Kombe & another v Mohammed & another (Civil Appeal E042 of 2022) [2025] KECA 912 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KECA 912 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E042 OF 2022

KI LAIBUTA, SG KAIRU & GWN MACHARIA, JJA

MAY 23, 2025

BETWEEN

KATANA CHARO KOMBE ..... 1ST APPELLANT

KARISA CHARO KOMBE ..... 2ND APPELLANT

AND

ABDULLAH MANGI MOHAMMED ..... 1ST RESPONDENT

PROF MS ABDALLA (SUIG AS TRUSTEES OF MASJID JIBRAN MTWAPA) ..... 2ND RESPONDENT

(Being an appeal from the Judgement of the Environment and Land Court of Kenya at Malindi (Odeny, J.) delivered on 16th March 2022 in ELC No. 202 of 2018)

JUDGMENT

1. This appeal arises from the decision of the Environment and Land Court (the ELC) (Odeny, J.) delivered on 16th March 2022. In the decision, the learned Judge entered judgement in favour of Abdullah Mangi Mohamed and Prof. M.S. Abdalla (suing as the trustees of Masjid Jibran Mtwapa) (the respondents), against Katana Charo Kombe and Karisa Charo Kombe (the appellants).

2. The background to the appeal is that the respondents instituted a suit by way of a plaint dated 23rd October 2018. The subject matter in dispute was a parcel of land situate North of Mtwapa Creek in Kilifi County and known as subdivision Number 915 (Original No. 539/135) CR No. 70802 measuring approximately 0.1034 Hectares (Ha) (the suit property). The respondents averred that the suit property was valued at Kshs.7,000,000; that they had been in peaceful possession, utilization and occupation of the suit property with plans to build a donor funded Islamic Institution; that they had built a mosque on the suit property where Muslim faithfuls worshipped; that, towards the end of the year 2017, a boundary dispute arose between them and the appellants in respect of a portion of

the suit property where they intended to build the donor funded Islamic Institution for teaching and education of children from the neighbourhood; that the dispute arose when the appellants claimed ownership of this portion of the suit property; that the dispute was referred to the Kilifi County Government Department of Lands, which sent its surveyors to conduct a fresh survey to re-establish the boundary beacons; that, a copy of the findings of the re-survey was sent to the Land Registrar, Kilifi, by the Chief Officer of Land, Energy, Housing, Physical Planning and Urban Development; and that, due to the appellants actions, they (the respondents) have been unable to utilize and proceed with the intended construction of the Islamic Institution.

3. It was the respondents' case that the action of the appellants was illegal and deprived them of the right to occupation and use of their property. They prayed for judgment against the appellants for:

> "i. A permanent injunction restraining the appellants against themselves, their agents, servants, relatives, friends or anyone claiming interest through them from entering, remaining, building, alienating, selling and/or dealing with land parcel known as subdivision number 915 (original No. 539/135) CR No. 70802 in any manner whatsoever and from threatening the respondents from dealing with the suit property;
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> ii. Costs of the suit;
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> iii. Interest on the costs at court rates; and
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> iv. Any other relief the court may deems fit to grant."

4. In their Joint Statement of Defence dated 16th November 2018, the appellants put the respondents to strict proof of their claims. They averred that the respondents' intention was to illegally expand the suit property's boundaries to their properties, namely Certificate Title Numbers C.R. 18648 (Original Number 539/6) and C.R. 31141 (Original Number 582/1), both of which were subdivisions of title number C.R. 9087/4 (Original Number 397/7), a parcel of land owned by their deceased father.

5. The appellants stated that the boundary had not been altered since 16th May 1977 when their deceased father first acquired the suit property; and that the defence of adverse possession alluded to by the respondents was statute barred pursuant to the provisions of the *Limitation of Actions Act*. They insisted that it was only after the respondents started undertaking renovations of the mosque, and after realizing that they had no space of expansion that they began to expand their boundaries into their (the appellants) land. They denied that Kilifi County Government had the capacity to solve land disputes; that they were violent to the respondents; and that the respondents were trying to paint them as bad characters.

