REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL NO. E023 OF 2024

GEORGE CORNEL ORUKO.....1ST APPELLANT

MARTIN OWUOR OLOMBE.....2ND APPELLANT

NABOTH ODURO.....3RD APPELLANT

-VERSUS-

JOHN ONYANGO NYAGOL.....1ST RESPONDENT

MARY NYAGOL.....2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. E.A. Obina, SRM delivered on 11th April 2025 in Kisumu MCELC No. 77 of 2019)

JUDGMENT

Background

All that parcel of land known as Kisumu/Manyatta "B"/1850 measuring approximately 0.22 hectares (hereinafter referred to as "the suit property") was registered in the name of Olombe Abadha on 26th November 1990. Olombe Abadha (hereinafter referred to as

"Abadha") died on 16th June 1994. The Appellants were appointed as administrators of the estate of Abadha on 28th July 2016. On 16th May 2017, the suit property was transferred to the Appellants, as administrators of the estate of Abadha, by transmission. On the same date, the suit property was transferred by the Appellants to themselves as the owners thereof. A title deed was issued in their name on 17th May 2017. Abadha was said to have acquired the suit property from one Enoka Migunye Owuor (hereinafter referred to as "Migunye"). The 1st Respondent, John Onyango Nyagol, is the grandson of Migunye, and the 2nd Respondent is the 1st Respondent's wife.

On 19th June 2019, the Appellants brought a suit against the Respondents in the Chief Magistrate's Court at Kisumu, namely, Kisumu CMCELC No. 77 of 2019 (hereinafter referred to as "the lower court"), claiming that they were the registered owners of the suit property and that the Defendants had trespassed on the property by constructing rental houses on a portion thereof without the Appellants' permission. The Appellants sought judgment against the Respondents for an order of eviction from the suit property and the costs of the suit. The Respondents filed a joint statement of defence

to the Appellants' claim, and a counterclaim against the Appellants on 24th January 2020. The Respondents averred that their grandfather, Migunye, occupied the suit property in the 1960s before land adjudication in the area. The Respondents averred that it was unclear to them under what circumstances the suit property was registered in the name of Abadha during the land adjudication. The Respondents averred that they inherited the portion of the suit property under their occupation from Migunye and had openly and peacefully occupied it for several years without objection from the Appellants. The Respondents averred that they had their home on the suit property. The Respondents denied that they had trespassed on the suit property. The Respondents averred that the rental houses complained of by the Appellants were constructed by their mother in 1987.

In their counterclaim, brought by way of an Originating Summons, the Respondents claimed that they were entitled to a portion of the suit property measuring 0.22 hectares by way of adverse possession. The Respondents averred that they had been in adverse possession of the said portion of the suit property for over 12 years. The Respondents averred that on account of their occupation of the said portion of the

suit property for over 12 years, the title and interest Abadha and the Appellants had in the said portion of the suit property were extinguished by operation of law. The Respondents averred that they were entitled to be registered as the owners of the said portion of the suit property.

The Appellants filed a reply to the defence and a defence to the counterclaim by the Respondents on 21st August 2020. The Appellants averred that Abadha was the first registered owner of the suit property and that the Respondent's grandfather, Migunye, owned land Title No. Kisumu/Manyatta "B"/1852, which the Respondents inherited from him and were occupying. The Appellants denied that the Respondents were occupying the suit property. The Appellants averred that the Respondents had constructed a permanent house on land Title No. Kisumu/Manyatta "B"/1852, and that was where they were living. The Appellants averred that the Respondents' counterclaim was defective and bad in law. The Appellants averred that the lower court had no jurisdiction to entertain the Respondents' counterclaim. The Appellants prayed that the Respondents' counterclaim be dismissed with costs and judgment be entered for the Appellants as prayed in the plaint.

The lower court judgment

The lower court heard the Appellants' suit and the Respondents' counterclaim. In a judgment delivered on 11th April 2025, the lower court dismissed the Appellants' claim and allowed the Respondents' counterclaim. The lower court held that it had jurisdiction to determine the Respondents' adverse possession claim and that the claim was properly brought by way of a counterclaim. The lower court found that there was no dispute that the Appellants were the registered owners of the suit property. The lower court further found that the Respondents had proved that they had openly, peacefully, and continuously occupied a portion of the suit property measuring 0.1 hectares/0.1 acres for over 12 years. The lower court held that the Appellants were barred from recovering the said portion of the suit property from the Respondents.

