Shariff v Kanana & another (Civil Appeal 18A of 2020) [2025] KECA 1255 (KLR) (27 June 2025) (Judgment)

Neutral citation: [2025] KECA 1255 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 18A OF 2020

J MOHAMMED, JW LESSIT & A ALI-ARONI, JJA

JUNE 27, 2025

BETWEEN

ABDUL KADIR SHARIFF .... APPELLANT

AND

PAULINE KANANA .... 1ST RESPONDENT

FLORENCE KATHAMBI MUTHURI .... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court at Meru (Mbugua, J.) delivered on 31st October 2019inELC Case No. 40 of 2015)

JUDGMENT

1. The appellant filed a suit against the respondents seeking a permanent injunction to restrain the defendants, their agents, or anyone acting on their behalf from entering, alienating, or interfering with Parcel No. Isiolo Township/Block V/27 [hereinafter referred to as the suit property] until further orders of the court.

2. It was the appellant's case that he is the bona fide occupant of the suit property, having obtained a certificate of lease of the suit property on 22nd May 1996 and that at all material times relevant to the suit, the respondents had made use of the suit property to the appellant's detriment, by trespassing and conducting quarrying activities.

3. In response, the respondents filed a joint statement of defence and a counterclaim dated 30th June 2015, denying the allegations and asserting that they had been in quiet possession of the suit property, along with 28 other families, without any interference since 1982. According to them, the appellant was not entitled to any of the relief sought, as the suit property belonged to them, having occupied the land for over 35 years and conducted quarry activities since 1985, initially paying cess to the County Council of Isiolo before the appellant came on the scene.

4. In their counterclaim, the respondents contended that they occupied a large portion of the suit property, measuring approximately 7 acres, since 1982, they had registered a self- help group known as 'Mla Jasho', and have had quite possession which was uninterrupted until recently when the appellant laid claim on the suit property. They claimed that the appellant used force and police to harass, threaten them, and attempted to evict them from the suit property, causing them to suffer loss and damage. Specifically, they listed the loss of 2,000 tons of ballast and quarry tools valued at Kshs. 200,000. They sought a declaration that the suit property belonged to them through adverse possession.

5. The matter proceeded by way of viva voce evidence. The appellant relied on his witness statement, in which he stated that in early 1991, he applied for a light industrial plot from the County Council of Isiolo. The plot committee identified a suitable zone for the industrial plot and approved his application. Consequently, the committee's minutes were forwarded to the Commissioner of Lands. A development plan was created, and the Commissioner of Lands issued a letter of allotment in the appellant's name on October 1, 1991. The appellant accepted the offer and paid all required fees. Government Planners and Surveyors then conducted a physical survey in the presence of the appellant's agent. On 22nd May 1996, the appellant received a certificate of lease.

6. The appellant further testified that in 1997, he discovered that the respondents were occupying the suit property and collecting stones from the same, which they crushed; the respondents approached him, and he informed them that the plot belonged to him, at which point one of them offered to take care of the land. Later that same year, upon returning to the suit property, he found the respondents digging and asked them to stop excavating, but they ignored his request.

7. In addition, the appellant asserted that on seeking finance to start his business, when he took a bank official to the suit property, they found squatters which put off the banks interest to finance the project. Further, following the advent of devolution, the appellant returned to the County Government of Isiolo and reported the issue on 24th March 2015. The Ministry of Lands checked the records, confirmed his ownership of the suit property, and offered to have the Officer in Charge of Station [OCS] in Isiolo evict the squatters.

8. The appellant wrote to the OCS and had his agents accompany the OCS to the property in question. The OCS requested the squatters to provide documents proving their ownership of the land. One of the squatters claimed to know the owner of the plot, describing him as a man who wears a Muslim cap, whereas other squatters reacted aggressively. However, the OCS was unable to take action due to boundary disputes between Isiolo and Meru counties. Thereafter, the appellant wrote to the County Commissioner of Isiolo County in March 2016, and at that time, an order was already in place restricting all parties from carrying on activities on the ground. The appellant served the order and contacted the County Commissioner again on 2nd March 2016, explaining the situation and noting that the squatters had not ceased their activities. The County Commissioner advised the appellant to wait for the conclusion of the suit.

