



M’Njogu & 7 others v Mwangi (Sued as the Administrator of the Estate of the Late Gerald Mwangi Mugo - Deceased) (Civil Appeal E057 of 2022) [2025] KECA 1571 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1571 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL E057 OF 2022
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
OCTOBER 3, 2025**

BETWEEN

**JULIUS MWORIA M’NJOGU 1ST APPELLANT
M’MARETE M’MWITARI 2ND APPELLANT
PAUL MURIIRA M’NJOGU 3RD APPELLANT
JULIUS MWITI 4TH APPELLANT
JOHN MUTHOMI 5TH APPELLANT
DANIEL MUTUA MUGWIKWA 6TH APPELLANT
KIJUKI KAIGA 7TH APPELLANT
KAREMU M’ITUAMIKWA 8TH APPELLANT**

AND

GRACE KARWIRWA MWANGI (SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE GERALD MWANGI MUGO - DECEASED) RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court at Meru (Lucy N. Mbugua J.) dated 21st July, 2021 in ELC Cause No. 143 of 2016)

JUDGMENT

1. The appellants took out Originating Summons dated 24th August, 2016, before the Environment and Land Court(ELC), against the Respondent, Grace Karwirwa Mwangi, seeking a declaration that they had acquired prescriptive rights to parcel No. L.R. No.



Ntima/Igoki/2007 (suit property), measuring 2.62 hectares,

through adverse possession. The respondent appeared in her capacity as the administrator of the estate of Gerald Mwangi Mugo (deceased), her late husband, who was the registered proprietor of the suit property.

2. The appellants' case before the ELC was that the suit property is their ancestral land, that they have lived on the said property all their lives, and that their kinsmen were buried on the property. They asserted that they have put up homes and also cultivated the suit property. They averred that sometime in 1970, the then Minister for Lands, Jackson H. Angaine, illegally acquired a title deed to the suit property, but that he did not evict the appellants. They stated that sometime in 1998, Gerald Mwangi Mugo (deceased) informed them that he had purchased the suit property, and asked the appellants to vacate from the property. The appellants averred that they declined to leave as it was their ancestral land. That on 11th August 1999, the deceased, through his advocates served the appellants with an eviction notice but they did not vacate the suit property. That in 2009, vide a civil suit filed before the High Court at Meru, High Court Civil Case No. 85 of 2009, Gerald Mugo (deceased) filed suit seeking their eviction from the suit property, which suit was dismissed for want of prosecution. The appellants averred that they have enjoyed open and uninterrupted possession of the suit property for a period of over twelve years, and had therefore acquired rights to the same by adverse possession.
3. In opposing the originating summons, the respondent filed a replying affidavit and counter claim dated 2nd March, 2018. It was the respondent's case that the suit property was originally owned by her father, Jackson H. Angaine, since 1970, and was in 1998 transferred to her late husband, Gerald Mwangi Mugo (deceased), who is the current registered proprietor. She averred that the appellants have never enjoyed open, exclusive, continuous and uninterrupted possession of the suit property to entitle them to the orders sought in their pleadings. She pleaded that the deceased asserted his rights over the suit property through issuance of vacation notices to the appellants dated 11th August, 1999, and 17th March, 2016.
4. The respondent stated that the deceased further filed two civil suits against the appellants before the Meru Law Courts: one before the Chief Magistrate's Court vide Misc. Application No. 200 of 1999; and another before the High Court vide Meru High Court Civil Case No. 85 of 2009. The former sought an order of protection from the appellants, while the latter sought eviction orders against the appellants with regard to the suit property. The respondent averred that the appellants had never resided on, or developed the suit property, and that they were intermittent trespassers who would occasionally cut fodder for their domestic animals. She pointed out that the appellants had never asserted their interest, if any, on the suit property when it was first registered in 1970, and later when it was transferred to her late husband in 1998.
5. In the counterclaim, the respondent sought eviction and injunctive orders as against the appellants, to stop them from trespassing or occupying the suit property.
6. The case was heard by way of viva voce evidence. After hearing the parties, the superior court (Mbugua J.), in a judgment dated 21st July, 2021, determined that the appellants failed to prove that they enjoyed a continuous and uninterrupted possession of the suit property for a period exceeding twelve years. She dismissed their suit and allowed the respondent's counter claim as prayed.
7. Aggrieved by this decision, the appellants lodged this appeal.



Twelve grounds were laid out in their memorandum of appeal. In summary, the appellants faulted the learned trial Judge for failing to find that the statutory period started running in 1970 and lapsed in 1982, and that after 1982, the respondent was no longer the absolute proprietor of the suit property. They were aggrieved that the learned Judge failed to find that the transfer of the suit

property to the deceased in 1998 was subject to adverse possession rights of the appellants. They faulted the learned Judge for finding that Meru HCCC No.85 of 2009, which was filed by the deceased 27 years after the appellant had already acquired prescriptive rights over the suit property by way of adverse possession, had the effect of stopping the running of time in computation of the statutory period. They maintained that the respondent did not obtain any eviction orders against the appellants vide Meru HCCC No.85 of 2009, and the learned Judge erred in finding to the contrary. They took issue with the fact that the learned Judge allowed the respondent's counterclaim which they argued was incompetent. They faulted the learned Judge for finding that the appellants lied on oath that they lived on the suit property, contrary to the findings in the scene visit report. In the premises, they urged this Court to allow their appeal as prayed.

