



**Marwanga v Osaga & 4 others (Environment and Land Appeal
8 of 2023) [2025] KEELC 743 (KLR) (19 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 743 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 8 OF 2023**

M SILA, J

FEBRUARY 19, 2025

BETWEEN

FRED ONYANCHA MARWANGA APPELLANT

AND

HELLEN MAGASI OSAGA 1ST RESPONDENT

OSAGA MAGASI 2ND RESPONDENT

MACHERA MAGASI 3RD RESPONDENT

PETER MAGASI 4TH RESPONDENT

MAGASI MAGASI 5TH RESPONDENT

*((Being an appeal against the judgment of Hon. M.O Obiero (Senior Principal
Magistrate) delivered on 11 May 2023 in the suit Kehancha SPMCCELC No. 01 of 2020)*

JUDGMENT

1. The appellant herein lodged this appeal vide a memorandum of appeal dated 9 September 2023 against the judgment of Hon. M.O Obiero (SPM) dated 11 May, 2023. He raised 4 grounds of appeal, but before I address them, it is necessary that I give a background to the suit that led to this appeal.
2. The primary suit was commenced by way of plaint filed by the appellant against the respondents herein at the Kehancha Principal Magistrate’s court. The court stamp shows that the plaint was filed on 1 January 2020 though I doubt this position as 1 January 2020 was certainly a public holiday. Be that as it may, the plaint was later amended on 10 March, 2022. I need to mention that after the original plaint was filed, a memorandum of appearance was filed on 23 January 2020 through the law firm of M/s Thomas Muniko & Company Advocates. No defence was however filed. In a strange twist, Mr. Muniko held brief for the law firm of M/s Dennis Anyoka Moturi & Company Advocates on record for the plaintiff in an ex parte hearing conducted on 10 June 2021 and culminating in an ex



parte judgment delivered on 18 November 2021 by Hon. J. Ongondo. Subsequently, the respondents appointed the law firm of M/s Abisai & Company Advocates, who successfully applied to set aside the judgment, meaning that the matter had to commence de novo. The ruling was delivered on 3 February 2022. Thereafter, the respondents filed defence and counterclaim on 24 February 2022. The amended plaint was subsequently filed on 10 March 2022 as I have mentioned.

3. In the amended plaint, the appellant pleaded that he is the biological son of the late Sese Nyambane Nyambane the 1st registered owner, upon adjudication, of the land parcel Bugumbe/Masaba/ 368, the suit land herein. He averred that the said parcel of land was transmitted to him after succession and he was now the registered proprietor. He pleaded that the respondents are descendants of the late Magasi who was a neighbor and friend to his father way before the adjudication process. He pleaded that his father was a manager at British American Tobacco (BAT) at Kehancha, and had given the family of the late Magasi a license to occupy and be caretakers of the suit land when he went to work in Kericho. It was pleaded that the late Magasi owned the neighbouring parcel No. 367. He pleaded that after his father died, they could not come and take over the suit land as the plaintiff was young and lacked resources to do so. He decried that the respondents refused to vacate the suit land despite several meetings with the local administration forcing him to file the suit. In the suit, he asked for orders to have the respondents evicted and be permanently restrained from the suit land.
4. I had mentioned that the respondents filed defence and counterclaim on 22 February 2022. They amended those pleadings on 20 April 2022. In the amended defence and counterclaim, they admitted being descendants of the late Magasi. They however denied the other allegations in the plaint and invited strict proof. In the counterclaim, they pleaded entitlement to the suit land through adverse possession. They contended that Sese Nyambane, the father of the appellant, was well aware of their occupation on the suit land and never raised any complaint for a period exceeding 12 years. They pleaded that their occupation constitutes an overriding interest. They asked that it be declared that the suit of the appellant is time barred under Section 7 of the *Limitation of Actions Act*, Cap 22, Laws of Kenya, and that they are entitled to the suit land through prescription/adverse possession.
5. The matter was heard by way of viva voce evidence. The appellant testified as the sole witness in support of his case. He testified that the suit land belonged to his late father, Sese Nyambane Nyambane, who worked as a manager with BAT. He stated that his father was transferred to Kericho and they moved there in 1994. His father died in 1995. He filed succession in 2019, was issued with a grant which was confirmed, and he got registered as proprietor of the suit land. He stated that Magasi Makurere was a friend of his father and his father left the land to him. He stated that the land had trees on one acre and some houses and that they used to visit the land regularly. The houses were destroyed in 2015, the same year that Magasi died. He stated that after Magasi's death, the family became hostile and he reported the matter to the Chief and the District Officer. He asserted that they are not entitled to the land as they were only to guard it.
6. Cross-examined, he stated that his father came to Kuria in 1942 before he was born. He reiterated that his father had constructed some houses on the land though he had no photographic evidence of the same. He did not make a report on the damage to the trees. He repeated that it was in 1994 that his father allowed Magasi to remain on the suit land. He did not see any (written) agreement between them. In 1994 he was an adult and he elaborated that they are three sons and he is the last born. He did not have evidence of any report made to the Chief or D.O nor any demand notice. He admitted having nothing to show that he made effort to remove the occupants from the suit land. He acknowledged that they had been on the land since 1994. He stated that they currently have three houses on the land and are cultivating.
7. With the above evidence, the appellant closed his case.



