



REPUBLIC OF KENYA



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**Ikunyua v Ikunyua & 3 others (Civil Appeal 73 of 2018)
[2025] KECA 1546 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1546 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 73 OF 2018
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
OCTOBER 3, 2025**

BETWEEN

JOSEPH MUTHURI IKUNYUA APPELLANT

AND

JAMES MWITERI IKUNYUA 1ST RESPONDENT

CHARLES KOOME IKUNYWA 2ND RESPONDENT

MARITHA MWARIONJARU 3RD RESPONDENT

HARRIET MAKENA 4TH RESPONDENT

(Being an appeal against the judgment of the Environment and Land Court at Meru (L. N. Mbugua J.) dated 22nd November, 2017 in ELC Cause No. 135 of 2009)

JUDGMENT

1. The appellant, Joseph Muthuri Ikunyua, filed Originating Summons dated 7th October, 2009, before the Environment and Land Court (ELC), seeking to be registered as the absolute owner of land registered as L.R No. Ntima/Igoki/5219 (suit property) by operation of the doctrine of adverse possession. The registered proprietors of the suit property are the 3rd and 4th respondents. The 3rd respondent is the mother to the plaintiff as well as the 1st, 2nd and 4th respondents. The affidavit in support of the originating summons filed by the appellant, as well as the replying affidavit by the respondent in response to the originating summons, did not form part of the record.

The appellant's case before the ELC was that he had been in occupation and use of the suit property for a period of over twenty years. He testified that he was given the suit property by his father (the deceased) and that he occupied the suit property even during the deceased's lifetime. According to the appellant, the 3rd and 4th respondents colluded with the 1st and 2nd respondents to deprive him of the suit property.



2. In opposing the originating summons, the 1st and 2nd respondents filed a replying affidavit on 18th January, 2010, which was sworn by the 1st respondent. It was the 1st respondent's case that the suit property was transferred to the 3rd and 4th respondents in Succession Cause No. 339 of 2005.
3. The case was heard by way of viva voce evidence. The appellant during cross-examination testified that the suit property was transferred to the 3rd and 4th respondents pursuant to a judgment delivered in the succession case, in which they had sought to be granted letters of administration intestate to administer the estate of their late father. He admitted that he did not appeal the decision of the probate court. He maintained that he had been in occupation of the suit property even during his father's lifetime. The 4th respondent, Harriet Makena Ikunyua, gave evidence on behalf of the defence. She reiterated that the suit property was registered to herself and the 3rd respondent, and that the appellant was a trespasser who had refused to vacate the suit property.
4. After hearing the parties, the superior court (L. N. Mbugua J.), in a judgment dated 22nd November, 2017, determined that the appellant had not succeeded in proving his claim for ownership of the suit property by way of adverse possession. The learned Judge further determined that the 3rd and 4th respondents were not properly enjoined as parties to the suit. Since they were the registered proprietors of the suit property, the appellant's case was therefore a non-starter. She also found that the question of who was the rightful owner of the suit property was properly canvassed and determined in Succession Cause No. 339 of 2005, and therefore the appellant's suit was res judicata before the ELC. Consequently, she dismissed the appellant's suit.
5. Aggrieved by this decision, the appellant lodged this appeal. He laid out twelve grounds in his memorandum dated 24th April, 2018. In a nutshell, the appellant was aggrieved that the learned Judge did not decide the case in his favour, yet he had enjoyed open, continuous and exclusive possession of the suit property for a period of more than twenty years, from 1980 to 2004, before Succession Cause No. 339 of 2005 was lodged by the respondents. He faulted the learned Judge for dismissing the judgment of the High Court (P. M. Njoroge J.) in Civil Suit No. 135 of 2009 on the basis of non-service of documents, yet the pleadings were personally served upon the respondents. He took issue with the fact that the learned Judge failed to consider that the respondents' preliminary objection seeking to strike out the appellant's suit on the basis that it was res judicata was dismissed. The appellant was aggrieved that the learned Judge erred in failing to recognize that the 3rd and 4th respondents were enjoined as parties to the suit in a court order (Makau J.) dated 22nd October, 2012. He was aggrieved that the learned Judge failed to consider the fact that the firm of Basilio, Gitonga, Muriithi & Associates Advocates were not on record as the advocates representing the respondents, when the judgment was delivered by the High Court (P. M. Njoroge) in Civil Suit No. 135 of 2009. He invited us to allow the appeal as prayed.
6. The appeal was canvassed by way of written submissions. The appellant appeared in person. The firm of Basilio, Gitonga, Muriithi & Associates Advocates were on record for the respondents. The appellant, in his written submissions, stated that the judgment delivered by P. M. Njoroge J. in High Court Civil Suit No. 135 of 2009, on 8th October 2014, vested ownership of the suit property upon him by adverse possession. It was the appellant's submission that he had been in possession of the suit property for a period of over twenty years, since 1980, and that he has developed the same by constructing rental buildings. He urged us to allow his appeal as prayed.
7. On his part, counsel for the respondents, in opposing the appeal, submitted that the record of appeal as filed by the appellant was incompetent as it did not conform to provisions of Rule 87(1)(c) of the Rules of this Court. He explained that the appellant omitted to include pleadings, witness statements