8. The appeal was canvassed by way of written submissions. Counsel for the appellant highlighted the submissions during the plenary hearing of the appeal. The appellants were represented by the firm of Mwenda, Mwarania, Akwalu and Company Advocates. Counsel for the appellants, Mr. Mwarania, submitted that time, for the purposes of computing the statutory period with regard to adverse possession, started running in 1970 when the suit property was first registered, and therefore lapsed in 1982, after twelve years. He maintained that after 1982, the registered owner had extinguished his rights to recover the suit property, and therefore the subsequent transfer of the suit property to the respondent's husband in 1998 was inconsequential. Counsel submitted that though the respondent claimed that an eviction order was issued in Meru High Court Civil Case No. 85 of 2009 against the appellants, she failed to provide proof of the same.
9. Counsel for the appellants asserted that since the statutory period lapsed in 1982, the suit which was filed in 2009 did not have the effect of interrupting the said period for purposes of adverse possession. He maintained that the appellants occupied the whole of the suit property, and that whether the appellants have put up structures or buried loved ones on the said property was immaterial in determining their claim for adverse possession. Counsel for the appellants further submitted that the counter claim as filed by the respondent was time barred by virtue of Section 7 of the [Limitation of Actions Act](#) and ought to have been struck out. He therefore urged this Court to allow the appellants' appeal as prayed.
10. On the other hand, counsel for the respondent (Ndubi Ondubi & Associates), in opposing the appeal, submitted that time started running afresh in 2009, after the respondent's late husband filed Meru High Court Civil Case No. 85 of 2009, seeking orders of eviction as against the appellants from the suit property. It was his submission that the institution of the said suit amounted to an interruption of the appellant's possession of the suit property. He explained that the appellants lodged the suit before the superior court in 2016, which was seven years after time started running, and therefore their claim for adverse possession was unfounded. On whether the counter claim was time barred, counsel for the respondent submitted that the learned Judge having determined that the respondent was the rightful owner of the suit property, then it followed that the appellants were trespassing, and as such, the learned Judge did not err in issuing the eviction orders sought in the counter-claim. In the premises, counsel for the respondent urged this Court to affirm the decision of the superior court in its entirety.



11. 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 *John Teleyio Ole Sawoyo vs David Omwenga Maobe* [2013] eKLR this Court held:

“This being a first appeal we have the duty to reconsider both matters of fact and of law. On facts, we are duty bound to analyze the evidence afresh, re-evaluate it and arrive at our own independent conclusion but must bear in mind that the trial court had the advantage of hearing the witnesses testify and seeing their demeanour and should make allowance for the same. In the case of *Mwangi vs Wambugu* [1984] KLR 453 at page 461, Kneller JA (as he was then) stated:

‘This is a first appeal so this Court is obliged to reconsider the evidence assess it and make appropriate conclusion about it, remembering we have not seen or heard the witnesses and making allowance for this; (*Selle & Another –vs- Associated Motor Boat Company Ltd & Others* [1968] EA 123, 126 (CA Z) and *Williamson Diamonds Ltd –vs- Brown* [1970 EA 1.12] (C A T)’.

Still on the duty of the first appellate Court, Hancox JA (as he then was), stated in *Ephantus Mwangi & another –vs- Duncan Mwangi Wambugu* [1982 -88] 1 KAR 278 at page 292, as follows:

‘A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.’”

12. Having re-evaluated the record of appeal, as well as submissions by parties to the appeal, we find that the issue for determination by this Court is whether the appellants sufficiently proved their claim of adverse possession.
13. 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.”

14. 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 twelve years. The onus of proving these elements remains on the appellants.
15. We have re-evaluated the testimony and evidence of the parties.

The appellants testified that the suit property was their ancestral land; that they were born on the said land; that they have built houses and cultivate the land; and that their kinsmen have been buried on the suit property. The appellants asserted that they were in possession of the land when the respondent’s father acquired title to the same in 1970, before it was transferred to the respondent’s late husband (deceased) in 1998. The respondent, on the other hand testified that the appellants entered the suit property in 1999, and that since then, the deceased asserted his rights over the suit property, up to and until his demise in 2011.