8. During the defense hearing a total of 2 witnesses testified. DW1 was Hellen Magasi Osaga, the 1st respondent herein. She adopted her witness statement as her evidence in chief. In her witness statement which is dated 22 February, 2022, she stated that she was married in 1974 to one Makorere Mororo, the son of Osaga Machera. She stated too that they lived on the suit land with her husband and her co-wife one Elizabeth Makorere since 1974. She stated that their late grandfather, Osaga Machera, died and was buried on the suit land. She stated that she together with the other respondents have extensively developed the suit land by cultivating and tilling it for their daily livelihood. She stated further that they have established homes on the suit land and are using it to the exclusion of everyone else including the appellant, and that this has been their home for more than 40 years. It was her averment that the appellant has never made any attempt to evict them from the suit land until recently when he clandestinely acquired title so as to defeat their interest on their land. She claimed that the appellant's late father, Sese Nyambane Nyambane was well aware of their use and occupation of the suit land before he died but did not at any time evict them. She contended that their interest on the suit land overrides that of the appellant by virtue of the doctrine of adverse possession. She contended too that the appellant holds title to the suit land in trust for all the respondents. She dismissed the appellant's claim as misleading and urged the court to disregard it. She urged the court to dismiss the appellant's suit and allow their counterclaim as prayed. In court, she testified that she does not know the appellant. She testified that her husband was buried on the suit land. She added that they did not ask for permission to live on the suit land and that she has lived on the land for over 60 years. She introduced the 2nd to 5th respondents as her sons and that they all live on the land. She produced 9 photographs in an effort to prove her occupation on the land.
9. In cross-examination, she testified that she was married to Magasi Osaga not Mokorere Maroro as mentioned in her statement. She testified that her husband informed her that the land belonged to his father and that it was ancestral land. She lived with her husband on the suit land. She testified that her father in law was Magasi Osaga who died over 30 years back. She was not aware whether he had other land. She testified that her husband is deceased and she has not filed any succession cause over his estate. She asserted that he had only one wife, herself; she did not know Elizabeth Chacha Makorere. She however acknowledged knowing one Joseph Makorere, a son to Wambura who is her brother in law. She stated that Wambura was from another house. She also knew John Burure as her neighbour. She was asked whether she knew Sese Nyambane and she now testified that she does not know him. She stated that she found no other home on the suit land and that she found neighbours living in it. She did not know the size of the suit land. She also did not know the area that she is in occupation of. She did not know the owner of the parcel No. 367. She stated that her husband was buried on the suit land. She was cross-examined on the photographs that she produced as exhibits and she now stated that she cannot identify her home from the photographs. She could not tell the portion of land in her occupation. She denied that there were houses which were demolished. She could not remember when she constructed the last house on the suit land but affirmed that she lives on it with her sons.
10. Re-examined, she now stated that the photographs show her home and her farm.
11. DW2 was one Cleophas Michira Makore. He testified and adopted his witness statement as his evidence in chief. In his witness statement dated 22 February 2022, DW-2 he stated that he was 41 years old at the time and that he was born on the suit land. He stated that the respondents are his relatives and that they all live on the suit land. He stated that their late grandfather Osaga Machera died and was buried on the suit land. He stated that he together with the respondents have developed the suit land extensively by cultivating and tilling it for their daily subsistence. He added that they have established their homes on the suit land and have used it to the exclusion of everybody else. He stated that Sese Nyambane was well aware of the respondents' use of the suit land before his death and did not at any time evict them.



