



Okech (Suing as the administrator and legal representative of the Estate of Henry Okech Odiembo) v Ogwang & 2 others (Environment and Land Appeal E009 of 2023) [2024] KEELC 4112 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4112 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAAYA
ENVIRONMENT AND LAND APPEAL E009 OF 2023**

AY KOROSS, J

MAY 9, 2024

BETWEEN

**BEATRICE AWINO OKECH (SUING AS THE ADMINISTRATOR AND
LEGAL REPRESENTATIVE OF THE ESTATE OF HENRY OKECH
ODIEMBO) APPELLANT**

AND

JACOB OCHIENG OGWANG 1ST RESPONDENT

ALLOYS OMOLO NYAMWANDA 2ND RESPONDENT

KEPHER OTIENO ABONYO 3RD RESPONDENT

*(Being an appeal from the judgment of SPM Honourable J.P. Nandi
delivered on 7/09/2023 in Bondo SPM ELC Case No. E019 of 2022 (0S))*

RULING

Background of the appeal

1. This matter was scheduled for judgment today however, I have to render a ruling instead of a judgment as shall be demonstrated later in this ruling.
2. In the trial court, the appellant was the plaintiff and the respondents were the defendants. This appeal impugns the appreciation of facts and evidence by the learned trial magistrate.
3. At the heart of contention were land parcel nos. South Sakwa/ Barkowino/4569 and 4570 (suit properties) which are respectively registered in the 1st and 3rd respondents' names.
4. From the record, these suit properties were subdivisions of land parcel no. South Sakwa/ Barkowino/2611 (mother parcel) which was originally registered in the 2nd respondent's name before



- its subsequent registration to the 1st respondent who eventually subdivided it to create the suit properties.
5. Now, turning to the pleadings and evidence, in the originating summons (OS) dated 31/05/2022 and affidavit in support thereof which she deposed on 31/05/2022, the appellant stated she had acquired the suit properties by adverse possession.
 6. She testified as PW1 and called one witness who had taken photographs of her developments that allegedly subsisted in the suit properties. In giving evidence, the appellant and her witness who testified as PW2 produced documents and photographs that allegedly substantiated the appellant's case.
 7. Thus, the appellant sought orders that she be registered as the proprietor of the suit properties and, a permanent injunction prohibiting the respondents from interfering with her occupancy be issued and costs of the suit. The OS was vehemently opposed by all the respondents who had different counsels representing them.
 8. The firm of Ms. Odhiambo B.F.O & Company Advocates filed the 1st respondent's replying affidavit which was deposed on 20/06/2022. In this affidavit which was relied upon by the 1st respondent who testified as DW1, the 1st respondent acknowledged that though he had purchased the mother parcel from the 2nd defendant, he had entirely sold it to the 3rd respondent and he had ceased having anything to do either with it or with the suit properties. According to him, he was non-suited to the proceedings.
 9. Although the law firm of Ms. Felix Oketch & Co. Advocates represented the 2nd respondent, his replying affidavit which he swore on 26/10/2022 did not disclose who the drawer was.
 10. Be that as it may, in the replying affidavit, the 2nd respondent averred that having entered into a contract with the deceased appellant, it was not tenable for him to enter into a contractual relationship with the 1st respondent.
 11. Noteworthy, notwithstanding filing his replying affidavit, the 2nd respondent did not testify and as a result, assertions contained in his replying affidavit were mere assertions that were not substantiated.
 12. Through the law firm of Ms. AAO Advocates, the 3rd respondent deposed his affidavit dated 20/06/2022. In it, the 3rd respondent averred that he purchased South Sakwa/ Barkowino/4570 from the 1st respondent. Further, he stated it was fenced, he regularly visited it, the appellant did not have access to it and he had commenced architectural designs over it.
 13. The 3rd respondent testified as DW3 and his evidence was led by his architect who testified as DW2 and his brother and alleged caretaker who testified as DW4.
 14. The matter proceeded to trial, witnesses testified, parties' cases were closed, submissions were filed and the suit was eventually reserved for judgment.
 15. In the impugned judgment that was rendered on 7/09/2023, the learned trial magistrate framed issues for determination which were whether the appellant had met the threshold for grant of orders of adverse possession and costs.
 16. Based on his analysis and reasoning, the learned trial magistrate found the appellant had not proved her case on a balance of probability and thereby dismissed her case with costs to the respondents.

Appeal to this court

17. Dissatisfied by the impugned judgment, the appellant filed her memorandum of appeal dated 28/09/2023 in which she outlined several grounds that faulted the learned trial magistrate for grounds



inter alia; failing to find the appellant had been in adverse possession of South Sakwa/ Barkowino/4569 from 1997 and South Sakwa/ Barkowino/4570 from 1998, failing to make a finding on the portion that contained the appellant's block of houses and the boundary of South Sakwa/ Barkowino/4570, making assumptions on the non-payment of the balance of the purchase price by the deceased appellant and failing to find the appellant had proved the ingredients of adverse possession.

18. Accordingly, the appellant implored this court to allow the reliefs sought in the OS together with the costs of the lower court suit and of the appeal.
19. As directed by the court, the appeal is canvassed by written submissions. The appellant's law firm on record M/s. Achola Jaoko & Co. Advocates filed written submissions dated 16/01/2024 while the 1st and 3rd respondents' law firms on record that were earlier referenced in this judgment respectively filed theirs on diverse dates of 21/02/2024 and 19/02/2024.
20. It is noted without seeking leave for an extension of time to file submissions, the 2nd respondent's counsel blatantly filed his submissions on 21/02/2023 which was after this matter had been reserved for judgment, and on that basis, this court will not consider them.

The appellant's submissions

21. In her submissions, the appellant collapsed her grounds of appeal into a singular ground- whether she had met the ingredients of adverse possession, and in doing so, she advanced two principles of adverse possession; uninterrupted occupation for more than 12 years and exclusive possession.
22. On these principles, the appellant's counsel submits that transactions between the respondents were a nullity since at the time, she had an overriding right over the suit properties by adverse possession. Further, the act of the 3rd respondent fencing off South Sakwa/ Barkowino/4570 in 2015 is an act of trespass. To buttress the argument, counsel relies on the Court of Appeal decision of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR where the court stated: -

“In terms of Sections 7, 9,13,17,37 and 38 of the title of a registered owner of land will be extinguished and vested in a third party who proves that he has been in possession of the land continuously and uninterrupted for a period of 12 years; that such possession has been open and notorious to the knowledge of the owner; that the possession has been without the permission of the owner; and that the third party has asserted a hostile title and dispossessed the true owner.”

1st respondent's submissions

23. In arguing all the 5 grounds separately, his counsel submits the appellant did not prove her claim of adverse possession and the learned trial magistrate could not be faulted in his analysis of the principles of adverse possession or in arriving at the decision he did.
24. Foremost, the counsel submits the appeal is incompetent as a decree was not availed to this court and urges this court to strike out the appeal and places reliance on the persuasive case of *Kenya Commercial Bank Ltd & another v Pili Victoria* [2020] eKLR where the court stated: -

“First, from the reading of Section 65(1) of the Act it is the decree or part thereof that is appealed from the subordinate court to the High Court. Second, under Order 42 Rule 13(4) of the Rules a Court may dispense with any document to be part of the Record of Appeal except the memorandum of appeal, the pleadings and the judgment, order or decree appealed from and in appropriate cases the order giving leave to appeal. Third, the saving



grace under Article 159(2)(d) of *the Constitution* is inapplicable in this case. That is because the provision only applies to matters relating to procedure or form and not the substance thereof. Fourth, despite clear provisions on extension of time the Appellant never sought for any extension of time to file the decree neither did it explain any difficulty in obtaining the decree.

22. The Record of Appeal is therefore incomplete. In the words of the Supreme Court in Civil Application No. 20 of 2014 Bwana Mohamed Bwana (supra) ‘such an appeal would be incomplete and hence incompetent.’
25. Counsel submits by claiming adverse possession by purchase, the appellant’s claim was outside the confines of adverse possession and the learned trial magistrate properly considered when time started to run and appreciated the suit properties were separated by a barbed wire fence and the appellant did not exclusively occupy the suit properties.

3rd respondent’s submissions

26. On the condensed issue of whether the appellant proved the elements of adverse possession to the requisite standards, counsel places heavy reliance on the persuasive decision of Gabriel Mbui v Mukindia Maranya [1993] eKLR which outlined the principles of adverse possession in the following terms: -
 - “(1) the intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period...
 - (2) The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else...
 - (3) The occupation of the land by the intruder who pleads adverse possession must be nonpermissive use, ie without permission from the true owner of the land occupied...
 - (4) The nonpermissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi, that is to say, occupation with the clear intention of excluding the owner as well as other people...
 - (5) Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the incroacher or squatter, unless the acts be done which are inconsistent with the owner’s enjoyment of the soil for the purposes for which he intended to use it...
 - (6) The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community, of the exercise of dominion over the land...
 - (7) The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period...



- (8) the rightful owner or paper title holder against whom adverse possession is raised, must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period...
- (9) The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession..."

27. Anchoring on this decision, counsel submits the appellant has not met the threshold, and being a purchaser, the deceased appellant could not lay a claim of adverse possession. Counsel further submits the appellant is not in exclusive possession and dealings between the respondents and eventual subdivision of the mother parcel and occupancy by the 3rd respondent amounted to interruption.

Preliminary issues

28. The nature and form of a memorandum of appeal is set out in Order 42 Rule 1 (2) of the Civil Procedure Rules in the following manner: -

“The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”

29. The essence of this law is to assist the court and parties in framing the issues and to identify the core grounds the appellant is aggrieved against. With due respect to the appellant, the grounds of appeal as charted out in the memorandum of appeal fell short of this law as they were not concise, were argumentative, and narratively stated the evidence.

Issues for determination

30. Being a 1st appeal, the power of this court is set out in Order 42 Rule 32 of the Civil Procedure Rules. Being steered by the principles enunciated in the well-cited case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, this court will not interfere with the impugned judgment save this court satisfies itself the learned trial magistrate misdirected himself thus arrived at an erroneous decision, undoubtedly exercised his discretion wrongly and occasioned injustice by such erroneous exercise.
31. Turning to the matter at hand, I have carefully considered the records, rival submissions, provisions of law relied upon, and judicial precedents cited. Given the unconcise grounds of appeal, this court has condensed the appellant's grounds of appeal into a singular ground; whether the learned trial magistrate erred in finding the appellant had not met the threshold of adverse possession.
32. Consequently, the following issues commend themselves for resolution:-
 - a. Whether the record of appeal is incompetent.
 - b. If (a) is in the negative, whether the learned trial magistrate erred in finding the appellant had not met the threshold of adverse possession.
 - c. What orders should this court issue including an order as to costs?



a. Whether the record of appeal is incompetent.

33. I have carefully perused the records and even though the index of the record of appeal seems to suggest that a decree dated 7/09/2023 has been tendered to this court and available on page 183 of the record of appeal, none is available or was ever extracted from the lower court.
34. Suffice to say, from the lower court record, in a letter dated 8/09/2023 by the appellant's counsel on record, the appellant only applied for certified copies of the proceedings but never a decree that ensued from the judgment. As a result, I must agree with the 1st respondent that the record of appeal lacks a decree. The question that arises is whether this is fatal.
35. The legal framework for lodging an appeal from the subordinate court to this court is provided for in Section 16A (1) of the [Environment and Land Court Act](#) (ELC Act) in the following terms: -
- “All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in section 13(2) of the [Environment and Land Court Act](#) (Cap. 8D), provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.”
36. A similar provision is also found in Section 79 (G) of the [Civil Procedure Act](#) while Section 65(1) of this same Act states as follows: -
- “Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—
- (a) deleted by Act No. 10 of 1969, Sch.;
 - (b) from any original decree or part of a decree of a subordinate court, on a question of law or fact;
 - (c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.”
37. In giving effect to these provisions of law amongst other Orders and Rules, Order 42 Rule 2 of the Civil Procedure Rules provides: -
- “Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.”
Emphasis added.
38. In addition, Order 42 Rule 13 (4) of the Civil Procedure Rules outlines the contents of a record of appeal in the following manner: -
- “Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—



- (a) the memorandum of appeal;
- (b) the pleadings;
- (c) the notes of the trial magistrate made at the hearing;
- (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

- (i) a translation into English shall be provided of any document not in that language;
- (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).” Emphasis added.

