



**Munubi v Munubi & 4 others (Environment and Land Appeal
4 of 2024) [2025] KEELC 4489 (KLR) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4489 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL 4 OF 2024**

**E ASATI, J
JUNE 12, 2025**

BETWEEN

MBIYU PETER MUNUBI APPELLANT

AND

KENNETH ZIYAZI MUNUBI 1ST RESPONDENT

AGGREY ZEYAZI MUNUBI 2ND RESPONDENT

CHRISTOPHER LIDWEYE MUNUBI 3RD RESPONDENT

ALBERT AMBURA MUNUBI 4TH RESPONDENT

NANCY KAVAYA MUNUBI 5TH RESPONDENT

*(An appeal arising out of the judgement by HON R. NDOMBI, PM
in VIHIGA PMC ELC NO. 57 OF 2021(OS) delivered on 1/02/2024)*

JUDGMENT

Background

1. A brief background to the appeal herein is that the appellant was the applicant/plaintiff in Vihiga PMC ELC No 57 of 2021(OS), the suit. Claiming that he had had adverse possession of land parcel known as South Maragoli/Lugovo/860 (the suit land herein), the appellant sued the Respondents vide the Originating Summons dated 21st September 2021 seeking for:
 - a. A declaration that the title of Apollo Zeyazi Munubi to land parcel number South Maragoli/Lugovo/860 has been extinguished by the applicant's adverse possession thereof for a period of more than 12 years in terms of the [Limitation of Actions Act](#).
 - b. An order that the applicant had become entitle by adverse possession to Land reference number South Maragoli/Lugovo/860.



- c. An order that the Land Registrar Mbale register the applicant as absolute proprietor of Land parcel number South Maragoli/Lugovo/860 in place of Apollo Zeyazi.
 - d. That the Land Registrar Mbale be directed that the order herein shall be an instrument of transfer of ownership of the whole suit land from Apollo Zeyazi to the plaintiff.
 - e. That costs of the application be provided for.
2. The record shows that in response to the appellant's claim the Respondents filed the Respondents' Replying Affidavit sworn by Christopher Lidweye Munubi, the 3rd Respondent herein, on 15th December 2021, denying the appellant's claim and averring that the appellant and his siblings only started trespassing onto the suit land in the month of February 2018 after the parents of the Respondents had passed on.
 3. The record shows that the suit was heard before the trial court which vide its judgement dated 1st February 2024 found that it was not clear when the appellant moved into the suit land, that there was no evidence that the appellant had occupied the land for the requisite period of 12 years for adverse possession and that the appellant had failed to discharge the burden of proof that he was in adverse possession. The court therefore proceeded to dismiss the suit with costs.

The appeal

4. Aggrieved by the judgment, the appellant filed the present appeal vide the Memorandum of Appeal dated 26th February 2024 seeking for orders that: -
 - a. The appeal be allowed.
 - b. The judgement entered on 1st February 2024 by the Honourable trial Magistrate and any other subsequent orders be set aside or be vacated.
 - c. The trial Magistrate's judgment be substituted by an order of the court dismissing the Respondents' case with costs in Vihiga PMC ELC No. 57 of 2021.
 - d. Costs of this appeal and the proceedings in the lower court be borne by the Respondents.

Submissions

5. Vide directions given by the court on 11th November 2024 the appeal was heard by way of written submissions. Written submissions dated 29th November 2024 were filed by the firm of M. Kiveu Advocates on behalf of the appellant.
6. Counsel submitted that it is common law that for a claim of adverse possession to succeed the claimant must demonstrate that the occupation was without the proprietor's permission. Counsel submitted further that the parties had been actively litigating over ownership of the suit property in Kakamega High court Succession Cause No. 913 of 2023 but that there was no evidence of dispossession.
7. That adverse possession seeks to punish the indolent owner for sitting on his rights while on the other hand incentivizing any land owner to maximize the value of land by putting it into good use.
8. Counsel submitted that the appeal has merit and urged the court to allow it.
9. On behalf of the Respondents written submissions dated 20th January 2025 were filed by Angu Kitigen & Company advocates.



