

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELCLA NO. E052 OF 2024

OLIVER OLOO..... 1ST APPLICANT

PONTIANO OLOO..... 2ND APPLICANT

STEPHEN OLOO..... 3RD APPLICANT

VERSUS

LEAH ATIENO GANDA.....1ST RESPONDENT

PAUL ONYANGO.....2ND RESPONDENT

(Being an appeal against the decision and judgement of Hon. E.A. Obina (PM) in KISUMU CM MCELC NO.54 OF 2017 dated 20th June, 2024)

J U D G E M E N T

Background

The appeal herein challenges the judgement in KISUMU CMC ELC CASE NO 54 OF 2017 (the suit). The record of appeal shows that the suit was filed by one APOLLO GANDA OJANY, now deceased, as KSM CMC CIVIL CASE NO 209 OF 2016 vide the plaint dated 22nd April 2016. The Appellants were the Defendants in the suit. The suit was later registered as a land case and assigned the current case number. The record further shows that the plaintiff, Apollo Ganda

Ojany, died in the pendency of the suit and was substituted by the present respondents whereupon the plaint was amended and replaced with the amended plaint dated 29th October, 2018. The case of the deceased against the appellants was that he was the registered owner of a parcel of land known as KISUMU/CHIGA/513 (the suit land).

That the suit land was developed and with his consent, the Appellants were occupying part of the structures where he hosted them as they were still looking for alternative land to settle.

He pleaded that he intended to pull down the structures which were occupied by the Appellants and had given notice for the Appellants to vacate and surrender and give up the occupation of the structures to him to no avail. That instead, the Appellants had become undesirable licensees and a nuisance by way of their habits and conduct of being drunk and disorderly and had resorted to threatening the deceased with harm.

The deceased therefore sought for orders that the Appellants vacate, surrender in vacant possession and give up occupation of the structures on the suit land, an order of permanent injunction, an order of eviction with the assistance of the OCS Kondele Police Station and costs of the suit.

In response to the deceased's claim, the Appellant filed a written statement of defence and counterclaim dated 6th September, 2019. The Appellants denied the Respondents' claim and averred that having been in occupation of a clearly delineated portion of the suit land from 1960s to date, a period of over 40 years, the Respondents had no locus standi to assert any right or claim over the suit land.

That in the alternative if the deceased had any rights over the suit land, the same had become extinguished pursuant to the doctrine of adverse possession.

The record shows that the suit was heard before the trial court which vide the Judgement dated 20th June, 2024 found that the Respondents had proved their case on a balance of probabilities and allowed the relief sought in the amended plaint. The counterclaim was dismissed.

The appeal

Aggrieved by the judgement, the Appellants preferred the present appeal vide the Memorandum of Appeal dated 18th July, 2024 and sought for the appeal to be allowed by setting aside the judgement of the trial court in its entirety with costs of both the appeal and the trial court being granted to the Appellants.

Submissions

The appeal was heard by way of written submissions. Written submissions dated 20th August, 2025 were filed by the firm of Ouma Njoga & Company Advocates for the Appellants whereas written submissions dated 15th July, 2025 were filed by the firm of Juliet Dima & Associates Advocates for the Respondents.

The appeal was based on the following grounds that: -

1. the learned trial Magistrate erred in law and fact by failing to appreciate that the Respondent herein and the Plaintiffs in the lower court relied on an amended plaint dated 29th October, 2018 and thus sued in their representative capacities as the administrators of the estate of the late Apollo Ganda Ojany and not in their own behalf.
2. the learned trial Magistrate erred in law by failing to appreciate that by their pleadings before the lower court, the Respondent advanced a case that land parcel No.KISUMU/CHIGA/513 belonged to the Deceased Apollo Ganga Ojany who was the registered owner thereof and consequently were bound by their pleadings.
3. the learned trial Magistrate erred in law by failing to critically analyse the pleadings by the parties before him and as a result

totally misapprehended the case falling for his determination as can be readily discerned from the manner he framed the issues falling for his determination with the result that he arrived at the wrong decision to award the Respondents' claim.

4. the learned trial Magistrate erred in law by failing to appreciate that the Respondents suit as framed in their pleadings did not invite for determination whether or not the Respondents were the current registered owners of the suit parcel of land but rather whether the deceased Apollo Ganda Ojany was the current registered owner of the suit parcel of land and whether he had a sustainable cause of action against the Appellants which survived him that the Respondent as administrators of his estate could take over and litigate.
5. the learned trial Magistrate erred in law by failing to find and hold that the suit before him having been lodged at the instance of the estate of the deceased Apollo Ganda Ojany was time barred as the rights of the said deceased over the suit parcel of land had long extinguished by the time the suit was being lodged in court by the deceased in 2017 owing to the long and adverse occupation of the suit parcel of land by the Appellant's and their family since 1985.

