



Juma v Inganga & 4 others; Juma & 6 others (Interested Parties) (Environment and Land Appeal E022 of 2022) [2024] KEELC 4775 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4775 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E022 OF 2022**

DO OHUNGO, J

JUNE 20, 2024

BETWEEN

DR. IDD W. JUMA APPELLANT

AND

MICHAEL PATRICK INGANGA 1ST RESPONDENT

CHRISTOPHER MAKANA OKWALO 2ND RESPONDENT

HERBERT WANYANGU 3RD RESPONDENT

DIXON OKUSIMBA INDAKWA 4TH RESPONDENT

CALISTO OMUTIMBA AKAPETI 5TH RESPONDENT

AND

MUSTAFA A. JUMA INTERESTED PARTY

MOHAMMED W. JUMA INTERESTED PARTY

RASHID O. JUMA INTERESTED PARTY

TWAHA A. JUMA INTERESTED PARTY

KHATWIBO A. JUMA INTERESTED PARTY

ABDINUR A. JUMA INTERESTED PARTY

SHUAB J. JUMA INTERESTED PARTY

(Being an appeal from the judgment and decree of the Senior Principal Magistrate's Court at Mumias (Hon. T A Obutu, Senior Principal Magistrate) delivered on 30th June 2022 in Mumias MCELC No. 122 of 2018)



JUDGMENT

1. Litigation leading to this appeal started in the High Court at Kakamega on 18th June 2015, when the Respondents herein filed Originating Summons (OS) dated 17th June 2015, against the Appellant and the Interested Parties herein, all as Respondents (Defendants). The matter was later transferred to the Subordinate Court, where it was heard and determined.
2. The Respondent averred in the OS that they had acquired a portion of the parcel of land known as East Wanga/Lubinu/1123 as subsequently subdivided into land parcel numbers East Wanga/Lubinu/4189, 4190, 4191, 4192, 4193, 4194, 4195, 4196, 4197 and 4198 (the suit properties) by adverse possession. They therefore urged the court to determine whether they had established adverse possession, whether they were entitled to be registered as proprietors of the portions that they were in occupation of and whether subdivision of East Wanga/Lubinu/1123 into land parcel numbers East Wanga/Lubinu/4189, 4190, 4191, 4192, 4193, 4194, 4195, 4196, 4197 and 4198 and registration thereof in favour of the Appellant and the Interested Parties should be cancelled. They also prayed for costs of the suit.
3. Upon hearing the matter, Hon. T A Obutu (Senior Principal Magistrate) delivered judgment on 30th June 2022. The learned Magistrate found merit in the Respondents' case and ordered that they were "entitled to adverse possession" in respect of the specific portions of land parcel number East Wanga/Lubinu/1123 that they were occupying, that land parcel numbers East Wanga/Lubinu/4419, 4420, 4421 and 4422 "be subdivided to take out the portions of land which are correctly occupied by the Plaintiffs/Applicants and titles to issue accordingly," and that the Court Administrator Mumias Law Courts to execute the transfer documents in case the Appellant and the Interested Parties declined to do so within 30 days from the date of the judgment. He also awarded the Respondents costs of the suit and ordered that the costs be paid by the 6th Interested Party.
4. Dissatisfied with the outcome, the Appellant filed this appeal on 7th July 2022, through Memorandum of Appeal dated 1st July 2022. He prayed that the judgment be set aside, and that the Respondents' case be dismissed with costs.
5. The grounds of appeal as listed on the face of the Memorandum of Appeal are that:
 1. The Honorable Learned Magistrate erred in law in entertaining a matter and or granting orders which was outside his jurisdiction as provided in law.
 2. The Honorable Learned Magistrate erred in law in granting the respondents a remedy which was never sought in the pleadings namely directing the Court Administrator to execute documents in favour of the Respondents to effect transfer of the suit parcels of land.
 3. The Honorable Learned Magistrate erred in law in entertaining a suit related to and issuing orders over a land parcel whose title had long ceased to exist namely E.WANGA/LUBINU/1123.
 4. The Honorable Learned Magistrate erred in fact and in his findings to the effect that all the Appellants' brothers had testified in court and supported the Respondents' claim which finding was incorrect and not supported by the record.