In its final orders, the lower court dismissed the Appellants' suit against the Respondents and declared that the Respondents had acquired a portion of the suit property by adverse possession. The lower court ordered the land registrar and the surveyor to visit the suit property and confirm the exact measurements of the portion

thereof occupied by the Respondents. The court further ordered that the suit property be subdivided and the portion thereof occupied by the Respondents be transferred to them. On costs, the court ordered each party to bear its own costs.

The Appeal

The Appellants were aggrieved by the lower court's decision and preferred this appeal. In their memorandum of appeal dated 10th May 2024, the Appellants challenged the lower court's judgment on the following grounds;

1. The trial court misapprehended in substantial material respects the nature and legal tenets of the Respondent's pleaded claim and, as a result, arrived at an erroneous and unjust decision.
2. The trial court's findings that there was no encroachment despite all the evidence tendered by both parties, and failing to make any finding of encroachment, constitute a failure and miscarriage of justice.
3. The trial court erred in law and principle by acting on a self-invoked presumption that lacked an evidential basis.

4. The trial court's decision to rely on self-fished technical arguments that stood in conflict with the evidence tendered by both parties was contrary to legal principles governing admissibility, relevance, and proof of facts in judicial adjudication.
5. The trial court completely disregarded the entire evidence tendered by the Appellants and made a decision contrary to the legal principles governing admissibility, relevance, and proof of facts in judicial adjudication.
6. The trial court erred in law and fact in its finding that the Respondent had acquired an uncertain portion of land allegedly measuring approximately 0.1hectares or acres in the absence of any evidence proving adverse possession of a definite area.
7. The trial court erred in law and fact in issuing orders of adverse possession despite there being no evidence in proof of the same.
8. The trial court erred in failing to accord any weight to the evidence tendered in support of the Appellants' case.
9. The trial court failed to properly address its mind to its role as a first appellate court (sic) and thus arrived at a decision that was defective in law and amounted to a failure of justice.

The Appellants prayed that the appeal be allowed and the entire judgment of the lower court be set aside. The Appellants also prayed for the costs of the appeal and the lower court suit.

The appeal was argued through written submissions.

The Appellants' submissions

The Appellants filed submissions dated 13th October 2025. The Appellants submitted that they proved before the lower court that they were the registered owners of the suit property and that the Respondents had entered and occupied the property without their permission. The Appellants submitted that the lower court erred in failing to find that the Respondents were trespassers on the suit property. The Appellants submitted that they were entitled to the reliefs sought before the lower court, including compensation for loss of use. The Appellants further submitted that there was no evidence on the basis of which the lower court could have made a finding that the Respondents had acquired a portion of the suit property by adverse possession. The Appellants submitted that there was no evidence in support of the Respondents' claim that their grandfather, Migunye, had occupied the suit property from the 1960s, and that

they came into possession of the property through him. The Appellants submitted that there was no evidence before the lower court showing that the Respondents' grandfather or father either owned or occupied the suit property. The Appellants submitted that there was also no documentary evidence linking the Respondents' grandfather or father to the suit property. The Appellants submitted that in reaching a finding that the Respondents had acquired the suit property by adverse possession, the lower court relied on hearsay evidence. The Appellants submitted that the lower court erred in awarding the Respondents a portion of the suit property measuring 0.22 hectares without a surveyor's report. The Appellants submitted that the Respondents failed to prove their claim of adverse possession. The Appellants urged the court to allow the appeal and set aside the lower court's judgment. The Appellants cited several authorities in support of the submissions, which I have considered.

The Respondents' submissions

The Respondents filed submissions dated 5th January 2026. The Respondents submitted that the lower court properly evaluated the competing claims of title and arrived at the correct decision. The

Respondents submitted that the Appellants were the registered owners of the suit property, and that this was not disputed. The Respondents submitted that the Appellants' title was, however, subject to the Respondents' adverse possession claim over a portion of the suit property. The Respondents submitted that the evidence they adduced before the lower court was not hearsay. The Respondents submitted that they adduced evidence tracing their family's occupation of the suit property from the 1960s. The Respondents submitted that they established the elements of adverse possession in the lower court. The Respondents submitted that the restriction that was registered against the title of the suit property by the Land Registrar on 24th October 2014 did not stop the time from running in favour of the Respondents. The Respondents submitted further that the Appellants did not demonstrate that they had at any time occupied the disputed portion of the suit property. The Respondents submitted that since they were not trespassers on the suit property, the Appellants were not entitled to an award of damages against them for loss of use of the suit property. The Respondents submitted further that the absence of a survey report could not invalidate the lower court's finding that they had acquired a

portion of the suit property measuring 2.2 hectares. The Respondents submitted that the lower court's evaluation of evidence was thorough and proper, and urged the court to dismiss the Appellants' appeal with costs. The Respondents cited several authorities in support of their submissions, which I have considered.

