

**IN THE COURT OF
APPEAL AT NAKURU**

(CORAM: MATIVO, GACHOKA & OKELLO,

JJ.A.) CIVIL APPEAL NO. E041 OF 2021

BETWEEN

**EDWARD O. OKUL.....1ST APPELLANT
TOM MBOYA OKUL.....2ND
APPELLANT**

AND

**HEBISIBAH MORAA ONDIEKI.....1ST
RESPONDENT
MARY IRENE ATIENO.....2ND
RESPONDENT
CHARLES CHAHYA ARADI.....3RD
RESPONDENT
STEVE BIKO ARADI.....4TH RESPONDENT**

(An appeal against the judgment and decree of the Environment and Land Court of Kenya at Nakuru (J.M. Mutungi, J.) delivered on 4th March 2021

in

ELC Case No. 83 of 2019)

**JUDGMENT OF THE
COURT**

1. By a plaint dated 13th September, 2019, the respondents, **Hebisibah Moraa Ondieki, Mary Irene Otieno, Charles Chahya Aradi** and **Steve Biko Aradi**, sued the appellants in the Environment and Land Court at Nakuru in **ELC No. 83 of 2019**. They averred that in October, 1985, the late Barrack

Deya Okul (deceased) fully and exclusively sold **Title No. Nakuru Municipality Block 1(Langa Langa/744** and all the proprietary

interests therein at a total consideration of Kshs 100,000/= the whole of which was fully paid and the former gave up possession in favour of the latter with the commitment and undertaking that he would transfer and register the same in favour of the buyer.

2. They averred that despite full payment of the purchase price, there was substantial delay in transferring and registering the said property in the name of the purchaser and the same was due to so much trust between the two until the two died. They averred that the purchaser predeceased the vendor but that despite the existence of trust between the two deceased individuals had for each other, the vendor demanded a further kshs 300,000/= from the 1st respondent in order to transfer the said property as initially intended. Thereafter, the vendor Okul provided the 1st respondent with his Kenyan Identity Card Number, his Personal Identification Number and transfer forms which he duly signed but intended the recipient to fill in the details as required. The respondents then discovered that the deceased Okul, the vendor herein had charged the property with Thabiti Bank Ltd (then in liquidation) without the knowledge of the respondents and behind the purchaser Manoah Kisame Aradi (deceased).

3. They further averred that subsequently, the appellants lodged **Nakuru High Court Succession No. 236 of 2015** and included the suit property herein as part and parcel of the estate of Barrack Deya Okul but the court was not informed of the interests of the estate of the late Manoah Kisame Aradi (deceased) and the respondents as the administrators of the same. As a consequence, the 1st respondent was enjoined as an interested party in the succession cause No. 236 of 2015 with regard to the property in question. The probate court ordered among other things that any action in respect of the suit property be suspended for 12 months to enable the 1st respondent (interested party) take remedial measure required in the Land and Environment Court which has jurisdiction.
4. The respondents prayed for judgment against the appellants as administrators of the estate of the late Barrack Deya Okul for orders that by way of contractual conduct, promissory estoppels and adverse possession of **Title No. Nakuru Municipality Block 1 (Langa Langa)/744** is the property of the respondents and the appellants should discharge the same from liability or encumbrance by Thabiti Finance Company Limited and then register the same in favour of the

respondents or in the

alternative, do compensate the respondents at the current market value of the property.

5. In their defence dated 14th February, 2020, the appellants Edward O. Okul and Tom Mboya Okul denied that the respondents are entitled to be registered as proprietors or to compensation of the suit property, that the vendor Barrack Deya Okul (deceased) never entered into an agreement for sale of the suit property to Hebisibah Moraa Ondieki or any other person, that the purchaser Manoah Kisame Aradi (deceased) never completed paying the purchase price and that possession and occupation of the suit property was never given to the purchaser. They further aver that the alleged petty cash voucher was never signed by the vendor and that the document was a forgery. The appellants further alleged that the suit was bad in law, time barred, inept and filed contrary to the provisions of the Limitation of Actions Act. They therefore prayed that the suit be dismissed with costs.
6. Both parties adduced evidence and called witnesses in support of their respective positions. In the impugned judgment, the learned judge identified five issues for determination to wit, whether there was a sale agreement between Barrack Deya Okul