6. The suit was heard by way of viva voce evidence. The evidence of the respondents proceeded before Olola, J. Abdullah Mangi Mohammed (PW1), the 1st respondent, testified that the suit property originally belonged to Kubana Salim, and that it was excised from Plot No. 539; that, when Kubana died, her daughter, one Rehema Shehe Ali, transferred the suit property to the respondents as the trustees; that there was a boundary dispute, and that they involved a surveyor to come and identify the beacons; that the beacon was not on the appellants' land as they claimed, but that they wanted it to be moved further into their (respondents) portion of the suit property; that the dispute arose because the appellants did not want them to build a wall for the Madrasa classes; that they had been paying rates for the suit property; that the suit property had been surveyed; and that he had never seen the Deed Plan that the appellants were relying on.

7. In support of the respondents' case, Abdullahi produced in evidence a Certificate of Title dated 30th November 2017 (PEXH 1), a Deed Plan (PEXH 2), a Copy of Transfer to Rehema Shehe Ali (PEXH 3), a Summary Report from the Surveyor (PEXH 4), a Demand Notice (PEXH 5) and an Assessment Report from NEMA (PEXH 6).

8. For the appellants' case, Katana Charo Chombe (DW1), the 1st appellant, testified before Odeny, J. While relying on witness statement dated 16th November 2018, he testified that a fence that was built between their parcel of land and the mosque acted as the boundary; that they had lived on the suit property without any issues until the year 2012 when the respondents' father died; that they found some stalls/kiosks on the suit property, but that they are not the ones who constructed them; and that those stalls had been there since time immemorial.

9. In cross examination, DW1 stated that they (the appellants) had a title deed to their plot as well as a Deed Plan that showed the boundary; that their plot was No. 582; that their witness statements indicated that their land was plot Nos. 539/6 and 592/1, and which were a sub-division of original plot No. 397/7; that he did not have a Deed Plan for plot No. 582, which was adjacent to plot No. 915, and over which they had no claim; that the structure on plot No. 915 was an encroachment to their land; and that their plot neighbours the Mosque.

10. After considering the evidence on record, the learned Judge (Odeny, J.) observed that it was not disputed as it was conceded by the appellants that the suit property belonged to the respondents; and that there was a Mosque on the suit property. She held that the issues in dispute were in relation to a boundary dispute. Upon scrutiny of the Survey Report, she held that the Report confirmed that all beacons were found or re-established in accordance with the *Survey Act*, Cap 299 and Survey Regulations thereon which confirmed that the boundaries were in their proper place.

11. As regards the structures on the suit property, the Judge observed that they were mistakenly constructed, thus confirming the respondents' case that there were illegal structures on the boundary; that the issue of adverse possession did not arise as the appellants did not file a counterclaim alongside their defence, and that they did not prove that the boundary dispute arose in 1978 and not 2017; and that, accordingly, the line of defence adopted by the appellants was unmerited.

12. Aggrieved, and in exercise of their right to appeal, the appellants invoked this Court's jurisdiction by filing a Notice of Appeal dated 4th April 2022. They have raised 5 grounds of appeal by which they fault the learned Judge for:

    a. Allowing the respondent's suit yet the same was statute barred;

    b. Making a finding that adverse possession is not available through a defence but rather by way of a counterclaim yet the law allows a defence based on limitation to be as good as a claim;

    c. Not appreciating that the appellants' evidence including the pleading that they were in actual and/or physical occupation or possession of a portion of land on the suit premises, being subdivision No. 915 (Original No. 539/135) CR No. 70802 which was also the respondent's position;

    d. Determining the suit as a boundary dispute yet it involved a claim of ownership of a portion of a portion of land on the suit premises; and

    e. Not appreciating the fact that the appellants were entitled to the orders of adverse possession in respect of the suit premises and therefore erroneously dismissing the appellants' defence.

13. The appellants thus pray: that their appeal be allowed by setting aside the Judgement of the trial court and substituting therefor an order dismissing the respondent's suit with costs; for order that they be registered as the proprietors and/or owners of the suit premises, being subdivision No. 915 (Original No. 539/135), CR No. 70802 by way of adverse possession; and that costs of the appeal be borne by the respondents.

