Omanjo & 9 others v Odukado & 3 others (Civil Appeal E130 of 2022) [2025] KECA 615 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KECA 615 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL E130 OF 2022

MSA MAKHANDIA, P NYAMWEYA & LK KIMARU, JJA

MARCH 28, 2025

BETWEEN

TIMOTHY OMANJO ..... 1ST APPELLANT

FRANCIS OTIENO OJOSH ..... 2ND APPELLANT

FREDRICK OTIENO O ..... 3RD APPELLANT

DONALD YURI OWINO ..... 4TH APPELLANT

EZEKIEL ONYANGO OMANJO & 5 OTHERS & 5 OTHERS & 5 OTHERS & 5 OTHERS & 5 OTHERS ..... 5TH APPELLANT

AND

JOHN OWITI ODUKADO ..... 1ST RESPONDENT

JOSEPH OTIENO ODUKADO ..... 2ND RESPONDENT

GEORGE ONYANGO ODUKADO ..... 3RD RESPONDENT

SAMWEL ODERO ..... 4TH RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court at Migori (Ong'ondo, J.) delivered on 28th September, 2021 in ELC Case No. 444 of 2017 (Formerly Kisii ELC No.451 of 2014)

JUDGMENT

1. In a further amended plaint dated 4th February, 2019, the appellants instituted a suit against the respondents before the Environment and Land Court ("the ELC") at Migori. The appellants alleged that they are the registered proprietors of land parcel L.R. No. Kanyamkago/Kawere/4279, measuring ten (10) hectares (hereinafter referred to as 'the suit property'). It was their contention that in early 2014, the respondents, without any colour of right, trespassed and built on a portion of the suit

property, and have continued to erect permanent structures thereon. That despite several notices to evict and remove the structures thereon, the respondents refused to leave the suit property. The appellants averred that in total disregard of a court order issued on 13th February, 2018, the respondents, on 16th February, 2018, buried one Julius Odukado Owiti on a portion of the suit property. It was the appellants' case that the suit property was originally owned by their father, Hesbon Otieno Omanjo, and was thereafter duly transferred to them.

2. The appellants prayed for declaratory orders that they are the duly registered owners of the suit property; eviction orders against the respondents and orders directing the respondents to demolish illegal structures erected thereon, as well as a permanent injunction restraining the respondents from interfering in any way with the suit property; an order directing the respondents to exhume the body buried on the suit property; as well as costs of the suit.

3. In response, the respondents filed a joint statement of defence and counterclaim dated 31st October, 2019. The respondents denied the averments made by the appellants in their amended plaint. It was the respondents' defence that sometime on 23rd November, 1974, the appellants' father, Hesbon Otieno Omanjo, procured registration of the suit property in his name. That at the time of such registration, the respondents and their father were in actual occupation and possession of the suit property. That on 20th February, 2014, when the appellants' father transferred the suit property to the appellants, the respondents had been in possession of suit property for a period of more than twelve years, having been on the property since 1974.

4. The respondents pleaded that the registration of the appellants as the proprietors of the suit property was subject to existing overriding interest as envisaged by Section 28 of the *Land Registration Act*. They contended that the appellants' right to recover the suit property was extinguished by effluxion of time and was therefore statute barred. The respondents urged that they had acquired prescriptive rights over the suit property by virtue of the application of the doctrine of adverse possession.

5. In the counterclaim, the respondents prayed for declaratory orders that the appellants' right to recover the whole of the suit property was barred by virtue of the Limitations of Actions Act, and that the respondents have been in actual, open, continuous and uninterrupted occupation of the suit property for a period exceeding 12 years; an order directing the registration of the respondents as joint proprietors of the suit property; as well as cost of the counterclaim.

6. The case was heard by way of viva voce evidence. PW1, Timothy Omanjo, PW2, Donald Oyugi Owino, and PW3, Ezekiel Onyango Omanjo, testified that their father, Hesbon Otieno Omanjo, transferred the suit property measuring ten (10) hectares (25 acres) to the appellants, being his children, and that each child was to get one hectare. It was their testimony that the respondents, sometime in 2014, trespassed on a portion of the suit property and built permanent structures thereon. They stated that the respondents' father, Julius Odukado, died in 2018 and was buried on the suit property. It was their evidence that the respondents occupy six (6) acres of the suit property.

7. Upon cross-examination, PW1 stated that both the appellants and the respondents resided on the mother parcel L.R No. Kanyamkago/Kawere/1/215, and that the respondents did not migrate from the suit property after sub-division of the mother parcel. He stated that the respondents have put up homesteads on the suit property and they also cultivate the land. He testified that the suit property, which forms a portion of the mother parcel, is registered in the appellants' names, and they filed suit to have the respondents evicted therefrom.