(deceased) dated 30th October, 1985 in respect of land parcel **Nakuru Municipality/Block 1/744 (Langa Langa)**; whether Manoah Kisame Aradi (deceased) took possession of the suit property pursuant to the sale agreement and if so, whether he continuously remained in possession; whether the estoppel doctrine and/or the adverse possession doctrine would be applicable in the circumstances of this case; and whether the respondent's action is founded on contract, and if so, whether the action is statute barred by reason of the provisions of Limitation of Actions, Act; and what orders/reliefs should the court grant.

7. By judgment of the trial court dated 4th March, 2021, the court held that the respondents had proved that they had been in adverse possession of the land parcel **Nakuru Municipality/Block 1/744 (Langa Langa)** for the requisite period of twelve years and entered judgment in favour of the respondents and made the following orders —

***“(i) A declaration be and is hereby issued that the respondent s as administrators of the estate of Manoah Kisame Aradi (deceased) have acquired title to land parcel Nakuru Municipality/Block 1/744(Langa Langa) by virtue of being in adverse possession for a period of thirty years.*”**

(ii) That subject to the prohibitory order registered on 26th March, 1998 (HCC No. 242 of 1992) being lifted, the land registrar Nakuru is ordered to register the respondents jointly as the owners of land parcel Nakuru Municipality/Block 1/744(Langa Langa) in place of Barrack Deya Okul (Deceased).

(iii) Each party to bear their own costs of the suit.”

8. Aggrieved by that decision, the appellants, lodged the instant appeal before this Court. They filed their notice of appeal dated 25th March, 2021. They also filed the memorandum of appeal dated 6th May, 2021 that raised eight grounds disputing the findings of the superior court, summarised as follows: that the respondents had not acquired title to land parcel **Nakuru Municipality/Block 1/744 (Langa Langa)** by virtue of being in adverse possession for a period of twelve years; that adverse possession was not specifically pleaded as required by law; that the learned judge erred in law and fact by considering matters that were not pleaded in the pleadings; that the law on adverse possession and the procedure for acquiring proprietary rights under adverse possession was not properly applied; and the learned judge misapprehended the law by reaching a conclusion that is inconsistent with the binding and persuasive authorities of

the superior courts and thereby arriving at a wrong conclusion

by disregarding the doctrine of stare decisis. For those reasons, the appellant prayed that his appeal be allowed by setting aside the judgment of the ELC. They further sought costs of this appeal.

9. The appeal was heard virtually on 25th February, 2026. Learned Counsel Mr. Adoli appeared for the appellants. He relied on his submissions dated 23rd November, 2025 and also made oral highlights of the submissions. There was no appearance for the respondents but their written submissions dated 28th November, 2025 filed by Lawrence Mwangi, advocates for the respondents, were on record.
10. Regarding the issue of acquisition of title land parcel **Nakuru Municipality/Block 1/744 (Langa Langa)** by virtual of being in adverse possession for a period of 12 years, the appellants' counsel submitted that the learned judge went outside the pleadings that had been filed in court to address issues and prayers not sought and, in the process, prejudiced the appellants' case as they did not have the opportunity to address the issue.
- 11.** Counsel averred that adverse possession must be specifically pleaded. That adverse possession is provided for under

section

38 of the Limitations of Actions Act and thus, ought to be specifically pleaded in line with the provisions of **order 2 rule 4** of the Civil Procedure Rules. To support their case, the appellants rely on the cases of **Marira & 2 Others vs Mutiso & 4 Others (Civil Appeal E112 of 2022) [2025] KECA 1437 (KLR)** and **Amollo vs Okongó & 2 Others, Civil Appeal No. 73 of 2019 [2023] KECA 789 (KLR)** which underscore the mandatory requirement that adverse possession must be specifically pleaded.

12. The appellants' counsel also faulted the learned judge in his consideration of adverse possession by holding that the respondents had an uninterrupted occupation despite there being various eviction notices from both the proprietor and the municipal council of Nakuru against one James Njoroge who was the respondents' tenant. They aver that the learned judge misdirected himself in law by making a case for adverse possession in favour of the respondents outside the parameters of the law. The appellants thus pray that this appeal be allowed with costs and that the judgment of the Environment and Land Court be set aside.

