



**Gumba & 6 others v Abdallah (Environment and Land Appeal  
E027 of 2023) [2024] KEELC 5634 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5634 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL E027 OF 2023**

**NA MATHEKA, J**

**JULY 25, 2024**

**BETWEEN**

**JOSHUA OSIMBO GUMBA ..... 1<sup>ST</sup> APPELLANT**  
**DANIEL KAPANGA SIMIYU ..... 2<sup>ND</sup> APPELLANT**  
**PHILIP MUNYONYI MAKANDE ..... 3<sup>RD</sup> APPELLANT**  
**MBEYU RAMBI CHONGA ..... 4<sup>TH</sup> APPELLANT**  
**PILI TSUMA CHIBOYI ..... 5<sup>TH</sup> APPELLANT**  
**JUMA KARISA KENGA ..... 6<sup>TH</sup> APPELLANT**  
**JOSEPH KIARIE WAINAINA ..... 7<sup>TH</sup> APPELLANT**

**AND**

**MASJID RASHID ABDALLAH ..... RESPONDENT**

**JUDGMENT**

1. This is an Appeal from the Judgment of the Chief Magistrate's Court Mombasa delivered on 29<sup>th</sup> August 2023 by Hon. J.B. Kalo CM in MCCC NO. 2198 of 2018 on the grounds inter alia that the learned magistrate judgment was in conflict with the basic principles of adverse possession; that the limitation period for the cause of action had lapsed by the time of filing suit; that the respondents did not legally and validly acquire title and could not exercise any ownership rights. The Appellant prays that the appeal be allowed and this court to set aside the judgment of Hon. J.B Kalo CM in MCCC NO. 2198 of 2018 and allow the appellants counterclaim in the trial suit.



2. With respect to first appeals the court in *Bwire vs Wayo & Sailoki (Civil Appeal 032 of 2021)* (2022) KEHC 7 (KLR) (24 January 2022) (Judgment) while citing with approval the case of Santosh Hazari vs. Purushottam Tiwari (Deceased) by L. Rs (2001) 3 SCC 179 held that;

...the judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.”

3. In the plaint dated 24<sup>th</sup> October 2018, the respondent sought inter alia permanent injunction and eviction of the appellants for reasons that they had trespassed on parcels of land known as MSA/4800,4801,4802 and 4803/ II/MN (formerly 116/1/II/MN) hereafter known as suit properties. At the commencement of the suit there were only four defendants to wit Joshua Ahaga, Evans Kalenga Kalenga, Tsuma Ngala Chingulu and John Wanjala but in due course fifteen more defendants were joined to the suit and at the point of judgement only the new fifteen defendants were party. The same fifteen defendants are the appellants in this appeal and I will thus focus only on their joint statement of defence and counterclaim dated 17<sup>th</sup> February 2020 where the defendants exposed the 1<sup>st</sup> four defendants as non-existent individuals. That the plaintiff is not the proprietor of the suit properties and that they had been in occupation for over 30 years which is since 1989.
4. At the hearing PW1 relied on his witness and produced among other documents a survey report. He was testifying through power of attorney and his testimony is that the title deeds were in the name of the respondent and he does not know when the appellants came onto the suit properties. DW1 the 1<sup>st</sup> appellant herein stated that they have resided on the land for more since 1989 without interference from anyone and that they developed structures on the land. In the judgement, the learned trial magistrate held that although PW1 admitted to not knowing when the appellants took possession he declined to find in favour of adverse possession of the appellants as the trial suit had interrupted the adverse possession despite having stayed in possession for more than 12 years before the trial suit was filed. This resulted in him dismissing the counterclaim by the appellants and declaring that the plaintiff's title is unchallenged.
5. Counsel for the appellants and the respondent filed their submissions dated 24<sup>th</sup> June 2024 and 1<sup>st</sup> July 2024 respectively. Having considered the pleadings and submissions by counsel for the appellant, the issues for determination is whether the claimants have proved adverse possession and consequently what orders can the court give?
6. Although the trial suit started as a tortious claim of trespass it quickly resulted in a judgment which considered adverse possession. The appellants herein claimed adverse possession but challenged the title of the respondent. In a nutshell adverse possession means possession adverse to the title of the owner. The ingredients in proving adverse possession were discussed in *Maweu vs. Liu Ranching and Farming Cooperative Society* 1985 KLR 430 where the Court held that;

Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.



7. Counsel for the appellants submitted that there are photos in the topo cadastral survey produced by the respondent in the trial suit showing there are houses on the suit properties and claim that there is an open air market in antiquity commonly known as Soko Mjinga Market which has been in existence since 1989. Further it is the evidence of DW1 that they paid Kshs. 300 to one Salim who subdivided the suit property and showed them their portions of the same. There was no real challenge put up on the title of the respondent and it is trite that possession became adverse from the dates of obtaining title. The dates of registration for the L.R 4800,4801,4802 and 4803 were 4<sup>th</sup> March 2015, 30<sup>th</sup> September 2004, 5<sup>th</sup> July 2013 and 21<sup>st</sup> February 2014 respectively.
8. In all the testimonies provided, it was not elaborated if during the purchase of the suit properties the appellants were already on the land because that would have had a different outcome as the sales would be a nullity since the previous owners would have held the land in trust for the appellants and could not have sold them to the respondent. PW1's witness statement narrates that survey was done in 1993 and there were no squatters and that the appellants came sometime in 2017 after encouragement by politicians. In the list of documents by the appellants dated 17<sup>th</sup> February 2020 there is an undated statement giving an alleged history from 1987 until 2004 when their kiosks were demolished, no further history was given. There is also another letter dated 22<sup>nd</sup> July 1997 authored by the then officials of the hawkers of Soko Mjinga where they are complaining of being issued with notices of eviction and that they approached the "owner" the owner claimed he was not aware.
9. It is beyond peradventure that the possession of the appellants was with force and it cannot be alluded to have been with the permission of an "owner" who perhaps might have been the aforesaid Salim who was charging Kshs. 300 as no explanation has been given as to why they paid him. Although it is not known whether the nexus of Salim and the suit properties what is abundantly clear is there was interference from as early as 1997 which is eight years from the date they claim they started possession. The learned trial magistrate was accurate in dismissing the adverse possession. I find this appeal is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25<sup>TH</sup> DAY OF JULY 2024.**

**N.A. MATHEKA**

**JUDGE**