or exhibits filed by the parties in the case before the Environment and Land Court. On whether the 3rd and 4th respondents were properly enjoined as parties to the suit before the ELC, counsel submitted that the appellant failed to prosecute the application seeking to enjoin the said respondents as parties to the suit. Consequently, the 3rd and 4th respondents were not parties in the appellant's suit before the ELC.

8. Counsel for the respondents further reiterated that the suit before the ELC was *res judicata*, as the question of who was the rightful owner of the suit property was determined in High Court Succession Cause No. 339 of 2005, which the appellant participated in. Counsel submitted that twelve years had not lapsed since 2007, when the suit property was vested upon the 3rd and 4th respondents. That was when the appellant filed his suit before the ELC. Counsel submitted that the appellant claimed that the suit property was ancestral land. He could not therefore, in the same breath, claim proprietorship of the same by adverse possession. Counsel cited a decision of the ELC in the case of *Haro Yonda Juaje vs Sadaka Dzeno Mbauro & another* [2014] eKLR in support of his argument. In the premises, counsel for the respondents urged this Court to affirm the decision of the superior court in its entirety and dismiss the appeal.

9. This being a first appeal, it is the duty of this Court to analyze and re-assess the evidence on record and reach its own conclusions. In *Selle vs. Associated Motor Boat Co.* [1968] EA 123, the court expressed itself as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan* (1955), 22 E.A.C.A 270.”

10. Having evaluated the record of appeal, as well as submissions by parties to the Appeal, we find that the appeal turns on the following issues:

- i. Whether the appeal as filed by the appellant was incompetent;
- ii. Whether the 3rd and 4th respondents were properly enjoined as parties to the suit filed by the appellant before the ELC;
- iii. Whether the learned Judge erred in setting aside the judgment delivered in High Court Civil Case no. 135 of 2009; and,
- iv. Whether the appellant sufficiently proved his claim of adverse possession.

11. With regard to the first issue, it was the respondents' submission that the appeal as filed by the appellant did not conform to the provisions of Rule 87(1)(c) of the Rules of this Court, 2010. Counsel for the respondents urged that, other than the originating summons, the appellant failed to include pleadings, witness statements and exhibits filed by both parties, thus rendering the record of appeal incomplete. We note that the appellant failed to include in the record of appeal crucial documents such as the affidavit in support of the originating summons, the respondents' replying affidavit in response to originating summons and the annexures thereto, as well as witness statements. We also appreciate the fact that the appellant appeared in person, and was not represented by an advocate. The supporting



and replying affidavits of the parties formed part of the pleadings, which are mandatory documents to be included in the record of appeal by virtue of the provision of Rule 87(1)(c) of the rules of this Court, 2010 (currently Rule 89 of the 2022 Court of Appeal Rules.)

12. The Supreme Court, in *Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 Others* [2015] eKLR held as follows regarding failure to file requisite documents:

“Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or *the Constitution*, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

