



**Omenyo & 2 others v Odhiambo (Civil Appeal 261 of 2019)
[2025] KECA 335 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 335 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 261 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
FEBRUARY 21, 2025**

BETWEEN

JACOB ODERO OMENYO 1ST APPELLANT

ISAAC MORO OMENYO 2ND APPELLANT

EDWIN OKOTH OJUNGA 3RD APPELLANT

AND

NEWTONE LEE ODHIAMBO RESPONDENT

*(Being an Appeal from the judgment of the Environment and Land Court at
Kisumu, (Kibunja, J.) dated 5th September, 2019 in ELC No. 116 of 2016)*

JUDGMENT

1. This appeal arises from an Originating Summons that was filed by the appellants, Jacob Odero Omenyo, Isaac Moro Omenyo and Edwin Okoth Ojunga, (1st, 2nd and 3rd appellants, respectively) who had moved the Court under Order 37 Rule 7 of the Civil Procedure Rules, Section 1A and 3A of the *Civil Procedure Act*, and Section 38 of the *Limitation of Actions Act* Cap 22. The appellants, who claimed adverse possession of land parcel No. Kisumu/Konya/2528 (herein suit property), claimed to have been in adverse possession of the suit property for uninterrupted period of twenty-six years, and, therefore, sought to be declared the owners of the suit property by dint of adverse possession.
2. The motion was supported by an affidavit sworn by the 1st appellant, who produced a copy of the Green Card, to confirm that the respondent is the registered owner of the suit property. The ownership of the suit property is disputed as the 1st appellant claimed that the suit property actually belonged to his deceased's father, the late Joseph Omenyo Oloo, who inherited the land from his late father and his grandfather. The 1st appellant contended that his father entered into occupation of the suit property



- in the 1950's and established his home, and that he lived with his father in that home until his father died on 14th July, 1993, and his remains were interred on the suit property.
3. The 1st appellant maintained that the 2nd appellant who was his father's first born, established his home on the suit property around the year 1990, and that he also established his home on the same parcel of land in 2000, while the 3rd appellant remained in occupation of a portion of the suit property. The appellants maintained that they have all been in open and uninterrupted occupation for the suit property for over twenty-six years.
 4. Following the filing of an application in the Environment and Land Court (ELC), under Order 5 Rule 14 and Rule 17, of the Civil Procedure Rules, the ELC granted orders on 15th March, 2017, for the originating motion and the hearing notice to be served on the respondent through advertisement in one daily newspaper. Although the appellants contended that they served the respondent, no appearance or defence was filed.
 5. On 17th January, 2019, the ELC, having ordered the originating summons to be deemed as a plaint, hearing of the suit proceeded, with the 1st appellant testifying as an only witness, on his own behalf and on behalf of the other two appellants. The 1st appellant testified that the suit property belonged to his grandfather; that it was inherited by his father; and that they have lived on the land for over twenty years. He produced a copy of the Green Card to show that the suit property was registered in the name of the respondent who was not known to them, and who has never used the suit property. He admitted that his father's name Joseph Omenyo Oloo, does not appear on the Green Card, nor was his father ever registered as the owner of the suit property. He also admitted that the adjudication register showed that the land belonged to one Maurice Michael Simiyu. He stated that they do not reside on the suit property but only farm it.
 6. On 5th September, 2019, the ELC (Kibunja, J), delivered a judgment in which he dismissed the appellants' claim, finding that they had not proved their claim. The learned Judge found that the appellants' evidence differed from their pleadings as the 1st appellant testified that his late father was not buried on the suit property, but was buried on a different land parcel, and that none of the appellants was residing on the suit property. In addition, that contrary to the originating motion where the appellants claimed to be in adverse possession of the suit property, the evidence showed that they had occupied the suit property as their ancestral land; and that their occupation could not have been adverse as they believed the suit property was theirs. The learned Judge held that the occupation only became adverse when the appellants discovered that the title to the suit property was in the name of the respondent. Since the Green Card was issued on 2nd April, 2014, which is the earliest the appellants could have discovered that the suit property was registered in the name of the respondent, the originating summons which was filed on 24th May, 2016, showed the adverse possession had only been for a period of two years, and therefore, although the claim was undefended, the claim for adverse possession could not succeed.
 7. Further, the learned Judge noted that the purported service on the respondent through the Standard Newspaper of 7th April, 2017, was not proper as it was not done by an authorized process server, and the Newspaper advertisement only required the respondent to come to court on the hearing date, but did not inform him where to collect or obtain the suit papers.
 8. The appellants, being dissatisfied with the judgment, have lodged the present appeal raising six grounds in which they fault the learned Judge for failing to take into account the doctrine of adverse possession in the evidence tendered; failing to hold that it is the appellants who are in actual possession and continuous uninterrupted occupancy of the suit property; failing to take into account the provisions of Section 24 of the [Land Registration Act](#); failing to recognize that the title to the suit property having



