Ajemo & another v Ojala (Civil Appeal E029 of 2024)
[2025] KEELC 5072 (KLR) (18 June 2025) (Judgment)

Neutral citation: [2025] KEELC 5072 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

CIVIL APPEAL E029 OF 2024

FO NYAGAKA, J

JUNE 18, 2025

BETWEEN

PHILISTER ANYANGO AJEMO ..... 1ST APPELLANT

PANELLA ADHIAMBO AJEMO ..... 2ND APPELLANT

AND

RONALD OKOTH OJALA ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. E.M. Onzere PM delivered on the 28th May 2024 in the Principal Magistrate's Court at Ndhiwa in ELC Case No. E033 of 2022, Ronald Okoth Ojala v Philister Anyango Ajemo & Pamela Adhiambo Ajemo)

JUDGMENT

1. In the trial Court, the Plaintiff now Respondent filed the primary suit before the trial court vide his plaint dated 24th November 2022 seeking a declaration that he had acquired title to Land Parcel No. Kanyamwa/Kayambo-Kwamo/1064 through adverse possession or in the alternative that the late Charles Kongo Ajemo holds the said title in a resulting trust for him.
2. In the said Court, the Defendants now Appellants entered appearance and filed their joint statement of defence dated 17th February 2023 in which they denied the respondent's averments.
3. The matter proceeded for trial and by a judgment delivered on 28/5/2024 the trial court decreed that: -
    a. The plaintiff is entitled to land number Kanyamwa/Kayambo/Kwamo/1064 by virtue of adverse possession.
    b. The Land Registrar Homabay County is directed to register the land in the name of the plaintiff and subsequently issue him with title deed over the land.
    c. Costs of the suit are awarded to the plaintiff.

4. Being dissatisfied with the said Judgment/decree, the appellants lodged this appeal vide the Memorandum of Appeal dated 28/5/2024 and raised four (4) grounds of appeal as follows: -

    a. That the trial Court erred in law and fact in awarding the Plaintiff the whole land parcel no. K/Kayambo/Kwamo/1064 measuring 9.54 hectares despite the Plaintiff reportedly stating that he occupies only a portion of the same.

    b. That the trial Court erred in law and fact by ignoring the fact that the burden to prove how much of land parcel no. K/Kayambo/Kwamo/1064 that he actually occupies was squarely on the Plaintiff throughout the proceedings.

    c. That the trial court in law and fact by ignoring the plaintiff's testimony that he occupied only a portion of the suit property and not the whole parcel.

    d. That the trial Court erred in law and in fact by ignoring the fact that in a case for adverse possession, the Plaintiff is only entitled to the portion of the property that he actually occupies and uses.

5. The appeal was disposed of by written submissions. The appellant submitted that the respondent failed to discharge the burden of proving the exact portion of the suit land that he had a claim over having testified to only occupying a portion thereof and thus the trial magistrate erred in awarding him the whole of the suit property.

6. That they were sued, before the trial court, in their personal capacity and not as administrators of the deceased's estate who was the registered proprietor of the suit property and thus they were at a loss as to how they would transfer the suit property.

7. In response, the respondent made submissions that the record of appeal had not been prepared and arranged in accordance with Order 42 Rule 4 of the Civil Procedure Rules as the appellants sought to be heard on a ground that was not set forth in the Memorandum of Appeal specifically the issue of capacity to be sued.

8. The respondent further submitted that the evidence he submitted before the trial court was sufficient to support his claim that he had acquired title to the suit property through adverse possession.

9. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial afresh and come to its own independent findings and conclusions. See Selles & Anor vs. Associated Motor Boat Co Ltd & Others [1968] EA 123.

10. Before the trial court, the respondent told the court that the suit property was registered in the name of Charles Kongo Ajemo in 2008, the deceased husband of the appellants herein; that he has been on the suit since 1987 when he was born and that in 2008 he built his house there and even planted trees, bananas and other crops; that he has never seen the appellants on the land as they have never lived or farmed the land and that even though he occupies a portion of the land he was never requested to stay on only 2 acres.

