



**Agum v Anyango (Environment and Land Appeal E003 of 2021)  
[2023] KEELC 21269 (KLR) (6 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21269 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT AND LAND APPEAL E003 OF 2021  
BN OLAO, J  
NOVEMBER 6, 2023**

**BETWEEN**

**PHILIP LUTTA AGUM ..... APPELLANT**

**AND**

**PAMELA ANYANGO ..... RESPONDENT**

*(Being an appeal from the Judgment of HON. P. Y. Kulecho – Senior Resident Magistrate delivered on 15th February 2021 in Busia Chief Magistrate’s Court Elc Case No 151 of 2019)*

**JUDGMENT**

1. Philip Lutta Agum (the Appellant herein) was the Plaintiff in BUSIA CMC ELC Case No 151 of 2019 in which he sought judgment against Pamela Anyango as Defendants (the Respondent herein) in the following terms as per an amended plaint dated and filed on 31<sup>st</sup> January 2020 in respect to the land parcel No Samia/Butabona/2362 (the suit land):
  1. The Officer Commanding Funyula Police Station (OCS) do assist in eviction of the Respondent from the land parcel No Samia/Butabona/2362.
  2. Costs of the suit.
2. The basis of the Appellants case was that he is the registered proprietor of the suit land on which the Respondent had trespassed and put up permanent structures without paying the purchase price thereof hence necessitating her eviction therefrom.
3. The Respondent first filed a defence and counter-claim dated 16<sup>th</sup> September 2020 through the firm of J. V. Juma & Company Advocates. Then on the following day, she filed a defence through the firm of Okeyo Ochiel & Company Advocates. The defence filed on 17<sup>th</sup> September 2020 was subsequently withdrawn on 19<sup>th</sup> October 2020.



4. In her defence and counter-claim, filed on 16<sup>th</sup> September 2020, the Respondent, pleaded that the Appellant had in fact sold the suit land to her husband one NICHOLAS MWABI MALOBA on 7<sup>th</sup> July 2007 and they took possession of the same. That she had been in possession and occupation of the suit land upto the time of filing the suit and therefore the Appellant was not entitled to any orders of eviction.
5. By way of counter-claim, the Respondent pleaded that she had been in quiet and peaceful occupation of the suit land since July 2007 and the Appellant's title had been extinguished as that period of her occupation was over 12 years.
6. The Respondent therefore sought judgment against the Appellant as follows:
  - a. The Appellants suit be dismissed with costs.
  - b. The Appellant's right over L.R No Samia/Butabona/2362 got extinguished by adverse possession upon expiry of 12 years from the time the Respondent came into possession from July 2007.
  - c. The Appellant be ordered to execute all the relevant statutory documents required of him to facilitate the transfer of the suit land in default, the Executive Officer of this Court do execute the same in place of the Appellant.
  - d. The Appellant, his family members, agents or those claiming through him be permanently barred, restrained and injuncted from disposing charging, taking, entertaining, using or in any way interfering with the suit land.
  - e. Costs of the counter-claim be met by the Appellant.
7. The suit was heard by HON. P. Y. Kulecho (Senior Resident Magistrate) on 19<sup>th</sup> October 2020 and the parties were the only witnesses who testified in support of their respective cases.
8. By a judgment delivered on 15<sup>th</sup> February 2021, the trial Magistrate dismissed the Appellant's suit with costs and entered judgment for the Respondent.
9. Aggrieved by that judgment, the Appellant moved to this Court vide his Memorandum of Appeal dated 16<sup>th</sup> March 2021 in which he sought that the judgment delivered on 15<sup>th</sup> February 2021 in the Respondent's favour be set aside and instead, this Court do enter judgment in his favour.
10. The following four (4) grounds of appeal have been raised in support of the appeal:
  1. The learned trial Magistrate erred in law and fact by failure to appreciate the entirety of the Appellant's evidence tendered in the trial.
  2. The learned trial Magistrate erred in law and fact by mis-apprehending the pleadings, testimonies and exhibits.
  3. The learned trial Magistrate erred in law and fact by holding that the Respondent's occupation had matured into prescription.
  4. The learned trial Magistrate erred in law and fact by handing down an erroneous judgment.
11. The appeal has been canvassed by way of written submissions filed by Mr Jumba instructed by the firm of Balongo & Company Advocates for the Appellant and by MR. J. V. JUMA instructed by the firm of J. V. Juma & Company Advocates for the Respondent.
12. I have considered the record, the memorandum of appeal and the submissions by counsel.



