



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

**ELC APPEAL NO. E039 OF 2021**

**-BETWEEN-**

**SAMWEL ODHIAMBO OYUGI.....**  
**APPELLANT**

**-AND-**

**CLEMENT OKINYI**  
**SAKIRI.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The present appeal arose from the judgment of the trial court delivered on 9<sup>th</sup> September 2021 by the Honourable M.O. Obiero, Senior Principal Magistrate, at Migori, in ELC Case No. 30 of 2019, wherein the court entered judgment in favour of the respondent, granted a permanent injunction restraining the appellant from interfering with land parcel Suna West/Wasweta II/340, and dismissed the appellant's counterclaim for adverse possession together with all ancillary prayers.

2. The appellant was dissatisfied with the said judgment and consequently filed the present appeal. By a Memorandum of Appeal dated 13<sup>th</sup> September 2021, the appellant challenged the judgment on four principal grounds, namely, that the learned trial magistrate erred in law and fact by: (i) failing to consider the evidence and pleadings, thereby reaching a wrong conclusion that the respondent had proved his case; (ii) failing to consider the evidence and pleadings in finding that the respondent was entitled to the reliefs sought; (iii) delivering a judgment that was against the weight of evidence and the appellant's submissions; and (iv) exhibiting bias against the appellant.
3. In that regard, the appellant seeks, inter alia, orders that the appeal be allowed, the judgment and decree of the trial court be set aside, and that this Court substitutes the same with appropriate orders in his favour, together with the costs of the appeal.

### **Submissions**

4. The appeal was canvassed by way of written submissions, which were duly filed by both parties.

### **Appellant's Submission**

5. In his written submissions dated 5<sup>th</sup> December 2023, the appellant submitted that the trial court erred in dismissing his counterclaim and in upholding the respondent's title. He argued that the respondent's suit before the trial court was statute-barred, contending that by the time the respondent and his predecessor-in-title were registered as proprietors, the appellant had already acquired the suit land by adverse possession, having been in what he termed peaceful, uninterrupted, open and continuous occupation for over 30 years.

6. Reliance was placed on the Court of Appeal decisions in **Kairu v Gacheru [1988] eKLR, Ruth Wangari Muigai v Edward Njuguna Mwangi [2015] eKLR, Sammy Likuyi Adiema v Charles Shamwati Shiskani [2014] eKLR, Samwel Miki Waweru v Jane Njeri Richu [2007] eKLR, and Wanyancha Gibiti & 3 others v Waigoge Nyahiri Sinda [2015] eKLR.** He argued that the respondent's title had been extinguished under sections 7, 13 and 17 of the Limitation of Actions Act, rendering the respondent a mere trustee of the appellant's beneficial interest.
7. The appellant further submitted that the learned magistrate failed to appreciate that he and his family took possession of the land pursuant to a purchase arrangement with the respondent's predecessors. He urged the Court to take judicial notice under sections 59 and 60 of the Evidence Act that informal land transactions are common in rural settings.
8. He cited the Court of Appeal decision in **Benja Properties Ltd v Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR,** which affirmed the principle that possession is nine-tenths of ownership. He therefore urged this Court, as a first appellate court with powers under section 78 of the Civil Procedure Act, to allow the counterclaim, cancel the respondent's title and declare him owner by adverse possession.

### **Respondent's Submissions**

9. The respondent, through submissions dated 5<sup>th</sup> December 2023, opposed the appeal, arguing that the trial court conducted a thorough appraisal of the pleadings, evidence and the law. He emphasised that the appellant failed to produce any written sale agreement, contrary to section 3(3) of the Law of Contract Act. He relied on the Court of Appeal's authoritative holding in **Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR,** which states that a document marked for identification is not

evidence unless formally produced and proved. As no such agreement was produced, the appellant's claim of purchase could not stand.

10. The respondent further submitted that the appellant's claim for adverse possession was rightly rejected. He pointed out that the respondent became registered proprietor on 6<sup>th</sup> November 2013, and the suit was filed in 2019 only six years later, far short of the twelve (12) years required under sections 7 and 13 of the Limitation of Actions Act.
11. He also highlighted the trial court's finding that the appellant had voluntarily vacated the land, thus extinguishing any claim of continuous possession. The respondent maintained that the allegation of bias against the magistrate was unsubstantiated and urged the Court to dismiss the appeal.

### **Respondent's Supplementary Submissions**

12. In supplementary submissions dated 9<sup>th</sup> January 2024, the respondent raised a preliminary issue, arguing that Okongo Wandago & Co. Advocates were not properly on record for the appellant. He submitted that under Order 9 Rule 9 of the Civil Procedure Rules, a change of advocate after judgment can only be effected through a court order or by consent between outgoing and incoming advocates. He contended that such consent or order was absent, rendering the Notice of Change irregular.
13. The respondent further submitted that the appellant's argument on statutory limitation was not pleaded as a ground of appeal, and should therefore be disregarded since parties are bound by their pleadings. Reiterating the trial court's findings on possession, he stressed that the appellant had not been in actual possession for 12 years, and had even

admitted to vacating the land. He therefore urged the Court to find the appeal devoid of merit and to dismiss it with costs.

### **Analysis And Determination**

14. The issues for determination have been usefully condensed from the grounds of appeal and the parties' submissions as follows:

a) Whether the appeal is tenable; and

b) What orders should be made in this appeal to meet the best ends of justice

15. This being a first appeal, the Court is obligated to reconsider the evidence, re-evaluate it, and draw its own conclusions, while bearing in mind that the trial court enjoyed the advantage of observing the witnesses. This duty is settled in **Mwanasokoni v Kenya Bus Services Ltd** (1982-88) 1 KAR 278 and was reaffirmed in **Titus Ong'ang'a Nyachieo v Martin Okioma Nyauma & 3 others [2017] eKLR.** Guided by those principles, I have carefully reviewed the Record of Appeal, the impugned judgment, and the submissions tendered before this Court.

16. The appellant's primary contention is that the trial court erred in law and fact by failing to appreciate that the appellant (and his family) had been in long, open and adverse possession of the suit land from as early as 1991, and that by the time the respondent was registered any title which the respondent or his predecessor purported to rely on had been extinguished by prescription.

17. The appellant relies on authorities such as **Kairu v Gacheru [1988] eKLR** and **Benja Properties Ltd v Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR** for the proposition that possession is the root of title and may, in appropriate circumstances, defeat competing documentary title. The appellant submitted that the trial court wrongly elevated technical formalities (absence of a signed, attested written contract) over the realities of rural land dealings and that the court should have taken judicial notice under sections 59 and 60 of the Evidence Act of commonplace informal transfers.
18. The respondent, in opposition, maintains that the trial court properly considered the pleadings and evidence and that the appellant failed to discharge the necessary legal burden. The respondent emphasised that the appellant did not produce the alleged written agreement as a signed and attested document; relied on the principle in **Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR** that a document marked for identification is not proved until formally tendered and authenticated; and pointed out that the suit was instituted in 2019, a mere six years after the respondent's registration in 2013, which is far short of the 12-year statutory period required for prescription against a registered proprietor.
19. The respondent also raised the procedural objection concerning change of advocates, submitting that Order 9 Rule 9 of the Civil Procedure Rules contemplates court authorization or consent for post-judgment change of advocate.
20. The respondent's supplementary submissions reiterated that the appellant's limitation/statute-barred argument was not pleaded as a ground of appeal and, on that basis, should be disregarded; and urged

this Court to find that the appellant vacated the land of his own volition and thus cannot found a claim in adverse possession. The respondent further submitted that there is no evidence of bias by the trial magistrate and that costs should follow the event.

21. I begin my analysis by recalling the legal principles applicable to this appeal. A registered proprietor's title is prima facie invincible except where the challenger proves a superior right. To dislodge registered title by adverse possession against a registered proprietor the claimant must prove exclusive, continuous, open and adverse possession for twelve (12) years.
22. Claims based on contract or disposition of land must comply with the formalities in section 3(3) of the Law of Contract Act (writing, signature and attestation). Contractual claims are also subject to limitation: actions founded on contract must be brought within six (6) years from the date on which the cause of action accrued (Limitation of Actions Act). Where documentary formalities are not complied with, an oral agreement relating to disposition of land will not ground a proprietary interest. A first appellate court must re-evaluate the evidence but give due regard to credibility findings made by the trial court which saw and heard witnesses.
23. On the evidence, the respondent produced a certificate of title showing registration as proprietor dated 6<sup>th</sup> November 2013 and relied on succession/transfer documents and the testimony of PW-2 Nicholas Odhiambo Osure who gave an account of the sale to the respondent. The appellant and DW-2 (Joseph Otieno Oyugi) gave oral accounts of a transaction beginning in 1991, alleged payments, use and occupation by

the family and later vacating the land.

24. Crucially, the alleged written agreement of 30<sup>th</sup> December 1991 was not produced to the court as a signed and attested instrument. The appellant did produce certain documents (certificate of confirmation of grant; certificate of official search; demand letters) but these do not satisfy the statutory requirements for disposition of land nor do they, on their face, prove uninterrupted exclusive possession for 12 years.
25. The trial magistrate found that the appellant had vacated the land, was no longer in occupation at the time of suit, and had failed to produce the alleged agreement findings which informed the conclusion that the counter-claim failed. On the record, the appellant's own witnesses gave evidence of gaps in occupation (for example Joseph Otieno leaving to Olambwe in 2003, and statements that the appellant was not living on the land in 2019). In addition, the appellant's case showed that the alleged payments and completion of transaction were not pursued or enforced until many years later. The trial court's findings on these factual matters were open on the evidence.
26. On the specific legal point of prescription/adverse possession, the appellant needed to prove 12 years' exclusive possession against the registered proprietor or prior to registration where applicable. The respondent's registration in 2013 and filing of suit in 2019 defeat any contention that the appellant had twelve years' uninterrupted possession up to the material dates. The court correctly observed that an adverse possession claim cannot succeed where the claimant has vacated the land and occupation is not continuous.