11. The 1st appellant testified as DW1 denying that the respondent had lived on the land since 1987. She testified that they came to visit the land in 2010 having elected to stay with their deceased husband in Mumias and found the respondent had erected a building therein and told him to vacate which he did for a period of 2 years only for him to return in 2014 and that they had been trying to get access to the property but the respondent chases them away. DW2, the second appellant corroborated DW1's testimony and gave a similar testimony to her.

12. DW3, Fredrick Otieno Kongo, a brother to the deceased in whose name the suit property is registered testified that he came to know about the respondent in 2010 when the respondent built a house on the property. He testified that the deceased had worked on the land until 1978 when he went to Mumias only to return in 2014 when the respondent pleaded with the deceased to let him stay on 2 acres of the land but the deceased declined. It was his testimony that the deceased only returned home on his retirement and settled on his father's land which he occupies and as such he wanted the appellants to vacate the land.

13. I have considered the evidence tendered before the trial court and the submissions made before me. Having perused the grounds of appeal pleaded by the appellants, it is clear that the appellants do not dispute that the respondent had gained title over the suit property by adverse possession but rather whether the trial court erred in declaring that the respondent had acquired title over the whole of the suit property as opposed to the area that he occupied and used.

14. The doctrine of adverse possession in Kenya is founded under *Limitation of Actions Act*, CAP 22 Laws of Kenya. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further section 13 of the same Act, provides that adverse possession is the exception to this limitation:

    1) A right of action to recover land does not unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under Section 9, 10, 11, and 12 a right of action to recover land accrues on a certain date and no person is in adverse on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

    2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

    3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12(3), the land in reversion is taken to be adverse possession of the land".

15. On the other hand, Section 38 of the Act allows a claimant to apply to Court for orders of adverse possession and provides that:

> " Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land."

16. As earlier herein stated, the uncontroverted evidence before the trial court is that the respondent, not being the registered owner of the suit property, had been in occupation and use of the suit property since 1987 when he was born; that the respondent enjoyed uninterrupted use and occupation of the suit property as his evidence on the same similarly remained uncontroverted by the appellants.

17. As concerns the identity and size of the portion of land that the respondent was entitled to, the courts have held that the land alleged to be the subject of adverse possession proceedings must be definitely identifiable. In the case of Gatimu Kinguru v Muya Gathangi (1976) KLR 253 the court observed that:

> " the land or portion of land adversely possessed must be definitely identified, defined or at least an identifiable portion with a clear boundary..."

18. The matter proceeded on the premise that the Court had jurisdiction to hear and determine it. In his pleadings, the respondent sought a declaration that he had acquired title to Land parcel No. Kanyamwa/Kayambo-Kwamo/1064 through adverse possession. The respondent did not plead for a portion of the suit property but the whole of it.

19. In his testimony, the respondent reiterated his assertions that he was claiming the entirety of the suit property and in cross-examination, whilst reiterating that the appellants had never lived or farmed the suit property, he denied allegations that he had sought the assistance of the area Assistant Chief to intervene with the appellants and allow him to stay on 2 acres of the suit property.

20. Bearing in mind the entire evidence on record in this case, and applying the facts of the case as well as legal principles stated above, it is clear that the respondent who was the plaintiff before the trial court proved his case for adverse possession over the suit property on a balance of probabilities.

21. As a consequence, the declaration that he was entitled to land number Kanyamwa/Kayambo/Kwamo/1064 by virtue of adverse possession and subsequent order to the Land Registrar Homabay County to register the land in his name could issue, if only the Court had jurisdiction.