8. DW1, John Owiti Odukado, told the Court that the suit property was excised from the original parcel number Kanyamkago/Kawere/1/215, which belonged to his father, Julius Odukado Owiti. He

testified that his father accommodated the appellants' father, Hesbon Otieno Omanjo, on the said parcel of land, and that the appellants' father put up his house within his father's homestead. It was his evidence that parcel 215 was partitioned and that the suit property (Kanyamkago/Kawere/1/4279), measuring 25 acres was retained by his father. He stated that the appellants' father occupied one and a half acres of the suit property, and that this is the portion the appellants have been occupying, and that the remaining 23 and ½ acres are occupied by the respondents. He reiterated that his father died in 2018 and was buried in his homestead on the suit property.

9. DW2, Elam Mogosi Kisia, stated that the appellants and the respondents are his neighbours. It was his evidence that the original parcel number Kanyamkago/Kawere/215 was owned by three proprietors; Francis Ogeya, Julius Odukado (respondents' father) and Peter Obiri Karanja. He stated that the respondents' father accommodated the appellants' father, Hesbon Omanjo, on his portion of the said parcel of land. It was his testimony that the respondents' father had a homestead which he constructed on the suit property in 1953, and that he lived thereon until his death in 2018. He recalled that Hesbon Omanjo had the suit property registered in his name, and later transferred it to his children, the appellants. He testified that the suit property is currently occupied by both parties, with the appellants occupying two (2) acres. He stated that only the 1st appellant has a homestead on the suit property. He testified that the rest of the suit property is occupied by the respondents.

10. DW3, Musoda Kisigira Andago, also a neighbour, testified that the respondents' father lived on the suit property since 1953 until the time of his death. He testified that the respondents have all put up homesteads on the suit property. It was his testimony that the respondents' father gave the appellants' father a portion of the suit property measuring approximately 1 and ½ acres whereupon he put up his homestead. He stated that the said portion was now occupied by one of his sons.

11. At the end of the trial, the learned Judge found in favour of the respondents. The learned Judge determined that the respondents had enjoyed open, peaceful and continuous possession of the suit property since 1974, and had acquired rights to the same in adverse possession to that of the appellants. The learned Judge found that the appellants had failed to prove that the respondents were trespassers as alleged. He dismissed the appellants' case and allowed the respondents' counterclaim as prayed.

12. The appellants, aggrieved by the said decision, lodged an appeal before this Court. They proffered eighteen (18) grounds of appeal.

    In summary, the appellants faulted the learned trial Judge for failing to appreciate the evidence adduced by the appellants to the effect that they had acquired the suit property from their father, Hesbon Omanjo, who was the original proprietor of the suit property, and that they have been in occupation of said property since 1974. They were aggrieved by the decision of the learned trial Judge, when he held that the respondents had not availed any documentary evidence, nor was a site visit conducted, to establish that they were in possession of the suit property, and had acquired rights to the same by adverse possession. They complained that the learned trial Judge ignored the fact that the respondents only occupied six (6) acres of the suit property, while the appellants were in possession of the remaining portion. It was their assertion that time, for purposes of adverse possession, could only start running in 2014, when the suit property was transferred to the appellants. They contended that the respondents' counterclaim was improperly on record, and that a claim of adverse possession cannot be granted in complete disregard of Order 37 of the Civil Procedure Rules. They faulted the learned trial Judge for selectively interpreting the law, and thereby aiding the cause of the respondents, while occasioning a miscarriage of justice upon the appellants. The appellants invited us to allow the appeal, set aside the judgment of the ELC, and substitute it with an order allowing the appellants' suit before the superior court.

13. The appeal was heard by way of written submissions. Ms. Ochwal appeared alongside Ms. Barbara learned counsel for the appellants. It was submitted on behalf of the appellants that the green card availed by the appellants proved that the suit property was a resultant partition of the mother parcel number 215, and was registered to the appellants' father as the first owner. Counsel urged that the sub-division occurred on 1st July 2013, whereby the suit property was registered in the name of the appellants' father, and was later transferred to the appellants on 20th February, 2014. Counsel submitted that the original parcel of land having been a tenancy in common, registered in the names of two proprietors, time for purposes of adverse possession could not have started running in 1974, and only started running after the suit property was registered in the name of the appellants in 2014.

