

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA**

ELCLA NO. E015 OF 2024

MAURICE OBUNDWA

ODOJE.....APPELLANT

VERSUS

THOMAS MIYERE

MIKOLO.....RESPONDENT

JUDGMENT

1. Aggrieved by the Judgment of Hon. Paul Nandi in Bondo P.M ELC NO. 060/2022 delivered on 17/5/2024, the Appellant Maurice Obundwa Odote who was the defendant in the suit has raised five grounds of appeal and sought for the following orders:

a) That the appeal be allowed.

b) The orders of the trial court issued on 17th May 2024 be set aside or varied.

c) The costs of the appeal be borne by the Respondent.

d) Such other reliefs as may appear just to the Honourable court.

2. The grounds of appeal in respect of the appeal are interalia;-

a) That the learned Magistrate erred in law and fact by granting the Respondent a portion of the Appellants parcel through adverse possession

while the Respondent did not plead adverse possession.

- b) That the learned Magistrate erred in law and fact by declaring that the Respondent was entitled to 0.6 HA of the appellant's parcel of land when the actual size of the land occupied by the Respondent was not clearly determined.
 - c) That the learned Magistrate erred in law and in fact in failing to appreciate that the Respondents case was anchored on a sale agreement which had taken over 12 years hence the Respondents case was time barred by statute of limitation of time.
 - d) That the trial court erred in law by awarding the Respondent costs of 60% upon assessment when in real essence the Respondent only succeeded in one prayer in his plaint hence each party ought to bear their own costs.
 - e) That the trial court erred in law and fact by making its judgment based on contradicting evidence.
3. On the strength of the above grounds the Appellant sought that the appeal be allowed.
 4. Upon admission of the Appeal the court directed that the Appeal proceeds by way of written submissions. The parties filed the said submissions and which are summarized as follows; -

APPELLANTS SUBMISSIONS.

5. The Appellants submissions filed by Ooro Awana & Co. Advocates submitted on the grounds of appeal generally which were framed as the issues for determination.
6. On ground 1, the Appellant has reproduced the prayers sought in the primary suit and submits that no prayer for adverse possession had been sought hence the same could not have been granted. In this respect he placed reliance on the decision in the cases of **Independent Electoral & Boundaries Commission & Another vs Stephen Mutinda Mole & 3 others.**
7. The Appellant equally submits that 12 years had not lapsed since the last payment was made on 6th May 2008. That the Respondent had 12 years to enforce the agreement for sale which lapsed in 2020 and the suit having been filed in 2022 was time barred. Reliance was placed on the decision of the Court of Appeal in **Peter Webiri Michuki vs Samwel Mugo Muchuki (2014) eKLR.**
8. It is urged with regard to adverse possession 12 years had not lapsed as time started running in 2020.
9. The Appellant further submitted that the Respondent could not plead adverse possession as well as fraud in the same case. He relied on the decision in **Abala vs Orachia KEELC 6279 KLR.**
10. The Appellant further submitted that the Respondent did not plead the exact size of the land he had purchased as

he had indicated in witness statement that he had purchased a portion of 0.06Ha and changed the same to 0.6Ha. That no survey report was produced in court to inform the size of the land.

11. On issue no. 3, the Appellant submits that the trial court erred in enforcing an agreement that was more than 12 years, by declaring the Respondent having acquired the same through adverse possession without pleading it hence causing a miscarriage of justice.
12. On issue 4, the Appellant submits that the learned Magistrate erred in awarding 60% as costs, which he ought not to have awarded but should have ordered each party to bear its own costs as the court had granted a prayer that was not pleaded.
13. On the last issue, the Appellant submits that there was no basis for the award of 0.6Ha which was founded on no evidence.
14. The court is urged that the appeal be allowed.

RESPONDENTS SUBMISSIONS

15. The Respondent submissions are dated 27/03/2025 vide Mesrs. Peter M. Warindu & Co. Advocats. Counsel did not frame any issues for determination but rather submitted wholesomely on the Appeal.
16. Placing reliance on the decision in **Selle and Another vs Associated Motor Boat Co. Ltd & Others (1968) EA**

123, Peters Vs Sunday Post Limited (1958) EA the court is reminded of its duties as a first Appellate court.

17. Rehashing the evidence and proceedings in the trial court, the Respondent submits that the issue of adverse possession was pleaded in the plaint and the court rightly adjudicated the matter based on it. That at the time there was a lot of confusion on the jurisdiction of magistrate's court over adverse possession claims and the trial court should not be victimized for having rendered itself.
18. On the size occupied by the Respondent, it is contended that the Respondents, had led evidence of purchase of 0.6 hectares and the trial court was right in finding so.
19. On the suit having been time barred the respondent submits that he was in peaceful possession from year 2008 and a cause of action in adverse possession had arisen. Reliance is placed on the provisions of section 26 of the Limitation of Actions Act chapter 22 of the Laws of Kenya.
20. On costs, the Respondent submit that the same is discretionary and the court cannot be said to have erred.

ISSUES FOR DETERMINATION

21. Having analyzed the Record of Appeal the submissions and considered the law, it is my view that the main issue for determination is Whether the appeal is merited. In deciding this issue the court shall analyze;

- a) Whether the court was right to infer and grant adverse possession.
- b) What is the acreage in occupation by the Respondent.
- c) Whether the award of costs was justified.
- d) What reliefs ought to issue
- e) Who bears the costs of this Appeal.

