



REPUBLIC OF KENYA



**Malakwen v Kogo (Civil Appeal 290 of 2019) [2024] KECA 912 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KECA 912 (KLR)

**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT ELDORET**  
**CIVIL APPEAL 290 OF 2019**  
**F SICHALE, LA ACHODE & WK KORIR, JJA**  
**JULY 26, 2024**

**BETWEEN**

**JUDETHEUS KIPLAGAT MALAKWEN ..... APPELLANT**

**AND**

**NORMAN KIBITOK KOGO ..... RESPONDENT**

*(Being an appeal from the judgment of the Environment and Land Court at Eldoret (Ombwayo.J) delivered on 1st August 2019 in Eld ELC Case No. 141 of 2014)*

**JUDGMENT**

1. Judetheus Kiplagat Malakwen the Appellant, is appealing against the judgment delivered in Eldoret Environment and Land Court on 1<sup>st</sup> August 2019, by A. Ombwayo. J in favour of Norman Kibitok Kogo the respondent herein.
2. A chronicle of the appeal is that by a plaint dated 6<sup>th</sup> May 2014 the appellant approached the superior court, claiming that he is the registered owner of land Ref No Nandi/ Kebulonik/251, (suit land). He therefore, sought orders of eviction and permanent injunction against the respondent.
3. In rebuttal, the respondent filed a statement of defence dated 26<sup>th</sup> May 2014 and amended on 29<sup>th</sup> February 2016 and a counterclaim, denying the contents of the plaint and disputing the registration of the suit land in the appellant's name. He averred that the registration did not supersede the customary trust in the land existing in favour of the Kogo family. He alleged that he has lived in the suit land since 1983 *nec vi, nec clam, nec precario*. He prayed for: the suit to be dismissed; a declaration that the suit land belongs to the family of Kogo; a permanent injunction to restrain the appellant from harassing and evicting him and alternatively, for a declaration that he has acquired 2 acres of the suit land by way of adverse possession and the same to be conferred to him.
4. Consequently, the appellant filed a reply dated 29<sup>th</sup> May 2014 and amended on 14<sup>th</sup> March 2016 to the defence, together with a defence to the Counterclaim. He averred that the respondent encroached into the suit land in 2013 and occupied a portion thereof measuring ¼ acre but that the respondent has not



been in the suit land for more than 32 years. He averred that the respondent has not satisfied the legal parameters for a claim under adverse possession to succeed and he has no customary law trust to assert on the suit land. The appellant maintained that he is the absolute owner of the land and prayed that the counter claim be dismissed.

5. During the hearing, the appellant testified as PW1 and stated that he was registered as the owner of the suit land in 1969 and the land is therefore his. Further, that he was a police officer who lived in police lines and only went back home in 1995. However, during the period that he was not at home, his wife, children and grandmother, Veronica Chebichii, lived on the land. It was his testimony that the respondent's rightful place is in Nandi/Kiplombe/373 that is in the name of the said grandmother, Veronica Chebichii. He also testified that the respondent entered the suit land in 2013 and that the land in dispute is not family land, as it was bought by his father Kipngetich Arap Tanui.
6. The respondent testified as DW1 and stated that he was born in the suit land in 1983 and lived with his grandmother, Veronica Chelembach Korir on it. He occupies 2 acres of the suit land where he has constructed a house, planted maize, kept cows, got married and has been in possession of the land for 24 years. He further stated that Veronica sued the appellant and Joseph Malakwen Lelei in respect of the suit land, however, he did not know the outcome of the suit.
7. William Kipkemboi Ngetich DW2, testified that he knew both the appellant and the respondent. The appellant is his first paternal cousin, and the respondent's father, Reuben Kipngetich, was adopted by Veronica. The respondent was born, circumcised and married on the suit land. He lives on the land with his family and when the appellant left work in 2005, he found the respondent in the suit land.
8. Upon hearing the matter before him, the learned judge found that the appellant's claim fails for being time barred against the respondent who became an adult in 2001, and lived in, married and developed his portion of the suit land. He held further that the counterclaim succeeds based on adverse possession as the respondent had acquired prescriptive rights over 2 acres of the suit land at the expiry of 12 years from the year 2001.
9. The appellant was dissatisfied by the judgment and he filed the instant appeal alleging that the judge erred in law and fact on several grounds to wit:
  - i. In dismissing the appellant's claim.
  - ii. In finding that the respondent had acquired 2 acres out of land reference Nandi/Kebulonik/251 through adverse possession.
  - iii. In finding that the respondent was using the same portion of land which the deceased Veronica Chebichi Korir was claiming in Eldoret ELC No 588 of 2012, Eldoret HCCC No 36 of 2006 and Eldoret CACA No 82 of 2006 an appeal from Eldoret HCMCE No 99 of 2002 and therefore adverse possession could not succeed in the respondent's favour.
  - iv. In finding that a claim of acquisition of 2 acres by dint of adverse possession had been established in the absence of any expert report on the area the respondent occupied.
  - v. The decision of the judge is legally and factually untenable.
  - vi. In failing to find that the approach/ position taken by the respondent defeated his claim of adverse possession as trust and adverse possession could not be pursued in one case while at the same time challenging the appellant's title deed.
  - vii. The judge erred in failing to note that the respondent had moved into the suit land as a relative to take care of Veronica Chebichii Korir, the appellant's maternal grandmother.



