



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**APPEAL NO. E028 OF 2024**

**ANDERSON YAA .....1<sup>ST</sup>**

**APPELLANT**

**CHARLES JEFA .....2<sup>ND</sup>**

**APPELLANT**

**CHARO KAINGU .....3<sup>RD</sup>**

**APPELLANT**

**RIZIKI KITSAO ..... 4<sup>TH</sup>**

**APPELLANT**

**VERSUS**

**KITHI KALU KITHI. ....1<sup>ST</sup>**

**RESPONDENT**

**HAMISI CHARO KITHI .....2<sup>ND</sup>**

**RESPONDENT**

*(An appeal arising from the decision of Hon. Learned Principal Magistrate Rita Amwayi, dated June 26, 2024, delivered at Kaloleni Law Courts.)*

## **JUDGMENT**

- 1.** Refer to a plaint dated 15 November 2022, filed on 18 November 2022, wherein the respondents asserted before the trial court that the suit property legally belonged to them. They sought a perpetual injunction preventing the appellants from entering and using the land, as well as a mandatory injunction for possession of the suit property due to the appellants' unauthorized occupation and use thereof since 13 April 1998.
- 2.** The appellant submitted an amended statement of defence and counterclaim dated 25 September 2023, filed on 29 September 2023, denying the allegations in the plaint and asserting that the respondent's father sold the suit property to the appellants on various dates, and that the respondents should facilitate the transfer of titles to them.
- 3.** The learned Magistrate issued a ruling on April 19, 2023, granting the respondents an order for a temporary injunction against the appellants' unlawful continued occupation and use of the suit property (as recorded on pages 12-15 of the record of appeal). This ruling was later annulled through the mutual consent of the parties.

4. After a full trial, the learned trial Magistrate delivered her judgment, which was appealed, leading to this appeal. Refer to the Memorandum of Appeal dated April 1, 2025, which outlines seven grounds of appeal, summarized as follows:

***a) The learned Magistrate erred in law and fact by ignoring the appellants' submissions that the suit was time-barred and that the doctrine of adverse possession favored the appellants.***

***b) The learned Magistrate made an error in law and fact by giving superficial or no consideration to the evidence presented by the appellants.***

5. The court ordered that the appeal be canvassed through written submissions, and I acknowledge receipt of submissions from learned counsels for the appellants, Mr. Amanyana and Mr. Ngure, for the respondents, with gratitude, since they greatly assisted this court in deciding on the issues raised in the appeal.

6. Based on the materials and submissions before me, I outline the following issues for the court's determination: whether the suit in the lower court was time-barred, whether the doctrine of adverse possession favored the appellants, and

whether the learned Magistrate failed to consider the evidence presented by the appellants. Costs.

7. The authority of this court as the first appellate court to review evidence from the lower court should be exercised cautiously when necessary. In **Peters v Sunday Post Limited [1958] EA 424**, the court stated as follows:

*“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”*

8. The duty of this court in the appeal is therefore to re-evaluate the evidence, assess it independently, and reach its own conclusions. This careful process, as outlined in **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123**, guarantees that every aspect of the case is thoroughly examined and considered:

*“...this court is not bound necessarily to accept the findings of fact by the court below. 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 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..."***

- 9.** The appellants presented four witnesses in court, while the respondents called two witnesses who testified in support of their case and relied on their written statements. Their testimonies are recorded in the court proceedings and the record of appeal.
- 10.** From the record of appeal, the appellants testified that they are *bona fide* purchasers for value of portions of land with Title No. Kaloleni/Chalani/272, which they bought from the late Kithi Mwambua (the respondents' father) before his demise.
- 11.** The sale agreements between the respondents' father and the appellants are dated from 1984, and the parties involved appeared before the Local Administration to witness the agreements and to establish the boundaries of the suit property.

**12.** The appellants, upon paying the full purchase price, were shown individual portions of land, and the boundaries were marked between neighbors in occupation of the said land.