6. the learned trial Magistrate erred in law and fact by finding that the Appellant family's occupation of the suit land was with the permission of the deceased Apollo Ganda Ojany contrary to the evidence on record and the law as regards conferment of rights over land.
7. the learned trial Magistrate erred in law and fact by finding and holding that the actions and activities on the part of the Appellants as occupants of the suit parcel of land for instance burial of several members of the family thereon, construction of several structures including a family mausoleum thereon were inconsistent with the allegation that the Appellant's occupation of the suit parcel of land was with permission of the deceased and was temporary.
8. the learned trial Magistrate erred in law by failing to appreciate that the Appellants were in occupation of the suit parcel of land by virtue of the fact that the portion of the suit land under their occupation was their deceased father's home and the only home they had known since 1984 and predated the late Apollo Ganda Ojany's occupation of the remaining portion of land which started in 1994.

9. the learned trial Magistrate erred in law and fact by failing to find and hold that the evidence on record was at variance with the pleaded case and as a result failed to hold that the Respondents had failed to prove their case as pleaded.
10. the trial Magistrate misapprehended the Appellants' case by finding and holding that their claim to the land by way of adverse possession was dismissed when no such claim was before him.

Analysis and determination

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 that

“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.”

The Appellants argued grounds 1 - 4 and ground 9 of the appeal together and submitted that the suit in the lower court was instituted by the deceased one Apollo Ganda Ojany who passed on before conclusion of the suit thereby prompting the substitution with the Respondents herein as the administrators of the estate of the deceased. Counsel submitted that the Respondents needed to prove whether as at the time of his demise, Apollo Ganda Ojany was the registered proprietor of the suit land and not when or whether the 1st Respondent became or is the current proprietor of the suit land.

Counsel submitted that the trial court therefore erred in finding that the Plaintiffs got title to the land in the year 2019 and hence erroneously held that adverse possession does not arise.

The Appellant submitted that the deceased who was the registered owner of the suit parcel lost his right to the suit land and as such the issue falling for determination ought to have been whether the deceased and/or his estate had lost the rights over the suit land or whether the deceased had a sustainable cause of action against the

Appellant which survived him and which the Respondents as administrators of his estate could take over and litigate.

That there was no evidence adduced to demonstrate what structures, if any, that the Appellants occupied that the Respondents sought to demolish. That no evidence was adduced to show that the Appellants had become undesirable licensees or a nuisance.

That it is clear that the deceased registered owner did not consent or permit the Appellants to occupy the portion they so occupied hence the issue of licence did not arise. That the trial court erred in law and fact in failing to find that the evidence adduced was at variance with the pleadings and that the Respondents had failed to prove their case, especially on the issue of license.

On behalf of the Respondents, it was submitted that the evidence from both sides pointed more to permissive use of the suit land than to hostile and non-permissive occupation.

Counsel referred the court to the submissions made before the trial court and the testimonies of PW1, DW3 and DW4 and submitted that the bottom line of these testimonies was that the occupation was consensual.

Counsel submitted that in the context of land ownership and adverse possession claims, a presumption of permissive use typically applies when a family member occupies land belonging to another family member. Counsel relied on the case of Samuel Kihamba -vs- Mary Mbaisi [2015]eKLR where the Court of Appeal held in part that it would create havoc for families and the society of Kenya generally if the principle of adverse possession applied within families against close relatives.

Counsel also relied on the case of Rodgers Mwamboje -vs- Douglas Mwamboje (2014)eKLR and submitted further that the Appellants did not claim any right of adverse possession for themselves individually but based their claim on the initial entry onto the suit land by their father.

The evidence placed before the trial court regarding the issue of adverse possession comprised the testimony of PW1 who vide her witness statement which was adopted as her evidence in chief stated that she got married to Apollo Ganda Ojany, the first registered owner of the suit land, in 1974. That they established their home on land parcel number KISUMU/CHIGA/489 while the Appellants' late father and his brother by the name of Joseph Guda Opiyo were occupying land parcel number KISUMU/CHIGA/490. That

sometime in the year 1984, the Appellants' father by the name Oloo moved with his mother and brother and established their home on the deceased's land without the deceased's permission.

