



Masambaga & 7 others v Malindi Holdings and Estate Limited (Civil Appeal 165 of 2019) [2022] KECA 782 (KLR) (10 June 2022) (Judgment)

Neutral citation: [2022] KECA 782 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL 165 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JUNE 10, 2022**

BETWEEN

**EVERLYN LUVANDWA MASAMBAGA 1ST APPELLANT
GEDION MACHARIA 2ND APPELLANT
HARRISON CHARO SHUTU 3RD APPELLANT
KIRIMO FONDO SHUTU 4TH APPELLANT
FRANCIS LAWRENCE KATANA FONDO 5TH APPELLANT
CHARLES MICHAEL SHUTU 6TH APPELLANT
RODGERS KARISA NYALE 7TH APPELLANT
ELVIS MWALIMU KATANA SHUTU 8TH APPELLANT**

AND

MALINDI HOLDINGS AND ESTATE LIMITED RESPONDENT

(Being an appeal against the judgment of the Environment and Land Court at Malindi, Honourable J. O. Olola (J) delivered on 20th September 2019) in Malindi ELC no 96 of 2010)

JUDGMENT

1. Malindi Holdings Limited, (“the Respondent”) filed a suit in the High Court by way of an amended plaint dated 15th September 2011, which suit was later transferred to the Environment and Land Court (ELC). The Respondent sought various orders in the said suit against the Appellants herein, including declarations that it is the registered proprietors in respect of several parcels of land being Land Reference Number 9298 Malindi, Land Reference Number 9299 Malindi, and Land Reference Number 9300 Malindi (hereinafter “the suit premises”); an order of mandatory injunction requiring the Appellants to demolish illegal structures and other developments on the suit premises; an order



- of permanent injunction restraining the Appellants, vacant possession, general damages and the costs of the suit.
2. The Respondent's claim was that it is registered as proprietor and as lessee of the suit premise for a term of 99 years from 1st May 1994,. It was its argument that on diverse dates in 2008, the Appellants without any colour of right trespassed onto the suit premises and erected illegal structures thereon, and have thereby prevented the Respondent from developing the suit premises, who has therefore suffered loss and damage.
 3. The Appellants, in a joint Defence dated 14th September 2010, denied that the Respondent was the owner of the suit premises, which they claimed to have lived on for over 12 years. While citing section 7 as read with section 17 of the Limitation of Actions Act, they also claimed that the Respondent's claim was time-barred.
 4. After hearing the parties, the ELC (Olola J.) held that there was evidence that the Appellants or some of them resided on the land from as early as 1989 and it could therefore be inferred that the Respondent purchased the suit properties while some of the Appellants, in particular the 3rd, 4th, 5th, 6th and 8th Appellants were resident therein. However, that any claim by the Appellants for adverse possession of the suit premises could only arise from the time the same came to be registered in the name of the Respondent in 15th September 1994, since the Kenya Industrial Estates previously held the suit premises on behalf of the Government, and allocated the same to private individuals on 19th April 1994, from whom the Respondent bought the suit properties in September 1994.
 5. Further, that the acceptance by some of the Appellants and by their father, one Charo Shutu (since deceased) of compensation that was paid to them by the Respondent in the year 2000 and 2001, terminated any possession that was adverse to the Respondent's interests on the land. According to the trial Judge, whether or not the Appellants left the land in the year 2001 after being paid the compensation was immaterial, as 12 years was yet to expire following the said disruption of their possession by the time the Respondent's suit was filed in the year 2010.
 6. Accordingly, that the Appellants had not met the threshold for a claim of adverse possession, and since the 3rd, 4th, 5th, 6th and 8th Appellants did not have any title to the suit premises, they could not purport to sell and/or lease the land to any of the other Appellants. Lastly, that the Respondent had demonstrated that it duly acquired the suit properties and was registered as the owner thereof, and the trial Court entered judgment in its favour and awarded it general damages for trespass of Kshs 200,000/- annually from the year 2010 until the Appellants grant vacant possession, which vacant possession was to take effect within 45 days from the date of the impugned judgment.
 7. The Appellants being dissatisfied with the said judgment, proffered this appeal. The Appellants challenge the findings of the ELC in seven grounds of appeal in the Memorandum of Appeal dated 18th December 2019 in three main areas, namely whether the recipients of the payment made by the Respondent acted on behalf of, and bound the Appellants, whether adverse possession rights are individual claims; and whether the defence of limitation of actions was available to the Appellant.
 8. As this is a first appeal from the decision of the ELC, we reiterate this Court's role as expressed in *Selle & Another vs Associated Motor Boat Co. Ltd. & Others* (1968) EA 123, where it was stated that an appeal to this Court is by way of retrial, and the principles upon which this court acts in such an appeal are that it 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 to follow the trial judge's findings of fact if it appears