He believed that the respondents are entitled to the suit land by way of adverse possession. In court, he added that he lives in Masaba. He stated that he came to know the appellant in 2019 when he came to his mother's land. He introduced the 1st respondent (Hellen) as his neighbour and that she belongs to his clan. He also knew the 2nd – 5th respondents and affirmed that they live on the suit land. Regarding the photographs, he stated that they show the homes of the respondents on the suit land.

12. During cross-examination, DW-2 stated that the 1st respondent belonged to their clan. He stated that he did not know Makorere Maroro though it would appear that he later said that this was his father. He stated that his mother is Elizabeth Chacha Makorere. He denied that he was son of Osaga Machera (despite this being the evidence in his statement). He affirmed that his father was given land during adjudication and that it was the parcel No. 367. He elaborated that Osaga Machera is father of Magasi. He testified that Hellen's husband was Magasi Osaga who died in 1987. He did not know when Hellen got married. He could not say whether Hellen's husband claimed the suit land when he was alive. He testified that his brother, Joseph Makori, filed succession for the parcel No. 367 and Hellen did not get a share of this land. He stated that he lives on this parcel No. 367 and not the parcel No. 368. He testified that Hellen has four sons and she has constructed houses on the suit land. He stated that the last house was built in 2017 and that the whole land is being cultivated. He added that the land was subdivided in 2001.
13. DW-2 was not re-examined.
14. With that evidence, the respondents closed their case. Significantly, the 2nd – 5th respondents offered no evidence.
15. Counsel were invited to file submissions and it would appear that only counsel for the respondents filed submissions.
16. The trial court delivered its judgment on 11th November, 2023 wherein it isolated the following issues :
 - i. Whether Magasi Osaga was a licensee of Sese Nyambane on the suit land.
 - ii. Whether the plaintiff is entitled to the prayers in the plaint.
 - iii. Whether the defendants/counterclaimants have proved the counterclaim.
 - iv. Whether the defendants/counterclaimants are entitled to the orders sought in the counterclaim.
17. On the first issue, the trial court held that the evidence of the appellant did not sufficiently demonstrate that Magasi was a licensee of Sese Nyambane. He also thought it of note that the appellant waited until 2015, after the death of Magasi, to start claiming the suit land. On the second issue the trial court held that the appellant's suit has been caught up by limitation of time and it cannot form the basis of grant of any orders. He held that the appellant is not entitled to the prayers in his plaint. On the third issue, the trial Magistrate held that the respondents had proved that they had lived on the suit land for over 12 years, continuously, and openly, and thus proved their case for adverse possession. On the fourth issue, the trial Magistrate held that the respondents are entitled to the prayers in the counterclaim and allowed it. Finally the appellant was condemned to pay costs.
18. Aggrieved, the appellant filed this appeal on the following grounds :
 1. That the learned trial magistrate erred in law and in fact when he failed to find that there can never be adverse possession where license and permission was given.