9. On the part of the respondents, the 1st respondent testified that she first occupied the suit property in 1982 where she undertook farming. Thereafter, she began collecting stones. It was her evidence that the land belonged to the government, and at the time she took occupation, it was common for individuals to claim a portion by fencing it off. Further, she discovered that she could generate income by selling the stones. She collaborated with others to produce ballast and sell it. Initially, 28 people were involved, but by the time the suit was initiated, the number had grown to 50, and they had formed themselves into a group. She further testified that she had never met the appellant before and that he did not provide any documents to support his ownership of the land.

10. The 2nd respondent, on her part, testified that she occupied the land in 1983 and began collecting stones for hardcore in 1988. No adjudication officer had been to the suit property to demarcate the land, despite their requests to the County Government to do so. They built houses on the land and were unaware of the appellant until he arrived with the police to evict them. Furthermore, she claimed they were in the process of surveying the suit property, although she did not possess any official documents to support the claim. She also testified that they operated as a registered group called Mla Jasho Self Help Group, which was officially registered in 2011.

11. Patrick Mutethia [DW3] testified that he had been living on the suit property for 30 years, along with others, with whom he had formed a self-help group, Mla Jasho Self-Help Group, in 1992 and registered it in 2011. It was his evidence that they all worked together on the suit property. He further stated that he did not know the appellant, who visited the land one day, claiming it was his, accompanied by police officers, which led to the arrest of some squatters while others lost their belongings.

    He contended that the appellant never produced any documents proving his ownership; he only presented a court order. He testified that the quarry was their livelihood and that no one had previously complained about the land being theirs. The group had a chairman and a secretary, and the respondents were just members of the group.

12. In a judgment delivered on 31st October 2019, the trial court held that for one to establish a claim for adverse possession, an individual must show that they have occupied the land in question quietly, openly, peacefully, and uninterrupted for at least 12 years, without the permission of the title holder. The court went further to find that the appellant did not prove that his attempts to evict the respondents were successful in a way that could be considered to have interrupted their possession of the land. Consequently, the court concluded that unless the respondents were effectively evicted from the land, their possession would be regarded as continuous and averse to the appellant's title.

13. The trial court, thus, dismissed the appellant's claim and granted the prayers sought in the counterclaim. The court further found that the appellant had failed to oppose the counterclaim effectively and that the respondents' possession of the suit property had been for a period of over 12 years, had been exclusive, continuous, notorious and averse to the appellant's title to the suit property, and declared that the suit property, Land Parcel No. Isiolo Township Block V/27 belonged to the respondents by way of adverse possession.

14. Aggrieved by the judgment, the appellant preferred this appeal raising six [6] grounds in his memorandum of appeal dated 17th February 2020, stating that the learned judge erred in law: in failing to find that the appellant was the bona fide registered owner of the suit property and that an alleged claim of adverse possession had undermined his rights; in failing to consider the evidence on record where the appellant disputed the counterclaim; failing to recognise that the principle of the doctrine of adverse possession cannot be invoked through a counterclaim and applying incorrect rules; concluding that the respondents had been utilising the suit property based on photographic evidence, and that failure to evict the respondents led to a decision that contradicted the weight of the evidence on record.

15. As this is a first appeal, we must analyse, evaluate and re- assess the evidence on record and reach an independent conclusion. This approach was adopted in *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015] eKLR, where the court cited the case of *Selle v Associated Motor Boat Co.* [1968] EA 123 and held as follows; -

    > " 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 allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

16. Having considered the record, oral submissions by the appellant's counsel in the absence of any submissions from the respondents, and considering the law, we are of the considered opinion that this appeal turns on two issues: whether the appellant proved his claim of being the bona fide registered owner of the suit property; and whether the appellant's right as a registered proprietor was extinguished by the respondents on account of adverse possession as claimed by the respondents by way of a counterclaim.

17. In his oral submissions, learned counsel for the appellant, Mr. Otieno, submitted that the trial court erred in failing to take into account that the appellant was the first registered owner of the suit property. Learned counsel cited Section 26 of the *Land Act* in support of the proposition that the appellant had absolute and indefeasible ownership and that the appellant's evidence was cogent and not challenged.