13. The complaint by the respondents on lack of inclusion of the primary documents in the record of appeal is valid; however, we observe that this issue is being raised for the first time during the hearing of appeal. We are of the view that both parties have a duty to assist the Court arrive at a decision that determines the dispute before it on its merits. It was equally incumbent upon the respondents to avail the same documents by filing a supplementary record of appeal. The respondents chose to wait till the hearing of the appeal to raise this issue in their submissions. We hold that the objection was raised belatedly and under Section 3A and 3B of the *Appellate Jurisdiction Act* we shall proceed to consider the merits of the appeal.
14. On whether the 3rd and 4th respondents were properly enjoined as parties to the suit before the ELC, the record shows that the appellant had initially named the 1st and 2nd respondents as the defendants in his originating summons. The appellant stated that the 3rd and 4th respondents were properly enjoined as parties to the suit vide an order of the court (Makau, J.) made on 22nd October, 2012. The appellant however failed to attach the said order in the record of appeal, thereby denying us the opportunity to peruse the same. The learned Judge, in the impugned judgment, held that the 3rd and 4th respondents were not properly enjoined as parties to the suit, yet they were the registered owners of the suit property, rendering the appellant’s case a non-starter.
15. A perusal of the proceedings of the superior reveal that on 22nd October, 2012, the applicant did make an application before the court (Makau, J.) to have the 3rd and 4th respondents enjoined as parties to the suit. When the case proceeded for the main hearing on 16th February 2016, the 4th respondent gave evidence on behalf of the defence. She identified herself as one of the defendants in the suit. The initial judgment of the court (P. M. Njoroge, J.) dated 8th October, 2014, that was set aside, listed four respondents. There is therefore nothing on record to show that the 3rd and 4th respondents were not properly enjoined as parties to the suit. We agree with the appellant that the trial court made this decision in error. The 3rd and 4th respondents were properly enjoined as parties to the suit.
16. The appellant faulted the ELC for setting aside a judgment by M. Njoroge, J. dated 8th October, 2014, in Meru High Court Civil Case No. 135 of 2009, where the court had declared the appellant as the rightful owner of the suit property by adverse possession. The judgment was issued *ex parte* by the court on the premise that the respondents had been duly served with the pleadings and hearing notice, but they had failed to appear in court. The respondents’ counsel filed an application that sought to stay execution of the judgment, in the interim, and further asked the court to set aside the said judgment, as the appellant had not served the respondents as he had alleged. The court (P. M. Njoroge, J.), in a ruling dated 8th December, 2014, allowed the application by the respondents, and set aside the said *ex parte* judgment. The appellant, in his grounds of appeal, faulted the ELC for setting aside the said judgment.



17. The appellant failed to attach a copy of the said ruling dated 8th October 2014, which set aside the said judgment. Secondly, we hold that the appellant should have filed an appeal against the impugned ruling that set aside the said judgment after it was delivered, if he was aggrieved. The current appeal is against the judgment of the ELC delivered on 22nd November, 2017 and not against the ruling that set aside the initial *ex parte* judgment. For these reasons, this ground lacks merit and is disallowed.
18. Turning to the final issue for determination, the elements to be proved in a claim of adverse possession have been aptly stated by various decisions of this Court. In *Samuel Kihamba v. Mary Mbaisi* [2015] eKLR, this Court observed thus:
- “Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land.
- There must be an apparent dispossession of the land from the land owner.”
19. From the foregoing, a party claiming adverse possession has to prove that they have occupied the land in question openly without license or permission of the land owner, with the intention to have the land, and that they have dispossessed the registered owner of the suit property for the statutory period, as opposed to merely establishing that they have been in possession of the land for a period of twelve years. The onus of proving these elements remains on the party claiming proprietary rights by virtue of adverse possession.
20. In the instant appeal, the appellant’s case was that he was given the suit property by his father (the deceased), and that he had enjoyed possession of the suit property for a period of over twenty years since 1980. The appellant told the court that he occupied the suit property, even during the deceased’s lifetime, even at the point that the suit property was registered to the deceased. It is clear to this Court that the appellant entered into the suit property with the consent and permission of his late father. If one occupies land by permission and consent or license of the registered owner, such a person does not accrue any right of adverse possession on the said owner.
21. In the case of *Samuel Miki Waweru v. Jane Njeri Richu* [2007] eKLR this Court observed as follows:
- “It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. Further as the High Court correctly held in *Jandu vs. Kilpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been given.”
22. We find that the appellant’s possession of the portion of the suit property cannot be said to be asserting a hostile title in denial of the registered owner’s title, by virtue of the fact that he occupied the same with the permission of the deceased.
23. After the deceased died, the respondents filed High Court Succession Cause No. 339 of 2005, in which they sought to administer the estate of the deceased. The suit property formed part of the estate of the deceased. In the judgment of the probate court delivered on 30th January 2007, the suit property was bequeathed to the 3rd and 4th respondents, and subsequently registered in their names. The appellant was an objector in the proceedings before the Probate court. The appellant did not lodge an appeal against the judgment of the Probate court which disallowed his claim in respect of the suit property. We agree with the finding of the learned Judge that the issues raised by the appellant in the suit before the



ELC, particularly with regards to the ownership of the suit property, were dealt with in the Succession Cause. These issues therefore stood res judicata before the ELC.

24. In these circumstances, it is our finding, upon our re-evaluation of the evidence on record, that the appellant did not discharge both the legal and evidential burden to prove his claim for adverse possession of the suit property.

25. We find no merit in this appeal. We order that it be and is hereby dismissed with costs.

DATED AND DELIVERED AT NYERI THIS 3RD DAY OF OCTOBER, 2025.

JAMILA MOHAMED

..... **JUDGE OF APPEAL**

L. KIMARU

..... **JUDGE OF APPEAL**

A.O. MUCHELULE

..... **JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