22. Sub Issues b) and c) will be dependent upon the answer to a).

ANALYSIS AND DETERMINATION

23. The duty of an appellate court is stipulated under Section 78 of the Civil Procedure Act which reads; -

“Subject to such conditions and limitations as may be prescribed, an appellate court shall have power;

1. (a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

(2,) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

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24. I will also be guided by the case of **Selle Vs. Associated Motor Boat Co. (EA.123)** where the court stated thus; -

‘.....Briefly put 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.’

25. The Appellant states that parties are bound by their pleadings and having not pleaded adverse possession, then the court erred for going outside the pleadings. The Respondent states that the same was pleaded. I however

note that some of the ingredients were pleaded in the plaint.

26. The Plaint before the trial court appears at pages 33 – 35 of the Record of Appeal. My perusal of the same reveals the plaintiff pleaded at paragraph 4, that he had peaceful possession and occupation. Was the court right therefore to infer this as a claim of adverse possession?
27. In the case of **Odd jobs vs Mubia (1970) E.A 476** it was held that;-

"A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision; on the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it".
28. The above decision was subsequently followed by the Court of Appeal for Eastern Africa in the cases of **Nkalubo vs. Kibirige [1973] E.A. 102** and **Railways Corporation vs. East African Road Services Ltd. (1975) E.A. 128.**
29. Having pleaded some of the ingredients of adverse possession, without specifically pleading adverse possession, it must be deemed that the Respondent had desired the court to make its decision in line with the decision in **Odd Jobs (supra)**

30. It is therefore the finding of this court that though adverse possession was not expressly pleaded but some of the ingredients thereof having been raised at paragraph 4, the court could infer adverse possession.
31. But I think the big question that arises is did the court have jurisdiction to adjudicate over a claim of adverse possession?
32. I have read the judgement of the trial court delivered on 17th May 2024 found at page 26 - 30 of the Record of Appeal. The trial court identified the 4th issue as '**whether the plaintiff is entitled to the suit land.**' Analysing the evidence and applying the provisions of Section 7, 13, 17 and 38 of the Limitation of Actions Act the trial court held as follows; -

'1. The plaintiff has been able to establish that he has been in adverse possession of the suit land for more than 12 years. This means that at the time the defendant was doing succession in respect of the then parcel **SOUTH GEM/NDORI/329**, the plaintiff had acquired title by way of adverse possession to a portion measuring 0.60Ha. It is my considered opinion that the plaintiff has been able to demonstrate that he is entitled to the suit property then known as **SOUTH GEM/NDORI/329** to a portion measuring 0.060 Ha.

2. The plaintiff can now present this judgement to the probate court for implementation of the same.....’

33. The trial court then proceeded to enter judgement based on paragraph 1 aforesaid.
34. The plaintiff who is the respondent in the present appeal has submitted that he was in peaceful possession from year 2008 and a cause of action in adverse possession had arisen. On jurisdiction it is submitted that at the time there was a lot of confusion on the jurisdiction of magistrates’ court over adverse possession claims and the trial court should not be victimized for having rendered itself. I have noted the submissions raised do not specifically plead that the court did not have jurisdiction but computation of time and the raising of a claim on both fraud and adverse possession at the same time.
35. The bottom line is that the judgement in favor of the Respondents plaintiff was based on the doctrine of adverse possession.
36. The Court of Appeal recently adjudicated on the issue in the case of **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. In clarifying the law, the court 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.'

37. 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 trial 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.
38. Arising from the foregoing clearly the trial court had no jurisdiction to enter judgement on the basis of adverse possession. It does not matter that at the time the judgement was delivered there was a lot of confusion on the jurisdiction of Magistrates in handling claims of adverse possession. There is no cure.
39. My hands are therefore tied by the decision of the Court of Appeal and I must set aside the judgement granting the Respondents a portion of the suit property on the basis of adverse possession. The trial court lacked jurisdiction.
40. What is the import of the above finding. The import in my view is that this appeal must succeed on the basis of the

above finding. Further there would be no basis upon which to discuss the rest of the issues except costs.

41. It has been submitted that in the event this court finds that the trial court erred in pronouncing itself on adverse possession, the court should order that the case be set for retrial. I have noted the contents of paragraph 2 of the Determination on the first issue (page 2/6 of the judgement) and I agree that issues of how the grant was obtained lie with the court that handled the succession. I decline to entertain the proposal for a retrial.
42. On costs of the suit at the trial court I would set aside the award and replace it with orders that each party should bear its own costs both at the trial court level and this appeal. The reason being that I have found that adverse possession can be inferred even when it is not specifically pleaded. However, based on the special circumstances on the case of Sugawara applying retrospectively then each party must shoulder its expenses.

**Delivered and Dated at Siaya This 2nd Day of
October 2025**

**HON. LADY JUSTICE A.E. DENA
JUDGE**

2/10/2025

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

Mr. Ooro F for Appellant

Ms. Abir for Respondent

Court Assistant: Ishmael Orwa

ORIGINAL