**13.** The appellants were given vacant possession of the land parcels they bought and have been peacefully living on them ever since.

**14.** They testified that they were therefore surprised when the respondents filed the suit against them, which was over twenty-four (24) years after the appellants occupied the property.

**15.** On the other hand, the respondents testified before the trial court that the suit property rightfully belongs to them. They requested a permanent injunction to prevent the appellants from entering and using the land, as well as a mandatory injunction for the vacant possession of the suit property due to the appellants' illegal occupation and use of the property since April 13, 1998. They completely challenged the sale agreements the respondents had obtained, arguing that they had no probative value in law.

***Whether the Statute of Limitations barred the suit in the lower court, and whether the doctrine of adverse possession favored the appellants.***

**16.** Mr. Amanyia contends that the suit filed in the lower court was submitted after the statutory limit of 12 years, as specified in Section 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya, and therefore it is time-barred; thus, the orders sought did not apply to the appellants. Counsel cited judicial decisions that reinforce this point and emphasize the nature of adverse possession. See - **Edward Moonge Lengusuranga v James Lanaiyara & Another [2019] e KLR, Mehta v Shah [1965] E.A 321, Gathoni v Kenya Co-operative Creameries Ltd [1982] KLR and Iga v Makerere University [1972] EA.**

**17.** Counsel further argues that the part of the appeal based on the doctrine of adverse possession is that the appellants have occupied the suit property for over 12 years, and that this doctrine supported their case in the lower court. Counsel cited decisions in **Daniel Kimani Ruchine & Others v Swift, Rutherford Co Ltd & another [1977] KEHC 30 (KLR), Francis Gicharu Kariri v Peter Njoiroge Mairu Civil Appeal No. 293/202, and Titus Kigoro Munyi v Peter Mburu Kimani [2015] KECA 952 (KLR).**

**18.** Conversely, Mr. Ngure asserts that the appellants' assertion that the learned Magistrate did not determine whether the suit was time-barred is unsupported. Counsel contended that the appellants did not raise this issue during the trial and could not have reasonably expected the learned Magistrate to address or decide upon it. This matter is being raised for the first time on appeal, which this court is not empowered to consider. The jurisdiction of an appellate court is limited to reviewing issues presented adequately before the trial court. A court cannot be deemed to have erred on an issue that was never argued. This precisely reflects the position the appellants are attempting to establish with this ground of appeal. See **Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2 EA 212; Kenya Hotels Ltd v Oriental Commercial Bank Ltd (formerly known as the Delphis Bank Limited) [2019] ECLR.**

**19.** Regarding these two issues of appeal, limitation of actions, and adverse possession, I have reviewed the appeal record and what was presented before the learned trial Magistrate in her judgment from paragraphs 27 to 28. She acknowledged the appellants' occupation of the suit property

since 1998, although she concluded that the sale agreements the appellants had contained some flaws, especially concerning the portions they purchased and their identification documents. She also recognized that the 4th appellant had already secured a title to his portion, being Kaloleni/Chalani/764.

**20.** While the learned Magistrate discussed the effects of registration under section 24(a) and 26(1) of the Land Registration Act, 2012, which I agree with, she did not consider the impact of how long the appellants had been on the suit properties, having gained entry through purchase in 1998. She also overlooked the possibility that the doctrine of adverse possession could apply to the appellants if the sale agreements were deemed ineffectual in transferring proprietary rights to the appellants.

**21.** I disagree that these were new issues introduced at the appellate level, as the stay of the appellants on the suit properties was actively discussed during the hearing and should have been part of the trial court's discussion in her judgment.