13. The respondents opposed the appeal. They filed written submissions and a case digest dated 28th November, 2025. Learned counsel submitted that the learned judge did not error in law or facts by finding and holding that by virtue of adverse possession, that he did not issue orders that were not in the pleadings; that he did not find that the respondents' occupation was interrupted or that he ruled against the weight of evidence on record. That the learned judge findings was within the parameters of facts and evidence on record. Learned counsel urged this Court to uphold the judgment of the superior court.
14. Regarding the issue of acquisition of title land parcel **Nakuru Municipality/Block 1/744 (Langa Langa)** by virtue of being in adverse possession for a period of 12 years, learned counsel submitted that there was acquiescence on the part of the appellants and the respondents' possession of the suit land was adverse for more than twelve years and this constituted adverse possession. He submitted that the appellants lost their rights to the land by being dispossessed and the respondents took possession of the suit land for over thirty years. The respondent took possession after paying the purchase price.

15. On adverse possession, learned counsel submitted that **Order 37** of the Civil Procedure Rules and its application on adverse possession is not couched in mandatory but discretionary terms and that is why the word “may” is used. That what is material is whether the pleadings and evidence disclose the essential elements of the claim. He buttressed his arguments by relying on the following authorities; **Akumu & 2 Others vs Onyona & 2 Others, Land Case Appeal No. E017 of 2023 [2024], Gatei vs Gatei, ELC Case No. 2 of 2019 [2024] KEELC 3323 (KLR)** where the court held that once a claimant proves open, exclusive and uninterrupted occupation for the statutory period, the court is duty-bound to interrogate the substance regardless of the procedural pathway taken.
16. On the issue of promissory estoppel, learned counsel submitted that the High Court considered the parties conduct and the sale transaction of 30th December, 1995 and found that the appellants made clear representations both in writing and conduct that the respondents would enjoy and retain possession of the suit property. He submits that the respondents acted on that promise to their detriment by taking possession, developing the property, and remaining in

occupation for over thirty years.

The learned counsel concludes by praying that this Court upholds the judgment of the superior court.

17. This is a first appeal, therefore, this Court's mandate as a first appellate court is settled as being re-hearing or retrial of the case based on the material on record. This duty is well provided for in **Rule 31(1)(a)** of the Court of Appeal Rules (2022) which requires this Court to re-examine both issues of law and fact. While this Court has the power to arrive at its own independent decision, we must exercise caution and be slow to overturn a trial court's findings of fact because we did not have the advantage of seeing or hearing the witnesses. In **Gitobu Imanyara & 2 Others vs Attorney General** [2016] eKLR, the court observed thus;

"..being a first appeal, it is trite law, that 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."

18. We are also guided by the Court of Appeal for East Africa decision in **Peters vs Sunday Post Limited [1958] EA page 424**, where the court stated that:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

19. Bearing in mind **Rule 31(1)(a)** of the Court of Appeal Rules (2022) and the plethora of authorities in this area, we will only overturn a trial court’s finding if it is shown to be clearly wrong, or if the judge failed to take into account material circumstances or probabilities.

20. We have carefully considered the record, the grounds of appeal, and the parties’ submissions and the issues for determination by this Court. We discern three primary issues for determination, to wit, whether the ELC erred—

(i) by holding that the respondents acquired title to *land parcel Nakuru Municipality/Block 1/744(Langa*

Langa) by virtue of being in adverse possession for a period of twelve years;

(ii) that the learned judge erred in law and fact by considering matters that were not pleaded in the pleadings, specifically that adverse possession was not specifically pleaded as required by law; and

(iii) in the application of the law on adverse possession and the procedure for acquiring proprietary rights under adverse possession.

21. We start by addressing the issue of whether learned judge erred by holding that the respondents acquired title to land parcel **Nakuru Municipality/Block 1/744 (Langa Langa)** by virtue of being in adverse possession for a period of twelve years. The appellants' position is that adverse possession was not specifically pleaded as required by law and further that there was interruption from the proprietor and the Nakuru Municipal Council such that the possession was not quiet.