Analysis and Determination

I have considered the pleadings and proceedings of the lower court, the judgment of the court, the grounds of appeal put forward by the Appellants, and the parties' submissions. As correctly submitted by both parties, this being a first appeal, the court must reconsider and re-evaluate the evidence on record and draw its own conclusions regarding the lower court's findings on the issues raised for determination before it.

In Gitobu Imanyara & 2 Others *v*. Attorney General [2016] KECA 557 (KLR), the Court of Appeal stated as follows on the mandate of the court on a first appeal:

"...this Court is not bound necessarily to accept the findings of fact by the court below and that 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. See Selle and Another v. Associated Motor Boat Company Limited and others [1968] EA 123 and Williamson Diamonds Ltd. v. Brown [1970] E.A.L.

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in Peters –vs- Sunday Post Ltd [1958] EA 424. In its own words: -

"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.""

In Kenya Ports Authority *v.* Kuston (Kenya) Limited [2009] 2EA 212 the Court of Appeal stated that:

"On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

It is also settled that on a first appeal, the court will not interfere with the findings of fact by the trial court unless they were not based on evidence at all, or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, Peter *v*. Sunday Post Ltd. [1958] E.A 424 and Makube *v*. Nyamuro[1983] KLR 403.

In my view, the Appellants' nine grounds of appeal raise only four issues for determination, namely;

1. Whether the lower court erred in its finding that the Appellants had not proved their claim against the Respondents.
2. Whether the lower court erred in its finding that the Respondents had proved their adverse possession claim over a portion of the suit property, and as such were entitled to have the said portion transferred and registered in their names.
3. Whether the appeal should be allowed.

4. Who should bear the cost of the appeal?

I will consider these issues together. The Appellants' case in the lower court was straightforward. The Appellants contended that they were the registered proprietors of the suit property, which they acquired from Olombe Abadha, deceased ("Abadha"), through inheritance on 16th May 2017. The 1st Appellant is the grandson of Abadha, while the 2nd and 3rd Appellants are the sons of Abadha. The Appellants contended that Abadha purchased the suit property from Enoka Migunye Owuor ("Migunye") in the 1960s. The Appellants averred that the 1st Respondent, who was the grandson of Migunye, and the 2nd Respondent, who was his wife, entered the suit property without their permission and constructed temporary houses on a portion of the suit property with about 10 rooms from which they were collecting a monthly rent. The Appellants averred that the Respondents were trespassers on the suit property and should be evicted therefrom.

The Respondents, on the other hand, contended that they were occupying the suit property as of right, having inherited it from their grandfather, Migunye, who had occupied the disputed portion since

the 1960s. The Respondents averred that the temporary houses complained of by the Appellants were constructed by the 1st Respondent's mother in 1987. The Respondents averred that they had occupied the disputed portion of the suit property for several years and, as such, had acquired it by adverse possession. The Respondents averred that they were not trespassers on the suit property, and as such, the Appellants were not entitled to the relief sought.

The 1st Appellant stated in cross-examination that the temporary rental houses they were complaining about were built in the 1980s. On his part, the 2nd Appellant stated that the said temporary houses were built in 1994, and that more were added in 2014. I am satisfied from the evidence on record that the members of the Respondents' family, starting with their grandfather, had occupied the disputed portion of the suit property for several years, and that the houses the subject of the Appellants' complaint in the lower court were put up in the 1980s. The photographs of the disputed houses produced in evidence left no doubt that they were very old and had been in place for several years. It was not disputed in the lower court that the Appellants were the registered owners of the suit property. The