either that they are not based on the evidence on record, or where the trial court is shown to have acted on wrong principles of law, as held in *Jabane vs Olenja* [1986] KLR 661.

9. We heard the appeal on 24th February 2022, and Mr. William Kenga, learned counsel for the Appellants, and Mr. Tukero ole Kina, learned counsel for the Respondent, were both present and canvassed their respective positions while relying on their written submissions they lodged in Court.
10. It is not disputed in this regard that the Respondent is the registered proprietor of the suit premises, and did make payments to persons who were occupying the suit premises in 2001, and who included the father of some of the Appellants. At the trial in the High Court, Mr. Abdallah Said, a shareholder of the Respondent who testified as PW1, confirmed the processes of their purchase of the suit property, and also of the payments made to the Appellant's father and some of his sons, which he termed as extortion money, after they claimed to own the suit premises. He also testified that the suit premises are occupied by the Appellants who have built structures thereon, and referred to criminal case against some of the occupiers for forcible detainer of the suit premises which they were acquitted. He produced the documents of title to the suit property and agreements of the payments to the Appellants' father and brothers.
11. PC Gabriel Kosgei, testified as PW 2, and stated that he is a gazetted crime Scene officer and was requested to visit the scene by the complainant during the case on forcible detainer, and he produced photographs of the suit premises taken on 30th September 2010 attached to a report dated 5th October 2010 which showed constructions made thereon by the Appellants. He further testified that he again went to the scene on 16th March 2011 and took photographs which were annexed to a report dated 29th March 2011, and again on 25th October 2011 and prepared report on 5th December 2011 showing the developments on the property at different stages of construction; and lastly on 11th October 2013, when he took photographs showing new constructions on the suit premises.
12. Edward Merenge Kiguru. PW 3 a licensed surveyor based in Mombasa, referred to a survey report dated 6th March 2010 which was later updated in 2015, that he prepared on the suit premises showing its location and structures thereon. He noted that when he visited the property in 2010, there were people occupying the suit premises, and new structures constructed thereon in 2015.
13. The Appellants on their part called three witnesses to testify in support of their case. The first witness was Harrison Charo Shutu (the 3rd Appellant) who testified as DW 1, and stated that he stayed on Plot 9297, and was born thereon in 1963. He stated that the 4th, 5th, 6th and 8th Appellants were his brothers while the 1st and 7th and 8th Appellants were a lodger and neighbours respectively. His evidence was that all his brothers were born on the suit premises, and the other Appellants occupied it in 1997, and he referred to letters from the Government officers on their entitlement to the suit premises. DW1 denied receiving money from the Respondent and testified that it was his brothers, namely Philip Charo and John Charo Shutu who entered into agreements with the Respondent and accepted to received payment, but as individuals and not on behalf of the other family.
14. The second witness (DW 2) was David Randu, who testified that he was the Town Clerk Municipal Council of Malindi in 1989, and wrote a letter dated 13th December 1989 addressed to the District Officer, Malindi, whose subject was on Charo Shutu's residence at a place designated known as M5 in Industrial area. He conceded that he did not know the owner of the land, and that his letter did not show any parcel number neither was there was map or plan attached to it. The last witness who testified on behalf of the Appellants was Hamed Omar Hamed (DW3), who also who testified that he was the Assistant Chief of Shela Sub-Location in February 1994, and Town Clerk Municipal Council of Malindi in 1989, and wrote a letter dated 1st February 1994 confirming that Charo Shutu's family



lived on Plot M5 and had always lived there since he was appointed a chief in 1990. He testified that the 3rd to 8th Appellants are all members of Charo Shutu's family and still reside on the said land.