13. This being a first appeal, I am obliged to re-evaluate the evidence and make my own conclusion – see *Selle v Associated Motor Boat Co.* 1968 E.A. 123 and also *Abdul Hameed Sale v Ali Mohamed Sholan* 1955 22 EACA 270 among other cases.
14. I shall consider grounds NO 1 and 2 together in which it is pleaded that the trial Magistrate failed to appreciate the Appellant’s evidence and misapprehended the pleadings, testimonies and exhibits.
15. From my perusal of the impugned judgment, I see no merit in those claims. The trial Magistrate, and quite properly in my view, analysed the evidence by both parties. At page 2 of the judgment, she set out what issues, in her view, were important for determination. She identified them as follows: Whether the Appellant’s claim was proved. Whether the Respondent’s counter-claim was proved. What orders to be granted. Who is entitled to costs.
16. The trial Magistrate then exhaustively considered cases of both parties from pages 3 to 5 before arriving at the decision that the Appellant’s case was for dismissal. I do not discern any misapprehension of the oral or documentary evidence adduced by the Appellant.
17. Those two grounds must fail.
18. On ground NO 3, the trial Magistrate is assailed for erring in fact and in law by holding that the Respondent’s occupation of the suit land had matured into prescription.
19. In his submissions on the issue of prescription, counsel for the Appellant has taken the view that since the Respondent was a licensee having lived on the land following the purchase by her late husband, she cannot benefit from the doctrine of adverse possession. Counsel also submitted that since there was no consent of the Land Control Board, the sale agreement between the Appellant and the Respondent’s husband was void and therefore the Respondent was a trespasser. This is how counsel has submitted on that issue:

“The Honourable trial Magistrate failed to make a finding as to when the Respondent’s occupation of the suit land became trespass or adverse. The trial Magistrate having found that the entry onto the suit land by the Respondent was not trespass, failed to direct her mind to section 6 of the *Land Control Act* the application of which rendered the land sale agreement of 7<sup>th</sup> July 2017 null and void for lack of consent by the relevant Land Control Board, some six months after it was executed.”

20. Counsel then proceeds to submit further that:

“Upon the land sale agreement becoming null and void, the Respondent’s continued occupation of the suit land became by operation of law trespass or adverse against the interest of the Appellant, the Respondent did therefore cease to be a licensee six months after 7<sup>th</sup> July 2007 when the land sale agreement became null and void pursuant to Section 6(b). Her continued stay after the land sale agreement dated 7<sup>th</sup> July 2007 became null and void under Section 22 of the *Land Control Act* amounted to trespass.”

21. Counsel then concluded his submission on this issues by stating:

“Period of adverse occupation should therefore commence at expiry of six months after 7<sup>th</sup> July 2007 to 7<sup>th</sup> January 2008. 12 years adverse period would mature on 7<sup>th</sup> January 2020. The Plaintiff filed his suit on 23<sup>rd</sup> October 2019 some 76 days ahead of expiry of the 12 years adverse period. The Appellant therefore filed this suit on time.”



22. Counsel for the Respondent made the following submission on that issue at paragraphs 18 and 19:  
18: “My Lord, even going by the Appellant’s own submission in this Court paragraph 6 the 12 years of adverse possession matured on 8<sup>th</sup> January 2020.”

19: “The suit by the Appellant against the Respondent was instituted on the 31<sup>st</sup> January 2020. It was already too late. The title to the suit land was already extinguished.”

23. The trial Magistrate having considered all the evidence on this issue, made the following findings at page 4 of the impugned judgment:

“The Defendant led evidence to show that she and her family have resided on the suit property since 2007 un-interrupted, that although she had no contract with the Plaintiff. It is on this basis that the Defendant prays for an order that the Plaintiff’s right over the suit property got extinguished by adverse possession upon expiry of 12 years from July 2007 which is July 2019.”

The trial Magistrate then concludes by saying at page 5 of the impugned judgment that:

“The Defendant in her own right can claim that she has acquired interest in the suit property by way of adverse possession. To lay claim of adverse possession the Defendant does not require letters of administration in respect of her late husband’s estate, this claim is hers in her own right on the basis of having resided on the suit property for a period of upto 12 years.”

24. With that, the trial Magistrate proceeded to find that the Respondent had proved her counter-claim.

25. That the Respondent entered the suit land following a sale agreement between her late husband one Nicholas Mwabi Maloba and the Appellant executed in 2007 cannot be disputed. Indeed when the Appellant tried to resile from that agreement although it was not produced, the trial Magistrate found to the contrary and described him as a person “lacking in candour”. The trial Magistrate went on to find that:

“Although the sale agreement was not adduced in evidence in cross-examination the Plaintiff admitted that he hold the suit property to the Defendant’s late husband and that is how the Defendant and her family came up into occupation thereof. The Plaintiff confirms that the Defendant has been residing on the suit property since 2007 with his knowledge.”

This Court has no reason to doubt those findings of fact by the trial Magistrate who had the opportunity to hear and observe the Appellant as he testified.

26. Counsel for the Appellant has submitted at length on the fact that the sale agreement between Appellant and the Respondent’s husband did not have the consent of the Land Control Board as required vide the [Land Control Act](#). This is what counsel has said:

“The learned trial Magistrate failed to direct her mind to the provision of the said Act and arrived at the wrong findings.”



