



**Simon v Adel (Environment and Land Appeal E005 of 2021)
[2023] KEELC 15978 (KLR) (8 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 15978 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E005 OF 2021
GMA ONGONDO, J
MARCH 8, 2023**

BETWEEN

MICHAEL OCHOO SIMON APPELLANT

AND

SALMON KWANYA ADEL RESPONDENT

(Being an appeal from the Judgment of T.M Olando Senior Resident Magistrate in Land Case No 60 of 2019 at Homa Bay Chief magistrate's Court rendered on.....)

JUDGMENT

1. The instant appeal arose from the judgment and decree of honourable T.M Olando, Senior Resident Magistrate (now, PM) delivered on September 22, 2021 in Homa Chief Magistrate's Court Civil Suit Number 60 of 2019 where he held that the defendant who is the appellant herein was a trespasser on the suit land (infra) belonging the respondent who was the plaintiff in the suit. Further, that the respondent had proved his case against the appellant on a balance of probabilities thus, entered judgment in favour of the plaintiff for eviction and costs sought in the suit.
2. The appellant, Michael Ochoo Simon is represented by the firm of G.S Okoth and Company Advocates.
3. The respondent, Salmon Kwanya Adel is represented by the firm of Aluoch Odera and Company Advocates.
4. The subject matter of the appeal is land reference number Kanyada/ Kanyango/Kalanya/3129 measuring approximately Zero decimal Zero Six hectares (0.06 ha) in area (the suit land herein).



5. It is noteworthy that this court has the mandate to entertain the appeal under section 13 (4) of the ELC Act, 2015 (2011) which provides;

“In addition to the matters referred to in subsections (1) and (2), the court shall exercise appellate jurisdiction over the decisions of subordinate courts or tribunals in respect of matters falling within the jurisdiction of the court.”

6. Since this is the first appeal from the trial court, I am obliged to revisit the evidence on record, evaluate it and reach my own conclusion. Furthermore, it must be recognized that an appellate court will not ordinarily interfere with the findings of the trial court unless they are based on no evidence at all, or on a misapprehension of the same or the court is shown demonstrably to have acted on wrong principles in reaching the findings; see *Mwanasokoni v Kenya Bus Services Limited* (1982-88) 1 KAR 278.

7. The claim before the trial court was commenced by a plaint dated October 28, 2019 and filed on November 21, 2019, where the respondent who was the plaintiff therein sued the appellant for the orders infra;

- a. An order for eviction of the defendant from suit premises and vacant possession of the same on Parcel No. Kanyada/Kalanya/Kanyango/3129
- b. Costs of this suit.
- c. Any other relief that this Honourable court shall deem fit to grant.

8. The appellant denied the respondent’s claim in his statement of defence dated December 10, 2019 and filed on December 16, 2019 and prayed for it’s dismissal with costs. He stated, *inter alia*, that whereas the suit land is registered in the name of the respondent, he rented a semi-permanent house erected thereon in August 1988 and not 1993 at a monthly rent of Kes 250/= per month which he paid for about a year then the respondent disappeared without communication until August 2019. That he then resided in the rented house for another two or so years

9. The appellant further stated that the said semi-permanent house collapsed. After carrying out several repairs to the same, he decided and erected a semi-permanent building thereon in the year, 1993. That he has continually, openly, peacefully and uninterruptedly resided thereon hence has an overriding interest over the suit land in accordance with section 28 (h) of the *Land Registration Act*, 2016 (2012).

10. In his testimony, the respondent (PW1) relied on his statement filed on 3rd December 2020. He testified that the appellant was his tenant not paying rent and wanted him to be evicted. He further relied on a green card (PExhibit 1) and advocate’s notice (Pexhibit 2) herein.

11. Jane Akinyi Simon (DW1) wife of the appellant told the court that the appellant was sick and unable to walk. That she got married to the appellant in 1982. She relied on her statement filed in court and adopted as part of her evidence. Further, the statement of the appellant was admitted in evidence by consent of the parties.

12. In reaching his findings, the learned trial magistrate relied on section 107 of the *Evidence Act* chapter 80 Laws of Kenya and the case of *Eastern Produce (K) Ltd v John Lumumba Mukosero* (2008) eKLR. He held that the Appellant did not rebut the respondent’s evidence that he was the registered proprietor of the suit land and admitted that he occupies the same. That evidently, the appellant was a trespasser thereon.