15. Since the Appellant's occupation of the suit premises is not contested, the issues arising for determination in this appeal are two, namely, the legal effect on the Appellants' claim, if any, of the payments made by the Respondent, and whether the Appellants established a claim of adverse possession of the suit premises.
16. On the first issue of the legal effect of the payments made by the Respondent, the Appellants' counsel's submissions were that the Appellants had invoked the doctrine of adverse possession to acquire the suit premises individually and not through inheritance from their father, their defence of limitation was not based on inheritance Charo Shutu. Therefore, that the acceptance of compensation by their father, Charo Shutu, did not terminate any possession that was adverse to the Respondent's interest on the land. The counsel further submitted that there was no evidence of the Appellants' involvement in the purported compensation, neither did they authorize the same. Reliance was placed on the doctrine of privity of contract to submit that the purported sale agreements and/or compensation between the Respondents and the relatives of the Appellants were not binding on the Appellants.
17. It was also the Appellants' argument that the recovery of land in adverse possession could only be done through an action of recovery of the same or reentry by the registered owner into the land, and that time stops running against a squatter if he vacates the suit premise or acknowledges the true owner's title. Their counsel submitted that the Appellants had been living on the suit premise from or before 1989, and that when the compensation and/or extortion monies were paid to third parties in 2000 and 2001, the Appellants did not move out of the suit premises and therefore, time continued running, notwithstanding the said compensation, which in any event did not concern them.
18. Reference was in this respect made to the decisions in *Joseph Mutafari Situma* Civil Appeal 351 of 2002 and *Joseph Gabumi Kiritu* Civil Appeal no 20 of 1993, for the submission that unless and until a squatter vacates the suit premises or acknowledges the true owner's title, time cannot stop running in favour of an adverse possessor; and in *Leonola Nerima Karani* Civil Appeal No 142 of 2007 that time against an adverse possessor stopped from running when the true owner asserts an ownership title through the filing of a suit for recovery of his land but not through mere administrative action or any other action which does not amount to effective entry on the suit land. Also cited was the holding in *Benson Mukuwa Wachira*, Civil Appeal No 121 of 2006 (Nairobi) that a promise made by a trespasser to leave the land on which he is trespassing but does not leave as so promised cannot be said to be an acknowledgement of title of the owner, neither is a promise to buy the land, which does not interrupt time or stop time.
19. The Respondent's counsel's position was that the Appellants asserted their claim as a birth right, thereby invoking the doctrine of adverse possession in the suit as a defence through inheritance from their father, Charo Shutu argued that the Appellants should not be allowed to turn an inherited claim to an individual claim with a view to beat justice. Therefore, since the Appellants have acknowledged the Respondent's title in the suit premise; and the Appellants' predecessors in the adverse possession waived their rights; that time stopped running upon payments of compensation. The Respondent submitted that the Appellants were representatives, heirs and or assignees to the parties to the contract and therefore bound by the contract. It is the Respondent's argument that the Appellants' father was paid and he was acting on behalf of the larger family.
20. The Respondent's counsel further submitted that under section 37 of the Limitation of Action Act adverse possession operates against title, and only applies where the land is registered, and the suit property was not registered before 1994. Additionally, the Respondent got an acknowledgement as



owner of the suit premises from the Appellants who accepted compensation in 2000, six (6) years after such registration, thus the Appellants' right to adverse possession was yet to crystalize, and the said payment terminated any claim that their possession was adverse to the Respondent's interest on the land. The counsel contended that the Appellants were approbating and reprobating which is an unacceptable conduct, and placed reliance on the decision to this effect in *Evans v Bartlam* (1937) 2 All ER 649 and by this Court in *Behan & Okero Advocates vs National Bank of Kenya* (2007) e KLR that a party could not be allowed to blow hot and cold at the same time.