5. The Honorable Learned Magistrate erred in law in issuing orders whose effect was to rectify and or alter the records of registered land parcels namely L.P E.WANGA/LUBINU/4419, 4420 4421 and 4422 when there was no suit to justify such orders nor any legal basis for same.
 6. The orders issued by the Honorable Learned Magistrate went against the mandatory requirement of the law namely Order 37 Rule 7(2) of the Civil Procedure Rules requiring the Respondents to file certified copies of the extract of the land registers for L.P E.WANGA/LUBINU/4419, 4420 4421 and 4422 when instituting the suit which requirement was never complied.
 7. The judgment of the Honorable Learned Magistrate is against the principles of fair hearing and natural justice.
 8. There is an error on the face of the record of the court as DW1 and DW2 who testified as the Respondents' witnesses are named in the judgment of the lower court as the defendants' witnesses which errors goes to the core of the judgment.
 9. The judgment of the Honorable Learned Magistrate grossly violates Order 21 Rules 4, 5 and 6 of the Civil Procedure Rules on the requirements of a valid judgment.
 10. The Honorable Learned Magistrate erred in law and in fact by failing to take into account submissions made by counsel for the Appellant and as a result did not address the issues of law raised with respect to the Respondent claim.
 11. The Honorable Learned Magistrate misdirected himself on the correct principles of adverse possession as a result of which he arrived at wrong findings and or conclusions and issued orders that unknown to law and or ultra vires.
 12. The judgment of the Honorable Learned Magistrate went against the weight of evidence on record and or is unsupported by the available evidence.
 13. The Honorable Learned Magistrate was biased against the appellant and or relied on extraneous or irrelevant matters in his judgment as a result of which an injustice has occasioned to the appellant.
 14. The order singling out the appellant for payment of costs was punitive, unjustified and unlawful and did not take into account the proceedings and orders of the High Court in Succession Cause No.26 of 1999 which issued certificate of confirmation of grant which resulted in the subject titles and in which the appellant was mere administrator.
 15. In all aspects of the case, the Honorable Learned Magistrate did not address himself to the correct principles of law and or conduct himself judiciously.
6. The appeal was canvassed through written submissions. The Appellant argued that the dispute before the Subordinate Court concerned the estate of Juma Shitseswa Linani (deceased) which was the subject of Kakamega High Court Succession Cause No. 26 of 1999 where a confirmation of grant was issued, leading to the titles in dispute. The Appellant further argued that the succession cause was live with an application for revocation of grant pending and that the Respondents ought to have filed their claim



in the said cause. That the suit before the learned Magistrate was barred under Section 6 of the *Civil Procedure Act*. He also argued that the title in land parcel number East Wanga/Lubinu/1123 had long ceased to exist having been closed following distribution of the estate and that the learned Magistrate had no jurisdiction to entertain in regard to a non-existent title.

7. The Appellant further argued that the learned Magistrate issued orders concerning land parcel numbers East Wanga/Lubinu/4419, 4420, 4421 and 4422 yet there was no claim over those parcels before the Subordinate Court and in disregard of Order 37 Rule (2) of the Civil Procedure Rules since the Respondents did not produce extracts of title. He also contended that the learned Magistrate did not properly apply the principles of proving adverse possession and relied on the decision of the Court of Appeal in the case of *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR in support of those arguments. The Appellant therefore urged this court to allow the appeal.
8. The First and Sixth Interested Parties attended court and told the court that they support the appeal. They did not file any written submissions. On their part, the Second, Third, Fourth, and Fifth Interested Parties filed brief written submissions in which they supported both the appeal and the Appellant's submissions. The Seventh Interested Party neither attended court nor filed any written submissions.
9. In reply, the Respondents argued that they established adverse possession and that their evidence was supported by the Interested Parties who are the Appellant's brothers. That the subdivision of land parcel number East Wanga/Lubinu/1123 did not affect the portions that they claim and that the Subordinate Court did not err in rendering the judgment as it did. They urged this court to dismiss the appeal.
10. This is a first appeal. Consequently, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
11. I have considered the grounds of appeal, the pleadings, the evidence, and the submissions. The issues that arise for determination are whether adverse possession was established and whether the reliefs sought were available.
12. The Court of Appeal discussed the law on adverse possession in the case of *Richard Wefwafwa Songoi v Ben Munyiwa Songoi* [2020] eKLR as follows:

Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It must start with a wrongful dispossession of the rightful owner. (See comparative Indian cases of *S. M. Kenni alias Tamanna Sabebe – v- Mst Bibi Sakina* AIR 1964 SC 1254; and *Parsimi – v- Sukhi*, 1993 4 SCC 375).

