



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wananjaba v Okoma (Environment and Land Appeal E034 of 2021)  
[2024] KEELC 4820 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4820 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E034 OF 2021**

**DO OHUNGO, J**

**JUNE 20, 2024**

**BETWEEN**

**CHARLES JUMA WANANJABA ..... APPELLANT**

**AND**

**ALFRED OKOMA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Chief Magistrate's  
Court at Kakamega (Hon. Eric Malesi, Principal Magistrate)  
delivered on 16th July 2021 in Kakamega MCCC No. 73 of 2016)*

**JUDGMENT**

1. Litigation leading to this appeal started in the Subordinate Court on 9<sup>th</sup> March 2016 when the Appellant filed a plaint dated 12<sup>th</sup> February 2016. He averred that he was the registered proprietor of the parcel of land known as Bunyala/Nambacha/702 (the suit property) and that he entered into an agreement pursuant to which he was to sell a portion of the suit property to the Respondent. That the agreement was not completed, and the Respondent trespassed onto the suit property and was claiming a portion of it. He prayed for judgment against the Respondent for Respondent's eviction together with his agents, employees, and relatives.
2. The Respondent filed a defence and counterclaim in which he averred that he purchased one acre of the suit property from the Appellant in 1997, took immediate possession and started developing it. He denied the allegations of trespass and averred that the Subordinate Court did not have jurisdiction. He averred in his counterclaim that he fully paid the purchase price, and that the Appellant surrendered the portion to him and gave him full authority to develop it. That he utilized the portion freely without interruption from 1997 and that he had acquired title thereto by adverse possession. He therefore prayed for judgment against the Appellant for a declaration that he had acquired title by adverse possession, an order that the Deputy Registrar be empowered to sign all necessary on behalf of the Appellant to facilitate transfer of the portion, costs of the suit and interest.



3. Upon hearing the matter, Hon. Eric Malesi (Principal Magistrate) delivered judgment on 16<sup>th</sup> July 2021 wherein he ordered that the Respondent had acquired one acre of the suit property through adverse possession, and that the Appellant executes transfer instruments in respect of the one acre portion to the Respondent failure of which the Executive Officer of the Subordinate Court would be empowered to execute the same. He also awarded the Respondent costs of the suit.
4. Dissatisfied with the outcome, the Appellant filed this appeal on 28<sup>th</sup> July 2021, through Memorandum of Appeal dated 27<sup>th</sup> July 2021. He prayed that the appeal be allowed with costs and that eviction orders be granted against the Respondent.
5. The Appellant listed the following grounds of appeal in the Memorandum of Appeal:
  - i. That the magistrate erred in law and fact in failing to uphold the Appellant's claim which had been proved on a balance of probability.
  - ii. That the Magistrate erred in law and fact in failing to hold that the Respondent's counter claim was not proved on a balance of probabilities.
  - iii. That the magistrate erred in law and fact in computing the years the Appellant could legally have held the land as a legal owner.
  - iv. The learned magistrate erred in law and fact in taking into account of facts and evidence which was not produced before him.
  - v. The learned magistrate erred in law and fact in making a judgment which was legally unsound.
6. The appeal was canvassed through written submissions. The Appellant compressed his grounds of appeal into two issues for determination: whether the Appellant's case was proven on a balance of probabilities and whether adverse possession was established. He argued that the sale agreement was illegal since he was not the registered proprietor of the suit property, and that the illegality was confirmed in Criminal Case Number 531 of 2005 where her was convicted of the offence of obtaining money by false pretence contrary to Section 313 of the Penal Code.
7. He added that the effect of the conviction was that there was no valid agreement and that the occupation of the suit property from 1997 to the date of conviction could not confer title to the Respondent who knew that he was occupying land not owned by the Appellant. That the Respondent testified in the criminal matter that he conducted a search which showed that the suit property was owned by Gideon Mugo and not the Appellant. That, consequently, the Respondent should have pursued adverse possession against Gideon Mugo. He went on to argue that since he only obtained title on 24<sup>th</sup> August 2012, no adverse possession could be claimed against him before 2012. That by the time he filed his suit for eviction on 9<sup>th</sup> March 2016, he had only been a registered proprietor for four years and that he was therefore entitled to the eviction order sought.
8. On the second issue of proof of adverse possession, the Appellant argued that the Respondent did not establish adverse possession since most of the period that he computed was when Gideon Mugo was proprietor. That, consequently, the occupation was not peaceful and open since it was against a person who was not sued. The Appellant therefore urged the court to allow the appeal.
9. The Respondent, who is self-represented, countered by filing a document titled "Respondent's Statement ...". When he appeared in person before the court, he confirmed that the document constitutes his submissions. He argued that the Appellant sold a one acre portion of the suit property to him in 1997 and that this appeal was filed in bad faith. He added that the suit property was subdivided