10. This appeal was disposed of by way of written submissions. The firm of Anassi Momanyi & Co. Advocates filed those dated 7<sup>th</sup> June 2023, on behalf of the appellant while the firm of Maritim & Company Advocates filed those dated 28<sup>th</sup> July 2023 on behalf of the respondent.
11. The appellant submitted that the respondent is a relative who was welcomed into the suit land in 2013 until the time that the permission was withdrawn and therefore, the claim for adverse possession should have failed. Additionally, that adverse possession should not have succeeded in light of the fact that their grandmother filed a claim over the suit land the subject of Land Disputes Tribunal and Eldoret CACA No 82 of 2006 and therefore, time ceased running the moment the cases were filed and were pending before the court.
12. It was urged that there was no clarity as to the 2 acres allegedly occupied by the respondent since no survey was conducted and there was contention as to the size of the land he occupied.  
Further, that the respondent disputed the appellant's title to the suit land yet, for the claim of adverse possession to succeed, one must wholly accept the registered owners title to the land. It was further urged that the respondent failed to prove that he was exclusively occupying the portion of the suit land claimed for his claim to succeed.
13. The appellant contended that the respondent cannot fail to recognize the person from whom he is claiming land as a trespasser, while at the same time seeking acquisition of the parcel of land through adverse possession.
14. In opposition, the respondent urged that the judge's finding was right, as he was born and initiated under the Nandi custom on the suit land. That he married and lives there to date. He posited that he has also built on the land, a fact that has not denied by the appellant. Further, that his grandfather (the late Chelembach Korir), was buried on the suit land. He contended that the claim that he came in the land in 2013 is unfounded and there is overwhelming evidence to indicate that he has been on the land since birth.
15. The respondent urged that since he was not a party to the cases that were filed in respect of the suit land, time did not stop running for him and therefore, the appellant is statute barred by effluxion of time. That under the Statute of Limitation, the appellant is estopped from making a claim for land after 12 years, and the respondent has been in the land for more than 12 years.
16. During the plenary hearing, learned counsel Mr. Momanyi appeared for the appellant and reiterated what was contained in their written submissions. Learned Counsel Mr. Maritim appeared for the respondent and also rehashed the contents of his written submissions.
17. We have considered the record of appeal and the rival submissions before us. This being the first appeal, the duty of this Court is as stated in Rule 31 (1)(a) of the [Court of Appeal Rules, 2022](#) as follows:  

“On appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power to re-appraise the evidence and to draw inferences of fact.”
18. Also, this Court in [Abok James Odera T/A A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates](#) [2013] eKLR had the following to state on the role of the Court on first appeal:  

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give



reasons either way. See the case of *Kenya Ports Authority v Kustbon (Kenya) Limited* (2000) 2 EA 212 wherein the Court of Appeal held, inter alia, that: -

“On a first appeal from the High court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

19. The appellant filed suit seeking orders of eviction. He alleged that the respondent was a trespasser. The respondent filed a counter-claim and he alleged that there was a customary trust in favour of the Kogo family and further, that he had acquired the land by way of adverse possession. Ombwayo, J found that the respondent had acquired the 2-acres under the doctrine of adverse possession.
20. Therefore, the only issue for our consideration is whether the learned judge was right in finding that the respondent has acquired the 2 acres of the suit land through adverse possession.
21. The proviso on adverse possession in Section 7 of the *Limitation of Actions Act* provides that:

“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.”

22. Further, Section 13 of the *Limitation of Actions Act* provides more clarity on adverse possession. It provides thus:

“(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.

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.”

23. The appellant urged that the respondent came into the land in 2013 to take care of his grandmother. That is why he allowed him into his land. On the other hand, the respondent posited that he was born, initiated and married in the suit land. This is what the learned judge held on this issue:

“This court finds that the plaintiff was registered as proprietor of the suit land when he was a minor on 17<sup>th</sup> September 1969. The defendant was born on the land in 1983 and lived thereon with both Chelembach Korir and Veronica Chebichii Korir who were the purchasers of the suit land. The defendant became an adult in 2001 and that is when he could assert his rights under the principle of adverse possession.



In respect of this matter, 12 years of adverse possession began running in 2001 until the year 2013. Failure to initiate action against the defendant within 12 years from 2001 to 2013 amounted to laches and at the expiry of 12 years from 2001, the plaintiff's action is time barred."

24. We had recourse to the decision in *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR where this Court pronounced itself on adverse possession as such:

"...Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College* (1900)1 Ch.19, 21."

25. It is not in dispute that the appellant was registered as proprietor of the suit land when he was a minor on 17<sup>th</sup> September 1969. Chelembach Korir and Veronica Chebichii Korir who were the grandparents of the appellant were the purchasers of the suit land. From the evidence of DW2 the respondent's father, Reuben Kipnetich, was 'adopted' and brought in to the suit land by Veronica Chebichii. Therefore, the respondent's father was in the suit land with permission and by invitation.

26. It is also not disputed that the respondent was born, raised, circumcised and married on the suit land. He continued to live peacefully in the suit land with Veronica and his family after the demise of his father. It follows that the respondent was also in the suit land with the permission of the original owner of the suit land Veronica Chebichii. The appellant himself recognized that the respondent was a relative and hence he had permission to be on the land.

27. From the foregoing we are in no doubt that the learned Judge ought to have dismissed the appellant's suit against the respondent as he did because clearly, the respondent was not a trespasser. His presence on the land is legitimate as is discernible from the tracing we have done above. However, the respondent's counter-claim cannot stand either. The respondent cannot plead to have been entitled to 2-acres of land under a customary trust and in the same breath claim to have acquired the 2-acres of land under the doctrine of adverse possession.

28. Accordingly, this appeal succeeds partly with the following orders:

- a. The respondent's counter-claim against the appellant stands dismissed.
- b. The appellant's suit against the respondent stands dismissed.
- c. Each party to bear their own cost.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JULY, 2024**

**F. SICHALE**

..... **JUDGE OF APPEAL**

**L. ACHODE**

..... **JUDGE OF APPEAL**

**W. KORIR**



..... **JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

