



**Chepkwony v Malenya (Civil Appeal 90 of 2018)  
[2021] KECA 47 (KLR) (23 September 2021) (Judgment)**

Neutral citation: [2021] KECA 47 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 90 OF 2018  
W OUKO, RN NAMBUYE & W KARANJA, JJA  
SEPTEMBER 23, 2021**

**BETWEEN**

**JOEL CHEPKWONY ..... APPELLANT**

**AND**

**ENNES SHISIALI MALENYA ..... RESPONDENT**

*(Being an appeal arising from the Judgment/Decree of the High Court of Kenya,  
(M. Njoroge, J.) dated 21st March 2018 in Kitale ELC Case No. 58 of 2010)*

**JUDGMENT**

- 1 This is a first appeal arising from the judgment of the Environment and Land Court (ELC) at Kitale High Court, (M. Njoroge, J.).
- 2 The background to the appeal albeit in summary form is that the appellant is the registered proprietor of LR No. Transnzoia/Sinyerere/ Kipsaina Block 8/Kesogon/305 comprising 4.0475acres (the suit property). It was his averment and testimony at the trial that he only sold two (2) acres out of the suit property to the respondent. The sale did not however materialize due to the respondent's failure to clear the balance of the purchase price as had been agreed between them and for lack of Land Control Board consent sanctioning the transaction. The respondent's refusal to vacate the suit property as was requested of her by the appellant after the sale transaction failing to materialize is what prompted him to file a plaint dated 5th July, 2010 in the Environment and Land Court (ELC) Kitale Civil Suit No. 58 of 2010, seeking a declaration that the respondent was a trespasser and that she should be evicted from the suit property together with attendant orders for costs and any other relief that the honourable court may deemed fit to grant.
- 3 In rebuttal, the respondent filed a defence dated 22nd July, 2010. The sum total of her averments and testimony at the trial is that she purchased a total of four (4) acres out of the suit property. She variously paid a total of kshs. 235,000.00 towards the said purchase. She settled thereon in the year



1997 soon after the execution of the first sale agreement for two acres. The second agreement for sale of the additional two acres was executed in 1999. She concedes the full purchase price was not paid for the last purchase of the additional two acres on account of appellant's failure to obtain the requisite Land Control Board consent which was conditional to the payment of the balance of the purchase price. That, although she did not utilize the leave granted to her by the trial court on 14th November, 2013 to amend her defence to include a counterclaim for adverse possession, it is her position that she had been on the land in excess of twelve years as at the time the appellant's claim was initiated against her. She is therefore entitled to the two portions she purchased from the appellant and in respect of which she had been in control, use and occupation of since the time of purchase.

She therefore prayed for the dismissal with costs of appellant's claim against her.

4 In his reply to defence, appellant denied that the respondent took possession of the suit property in 1997 or that there was a second sale agreement that was contingent on the consent of the Land Control Board. He blamed the respondent for breach of the agreement for sale of two (2) acres executed between them in 1997. He denied respondent's claim that she was entitled to the suit property by way of adverse possession and that the defence to be dismissed and his claim allowed with costs.

5 At the conclusion of the trial, the learned judge analyzed the record, identified issues for determination and, inter alia, expressed himself thereon as follows:

“41. In my view, the defendant knew that she was seeking title by way of adverse possession since the day she filed her original defence in this matter and any amendment may have only been aimed at defining the issue in a more erudite manner.

42. Though refined pleadings are necessary to make the work of the court and of a party's adversaries easier in defining the real issues in controversy where the document filed by the litigant leaves no doubt as to what kind of claim the litigant is making, the court should not ignore it.

43. In this case, the court will not ignore the claim for adverse possession merely because the defence was not amended to read “amended defence and counterclaim” as intended. It may be that the defendant left issues of crafting pleadings into the proper form to her legal experts, the advocates who represented her and who, one after the other, let her down and departed from the scene without accomplishing a task as simple as filing an amended defence and counterclaim as earlier ordered by the court. I note that paragraphs 7 and 8 of the plaintiff's reply to defence dated 12/8/2010 state as follows:

“7. It is denied that the defendant has resided on the land for any duration as alleged, and the defendant is put to strict proof of the allegation.

