

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT HOMABAY**  
**ELCA E008 OF 2025**

**ELISHA OUMA MIDEMBI.....**  
**APPELLANT**

**VERSUS**

**PENINA AKINYI**  
**OKOTH.....RESPONDENT**

**JUDGMENT**

**(Being an appeal from the judgment of the Principal Magistrate Hon. Nicodemus Mosesti (PM) delivered on the 11<sup>th</sup> September, 2024 in Mbita PM ELC No. E002 of 2021).**

**INTRODUCTION**

1. This is an appeal arising from the judgment of Honourable Nicodemus Mosesti Principal Magistrate, delivered on 11<sup>th</sup> September, 2024 in Mbita ELC No. E002 of 2021.
2. The Appellant filed a Memorandum of Appeal dated 17<sup>th</sup> February, 2025 appealing against the said judgment on the following grounds: -

**1. THAT the learned trial Magistrate erred in law and/or fact by ignoring the Appellant’s testimony and treating it superficially that the Appellant was in actual and active possession of the suit**

**land for more than Twenty (20) years thus failed to consider that the Appellant qualified for a claim of adverse possession against the Respondent.**

**2. THAT the learned trial Magistrate failed to cumulatively and or exhaustively evaluate the entire evidence on record and testimony of the parties and hence failed to capture and decipher the salient issues and/or features of the suit before him and thus arrived at an erroneous conclusion.**

**3. THAT the Learned trial Magistrate erred in fact and in law in finding that the Respondent had overriding interests over the Appellant.**

**4. THAT the learned trial Magistrate erred in law and fact in that he disregarded the Appellant's submissions and judicial authorities with the resultant miscarriage of justice to the appellant on the suit land.**

3. The Appellant seeks orders setting quashing and setting aside the decision of the trial magistrate's judgment and substituting it

with an order allowing the Appellant's suit. He also sought for costs of the appeal and trial court.

### **BRIEF FACTS**

4. The Respondent had filed a plaint dated 21<sup>st</sup> January, 2021 seeking an order of permanent injunction to restrain the Respondent from trespassing onto land parcel Kasgunga/Kamreri/1615 the suit property which she had inherited from her deceased father. She also sought for an order of eviction against the Appellant.
5. The Appellant filed his Defence dated 28<sup>th</sup> January, 2021 where he denied the Respondent's claim and urged the court to strike out the suit
6. The trial court heard the case and found that the Respondent had proved her case on a balance of probabilities thus rightful owner of the suit parcel.
7. The Appellant being dissatisfied with the judgment filed the present appeal which was canvassed by way of written submissions.

### **Submissions**

8. Counsel for the Appellant filed his submissions dated 15<sup>th</sup> April, 2025 where he identified one issue for determination, whether the Appellant's claim is merited.
9. It was his submission that it was not in dispute that the Appellant was in possession of the suit parcel since 2003. He relied on the **Court of Appeal** case of **Ruth Wangari Kanyagia V Josephine Muthoni Kinyanjui [2017] eKLR** which cited the decision in **India Supreme Court case of Kamataka Board of Wakf V Government of India & Others (2004) 10 SCC 779**.
10. Counsel submitted that the Respondent did not dispute that the Appellant had built on the suit parcel and that the Appellant admitted that they only came to the property in 2021. He submitted that the Appellant had acquired the suit property by virtue of adverse possession.
11. In conclusion, he urged the court to allow the appeal as prayed.
12. Counsel for the Respondent on the other hand filed his submissions dated 5<sup>th</sup> November, 2025 where he identified two issues for determination. The first issue was whether the

Appellant's possession of the suit property meets the legal requirements for a successful claim of adverse possession.

13. He relied on the Court of Appeal case of **Kimani Ruchine V Swift Rutherford & Co. Ltd (1980) KLR** and submitted that the Appellant needed to prove that his occupation of the suit property was peaceful, open, and continuous.
14. It was counsel's submission that the Appellant's claim failed to prove the essential element of hostility. He further submitted that the Appellant allegedly entered the land in the year 2003 after the death of the Respondent's father who died 1984.
15. He submitted that the entry to the suit property by the Appellant was an act of intermeddling with a deceased person's estate since his estate was yet to be succeeded thus contrary to **Section 45** of the **Law of Succession Act**. He cited the case of **Veronica Njoki Wakagoto (Deceased) (2013) eKLR**.
16. He further submitted that the Appellant's claim that the land belonged to his father, he demonstrated he was not asserting as an independent, hostile title in denial of the true owner.
17. He submitted that the trial magistrate correctly failed to find in the Appellant's favour since the possession lacked the

necessary element of being adverse to the Respondent's inherited title.