14. We heard this appeal virtually on 4th December 2024. Learned counsel Mr. Kenga appeared for the appellants while learned counsel Mr. Otara appeared for the respondents. Both counsel relied on their written submissions, which they highlighted orally. The submissions by both parties are dated 2nd December 2024.

15. The appellants addressed the Court on two issues, namely whether a defence hinged on limitation of time qualifies as a suit for adverse possession; and whether the trial court erred in determining the matter as a boundary dispute.

16. As to whether a defence based on limitation of time qualifies as a suit for adverse possession, the appellants submitted that they raised the defence of adverse possession vide paragraph 6 of their statement of defence; and that, at paragraph 5 thereof, they stated that they had been staying on the suit premises for over 40 years. In support of the proposition that a defence based on limitation is as good as a suit for claim of adverse possession, they referred to the decision of this Court in Chevron (K) Ltd vs. Harrison Charo Wa Shutu (2016) KECA 248 (KLR) in submitting that the Court departed from the decision in Njuguna Ndatho vs. Masai Itumu & 2 Others - Civil Appeal No. 231 of 1999 where it had taken the approach that claims for adverse possession can only be commenced by way of an Originating Summons; and that, accordingly, the learned Judge erred when she declined to analyze and/or consider their evidence on the ground that there was no counterclaim with respect to a claim for adverse possession.

17. On the issue as to whether the trial court erred in determining the matter as a boundary dispute, the appellants submitted that the dispute before the trial court was not one of boundaries, but encroachment on land; that, if the issue at hand was a boundary dispute, then the trial court would have been sitting as an appellate court on a boundary dispute that was already determined by the Land Registrar; that, boundary disputes are determined by the Land Registrars pursuant to Section 18 of the *Land Registration Act*, No. 3 of 2012; and that, for this reason, the Judgment of the trial court was erroneous. We were urged to allow the appeal.

18. On the part of the respondents, it was submitted that, from the appellants' own defence, the parcels of land of which each party was in occupation, was distinct; that the parcels as occupied by the respective parties were supported by respective deed plans; that there was no evidence placed before the trial Judge that the appellants had trespassed onto their parcel for a period of more than 12 years to warrant a claim for adverse possession; that oral evidence was availed to that effect; that the claim for adversepossession could not also hold as the appellants confirmed that no party had tampered with the boundaries; and that the appellants' oral evidence confirmed that the dispute was boundary-related.

19. The respondents further contended that the appellants filed a defence without a counterclaim for adverse possession; and that, even if the claim for adverse possession was to be ventilated and considered, the evidence of DW1 did not support it.

20. The respondents also submitted that it is not true that the trial court did not properly consider and analyse the evidence on record; and that, to the contrary, it properly carried out its duty as a trial court in this regard before concluding that the appellants' suit ought to be dismissed.

21. Finally, as regards the issue of costs, the respondents submitted that costs follow the event, and that a court has the discretion in awarding costs as was held in Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others SC Petition No. 4 of 2012 (2014) eKLR; and that, for the reasons submitted on, the appeal should be dismissed with costs to the respondents.

22. As a first appellate court, our mandate is underpinned by rule 31(1) (a) of this Court's Rule, 2022 which is to reconsider the entire evidence, re-evaluate it and draw our own conclusions in determining whether or not to uphold the trial Judge's decision. Even as we do so, we have to bear in mind that, unlike the trial court, we did not have the advantage of seeing and assessing the demeanour of the witnesses. In Kenya Ports Authority vs. Kuston (Kenya) Ltd (2009) 2 EA 212, the role of the first appellate court was explained in the following words;

> "This being a first appeal to this Court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect..."

23. Further, we are cognizant of the fact that we should not interfere with the findings of fact by the trial court simply because we would have arrived at a different finding. We would only interfere with the finding of fact by the trial court if it is based on no evidence, or on misapprehension of the evidence, or on the basis that the Judge acted on wrong principles. This principle was enunciated in Ephantus Mwangi vs. Duncan Mwangi Wambugu [1984] eKLR.