into Bunyala/Nambacha/2599 in the name of the Appellant and Bunyala/Nambacha/2600 in his name. He urged the court to dismiss the appeal with costs.

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 the Subordinate Court had jurisdiction, whether adverse possession was established and whether the reliefs sought ought to have issued.
12. The first question that every court of law must always ask itself before embarking on hearing and determining any dispute is whether it has jurisdiction. As the Court of Appeal stated in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR:  

... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. ...
13. Jurisdiction is given to a court by law. Neither can the court confer it on itself, nor can the parties grant it to the court, even by consent. As the Supreme Court stated in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR:  

A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ...
14. The Respondent averred in his defence that the Subordinate Court did not have jurisdiction. The parties did not address the issue of jurisdiction beyond the Respondent's averment in the defence. Nevertheless, the learned Magistrate addressed the issue in the judgment, and quite properly so. The bone of contention was whether the Subordinate Court had jurisdiction to hear and determine adverse possession claims. The learned Magistrate held that he had jurisdiction.
15. The learned Magistrate who handled the matter was of the rank of Principal Magistrate. There was no suggestion that he was not gazetted or that he did not have the requisite pecuniary jurisdiction in the matter.
16. I have no doubt in my mind that pursuant to the provisions of Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the *Magistrates' Courts Act*, 2015, so long as presided over by a magistrate duly gazetted under Section 26 (3) of the *Environment and Land Court Act*, 2011 and who has the requisite pecuniary jurisdiction, Magistrates' courts have jurisdiction to hear and determine cases involving claims of adverse possession. See *Philip Kithaka v Mercy Karimi Nyaga* [2021] eKLR and *Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & another* [2020] eKLR. I agree with the learned Magistrate that he had jurisdiction.
17. The Respondent did not dispute that the Appellant was the registered proprietor of the suit property. As a registered proprietor of land, the Appellant was entitled to the rights, privileges, and benefits under



Section 24 of the *Land Registration Act*. Section 26 of the Act obligated the Subordinate Court to accept his certificate of title as conclusive evidence of proprietorship unless the provisos under Section 26 (1) (a) or (b) were established. There was no case before the Subordinate Court seeking nullification of the Appellant's title. Thus, if the Respondent did not prove his adverse possession claim, it would follow that the relief of eviction sought by the Appellant would naturally issue, save for a just reason.

18. The ingredients of adverse possession were discussed by the Court of Appeal in *Richard Wefwafwa Songoi v Ben Munyifwa 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 Sabeel 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.

19. The Respondent's case was that he entered the suit property in 1997, in furtherance of a sale transaction with the Appellant. The Appellant does not dispute the existence of the transaction but contends that it was frustrated and was not completed.

20. By its very nature, adverse possession is founded on hostile entry devoid of consent from the proprietor. Entry and possession of land in furtherance of a sale transaction is deemed to be by permission of the proprietor and does not therefore amount to adverse possession. Nevertheless, possession and occupation by a purchaser who has completed paying the purchase price is by right and not 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. In other words, time for purposes of adverse possession does not start to run in favour of a purchaser until he demonstrates full payment of the purchase price.