18. On the second issue for determination, he submitted in the negative and argued that the trial court did not err in finding that the Respondent had overriding interests on the suit parcel. He submitted that the Appellant's occupation, based on a third-party claim (his father's alleged ownership), could not extinguish the legitimate proprietary rights of the Respondent as the legal heir.

### **Analysis and Determination**

19. Upon consideration of the grounds of appeal, pleadings, submissions and the authorities cited, the following issues are for determination:

**1. Whether the appeal is merited.**

**2. Who should bear the cost of the appeal.**

20. Being a first appeal, the court relies on a number of principles as set out in **Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123:**

**“...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. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”**

21. Further, in the case of **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR)** the court held that:

**“This being a first appeal, this court’s mandate is to re-evaluate, re-assess and re-analyze the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect.”**

22. In addition, the Court the of Appeal, in **Susan Munyi v Keshar Shiani (2013) eKLR**, stated as follows:

***“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyse, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions”***

23. Furthermore, in **Williamson Diamonds Ltd and another v Brown** [1970] EA 1, it held that:

***“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”***

24. Again, in **PIL Kenya Limited v Oppong** [2009] KLR 442, it was held that:

***“It is the duty...of a first appellate court to analyse and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeking the witnesses and their demeanour and giving allowance for that”.***

25. To buttress the point, this court looks at the decision of **Gitobu Imanyara & 2 others Vs Attorney General [2016] eKLR** wherein it was held as follows;

***“An appeal to this Court from a trial by the High 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 allowances in this respect.”***

26. Regarding where the Court exercises discretion and a party appeals from the decision made, the appellate court has to consider whether exercised injudiciously and or proceeded on the wrong principles or included matters he ought not to have included or failed to take into account some he ought to have considered. Thus, in **Supermarine Handling Services Ltd V Kenya Revenue Authority [2010] KECA 373 (KLR)** the court held as follows:

***“...Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not***

***interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule”.***

27. Again, in **Supermarine Handling Services Ltd versus Kenya Revenue Authority [2010] eKLR (Civil Appeal 85 of 2006)** the Court stated :-

***“... Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule”.***

28. Further, in **Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR** the Court of Appeal held that:

***“...the Court of Appeal, in interfering with the exercise of discretion of the trial Judge appealed from, ought to satisfy itself that the exercise of that discretion either way was improper and therefore warrants interference.”***

29. It had been earlier restated in **Edward Sargent versus Chotabha Jhaverbhat Patel [1949] 16 EACA 63**, that there is no bar to an appeal lying to an Appellate Court against an order made in the exercise of judicial discretion, but for the Appeal Court to interfere only if it be shown that the discretion was exercised injudiciously.

30. Thus, of an appeal on discretion of a court, the seminal case of **Mbogo and Another v Shah [1968] EA 93** at **96** the court held:

***“For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has***

***been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice.”***

31. Added in view to that, in **Agola v Ngodhe (An administrator to the Estate of Zakayo Ngodhe) (Environment and Land Appeal E025 of 2024) [2025] KEELC 1367 (KLR) (6 March 2025) (Judgment)**, this court stated;

***“As for the instant appeal, it is clear that it arose from the low court’s exercise of discretion. Regarding appeals of such nature, the appellate court will not normally interfere with the discretion of the trial court unless the trial magistrate or judge exercised the discretion wrongly, injudiciously or misdirected himself in some matter thereby arriving at a wrong decision, the decision clearly wrong.”***

32. Guided by the above principles this court has recently held, in **Nyaoke & 7 others v Ayaga (Environment and Land Appeal E024 of 2024) [2025] KEELC 7345 (KLR) (28 October 2025) (Judgment)** as follows,

*“Again, it is worth of note that this is an appeal that challenges the exercise of discretion by the trial court. The principles that*