16. It is our holding that the appellants have not provided any evidence to support their claim that they were born on the suit property, and have resided there since before 1970, when the respondent's father acquired title to the same. The 1st appellant testified that all the appellants have built houses on the suit property where they reside with their families, and that their parents were buried on the said land. However, the Scene visit report dated 23rd September 2019, by the Executive Officer of the Court, who was ordered by the court to visit the suit property, indicated that there were no residential buildings or graves on the suit property, as alleged by the appellants. This observation disputes the appellants' assertion that they were born and were at the time resident on the suit property. Further, according to the report, the appellants were unable to point out the specific boundaries of the area they were claiming to have acquired by adverse possession, even though they alleged that the same was their ancestral land. What struck the court was the sheer vagueness of their claim when they were told to point out the claimed area on the ground.
17. It is not clear to this Court when the appellants entered the suit property. In her judgment, the learned Judge failed to make a determination on the same. The demand letter dated 11th August, 1999 produced by both parties showed that the appellants were in use of the suit property in 1999. The deceased husband of the respondent had instructed his advocates to write to the appellants demanding that they stop trespassing and cultivating on the suit property. In the absence of any evidence to prove that the appellants were in occupation of the suit property before the title was transferred to the deceased in 1998, for purposes of computing time, we find that time started running in 1999, when the deceased demanded that the appellants stop trespassing on the suit property.
18. As to the nature of occupation, the appellants asserted that they have been in open, continuous and exclusive occupation of the suit property, a fact which was challenged by the respondent. The report by the Executive Officer of the Court indicated that the appellants have cultivated the suit property at some point in time. The appellants maintained that neither the deceased nor the respondent have ever been in possession of the suit property.

However, we hold that the non-utilization of a parcel of land by the registered owner does not extinguish his proprietary rights over the said property. This Court held so in the case of *Alfred Welimo v. Mulaa Sumba Barasa*, Civil Appeal No. 186 of 2011, where it expressed itself thus:

“It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it; for as Robert Megarry aptly observed in his *Megarry's manual of the Law of Property*, 5th ed. page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So the mere fact that the appellant abandoned possession of the suit property and went to live at Ndalun scheme by and of itself does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with *animus possidendi* (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land...”

19. In this case, the respondent has furnished evidence to the effect that the deceased filed an application before the Chief Magistrate's Court at Meru vide Miscellaneous Application No. 200 of 1999, as against the appellants, seeking to have the suit property surveyed, and further seeking orders directing the police to provide security during the survey process, which orders were granted by the Magistrate's court. Further, the deceased filed a civil suit before the High Court in Meru vide High Court Civil Case No. 85 of 2009 seeking orders of eviction of the appellants from the suit property. These facts are not disputed. It is trite that filing of a suit asserting rights over land stops time from running for purposes



of adverse possession. Therefore, the learned Judge did not err in determining that time running in favour of the appellants' claim for adverse possession was interrupted when the deceased filed the said civil suit in 2009.

20. This Court, in the case of *Gulam Miriam Noordin v Julius Charo Karisa* [2015] eKLR, observed as follows:

“When would time stop running? In *Joseph Gahumi Kiritu v Lawrence Munyambu Kabura* Civil Appeal No.20 of 1993, this Court held that;

“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. ...He must therefore make a peaceable and effective entry, or sue for recovery of land.”

21. In *Alfeen Mehdimohammed v. Basil Feroz Mohamed & 223 others* [2016] eKLR. This Court held thus:

“A person seeking to acquire title to land by adverse possession for the applicable statutory period, must prove non permissive or non- consensual, actual open, notorious, exclusive and adverse use by him, expressed in the Latin Maxim, *nex vi nec clam nec precario*. See *Jandu v. Kirplal & another* [1975] EA 225. This denotes complete and exclusive physical control over the land in dispute and to have *animus possidendi*, or simply put, the intention to have the land. See *Eliva Nyongesa and another v. Nathan Wekesa Omacha* Civil Appeal No. 134 of 1993.

Time which has begun to run in favour of the adverse possessor will stop when the owner of the land asserts his right by taking legal proceedings or by making effective entry into the land. See *Njuguna Ndatho v. Masai Itumo & 2 others*. Civil Appeal No. 231 of 1999.”

22. From the foregoing, we agree with the learned trial Judge's finding that the appellants failed to establish that they have been having continuous, peaceful and un-interrupted possession of the suit property. The fact that the appellants have cultivated and grazed on the suit property for a period of over twelve years does not, per se, prove their claim for adverse possession. The record shows that the appellants' occupation of the suit property was under constant challenge by the deceased by way of litigation in respect of the suit property. It is our finding that during the subsistence of the civil suit filed by the deceased before the High Court at Meru in 2009, the appellants' claim to the suit property was interrupted and discontinued. From 2009 to 2016, when the appellants lodged their suit before the Environment and Land Court, the statutory period of twelve years had not lapsed.

23. We have said enough to show that the appellants claim for adverse possession was not proved, and therefore the learned Judge was correct in holding that no finding could be made in the appellants' favour in that regard. Having determined that twelve years had not lapsed from 2009 when time started running afresh up to 2016 when the appellants' suit was filed before the ELC, the respondent's counter-claim was not time barred and was properly filed before the said court.

24. The upshot is that we find no merit in this appeal and we order that it be and is hereby dismissed with costs to the respondent.



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

JAMILA MOHAMMED

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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