21. The Respondent contended that he fully paid the purchase price of KShs 65,000. He did not however produce evidence of full payment. The Appellant testified that there was a balance of KShs 8,000. In the absence proof of payment of the entire purchase price, time for purposes of adverse possession could not start running in the Respondent's favour. His possession did not transition from consensual to a hostile one. He has failed to demonstrate a hostile, open and undisturbed possession for the requisite



- 12 years. I find that the Respondent did not establish adverse possession and is therefore not entitled to the relief that he sought in his counterclaim.
22. It is necessary to remind litigants that adverse possession is not a procedure for enforcing contracts, or specifically, 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, they fail to establish those ingredients, the claim will equally fail, even where there is an acknowledged sale transaction.
  23. The next question for determination is whether the Appellant is entitled to the relief of eviction of Respondent together with his agents, employees, and relatives from the suit property. Earlier on in this judgment, I highlighted the rights of a registered proprietor of land. There is no dispute that the Appellant is the registered proprietor of the suit property. That much is borne out by the copy of the register which was produced in evidence, and which shows that the appellant was registered as proprietor on 24<sup>th</sup> August 2012. There is nothing on record to indicate that the position has changed. I am aware that the Respondent stated in his written submissions that the suit property was subdivided into Bunyala/Nambacha/2599 in the name of the Appellant and Bunyala/Nambacha/2600 in his name, supposedly pursuant to the judgment of the Subordinate Court. However, I have perused the record of the Subordinate Court and there is nothing therein, as of the date of this judgment, to show that subdivision was accomplished, and titles issued as claimed in submissions.
  24. The Appellant conceded that he received money from the Respondent, towards purchase of the portion of the suit property. The Appellant's own testimony was that only a balance of KShs 8,000 remained. The Respondent did not counterclaim, in the alternative, for any refund. He must have been preoccupied with pursuing adverse possession.
  25. I have agonised over whether it would be just to order the Respondent's eviction and simply remain silent on what happens to what the Respondent paid. The difficulty is twofold: firstly, the court and parties are bound by the pleadings. See *Raila Amolo Odinga & Another vs. IEBC & 2 others* [2017] eKLR. Secondly, beyond the acknowledged balance of KShs 8,000, there is no clarity on what sum was actually paid. This is partly because the Respondent contends that the purchase price in the agreement was KShs 50,000 and that it was enhanced by the Appellant to KShs 65,000. There would have to be a separate enquiry to establish what is payable to the Respondent by way of refund. I also bear in mind the requirement that that special damages must be specifically pleaded and strictly proved with a degree of certainty and particularity. See *Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd* [2013] eKLR. In those circumstances, my instincts on the justice of the situation have been constrained by procedural considerations. Procedure is itself a critical component of justice and is in fact a handmaiden of just determination of cases. See *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR. The parties will have to plead an appropriate case elsewhere, to resolve that bit.
  26. I find that the Appellant is entitled to the relief of eviction of Respondent together with his agents and employees from the suit property.
  27. In view of the foregoing discourse, the learned Magistrate misdirected himself as to whether adverse possession was established. I find merit in this appeal. I make the following orders:
    - a. This appeal is allowed.
    - b. The judgment of the Subordinate Court is set aside and replaced with an order dismissing the Respondent's counterclaim.
    - c. The Respondent together with his agents and employees to vacate from the parcel of land known as Bunyala/Nambacha/702 within 90 (Ninety) days from the date of delivery of this judgment. In default, the Subordinate Court to issue an eviction order.



d. Considering the circumstances of the dispute, I make no order as to costs.

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

**D. O. OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

**No appearance for the Appellant**

**The Respondent present in person**

**Court Assistant: M Nguyayi**

