

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELC APPEAL NO. E006 OF 2023

MAGDALENE JOSEPH MUUNDA.....APPELLANT

-VERSUS-

NTHENYA MBEVO KAMANZA

RESPONDENT

(Being an appeal from the judgment of Hon. B. N. Ireri, Senior Principal Magistrate delivered on 20th September, 2021 in Makindu ELC Case N. 25 of 2018)

JUDGMENT

1. The history of the suit property can be traced to the 1970's. One Alima Mbithe Kamanza owned plot number 19 at Kalamba Market in Kibwezi. He plot measured 40ft x 100ft. Alima Mbithe Kamanza who died on 15th November, 1971 had a son called Philip Uvevo Kamanza. Philip Uvevo Kamanza married two wives that is the Plaintiff and Mbenesi Mwikali Kamanza. Philip Uvevo Kamanza died on 15th August, 1987 and one of his wife Mbenesi Mwikali Kamanza died on 27th May, 2011.
2. Between 7th October, 1994 and 9th October, 1994, the Aombe clan divided the properties of Philip Uvevo Kamaza amongst his two wives and children. Plot 19 was given to the Appellant. Plot 19 had been leased to Joseph Muunda Makau in 1992 where he was operating a hotel. Joseph Muunda Makau paid rent for a few months but later refused to pay rent claiming that he owned half of plot 19. He died on 18th February, 2005.
3. The hotel which was being run by Joseph Muunda Makau was closed down upon his demise. The Respondent later discovered that Joseph Muunda Makau had attempted to subdivide plot 19 into plot 19A and 19B and that plot 19A had been registered in the name of Raban W. Muuo. The Appellant and her co-wife claimed that their husband had purchased half of plot 19 on 9th August, 1995 from the Appellant.

4. It is the Appellant and her co-wife's claim to half of plot 19 which prompted the Respondent to file an amended plaint in which she claimed the following reliefs:
- a. Surrender of my plot No. 19A.**
 - b. Payment of rent arrears from the year 1995 upto 2018.**
 - c. A declaration that Plot No. 19 located at Kibwezi Market was illegally, unprocedurally and unlawfully subdivided, transferred in the names of Joseph Muunda and Rabani W. Muuo.**
 - d. An order of cancellation of any registration and letter of allotment issued in the names of Joseph Muunda and Rabani W Muuo by the 4th Defendant in respect of plot No. 19 located at Kibwezi Market.**
 - e. Costs of the suit.**
 - f. Interest on (3) and (4) above.**
5. The Appellant and her co-wife filed an amended defence and raised a counterclaim in which they sought the following reliefs:
- a. The 1st and 2nd Defendants be declared the legal owners of Plot No. 19A at Kalamba Market in Kikumbulyu Location, Kibwezai by adverse possession.**
 - b. The 1st and 2nd Defendants be declared the legal owners of plot No. 19A at Kalamba Market in Kikumbulyu location, Kibwezi by virtue of having inherited the same from their deceased husband one Joseph Muunda who had lawfully purchased the same.**
 - c. The 1st and 2nd Defendants be declared the legal owners of plot No. 19A at Kalamba Market in Kikumbulyu location, Kibwezi by adverse possession.**
 - d. The last original indentures in respect of plot No. 19A at Kalamba Market in Kikumulyu location, Kibwezi which are with the Plaintiff be dispensed with.**
 - e. Cost of the suit.**

f. Interest on a, b, c and d above.

6. After a full hearing, the trial magistrate substantively allowed the Respondent's claim and dismissed the Appellant and her co-wife's counterclaim with costs. This is what triggered the appeal herein in which the Appellant raised the following grounds of appeal:
- 1) The learned magistrate erred in law and facts by dismissing the entire Defendant/defence with costs to the Plaintiff.**
 - 2) The learned magistrate erred in law by disregarding weight of evidence in favour of the Defendant/Appellant.**
 - 3) That the learned magistrate erred in law and facts by holding the Plaintiff proved her case on the balance probability where the Defendant was not proved as the right one to be sued.**
 - 4) That the learned magistrate erred in law and facts by applying wrong principles of law to arrive at wrong judgment.**
 - 5) That the learned magistrate erred in law and facts by not appreciating the doctrine to competing equities between the parties.**
 - 6) The learned magistrate erred in law and facts by not considering the legal capacity of the parties herein in the proceedings.**
7. The parties were directed to file written submissions. The Appellant filed her submissions dated 4th April, 2025. The Respondent filed her submissions dated 5th May, 2025.
8. The Appellant submitted that the Respondent had no locus standi to bring the suit against them as she had not obtained letters of administration in respect of the estate of Philip Uvevo Kamanza. The Appellant also submitted that the trial magistrate did not apply the proper principles of law thus arriving at a wrong judgment and further that he did not consider the evidence of the Appellant.
9. On her part, the Respondent submitted that she had the capacity to sue as she had filed for grant of letters of administration in 2017 which grant was

subsequently confirmed in 2019. The Respondent further submitted that the trial magistrate properly analyzed and evidence adduced by the parties and arrived at a proper finding that the Respondent had proved her case and that the Appellant had not proved her claim for adverse possession.

10. My duty as a first appellate court is to reevaluate the evidence adduced afresh and reach my own conclusions. This position was clearly stated in the case of **Selle v-s- Associated Motor Boat Company Limited & Others (1968) EA 123 at 126** in the following words:

“An appeal to this court from a trial of the High Court is by way of a 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 bear in mind it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound to follow the trial judge’s findings of fact if it appears that either he clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconstant with the evidence generally (Abdul Hameed Saif –vs- Ali Mohamed Sholani (1955) 22 EACA 270)”.

