



REPUBLIC OF KENYA



**Omollo v Ngune (Environment and Land Appeal E006 of 2023)
[2024] KEELC 7431 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7431 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E006 OF 2023
SO OKONG'O, J
OCTOBER 31, 2024**

BETWEEN

JANET AKINYI OMOLLO APPELLANT

AND

MARICUS OTIENO NGUNE RESPONDENT

*(Being an appeal from the judgment and decree of Hon. C.N.C. Oruo P.M delivered
on the 14th day of July 2023 in Winam SPMELC (O.S) No. E010 of 2022)*

JUDGMENT

1. This appeal arises from the judgment delivered on 14th July 2023 by Hon. C.N.C. Oruo P.M in Winam SPMELC No. E010 of 2022(O.S) (hereinafter referred to only as “the lower court”). The Respondent brought a suit against the Appellant in the lower court through Originating Summons dated 31st March 2022. The Respondent claimed that he had acquired all that parcel of land known as Kisumu/Wath-Orego/5847 (hereinafter referred to only as “the suit property”) by adverse possession and was entitled to be registered as the owner thereof in place of the Appellant. The Respondent averred that the suit property was registered in the name of the Appellant. The Respondent averred that he entered and occupied the suit property without the consent of the registered owner of the property and had remained in actual physical occupation and possession of the same to the exclusion of the registered owner since 2005.
2. The Respondent averred that his occupation and possession of the suit property had been peaceful and uninterrupted for over 12 years. The Respondent averred that his occupation of the property had been open, noticeable and hostile to the rights and interests of the registered proprietor of the property and that he had occupied the suit property with his family and had also tilled the same from 2005 to the date of filing the suit. The Respondent averred that he occupied the entire parcel of land.



3. The Originating Summons was supported by the affidavit of the Respondent sworn on 31st March 2022. In the affidavit, the Respondent averred that the suit property was registered in the name of the Appellant but it was ancestral land he had occupied since 2005 when he built his home thereon. The Respondent averred that the suit property was a subdivision of all that parcel of land known as Kisumu/Wath-Orego/213 (hereinafter referred to only as “the original parcel”) which was registered in the names of one, Herina Owuor Metha and Sila Amoke Metha who were to hold the same in trust for the entire Ochola Metha family to which the Respondent belonged. The Respondent averred that Sila Amoke Metha, deceased was his cousin and that before his death in 2003 he pointed out to the Respondent the portion of the original parcel on which he was to build his homestead. The Respondent averred that he built his home on the said portion of the original parcel in 2005 after the death of Sila Amoke Metha. The Respondent averred that after the death of Sila Amoke Metha the original parcel (Kisumu/Wath-Orego/213) underwent several subdivisions and transfers. The Respondent averred that after the said subdivisions, his homestead fell on the portion of the original parcel known as Kisumu/Wath-Orego/5847(the suit property). The Respondent averred that the said subdivisions took place while he was in occupation of the original parcel and had occupied the property for a period exceeding 12 years.
4. The Respondent sought; a declaration that the Appellant’s rights and interests in the suit property had been extinguished and that the register of the suit property should be rectified by the cancellation of the name of the Appellant as the owner of the suit property and replacement of the same with the name of the Respondent.
5. The Appellant opposed the Originating Summons through a replying affidavit sworn on 27th May 2022. The Appellant averred that she was the registered owner of the suit property having acquired the same from her deceased husband, Titus Omollo Amoke through succession proceedings in Kisumu CMC Succession Cause No. 460 of 2018. The Appellant admitted that the Respondent had been in actual possession and occupation of the suit property as he claimed in the Originating Summons. The Appellant averred that the Respondent acquired the suit property from his late father, Mzee Ngune Ochola. The Appellant averred that through an agreement entered into on 3rd August 1992 between the Appellant’s deceased father-in-law, Sila Amoke Metha and the Respondent’s deceased father, Mzee Ngune Ochola, the Appellant’s deceased father-in-law allowed the Respondent’s deceased father to occupy a portion of the original parcel (Kisumu/Wath-Orego/213) temporarily. The Appellant averred that the original parcel was subsequently subdivided to give rise to among others, the suit property which was occupied by the Respondent.
6. The Appellant averred that the Respondent was served with a notice to vacate the suit property on 15th May 2020 but failed to do so even after he was given more time to look for alternative land to move to. The Appellant averred that the Respondent was illegally occupying the suit property. The Appellant averred that the Respondent had failed to prove his adverse possession claim. The Appellant prayed that the Application be dismissed with costs.
7. The lower court heard the matter and delivered a judgment on 14th July 2023 in favour of the Respondent. The lower court found that the Respondent had established his adverse possession claim. The lower court made a declaration that the Respondent had established that that the Appellant’s interest in the suit property had been extinguished by the Respondent’s adverse possession of the suit property and that the property should be registered in the name of the Respondent.
8. The Appellant was aggrieved by the decision of the lower court and preferred the present appeal which was filed on 10th August 2023. In her Memorandum of Appeal dated 4th August 2023, the Appellant challenged the lower court’s judgment on the following grounds;