2. That the learned trial magistrate erred in law and in fact when he failed to evaluate the evidence on record and find that licence had been given to the respondents' father by the appellant's father to utilize the suit land
 3. That the learned trial magistrate erred in law and in fact when he failed to evaluate the evidence on record thus reaching conclusion in failing to find that the respondent entered the suit land through their deceased father whom had been given licence to utilize the suit land. The respondents did not come to the suit land on their own. They derived their existence from their deceased father whom had been given licence on the suit land.
 4. That the learned trial magistrate erred in law and in fact when entered judgement for the respondents against the weight of the evidence.
19. In his prayers, the appellant requests this court to allow the Appeal, set aside the judgment of the trial court, and substitute the same with an order allowing the appellant's case as prayed in the plaint together with costs.
 20. The appeal came up for directions on 15 October 2024 whereby the same was admitted and I directed the parties to file and serve written submissions. Counsel also made oral submissions at the hearing of the appeal.
 21. Mr. Nyambati, learned counsel for the appellant, submitted in reliance with his written submissions dated 2 December 2024. Mr. Nyambati argued that the counterclaim did not have a verifying affidavit as required by law. He contended such an anomaly offends the mandatory provisions of Order 7 Rule 5 CPR. He underscored that the trial magistrate therefore had the option to exercise the discretion granted to him by striking out the matter under Order 4 Rule 1 (6) of the CPR as the counterclaim did not comply with the mandatory provisions of the law.
 22. Mr. Nyambati equally submitted that the 1st respondent who testified as DW1 did not testify on behalf of the other respondents who were counterclaimants in the suit and on that basis he contended that there was no authority signed and filed to confer her power to proceed with the matter before the trial court on behalf of the other respondents sued in the matter. He underscored that therefore that the trial erroneously proceeded to allow the counterclaim for all the respondents.
 23. Mr. Nyambati submitted too that it is a cardinal principle in law that before a party moves for adverse possession there needs to be an expert report filed. He argued that in the entire proceedings there was no evidence of an expert report and the trial court was in limbo to determine what exactly the claim in the counterclaim was.
 24. Further Mr. Nyambati submitted that according to the evidence tendered by the appellant, it was clear that the entry to the suit land, parcel No.368, was by permission of the deceased Sese Nyambane. He contended that the evidence equally revealed that entry was in 1994 and expired in 2016 when Magasi passed on. He argued that in the proceedings none of the respondents denied knowledge of Magasi or ever denied being grandsons and daughters in law to Magasi. Counsel submitted that the lapse of the licence took place in 2015 and the appellant moved court in 2019. He argued that the Appellant's father and Mr. Magasi did not have licence in writing but was it was revealed during the hearing by the Appellant that his late father and Magasi were neighbours before he moved to Kericho.
 25. He argued that the title of the appellant was protected by Sections 24, 25 and 26 of the [Land Registration Act](#) and thus he met the threshold for an order of injunction.
 26. Mr. Nyambati went on to submit that the appellant had demonstrated that upon demise of Magasi, the alleged licensee, in 2015, the licence expired and the persons who moved to the land by virtue of the



- permission of Magasi could not claim an adverse possession interest over the suit land. He argued that time started running from 2015 and thus the Respondents did not meet the threshold to be declared as adverse possessors.
27. It was his submissions too that the learned trial magistrate did not specifically indicate what was granted in the counterclaim among the five prayers. He underscored that under the law of trust the respondent could not satisfy how the appellant was registered as trustee for them.
 28. Mr. Nyambati submitted too that that the provisions of Section 38 of the *Limitation of Actions Act* did not act in favor of the respondents. He also argued that Section 7 of the Limitation Action Act does not apply to this case. He urged the court to allow the appeal and set aside the judgment of the subordinate court with costs.
 29. Mr. Abisai, learned counsel for the respondents, also submitted in reliance with the respondent written submissions. Mr. Abisai before delving into his submissions addressed the two preliminary objections that Mr. Nyambati raised at the beginning of his submissions, which he contended did not arise in the lower court. The two issues were that there was no verifying affidavit and the claim that the evidence on record for the respondents did not apply to the other respondents. He pointed out that the Memorandum appeal did not contain these arguments in the grounds of appeal. He argued that the same were an afterthought by the appellant and therefore he cannot be allowed to argue them, having not pleaded the same in the memorandum of appeal. He nevertheless went on to reveal that the verifying affidavit is firmly on record, the same having been filed on 20 April 2022 and sworn by Hellen Magasi Osaga. Counsel thus urged the court to disregard the two objections.
 30. Mr. Abisai did submit that the Appellant's claim was premised on trespass. He underscored that trespass is a tort which is actionable within 3 years as per section 4 (2) *Limitation of Actions Act*. He contended that if this claim was a claim for recovery of land, the limitation is also known, and that it is 12 years as per Section 7 *Limitation of Actions Act*.
 31. Addressing the issue as to whether there was a licence entered between the appellant and one Magasi that allowed the respondents to occupy the land, Mr Abisai submitted that there was no such licence produced before the trial court. He thus contended that the appellant cannot be heard to argue that there ever existed one.
 32. Mr. Abisai submitted too that if the court were to go by the evidence given by PW-1, the appellant confirmed that the respondents started occupying the suit land in 1994, even though the 1st respondent particularly stated that she started staying in the suit land in 1974. Mr. Abisai argued even if the year 1994 is taken the appellant's claim would still be time barred.
 33. Mr. Abisai submitted further that the photographs of where the Respondent occupied were not challenged. He stated that the houses shown in the photos are old and thus the same prove that the 1st respondent had been on this land together with her family for more than 12 years. Mr. Abisai further submitted the Amended Plaintiff was timeless and is not pegged on any time given that years are missing. He thus underscored that keeping the plaintiff timeless was deliberate so that the issue of limitation could be skirted about.
 34. Mr. Abisai further argued that the respondents had stayed on the land for more than 12 years and thus are entitled to the same and cannot be removed by way of eviction and be declared trespassers over this land.
 35. Mr. Abisai in the end urged this court to adopt the reasoning in the said case and find that the lower court was proper in its analysis of the evidence and dismiss the appeal with costs.



36. Mr. Nyambati in his rejoinder reiterated that that counterclaim did not specifically indicate the time of entry for purposes of computation of time. He also insisted that there was no specific documentary evidence, to support the allegations in the respondents' counter-claim on possession, and the same remained unsubstantiated. Mr. Nyambati argued further that according to the pleadings of the appellant, the permission lapsed in 2015 and the appellant moved without delay to obtain letters of administration and gain ownership of the suit land.
37. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and reach its own conclusions. This is what section 78 of the *Civil Procedure Act* espouses. This court must, however, bear in mind that a trial court, unlike the appellate court, the trial court had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows:
- “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
38. In addition, an appellate court will only interfere with the judgment of the lower court if the said decision is founded on wrong legal principles. That was the holding by the Court of Appeal in *Mkubee v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that:
- “A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”
39. I have considered the pleadings herein as well as the submissions filed by the appellant. The issues for determination are;
- i. Whether the appellant proved his case against the Respondents to deserve the prayers he sought in his plaint.
 - ii. Whether the respondents were entitled to the prayers sought in the counter claim.
40. Before determining the above issues, it is important to address the preliminary points raised by the learned counsel for the appellant in his oral submissions. The learned counsel for the appellant in his submissions raised issue regarding counterclaim filed by the respondents i.e that it did not have a verifying affidavit sworn by the 1st respondent. He also claimed that the counterclaim was only raised by the 1st respondent since she did not in her testimony indicate that she was acting on behalf of the other respondents.
41. On the verifying affidavit, nothing should arise out of that, since there is in fact a verifying affidavit to the counterclaim which is sworn on 22 February 2022 and filed on 20 April 2022.
42. On the question of authority, i.e whether the 1st respondent had authority to testify on behalf of the other respondents, I am persuaded that this is a valid point and can fall within the general lines encompassed by the four grounds of appeal. I in fact believe that there is substance in that argument but I will get to this a little later in my judgment.



43. Let me turn to the gist of the case, i.e whether the appellant demonstrated that the respondents were only on the land as licencees under a licence given to Magasi and whether the respondents proved entitlement to the suit land through adverse possession.

44. I agree with counsel for the respondents that there was no written agreement produced which demonstrated that there was ever a licence given to Magasi to occupy the suit land and take care of it, on the reason that Sese Nyambane was now living in Kericho which was far away from the land. The claim that there was a licence was an oral claim. But even without the claim, the appellant would still, as the registered proprietor of the suit land, be entitled to lodge a claim for possession of the land and for eviction, unless the persons in occupation demonstrated a competing right to the land which could be sustained. This is discernible from a reading of Section 24 and 25 of the [Land Registration Act](#), which provide as follows :

24. Interest conferred by registration

Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

45. From Section 24 above, the fact that one is registered as proprietor, vests that person with the rights related to the land in question. These rights are granted by virtue of that registration and they are therefore rights granted under statute and vested upon every registered proprietor of land. Under Section 25, the rights of a registered proprietor of land are held free from all other interests and claims and are not liable to be defeated unless as may be provided under the Act. It follows that the burden is on the one asserting that the registered proprietor is restrained, pursuant to a provision in the Act, from exercising the rights vested upon him by virtue of him by the registered proprietor. Such person is for example at liberty to point to a lease, a charge, or other encumbrance, assert that the registered proprietor is a trustee, or point to the overriding interests in Section 28 of the Act. He could also



assert that the rights of the proprietor have been extinguished by law, for example by Section 17 of the *Limitation of Actions Act*. I however need to stress that the burden is not on the registered proprietor, as the law already vests him with rights upon registration, but is on the one claiming that there is a law that bars the registered proprietor from exercising his rights.