11. There is no contention that plot No. 19 was originally registered in the name of Alima Mbithe Kamanza. Alima Mbithe Kamanza had only one son that is Philip Uvevo Kamanza who had two wives. One of his wives Benesi Mwikali died on 27th May, 2011. The surviving wife is the Respondent. The issues which emerge for determination are firstly whether the Respondent had capacity to file this suit. Secondly, whether plot No. 19A (suit property) was lawfully obtained from plot No. 19. Thirdly, whether the Appellant had proved that she had obtained the suit property through adverse possession. Fourthly, which order should be made on costs.

12. There is evidence which was adduced that the properties of Philip Uvevo Kamanza were distributed by the Aombe Clan amongst his two wives and their children. Among the Kamba community the clan officials are given powers to do certain things including distribution of property of a person who has died intestate. In the instant case, the Aombe Clan sat between 7th and 9th October, 1994 and distributed the properties of Philip Uvevo Kamanza. Plot No. 19 was given to the Respondent. There was a review of the distribution of 9th October, 1994 which was carried out on 21st September, 1996.
13. The Respondent later on filed a succession cause in respect of the estate of her husband in 2017. She obtained a confirmed grant on 21st May, 2019. It is therefore clear that she had capacity to file the suit against the Appellant.
14. Alima Mbithe Kamanza died on 15th July, 1971. Plot No. 19 which was registered in her name by Masaku County Council had not been subdivided. When Makueni County Council was created, records were transferred to the council. Still plot 19 remained intact. Joseph Muunda Makau was a tenant operating a hotel on plot 19 as from 1992. Joseph Muunda Makau paid rent for some time before he stopped paying rent alleging that he had purchased the suit property.
15. The evidence by the Appellant during the hearing is that Joseph Muunda Makau had entered into a sale agreement with the Respondent for the purchase of the suit property on 9th August, 1995. On the same day of the agreement, Alima Kamanza is said to have made an application to Makueni County Council for the subdivision of plot 19. The witnesses to the application for subdivision were said to be the Respondent and Joseph Muunda Makau. The subdivision application is said to have been approved by the area councilor on 15th May, 2000.
16. On 24th May, 2002, Makueni County Council wrote to Alima Kamanza asking her to pay Kshs.2,000/= for subdivision and Kshs.1,000/= being conservancy fee for the year 2000. On 16th November, 2000, a letter of

allotment was issued in the name of Joseph Muunda Makau. On 14th March, 2006, the government of Makueni County which is the successor of Makueni County Council wrote a letter confirming that the suit property was in the name of Joseph Muunda Makau.

17. The Respondent denied selling the suit property to Joseph Muunda Makau. The Appellant on the other hand maintained that the Respondent sold the suit property to her husband and filed a counterclaim that she had been on the suit property which was purchased by her husband for long and that she had acquired the same by adverse possession.
18. The application for subdivision was allegedly made by Alima Kamanza on 9th August, 1995 and was allegedly witnessed by the Respondent and Joseph Muunda Makau. It is not possible that Alima Kamanza who died on 15th November, 1971 could have made an application for subdivision. The application for subdivision was made on the same day of the agreement for sale. The application for subdivision whose date was changed from 9th August, 1995 to 9th August 1996 was not signed by the alleged Applicant. It is also not clear whether the Respondent thumb printed or signed the application for subdivision. The subdivision application was recommended by the area councilor on 15th May, 2000.
19. There are minutes of June, 2000 by the Works Town Planning and Market Committee which were produced by the Appellant but it is not shown whether or not the application for subdivision of plot 19 was approved. This being the case, the purported letter of allocation of the suit property given on 16th November, 2000 is questionable.
20. It is not indicated in the sale agreement how the purchase price of Kshs.250,000/= was paid. There is no indication whether it was by cash or cheque and if so when it was paid. The Appellant did not in her witness statement and evidence in chief state how the purchase price was paid.
21. It is therefore clear that the suit property was neither purchased from the Respondent nor was it properly subdivided as alleged. A letter from the

government of Makueni County points out that plot No. 19 was erroneously registered in the name of Rabani W. Muuo. The letter goes on to fault the purported subdivision and registration in the name of Joseph Muunda Makau which is null and void.

22. The evidence of the Appellant was that the hotel business which was being operated by her husband was closed in 2005. The building was in dilapidated state and was pleading to be allowed to put some iron sheets to prevent it from further damage. She also conceded that the Respondent's son had edged them out from the suit property which he had renovated and rented out to third parties. This being the case there is no way the Appellant's claim of adverse possession would have succeed.

23. As far as 21st September, 1996, the tables and chairs which were in the suit property were shared out to the Respondent. This shows that the Appellant and her co-wife were not in peaceful occupation of the suit property. The admission that the Respondent's son has taken over the suit property shows that the Appellant has no control or occupation of the suit property.

24. The trial magistrate properly analyzed the evidence before him and found that the Appellant had not proved her claim for adverse possession.

25. The trial magistrate having found that there was no sale between the Respondent and Joseph Muunda Makau, the Appellant's claim to the suit property was a trespass to the same and the Appellant and her co-wife did not require to be administrators of the estate of Joseph Muunda Makau in order to be sued. I therefore find that the Appellant's appeal is devoid of merit. The same is hereby dismissed with costs to the Respondent.

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HON. E. O. OBAGA

JUDGE

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT
TEAMS THIS 21ST DAY OF OCTOBER, 2025.**

IN THE PRESENCE OF:

Ms. Muturi for Ms. Kiusya for Respondent.

Mr. Mwendwa for Appellant.

Court assistant Steve.

ORIGINAL