8. It is denied that the defendant has been in continuous or uninterrupted occupation of the said property, and it is further denied that she is entitled to be registered as the owner of the property by way of adverse possession.”

44. This court therefore deems the pleadings at paragraph 8 and 9 of the defence as sufficient for the purpose. In view of the pleading by the plaintiff as cited in the foregoing paragraph, denying the plaintiff this remedy for the sole faults of her counsel is to me an over-reliance on formalities and technicality which is discouraged by Article 159 of the Constitution. Substantive justice is to be encouraged.”



6 The learned Judge construed Article 159 of the *Constitution of Kenya* and considering it in light of the decision in the case of *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR expressed himself as follows:

“45. In this case, I therefore find that the parties were well aware of each other’s case from the pleadings. Consequently, I find that the defendant has established her claim for title by way of adverse possession on a balance of probabilities.”

7 The appellant was aggrieved and is now before this Court on a first appeal raising eleven (11) grounds of appeal namely that: the trial judge erred in law and in fact: in entering judgment and making orders in favour of the respondent which she had not sought or prayed for in her pleadings; in departing from the law and established practice in holding that a judgment for a claim of adverse possession could obtain without the institution of an originating summons or process; in failing to hold that non-compliance with the provisions of the *Land Control Act* rendered the agreements between the appellant and the respondent null and void for all purposes; in disregarding or rejecting some of the appellant’s documents without evidence from the respondent controverting them; in holding that the respondent proved her claim of adverse possession without any tangible and cogent evidence to support the same; in failing to appreciate the fact that the appellant is resident on L.R No. Trans-Nzoia/Sinyerere/Kipsaina Block 8/Kesogon/305 and awarding the property to the respondent amounts to evicting the appellant from the suit property; in failing to observe that the agreements between the appellant and the respondent had not been rescinded formally by either party and therefore a claim based on adverse possession could not hold; in selectively using the documents produced by the appellant in his judgment and in some instances using the appellant’s documents to prove the defendant’s case; in making inferences, propositions, speculations and allegations of forgery and fraud without proper, tangible and cogent evidence and particulars in the respondent’s pleadings to support the same; in misapplying the rules of engagement in civil litigation by extrapolating the respondent’s pleadings to the detriment of the appellant’s case; and, lastly, in not applying properly the provisions of sections 107 and 109 of the *Evidence Act*, Cap 80 Laws of Kenya, section 6, and 7 of the Land Control Act concerning the respondent’s evidence in the Superior Court.

8 When the appeal was called out for plenary hearing, there was no appearance for the firm of Bungei & Murgor Advocates on record for the appellant though served electronically by the Deputy Registrar of the Court with the hearing notice for the hearing of the appeal on 19th January, 2021 at 4.09 pm. Learned counsel Mr. Kipkesai appeared for the respondent. The Court being satisfied that the firm of Bungei & Murgor Advocates had due notice of the date fixed for the hearing of the appeal, allowed Mr. Kipkesai to prosecute the appeal.

9 Mr. Kipkesai informed the Court that both parties had filed written submissions. Those for appellant were filed on 28th January, 2021 while theirs were filed on 4th February, 2021 and which they had agreed to adopt fully without oral highlighting. The appeal was therefore canvassed through written submissions in the presence of Mr. Kipkesai for the respondent but without oral highlighting.