27. And after citing the provisions of Section 6 of the *Land Control Act*, counsel proceeded to submit thus:

“No evidence was given that the land sale agreement received the consent of the Land Control Board. The sale is deemed to have become null and void six months from the date of the execution of the land sale agreement which both parties said was 7<sup>th</sup> July 2007.”

28. The Respondent, by her counter-claim, did not seek to enforce the land sale agreement between her late husband and the Appellant. Her claim was based on adverse possession and therefore, Section 6 of the *Land Control Act* was not applicable. In the case of *Public Trustee v Wanduru Ndegwa C.A. Civil Appeal No 73 of 1982 [1984 Eklr]*, Madan Ja, (as he then was), said:

“What the land control legislation prohibits without consent is an agreement, a transaction or a dealing in agricultural land which comes about as a result of a volitional act between the parties themselves. The ownership of land of whatever type is also mutable by operation of law, e.g. by succession or by adverse possession. The provisions of the *Land Control Act* have no application where the claim to title of agricultural land is by operation of law such as by adverse possession. It is not an agreement, a transaction or a dealing in agricultural land.”

29. It is clear therefore that whether or not the Land Control Board granted its consent to the sale agreement between, the Appellant and the Respondent’s husband, that has no bearing to the Defendant’s counter claim to the suit land by way of adverse possession.

30. The Appellant’s counsel takes the view that in any event, the period for purposes of adverse possession should commence running from 7<sup>th</sup> January 2008 which is 6 months from 7<sup>th</sup> July 2007 following the expiration of time when the consent of the Land Control Board should have been obtained. As I have already stated above, the *Land Control Act* has no bearing in a claim of land by way of adverse possession. The Appellant tried to suggest that the Respondent’s husband did not pay the entire purchase price. He did not however say how much of the purchase price was outstanding and if so, what efforts he took to have the Respondent’s husband pay the balance, if any. The trial Magistrate was equally not convinced with the Appellant’s argument and also said at page 4 of the impugned judgment as follows:

“There is no logical explanation as to how the Defendant’s late husband would have entered upon the suit property without paying a single cent, the Plaintiff ought to have been candid and told the Court what the agreed price was, and what amount is still owing if any. To make a general denial only works against the Plaintiff.”

31. I agree entirely. The sale agreement, and which the Appellant admitted, was between the Appellant and the Respondent’s husband. The duty was therefore on the Appellant to prove the contents thereof Section 112 of the *Evidence Act* provides that:

112: “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”

Since the Respondent was not a party to that sale agreement, the burden was on the Appellant to produce it so that the Court could know its contents. However, while he admitted that such an agreement existed, for reasons best known to himself, he refused to produce it. The only logical conclusion which the trial Court could have arrived at, and with which this Court agrees, is that the Respondent and her husband went into occupation and possession of the suit land upon payment of the full purchase price on 7<sup>th</sup> July 2007. Time therefore started to run, for purposes of adverse



possession, on 7<sup>th</sup> January 2007. Again, it is clear from the case of Public Trustee v Wanduru Ndegwa (supra):

“... that adverse possession should be calculated from the date of payment of the purchasers price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed of possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.”

The record shows that when the Appellant testified on 19<sup>th</sup> October 2020, he said:

“I pray for an eviction order against the Defendant. The Defendant has been on my property since 2007. I granted the Defendant permission to temporarily reside on my property. One Nicholas Mwabi is the one who granted the Defendant permission to reside upon my property.”

32. The Appellant was of course being rather economical with the truth. The Respondent was on the suit land not as a licensee but as a purchaser since her husband had purchased the suit land. And the only reason why the Respondent was still on the suit land on 23<sup>rd</sup> October 2019 when the Appellant first moved to the subordinate Court seeking eviction orders is because she was now claiming it as of right. Since time started running from 7<sup>th</sup> July 2007, it means that the 12 year period within which the Appellant could have been entitled to evict the Respondent expired on 7<sup>th</sup> July 2019. By 23<sup>rd</sup> October 2019 when the suit was filed, the Appellants title to the suit land had long been extinguished by operation of law.
33. The Respondents claim to the suit land by way of adverse possession was well merited.
34. The ground of appeal is dismissed.
35. Finally, the Appellant takes issue with the trial Magistrate for handing down an erroneous judgment.
36. From what I have discussed above, it must be obvious by now that the trial Magistrate did not error either in law or fact in arriving at the decision the subject of this appeal. Having found that the Respondent had acquired ownership of the suit land by way of adverse possession, the Appellant's suit seeking the main prayer that the Respondent be evicted therefrom was bound to collapse. The trial Magistrate acted within the law in dismissing the Appellant's claim and finding in favour of the Respondent.
37. The up-shot of all the above is that this appeal is devoid of merit. It is accordingly dismissed with costs to the Respondent both here and in the Court below.

**BOAZ N. OLAO**

**JUDGE**

**6TH NOVEMBER 2023**

Judgment dated, signed and delivered on this 6th day of November 2023 by way of electronic mail and with notice to the parties.

**BOAZ N. OLAO**

**JUDGE**

**6TH NOVEMBER 2023**