1. The Learned Magistrate erred in law and fact by misapprehending the principles applicable to a claim for adverse possession and thereby reached a wrong finding.
2. The Learned Magistrate erred in fact in failing to conclude from the Respondent's evidence that having been allowed into the suit property by the late Sila Amoke Metha who was the proprietor thereof and having stayed in the property based on that permission up to the date of that suit, he was but a licensee whose license could be terminated on notice and not an adverse possessor.
3. The Learned Magistrate erred in law and fact by ignoring the Appellant's testimony and unchallenged evidence thereby reaching a wrong finding in favour of the Respondent.
4. That Learned Magistrate erred in law and in fact in;
 - a. Failing to find that the two witnesses presented by the Respondent in support of his claim for adverse possession spoke with gross equivocation on the essential elements of adverse possession and therefore rendered themselves not credible, and
 - b. That in further failing to find that the matter of the expiry of the Respondent's license had been addressed to him both by the Appellant and through the office of the Local Chief.
5. The Learned Magistrate erred in law and fact by failing to give due weight to the Letter of the Chief of West Kajulu Location dated 17th March 2021 which in its true and proper import constituted a further Notice of Termination of the Respondent's occupation of the suit premises as a Licensee.
6. The Learned Magistrate further erred in fact and law in failing to give due weight to the correspondence between the Appellant and the Respondent between the years 2014 and 2018 which correspondence in their true and proper import constituted Notices of Termination of the Respondent's occupation of the suit property as a Licensee.
7. The Learned Magistrate erred in fact in further failing to find that from as early as 2014, the Respondent's occupation of the portion of the suit property had been challenged and he had been ordered to vacate and therefore time for purposes of adverse possession could not as the court did find, be deemed to have commenced from 2003.
9. The Appellant prayed that the judgment of the lower court delivered on 14th July 2023 be set aside and substituted with an order dismissing the Respondent's suit in the lower court with costs to the Appellant. The Appellant also sought the costs of the appeal.
10. The appeal was argued by way of written submissions.

The Appellant's submissions

11. The Appellant centered her submission on the following two issues; whether the Respondent entered the suit property as an adverse possessor or as a licensee, and whether for adverse possession, the time began to run when the Respondent entered the suit property or when his license to occupy the property was terminated. The Appellant submitted that the agreement dated 3rd August 1992 between the Respondent's deceased father, Mzee Ngune Ochola and the Appellant's deceased father-in-law, Sila Amoke Metha which the Appellant tendered in evidence constituted a revocable license. In support of this submission, the Appellant relied on the definition of a license in Black's Law Dictionary and the cases of *Gachuma Gacheru v. Maina Kabuchwa Civ. Appeal No. 164 of 2011*, *Wanje & Others v. A.K.*



Saikwa & Others [1984] KLR61, Samuel Miki Waweru v. Jane Njeri Richu C.A. No. 122 of 2001 and Gabriel Mbui v. Mukindia Maranya [1993] eKLR.