22. However, the question that the Court ought to have satisfied itself with is, did it have jurisdiction? In Okoiti v Portside Freight Terminals Limited & 12 others (Petition E011 of 2024) [2025] KESC 44 (KLR) (30 June 2025) (Judgment), the Supreme Court held that,

> " In Macharia & another Vs Kenya Commercial Bank Limited & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR), this Court affirmed, like the Court of Appeal many years before it in the case of Owners of The Motor Vessel "Lillian S Vs Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR) that jurisdiction is everything; that without it a court must down its tools; that jurisdiction is derived from *the Constitution*, legislation, or both, and that a court cannot assume jurisdiction beyond what is conferred by law. Accordingly, as a standard practice, the Court must independently ascertain that any appeal brought under Article 163(4) of *the Constitution*, or any other provision, is properly before it."

23. Also, in Kenya Bureau of Standards v Geo Chem Middle East [2019] eKLR, the Court of Appeal held that,

> " On the issue of jurisdiction, it is a truism that jurisdiction is everything and if a Court or tribunal finds that it lacks jurisdiction to deal with a matter, then it must down its tools. This is why it makes sense for the Court or arbitrator to determine the question of jurisdiction in limine, where jurisdiction is challenged. See Owners of Motor Vessel Lillian S v Caltex Oil (Kenya) Ltd (1989) KLR 1, and the Supreme Court decision in S. K. Macharia & Another v Kenya Commercial Bank Limited & 2 others, Sup. Ct. Appl. 2 of 2011, [2012] eKLR."

24. Further, jurisdiction being a creature of statute it cannot be arrogated by a Court or assumed or imagined or imported to it by any means including crafting it. It is either the Court has it or it does not. Once a dispute is placed before the Court, a prudent and focused judge or judicial officer should

immediately ask himself or herself whether he/she has authority to determine the dispute. If there is none, he/she should down tools and call it a day. Thus, in Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling), the Supreme Court held;

> " A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law could only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which was conferred upon it by law. The issue as to whether a court of law had jurisdiction to entertain a matter before it, was not one of mere procedural technicality; it went to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings."

25. When the matter was placed before the trial Court, it should have satisfied itself that it had jurisdiction. In the Sugawara v Kiruti (Sued in her capacity as the administratrix of the Estate of Mutarakwa Kiruti Lepaso alias Mutaragwa Kiruti Lepaso alias Mutaragwa Kiroti Leposo and in her own Capacity) & 3 others (Civil Appeal E141 of 2022) [2024] KECA 1417 (KLR) (11 October 2024) (Judgment) the Court of Appeal held;

> " 5. A court's jurisdiction flowed from either *the Constitution* or legislation or both. Thus, a court could only exercise jurisdiction as conferred by *the Constitution* or other written law. It could not arrogate to itself jurisdiction exceeding that which was conferred upon it by law.
>
> 6. If it was intended that claims for adverse possession be determined by the Magistrates' Court, nothing would have been easier than for Parliament to have expressly enacted such a provision. So that in view of the express provisions of the law, a strict interpretation of section 38 of the *Limitation of Actions Act* would mean that hearing and determination of such matters was specifically limited to the Environment and Land Court to the exclusion of Magistrates' Court."

26. Therefore, since this (issue of jurisdiction) was the only main issue for determination indirectly flowing from or arising out of the fourth ground of the appellants' Memorandum of Appeal dated 28/5/2024 and in line with the provisions of Order 42 Rule 4 of the Civil Procedure Rules 2010, it is the finding of this court that the learned trial magistrate's judgment was faulty in the sense that it was made by a Court which did not have jurisdiction. I proceed to set it aside.

27. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated 28th May 2024 is hereby allowed, and the judgment of the trail Court set aside. Further, the suit in trial court is struck out with no order as to costs because it was filed in a Court without jurisdiction. Each party to bear own costs of this Appeal.

28. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED 18TH JUNE 2025.

HON. DR. IUR NYAGAKA,

JUDGE

In the presence of,

Ms. Oyala holding brief for G.S. Okoth for the Respondent

Jack Otieno for the Appellant