22. I agree with Mr. Amany, learned counsel for the appellants, that the claim before the trial court for the recovery of land was time-barred. Section 7 of the Limitation of Actions Act provides:

*“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”*

23. This position was reinforced in the case of **Edward Moonge Lengusuranga v James Lanaiyara & Another [2019] eKLR** as follows:

*“Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the first Defendant having bought the suit land in the year 1999 (as per Paragraph 6 of the Complaint) and taken possession of the same, the Plaintiff herein could only seek to recover it from the 1<sup>st</sup> Defendants, but only if he did so within twelve years after the Sale Agreement.”*

24. The purpose of the Law of Limitation, which was outlined in the case of **Mehta v Shah [1965] E.A 321**, is as follows:

***“The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”***

**25.** In **Gathoni v Kenya Co-operative Creameries Ltd**

**[1982] KLR 104**, the Court of Appeal stated the following:

***“...The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”***

**26.** A suit barred by limitation is a claim prohibited by law; therefore, by operation of law, the court cannot grant the relief sought. In the case of **Iga v Makerere University** **[1972] EA**, the Court expressed this regarding the law of limitation:

***“A Complaint which is barred by limitation is a Complaint barred by law. Reading these Provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the***

***Court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the Court cannot grant the remedy or relief sought.***

**27.** The suit, filed more than 24 years after the land purchase (sic) and occupation, reflects a failure to start legal proceedings on time by the respondents. The esteemed trial magistrate made a legal error by granting permission to proceed with the case, as it was, in fact, barred by the statute of limitations.

**28.** It therefore follows that, even if the respondents possessed a legitimate title as alleged in the trial court, such title ceased to exist and/or was extinguished the moment they failed to bring this suit within the twelve years mandated by statute, or chose to ignore this requirement.

**29.** Regarding the doctrine of adverse possession, the success of such a claim was established in the case of **Daniel Kimani Ruchine & Others v Swift, Rutherford Co Ltd & another [1977] KEHC 30 (KLR)** as follows:

***“The Plaintiff have to prove “that they have used this land which they claim as of right, nec vic, nec claim,***

*nec plecario (no force, no secrecy, no permission), so the Plaintiffs must show that the Defendant had knowledge (or the means of knowing, actual or constructive) of the possession of the occupation. The possession must be continuous. It must not be broken for any temporary purposes by any evidence to interrupt it or by any recurrent consideration."*

**30.** The respondents were fully aware of the appellants' occupancy of the property. Even before their father's death, they were aware that the appellants had possessed the suit property for over 20 years. Even if the Magistrate lacked jurisdiction to consider issues of adverse possession (see **Sugawara v Kiruti (Sued in her capacity as the administratrix of the Estate of Mutarakwa Kiruti Lepaso alias Mutaragwa Kiruti Lepaso alias Mutaragwa Kiroti Leposo and in her own capacity) & 3 others (Civil Appeal E141 of 2022) [2024] KECA 1417 (KLR) (11 October 2024) (Judgment)**), the doctrine of adverse possession still favored the appellants as a shield. Therefore, the trial Magistrate erred in ordering their eviction from the property.

**Whether the learned magistrate failed to consider the evidence tendered by the appellants.**

- 31.** Although the sale agreements between the parties had gaps, as previously mentioned, there was sufficient evidence that the appellants had possessed the suit property for over 20 years to justify a declaration that they acquired ownership through the doctrine of adverse possession. The appellants provided substantial legal grounds showing the trial magistrate erred in her judgment. They possessed rights with the required duration that could not be ignored.
- 32.** Since the trial court had no jurisdiction to declare the appellants as adverse possessors, their counterclaim in the lower court could also not succeed.
- 33.** As a result, the appeal is granted to the extent that the orders issued by the trial Magistrate are overturned and completely set aside.
- 34.** The counterclaim is also dismissed. Maybe the appellants can seek a proper forum to pursue their claim of adverse possession.
- 35.** Each party will bear their own costs.

**Dated, signed, and delivered electronically in Malindi  
on 6<sup>th</sup> November, 2025.**

**E. K. MAKORI  
JUDGE**

**In the presence of:**

**Mr. Ngure for the Respondents**

**Happy: Court Assistant**

**In the Absence of:**

**Mr. Amanyanya for the Appellants**