10. Counsel relied, inter alia, on the case of *Wambugu vs Njuguna* [1983] KLR and submitted that the right to adverse possession does not automatically accrue unless the person in whom this right has accrued has taken action. That the appellant's mode of entry onto the suit land was in the years 2018-2019 which means that it was trespass onto the suit land. That it is trite law that for a claim of adverse possession to suffice, the claimant must demonstrate all elements to support the claim. Counsel referred the court to the case of *Mombasa Teachers Co-operative Savings and Credit Limited vs Robert Katana & 15 others* [2018] eKLR where it was held that: -

“Likewise, it is settled that a person seeking to acquire title to land by adverse possession must prove non-permissive or non-consensual, actual, open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim of *nec vi nec clam nec precario*.”

11. Counsel submitted that from the year of entry of the appellant onto the suit land in the year 2019, 12 years had not elapsed to the year 2021 when the suit was filed.

12. Counsel submitted further that corroboration of the fact and length of possession by independent and verifiable and reliable evidence is necessary in cases of adverse possession to be able to meet the threshold required of a balance of probabilities to divest a registered owner of his/her property. That there was no evidence placed before court to show that the appellant was in exclusive possession of the entire suit land or a portion thereof.

13. Counsel urged the court to dismiss the appeal with costs.

Issues for determination

14. The grounds of appeal as set out in the Memorandum of Appeal which form the issues for determination are that; -

- a. The learned trial Magistrate was in error in failing to uphold the appellants' claim of adverse possession.
- b. That the learned trial Magistrate's evaluation of the evidence before her was wanting and hence she misdirected herself by holding that the appellant had failed to prove her case on balance of probability.
- c. That the learned Magistrate failed to appreciate the inconsistencies in the Respondent's testimonies during the site visit.
- d. The learned trial Magistrate exhibited actual bias in dismissing the appellant's claim.
- e. The learned trial magistrate's decision has caused the appellant gross miscarriage of justice.

Analysis and determination

15. This being a first appeal, this court is obligated to re-analyse the evidence placed before the trial court and draw its own conclusions. In *Selle & Another vs Associated Motor Boat Company Limited and Others* [1968] EA 123 it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact by the court below. It stated

“an appeal to this 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 conclusion though it should always bear in



mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.”

16. The first issue for determination is whether or not the trial court erred in failing to uphold the appellant’s claim of adverse possession.
17. Adverse possession is a doctrine of law *vide* which a person obtains legal title to land by reason of actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed period. In Kenya, the prescribed period is 12 years. The doctrine is anchored on sections 7, 13 and 38 of the *Limitation of Actions Act*.
18. A person claiming title to land by reason of adverse possession has the burden of proof under the provisions of sections 107 to 109 of the *Evidence Act* to prove the ingredients of adverse possession on a balance of probabilities. The ingredients of adverse possession have been discussed and identified in several authorities. For instance in the case of *Gabriel Mbui vs Mukindia Maranya* [1993]eKLR adverse possession was defined as :-

“..the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner’s enjoyment of land for purposes for which the owner intended to use it.”

In *Mtana Lewa –vs- Kahindi Ngala Mwangandi* [2015] e KLR the Court of Appeal defined adverse possession as:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

19. The appellant had the burden to prove that he had had open, actual, continuous, uninterrupted, peaceful and exclusive occupation of the suit land with the knowledge but without the consent or permission of the registered owner for the prescribed period of 12 years. In *Kimani Ruchure vs Swift Rutherfords & Co. Ltd* (1980)KLR 10 Kneller J held that

“the Plaintiffs have to prove that they have used this land which they claim as of right: *nec vi, nec clam, nec precario* (no force, no secrecy, no persuasion)

20. The evidence placed before the trial court by the appellant was as contained in his witness statement dated 22nd July 2022 which was adopted as his evidence in chief. He had stated in the witness statement that he was the son of Gideon Munubi, deceased who was the son of the late Elisha Munubi. That the Respondents are his cousins. That since he was a young man, his family had been using the land by planting coffee, food crops, eucalyptus trees, bananas, nappier grass and ground nuts. That he was aged 57 and his family had been using the land since he was born.



