Opiyo Okuta (DW3) relied on his statement on record, which was adopted as part of his evidence. He stated that he was 4 years old when parties entered into a sale agreement in 1976.
17. It is noteworthy that the learned trial magistrate set out the parties' respective cases, framed three issues for determination, analysed them and arrived at her decision based on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the Civil Procedure Rules, 2010.



18. In her judgment, the learned trial magistrate observed, inter alia;
- “...The documents produced by the plaintiff are a clear indication that he acquired ownership of the suit property procedurally and legally. The fact that he is the legitimate registered owner of the land confers to him absolute rights over the same...”
19. Regarding the appellant’s case, the honourable trial magistrate found that DExhibit was illegal and inadmissible and noted that:
- “...The defendant produced a sale agreement dated 23/10/1976 as DExh 1. I have perused the agreement and I find that it has been altered to change the consideration... I have also noted that the witnesses who signed it were both under the age of 18 years at the material time. Further, I do find that the said agreement does not state the parcel number of land for which the transaction is being made, and/or the portion/size of the same...”
20. The appellant laments that the honourable trial court disregarded the fact that his family has been in occupation of the suit land, cultivating the same since 1976 and has erected a homestead thereon. That the registration of the same in the respondent’s name was irregular, illegal and unconstitutional since it was done in exclusion of the appellant’s interest thereof. That he had acquired title to the suit land by way of adverse possession.
21. The Court of Appeal in the case of *Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Bakshein and another* (2015) eKLR, observed 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.
22. Furthermore, the applicant must show that such possession was without the permission of the owner; see *Richard Wefwafwa Songoi -vs- Ben Munyitwa Songoi* (2020) eKLR.
23. In the present case, the appellant has averred that his family’s entry into and occupation of the suit land was as a result of a sale between the initial defendant and deceased 1. That it is evidenced in DExhibit 1.
24. On that score, this court subscribes to the decision of the Court of Appeal in *Wambugu -vs- Njuguna* (1983) KLR 173 wherein it was stated that:
- “Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist.”
25. Indeed, the appellant’s father herein being a purchaser whose possession is based on a contract of sale can only justify a claim for adverse possession if the contract of sale had been repudiated or rescinded. Alternatively, there is such justification upon the purchaser’s payment of the last installment of the purchase price.



26. However, I note that the sale agreement which forms the basis of the appellant's claim is invalid since two of the witnesses thereto to wit, John Okello Apiyo (DW2) and Julius Opiyo Okuta (DW3), were minors at the time of such execution and could not have attested to the same. Also, there are glaring inconsistencies with regards to the purchase price indicated therein.
27. Further, it is trite law that possession can take the form of fencing or cultivation of the land in question; see *Gatimu Kinguru vs Muya Gathangi* (1976) KLR 253 and *Titus Ong'ang'a Nyachieo vs Martin Okioma Nyauma and 3 others* (2017) eKLR. In the instant appeal, the appellant did not produce any tangible evidence such as photographs, which would have proven possession of the suit land.
28. The appellant has urged this court to issue an order for a retrial to allow him to amend his defence and include a proper counter claim. On that score, Section 78 (1) (d) of the *Civil Procedure Act* Chapter 21 Laws of Kenya, empowers an appellate court to order a new trial.
29. The Court of Appeal in the case of *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A clarified circumstances under which an appellate court may order a retrial thus:
- “... The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.” (Emphasis laid)
30. I have perused the record of the trial court and note that upon close of pleadings, the appellant did not seek leave to amend his defence to include a counterclaim. Further, the appellant has failed to demonstrate that there was a fundamental lapse in the trial court's proceedings and judgment. Clearly, the said prayer is an afterthought and if granted will highly prejudice the respondent herein.
31. This court is guided by Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya which provides as follows:
- i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
32. In that regard, I find that the respondent who was the plaintiff at the trial court proved his claim on a balance of probabilities.
33. In the premises, the trial magistrate's judgment delivered on 22<sup>nd</sup> December 2022 is faultless at law. I hereby endorse the same.
34. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated January 5, 2023 and filed herein on January 10, 2023, is devoid of merit. The appeal is hereby dismissed with costs of this appeal and the court below to the respondent.
35. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 4<sup>TH</sup> DAY OF DECEMBER 2024.**

**G.M.A ONG'ONDO**

**JUDGE**



Present

1. Respondent in person
2. Malachi, Court Assistant