10 Supporting the appeal, the appellant relied on sections 107 and 109 of the Evidence Act Cap 80 Laws of Kenya and the case of *Wambugu vs. Kamau Njuguna* [1982-1988] 1 KAR and faulted the learned Judge for: granting a declaration that the respondent had acquired title to the entire suit property by adverse possession in the absence of supporting pleadings or evidence failing to determine the date from which time for purposes of adverse possession was to start running in favour of the respondent especially when it is on record that neither party gave notice to the other rescinding the agreement(s) of sale; failing to appreciate that the respondent’s response to his claim against her for a declaration that she was a trespasser and should therefore be evicted from the suit property was simply for dismissal of



- the appellant's claim against her with costs and not for her to be declared as owner of the suit property by way of adverse possession; to appreciate that rival pleadings and testimonies of the respective parties herein are explicit that the respondent had purchased only two (2) acres of land from the suit property in respect of which she pleaded expressly that she was amenable to a refund of the consideration she had paid towards the aborted sale with interest.
- 11 In light of the above assertions, the appellant therefore contends that the learned Judge's decision declaring the respondent as entitled to the entire suit property did not only go contrary to the respective parties' pleadings herein but it also amounted to constructive eviction of the appellant from his land. That finding was also erroneous as according to him, the relief of adverse possession was not available to the respondent for her failure to amend her defence and introduce a counterclaim seeking orders that she was entitled to four (4) acres out of the suit property by way of adverse possession or alternatively commence the claim for adverse possession through an originating summons.
  - 12 Relying on the case of *Independent Electoral and Boundaries Commission vs. Stephen Mutinda Mule & 3 Others* [2014] eKLR and *Raila Amolo Odinga & Another vs. Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR the appellant faulted the learned Judge, firstly, for suo motu invoking and applying Article 159(2)(d) of the Constitution of Kenya, 2010 to accord relief to the respondent which was neither pleaded for in her pleadings nor raised in their submissions; and second, for the failure to appreciate that the proper procedure for instituting a claim for adverse possession is by way of originating summons under sections 37 and 38 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, supported by a supporting and verifying affidavits.
  - 13 Relying on the High Court decision of *Gabriel Mbiu vs. Mukinda Marenya* [1993] eKLR; the case of *Titus Mutuku Kasuve vs. Mwaani Investments Limited & 4 Others* [2004] KLR 184 and *Samuel Miki Waweru vs. Jane Njeri Richu*, [2007] eKLR all on elements for sustaining a claim for adverse possession submitted that the respondent's claim fell short of the above threshold firstly for the respondent's failure to institute her claim by way of originating summons; and second, for failing to satisfy elements and or ingredient for sustaining a claim for adverse possession especially when the record is explicit that an application for injunction dated 27th March, 2017 was allowed restraining the respondent from constructing a residence on the suit property, while exhibit 6 from Kesogon Police Patrol base and exhibit 7 from the District Commissioner Trans Nzoia East County are both explicit that there were squabbles on the suit property. Allegations of enjoyment of a quiet and peaceful occupation of the suit property did not therefore arise in the circumstances.
  - 14 The appellant also relied on the case of *Ernest Wesonga Kweyu vs. Kweyu Omuto*, Civil Appeal No. 8 of 1990 and faulted the learned Judge for: making inferences, propositions, speculations and allegations of forgery or fraud in the absence of particulars of the same having been pleaded and proved by the respondent; discounting the appellant's documentary exhibits in favour of the respondent's oral testimony without basis; failing to appreciate that there were no express terms on the agreements indicating as to when the respondent was put in possession for purposes of adverse possession, on the totality of which the appellant prayed for the appeal to be allowed with costs to her.
  - 15 In rebuttal, the respondent relied on paragraphs 9 and 10 of the defence and submitted that all the reliefs granted by the learned Judge in favour of the respondent were well founded both on facts and in law especially when the above mentioned paragraphs explicitly demonstrate that the respondent pleaded that she was entitled to be registered as proprietor of the entire suit property and in the alternative a refund of kshs. 235,000.00 being the full consideration for the first two acres and kshs.95,000.00 paid towards the balance of two acres, in addition to specifically praying for the dismissal of the appellant's claim. That the learned Judge's holding that the respondent was in actual possession of the suit property was well founded both on the pleadings and evidence tendered by the