21. The legal effect of payment by the Respondent on the Appellant's claim can only be discerned against the requirements required to proof adverse possession, which are firstly, the fact of possession, and secondly the continuous possessory intent. As explained in *Elements of Land Law*, 5th Edition by Kevin Gray and Susan Francis Gray at page 1179 "Possession is attributed to the squatter (and his possession is adverse) only if he has both factual possession (factum possessionis) and the requisite intention to possess (animus possidendi). These elements of factum and animus interact significantly and must coincide continuously throughout the entirety of the required period of possession.
22. This position was also explained by Makhandia JA in *Mtana Lewa vs Kabindi Ngala Mwangandi* [2015] eKLR as follows:

"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:-

"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."
23. The animus to continuously possess and assert rights over the suit premises in the instant case was therefore definitely interrupted by the payments made by the Respondent to those in possession thereof, which possessors also expressly ceded any claim to the suit premises and acknowledged the Respondent's superior title to and ownership of the suit premises in the agreements entered into. The Appellants' argument in this respect is that the said payment was not received on their behalf and they did not in fact receive any payment, nor enter into any agreements with the Respondent, therefore that their possession has been uninterrupted since 1989.
24. However, their own evidence of possession, which was adduced on their behalf by DW2 and DW3 in the trial Court, was that it was the members of the family of Charo Shutu' who lived on Plot M5. The same Mzee Charo Shutu is the one who the Respondent demonstrated received the payments made ostensibly on behalf of his family that was residing on the suit premises, and entered into agreements acknowledging the Respondent's ownership of the suit premises in 2000 and 2001. The Appellants did not in this respect bring any evidence of possession that was independent of, and separate from that the family of Charo Shutu, and having relied on evidence of possession as members of the said family, the payment by the Respondent therefore effectively terminated their intention to adversely possess the suit premises. They cannot therefore be allowed to approbate and reprobate.



25. In this respect a distinction needs to be made between the elements that need to be proved by a person claiming adverse possession, and what needs to be proved by the legal owner in an action for recovery to defeat adverse possession. The onus always remains on the person claiming adverse possession to prove that the possession is complete and exclusive, is open, not by force and adverse, not by the consent of the true owner, irrespective of any action of recovery by the legal owner. On the other hand, an action for recovery only requires proof on the part of the legal owner of the positive steps taken to recover possession before the effluxion of the limitation period, and does not divest the adverse possessor of his or her burden of proof. The payments by the Respondent were made before it brought an action for recovery, and their only legal effect was to negate and rebut the Appellants' intention to possess and exclude the world at large from the suit premises and their adverse possession at the time of payment.
26. On the second issue as to whether the defence of limitation of action was available to the Appellants, their counsel submitted that the trial Judge found that the Appellants had been on the suit premise from as early as 1989, and that when the Respondent purchased the suit premise in 1994, they were already on the suit land. Therefore, that by the time the purported agreements were signed with the Respondent with third parties, the Appellants had been on the suit premise for over 12 years, since their possession was not interrupted by the said agreements and the Respondent did not recover possession. Additionally, that since the trial Judge rightly found that the Respondent became the registered owner on 15th September 1994, 16 years had passed by the time the suit was filed in the year 2010.
27. The counsel further submitted that the suit premises were part of Plot no 5 which alongside Plot no M4 housed the family of Charo Shutu, and made reference to various other decisions by this Court to that effect, namely *Kirimo Shutu & 6 others vs Godfrey Karume*, Civil Appeal No 85 of 2016 and *Chevron (K) Ltd vs Harrison Charo wa Shutu*, Civil Appeal No 17 of 2016
28. On his part, the Respondent's counsel placed reliance on the decision in *Joseph Gabumi Kiritu vs Lawrence Munyambu Kabura* Civil Appeal No 20 of 1993 that time which has begun to run is stopped either when the owner asserts his rights or when his right is admitted by the adverse possessor. The counsel reiterated that the limitation period had not crystalized even though the Appellants had been on the suit premise from 1989, and cited the decision of this Court in *Francis Gitonga Macharia vs Muiruri Waitbaka*, Civil Appeal No 110 of 1997 [1998] eKLR that the limitation period for purposes of adverse possession only starts running after the registration of the land in the name of the Respondent.
29. It was his further submission that it is trite law that adverse possession could not accrue against land owned by the government under section 41 of the *Limitation of Actions Act*, and that possession of government land was as offence under section 142 of the *Government Land Act*. The counsel maintained that only six (6) years had passed before time stopped running against the Respondent when the Appellants accepted compensation from the Respondents through Charo Shutu, whom they claim their interest from. In addition, that after the said compensation, the Respondent filed the suit in 2010, and the period of 12 years was yet to expire following the disruption of their possession.
30. We note that the Appellants did not contest the Respondent's averments that the suit premises were government land before their allocation in 1994. It was in this respect held by this Court in *Chevron (K) Ltd vs Harrison Charo Wa Shutu* [2016] eKLR in similar circumstances that "...Until 1994 the property was Government land hence the period before 1994 does not account for the period to be computed in arriving at the statutory 12 years as there cannot be a claim of adverse possession against public land. See *Wambugu v. Njuguna* [1983] KLR 172. We have in this respect also found that the legal effect of the payments made by the Respondent in 2001 was to legally negate and disrupt any adverse possession by the Appellants, as they thereby acknowledged the title of the Appellant. As



