Mwagandi v Lewa (Civil Appeal E004 of 2022)
[2025] KECA 1036 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KECA 1036 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E004 OF 2022

AK MURGOR, P NYAMWEYA & GV ODUNGA, JJA

JUNE 5, 2025

BETWEEN

KAHINDI NGALA MWAGANDI ..... APPELLANT

AND

DR MATANA LEWA ..... RESPONDENT

(An appeal against the Judgment and Decree of the Environment and Land Court of Kenya at Malindi (J.O. Olola J.) delivered on 3rd June 2021 in ELC No. 108 of 2021 (O.S.))

JUDGMENT

1. Kahindi Ngala Mwagandi, the Appellant herein, has appealed against a judgment delivered on 26th February 2021 by the Environment and Land Court [ELC] at Malindi [J. O. Olola J.] in ELC No 108 of 2021 [O.S.], which dismissed his Originating Summons dated 11th April 2011, with costs being awarded to Dr. Matana Lewa [the Respondent herein]. The Appellant had sought orders in the Originating Summons that he be declared to have been in occupation of the parcel of land described as TezoRoka374 peacefully, openly, continuously, and without interruption for a period exceeding 12 years; and to be the absolute owner of the occupied suit land by virtue of adverse possession. Further, that the Registrar of Lands be directed to survey and ascertain the occupied portion and excise the same from the Respondent's title and issue title to the Appellant.

2. Dr. Mtana Lewa opposed the grant of the said orders in a replying affidavit he swore on 9th November 2013, wherein he averred that he was the legal bona fide owner of the suit property. He asserted that on 13th January 1995, he charged the aforesaid property to Kenya Commercial Bank Ltd to secure a credit facility advanced to himself whereupon the title documents were placed in the custody of the Bank. The Respondent averred that the Bank had misplaced the title documents but the charge thereon remained undischarged to date. The Respondent asserted that the contention by the Appellant that he had continuous, open, and uninterrupted possession of the property for over 12 years since 1992 was therefore untrue as he had not adduced any documentary evidence to that effect.

3. The Appellant testified as the sole witness for his case during the trial in the ELC. He stated that he was a farmer in Mtondia Tezo Roka, and that sometime in the 1990s, he went to the area Chief, one Dickson Mae looking for land to settle. The Chief then asked him to go and bring his identity card, and upon production he was shown land that was then unoccupied by the Land Adjudication and Settlement Officer.

   Immediately thereafter, he began developing the property, and in particular dug a borehole, planted coconut trees, and constructed permanent houses where he lives with his family and parents. He later discovered the Parcel No. 374 TezoRoka Settlement Scheme was registered in the name of one Mtana Lewa, however ever since he took possession of the land he had never seen the registered owner. Lastly, that he obtained a letter from the area Chief which he took to the Lands Office before he was given the land.

4. Similarly, the Respondent testified as the sole defence witness at the trial as follows: he was a resident of Tsisoni in Marereni, Kilifi County and the suit property is registered in his name and was allocated to him by the Settlement Fund Trustees [SFT] in the 1980s and he was issued with a title thereto in the 1990s; he knew the Appellant as the person who had intruded into the suit property; it was not true that the Appellant had been on the land since the 1990s; he learned of the Appellant's presence in the suit land in the year 2004 when the Appellant purported to enter into an agreement with an Italian purporting to allow the Italian to extract stones from the land which he stopped; the Appellant had however put some structures on the suit property between 2013 and 2014. Lastly, the Respondent conceded that he did not reside on the suit property.

5. The trial Judge declined to grant the orders sought by the Appellant in its judgment, primarily for the reason that the Respondent had obtained his title as a result of an adjudication process conducted in the area, in which the Appellant did not raise any objection to as required under section 26 of the *Land Adjudication Act*, after he learnt that the Respondent had been allocated the suit property. Further, that it was not contested that the Respondent had in 1995 charged the suit property to Kenya Commercial Bank Ltd and the Respondent cannot therefore be said to have lost his right to the land as he had secured a Bank charge over the same in the period the Appellant purports to have taken possession thereof. The trial Judge also found that when the Land Adjudication and Settlement Office wrote the letter dated 28th February 2007, they knew that the suit property was no longer available for allocation, the title thereto having been issued to the Respondent in 1992, and that the said letter was not admissible since the Appellant did not call the maker to authenticate the contents thereof.