21. That the Respondents had never used or occupied or visited the suit land.
22. He stated further that the land was fenced with barbed wire and live fence and that it did not require any demarcation to tell it from other parcels because his family had been maintaining it ever since.
23. He stated that it was only in the year 2018 after the Respondents' father had died that the Respondents came to the ground with the intention to subdivide the land and that it was when he learnt that the Respondents had undertaken succession to the estate of the registered owner.
24. The record shows that the Appellant had also filed an Affidavit in Support of the Originating Summons which he swore on 21st September 2021. Although the appellant did not annex to the said affidavit copy of extract of the title in respect of the suit land as required by law, he acknowledged in paragraphs 7 and 8 of the Affidavit that the suit land was registered in the name of one APOLLO ZEYAZI who was his uncle and father to the Respondents. He stated in the said Affidavit that registration of the suit land in the name of Apollo Zeyazi was in trust for other family members.
25. The record shows that Upon examining this evidence, the trial court found that it was not clear from the evidence how long the Respondents had lived away from the suit land and further that it was also not clear when the plaintiff entered the suit land. That from the evidence placed before court it appeared the applicant took possession of the land in the year 2018. That there was no evidence of earlier occupation or possession to show that 12 years had elapsed to prove adverse possession. That the plaintiff/appellant herein did not discharge the burden of proof on the issue of adverse possession.
26. The appellant faults the trial court for this finding and complains that the trial court exhibited open bias against him and failed to uphold his claim of adverse possession of the suit land. (see grounds 1 and 4 of appeal)
27. I have carefully re-examined the evidence placed before the trial court. According to the evidence of the plaintiff it appears it is his family members who had been using the land. The family members were not disclosed. The suit was not brought on behalf of the said family members. The appellant does not claim to have personally had exclusive possession of the suit land. In such a case a claim based on adverse possession cannot lie in his favour.
28. And the reason for entry onto the suit land, according to the appellant, was because the land was registered in the name of the Respondents' father one Apollo Zeyazi who was the appellant's uncle in trust for other family members including the appellant. Such kind of entry cannot result in adverse possession as the implication is that the appellant and/or his family were on the land as beneficiaries under the trust, if any.
29. There is no dispute that none of the parties live on the suit land. Though the appellant claimed that his family had been using the land since he was born, he laid no evidence before the trial court of his or his family's occupation or activities on the suit land before the year 2018 or 2019.
30. The Respondents' evidence was that the appellant entered the land in the year 2019 when he started planting sorghum, eucalyptus, nappier grass.
31. On the basis of the evidence placed before the trial court, I find that adverse possession was not proved. The trial court did not err in its findings and decision.
32. I further find that the trial court analyzed the evidence placed before it correctly and that no evidence of bias of the trial court against the appellant as claimed by the appellant was exhibited in the court below and before this appeal.



33. Further, it is important to point out that in view of the provisions of section 38 of the *Limitation of Actions Act* the trial court had no jurisdiction to entertain an Originating Summons claiming title to land based on adverse possession as now confirmed by the Court of Appeal in Civil Appeal No. 141 of 2022 (Sugawara vs Kiruti).
34. The court finds that the appeal lacks merit and hereby dismiss it. Costs to the Respondents.
Orders accordingly.

JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 12TH DAY OF JUNE 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Ajevi- Court Assistant.

Mondia for the Appellant.

N/A for the Respondents.