18. Further learned counsel contended that the appellant provided an account of how he applied for space to start a light industry business, allocation of the suit property by the County Council of Isiolo in 1991, survey of the same in 1997, and issuance of the lease to him. That in 1997, the appellant visited the place and found two ladies who occupied an adjacent land; he introduced himself as the owner of the suit property; when one offered to take care of the suit property, which he allowed and upon returning, he found them excavating a portion, and on requesting them to stop the activity they declined to move out, necessitating him to involve the Ministry of Lands and the police. That when the title was issued, there were no squatters on the land and that when the appellant visited the suit property in the company of the police, they were unable to evict the squatters.

19. According to the record, the respondents claimed to have been on the suit property from 1982 and 1983, paying cess to the County Council of Isiolo initially before the appellant came into the picture, and that they have had a peaceful and uninterrupted use of the suit property for over 35 years. They produced pictures, allegedly of the activities they undertook.

20. There is no dispute that the appellant has held a registered title in his name since 1997, and that previously the suit property belonged to the County Council of Isiolo. For starters the claim of adverse possession cannot be made against the County Council of Isiolo. The adverse possession needed to be proved from the time the appellant became the registered proprietor of the same. For adverse possession to take effect, the adverse possessor must have gained a hostile occupation against the true owner without the true owner's consent. The occupation must have been open, continuous and exclusive for a period of 12 years. The appellant produced his certificate of the lease; it was not challenged, except that the respondents believed that they were entitled to the suit property because they had occupied it for over 35 years and sought ownership by relying on the doctrine of adverse possession to advance their claim.

21. On adverse possession, this Court, in the case of *Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui*, Civil Appeal N. 95 of 2015 [UR], stated:

"We think, after examination of numerous decisions including *Gatimu Kinguru v Muya Gathangi* [1976] KLR 253, *Hosea v Njiru* [1974] EA 526, *Sospeter Wanyoike v Waithaka Kahiri* [1979] KLR 236, *Wanje v Saikwa [No. 2]* [1984] KLR 284, *Githu v Ndeete* [1984]

KLR 778, *Nguyai v Ngunayu* [1984] KLR 606, *Kisee Maweu v Kiu Ranching* [1982-88] 1KAR 746, *Amos Weru Murigu v Marata Wangari Kambi & District Land Registrar, Nyahururu* [NBI HCCC 33 of 2002], *Kasuve v Mwaani Investments Ltd & 4 Others* [2004] KLR 184, *Samuel Miki Waweru v Jane Njeri Richu* [2007] eKLR, *Muraguri Githitho v Mathenge Thiongo* [2009] eKLR, and others that were cited before us, that the law is settled and is anchored on Sections 7, 13, 17 and 38 of the *Limitation of Actions Act*."

22. Section 26 of the *Land Act* provides that:

> " 1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— [a] on the ground of fraud or misrepresentation to which the person is proved to be a party; or [b] where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
>
> 2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original." [Emphasis added]

23. On the other hand, Sections 7 and 13 of the *Limitation of Actions Act* provide that:

> " Section 7
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> Any person may not bring an action to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.
>
> Section 13
>
> 1. A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run [which possession is in this Act referred to as adverse possession], and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
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> 2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
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> 3. For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12[3] of this Act, the land in reversion is taken to be adverse possession of the land.
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> Section 37 provides that:

1. Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, 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."

24. The appellant's evidence is that when he acquired the suit property, there were no squatters on the land. On obtaining title he visited the suit property and in the adjacent plot was a land which was occupied by two ladies; the respondents. One of them sought his permission to take care of the suit property,which he agreed to. It is noteworthy that the respondents claim the suit land is 7 acres, whereas the appellant's title is for 5 acres.

25. Apart from the respondents' assertion that they have occupied the suit property for 35 years, there is no concrete proof of when they took possession of the land. The pictures they relied upon did not give dates when possession took place. The group they claim was occupying the suit property, whose members they claim to be, was registered in 2011. Is this when they entered the suit property? It is not clear.

26. We also take note that the appellant only sued the respondents, the women he met and allowed to occupy the suit property. The respondents claim that over 50 families occupy the suit property and are registered in the self-help group. There is also evidence that the two are not officials of the self-help group. The self-help group and the 50 families are strangers to the suit. Nothing would have been easier than the respondents enjoining them to the suit and the counter-claim or the squatters or the self-help group joining the suit.