39. Although this Order 42 Rule 13 (4) of the Civil Procedure Rules seems to suggest either a decree, order or judgment could suffice, this provision of law cannot be read and interpreted in isolation but has to be read conjunctively with Section 16A (1) of the ELC Act, Sections 65 (1) and 79 (G) of the [Civil Procedure Act](#) and Order 42 Rule 1 (2) and Rule 2 thereof of the Civil Procedure Rules.
40. From these provisions of law, it emerges one of the backbones of an appeal is a decree since it is the date from which time is computed, it is the basis upon which an appeal lies and it is the crux from which some of the grounds of appeal are derived from.
41. In my humble view, the absence of this crucial document from the record of appeal is a jurisdictional issue, and the appellant cannot seek refuge in Article 159(2)(d) of [the Constitution](#). See Kenya Commercial Bank Ltd & another v Pili Victoria (Supra).
42. In addition, I wish to emphasize this issue is not novel and has been the subject of interpretation by other courts whose decisions are binding on this court and this court adopts their position.
43. In the Court of Appeal case of Gregory Kiema Kyuma v Marietta Syokau Kiema [1988] eKLR, Apaloo JA interpreted Section 65 (1) and 79 (G) of the [Civil Procedure Act](#) and the then Order 41 Rule 1 A of the Civil Procedure Rules which is alike with the current Order 42 Rule 2 of the Civil Procedure Rules in the following words:-

“The question is, what documents must the appellant file within thirty days or within the time lawfully extended by the certificate of delay?. Since the section contemplates that the appeal is against a decree or order, the appellant is obliged to file first, Memorandum of Appeal in the form set out in appendix F No. 1 of the Civil Procedure Rules and second, a copy of the formal order of the Court, if available.

Rule 1 A of Order 41 permits this latter document to be filed “as soon as possible and in any event within such time as the Court may order.”



44. The Supreme Court of Kenya weighed in on this issue in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2015] eKLR where in paragraph 41 of its judgment, it found as follows: -

“Without a record of appeal a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or *the Constitution*, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues. In the Nigerian Supreme Court case, *Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Others*, SC. 11/2012, Judge Bode Rhodes-Vivour, JSC highlighted pertinent issues of jurisdiction:

“A court is competent, that is to say, it has jurisdiction when–

1. it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another, and
2. the subject matter of the case is within its jurisdiction, and no feature in the case prevents the court from exercising its jurisdiction; and
3. the case comes before the court initiated by the (due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction” (emphasis supplied).”

45. In conclusion and from the foregoing, it is my finding that the record of appeal has not fulfilled its prerequisites, it is incompetent and fatally defective. Because of these findings, a determination of issue (b) is unnecessary while on issue (c), I hereby strike out the record appeal, and since costs follow the event, I award costs to the respondents of kshs. 15,000/= each.

46. To this end, I hereby issue the following final disposal orders: -

- a. That the record of appeal is hereby struck out with costs to the respondents.
- b. That each of the respondents is awarded costs of ksh.15,000/= which shall be borne by the appellant.
- c. That the appellant shall file a complete record of appeal and pay the respondents’ costs within 14 days hereof and in default, the entire appeal shall stand dismissed with costs to the respondents.
- d. Mention for further directions on 5/06/2024.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 9TH DAY OF MAY 2024.

HON. A. Y. KOROSS

JUDGE

9/5/2024

Ruling delivered in open court virtually through Microsoft Teams Video



Conferencing Platform in the Presence of:

Mr. Jaoko for the appellant.

Mr. B. F.O. Odhiambo for the 1st respondent

Mr. Oreda for the 2nd respondent

Miss Loise Otieno for the 3rd respondent

Court assistant: Ishmael Orwa