22. The law on adverse possession is well settled in Kenya. The law allows a person to acquire title to land after twelve years of uninterrupted, open, and hostile occupation, as provided for under **section 13** of the Limitation of Actions Act, Cap 22.

23. In this case, the appellants contended that the appellant did not conclude his part of the contract and thus the contract terminated. They further contend that there was no quiet

enjoyment since the proprietor and the Municipal Council of Nakuru severally issued eviction orders to one Mr. Njoroge who was the tenant to the respondents. From the record, there was evidence that the respondents took possession of the suit property after entering into a contract on 30th October, 1985 and put-up structures from which they were collecting rent. We therefore agree with the trial court's finding that there was adverse possession based on the sale agreement dated 30th October, 1985.

24. It is also not disputed that there was a sale agreement in respect of the suit property. The only issue raised by the appellants is that the respondents never completed the payment of purchase price. The learned judge considered this issue and concluded, and rightly so, that the respondents had concluded part of their bargain and had proved their case on a balance of probability.

25. Entry into land as a result of a contract or a sale agreement that is not completed especially by no fault of the purchaser can be deemed as adverse. In the instant case, the sale agreement was not completed but the respondents had moved in and occupied the land for thirty years and erected structures. In **Ouko & Another vs Kageni (Civil Appeal**

No. 382 of 2019), the Court

highlighted that physical, uninterrupted occupation such as constructing developments or fencing constitutes sufficient possession. This was deemed as adverse possession based on a 1977 sale agreement that was never completed.

26. The cornerstone of the appellants' case is that adverse possession was not specifically pleaded. The appellants states that the respondents did not specifically plead adverse possession as required by law and that the learned judge granted orders that were never prayed for. The respondents on the other hand states that they have been in quiet possession for thirty years based on a sale agreement which was never completed by the appellants. In the case of **Odd Jobs vs Mubia (1970) E.A. 476**, the court held thus—

“A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision; on the facts the issue had been left for decision by the court as the advocates for the appellant led evidence and addressed the court on it.”

27. The respondents pleaded some of the ingredients of adverse possession and made reference to the same in their evidence. Further the appellants did adduce evidence on some aspects of adverse possession. The trial judge also considered this matter

and applied his mind. In particular, at paragraph 21 of the impugned judgment, the learned judge stated thus—

“Based on the evidence, it is my finding that indeed there was a sale agreement dated 30th October, 1985 relating to the suit property between Mr. Aradi (deceased) and Mr. Okul (deceased). The evidence further establishes that the family of Mr. Aradi took occupation and possession of the suit property, developed some structures thereon which they rented out and were receiving rents.”

At paragraph 25, the learned judge states—

“There is no doubt the defendant’s deceased father had acquiesced to the plaintiff’s family occupation of the suit property. That the respondent s’ family went ahead and erected structures on the suit property which they were leasing out is sufficient evidence to demonstrate they were treating the land as their own and their activities on the suit land were inconsistent and hostile to the interests of the registered owner. The plaintiff’s possession of the land was adverse to the interests of the defendants and constituted adverse possession.”

28. On this issue therefore, we find that entry into land as a result of a contract or a sale agreement that is not completed especially by no fault of the purchaser can be deemed as adverse. In the instant case, the sale agreement was not completed but the respondents had moved in and occupied the land, erected structures and had been in possession for over 30 years.

29. In view of the conclusions arrived at on each of the issues

addressed so far, we find no reason to interfere with the trial

court's findings. The trial court considered the totality of evidence and arrived at the correct conclusion that there was a valid sale agreement, that the respondents were in possession of the property suit property and that the respondents' possession of the land was adverse to the interests of the appellants.

30. Thus, having considered the record of appeal, the impugned judgment, the parties' submissions, the highlight by counsel, the authorities cited and the law, we are persuaded that this appeal lacks merit.

31. Consequently, this appeal is dismissed with costs to the respondents.

Dated and delivered at Nakuru this 8th day of May, 2026.

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....
**JUDGE OF
APPEAL DR. J. O.
OKELLO**

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the*

original.

Signed

DEPUTY REGISTRAR