27. In the case of *Mtana Lewa v Kahindi Ngala Mwagandi* [2015] KECA 532 [KLR], this Court stated:

> "...before one can claim title to land by adverse possession, and apart from proving 12 years of uninterrupted, open and peaceful possession, certain strictures must be satisfied. Those strictures are summarised in the Latin maxim, nec vi, nec clam, nec precario, that one's possession has not been through the use of force, not in secrecy and without the authority or permission of the true owner. In terms of Section 38 of the *imitation of Actions Act*, where a person claims to have become entitled by adverse possession to land, he must apply to the High Court for an order that he be registered as the new proprietor of the land in place of the registered owner. It is therefore not automatic that once all the elements of adverse possession have been met, the possessor, without more, becomes the new owner." [Emphasis added]

28. The self-help group and the 50 families needed to come forward to place their claim before the court and prove the same, which they did not do. As stated in the *Mtana Lewa case* [*supra*], it is not automatic that, simply because you have met the strictures of adverse possession, you automatically become a new owner. We are of the view that we ought to confine ourselves to the parties before the court: the two respondents who were sued and who filed a counterclaim, and, the appellant

29. The respondents did not controvert the appellant's evidence that he met them in 1997, when he became the registered owner and that they occupied an adjacent land when they asked for permission to take care of his land, and he permitted. Meaning that they entered the suit premises with his permission. Secondly, in 2015, the appellant attempted to reclaim his land from squatters with the assistance of the police, but to no avail. As observed above, neither the squatters nor the self-help group has a claim before the court.

30. It is one thing to claim and another to prove. The appellant came to court with his title, and no one claimed it was either fake or had been obtained illegally. The respondents, in their counterclaim, are seeking to apply the doctrine of adverse possession. They are required to prove that they entered the suit property, 'nec vi, nec clam, nec pre cario', meaning without force, without secrecy and without permission. The respondents claim that they initially paid cess to the County Council of Isiolo before the appellant became involved. However, no receipts were produced to prove the alleged occupation of the suit property and recognition by the said Council, although no claim of adverse possession against the County Council could have succeeded. Relevant to this case is the appellant's evidence, which remains uncontroverted, that in 1997, the respondents occupied an adjacent piece of land.

Indeed, there is evidence that the respondents knew that the owner of the suit property was a Muslim man. The respondents' entry, therefore, cannot be said to have been without permission.

31. As for the counterclaim, the respondents ought to have proven their claim. Even though the appellant did not file a defence to the counterclaim, this did not mean that the respondents were to receive the orders automatically as sought. The burden of proof was not on the appellant but the respondents to prove their counterclaim. In the case of *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] KECA 728 [KLR], this Court had this to say:

> " ...What these authorities are emphasizing is that for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. In other words his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession. Besides adverse entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession. So that a claim of adverse possession would not succeed if the entry to the land was with the permission of the owner and remains that way throughout, or before the permission is terminated or if before the expiry of the period, the owner of the land takes steps to assert his title to the land."

32. The respondents claimed to have occupied the suit property since 1982, initially paying cess. No evidence to that effect was placed before the court. Further, even if they had been in occupation since 1997, they did not negate the appellant's contention that they entered his portion with his permission. Neither did they produce receipts for utilities or even call persons from the neighbourhood or even the officials of the County Government of Isiolo to back the assertion that they were indeed occupants of the suit property.

33. It is therefore quite apparent that the respondents failed to prove that the appellant ever lost his rights on the suit property either by being dispossessed or by having discontinued possession of the suit property for a continuous statutory period of twelve years to entitle them to the title to the suit property by way of adverse possession. Ultimately, we set aside the trial court's judgment. Enter judgment in favour of the appellant and dismiss the counterclaim.

34. Each party will bear their own costs.

DATED AND DELIVERED AT NYERI THIS 27TH DAY OF JUNE, 2025.

JAMILA MOHAMMED

JUDGE OF APPEAL

...

J. LESIIT

JUDGE OF APPEAL ALI-ARONI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR