

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELCLA NO. E005 OF 2024.

ALICE AWUOR APOLA 1ST APPELLANT

EDWINA APOLA2ND APPELLANT

(Being sued as representatives of the Estate of Gertrude Apola)

VERSUS

VITALIS OBADE1ST RESPONDENT

JULIUS OBADE 2ND RESPONDENT

TOM OBADE 3RD RESPONDENT

(Being an appeal from the judgement and decree of Hon.

L. N. Kiniale (SPM) delivered on 1st February 2024 at

Nyando Law court Case No. ELC (O.S) E001 OF 2022).

JUDGEMENT

Background

The record of appeal filed herein shows that vide the Originating Summons received in court on 4th March 2022, the respondents sued the appellants herein in NYANDO SPM E &LC NO. E001 of

2022 (OS). The subject matter of the suit was a parcel of land known as KISUMU/WAWIDHI A1/5699 (herein referred to as the suit land) measuring approximately 2 acres which the respondents claimed to have acquired title to by adverse possession. The respondents therefore sought for orders directing that they be registered as proprietors of the whole of the suit land and that a permanent injunction do issue restraining the appellants from interfering with the suit land. The appellants were sued as personal representatives of the estate of one Gertrude Apola, deceased.

The appellants filed a Replying Affidavit sworn on 13th July 2023 in reply to the Originating Summons denying the respondents' claim. The record of appeal shows that the suit was heard before the trial court, which vide the judgment delivered on 1st February 2024, found that the respondents had met the threshold for acquiring title to land by adverse possession and that the respondents were entitled to the relief sought. The court proceeded to grant the prayers sought in the Originating Summons.

The Appeal

Aggrieved by the judgement, the appellants preferred the present appeal vide the Amended Memorandum of Appeal dated 29th April, 2023 on the grounds that;

1. the learned Magistrate erred in law and in fact by holding that the plaintiffs'/respondents' possession has been

continuous without force and or interruption for a period of 12 years.

2. the learned Magistrate erred in law and in fact in holding that the filing of a suit by the appellant did not interrupt the running of time in favour of the respondents.
3. the learned Magistrate erred in fact and in law by selectively relying on the oral, unsupported statement of the respondents while ignoring and/or dismissing the appellants' statement and evidence on record.
4. the learned Magistrate erred in fact and in law by holding that the time started running upon executions of the agreement to which one of the appellants was a party.
5. the learned Magistrate misdirected herself in law and in fact by shifting the burden of proof to the appellants.
6. the learned Magistrate misdirected herself in law and in fact by failing to appreciate that the trial court did not have jurisdiction to hear and determine adverse possession matters.

The appellants seek for orders that the appeal be allowed, the judgement and decree of Hon. L.N Kiniale (SPM) delivered on 1st February 2023 at Nyando Law Courts case No. ELC (OS) No. E001 of 2022 set aside and be substituted with an order dismissing the plaintiffs'/respondents' suit with costs.

Submissions

The appeal was heard by way of written submissions. Written submissions dated 28th July 2025 were filed on behalf of the appellants while written submissions dated 1st July 2025 were filed on behalf of the respondents.

Analysis and determination

This being a first appeal the court has an obligation to re-examine and analyze the evidence presented before the trial court.

The 1st and 2nd ground of appeal raise the issue of whether or not the respondents had been in continuous possession of the suit land without force and/or interruption for a period of 12 years.

The record shows that the respondents had pleaded in the Originating Summons that they had occupied, used, enjoyed peacefully and openly as of right and without interruption the whole of the suit land for a period exceeding 12 years. In paragraphs 2 and 3 of the Supporting Affidavit, the respondents stated that the respondents and members of their family were born and raised on the suit land having lived thereon since the year 2005 and put up permanent structures including a matrimonial home where they have lived as a family.

That they had been in peaceful occupation of the suit property until the appellants started claiming ownership claiming that the land belonged to the appellant's mother known as Gertrude Apola.

PW1 testified that the land was purchased by his parents. That as of 2005 they were in possession of the land. That there are several burials that had taken place in the land. That they buried 2 people on the land. PW2 testified that the suit land was sold by her husband to the respondents.

The Respondents produced among other exhibits photographs to show evidence of their occupation.

The appellants on the other hand vide the Replying Affidavit sworn by the 1st appellant stated that they were not aware of the claim that the respondents were born and raised on the suit land or have permanent structures thereon. They denied the claim that the respondents' occupation of the suit land was peaceful, open or uninterrupted but rather that the occupation has been with use of force, threats, intimidation and impunity.

That the appellants had filed a suit at Nyando court being land Case No. 01 of 2016 to stop burial of the respondents' relative on the suit land.