14. Counsel for the appellants further argued that the owners of the mother parcel of land, who included the appellants' and the respondents' fathers, came from the same clan, and that the respondents' father sued the appellants' father, with respect to ownership of the mother parcel of land, in Kisii HCCC No.177 of 1986. Counsel submitted that the matter was referred to arbitration, and the respondents' father was awarded four (4) acres, which is what he claimed in his statement of defence before the ELC at the time in the case. Counsel faulted the learned trial Judge for finding that the respondents had proved their claim for adverse possession, in respect to the whole of the suit property, even when the evidence on record established that both families occupied the suit property. Counsel explained that the respondents failed to prove that the mother title or title to the suit property was acquired by the appellants through fraud, illegality or misrepresentation, or that they had acquired rights to the suit property by the application of the doctrine of adverse possession.

15. In rebuttal, counsel for the respondents, Mr. Odero, submitted that the learned trial Judge did not question the legality of the appellants' title as alleged, and that the respondents claim to the suit property was founded on a claim for adverse possession. It was counsel's submission that the registration of the appellants as the owners of the suit property was immaterial, as the respondents' rights to the suit property had already accrued. Counsel urged that the appellants' claim of trespass against the respondents was not sufficiently established. He maintained that the appellants admitted on record that the respondents have been on suit property since 1974, and therefore their claim that the respondents trespassed upon the suit property in 2014 was unsustainable. It was his submission that the proceedings in Kisii HCCC No.177 of 1986 as well as the arbitral award alluded to by the appellants were not produced in evidence before the ELC. Counsel reiterated that the respondents established that they had been in possession of 23 and ½ acres of the suit property since 1974, with the full knowledge of the appellants, and had acquired rights to the said portion by virtue of the doctrine of adverse possession.

16. This being a first appeal, it is the duty of this Court to re-analyze and re-assess the evidence on record and reach its own independent conclusion. This duty was reiterated by this Court in Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, where the court observed thus;

> " 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 v. Associated Motor Boat Co. [1968] EA 123.

17. Having evaluated the record of appeal, as well as the submissions by parties to the appeal, the issues arising for our determination can be summed up as follows:

    i. Whether the respondents' counterclaim was competently before the superior court;

ii. Whether the appellants sufficiently established the tort of trespass as against the respondents with respect to the suit property;

iii. Whether the respondents claim of entitlement to the suit property by way of adverse possession was sufficiently established.

18. The appellants contended that by virtue of Order 37 Rule 7 of the Civil Procedure Rules, a claim for adverse possession ordinarily commences by way of originating summons, and therefore the respondents' claim for adverse possession raised in their counter- claim was untenable. This Court in Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR observed that a claim for adverse possession can be raised in various ways. It stated as follows:

> " The courts, have since this decision, held that a claim by adverse possession can be brought by a plaint; See Mariba v Mariba Civil Appeal No. 188 of 2002, counter-claim; or defence, as was the case here. See Wabala v Okumu (1997) LLR 609 (CAK). In Gulam Mariam Noordin v Julius Charo Karisa, Civil Appeal No 26 of 2015, where the claim was raised in the defence, this Court in rejecting the objection to the procedure, stated the law as follows;
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> > " Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter- claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of Wabala v Okumu [1997] LLR 609 (CAK), which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in Bayete Co. Ltd v Kosgey [1998] LLR 813 where the plaint made no specific plea of adverse possession, the plea was nonetheless granted."

19. It is our considered view that a party in adverse possession, who has been sued for trespass and eviction by a registered proprietor of a suit property, is entitled to establish his claim of adverse possession, as a defence to the allegations of trespass. It would be absurd for such a party to file a separate suit on his claim for adverse possession, yet a subsisting suit on the same subject matter existed against him. We find that the respondents' counterclaim was competently before the learned trial Judge.

20. Did the appellants sufficiently establish their claim of trespass against the respondents? The appellants presented evidence in form of a certificate of title and copy of the green card which established that they became the registered owners of the suit property on 20th February, 2014. The mother title of the parcel of land, L.R. No. Kanyamkago/Kawere 1/215, from which the suit property was excised, was owned by Hesbon Otieno Omanjo (the appellants' father) and one Francis Ogeya. Upon sub-division, the suit property was registered in the name of the appellants' father in July 2013, after which he transferred the same to the appellants in 2014. This evidence was uncontroverted by the respondents. The respondents in their testimonies before the superior court admitted that the suit property was registered in the names of the appellants.

21. In their pleadings, the appellants alleged that the respondents trespassed onto the suit property in 2014, and erected permanent structures thereon, and that the respondents, despite the appellants' demands, refused to vacate the suit property. The respondents, on their part, maintained that they have lived on the suit property since 1974, and had since acquired proprietary rights to the suit property by adverse possession.

22. For a claim to land by adverse possession to succeed, the applicant must prove that he/she has been in open, continuous and uninterrupted possession of the land for a period of twelve (12) years or more. This Court in Wilson Kazungu Katana & 101 Others v Salim Abdalla Bakshwein & Another [2015] eKLR had this to say:

> " From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years, having dispossessed the owner or there having been discontinuance of possession by the owner."

23. What is clear to us is that although the appellants claimed in their pleadings that the respondents trespassed upon the suit property in 2014, upon cross-examination, they admitted in court that the respondents have been in possession of a portion of the suit property since 1974. It was the appellants' case that the respondents occupied a portion of six (6) acres out of the twenty- five (25) acres forming the suit property, where they have put up their homes and are engaged in farming.

24. It was the appellants' submission that time for purposes of the application of the doctrine of adverse possession started running in 2013, when the suit property was registered in the appellants' father's name, and that the claim for adverse possession could not have arisen earlier, since the mother parcel of land No. 215 was a tenancy in common, owned by the appellants' father and Francis Ogeya, in equal undivided shares. We note that the appellants did not avail a copy of the green card with respect to the mother parcel of land No. 215, which would have indicated to the court whether the two registered owners owned the mother parcel of land as joint tenants or tenants in common, in equal shares, and whether the mother parcel of land had been partitioned between the two owners.

25. It was common ground, indeed it was undisputed that both the appellants and the respondents are in possession of the suit property. The bone of contention relates to the size of the portions occupied by either party. The respondents claim for adverse possession is with respect to the whole suit property. They contended that the mother parcel originally belonged to their father, and that they occupy the majority of the suit property, being 23½ acres out of the total 25 acres forming the suit property. The appellants on the other hand testified that the respondents only occupy a six-acre portion of the suit property, and the appellants are in possession of the remaining nineteen (19) acres.

26. Upon re-evaluation of the evidence on record, we are inclined to uphold the version of evidence adduced by the appellants. This is so because the appellants' evidence on the portion occupied by the respondents was consistent and never wavered. The respondents did not also controvert the evidence adduced by the appellants to the effect that in the suit filed by their father in 1986 against the appellant's father, his claim was for a portion of four (4) acres and not the 23½ acres that the respondents are alleging they are in occupation of. On the other hand, the respondents gave varying and contradictory testimonies as regards the portion of the suit property occupied by the appellants and by themselves. DW1 claimed that they occupied one and a half acres while DW2 testified that the appellants occupied two acres. Further, the respondents' father, in his original statement of defence dated 30th December, 2014, only claimed four acres of the suit property, and not the whole of the suit property as alleged

by the respondents. The respondents' father pleaded that he was entitled to four (4) acres of the mother parcel of land contained in No. Kanyamkago/Kawere 1/215. The respondents claim of adverse possession with respect to the whole suit property was therefore unfounded, speculative and unsupported by cogent evidence.

27. From the foregoing, we are satisfied by the evidence on record that the respondents enjoyed open, continuous and exclusive possession of six (6) acres of the suit property for a period of over twelve (12) years, and that they manifested an intention of dealing with the said portion of the suit property, in a manner that was in conflict with the appellants' proprietary rights, and as such dispossessed the appellants of the said portion of the suit property. The appellants, in the circumstances, failed to establish that the respondents were trespassers on the said portion of land as alleged in their further amended plaint.

28. Although we agree with the finding of the learned judge that the respondents established their claim for adverse possession, the respondents claim was only applicable to the portion of the suit property that they were in possession, and not the entire suit property. The learned Judge overlooked the evidence on record to the effect that the appellants also in occupied a larger portion of the suit property.

29. Before we conclude, the appellants' counsel urged that the issues raised in the counter-claim were res judicata, and had been canvassed by the parties in Kisii High Court Case No.177 of 1986. We note that the question of res judicata was not raised by the appellants in their grounds of appeal. Further, the subject matter in the suit before Kisii High Court was the mother parcel number Kanyamkago/Kawere 1/215, and not the suit property herein. There is no evidence on record that the arbitral award was adopted as judgment of the court as the parties alluded to the fact that the court file in that matter went missing. No judgment of the court that settled the matter with finality was availed in evidence before the trial court.

    In the end, the appeal is partially allowed as a result of which we set aside the Judgment of the ELC and substitute it with the judgment of this Court that both the appellants and the respondents are entitled to possession of the suit property. The appellants are entitled to 19 acres whilst the respondents are entitled to 6 acres. The suit property shall be surveyed and thereafter partitioned so that the judgment of this Court is given effect to. The survey will of course take into account and align with the respective portions occupied by the parties. Thereafter the respective portions shall be registered in the respective names of the appellants and the respondents. Since the appellants partially succeeded in the appeal, they shall be entitled to half of the costs on this appeal and before the ELC.

30. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF MARCH, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.