46. Thus, in our case, immediately the appellant flashed his title, and that title was not being contested pursuant to Section 26 of the *Land Registration Act*, the court needed to move on the rebuttable presumption that the appellant had every right to the land to the exclusion of all others. The burden of rebutting that presumption was on the respondents. In our case, the respondents asserted title by virtue of adverse possession. They bore the burden of proving a case for adverse possession, and if they failed in discharging that burden, then the court would have little option but uphold the appellant's rights as vested in him by law by virtue of being the registered proprietor of the land.
47. A careful analysis thus needs to be made to unveil whether or not the respondents discharged this burden. Their case was of course one of adverse possession and they even had a counterclaim seeking the prayer.
48. I had mentioned early in my analysis that there was substance in the argument of Mr. Nyambati regarding the position of the 2nd – 5th respondents vis-à-vis the position of the 1st respondent and I think this is an opportune moment to delve into that, as it has a bearing in deciding whether some or all of the respondents proved their case that they are entitled to the suit land by way of adverse possession.
49. It will be recalled that the appellant filed suit against all respondents seeking that they all be evicted from the suit land and they all be permanently restrained from it. The case was thus against each individual respondent. None of the respondents were being sued as a representative of the other. Since none of the respondents was sued in a representative capacity, the respondents needed to defend and prove their case individually, unless they appointed one of them to be their representative. This they could only do if they filed a written authority but none was filed. In fact the 1st respondent did not even pretend to have any authority to act, or testify, on behalf of the other respondents. The fact of the matter is that she did not have any authority from them. It follows therefore, that the 2nd and 5th respondents needed to attend court and present their evidence to oppose the suit and support their counterclaim. They did not. I see that they did file individual statements, but without them attending court to adopt them as their evidence, and be subjected to cross-examination, I do not see how it can be purported that the 2nd – 5th respondents tabled any evidence to contest the appellant's suit and support their own counterclaim to the disputed land by way of adverse possession.
50. That being the case, there would be no reason not to enter judgment in favour of the appellant against the 2nd – 5th respondents. But even if we enter judgment in favour of the appellant against the 2nd – 5th respondents, that judgment would be pyrrhic if judgment is entered in favour of the 1st respondent for the whole land, though it would count for something, if judgment is entered for the 1st respondent only for the portion that she occupies.
51. I think this is a good place to make an assessment as to whether the 1st respondent made out a case for the whole or part of the land by virtue of adverse possession.
52. The evidence of the 1st respondent was supported by DW-2. Save for their oral evidence, the only other tangible evidence you could refer to in support of their case was the photographs that the 1st respondent produced. Significantly, there was no expert report produced to support their occupation of the land. Having said that, occupation was actually not denied; that is why the appellant sued the respondents, including the 1st respondent in the first place. The question therefore would not be whether or not the 1st respondent was in occupation, but whether she occupied an ascertainable portion or the whole of



the land, to which she could assert that she has been in quiet continuous possession of, without the permission of the appellant, for a minimum period of 12 years.

53. At the outset I must say that I have really tried to understand and appreciate the evidence of the 1st respondent and it has not been easy. She of course averred that she came into possession of the suit land after she got married but even the relationships that she provided are in knots that are impossible to untangle. It is not even clear to me who her husband is. In her statement, which forms part of her evidence in chief (upon adoption) she stated that she got married in 1974 to Makorere Maroro the son of Osaga Machera. She stated that she lived on the land with her co-wife, the late Elizabeth Makorere, since 1974. When she was cross-examined, she testified that her husband was one Magasi Osaga and not Makorere Maroro. She added that her husband had only one wife and stated that she did not know one Elizabeth Chacha Makorere. This was despite her statement that she lived on the suit land with her co-wife Elizabeth Makorere. She never bothered to explain the contradiction in this piece of evidence and no opportunity was taken in re-examination to settle this issue. It was material in the circumstances of the case given that she was asserting her presence in the land by virtue of her marriage; but to whom? She had also mentioned in her statement living on the land with a co-wife yet in cross-examination she denied the presence of any co-wife. The evidence of DW-2 did not help much. It was also full of contradictions. In his statement, he stated that he was born and lives on the suit land. When he testified, he stated that he resides in the land parcel No. 367 and not the suit land. He also mentioned in his statement that his mother was Elizabeth Chacha Makorere and his father was Makorere Maroro. I am unable to unravel what the truth is, and what it is not, in the evidence of the 1st respondent.
54. Apart from the foregoing, it will be recalled that the 1st respondent also relied on photographs. I am afraid that photographs do not have much value. For example, a photograph can depict an occupied premises, but it may not tell you for how many years that person has been in the premises. It cannot also tell you exactly what parcel number it depicts. That has to come by way of explanation of the photograph or a proper expert's report. In our case, when the photographs were put to the witness during cross-examination, she could not identify her house in those photographs. Neither could she tell the portion of land in her occupation. She could also not remember the last house that she constructed on the land. In essence she failed to interpret the very photographs that she was relying on to support her case. In absence of explanation, I am afraid that those photographs cannot assist the 1st respondent in depicting for how long she has been in the premises, the nature of her occupation, and whether or not she is occupying and asserting title to the whole or only part of the land.
55. The 1st respondent of course denied making entry in 1994 and asserted that she made entry in 1974 and that this was her husband's ancestral land. Forgetting for a moment the difficulty in deciphering who her husband was, or is, I observe that the land was actually adjudicated in 1974 to Sese Nyambane. It could not therefore be ancestral land of the husband of the 1st respondent. And if she entered the land in 1974, she needed to state when, because during adjudication, it is the person in possession who obtains title to the land being adjudicated, and given that title was issued on 30 September 1974, it would mean that around this time, possession must have been with Sese Nyambane otherwise the land would not have been adjudicated to him.
56. When a large part of a person's case is based on oral evidence, for that evidence to be credible and persuasive, one of the critical factors that the court looks at is the consistency of the evidence. When evidence is inconsistent credibility suffers. When credibility suffers the court is unclear, and it would be dangerous for a court to hold that a person has proved his/her case based on unclear, cloudy and contradictory evidence.
57. I do not see how, with such sketchy and contradictory evidence, I can conclude that the 1st respondent proved an open, continuous, uninterrupted, quiet possession, without permission, for a period of 12



years so that she can be entitled to the suit land or a portion of the suit land by way of adverse possession. She needed to prove on a balance of probability all the ingredients of adverse possession. I cannot, as I have said, conclude that she has discharged this burden given the serious contradictions in her case. Her case is therefore for dismissal and given that the 2nd – 4th respondents gave no evidence, it follows that the entire counterclaim remained unproved to the required standard and was for dismissal. I will therefore proceed to substitute the judgment of the trial court which upheld the counterclaim with an order that the counterclaim of the respondents is dismissed.

58. Having dismissed the counterclaim, there would be no reason not to enter judgment for the appellant. As I discussed earlier, he is the registered proprietor and is vested with rights over the land. I need not in the circumstances of this case even need to interrogate whether or not a licence was given since the respondents have hopelessly failed to prove their counterclaim.
59. As the registered proprietor, and the respondents having not proven their counterclaim, the appellant remains to be the one vested with rights over the suit land, including rights of exclusive use and possession. With that in mind I have no reason not to enter judgment for the appellant as prayed in the plaint. I will proceed to substitute the order dismissing the case of the appellant with an order that his case succeeds in so far as the appellant sought an order for eviction and permanent injunction against the respondents which were prayers (a) and (b) in the amended plaint. With regard to prayers (c) and (d) relating to police assistance during eviction, the appellant is at liberty to formally apply for execution and he can specify the police assistance required during the eviction exercise. I therefore need not make any orders with regard to prayers (c) and (d) of the amended plaint. The final issue is costs. They will follow the event. I award costs of the primary suit and of the counterclaim, together with the costs of this appeal, to the appellant, payable jointly and/or severally by the respondents.
60. Judgment accordingly.

DATED AND DELIVERED THIS 19 DAY OF FEBRUARY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT MIGORI

Delivered in the presence of :

Mr. Nyambati for the appellant

Mr. Singei h/b for Mr. Abisai for the respondents

Court Assistant – Josephine Lori