6. The Appellant being aggrieved lodged an appeal against the decision by the ELC, and has raised four grounds of appeal in his Memorandum of Appeal dated 10th December 2021 and lodged on 19th January 2022 as follows:

   1. The Learned Judge erred in law and fact by reaching a finding that the Appellant's exhibit 1 was of no evidentiary value.

   2. The Learned Judge erred in law and fact by failing to reach a finding that charging the suit property to Messrs Kenya Commercial Bank Ltd by the Respondent affected the right to adverse possession by the Appellant

   3. The Learned Trial Judge erred in law and fact by failing to reach a finding that the fact that the Appellant did not lodge objections as required by section 26 of the *Land Adjudication Act* did amount to acceptance of the Respondent as the rightful owner of the suit property.

   4. The Learned Trial Judge erred in law and fact when he failed to consider the evidence adduced, the Appellant argument, submissions and authority when arriving at his decisions.

7. We heard the appeal on this Court's virtual platform on 16th July 2024, and learned counsel Mr. Sharia Nyange appeared for the Appellant while learned counsel Mr. Augustus Wafula, appeared for the Respondent. The counsel highlighted written submissions dated 9th July 2024 and 3rd June 2024 respectively. We need to reiterate the duty of this Court as a first appellate court at the outset, which is to reconsider the evidence, evaluate it and draw conclusions of fact and law [see Selle & Another v Associated Motor Boats Co. Ltd & Others [1968] EA 123]. This Court will only depart from the findings by the trial court if they were not based on evidence on record; where the court is shown to have acted on wrong principles of law as held in Jabane v Olenja [1968] KLR 661, or where its discretion was exercised injudiciously as was held in Mbogo & Another v Shah [1968] EA 93.

8. In this regard, the grounds of appeal raised by the Appellant can be collapsed into one issue, namely, whether the totality of the evidence adduced in the trial Court supported a finding of adverse possession by the Appellant. Mr. Nyange submitted that the Appellant without objection produced a letter dated 28th February 2007 signed by the District Land Adjudication and Settlement Officer and addressed to the Director of Lands Adjudication and Settlement, Nairobi, which confirmed that the Respondent was allocated the suit land known as KilifiRoka374, and that the Appellant had been in occupation thereof since 1992 and developed the land, which had two [2] houses, eight [8] coconut trees, twenty [20] banana trees, one [1] bore hole, ten [10] goats and four [4] cattle. Furthermore, that the issue of admissibility of the letter ought to have been raised at the time of production and not at the time of final submissions.

9. Counsel further submitted that the learned trial Judge misapplied the Court of Appeal decision of Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR since in that case the documents were merely marked for identification, whereas in the present case, the subject letter was produced as an exhibit and not marked for identification.

   Therefore, that finding by the ELC that the letter dated 28 February 2007 was of no evidentiary value is in error, since the letter had been produced and admitted into evidence, and confirmed the length of time the Appellant had been in occupation and the improvements made on the suit land

10. On whether there was evidence adduced of dispossession by the Respondent, counsel submitted that the charging of the suit property is no bar to the claim of adverse possession made herein. Reliance was made on the decision of this Court in Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees [2016] eKLR that the act of charging or mortgaging land does not interrupt time from running in adverse possession and as adverse possession is an overriding interest, the mortgage or transferee takes subject to such overriding interest. Therefore, that the claim of adverse possession was not defeated by the charging of the suit property by the Respondent to Kenya Commercial Bank, and the finding by the learned trial Judge that the Respondent did not lose his right to the land for this reason was in error.

11. Lastly, counsel submitted that the conclusion by the trial Court that the failure by the Appellant to lodge an objection as required under section 26 of the *Land Adjudication Act* after the adjudication process was acceptance by the Appellant that the Respondent is the rightful owner of the suit property was in error. Reliance was placed on the decisions of this Court in Gachuma Gacheru v Maina Kabuchwa [2016] eKLR and Samuel Kihamba v Mary Mbaisi [2015] eKLR that adverse possession is a fact to be observed upon the land and by open occupation of the land. It was counsel's submission that admission of the Respondent's ownership of the suit property could only be by entry thereon with the express or implied permission by the Respondent pursuant to an agreement or other contractual arrangement.

12. Mr. Wafula's submissions were that it is settled law that for a party to succeed in a claim for adverse possession, it must be demonstrated that there was open, continuous, notorious and uninterrupted possession for at least 12 years. In addition, that while the Appellant pleaded in this regard that he had been in occupation of the suit property since 1992 when the area chief allocated him the suit property, he failed to tender credible and admissible evidence to prove his allegations. On the reliance on the contents of the letter dated 28th February 2007 as proof of occupation, counsel's opinion was that the letter was never proved as required by the law, and he cited the case of Kenneth Nyaga Mwinge v Austine Kiguta & 2 others [supra] on the legal requirements for proof of documents. Therefore, that the contents of the letter remained mere allegations by a third party who was not called to testify before the trial Court to authenticate the contents, and was inadmissible hearsay. Reliance was also placed on the case of Kenya Commercial Bank Ltd v Thomas Wandera Oyala [2005] eKLR and section 63 of the *Evidence Act* for the submission that a duty is imposed on the courts to rely on direct evidence in adjudicating disputes.

13. Lastly, that the Appellant did not adduce independent evidence to prove the time of entry or that he had been in continuous occupation for the period prescribed in law, and the photographs of the house tendered were never linked to the suit land, they were not dated and therefore not authenticated.

14. We have considered the arguments by counsel for the Appellant and Respondent. The burden and onus of proof in a claim for adverse possession was addressed by this Court in Teresa Wachika Gachira v Joseph Mwangi, [2009] eKLR, where it was held that the person claiming adverse possession is required to prove continuous and exclusive use of the land in question nec vi, nec clam, nec precario. [neither by force, not secretly and without permission]. Additional to the fact and nature of occupation of the land, the person claiming adverse possession is required to prove the duration of such occupation, and specifically that they have been in occupation of the land for over twelve years. As explained by Makhandia JA in Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR:

> " Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve [12] years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, which is in these terms:-
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> "An action may not be brought by any person 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."

15. Also see in this regard the decisions in Jandu v Kirplal & Another [1975] EA 225 and Wambugu v Njuguna [1983] KLR

> 173. In the present appeal, the record shows that the evidence produced by the Appellant during the hearing to prove his possession and development of the suit property was as follows:
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> > " I recall I recorded a statement filed herein on 1332014. I also filed documents on the same day. Documents produced and marked as pexh 1-5"
> >
> > Among the documents produced as exhibits was the letter dated 28th February 2007 authored by the District Land Adjudication and Settlement Officer for Kilifi and

addressed to the Director of Land Adjudication and Settlement. The letter indicated that the according to the records, the suit property remained vacant but had been allocated to the Respondent; and a site visit ascertained that it was occupied by the Appellant since 1992, who had made certain developments thereon which were detailed by the said officer.

16. The Appellant's and Respondent's counsel have proffered differing arguments on the admissibility of the said letter after the trial Court held that it was inadmissible, and both counsel relied on the decision of this Court in Kenneth Nyaga Mwige v Austin Kiguta & 2 others [supra] wherein it was explained as follows:

> " 18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed andor marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record."