24. The same principle was restated in the case of Bundi Murube vs. Joseph Omkuba Nyamuro [1982-88] 1KAR 108 thus:

> " However, a Court on appeal will not normally interfere with a finding of fact by the trial Court unless, it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably, to have acted on wrong principles in making the findings he did."
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> In the same vein, Rahima Tayabb & Another V Ann Mary Kinamu [1982-88] 1KAR 90 Law JA also stated: "An appellate Court will be slow to interfere with a Judge's findings of fact based on his assessment of the credibility and demeanor of witnesses who has given evidence before him."

25. We have considered the appeal, the respective rival submissions and the law. We deduce that the main issue which arises for our determination is whether the learned Judge ought to have considered the appellants' defence of adverse possession, or whether she wrongfully concluded that the defence of adverse possession did not arise in the circumstances of this case.

26. The respondents' claim before the trial court was straightforward. They claimed ownership of the suit property, being subdivision Number 915 (Original No. 539/135) CR No. 70802 measuring approximately 0.1034 Ha. The appellants do not appear to dispute the fact that the suit property belongs to the respondents. From the evidence on record, the Certificate of Title dated 30th November 2017 indicates that the suit property was registered in the names of the respondents as trustees of Masjid Jibran Mtwapa.

27. Our understanding of the respondents' claim is that the appellants encroached onto the suit property. The boundary report dated 24th June 2018 concluded that all the beacons were found or re-established in accordance with the *Survey Act*, Cap 299 and Survey Regulations. As to the stalls on the suit property, the report stated that they had encroached onto the suit property.

28. The appellants' appeal is premised on the fact that the learned Judge failed to consider their defence of adverse possession for the reasons that it was not raised by way of a counterclaim. It is trite law that, for a claimant to succeed in a claim of adverse possession, they must demonstrate that they have been in occupation of the land without hostility from the owner for a minimum period of 12 years, and that the sole intention is to dispossess the actual owner of it. This Court in Mate Gitabi vs. Jane Kabubu Muga alias Jane Kaburu Muga & 3 others (2017) KECA 596 (KLR) 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 landowner, with the intention to have the land. There must be an apparent dispossession of the land from the landowner. 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:
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> > '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.'"

29. On adverse possession claims, the onus lies with the person claiming the title, to prove the essential elements. Indeed, a claim for adverse possession must be proved by way of evidence. The appellants simply pleaded adverse possession, but did not lead evidence to demonstrate how they acquired the portion of the suit property they claimed by way of adverse possession. At paragraph 5 of their defence, the appellants stated:

> "Furthermore, the 1st and 2nd defendants also state that the alleged suit property's boundaries have been the same without any alterations for the past (40) years, since Kobana Binti Salim Bin Khamis Kombo transferred to the 1st and 2nd defendants' family land to their late father Charo Kombe through a transfer document dated 16th May 1977."

30. It was further held in the case of Mbira vs. Gachuhi [2002] 1 EALR 137 that:

> " ... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non- permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption ..."

31. In Kasuve vs. Mwaani Investments Ltd & Others (2004) 1 EA, 184 the predecessor to this Court considered a claim for adverse possession which was dismissed on ground that the appellant therein was not certain as to the definite and distinct parcel of land he was claiming. The Court delivered itself thus:

> " Further, the portions which the Appellant was claiming were not clearly demarcated. There was no concrete evidence that the appellant was in exclusive adverse possession of any definite and distinct land ascertained to be 40 acres, hence the claim for adverse possession would fail through uncertainty."

32. In our view, the above averment was not enough to demonstrate adverse possession. We are aware that there are instances when this Court has held that a claim for adverse possession can be raised through a defence or a defence and counterclaim as was held in Gulam Miriam Noordin vs. Julius Charo Karisa (2015) KECA 188 (KLR). However, the appellants did not succinctly state the period they lived on

the portion of the suit property they were claiming or the exact portion thereof. Instead, what they averred is that the boundary has been in place for 40 years. We are not satisfied that, by merely stating that a boundary has been in place for 40 years, is equivalent to making a claim for adverse possession.

33. In addition to the foregoing, in cross-examination, DW1 stated as follows in relation to the suit property:

> " We have no claim for Plot No. 915. If there is anything on 915 that belongs to us then it is a mistake. The structure at 915 is an encroachment."

34. It is clear that in their oral evidence, the appellants reneged from their adverse possession claim, and seemed to acknowledge that the suit property belonged to the respondents by stating, 'If there is anything on 915 that belongs to us then it is a mistake. The structure at 915 is an encroachment.'. We reiterate that from the outset, the respondents' claim was one of a boundary dispute in which they invited a Surveyor who confirmed the correct boundaries. This, in our view, may have informed DW1 to state these words in cross-examination.

35. At the hearing of this appeal, the appellants' counsel Mr. Kenga submitted that the respondents' suit was statute barred. Unfortunately, this defence was not raised by the appellants before the trial court, and raising it now is too late in the day, which ultimately divests us of jurisdiction to consider it. This Court cannot deal with extraneous issues not dealt with by the parties before the court of first instance.

36. In Bandi vs. Dzomo & 76 others (Civil Appeal No. 16 of 2020) [2022] KECA 584 (KLR) (24 June 2022) (Judgment), this Court stated:

> " We note that the issue of the defectiveness of the defence and counter claim was never raised or argued before the ELC, and is therefore being raised for the first time on appeal. Whereas Rule 107 of the 2022 Court of Appeal Rules permits an appellate Court to delve into issues raised in the memorandum of appeal, this court has severally held that it cannot delve into issues that were never before the superior court. Raising that issue at the appeal stage is a change of tact, and an afterthought and can be said to be intended to steal a match against the 1st respondents. We decline to consider that ground as it ought to have been raised before the ELC. In the case of Mary Kitsao Ngowa & 36 Others v Krystalline Limited [2015] eKLR, this Court has previously dealt with such an issue and pronounced itself thus;
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> > '...we must also appreciate the fact that, this is not even an issue that was canvassed before the trial court. The issue regarding the interpretation, meaning and application of section 90 of the *Employment Act* was never placed or canvassed before the trial court for determination. The jurisdiction of the appellate court is to look into issues that were presented before the trial court. A court cannot be said to have erred on an issue that was never argued before it. This is what the appellants have sought to do in respect of this ground of appeal. Accordingly, the learned Judge cannot be faulted for not considering or appreciating the concept of continuing injury.""

37. Again, in Dellian Langata Limited vs. Symon Thuo Muhia, Mary Njoki Thuo, Agricultural Finance Corporation, Nairobi City Council & Council of Legal Education [2018] eKLR, the Court held that:

> " On the first issue of unpleaded matters, the general principle that a new point not raised in the pleadings may not be allowed or used as a basis of judgment is set out in older decisions of this Court and its predecessor. In Girdhari Lal Vidyarthi Vs. Ram Rakha (1957) EA 527

C.A, for instance, the former Court of Appeal, held that the appellant could not be heard to allege an express trust when he had only pleaded a resulting trust before the trial court.

The position is not an inflexible one, however, and as other authorities show the position now obtaining is that the Court has discretion to permit a new point to be taken on appeal where certain conditions obtain.

In SEcuricor (kenya) Ltd Vs. E.a Drappers Ltd And Anor [1987] KLR 338, it was held that the Court of Appeal has a discretion to admit a new point at appeal but that the discretion must be exercised sparingly; the evidence must all be on record; the new point must not raise disputes of fact and it must not be at variance with the facts or case decided by the court below.

The law on the matter was condensed by Platt, JA. in Wachira Vs. Ndanjeru (1987) KLR 252, as follows:

> 'The principles can be summarised as follows: the discretion to allow a point of law to be taken for the first time on appeal will not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case."

38. Having reconsidered and re-evaluated the evidence on record, we find that this appeal is devoid of merit. The same is hereby dismissed with costs to the respondents. We accordingly uphold the Judgment of the Environment and Land Court at Malindi (Odeny, J.) delivered on 16th March 2022.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MAY, 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

DR. K. I. LAIBUTA, CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR