



Odera v Were (Civil Appeal E041 of 2024) [2025] KECA 1284 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KECA 1284 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL E041 OF 2024
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
JULY 11, 2025**

BETWEEN

NOAH ODERA APPELLANT

AND

AGNETA ANYANGO WERE RESPONDENT

(Being an Appeal from the Judgment and Decree of the Environment and Land Court at Kisumu (Asati, J.) dated 14th December, 2023 in ELC Appeal No.38 of 2022)

JUDGMENT

1. This is a second appeal from the judgment and decree of the Environment and Land Court at Kisumu (Asati, J.) dated 14th December, 2021 in Kisumu ELC Appeal No. 38 of 2022.
2. In filing the initial suit against Noah Odera, the appellant, Agneta Anyango Were, (Agneta) the respondent herein, as the personal representative and administratrix of the estate of Paul Were Ogutu [deceased, Paul], sought orders of eviction, general damages, permanent injunction and costs.
3. The respondent's case was that Paul was the registered proprietor of land parcel number Kisumu/Kasule/3406 (the suit land) however, the appellant had forcefully taken up possession of part of the suit land and proceeded to illegally put up a house thereon before the estate of the deceased was fully administered, thus intermeddling with the estate; as far as she knew, there had been no transaction between her as the administratrix of the estate, and the appellant; that the suit land remained wholly registered in the name of the late Paul.
4. The appellant denied the claim; and by a counterclaim stating he owned half the suit land on account of a purchase; and prayed for a declaration that the rights of the registered owner to the portion measuring half of the suit land were extinguished by Section 7 of the *Limitation of Actions Act*; that he had acquired title by adverse possession, sought the orders of transfer, prohibition permanent injunction and costs.



5. It was his case that by an agreement dated 12th March, 2007, he entered into a sale agreement with the respondent's co-wife, Leonida Achieng Were (the vendor who had described herself as the owner of the suit land) now deceased for the sale of a part/portion of the suit land measuring half of the suit land at an agreed consideration of Kshs.200,000/= . In his evidence, the appellant admitted that the suit land was in the deceased's name, a fact which was never brought to his attention and that he never carried out a search of the suit land.
6. In its determination, the trial court found that the respondent failed to prove her case against the appellant on the required standards, dismissed the suit and allowed the counterclaim to the effect that the appellant had acquired the status of an adverse possessor, and directed for him to be registered as the proprietor.
7. Dissatisfied, Agneta, appealed against the decision praying that the appeal be allowed and the judgment of the lower court be set aside and substituted with the prayers in the plaint.
8. In her determination, the learned judge noted that clearly, at the time of the appellant's entry onto the suit land, the registered owner was deceased, thus the vendor had no proprietary rights, as the estate of the deceased was yet to be administered.

The learned judge further found that adverse possession entailed the running of time against the interest of the registered owner who has failed to assert his title and remove a trespass or a person in adverse possession from the land. Further, that as at the time of the alleged purchase and entry onto the suit land, there was no person with the capacity to transact in the suit land and against whose title and interest to the suit land time for purposes of adverse possession would run therefore it was erroneous to find that adverse possession had been proved in the circumstances. Subsequently, the learned judge set aside the judgment of the trial court and substituted it with an order dismissing the counter-claim and ordering the respondent's claim ordering eviction of the appellant from the suit land, an order of permanent injunction against the appellant and all his assignees; interest and costs.

9. Dissatisfied, the appellant preferred the present appeal on the condensed grounds faulting the learned judge for failing to evaluate and analyze the evidence, misconstruing the law on adverse possession, disregarding the appellant's submissions, and ignoring the material placed on record as such reaching an unsubstantiated finding on adverse possession.
10. In support of the appeal, the appellant through learned counsel Mr. Arika contended that despite proving his claim for adverse possession, the first appellate court went ahead and voided the sale on the basis of a frustrated contract of sale which was not an issue for determination between the parties; and that by delving into the issue of the void sale agreement, the learned judge arrived at a decision that was so perverse as she introduced extraneous or irrelevant matters. The appellant relied on the case of Samuel Miki Waweru vs. Jane Njeri Richu, Civil Appeal 122 of 2001 and the case of Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR where the Supreme Court held that misdirection on evidence or fact becomes a question of law.
11. Regarding the application of the doctrine of adverse possession, it is submitted that the rights of an adverse possessor are equitable rights that are binding on the land, which land in the instant case has been pleaded by the parties. Relying on the case of Lucy Wairimu Gichuhi & 2 Others vs. Regina Wanjiru Mwago & Another, Nyeri Civil Appeal No. 66 of 2019, the appellant maintains that at the time of his entry onto the suit land, there was no person with capacity and interest to the suit property for the purpose of adverse possession to run.
12. The appellant contends that his partial occupation of the suit property since December 2007; living therein and raising his family for a period in excess of over 13 years at the time of the commencement of



the suit was not disputed, as such adverse possession on the suit land began to run from 12th September, 2007.

13. In rebuttal, the respondent submitted that in his evidence, the appellant indicated to the court that he bought the suit land before applying for a certificate of official search; that he admitted that it was after the purchase of the suit land that it became known to him that it was registered in the name Paul Were Ogutu (deceased) as such the vendor (Leonida Achieng Were) could not confer ownership of the title to him.
14. The respondent argues that despite the appellant discovering that the vendor was not the registered owner, he still proceeded to take possession and construct a house thereon; and that under Section 45 of the *Law of Succession Act*, both Leonida Achieng Were and the appellant committed a crime and he cannot be allowed to benefit from his criminal actions.
15. Regarding the claim for adverse possession, the respondent argued that the appellant's interest in the suit land was never adverse to that of Paul Were Ogutu, as he never dealt with him and never sought his permission and authority post-humous; and that time does not run against the dead. The respondent contends that once the registered owner dies, sections 81,82,83 and 84 of the *Law of Succession Act* take precedence in the management of the estate and not through the disposal of his properties. The respondent maintains that the learned judge was right in holding that at the time the appellant transacted over the suit land, there was no person with the capacity to transact over the subject suit land.
16. This being a second appeal, the Court's mandate is limited to matters of law only. As a second appellate Court, this Court cannot interfere with the concurrent findings of fact by the two courts below. In *Kenya Breweries Ltd vs. Godfrey Odoyo* [2010] 1 KLR176 while citing *Stephen Muriungi and Another vs. Republic* [1982-88] 1 KAR 360 this Court expressed itself as follows:

“In a second appeal, the court has to resist the temptation of delving into matters of facts. The court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters, they should not have considered or looking at the entire decision, it is perverse. Where a right of appeal is confined to matters of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

17. Having considered the record in light of the impugned judgment and the rival submissions presented and the Court's mandate, the main issues for determination are whether the purported sale of the deceased property was void and whether the appellant could claim adverse possession arising from that agreement of sale.
18. Touching on the first issue, Section 45 of the *Law of Succession Act* provides as follows;
 - “(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 2. Any person who contravenes the provisions of this section shall:



- a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - b. be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”
19. The effect of the above provision of the law is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without such authority is guilty of intermeddling which is a criminal offence.
20. Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. At page 973 of the Black’s Law Dictionary, 11th Edition, the definition of the word ‘intermeddler’ makes reference to an officious intermeddler whose definition is provided for at page 1310 as follows:

“Someone who confers a benefit on another without being requested or having a legal duty to do so, and who therefore has no legal grounds to demand restitution for the benefit conferred.”
21. In re Estate of M’Ngarithi M’Miriti [2017] eKLR it was held that:

“... it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act ... any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the Court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”
22. From the provisions of section 45 of the Act and from the aforementioned persuasive decision of the High Court, intermeddling occurs where administrators or any person interested in the estate of a deceased person as a beneficiary or otherwise, deals with the said estate without any lawful authority and in a manner as to diminish such an estate.
23. It is therefore evident that when the appellant allegedly purchased the suit land, the same was registered in the name of the late Paul Were Ogutu. The appellant admitted at the time of purchase, he was not aware that the suit land was registered in the deceased’s name; and further admitted that he never conducted an official search to ascertain the ownership of the suit land.



24. Going by the provisions of the law, it is clear that the actions of the appellant and Leonida Achieng Were the deceased's wife in disposing of the suit land, and the appellant taking possession, occupation and development thereon amount to intermeddling with the estate of the deceased as the estate of Paul Were Ogutu had not been devolved by way of succession and issuance of a confirmed of grant.
25. The sale of the land was illegal null and void and no interest ever was conveyed by the Leonida to the appellant. Equally, the appellant received no interest in the suit land and Leonida had no power to sell the suit land, as the grant had not yet been obtained.
26. Can the appellant claim adverse possession arising from an impugned agreement of sale? The appellant's appeal is hinged on the agreement for sale and adverse possession. The doctrine of ownership by adverse possession is codified in sections 7, 13, and 38 of the Limitations of Actions Act. Section 7 of the Act states:

An action may not be brought by any person to recover the 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.

27. Section 13 of the *Limitation of Actions Act* provides as follows:

- “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor 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.
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.
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.”

28. Further, Section 38 of the *Limitation of Actions Act* provides that:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he 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.”

29. In the instant appeal, the appellant complains that despite proving adverse possession, the learned judge heavily relied on the sale agreement voiding the transaction. In her decision, the learned judge noted that at the time of the appellant's entry on the suit land, the registered owner was deceased. The judge further noted that at the time of the alleged purchase and entry onto the suit land, there was no person to transact in the suit land and against whose title and interest to the suit land time for purposes of adverse possession would run.



30. In the case of Ngugi vs. Kimunio (Environment & Land Case E006 of 2023) [2024] KEELC 1518 (KLR) (20 March 2024) (Judgment) [though persuasive and not binding], the learned judge in the Environment and Land Court held as follows:

“ ... for adverse possession [to take effect], these questions must be answered.

1. How did the applicant take possession of the suit property?
2. When did he take possession and occupation of the suit property?
3. What was the nature of possession and occupation?
4. How long has the applicant been in possession of the land?”

31. Similarly, in the case of Samuel Miki Waweru vs. Jane Njeri Richu (2007) eKLR, this Court differently constituted, expressed itself as follows:

“It is trite Law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise.”

32. In the instant appeal, the respondent argued and termed the agreement executed between Leonida Achieng Were and the appellant as void ab initio, as it amounted to intermeddling with the estate of a deceased person, contrary to the provisions of Section 45 of the *Law of Succession Act*. Indeed, Leonida could not sell the suit property before succession proceedings of the estate of the deceased had been finalized. The contract of sale was therefore illegal, null and void.

33. From the evidence adduced by the parties and on the admission of the appellant, it is evident that as of March, 2007, when the parties executed a contract for the disposal of half of the suit land, the same belonged to the deceased, and no succession proceedings had been commenced or finalized with regard to the estate of the deceased.

34. In view of the foregoing, Leonida lacked the necessary legal capacity to enable her dispose of the suit land, which property belonged to a deceased person, and no letters of administration had been issued.

35. Further, the appellant entered into the suit land as a purchaser and with the permission of Leonida, and therefore his occupation was not hostile or adverse to the respondent. Consequently, the claim for adverse possession is not available to the appellant.

36. The upshot is that we are unable to detect any error or omission nor misapplication of the law or legal principles, as to warrant interfering with the decision by the first appellate court. Ultimately, we find that the appeal lacks merit and is dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF JULY, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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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