17. "Admissibility" is in this respect defined in Black's Law Dictionary. Ninth Edition as the "the quality or state of being allowed to be entered into evidence in a hearing, trial or other official proceedings" while "admissible evidence" is "evidence that is relevant and is of such a character [e.g, not unfairly prejudicial, based on hearsay, or privileged] that the court should receive it". There are therefore two aspects of admissibility, the first is the decision made by the Court to admit the evidence that a party wishes to rely on at the time of disclosure by a party of that evidence, and the evidence is then admitted to the record as an exhibit. The second is the permissible use of that evidence by the Court to ascertain the veracity of the contents, and prove or disprove the facts in issue. The Court at this stage admits the evidence as being truthful and of probative value.

18. As explained by this Court Kenneth Nyaga Mwige v Austin Kiguta & 2 others [supra]:

> " 20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence

and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account."

19. This Court also distinguished between the admissibility of a document and its probative value in the decision in the case of Parkar & another v NQ & 2 others, [2023] KECA 908 [KLR], and while noting that a document may be admissible but still not carry any conviction and weight or probative value, and that the mere production and marking of a document as an exhibit by the court cannot be held to be due proof of its contents, held as follows:

> " 26. In a picturesque speech, the Supreme Court of India in Arjun Panditrao Khotkar v Kailash Kushanrao, [2020] 3 SCC 216 observed as under:
>
> '2. Documentary evidence, in contrast to oral evidence, is required to pass through certain check posts, such as-
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> [i]Admissibility; [ii]Relevancy and
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> [iii]Proof, before it is allowed entry into the sanctum. Many times, it is difficult to identify which of these check posts is required to be passed first, which to be passed next and which to be passed later. Sometimes, at least in practice, the sequence in which evidence has to go through these three check posts, changes. Generally, and theoretically, admissibility depends on relevancy. Under Section
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> 136 of the *Evidence Act*, relevancy must be established before admissibility can be dealt with.'
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> 27. Admissibility of a document is tested first. This position was clarified by the Supreme Court of India in Anvar PV v PK Basheer,AIR 2015 SC 180: [2014]10 SCC 473, it is held as under [sic]: 'Genuineness, veracity or reliability of the evidence is seen by the court only after the stage of relevancy and admissibility' "

20. Section 35 of the *Evidence Act* in this respect provides for two conditions that require to be satisfied for documentary evidence to establish the facts in issue and therefore be of probative value:

    a. The maker of the statement either—

        i. has personal knowledge of the matters dealt with by the statement; or

        ii. where the document in question is or forms part of a record purporting to be a continuous record, made the statement [in so far as the matters dealt with thereby are not within his personal knowledge] in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

    b. The maker of the statement is called as a witness in the proceedings.

21. The two conditions are conjunctive and cumulative, and both must be satisfied to confirm the veracity and factual basis of documentary evidence, and before a Court can rely on a document or certified copy thereof as being proof of the facts it alleges. The only exceptions provided under the section is if the person making the document is dead, cannot be found, has become incapable of giving evidence, their attendance cannot be procured, or even if it can be procured would actually occasion expense and delay which in view of the court is unreasonable. The onus is upon the person producing the document to establish that these exceptions apply.

22. In the present appeal, the Appellant did not call the maker of the letter dated 28th February 2007 to produce the same and be tested on its veracity and factual basis, nor did he lay any basis as to why it could not be produced by the maker. The trial Court was thus not legally able to scrutinize, evaluate, and apply its judicial mind to the probative value of the letter, including on its reliability and credibility. We therefore find that the learned trial Judge did not err in arriving at the decision that the said letter was inadmissible.

23. The Appellant in addition produced photographs to demonstrate his occupation and developments he had made on the suit property. It is notable firstly, that photographs are electronic records, and to be admissible, they require authentication by way of the certificate required by section 106B[4] of the *Evidence Act*, which confirms the following:

    a. the identity of the electronic record containing the statement and describing the manner in which it was produced;

    b. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

    c. the matters to which the conditions mentioned section 106B[2] relate, including the period the electronic record relates to; and

    d. the signature by a person occupying a responsible position in relation to the operation of the relevant device used in the production of the electronic document.

24. No such certificate was produced by the Appellant to authenticate the photographs, particularly as regards the time they were taken and location of the items therein. Secondly, this Court held in Eliakim Masale v Ilale Mohamed & 4 Others, *Mombasa Civil Appeal 135 of 2019*, that a photograph, being a static and inert representation of facts, can only objectively identify a certain person, item, or place at the particular period of time when the photograph is taken, and has limited evidentiary and probative value of as regards the facts of duration of occupation, or the continuous occupation of a property that is the subject of a claim by adverse possession.

25. The photographs produced by the Appellant were of semi-permanent houses and trees on a parcel of land, which he claimed was the suit property. The photographs were not dated, and there was no evidence as to when they were taken. It was also not evident that they related to the suit property. Lastly, the photographs being static and inert representations, are of limited evidentiary and probative value as regards the facts of the duration of occupation, or the continuous occupation of the suit property for the required period of twelve years by the Appellant.

26. It is thus our finding that the evidence produced by the Appellant in support of his claim for adverse possession was not sufficient to divest the Respondent of his title to the suit property, and that the trial Judge did not err in his findings in this regard. The Appellant's appeal therefore collapses as he was not able to prove his case.

27. This finding notwithstanding, we consider it prudent to comment on the arguments raised by the Appellant on the findings by the trial Court that the Respondent did not lose his right to the suit property as he had secured a bank charge over the same during the period the Appellant purports to have taken possession thereof, and that the Appellant did not raise any objection to as required under section 26 of the *Land Adjudication Act* after he learnt that the Respondent had been allocated the suit property. We reiterate in this regard that the onus always remains on the person claiming adverse possession to prove that he or she has complete and exclusive physical possession and control over the

subject land for the requisite period of twelve years, and without the consent of the true owner, which we have found the Appellant has failed to prove.

28. In the event that such possession by the adverse possessor is proved, the title owner will only be able to retain title by bringing evidence rebutting the discontinuance of his possession of the subject land, or of an action for recovery of the land from the adverse possessor as explained in Elements of Land Law, 5th Edition by Kevin Gray and Susan Francis Gray at page 1178 and 1188. The relevant evidence to rebut discontinuance of the title owner's possession is that of retainer of physical possession or of intermittent acts of control over the subject land, while recovery of land requires evidence of the positive steps taken by the title owner to recover possession before the effluxion of the limitation period. It is our view that the charging of the suit property by the Respondent did meet the required threshold for acts of control over the land that rebutted the discontinuance of the Respondent's possession of the suit property. The trial Judge did not therefore err in his findings as regards the legal effects of the charging of the subject land by the Respondent.

29. As regards the finding by the trial Court that the Appellant failed to lodge an objection under the *Land Adjudication Act*, we are of the view that what was in issue in the trial Court was whether the Appellant had proved adverse possession despite the allocation of the suit property to the Respondent. The processes under the *Land Adjudication Act* were to this extent irrelevant, and the applicable law and principles were those with respect to acquisition of title by adverse possession. In addition, the effect of a claim of adverse possession is to defeat a registered title however acquired, and it was held in Maweu v Liu Ranching & Farming Cooperative Society [1985] eKLR that title to land and adverse possession are not mutually exclusive, and an action based on adverse possession is clearly maintainable, notwithstanding that a certificate of title has been issued. Section 38[1] of the *Limitation of Actions Act* in this regard also expressly provides that a person claiming to be so entitled may apply to the court for an order that he or she be registered in place of the person then registered as the owner of the land.

30. To this extent, the trial Judge did err in finding that the Appellant ought to have brought evidence that he filed an objection under the *Land Adjudication Act*, which evidence was not relevant in the circumstances and context of the claim before the trial Court.

31. Save for setting aside the finding of the trial Court that the Appellant was required to raise an objection under section 26 of the *Land Adjudication Act* after he learnt that the Respondent had been allocated the suit property when claiming for adverse possession, we find no merit in this appeal, which is hereby dismissed. We also order that each party shall meet their costs of the appeal in light of our findings.

32. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 5TH DAY OF JUNE, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a True copy of the original Signed

DEPUTY REGISTRAR