



Opany & another v Okech (Suing as Legal Representative of the Estate of the Late Martin Okech Oyange) & another (Environment and Land Appeal E016 of 2024) [2025] KEELC 6857 (KLR) (9 October 2025) (Judgment)

Neutral citation: [2025] KEELC 6857 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E016 OF 2024
AE DENA, J
OCTOBER 9, 2025**

BETWEEN

MICHAEL ODIPO OPANY 1ST APPELLANT

MAURICE ODUOR OPANY 2ND APPELLANT

AND

JOSEPH JUMA OKECH (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE MARTIN OKECH OYANGE) 1ST RESPONDENT

JANET AWINO OKUMU (SUING JOINTLY AS LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE JAMES ADUR OYANGE AND JOSHIA OGANGO PAMBA) 2ND RESPONDENT

JUDGMENT

1. The Appellants Michael Odipo Opany and Maurice Oduor Opany being dissatisfied with the judgment and decree of the Hon. J. P. Nandi delivered at Bondo on 27th October, 2023 in Bondo ELC suit No. E047 of 2021 appeals against the whole of the said judgment and decree and prays that;-
 - a. That this Appeal be allowed.
 - b. That the Judgment and Decree in Bondo PMELC case no. E047 of 2021 be set aside and the orders prayed for by the Appellants be awarded as prayed.
 - c. The Appellants be awarded the costs of this appeal.
2. The grounds of appeal are set out in the Memorandum of Appeal as follows; -
 - a. The learned trial Magistrate erred in law and fact by finding that the sale agreement dated 16/6/1997 was not a valid agreement and that it was not binding on the parties.



- b. The learned trial Magistrate erred in law and fact by finding that the occupation of the appellants on the suit land is/was illegal and that they were trespassers despite their father having bought the same from the proprietors, an agreement to which the appellants were witnesses.
 - c. The learned trial magistrate erred in law and fact in that he failed to find that the appellants had proved the elements of adverse possession on a balance of probability as they had been in open and uninterrupted occupation of the suit property for more than 24 years.
 - d. The learned trial magistrate erred in law and fact by finding that time for adverse possession had not started running in view of the restriction still existing on the suit parcel yet it was not established whether or not the restriction was placed against the occupancy of the appellants on the suit parcel.
 - e. The learned trial magistrate erred in law and fact by relying on a restriction whose details as to whether there was any objection raised on the particular parcel disputing its ownership, by whom the said objection was raised and against who, were never produced.
 - f. The learned trial magistrate erred in law and fact by failing to find that the respondents herein did not approach court in good faith since they waited until after the demise of all the registered proprietors who had sold the suit parcel to the appellants deceased father for them to file a suit against the appellants
 - g. The learned trial magistrate erred in law and fact in that he failed to consider the appellants' submissions and the judicial authorities thereof which were relevant to the case.
 - h. The learned trial magistrate's decision is against the weight of evidence and is bad in law.
3. Upon admission of the Appeal, the court directed the Appeal to proceed by way of written submissions, both parties complied. The submissions are summarized as follows; -

Appellants Submissions

4. The Appellant framed three issues for determination in submissions dated 20/02/2025 filed through his Advocate Achieng Yvonne & Co. Advocates as follows; -
 1. Whether the validity of the sale agreement dated 16/06/1997 affected the claim of adverse possession
 2. Whether the Appellants proved the elements of adverse possession
 3. Whether time for adverse possession stopped running by dint of the restriction by the chief land registrar.
5. On issue number 1 the Appellant submits that the plaintiffs case was on adverse possession and not validity of the sale agreement which was a non-issue as the only outcome allowed in a claim for adverse possession is the loss of land through such possession. Reliance was placed on the decision in the case of Onzere vs Nanyama [Environment and Land Appeal 15 of 2022] [2024] KEELC 1392 [KLR].
6. On issue number 2 the Appellants urge that the elements of adverse possession were proved. The Appellants had been in exclusive possession for 2024 years without interruption from the year 1997 until the filing of this suit in 2021 by the respondents. Several cases were relied upon on the elements of adverse possession.



7. On issue number 3 it is submitted that in adverse possession time stops running only when the title owner initiates a legal action against an adverse possessor. Distinguishing the decision of Adonija Onyango Oluoch & 2 Others v Jackson Leele Mekenya [2018] eKLR relied upon by the trial court in finding that a claim of adverse possession cannot be maintained/arise where there is a restriction by the Chief Land Registrar, it is submitted that land ownership was in dispute including an appeal lodged by the plaintiff's father unlike in the present case. The facts were different. It is submitted time never stopped running.
8. It is submitted that the appellants discharged the burden of proof on a balance of probabilities and the appeal should be allowed.

Respondents Submissions

9. The Respondents submissions are dated 20/03/2025 filed through his Advocate Odongo Okal & Co. Advocates. The respondent submitted generally on the grounds of appeal and jurisdiction of the trial court.
10. It is submitted that the trial court had no jurisdiction to hear the matter in view of the Court of Appeal holding in Pauline Chemuge Sugawara vs Nairuko Ene Mutarakwa Kiruti [sued in her capacity as administrator of the estate of Mutarakwa Kirui Lopas alias] Civil appeal E141 of 2022 [2024] delivered on 11/10/2024 which held that the Magistrates court lacked jurisdiction to hear matters under the provisions of section 37 and 38 of the Limitation of Actions Act and which is binding on this court. That the counterclaim ought to be dismissed.
11. On ground 1 of the appeal, it is submitted that the trial court was right in finding that the sale agreement dated 16/6/1977 was not valid for want of signature as required under section 3[3] of the law of contract Act. Reliance is placed on the case of Patrick Tarzan Matu & Another vs Nassim Sharrif Abdulla & 2 Others [2009] eKLR. That agreement were time barred by dint of section 4 of the Limitations of Actions Act.
12. On ground 2 it is reiterated that the trial court was right in finding the appellants were trespassers since the agreement was invalidated making the occupation illegal.
13. On ground 3 it is submitted that adverse possession is a fact to be observed on land and there was no evidence in support of the alleged occupation of the appellants.
14. On ground 4 it is submitted that details on the restriction are immaterial and irrelevant to the proceedings before court.
15. It is submitted based on the provisions of sections 107, 108 and 109 of the Evidence Act that the onus was on the appellants to prove their claim on adverse possession which they did not. The court is invited to dismiss the appeal.
16. In further reply the Appellant filed supplementary submissions dated 27/03/2025 on the issue of jurisdiction of the trial court. It is submitted that the decision in Pauline Chemuge Sugawara vs Nairuko Ene Mutarakwa Kiruti [supra] did not invalidate past decisions made by Magistrates who acted based on their lawful gazettelement.

Analysis And Determination

17. Following my analysis of the Record of Appeal, the rival submissions of the parties the main issue for determination is whether this appeal has merit. In answering this issue the court will consider



- a. Whether the validity of the sale agreement affected the claim for adverse possession
 - b. Whether the Appellant proved the elements of adverse possession
 - c. Whether time stopped running by dint of the restriction placed by the Chief Land Registrar
 - d. Whether the trial court had jurisdiction to entertain the claim for adverse possession
 - e. What orders should issue as to the appeal and costs.
18. As the 1st appellate court, it is the duty of the court to analyse and re assess the evidence on record and reach its own conclusions in the entire matter but giving allowance to the fact that it did not hear the parties – see *Selle v Associated Motor Boat Company* [1968] EA 123
 19. The plaintiffs case in the trial court was a claim for trespass against the defendants who are the Appellants herein. The trial court framed the issue ‘ Whether the defendants are trespassers’. The defendants produced a sale agreement to prove that their entry was based on an earlier transaction between their father and the registered owners. The trial court having analysed the same, found that defendants who are the Appellants were trespassers on the basis that the sale agreement upon which they claim to have entered the suit property was null and void and that therefore the occupation of the defendants was illegal. The trial court made a finding that the defendants were trespassers. Further that they did not have a basis over the suit property as there was a restriction which is still existing.
 20. I have seen the analysis of the trial court discussing the requirements for a valid contract for the disposition of land under the provisions of section 3[3] of the *Law of Contract Act*. Indeed I concur with the trial courts finding that the agreement did not meet the legal threshold required under the said provisions.
 21. The question that ought to have followed in view of the finding that the sale agreement was illegal making the defendants trespassers, would be whether such a finding would make the plea of adverse possession unavailable to the defendants.
 22. I will proceed to determine the question whether the finding of invalidity of the sale agreement would make the defence of adverse possession unavailable.
 23. A party’s claim is derived from the pleadings and more so the prayers sought. The Statement of Defence & Counterclaim is at page 51 – 54 of the Record of Appeal. Paragraph 13, 14 and 15 speak to elements of adverse possession where it is pleaded the appellants rights to the property is extinguished since the respondents have to date remained in occupation of the land for over 24 years without interruption. Prayer a] seeks a declaration that they be registered as proprietors by dint of the said occupation.
 24. The trial court indeed recognised that the defendants claim is based on the doctrine of adverse possession.
 25. The plaintiffs adduced the title and search evidencing the registered proprietors. The same was challenged by the defendants as having been extinguished by dint of the defendants adverse occupation. Both the trespass and adverse possession begin with a wrong entry into land belonging to another individual or entity. The difference would be that entry under the doctrine of adverse possession is permitted by law subject to meeting certain criteria and focuses on the right of the true owner. Therefore, the plea of adverse possession would serve as a defence to a claim of trespass.



26. As pertains the sale agreement which I have already found was illegal I'm persuaded by the following dictum of Nyagaka J in the case of Onzere vs Nanyama [Environment And Land Appeal 15 OF 2022] [2024] KEELC 1392 [KLR];-

“ 42. The totality of the foregoing yields the inevitable conclusion that despite being the legal proprietor, the Appellant lost his ownership rights in the year 2000, twelve years after year 1988 which time the Defendant claims to have bought the land and took possession. The failure by the Appellant to keep tabs with what was happening on his land for a period of more than 12 years extinguished his ownership rights.

43. That said, it is immaterial whether there was a transaction between the Respondent and the Appellant's brother. If anything, the Appellant denies giving authority to the brother to sell the land yet the brother allegedly sold it and put someone on his[appellant's]land without his lawful authority, meaning he put him there adversely to the ownership thereof. Thus, the elements for adverse possession are on all fours in this suit irrespective of whether his brother illegally sold the land. I find so because the parameters that operationalize the doctrine of Adverse Possession do not allow any outcome other than that of loss of land through adverse possession.”

27. It is the finding of this court that the validity of the sale agreement does not affect a claim of adverse possession.

Whether time stopped running by dint of the restriction placed by the Chief Land Registrar

28. This question becomes pertinent. As regards adverse possession the trial court recognising the defendant's counterclaim was based on adverse possession, posed a question whether a claim for adverse possession can be maintained and or arise where there was a restriction by the Chief Land Registrar. Guided by the holding in Adonija Onyango Oluoch & 2 Others v Jackson Leele Mekenya the trial court found in the negative noting the facts of the case were the same.

29. To put the above into context, the defendants pleaded in the counterclaim that upon conclusion of the sale herein the parties went to the land registry to process title deed and they discovered that the Chief Land Registrar had placed a restriction on the register pending the finalisation of all appeals which had been filed to the Minister arising from land adjudication process which had just been concluded stalling the issuance of the title deed. The proprietors and the purchasers died before the restriction was lifted. That this notwithstanding the purchasers took possession which they term adverse.

30. The trial court held thus [see paragraph 15 of the judgement]; -

“ The occupation of the defendants on the suit land was and is not adverse to the plaintiff and interested parties in view of the restriction still existing on the suit parcel. As the Director of Land Adjudication has not issued a certificate of finalization as provided for under Section 29[3][b] of the Land Adjudication Act. This means the defendants counterclaim cannot succeed and dismiss it with costs.”

31. The restriction above is confirmed by the Certificate of official Search dated 17/08/2021 found at page 34 of the Record of Appeal. It was registered on 21/12/83. It reads thus ‘Restriction: Except under Order of the Chief Land Registrar No dealings should be registered on the titles until the appeals before the Minister have been finalised.’



32. My perusal of the plaintiffs submissions in the trial court [see page 77 of the Record of Appeal] reveals that Mr. Jaoko relying on the provisions of section 76 of the *Land Registration Act* submitted that the restriction barred any dealings with the said land and therefore the Defendants Counterclaim was null and void ab initio in respect of the restriction. With due respect I think this proposition could only stand in respect to the sale agreement.
33. In my view the answer to this issue lies in the very nature of a claim of adverse possession and the elements of the same as stipulated in law. These were set out by counsels as quoted in various authorities.
34. In the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, the Court of Appeal stated thus; -
- “Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it.....The *Limitation of Actions Act* makes further provision for adverse possession at section 13 that
- [1]. A right of action to recover land does not accrue 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 sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession 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 afresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- [3]
- Sections 37 and 38 of the *Limitation of Actions Act* stipulate that if the land is registered under one of the registration acts then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.’
35. Arising from the foregoing therefore adverse possession runs with the land and not the register. The power to register such restriction is donated to the Chief Land Registrar under the provisions of section 28 of the *Land Adjudication Act* Cap 284 . It would only affect claims prior to registration and not claims after the registration. Once the land was registered the restriction did not bar a claim for adverse possession. Time did not stop running. The land was being held in trust for the person claiming in possession until the time action is successfully taken under the provisions of section 38 herein. Further time would only stop running if the registered owner took action to assert back his ownership as envisaged under section 13 [2] above.
36. It is therefore my finding that adverse possession could arise regardless of the restriction.

Whether the Appellant proved the elements of adverse possession

37. But was the counterclaim properly raised? I ask since I note that a preliminary objection has been raised at this appellate stage. The Respondents urge that the trial court lacked jurisdiction to adjudicate the counterclaim. Reliance is placed on the Court of Appeal decision in *Pauline Chemuge Sugawara vs*



Nairuko Ene Mutarakwa Kiruti [supra]. It is urged by the Appellants that during the proceedings at the trial court then, the position on the jurisdiction of the Magistrates court to handle claims of adverse possession had not been clarified.

38. The Court of Appeal in clarifying the law held that notwithstanding the expansion of the jurisdiction of environment and land usage to the Magistrates Courts, it is instructive that under Section 9 [a] of the Magistrates Court Act, various matters are specified for determination, but claims for adverse possession are not included in that section. And that, it is only the Environment and Land Court which has jurisdiction to hear and determine claims for adverse possession.
39. It has now been established that a point on jurisdiction may be raised at any stage of proceedings even at appeal when it had not been raised at the High Court – see the case of Floriculture International Limited vs Central Kenya Ltd & 3 Others [1995]eKLR where the Court of Appeal cited the case of Kenindia Assurance Co. Ltd vs Otiende [1989] 2KAR 162.
40. I respectfully agree with the respondents that the trial court lacked jurisdiction to entertain the claim on adverse possession. Having been raised as a counterclaim then the same was not properly before the trial court. My hands are therefore tied by the decision of the Court of Appeal. The counterclaim would still stand as dismissed on the ground of jurisdiction. As it stands, I would have no powers to pronounce myself on the issue of whether the Appellants proved the elements of adverse possession as there was no suit in the trial court for purposes of the claim for adverse possession. A counterclaim is a separate suit.
41. The foregoing analysis answers to ground i], ii], iii],iv],Memorandum of Appeal]. The rest of the grounds raised would be of no consequence in my view.

What orders therefore should issue to dispose of this appeal?

42. This appeal has succeeded on the issue of whether the validity of the sale agreement could affect the claim for adverse possession and whether time stopped running by dint of the restriction placed by the Chief Land Registrar. But having failed on the issue of jurisdiction with regard to the counterclaim and the court having agreed with the finding of the trial court that the sale agreement was a nullity then I must uphold the trial courts finding to the extent that the sale agreement was null and void.
43. The upshot of the foregoing is that the prayers in the appeal cannot be granted and it is hereby dismissed for the foregoing reasons. Let each party bear its own costs of this appeal.

DELIVERED AND DATED AT SIAYA THIS 9TH DAY OF OCTOBER 2025.

HON. LADY JUSTICE A.E. DENA

JUDGE

9/10/2025

Judgement delivered virtually through Microsoft teams video Conferencing Platform in the presence of:

Ms Achieng for the Appellants

Mr. Odongo for the Respondent

Court Assistant: Ishmael Orwa