been extinguished after the period of twelve years without claim from any of the registered owners, it meant that the appellants were the adverse possessors; that the learned Judge failed to consider the evidence that was submitted by the appellants; and that the learned Judge failed to consider and appreciate the uncontroverted evidence contained in the originating summons, the documents and submissions submitted by the appellants.

9. The appellants also filed written submissions in which they maintained that the suit property was registered under the respondent's name under unclear circumstances, as they have lived on, and have been in possession of the suit property for over sixty years. They identified four questions for determination which were: whether the suit land belongs to the appellants; whether the appellants were in possession; whether the appellants obtained title to the suit property by adverse possession, how ownership can be determined by the court; and whether the appellants are entitled to costs of the suit.
10. The appellants maintained that the title of the respondent was acquired un-procedurally, and that the respondent has never appeared in court nor did he file a defence to the suit. They argued that parties were bound by their pleadings, and that in absence of pleadings, evidence if any, produced by the parties cannot be considered. The appellants relied on Kisumu Civil Appeal No. 27 of 2013, Samuel Kihamba -vs- Mary Mbaisi [2015] eKLR, where the Court held:

“Strictly, 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 force, without secrecy and without licence 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.”
11. The appellants also cited Kweyu -vs- Omutut [1990] KLR 709, in which Gicheru, JA. (as he then was) stated as follows:

“By adverse possession is meant, a possession which is hostile, under a claim or colour of title, actual, open, an uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor.”
12. The appellants argued that the uncontroverted evidence is weighty and the Court should rely on it to prove facts in disputes. He relied on Peter Ngigi & another (suing as a legal representative of the estate of Joan Wambui Ngigi) -vs- Thomas Ondiki Oduor & another [2019] eKLR, in which Mwongo, J. stated:

“There are many authorities that deal with the question of uncontroverted evidence, such as the situation in the present case where the defence did not show up at the trial.”
13. The appellants argued that Article 40 of *the Constitution* guarantees their rights to acquire and own property and therefore they had a right to the suit property which is their ancestral land. They therefore urged the Court to allow the appeal.
14. This being a first appeal, the role of this Court as per Rule 31(1)(a) of the Court of Appeal Rules, is to reappraise the evidence and draw inferences of fact before arriving at its own conclusion. In doing so, the Court must bear in mind that unlike the trial court, this Court has not had the advantage of seeing the witnesses testify and therefore must give due allowance for that consideration. (See *Selle -vs- Associated Motor Boat Company Limited* [1968] EA 123). A perusal of the record of appeal, and



the submissions by the appellant, reveal that the only issue for determination is whether the appellants claim of adverse possession with regard to the suit property as against the respondent was established.

15. Adverse possession entail possession that is inconsistent with and in denial of the title of the legal owner of the property in question. In *Kim Pavey & 2 others -vs- Loise Wambui Njoroge & another* [2011] eKLR, this Court relying on *Wambugu -vs- Njuguna* [1983] KLR 173, stated that disposition means the owner of property in question has been driven out of possession by another. In *Wambugu -vs- Njuguna* (supra), Chesoni acting JA (as he then was), adopted Lindley MR in *Littledale -vs- Liverpool College* [1900] 1 CH at P.21, as follows:

“In order to acquire by the statute of limitations a title to land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it.... two things appear to be contemplated by that enactment, dispossession and discontinuance of possession... the question becomes, ‘has the claimant proved that the title holder has been disposed or has discontinued his possession, of the land in question for the statutory period? rather than, has the claimant proved that he (through himself or others on whose possession he can rely, been in possession for the requisite number of years... the next question therefore is what constitutes dispossession of the property? ... to defeat a title by dispossessing the former owner, ‘acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.’”

16. In the appellant’s submissions, he has quoted pertinent authorities on the issue of adverse possession. This include, *Samuel Kihamba -vs- Mary Mbaisi* (supra) and *Kweyu -vs- Omutut* (supra), both of which stress the need for apparent dispossession of the land owner in proving adverse possession. The question that we must therefore address is whether the appellants established that the respondent had been dispossessed or had discontinued his possession of the suit property?
17. In this regard, the learned Judge of the ELC held as follows:

“That the originating summons and supporting affidavit clearly shows that the plaintiffs and their kin occupied the suit land as their own land. That is was their ancestral land and what this tell the court is that their occupation could not have been adverse as they believed the land was theirs. That one cannot in law be in adverse possession of his or her own land. That the only time the plaintiffs’ occupation of the suit land became adverse to the title or the registered propriety was when they discovered the title to the land was not theirs but the defendants. That according to paragraph 10 of the supporting affidavit and the oral testimony of PW1 that was after perusing the suit land’s Green Card. The Green Card attached to the supporting affidavit was satisfied as a true copy of the original on the 2nd April, 2014 which the court takes to be the date the plaintiffs discovered the land was actually registered in the name of the defendant. That from that date to the 24th May, 2016, when the originating summons was filed, only about two years one month had lapsed from the date the occupation of the suit land by the plaintiffs became adverse to the title of the defendant. That accordingly, the plaintiffs claim based on adverse possession though undefended fails...”

18. The learned Judge cannot be faulted as his findings are anchored on the affidavit which was sworn by the 1st appellant in support of the originating summons, from which it is evident that the appellants disputed the ownership of the suit property by the respondent and maintained that the suit property was their ancestral land as it was inherited by their father from their grandfather, and therefore their



occupation of the suit property was as persons who had a right to occupation through an interest in the ownership, and not as adverse possessors. The issue of adverse possession only arose when the Green Card came to their knowledge, from which they realized that the respondent was the registered proprietor of the suit property. Moreover, although the 1st appellant deposed in his affidavit that they had been in actual and constructive possession of the suit property for an interrupted period of twenty-six years, and that his only home was on that property, he contradicted himself in his evidence before the learned Judge, when he testified that the suit property was being used for farming and that they did not reside on the suit property.

19. In light of the above, it is evident that although the appellants testified that they were in occupation of the suit property, they did not prove that they were in adverse possession of the suit property or that they dispossessed the owner of the suit property. Their evidence was that they were in possession of the suit property because it was their ancestral land, which was inherited by their father from their grandfather. There is no evidence that they entered the suit property with any intention to disposes the respondent. To the contrary, they were not even aware that the respondent was the registered proprietor when they entered the suit property. An examination of the copy of the Green Card which they produced to show that the respondent was the registered owner of the suit property, shows that the respondent was registered as proprietor and title issued to him on 30th August, 2013. Before that, the Green Card shows that the property changed hands four times and title was issued to each of the successive owners. The appellants did not adduce any evidence to show that they openly dispossessed the respondent or any of the previous owners of the suit property.
20. We take cognizance of the concern that was noted by the learned Judge regarding the adequacy of service upon the respondent, that although service was effected through a Newspaper advertisement following an order granted by the court, the service was not done by an authorized process server, and the advertisement only notified the respondent to come to court, but did not inform him where to collect or obtain the suit papers. In our view, this is a matter that the learned Judge ought to have addressed before proceedings with the hearing ex parte. Be that as it may, in light of the conclusion that we have arrived at in this matter, we find that the appellants having failed to prove their case, the respondent's absence at the hearing is inconsequential.
21. For the above reasons, we uphold the judgment of the ELC and dismiss the appeal. The respondent having not participated in the proceedings, we make no orders as to costs.

Those shall be the orders of the Court.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