13. The appellant was aggrieved by the trial court’s judgment. Thus, he lodged this appeal by way of memorandum of appeal dated September 28, 2021 upon seven grounds of appeal, *inter alia*;



- a. The Learned Trial Magistrate erred in law in failing to appreciate that the tenancy of the premises fell within the [Rent Restriction Act](#) and therefore the Rent Tribunal has jurisdiction to hear and determine the dispute between the plaintiff and the defendant.
 - b. The Learned Trial Magistrate erred in law of procedure and practice in failing to take note that the suit was already statute barred in accordance with section 7 of the [Limitation of Actions Act](#).
 - c. The learned trial magistrate erred in law in failing to note that the appellant had overriding interest over the suit land and had in fact acquired title thereto by adverse possession.
14. Wherefore, the appellant has urged this court to quash the decision of the trial magistrate, allow the appeal and proceed to dismiss the respondent's suit with costs to the appellant.
15. I have anxiously considered the entire record in this appeal. The issues for determination in this appeal crystallise to-
- a. The trial court jurisdiction over the suit
 - b. Depending on the outcome in (a) above, has the appellant acquired any overriding interests inclusive of adverse possession over the land?
 - c. The appellant's entitlement to the orders sought in the memorandum of appeal?
16. In the submissions dated December 14, 2022, learned counsel for the appellant analyzed the grounds of appeal and urged the court to deliver the orders as proposed in paragraph 15 hereinabove. Counsel referred to the plaint and submitted, *inter alia*, that the trial court lacked jurisdiction to hear the matter. That the appellant acquired an overriding interest over the suit land.
17. To reinforce the submissions, counsel relied upon sections 2 and 5 (1) (f) of the [Rent Restriction Act](#) chapter 296 Laws of Kenya, the case of [Phoenix of EA Assurance Company Ltd v S.M Thiga t/a News paper service](#) (2019) eKLR, section 7 of the [Limitation of Actions Act](#) chapter 22 Laws of Kenya, section 28 (h) [Land Registration Act](#), 2016 (2012) and [Halsbury's Laws](#) volume 28 at paragraphs 961 and 977, amongst others. Therefore, counsel urged this court to dismiss the respondent's suit and allow the appeal with costs.
18. By the respondent's submissions dated November 28, 2022, reference is made to the seven grounds of appeal and delineated two issues for determination including whether the trial court had jurisdiction to determine the matter. Counsel for the respondent submitted that the trial court had no jurisdiction thereof and that the appellant was not entitled to adverse possession over the suit land.
19. To fortify the submissions, counsel cited *inter alia*, section 5 (7) [Rent Restriction Act](#) (*supra*) and [Patrick Muiru Kamunguna v Kaylift Services Ltd and another](#) (2021) eKLR, On that account, counsel termed the appeal devoid of merit and that the same should be dismissed with costs for both the appeal and the original suit to the respondent.
20. In the present appeal, it is noted that the respondent has questioned on the trial court's jurisdiction over the matter. This court is not unaware that a preliminary objection consists of points of law, *inter alia*, jurisdiction of a court; see [Mukisa Biscuits Manufacturing Company Ltd v West End Distributors](#) (1969) EA 696.
21. In the case of [Benson Ambuti Atega & 2 others v Kibos Distillers Limited and 5 others](#) (2020) eKLR, the Supreme Court of the Republic of Kenya dealt with judicial abstention (Pullman) doctrine



deliberately first reviewed by the US Supreme Court in the case of *Railroad Commission of Taxes v Pullman Co* 312 US 496 61S Ct643, 85 L.Ed.971 (1941) thus;

“a court though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism..”(Emphasis added).

22. In *Motor Vessel Lillian “S” v Caltex Oil (K) Ltd* (1989) eKLR, the Court of Appeal noted that;

“Jurisdiction is everything. Without it, a court has no power to take one more step.”

23. Undoubtedly, this court has the jurisdiction over disputes relating to rents; see section 13 (2) (b) of the *Environment and Land Court Act*, 2015 (2011).

24. Clearly, the, instant dispute ought to have been lodged at the Rent Restriction Tribunal, in the first instance as provided for under section 2 and 5(1) (f) of the *Rent Restriction Act* (supra). This was fundamental failure on the part of the Respondent. Indeed, article 159 (2) (b) of the *Constitution of Kenya* , 2010 is not a panacea or whitewash in the circumstances as held in *Kakuka Maimai Hamisi v Peris Pesi Tobiko and 2 others* (2013) KLR.

25. It is established law that where there is a clear procedure for the redress of a particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed; see *Benson Adegwa* case (supra) and *Speaker of the National Assembly v James Njenga Karume* (1992) eKLR

26. On the second issue, the elements of adverse possession are well settled; see *Wambugu v Njuguna* (1983) KLR 172.

27. At paragraph 3 of the statement of defence, the appellant was emphatic that his entry into the land in dispute was with the permission of landlord, the respondent from 1988 until 2019. Therefore, adverse possession could not arise. Nonetheless, the trial court had no jurisdiction thereof.

28. To that end, it is the finding of this court that the trial court was devoid of jurisdiction in the first instance in respect of the instant dispute. The impugned judgment is faulty at law and cannot stand.

29. Accordingly, this appeal is tenable and is hereby allowed in terms of the orders set out in paragraph 14 hereinabove

DATED AND DELIVERED AT HOMA BAY THIS 8TH DAY OF MARCH 2023.

G. M. A ONG'ONDO

JUDGE

PRESENT

- a. Ms P. Odhiambo, learned counsel for the appellant.
- b. Ms Aluoch Odera, learned counsel for the respondent.
- c. Fiona F, court assistant

