



**Kobe & 2 others v Osewe (Environment and Land Appeal  
19 of 2023) [2024] KEELC 5511 (KLR) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5511 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL 19 OF 2023  
GMA ONGONDO, J  
JULY 23, 2024**

**BETWEEN**

**MOSE KOBE ..... 1<sup>ST</sup> APPELLANT  
JANE AKUKU ..... 2<sup>ND</sup> APPELLANT  
PAUL ODIRA ..... 3<sup>RD</sup> APPELLANT**

**AND**

**JOHN OCHIENG OSEWE ..... RESPONDENT**

*(Being an appeal against the judgment and decree of Honourable Celesa Okore, Principal Magistrate delivered on 30th March 2023 at Oyugis Senior Principal Magistrate's Court Environment and Land case No. 77 of 2023)*

**JUDGMENT**

1. This Appeal emanates from the Judgment and Decree of Principal Magistrate Hon. Celesa Okore delivered on 30<sup>th</sup> March, 2023 in Oyugis Senior principal Magistrate's Court E & L Case No. 77 of 2023 in favour of the Respondent in line with his claim in the plaint dated 22<sup>nd</sup> June 2021 and dismissed the Appellants' statement of defence and counter-claim dated 24<sup>th</sup> January 2022.
2. Being aggrieved by the said decision, the Appellants through Omuthe and Company Advocates, lodged the Appeal by a Memorandum of Appeal dated 12<sup>th</sup> April 2023 and outlined the grounds of appeal as follows: -
  - i. The Honourable Learned Magistrate erred in law and in fact in failing to appreciate the fact that the Defence case before her was premised on adverse possession, which the Court relied on the title to land, thereby arriving at a wrong conclusion.



- ii. The Honourable Learned Magistrate erred in law and in fact by failing to appreciate that the Respondent's title is subject to overriding interests of the Defendant, therefore not absolute and indefeasible under Section 28(b) of the *Land Registration Act*, 2012.
- iii. The Honourable Learned Magistrate consequently erred in law and in fact in failing to hold that the Respondent's right to recover the suit property, Central Kasipul/Sino/393 was barred under the *Limitation of Actions Act* Cap 22 Laws of Kenya and his title thereto was extinguished on the grounds that the Appellants have openly, peacefully and continuously been in occupation and possession of the aforesaid portion for a period exceeding 12 years.
- iv. The Honourable Learned Magistrate erred in law and in fact by not considering the Respondent's herein admission that the Appellant herein are in occupation of the suit property.
- v. The Honourable Learned Magistrate erred in law and in fact by failing to hold that the Respondent's suit to evict the Appellants from the land they have known as home since 1975 was an afterthought since the Respondent's father (Deceased-3 herein) and brother who both were registered proprietors of the suit property left the Appellants on suit property and never intended to evict the Appellants.
- vi. The Honourable Learned Magistrate erred in law and in fact by holding that the Appellants' stay on the property had not been peaceful despite there being no violence case reported or any OB number produced in court.
- vii. The Honourable Learned Magistrate erred in law and in fact by allowing the Plaintiff to sue in his own capacity and not as the Administrator of the estate of Peter Osewe (Deceased 1 herein) whose documents he produced during hearing of the case.
- viii. The Honourable Learned Magistrate erred in law and in fact by admitting wrong evidence from the Respondent which misled the honourable court.
- ix. The Honourable Learned Magistrate erred in law and in fact by holding that the parcel which the Appellants' father (Deceased-2 herein) bought was Central Kasipul/Sino/396 and not the suit property.
- x. The Honourable Learned Magistrate erred in law and in fact by failing to hold that the Respondent held the title of the suit property in trust for the Appellants.
- xi. The Honourable Learned Magistrate erred in law and in fact by not considering that the Deceased-2 having bought the suit property from the registered owner, the Respondent was merely a trustee.
- xii. The Honourable Learned Magistrate erred in law and in fact by not considering that the suit property was subject to overriding interest, Constructive Trust being one of them.
- xiii. The Honourable Learned Magistrate erred in law and in fact by relying on an agreement of sale of land for parcel number 396 which was not received/ filed in court.
- xiv. The Honourable Learned Magistrate erred in law and in fact by failing to notice that the agreement the court relied on was illegally introduced in the court documents and the Appellants' sale agreement for parcel of land no. 393 which was relied on by the Appellants was expunged from the court document.



- xv. The Honourable Learned Magistrate erred in law and in fact by holding that the Appellants heavily relied on the sale agreement for parcel no. 396 yet the sale agreement filed and received by the court was the suit property which was directly in issue.
  - xvi. The Honourable Learned Magistrate erred in law and in fact by failing to rely on the Chief's Letter produced in court by the Appellants.
  - xvii. The Honourable Learned Magistrate erred in law and in fact by failing to rely on the consistent oral evidence by the Appellants.
  - xviii. The Honourable Learned Magistrate erred in law and in fact by admitting wrong evidence of the suit property as the title deed and certificate of search produced had been overtaken by events.
  - xix. The Honourable Learned Magistrate consequently erred in law and in fact in misdirecting itself on the facts of the case before it by failing to appreciate the totality of the case as pleaded, the evidence tendered, submissions and case law in support of the Appellants' case, thereby arriving at the wrong finding.
3. Thus, the Appellants has sought the following orders: -
    - a. The Appeal be allowed.
    - b. The Judgment and Decree of the Hon. Celesa Okore, Principal magistrate delivered on the 30<sup>th</sup> March, 2023 in the Magistrates Court at Oyugis, ELC Case No. 77 of 2023 be set aside and be substituted with an Order allowing the Appellants' suit with costs.
    - c. Costs of this Appeal and of the suit be borne by the Respondent.
  4. The Appeal was heard by way of written submissions pursuant to this court's orders of 7<sup>th</sup> March 2024.
  5. Learned counsel for the appellants filed submissions dated 27<sup>th</sup> May 2024 and stated the grounds of appeal as well as brief facts of the matter including the plaint, the statement of defence and counter claim, hearing of the suit and the impugned judgment. Counsel submitted that the trial court erred by relying on non-existent agreement. That the same is based on natural perception, not legally tenable and must be set aside in entirety and substitute it with judgment of the court.
  6. To buttress the submissions, counsel relied on, inter alia, Peterson Ndungu and others v Kenya Power and Lighting Co. Ltd [2018] eKLR, Kipkebe Ltd v Peterson Ondieki [2010] eKLR, Alfred Njau and others v City Council of Nairobi [1983] eKLR and Macharia Mwangi Maina v Davidson Mwangi Kagiri [2014] eKLR.
  7. By the submissions uploaded in the e-filing platform on 12<sup>th</sup> June 2024, the respondent in person asserted that the appellants have not settled on the suit property since the year 1975 as the 1<sup>st</sup> appellant was born in 1974, the 2<sup>nd</sup> appellant had not been married then and the 3<sup>rd</sup> appellant was born in 1988. That the 1<sup>st</sup> appellant started to encroach into the suit property in the year 2019. That the respondent reported the incident to the local chief and a meeting was convened. The outcome of the meeting was that the suit property did not belong to deceased-2. The respondent proceeded to process succession regarding the matter and completed it by the year 2020.
  8. Further, the respondent submitted on fraud and relied on surveyor's report. That he owns no land of the appellants and that the suit property belongs to him. Thus, he implored the court to dismiss the appeal with costs to him.



9. Briefly, the background of the appeal is that the Respondent filed the suit in the trial court by a plaint dated 22<sup>nd</sup> June 2021 seeking principal orders of permanent injunction and eviction against the Appellants from the whole of the suit property.
10. The Respondent/Plaintiff relied on his statement as well as title deed, certificate of official search, death certificate of Deceased-1 and Limited grant of letters of administration (P Exhibits 1, 2, 3 and 4 respectively) in his evidence. He stated in part that the suit property was family land registered in the name of Deceased-1 as per P Exhibits 1 and 2 and thus, the suit be dismissed with costs.
11. The Appellants filed their statement of defence and Counter-claim dated 24<sup>th</sup> January 202 in response to the allegations raised in the plaint. They stated that they have been the beneficial owners of the suit property and sought a declaration that they are the owners of it owing to their continuous possession and occupation thereof. They also sought permanent injunction to restrain the respondent from interfering with their quiet enjoyment and peaceful occupation of the suit property.
12. The appellant/1<sup>st</sup> defendant (DW1) relied upon his statement and told the court that they have possessed and occupied the suit property since 1975. That Deceased-2 who died in 1992, had bought it. He relied on identity card, sale agreement, chief's letter, demand letter, green card, title deed and grant of letters of administration (D Exhibits, 1, 2, 3, 4, 5, 6 and 7 respectively).
13. In her testimony, the 2<sup>nd</sup> appellant/defendant (DW2) relied on her statement to the effect that she got married to Deceased-1 in 1996. That she found Deceased-1 and others living thereon. That her father in law (Deceased-2) who had bought the land, died in 1992.
14. The evidence of 3<sup>rd</sup> appellant/ defendant (DW3) was that he is related to DW1 and DW2 and that Deceased-2 bought the suit property from the respondent's father (Deceased-3). That they have lived thereon and not on any other land since 1975.
15. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusions. This mandate does not however, entail taking on board new issues which were never brought to the trial court's attention or matters that were not subject of the trial court's consideration. See the Court of Appeal decision in *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR and *Kamau v Mungai and another* [2006] 1 KLR 150.
16. Also, in *Selle v Associated Motor Boat Co.* [1968] EA 123, The Court of Appeal held that: -

“This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
17. I have anxiously considered the grounds in the Memorandum of Appeal, the Record of Appeal duly filed and the rival submissions in totality. It is my considered view that the main issue arising for determination is whether this Court should interfere with the exercise of discretion by the trial court by setting aside the impugned judgment and decree. I proceed to address the grounds of appeal which are condensed thus: -
  - a. Capacity of the Respondent to file the suit.



- b. The application of Adverse Possession and Constructive trust herein.
- c. The orders to grant to meet the ends of justice in this appeal.
18. Concerning the first issue as outlined in ground 7 of appeal, it is the appellants' contention that the plaintiff ought to have filed the suit in his capacity as the administrator of the estate of his late brother (Deceased-1) and not in his personal capacity. That the Respondent sued in his own capacity even though the suit property is still registered in the name of Deceased-1 who is since deceased. That from the evidence adduced, nothing shows that the respondent is the sole registered owner of the suit property.
19. Undoubtedly, capacity is key in any proceedings and goes to the root of the case. Without proper locus standi, a party has no right to appear or be heard in such proceedings. If an issue on capacity/ locus standi is decided in the affirmative, it has the effect of disposing of the matter. It is not in dispute that the respondent is the administrator of the estate of Deceased-1 as he produced a copy of the Limited Grant as Pexh. 4 in full compliance with section 82 of the Law of Succession Act Chapter 160 of the Laws of Kenya which gives the personal representatives of a deceased person's estate the power to institute a suit on behalf of the estate; see also Alfred Njau case (supra).
20. Besides, did the respondent lodge the suit in the trial court in his personal capacity or as an administrator and on behalf of the estate of deceased-1? It is common ground that the suit property was previously registered in the name of the deceased-1 and this is further buttressed by copies of the Title Deed and Certificate of Search produced as Pexh. 1 and 2. The respondent did not produce any document as proof that he is the present registered owner of the suit property as indicated in paragraph 4 of his Complaint, but a copy of the Green Card produced as Dexh. 5 by the appellants, Entries No. 4 and 5 made on the 5<sup>th</sup> March 2021 show that the suit property has since been registered in the name of the respondent vide transmission pursuant to Succession Cause No. 105 of 2020 at Oyugis Principal Magistrate's Court.
21. The second issues which are central in this appeal are two-fold; Adverse Possession and constructive trust over the suit property and the same have been outlined in grounds 1,2,3,4,5,6,10,11 and 12 of the appeal. The Appellants contend that they have been in peaceful and quiet possession, occupation and have extensively developed the suit land since the year 1975 when Deceased-2 who was their father bought the suit land from the deceased-1. They relied on a sale agreement as the basis of their entry into the suit land and maintained that the deceased-1 died before transferring the suit property in their favour.
22. The appellants' assertion that Deceased-1 did not in any manner interfere with their occupation and use of the suit property during his lifetime. Further, the respondent has also neither been in physical possession of the suit land nor disturbed their peaceful and quiet possession and use thereof until the filing of the suit.
23. Regarding the issue of adverse possession as raised in the Counter-claim, the learned trial magistrate held in part as follows: -

“...The defense is also alleging acquisition of the suit land by adverse possession however, they have failed to prove that their stay on the land was peaceful and/or uninterrupted by the plaintiff, since the plaintiff has proved that he has tried everything possible to remove the defendants from the suit land, all in vain. The defendants have failed to prove their case against the plaintiff including the counter-claim to the required standard...”



24. Sections 7,13, 17 and 38 (1) and (2) of the *Limitation of Actions Act* Chapter 21 Laws of Kenya and Section 28 (h) of the *Land Registration Act* 2016 (2012) provide the statutory framework for the doctrine of adverse possession an overriding interest on registered land. Section 28(b) of the said latter Act provides for trusts inclusive of customary trusts which are overriding interests and can be proved by evidence; see also *Mumo v Makau* [2002] 1 EA 170 (eKLR).
25. The elements as regards a claim for Adverse possession are well settled; that the land in question must be registered in the name of a person other than the Applicant, the Applicant must demonstrate that he took possession of the suit land, asserted his rights over it in an adverse manner to the title of the land owner and the said title holder did not take any precipitate action against the said Applicant for a period of 12 years, the applicant must also demonstrate that his possession and occupation of the suit land was not by force or under the licence of the land owner and that the said possession was open, continuous and uninterrupted period of over 12 years; see *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR;
  26. *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR.
27. The first element to be proved in adverse possession claim, is that on the registration of the land in question is in the name of a person other than the applicants. In the instant case, it is common ground that the suit property was registered in the name of respondent on the 5/3/2021 vide transmission pursuant to Succession Cause No. 105 of 2020. The appellants produced a copy of the Green Card as D Exhibit 5 in support of their claim and the same is contained at page 30 of the Record of Appeal. I therefore, find that this ground was satisfactorily proved.
28. The second element of adverse possession pertains to uninterrupted possession/occupation and use of the suit property for the prescribed period of time. The onus is on the Applicants to demonstrate the duration and nature of their possession and whether the same accrued any prescriptive and overriding rights over the suit land, capable of registration. I note the defence case proceedings contained at pages 63 - 68 of the record of appeal and that the appellants solely relied on the sale agreement which they produced as D Exhibit 2 in support of their case. The appellants maintained that the suit property was bought by Deceased-2 from deceased-2 and who immediately took possession in the year 1975. That they have enjoyed peaceful, quiet possession and use since then until the filing of the suit. It was also their claim that Deceased-1 never interrupted their occupation and use of it.
29. On the respondent's allegations that the appellants' occupation and use of the suit property was not quiet and peaceful and which was also referred to by the trial magistrate in his judgment, it was their submission that no proof was adduced by the respondent either in the form of an Occurrence Book (OB) report made to the police station or otherwise. Thus, they maintained that their possession and use over the years has been peaceful, quiet and uninterrupted.
30. The respondent neither filed any response to the Counter-claim; nor adduced evidence of any precipitate action he took against the appellants with the intention to interrupt their occupation and use of the suit property. It is well settled that time for adverse possession will only be interrupted either by the title owner's re-entry/ repossession of the land or where there is an order of eviction or suit filed. Prior to the filing of the suit in the trial court, there is no demonstration of any positive action taken by the respondent against the appellant whose effect would have been to interrupt time. See Malindi Court of Appeal decision in *Peter Kamau Njau v Emmanuel Charo Tinga* [2016] eKLR
31. Moreover, the transfer and registration of the suit property in the name of the respondent in the year 2021, did interrupt the time from running nor the appellants' possession. Adverse Possession is a fact to be observed on the land and not on the title. Thus, the mere change of ownership from the deceased's



estate to the respondent did not affect the appellants' claim as observed in *Githu v Ndeete* (1984) KLR 776.

32. It has therefore, emerged that the 1<sup>st</sup> and 3<sup>rd</sup> appellants were born on the suit property and have remained thereon to date. Furthermore, their occupation and use of it, was affirmed by the respondent's own admission on cross-examination and by the Chief's Letter dated 01/10/2021 produced as DExhibit 3. There is nothing advanced by the respondent to dislodge this solid position.
33. The third element concerns a demonstration that the appellants' occupation and use of the suit property was inconsistent with the owner/ title holder's rights over the same property and was the same with an intention to dispossess the actual owner of the suit property. What amounts to dispossession in a claim for adverse possession has been held to be acts done by the adverse possessor which are inconsistent with the true owner's enjoyment of the soil for the purpose for which he intended to use the same. See Court of Appeal decision in *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR)
34. From the evidence adduced in the trial court and the oral testimony of the appellants, it is my considered view that there was sufficient demonstration of their intention to dispossess the respondent from the suit property. Although the appellants maintained that their entry into the suit property was pursuant to a sale agreement, their continued occupation and use of the land upon lapse of the 6 years contractual period became adverse to the actual owner's/ title holder's rights over the same property. Their acts of building their residential home and extensively developing the suit land was with a clear intention of dealing with the land exclusively as if the land was theirs and were inconsistent with the owner's enjoyment.
35. It is imperative to note that there are two different sale agreements an agreement in respect to a land parcel whose details are very faint and not legible and another sale agreement in respect of the suit property and the details thereof are clear and readable as per the record of appeal. The two conflicting documents are both on the record of appeal and bear the official stamp of the court. Be that as it may, the appellants' main defense was that of adverse possession and much as the sale agreement was a critical document, the same was only to support the appellants' claim on entry into the suit property. The court need not delve into the validity of the sale agreement in a claim for adverse possession.
36. As earlier stated, both the appellants and the respondent confirmed that indeed the appellants are in occupation of the suit property. This fact was correctly captured by the trial court in the impugned judgment. Clearly, there is no dispute on the land occupied by the appellants and the trial court thus, erred in solely relying on the conflicting sale agreements as a bar to the appellants' defence.
37. Additionally, I must point out that constructive trust applies in favour of the appellants in light of the purchase of the suit property by Deceased-2 from Deceased-1 who failed to transfer the same accordingly as disclosed in the testimonies of DW1, DW2 and DW3 in the obtaining circumstances; See *Mumo case* (supra) and *William Kipsoi Sigei v Kipkoech A asrusei and another* [2019] eKLR
38. In conclusion, it is my considered view that the appellants' claim on for adverse possession was sufficiently proved to the required standard. The trial magistrate thus, erred by dismissing the counter-claim. Consequently, it is my finding that grounds 1,2,3,4,5,6,10,11 and 12 of appeal are merited.
39. A fortiori, I find that the present Appeal is merited. The same is hereby allowed on the following terms:  
-  
I. The Judgment and Decree of the Hon. Celesa Okore, Principal magistrate delivered on the 30<sup>th</sup> March, 2023 in the Magistrates Court at Oyugis, ELC Case No. 77 of 2023, be set aside and be substituted with an order allowing the Appellants' counter claim with costs



II. Costs of this Appeal and the suit alongside the counter claim in court below be borne by the Respondent.

40. It is so ordered.

**DATED AND DELIVERED VIRTUALLY AT HOMABAY THIS 23<sup>RD</sup> DAY OF JULY, 2024.**

**G.M.A. ONG'ONDO**

**JUDGE**

In the presence of: -

1. Mr Omuthe learned counsel for the Appellants
2. The Respondent in person
3. T Luanga court assistant