- rival parties. Nowhere in his pleadings or evidence did the appellant ever state that he was in occupation of any portion of the suit property which the respondent contends was wholly under her possession, control and occupation from the date of the purchase of the first two (2) acres in 1997.
- 16 The respondent relied on the case of *Stephen Kagiku Maruba vs. Kibe Maruba Legal representative & Another* [2007] eKLR and *Gulam Miriam Noordin vs. Julius Charo Karisa* [2015] eKLR, the respondent submitted that the learned Judge fell in no error when he exercised his discretion and granted the relief of adverse possession in her favour as set out in her pleadings as opposed to raising the same either in a counterclaim or through an originating summons.
- 17 Relied on the case of *Titus Mutuku Kasuve vs. Mwaani Investments Limited & 4 Others* [2004] eKLR and *Public Trustee vs. Wanduru Ndegwa* [1984] eKLR and submitted that the respondent's claim satisfied the threshold for sustaining a claim for adverse possession as her assertion that: she took possession of the first two acres in 1997 and the latter two acres in 1999, she was in open and hostile possession of the suit property, and lastly, that by the time the injunction orders were issued against her in 2017 and exhibits 6 and 7 issued, she had been on the land for over eighteen (18) years, a fact supported by both the rival pleadings and evidence tendered before the trial court.
- 18 The respondent termed as outrageous the appellant's submission that the learned Judge interpreted his documents in a manner to suit the respondent's case because according to her the learned Judge interpreted those documents in accordance with the law, and evidence tendered in court by both sides on the basis of which the learned Judge admitted plaintiff's exhibit 1, 3 and 4 which were not only common to the evidence of both sides but also because both parties admitted executing them. Failure to refer to the ignored documents tendered by the respondent therefore occasioned no miscarriage of justice to either party while according to her exhibit 2 was rejected for good reasons as set out in the judgment and which according to the respondent were well founded on the record.
- 19 This is a first appeal. It is our duty to analyze and reassess the evidence on the record and reach our own conclusion on the matter. See *Selle vs. Associated Motor Boat Company* [1968] E. A 123, *Jabane vs Olenja* [1986] KLR 661, 664. This court stated in *Jabane vs. Olenja* [supra] that it will not lightly differ from the findings of fact of a trial Judge and will only interfere with them if they are based on no evidence. See also *Kenya Ports Authority vs. Kuston (Kenya) Limited* [2009] 2 E. A 212 wherein the court summarized the principle in the following words: "This being a first appeal to this court, is to 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 that respect....".
- 20 We have considered the record, the principles of law applicable and in our considered view only one issue falls for our determination namely, whether the conclusions reached by the learned Judge in the impugned judgment are unfounded both on the facts and in law as asserted by the appellant or wellfounded both on the facts and the law as asserted by the respondent.
- 21 We adopt the record as assessed above for purposes of resolving the above issue. The appellant relied both on his plaint and reply to defence in support of his assertion that he was entitled to relief as prayed for in his plaint. Paragraph 8 of the plaint read as follows:
- "8. The plaintiff further states although the defendant failed to honour her pledge, she has continued unlawfully being in occupation of the plaintiff's land and the honourable court ought to compel her to move out or be evicted."



The Respondent's response to the above averments is what is contained in paragraph 6, 8 and 9 of the defence. These read:

"6. The defendant denies the contents of paragraph 8 of the plaint and states that the payment of the balance of kshs.40,000.00 was subject to the plaintiff obtaining consent from the Land Control Board which he failed and the defendant avers that the plaintiff is the one guilty of breach of contract.

.....

8. The defendant avers that she has been in occupation and possession of the suit property for a period exceeding 12 years and this suit has been brought out of time and is therefore bad in law and an abuse of the due process of this honourable court.

9.The defendant further avers that having been in continuous and uninterrupted occupation/possession of the suit property and having buried some of her relatives thereon, she is entitled to be registered as the proprietor thereof by way of adverse possession.

By way of rejoinder, the appellant put up the following response in his reply to defence:

"3. It is denied that he defendant took possession of any land in the year 1997 and the defendant is put to strict proof.

.....

6. Paragraph 6 of the defence is denied and the defendant put to strict proof thereof.

7. It is denied that the defendant has resided on the land for any duration as alleged and the defendant is put to strict proof of the allegation.