27. The appellant's generalized submission about informal rural dealings, and the invocation of judicial notice under sections 59 and 60 of the Evidence Act, do not relieve the appellant from proving the legal requisites of adverse possession or establishing compliance with statutory formalities for disposition of land. Informal practice may explain how transactions occur in the locality but cannot displace the clear statutory requirements that protect registered title and demand formal proof of dispositions.
28. On the question of contractual enforceability, even if there had been an agreement in 1991, any suit to enforce the contract would be subject to the limitation provisions. The evidence suggested that payments and dealings were largely concluded long before the suit, and no timely enforcement was undertaken; as the trial court pointed out, the last alleged payment was said to have been in 2012, making a contractual claim time-barred if not pursued within the statutory period. Moreover, section 3(3) of the Law of Contract Act requires writing, signature and attestation for contracts disposing of interests in land requirements not satisfied on the record. The trial court therefore correctly analysed both the formal defect and the limitation bar.
29. The appellant urged this Court to exercise the powers under section 78 of the Civil Procedure Act to make orders which would bring finality, and cited recent Environment & Land Court authorities which the appellant submits are factually similar. While this Court has broad powers, it is constrained by the evidence before it. A first appellate court may enter judgment where the facts and law permit, but it cannot invent proof or make findings inconsistent with the primary evidence. The appellant's citation of authorities does not change the factual reality on the record: the absence of a proved written contract; the absence of 12 years'

continuous adverse possession; and the respondent's registered title properly evidenced.

30. On the procedural point regarding change of advocates raised in the respondent's supplementary submissions, the registry filings show a degree of confusion in the appearance list. Nonetheless, the parties have fully ventilated the matter on the merits in written submissions and at hearing. The Court must be slow to permit a procedural technicality to defeat a substantive adjudication where no prejudice is shown. I have therefore admitted the filings for the purposes of this appeal and direct that the Registrar regularize the record nunc pro tunc so as to reflect correctly who was on record at the relevant times. If any party wishes to make a discrete application for costs arising from a deliberately irregular substitution, that may be filed separately.
31. As to the allegation of bias in the trial court, the appellant has not pointed to any concrete act, statement or ruling by the trial magistrate which would give rise to a reasonable apprehension of bias. An adverse finding on the merits is not proof of bias. The trial judgment is reasoned and cogent and shows engagement with the evidence and applicable law; on that basis the charge of bias is unsubstantiated.
32. Having re-weighed the evidence and applied the law, I am satisfied that the trial court did not err in law or fact in the manner alleged by the appellant. The trial court evaluated the evidence, noted the absence of a proved written contract, applied the rules on limitation and prescription correctly, and reached conclusions on possession that were open on the evidence. There is no reason for this Court to disturb those findings.

## **Final Disposition**

33. Having carefully reconsidered, re-evaluated and analysed the pleadings, the evidence presented before the trial court, the impugned judgment, the memorandum of appeal, and the detailed written and supplementary submissions by both parties, and having applied the settled principles governing a first appellate court, I reach the inevitable conclusion that the appeal is devoid of merit.
34. The appellant did not demonstrate that the learned trial magistrate misapprehended the evidence, applied the wrong principles of law, acted on irrelevant considerations, or failed to consider any material evidence. On the contrary, the trial court properly found that the respondent is the duly registered proprietor of Suna West/Wasweta II/340, that the appellant failed to prove the existence or enforceability of any sale agreement, and that the claim for adverse possession was legally untenable in light of the appellant's own admission that he vacated the land and had not occupied it continuously for the statutory period. The appellant's further argument that the respondent's suit was statute-barred was not pleaded as a ground of appeal and, in any event, lacked substance.
35. It is also clear that the alleged agreement of 30<sup>th</sup> December 1991 was never produced as an exhibit, and even assuming it existed, it would not satisfy the mandatory requirements of section 3(3) of the Law of Contract Act, nor would it survive the limitation period under section 4(1)(a) of the Limitation of Actions Act. The appellant therefore failed to establish any contractual or possessory right capable of defeating the respondent's registered title. The respondent, on the other hand, demonstrated that he

lawfully acquired the land through succession and sale, and that his title is protected under section 26 of the Land Registration Act.

36. In the circumstances, and there being no material to warrant interference with the findings of the lower court, I find no merit in the appeal.

- a) The appeal is dismissed in its entirety.
- b) The judgment and decree of the Chief Magistrate's Court at Migori in ELC Case No. 30 of 2019 delivered on 9<sup>th</sup> September 2021 are hereby affirmed.
- c) The respondent shall have the costs of this appeal.

It is so ordered.

**DATED, SIGNED and DELIVERED** virtually at **NAIROBI** on this **27<sup>th</sup>** day of **November, 2025.**

**MOHAMMED N. KULLOW**  
**JUDGE**

**Judgment delivered in the presence of: -**

..... for the Appellant  
..... for the Respondent  
**Philomena W.**..... Court Assistant