*govern the instances that an appellant court may interfere with a decision arrived at by exercise of discretion by a court appealed from are now settled. This court must be cautious in deciding to interfere with the discretion of the trial court. If I must do so, I should not substitute my decision with the that of the trial court. I must consider and find, if I have to overturn that decision, that the trial court failed to act judiciously or was plainly wrong on principles that he proceeded on or considered or failed to consider factors which he ought not or ought to have considered, respectively.”*

33. The decisions above settle the legal and factual elements an appellate court would consider in an appeal arising from a trial court’s decision based on its analysis and findings on evidence adduced by parties. In this matter then, it was the Appellant’s case that he had been in occupation of the suit property since 2003 and therefore acquired the same by virtue of adverse possession. Upon cross examination, he admitted that he took possession of the suit parcel without the permission from the then owner Were Omollo (deceased). He also admitted that he had not been peacefully staying on the suit land.

34. He stated that in 2019 the Respondent accompanied by the surveyor and assistant chief and other persons came to the suit land.
35. The Respondent on the other hand contends that she is the registered owner of the suit parcel having inherited the same from his late father Were Omollo. She produced copies of the confirmed grant and title in her name.
36. It was the Respondent's case that the Appellant trespassed onto the suit parcel which trespass was still continuing.
37. In the case of **Mate Gitabi v Jane Kabubu Muga alias Jane Kaburu Muga & 3 others [2017] KECA 596 (KLR)**, the court held as follows:

**“For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin maxim *nec vi, nec clam, nec precario*. See**

**also ... *Kasuve vs Mwaani Investments Limited & 4 Others* [2004] 1KLR where this Court stated as follows: 'In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.'**

38. In the case of **Githu V Ndeete [1984] KLR 776** it was held that: -

**"Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act".**

39. It is not in dispute that the Appellant got into the suit land in an open manner at first in 2003 and has built his homestead thereon. It is also not in dispute that the homestead still lies on

the suit property to date despite the Respondent having told the Appellant to vacate.

40. It was clear from the Appellant's evidence that his quiet and continuous occupation was interrupted or broken before the end of the twelve-year period. In any event, I have keenly perused the court record and the evidence of the parties. The Defendant/Appellant pleaded that he was unaware of the alleged trespass. Further, in paragraph 7 that he had been in open and peaceful occupation of the suit land, without any interference and therefore had acquired the same by way of adverse possession. He did not in any way plead when he took possession of the suit land, which pleading was crucial in laying the basis for and determining the starting period of the claim he made of adverse possession.
41. On her part the plaintiff pleaded at paragraphs 6 and 8 that the Defendant trespassed onto the suit land in the year 2015 and she (plaintiff) asked him to vacate in vain. Then in that year he built a homestead on the suit land thereby aggravating the situation.
42. In his Statement, Elisha Ouma Midembi, the defendant, stated that had been living on the land since 2003, and that in 2019 he

was at home when he heard the assistant chief and a surveyor were in the place. He went to find out what was happening only to find that the plaintiff was claiming the land to be hers. As for the defendant she repeated in her testimony the content of the pleading on the alleged trespass.

43. It is not in contention that the Respondent discovered that the Appellant had trespassed onto the suit parcel in 2015. It is also not in contention that the Defendant only got to know the extent of occupation of the plaintiff's land when the surveyor visited the land and pointed out the boundaries. This finding of the court is derived from the Defendant's own evidence by way of a statement that it was until when the area chief and the surveyor visited the land that he knew the land claimed by the Plaintiff was being claimed to be hers. The time of trespass, and adverse possession for that matter then started running from the time of discovery by the defendant that he was on the plaintiff's land. It is this court's view that the 12 years started running from when the surveyor established the wrongful occupation, or at best then, from 2015 upon discovery of the trespass. In addition, since the trespass is still continuing by virtue of the Appellant still being in possession of the suit property, time has not

stopped thus the claim of adverse possession cannot suffice in the circumstance.

44. Consequently, the Appellant failed to meet any of the requirements for a claim for adverse possession and therefore the same fails in its entirety.

45. The upshot of the foregoing is that the appeal is not merited. It is hereby dismissed with costs to the Respondent.

46. Orders accordingly.

Judgment dated, signed and delivered virtually via the Teams Platform this 06<sup>th</sup> day of February 2026.

Hon. Dr. Iur Nyagaka  
Judge

**In the presence of,**

Ms. Ochieng Advocate for the Appellant

Mr. Nyakwamba Advocate for the Respondent