dispute was whether the Appellants were entitled to recover the portion of the suit property occupied by the Respondents. The lower court, held that the Appellants were not entitled to recover the disputed portion of the suit property from the Respondents. The court found that the Respondents had occupied the said portion of the suit property for over 12 years and had acquired it by adverse possession. The Appellants admitted that the temporary houses, which were in the Respondents' possession and prompted the trespass claim, had been on the suit property for over 25 years before the filing of the suit. This means that the Respondents had been in possession of the portion on which the said houses were situated for over 12 years. Under Section 7 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya, a suit for the recovery of land cannot be brought more than 12 years after the accrual of the cause of action. The Appellants had no right in the circumstances to recover the disputed portion of the suit property from the Respondents. The lower court did not, therefore, err in its finding that the Appellants had failed to prove that the Respondents were trespassers on the suit property, and as such, should vacate the same.

The lower court had jurisdiction to find that the Respondents had been in possession of the disputed portion of the suit property for over 12 years, and as such, the Appellants' claim over the property was not maintainable; their interest in the property having been extinguished by operation of law. The lower court, however, had no jurisdiction to declare that the Respondents had acquired the disputed portion of the suit property by adverse possession and should be registered as the owners thereof. Such a declaration and order could only be made by the Environment and Land Court. In 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 No.E141 of 2022) [2024] KECA 1417 (KLR) (11th October 2024) (Judgment), the Court of Appeal stated as follows:

"44. The controversial question of jurisdiction of the Magistrates' Courts in claims for adverse possession emanates from sections 37 and 38 of the *Limitation of Actions Act* where it is specifically provided that such claims are to be heard by the "High Court".

45. In particular, section 38 of the *Limitation of Actions Act* provides:

“ (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) …

(3) …

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.

(5) …”

46. In other words, reference is to the “High Court” as the court to which such cases are heard, and given the dictates of *the Constitution* set out above, this should be construed to mean the “Environment and Land Court”, as being the court donated with jurisdiction to hear and determine matters pertaining to adverse possession of land. The effect of this interpretation is that, it is only the Environment and Land Court established under Article 162(2) (b) that is mandated to hear these cases. So that, notwithstanding the expansion of the jurisdiction of environment and land usage to Magistrates Courts, it is distinctive that under section 9 (a) of the Magistrates Courts Act, various matters are specified for

determination, but claims for adverse possession are not included.

47. In the case of Republic vs Karisa Chengo & 2 Others [2017] eKLR this Court held that:

"A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

48. It is our view that, if it was intended that claims for adverse possession be determined by the Magistrates' Court, nothing would have been easier than for Parliament to have expressly enacted such a provision. So that in view of the express provisions of the law, a strict interpretation of section 38 would mean that hearing and determination of such matters is specifically limited to the Environment and Land Court to the exclusion of Magistrates' Court."

It is my finding from the foregoing that the lower court's finding and order that the Respondents had acquired the disputed portion of the suit property by adverse possession, and as such, the same should be transferred to them, were made without jurisdiction. The court should have stopped at the finding that the Respondents, having occupied the said property for over 12 years, were not trespassers on the

same, and that the Appellants could not recover the property from them. The Respondents should thereafter have brought their adverse possession claim in a court with competent jurisdiction to hear the matter, which court would have determined the measurement of the portion of the suit property occupied by the Respondents.

In view of the foregoing findings, I will allow the Appellants' appeal in part. The lower court's order dismissing the Appellants' trespass claim against the Respondents was proper. The same was based on the evidence that was adduced before that court. The lower court, however, lacked jurisdiction to find that the Respondents had acquired the disputed portion of the suit property by adverse possession and to order that it be surveyed and transferred to the Respondents.

Conclusion

In conclusion, the appeal before me succeeds in part. The part of the judgment delivered by Hon. E.A.Obina SRM on 11th April 2024, dismissing the Appellants' suit against the Respondents in the lower court, is upheld, while the part of the said judgment declaring that the Respondents had acquired a portion of all that parcel of land

known as Tile No. Kisumu/Manyatta “B”/1850 by adverse possession, and all the consequential orders are set aside for lack of jurisdiction. Each party shall bear its costs of the appeal.

Written and signed at Kisumu by

S. OKONG’O

JUDGE

Delivered, dated and countersigned at Kisumu on this day of 17th February 2026

E. ASATI

JUDGE

Judgment delivered virtually through Microsoft Teams Video Platform in the presence of:

for the Appellants

for the Respondents

-Court Assistant