39. In *Wambugu –v- Njuguna*, (1983) KLR 173, this Court held that adverse possession contemplates two concepts: possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not



the claimant has proved that he or she has been in possession for the requisite number of years.

40. A person who claims adverse possession must inter alia show:
- (a) on what date he came into possession.
 - (b) what was the nature of his possession?
 - (c) whether the fact of his possession was known to the other party.
 - (d) for how long his possession has continued and
 - (e) that the possession was open and undisturbed for the requisite 12 years.

13. The Respondents' case as pleaded in their OS was that they had acquired portions of the parcel of land known as East Wanga/Lubinu/1123 as subsequently subdivided into land parcel numbers East Wanga/Lubinu/4189, 4190, 4191, 4192, 4193, 4194, 4195, 4196, 4197 and 4198 by adverse possession. Thus, they focused their claim on the above parcels, or portions of the parcels.

14. By its very nature, adverse possession is a claim to title to land. The land claimed must therefore be strictly identified. One hardly needs to wonder why that requirement is at the core of the ingredients of proving adverse possession. Among others, the claim has to be brought against the title holder. Both the identity of the land and the title holder are central to the claim and must be established through production of an abstract of title. That is the essence of Order 37 Rule 7 (2) of the Civil Procedure Rules which imposes a duty on the claimant to avail the abstract as he files the OS. The rule provides:

The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

15. I am aware that non-compliance with Order 37 Rule 7 (2) prior to trial per se, is not fatal. Parties can always avail the abstract in the course of preparing for trial, or even by producing it during trial. Order 37 Rule 18 of the Civil Procedure Rules makes room for that by providing thus:

At the time of directions, if the parties do not agree to the correctness and sufficiency of the facts set forth in the summons and affidavit, the judge may order the summons to be supported by such further evidence as he may deem necessary, and may give such directions as he may think just for the trial of any issues arising thereupon, and may make any amendments necessary to make the summons accord with existing facts, and to raise the matters in issue between the parties.

16. The Court of Appeal stated as follows, in the case of *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR, regarding the importance of identifying the land claimed:

The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Githu v Ndele* [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them. It is exactly for this reason, perhaps that there was a mandatory requirement under the old *Civil Procedure Act* and the rules made thereunder that when taking out an O. S. anchored on adverse possession that an extract of the title to the subject land be annexed to the application. Indeed, the then Order XXXVI Rule 3D(2) specifically provided:



“...The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed...”

That requirement no doubt was couched in mandatory terms failing which it would render the O. S. incompetent. We have perused the entire O. S. and nowhere have we come across a certified extract of the title of the suit premises. Thus, the O.S. was incompetent and liable to be struck out. We are surprised that the trial court and counsel involved did not notice this fatal omission.

17. I have perused the record and I note that the Respondents did not produce certified copy of the register in respect of land parcel numbers East Wanga/Lubinu/1123, East Wanga/Lubinu/4189, 4190, 4191, 4192, 4193, 4194, 4195, 4196, 4197 and 4198. Nevertheless, during defence hearing, the Appellant produced a copy of the register in respect of land parcel number East Wanga/Lubinu/1123. A perusal of the said register shows the registered proprietor was Juma Sitheswa s/o Linani. There is an entry dated 13th January 2005 to the effect that the said proprietor was reported deceased. There are also entries in the encumbrances section indicating that a charge was registered in favour of the Industrial and Commercial Development Corporation (ICDC) on 25th November 1975 and that the said charge was discharged on 15th January 2004. ICDC was a state corporation which was established under Section 3 of the *Industrial and Commercial Development Corporation Act*. The OS herein was filed on 18th June 2015, less than twelve years from the date of the discharge.
18. Pursuant to Section 41 of the *Limitation of Actions Act*, “Government land or land otherwise enjoyed by the Government” is precluded from acquisition by adverse possession. Land charged in favour of a state corporation is in the category of precluded land. The Court of Appeal affirmed that position in *Kennedy Nyamumbo Sese v Settlement Fund Trustees & 2 others* [2017] eKLR where it held as follows regarding land charged in favour of a state corporation known as Settlement Fund Trustees:

... the disputed portion belonged to SFT, until it was transferred to Daniel in May 1995. In *Gitu v Ndungu & 2 others* [2001] eKLR, this Court in a 5 Bench decision, departed from its decision in *Eliud Nyongesa Lusena and Another vs Nathan Wekesa Omocha Civil Appeal No 134 of 1993* in which the Court had decided that the plaintiff after 12 years of exclusive possession of the suit property in regard to which the Settlement Fund Trustees had title, acquired title to it and the SFT became his trustee. The 5 Judge Bench reiterated its earlier holding in *Boniface Oredo vs Wabomba Mukile Civil Appeal No 170 of 1989* (unreported) delivered in 1992, that the interest of SFT in the suit property is not extinguishable under the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya in view of section 175 of the Agriculture Act Cap 318 that provides that a suit by SFT cannot be defeated by the defence of limitation.
19. Thus, the Respondents could not validly claim adverse possession in regard to land parcel number East Wanga/Lubinu/1123 until after lapse of twelve years from 15th January 2004. The earliest they could have validly filed the OS in respect of the parcel was 16th January 2016. The claim for adverse possession in respect of the parcel was premature. A cause of action had not accrued.
20. Regarding parcel numbers East Wanga/Lubinu/4189, 4190, 4191, 4192, 4193, 4194, 4195, 4196, 4197 and 4198, I note that no certified copy of the register was produced. It is thus impossible to tell if those parcels actually existed and who the registered proprietors were. Adverse possession could not be established in the absence of satisfying that elementary requirement. While still on the issue of the requirement that certified copy of the register be produced, I note that the learned Magistrate entered judgment in respect of land parcel numbers East Wanga/Lubinu/4419, 4420, 4421 and 4422 yet no



certified copy of the register in respect of the said parcels was produced. Such an order cannot stand. It may even turn out that judgment was entered without giving affected registered proprietors a hearing.

21. Even if the Respondents would have complied with the requirement as to production of the register, they would still need to prove that their possession was hostile to the title of the registered proprietor. As the name suggests, adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. Thus, for a claim of adverse possession to succeed, the claimant must demonstrate that his occupation was without the proprietor's permission. Entry and occupation pursuant to a sale agreement is ipso facto by permission of the proprietor and does not therefore amount to adverse possession. Nevertheless, once a purchaser completes paying the purchase price, his possession and occupation of the property is no longer by permission of the seller. In such a scenario, time for purposes of adverse possession starts to run in favour of the purchaser from the moment of final payment of the purchase price. See *Public Trustee v Wanduru Ndegwa* [1984] eKLR.
22. In *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR, the Court of Appeal yet again emphasised the need to demonstrate entry that is adverse to the title of the proprietor thus:

What these authorities are emphasizing is that for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. In other words his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession. Besides adversal entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession. So that a claim of adverse possession would not succeed if the entry to the land was with the permission of the owner and remains that way throughout, or before the permission is terminated or if before the expiry of the period, the owner of the land takes steps to assert his title to the land.

23. The Respondents' case is that they purchased the portions that they claim from Juma Sitheswa s/o Linani, who is since deceased. They put the dates of the sale agreements variously at 1973 to 1975. They however did not produce the sale agreements. In fact, they all claimed that they lost the agreements. If their entry was pursuant to sale transactions, their presence on the land cannot be adverse to the title of the proprietor in the absence of proof of full payment of the purchase price and compliance with terms of the purchase. The Respondents claimed that they made payments to ICDC. They did not demonstrate that payment to ICDC amounted to full payment of the purchase price and compliance with terms of the purchase.
24. While it may be true that the Respondents had some purchase transactions with the deceased, it must be remembered that adverse possession is not a procedure for enforcing sale of land transactions. A litigant who approaches the court seeking to obtain title by adverse possession must establish the ingredients of adverse possession. If, however, they wish to enforce a sale agreement, adverse possession is not the route to take.



25. In view of the foregoing discourse, the Respondents did not establish adverse possession. Consequently, the reliefs which they sought were not available. It is manifest that the learned Magistrate misdirected himself in allowing the Respondents' claim for adverse possession.
26. I find merit in this appeal, and I therefore allow it. I set aside the judgment of the Subordinate Court and replace it with an order dismissing the Respondents' case. Considering the circumstances of the dispute, I order that parties shall bear their own costs in respect of both this appeal and of the proceedings in the Subordinate Court.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF JUNE 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Malanda for the Appellant

Mr Mondia holding brief for Mr Manyoni for the Respondents

First and Fifth Interested Parties present in person

No appearance by the 2nd to 4th, 6th and 7th Interested Parties

Court Assistant: M Nguyayi