That in the year 2020, the 1st appellant brought a complaint concerning the respondents' occupation of the suit land whereupon a meeting at adjudication office was conducted and the issue discussed and parties referred to court. That the respondents filed Case No. 37 of 2021 at Nyando Law courts against the appellants which was disallowed and the appellants proceeded to commence succession to the estate of the deceased

registered owner, one Gertrude Nyamunga Atieno as provided for by law and subsequently transferred the suit land in their favour.

The 1st appellant testified before the trial court on behalf of the appellants that the land belonged to her mother Gertrude Atieno, deceased. That it was their mother who ploughed the land. That it was after the death of their mother that they found the respondents on the land. That when she tried to talk to the 1st respondent to vacate the land, he kicked her out with a *panga* and threatened to shoot her with a gun. That it was the respondents who were on the land.

It has been submitted on behalf of the appellants in this appeal that the possession was forceful without peace and was interrupted before the lapse of 12 years. That the period for adverse possession was interrupted by filing of case No. 1 of 2016 at Nyando Law Courts.

Counsel relied on the case of Civil Appeal No. 121 of 2006 Benson Mukubwa Wachira- Vs- Assumption Sisters of Nairobi Registered Trustees (2016) eKLR where it was held that institution of a suit against a trespasser does interrupt and stop the time from running.

On behalf of the respondents it was submitted that the respondents had relied on the requisite period of 12 years as provided for in section 7 of the Limitation of Actions Act. Relying on the cases of Wanyoike -vs- Kachiri (1979) KLR and Wilson Njoroge Kamau- vrs - Nganga Mukeru Kamau (2020)eKLR,

Counsel submitted that the respondents put out evidence to show that they have been in exclusive control of the suit land and demonstrated *animus possidendi* in developing the suit land by building their home thereon since the year 2005 openly and without interruption.

From their testimony, the basis of the respondents' entry onto the suit land was a land sale agreement vide which their parents bought the suit land. The 1st Respondent testified that the person who sold the land to his parent was Oloo Apala. He produced the land sale agreement as exhibit PEX 1. It is on page 38 of the record of appeal. It shows that the seller was John Oloo Apolla and the buyers James Obade Ogonda and Rose Akinyi Obade.

PW1 stated on cross -examination that the land was purchased in the year 2005. That according to the search done in 2021, the owner was Gertrude and that from the death certificate, Gertrude died in the year 2002. This information was confirmed by DW1 (the 1st appellant) who deposed in the Replying Affidavit that the suit land was the property of Gertrude Nyamunga Atieno deceased who died in 2002.

Among the appellant's documents was certificate of death for Gertrude Nyamunga Atieno, deceased. It is on page 45 of the record of appeal. It shows that the deceased died on 10/08/2002.

This means that as at the year 2005 when the respondents claim to have bought the land, the land was property of a deceased person protected by the provisions of the Law of Succession Act

and not available for sale until succession to the estate of the deceased is undertaken. See Section 79, 82 and 45 of the Law of Succession Act. Section 45 of the Law of Succession Act provides that

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall- (a) be guilty of an offence and liable to a one not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and (b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

Hence the selling and buying of the suit land, entry and occupation thereof were all acts of intermeddling with the estate of the deceased. Time could not start to run against title of a deceased person in such circumstances.

I find that the respondent had not had adverse possession of the suit land. The trial court therefore erred in finding that the respondents had had adverse possession of the suit land.

Ground 7 of the appeal raises the issue of jurisdiction of the court. Section 38 of the Limitation of Actions act provides that application for claims based on adverse possession shall be made to the High Court.

The Court of Appeal in *Sugawara vs Kiruti (sued in her capacity as the Administratrix of the Estate of Mutorakwa kiruti lepasso alias Mutaragwa Kiruti Lepaso alias Mutaragwa Kiroti Leopso and in her own capacity and 3 others [2024] KECA 1417 (KLR)* where it was held, inter alia, that in view of the express provisions of section 38 of the Limitation of Actions Act, the Magistrate's courts do not have jurisdiction to determine claims of adverse possession, settled the issue of whether or not Magistrates courts have jurisdiction in claims to land based on adverse possession. Hence the trial court erred in proceeding to entertain and pronounce itself on the Originating summons over a claim of adverse possession.

For the foregoing reasons, I find that the appeal has merit. The appeal is allowed. The judgement of the trial court is set aside and substituted with a judgment dismissing the respondents' suit.

Costs of the appeal to the appellants.

Orders accordingly.

Judgement dated and signed at Kisumu and delivered virtually this 29th day of January 2026.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen -Court Assistant.

Opiyo for the Appellants.

Awuor for the Respondents.