8. It is denied that the defendant has been in continuous or interrupted occupation of the said property, and it is further denied that she is entitled to be registered as the owner of the property by way of adverse possession."

22 We have given due consideration to the above rival pleadings. The approach the learned Judge ought to have taken in resolving the controversy in the above highlighted rival pleadings and evidence, and, which this Court on appeal is also obligated to take into consideration in the discharge of its mandate herein is as has been crystallized by principles of law enunciated by both the predecessor of this Court and the court itself with regard to the weight to be attached to the respective parties pleadings when resolving the controversy arising therefrom as between the disputing parties.

23 In *Captain Harry Gandy vs. Caspar Air Charters Limited* [1956] 23 E.A.C.A. 139 the predecessor of the court was explicit that:

"Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment."

while in *Odd Jobs vs. Mubia* [1970] E.A 476 the predecessor of the court added that:

"A court may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the issue has been left to the court for decision."

24 In *Ole Nganai vs. Arap Bor* [1983] KLR 233 the court was explicit that a court has no power to grant orders neither pleaded nor prayed for by the parties.



- 25 We have considered the above threshold in light of the respective parties rival pleadings both generally and aspects of them as highlighted above in particular. We are satisfied that issue of possession and occupation of the suit property for purposes of a claim for adverse possession had sufficiently been pleaded by the respective parties in their respective rival pleadings set out above.
- 26 We are therefore satisfied that the learned Judge cannot be faulted for reaching the only plausible conclusion based on a proper appreciation of the above pleadings that indeed a claim for adverse possession had sufficiently been pleaded in the respondent's defence and rebutted in the appellant's reply to defence.
- 27 As for proof of those averments, sections 107 and 109 of the Evidence Act, Cap 80 Laws of Kenya are explicit on the burden of proof in civil litigation. They provide:

107.(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

- 28 Our take on the construction of the above two provisions of law is that either party was obligated in law to adduce evidence to support the respective rival positions taken by them in their respective rival pleadings of which each claim to have discharged and were therefore entitled to relief as respectively claimed by them in their respective pleadings all of which turn on the issue as to whether the relief granted to the respondent by the trial judge is sustainable or not.
- 29 On possession and the date for computation of time for purposes of adverse possession the appellant is on record as having stated this in his examination in chief:

"...the defendant took possession of the land in 1999. She has constructed on the two acres. The defendant has not paid me the balance of kshs.45,000.00 and for development..."

and thus in cross examination:

"I went to the DC to report that there was a person who was staying on my land yet she had not paid me all the money..."

The respondent on the other hand had this to say

"I first purchased two acres in 1992 (it should read 1997 as per the evidence). In 1999, I bought another two acres making a total of 4 acres...."

.....

I have been staying on the 4 acres since 1997 and 1999. I have not obtained title because the plaintiff has refused to give me title. I pray the plaintiff case be dismissed with costs."

- 30 In *Karugi & Another vs. Kabiya & 3 Others* [1987] KLR 347, the court was explicit that the burden was always on the plaintiff to prove his/her case on a balance of probabilities and that such burden was not lessened even if the case was heard by way of formal proof.



31 The approach we take and which we fully adopt in resolving the above rival position is that taken by the court in *Chandrakant Devraj Shah vs. Alibhai Haji & Another* [2018] eKLR in which the court expressed itself inter alia as follows:

“... In *Kasuve vs. Mwaani Investments Limited and 4 Others*, [2004] 1KLR 184, the court was emphatic that in order to be entitled to land by adverse possession, the claimant must prove that he had been in exclusive possession of the land openly and as of right and without interruption for a period of twelve (12) years, either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. See also *Jandu vs. Kirpal* [1975] EA 225; *Ng’ati Farmers’ Co-operative Society Ltd vs. Councilor Ledidi & 15 Others* Nakuru CA No. 64 of 2004; *Francis Gicharu vs. Peter Njoroge Mairu* Civil Appeal No. 293 of 2002; *Kimani Ruchine vs. Shift Rutherford & Co. Ltd* [1980] KLR10; *Benjamin Kamau Murima & others vs. Gladys Njeri*, Civil Appeal No. 213 of 1996; *Wasui vs. Musimba* [2002] KLR 396; *Kweyu vs. Omutu* [1990] eKLR 709.

32 In line with the principles of law distilled from the above case law, in order for the appellant to succeed in his claim against the respondents, he was obligated to demonstrate that the acts relied upon to establish adverse possession were actual, visible, exclusive, hostile, open and notorious; that the respondents lost their right to the suit property through either dispossession, or discontinuation, of their possession of the same by virtue of proven acts or activities carried out on the suit property by the appellant which were inconsistent with the purpose for which the respondents intended to use the suit property for; that on the facts on the record, the appellant had used the suit property as of right *Nec vi, Nec clam, nec Precario* (no force, no secrecy, no persuasion); that the appellant’s occupation of the suit property was not derived from the respondents in the form of permission, agreement or grant; that the respondents held title of the suit property as at the time the appellant initiated the OS, resulting in this appeal; that the evidence tendered before Court in the appellant’s favour was sufficient for the court to draw legal conclusion that the appellant’s claim for adverse possession against the respondents was well founded both in law and on the facts.

33 In light of the above crystallized position in law, the appellant was obligated to prove his assertion in both his pleadings and evidence that although the respondent entered the suit land in 1997, according to him she was not entitled to any portion of it by way of adverse possession, firstly, for the failure to invoke the proper mode of procedure for seeking the relief; and second, for the failure to satisfy the prerequisites for granting the relief, while the respondent on the other hand was obligated in law to prove that failure to invoke the procedure provided for in law for seeking the relief for adverse possession namely by way of a counterclaim asserting the same or alternatively by way of an originating summons, notwithstanding, her claim was, nonetheless, well founded both in law and on the facts as set out in both her defence and supported by the rival evidence on record.

34 The appellant’s assertion that the learned Judge fell into error when he failed to vitiate the respondent’s claim for adverse possession founded only on her defence as opposed to being founded on the traditional mode of claiming such a relief through an originating summons is not remote. In *Chandrakant Devraj Shah vs. Alibhai Haji & Another* [supra] the court expressed itself, inter alia, as follows:

“38(1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, or land comprise in a lease registered under any of those Acts, he may apply to the 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”



35 As we have already alluded to above, it is evident from the record that the respondent's assertion of entitlement to the suit property was not founded on an originating summons but a defence and rebuttal in appellant's reply to defence. It is also evident from the record that the respondent sought leave to amend the defence to include a counterclaim, a position not objected to by the appellant.

Leave was indeed granted to her by the trial court to regularize that position but for reasons not borne out by the record, it was never utilized hence appellant terming it "squandered by the respondent who failed to seize on the moment and regularize her claim which according to him was fatal to that claim and should therefore have been vitiated by the trial court" while her position as also already highlighted above is that the learned Judge fell in no error when he granted the same based on the respective parties pleadings as laid.

36 It is on record that the learned Judge appreciated the above as the correct position on the pleadings on the record before him. He however, resolved the rival controversy by pinning responsibility for the default to seize the moment and utilize the leave to amend granted to the respondent by the court to amend her defence solely on the numerous advocates who represented her at the trial and who in the Judge's opinion failed in their duty to regularize the respondent's pleadings as per the leave granted to her by the court. Upon absolving the respondent of any blame, the learned Judge assessed and analyzed the pleadings and evidence tendered on record as laid before him and as already highlighted above and concluded that on the basis of the record as laid before him both parties had invited the court to rule on the issue of respondent's entitlement to the suit property by way of adverse possession based on their respective pleadings and evidence as laid before him, a process as we have already highlighted above appellant has invited us to fault and the respondent to affirm. Both have relied on case law in support of their opposing positions as already highlighted above.

37 The approach we take in resolving the above issue is that taken by the court in the case of *Gulam Miriam Noordin vs. Julius Charo Karisa* [2015] eKLR. In this case, the court reappraised the traditional position in law that claims for adverse possession are only sustainable in law if raised through an originating summons as reiterated by the court in the case of *Stephen Kaguku Mariba vs. Kibe Mariba (Legal Representative of the Estate of Margaret Magiri- Deceased) & Another* [2007] eKLR and *Njuguna Ndatho vs. Masai Itumo & 2 Others* [2002] eKLR in both of which the court faulted a counter-claim for adverse possession terming that mode of procedure as misconceived because according to the court, going by the traditional view on this matter, a claim for adverse possession traditionally could only be raised through an originating summons and issued an order reversing the order vesting the property in the respondent by the High Court based on a counter-claim.

38 In departing from the above position, the court *Gulam Miriam Noordin* [supra] expressed itself as follows:

"That position is no longer tenable where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim.

It is only when a party applies to be registered as the proprietor of land by adverse possession that order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of *Wabala vs. Okumu* [1997] LLR 609 (CAK), which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly,



in *Bayete Co. Ltd vs. Kosgey* [1998] LLR 813 where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.”

39 The court has also in *Teresa Wachuka Gachira vs. Joseph Mwangi Gachira* [2009] eKLR expressly stated that:

“Irrespective of the procedure adopted, the onus is on the person claiming adverse possession to prove that he has used the land he is claiming *nec vi, nec clam, nec precario*. It is clear that the change in the court’s approach to this question has by and by been dictated by the need to do substantive justice”

40 In light of the above observations the court expressed itself *inter alia* as follows:

“The power of the court to do substantive justice is today wider than before. We see no harm to make appropriate orders flowing from a finding that the respondent’s occupation of the suit property was adverse to that of the appellant; and that the latter’s title was so extinguished. By section 3(2) of *Appellate Jurisdiction Act* we order the appellant do transfer the suit property to the respondent at the latter’s expense within thirty (30) days from the date hereof failing which the Deputy Registrar, High Court Malindi will execute on behalf of the appellant all the necessary transfer documents...”

41 In light of the above exposition, it is our view that the current jurisprudential position on this issue as gathered from the above case law is that a party claiming adverse possession founded on a defence is entitled to relief where such claim is well founded on evidence. It is in this same vein that we hold that on the record as laid before us, the respondent’s claim for adverse possession was well founded in law. The learned Judge therefore fell in no error when he sustained that claim as presented in a defence and rebutted through a reply to defence as opposed to presentation by way of originating summons.

42 Turning to proof of elements/ingredients for sustaining a claim for adverse possession, we find as did the trial court that the threshold was satisfied for reasons as follows:

(i) On continuity, the appellant is on record as saying that the respondent took possession in 1999. Twelve years had therefore long lapsed by the time the suit was initiated. (ii) Publicity – It was admitted by the appellant that the respondent settled on the suit property and even constructed houses thereon. By his own admission, the appellant reported to the area District Commissioner vide exhibit 7 that there is a person who had refused to vacate his land and yet she had not completed payment of the same.

(iii) On extent – it is on record that the land is 4.0475 acres. The respondent only asserted her claim to four (4) acres. In the absence of justification for the respondent’s claim to the balance of the land this balance of the land irrespective of the size should have been excluded from her entitlement and given to the appellant.

43 In the result and for reasons given in the assessment, we find no merit in the appeal to the extent of four acres awarded to the respondent. We partially allow the appellant’s appeal to the extent of .0475 acres. We therefore make orders as follows:

- 1) The order of the trial court awarding the respondent entitlement to the whole of the suit property by way of adverse possession is partially set aside and substituted with an order declaring her entitled to only four (4) acres out of the suit property by way of adverse possession.
- 2) The balance of the suit property being .0475 acres is adjudged in favour of the appellant.



3) The respondent will have half (1/2) costs both on appeal and at the trial.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.**

**W. OUKO (P)**

.....

**JUDGE OF APPEAL**

**R. N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