That in 1994, her late husband Apollo Ganda, the deceased, established his home on the suit land as well. That in 1997 Oloo passed on and was buried on the suit parcel of land amid protests.

That thereafter, the deceased would prevail upon the Appellant's mother and her children to move out of the suit land but that the appellants and their mother would rudely respond that they were unable to build other homes on their father's land parcel number KISUMU/CHIGA/779 hence the deceased empathized with them and allowed them to get funds to build their home.

On behalf of the Appellants, DW1 testified that when he was born, he found his parents residing on the suit land.

DW2 stated that his father established his home on the suit land in the year 1984. That it was only after 10 years of his father establishing a home on the suit land in the year 1994 that the Respondents' husband and father Apollo Ganda, the deceased, also established his home on the same land.

What emerged from the evidence was that the father of the Appellants had entered onto the suit land in the year 1984 where

he established his home on a portion of it and resided together with his family until his death. That apart from developing a home on the suit land, there are deceased members of the Appellants' family whose bodies were interred on that portion of the suit land occupied by the Appellants' father.

Although the Respondents claimed that the appellants' stay on the suit land was with the deceased's (the registered owner's) consent, no evidence was placed before court to that effect.

The 1st Respondent stated that the appellants' father entered the land without deceased's consent and that there was a time he prevailed on them to vacate. That Appellants' father was on the land from the year 1984 till 1987 when he passed on.

The 1st Appellant does not reside on the land and the Respondents' position was that he was sued as a representative of his deceased father. The rest of the Appellants have been on the land ever since. The Appellants pleaded that the title of Apollo Ganda had become extinguished pursuant to the doctrine of adverse possession.

The doctrine of adverse possession is anchored on the provisions of sections 7, 13, 17 and 38 of the Limitation of Actions Act. Section 7 prohibits the filing of suits for recovery of land after expiry of 12 years from the date the cause of action accrued. The cause of

action accrued to Apollo Ganda in the year 1984 when the father of the Appellants entered the suit land and started to carry out activities that were contrary to Apollo Ganda's title to the land. Yet Apollo Ganda did not take any action to assert his title and take over possession until the year 2016 when he filed the suit herein for the recovery of the land.

By the time of filing suit, the period of 12 years prescribed under section 7 of the Limitation of Actions Act had elapsed.

Section 17 of the Limitation of Actions Act provides that title of a registered owner becomes extinguished upon expiry of the limitation period.

In ground 5 of appeal, it was submitted on behalf of the Appellant that the trial court ought to have found that the deceased's claim to the suit parcel of land, if any at all had long been extinguished and the suit was therefore statute barred having been brought outside the limitation period.

While the Respondents claimed in the plaint that the suit land is developed and the Appellants occupy part of the structures therein, it emerged from the evidence of both parties that the Appellants occupy homes on a portion of the suit land which their father and themselves have constructed since the year 1984 when their father

first entered the land. The said homes are not structures developed by the deceased as claimed in the plaint

I find that the evidence placed before the trial court proved that the suit filed by the deceased, Apollo Ganda, was time barred under the provisions of Section 7 of the Limitation of Actions Act, that the title held by Apollo Ganda to the portion of the suit land occupied by the Appellant had become extinguished and that in the circumstances, Apollo Ganda or his estate could not be entitle to the relief sought.

The current Respondents only joined the suit as personal representatives of the said Apollo Ganda after he passed on in the pendency of the suit. They had no claim of their own in the suit. Any title to the suit land subsequently acquired by either of the Respondents was not the subject matter of the suit but was subject to the findings of the trial court in respect of the title held by the deceased.

For the foregoing reasons, I respectfully find that the trial court erred in allowing the suit.

Regarding the counterclaim, although the Appellants pleaded in paragraph 10 of the defence and counterclaim that the rights of the registered owner had become extinguished pursuant to the doctrine of adverse possession, they did not present any prayers to or seek

any relief from the trial court. Further, under the provisions of section 38 of the Limitation of Actions Act, the trial court had no jurisdiction to entertain claims based on adverse possession. There was no claim therefore for the trial court to dismiss. The trial court therefore erred in making an order dismissing of the counterclaim.

Conclusion.

The result is that the court finds that the appeal has merit and allows it as follows: -

- i. The judgement of the trial court is hereby set aside in its entirety and replaced with a judgement dismissing the suit with costs to the appellants.
- ii. Each party to bear own costs of the appeal.

Orders accordingly.

Judgement dated and signed at Kisumu and delivered virtually this 30th day of October, 2025.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen - Court Assistant.

No appearance for the Appellants.

Atieno for the Respondents.