conceded by the Appellants, acknowledgment of an owner’s title by a trespasser causes time to stop running, and the required period of possession recommences from the date of acknowledgment, and they also cited decisions to this effect, notably Joseph Mutafari Situma (supra) and Joseph Gahumi Kiritu (supra).

31. It is not disputed that the Appellants continued with their possession even after the said payments made by the Respondent. However, the legal effect of the said payment on the limitation period was that time starts to run afresh in 2001 which is when the right of action accrued to the Respondent, and the Respondent’s suit filed in 2010 was therefore within the time limit provided by section 7 of the Limitation of Actions Act which provides that an owner of land 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, The defence of limitation of action is therefore not available to the Appellants.
32. Lastly, the Appellants have cited decisions of this Court which they claim made findings in favour of the Charo Shutu family in respect of the suit premises, In Kilimo Shutu & 6 others vs Godfrey Karume [2017] eKLR this Court noted of the Appellant’s claim therein that it “...therefore came as a surprise when sometimes in 2013 they learnt that, apart from the respondent holding a letter of allotment, he had also been subsequently registered as the proprietor of a portion, now described as parcel number LR. No. 4161 (the suit property) originally known as “Plot No. A1...”.
33. In Chevron (K) Ltd vs Harrison Charo Wa Shutu [2016] eKLR. the Court described the claim before it thus: “The appellant, Chevron (K) Ltd which, before its change of name, was known as Caltex Oil (K) Ltd and which was subsequently bought by Total (K) Ltd, was by stand premium of Kshs. 150,000 granted a lease of MALINDI LR. PORTION NO. 8897 (the suit premises) for a term of 99 years from 1st May 1994. The appellant instituted a suit in the Malindi Environment and Land Court, being Civil Case No. 29 of 2008 against the respondent, Harrison Charo wa Shutu claiming that the latter had unlawfully trespassed on the suit premises...” The land that was the subject of the adverse possession claims therein was evidently different from the suit premises in the present appeal.
34. More importantly, unlike in the present appeal, no payments were made to the possessors of the land by the legal owner in the two cited cases, which payments as we have found had far reaching legal effects on the Appellants’ claim for adverse possession and the application of the Limitation of Actions Act provisions.
35. We therefore find no merit in this appeal, and accordingly dismiss it with costs to the Respondent.
36. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF JUNE, 2022.

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