12. The Appellant submitted that the Respondent had the burden of proving that his occupation was non-permissive. The Appellant submitted that the Respondent instead admitted that his entry into the suit property and occupation of the same in 2005 followed a license that was granted in 1992 to his deceased father, Mzee Ngune Ochola by Sila Amoke Metha the previous registered owner of the original parcel (Kisumu/Wath-Orego/213). On the burden of proof, the Appellant relied on Sections 107(1), 108 and 109 of the *Evidence Act* and the case of Stellah Nduru Ichunge & Another v. Ezekiel Nkamani M'ichunge & Another [2019] eKLR.
13. The Appellant submitted that as long as the Respondent occupied the suit property with the permission of the registered owner thereof under the said license, time could not run for the purposes of adverse possession. The Appellant submitted that time began to run when the license was terminated and the Respondent was called upon to deliver vacant possession of the suit property.
14. The Appellant submitted that even if it were to be taken that time began to run in 2013 which was the earliest of the various dates given by the Respondent's witnesses, the Respondent had only occupied the suit property adversely for 9 years by the time he filed the Originating Summons in the lower court on 4th April 2022. The Appellant submitted that the Respondent was not entitled to claim the suit property by adverse possession. The Appellant urged the court to allow the appeal as prayed.

The Respondent's submissions

15. The Respondent framed two issues on which he submitted on namely; whether the Respondent had been in occupation of the suit property for a period exceeding 12 years, and whether the Respondent was a licensee of the Appellant. The Respondent submitted that his case before the lower court which he proved through the evidence adduced before that court was to the effect that he had been in occupation of the suit property from 2005 when he built his homestead thereon. The Respondent submitted that the trial court analysed the evidence before him and made a correct finding that the Respondent had occupied the suit property for over 12 years.
16. The Respondent submitted that if there was any license between the Respondent's father and the Appellant's father-in-law who was her predecessor in title, the same was extinguished upon the death of the Appellant's father-in-law. The Respondent submitted that the assertion by the Appellant that the Respondent's father passed on the license to the Respondent was not legally tenable. The Respondent submitted that even if the court were to believe that the father of the Respondent had a license, that license lapsed upon the death of the Respondent's father in 2003. The Respondent submitted that he took possession of the suit property in 2005 after the death of his father. In support of this submission, the Respondent relied on Wairimu Mburu v. Chege Thaiya [2019] e KLR and Gacheru v. Maina Kabuchwa, Civil Appeal No. 164 of 2011. The Respondent urged the court to dismiss the appeal with costs.

Analysis and determination

17. I have considered the pleadings and proceedings of the lower court, the judgment of the court, the grounds of appeal filed by the Appellant and the submissions by the advocates for the parties. This being a first appeal, this court has to consider and re-evaluate the evidence on record and draw its conclusions on the issues that were raised for determination before the lower court. However, the court has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified



before the lower court. In *Kenya Ports Authority v. Kuston (Kenya) Limited* [2009] 2EA 212 the Court of Appeal stated that:

On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

See also, *Verani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269, *Selle v. Associated Motor Boat Co. Ltd.* [1968] E.A 123 and *Abok James Odera t/a Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates* [2013]eKLR on the duty of the first appellate court.

18. The court will also not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v. Sunday Post Ltd.* [1958] E.A 424 and *Makube v. Nyamuro*[1983] KLR 403.
19. From the Appellant’s grounds of appeal, the issues arising for determination in this appeal in summary are; whether the Respondent entered and occupied the suit property with the permission of the previous owner thereof from whom the Appellant acquired the property, and when the time started running for the purposes of adverse possession.
20. In *Mbira v. Gachuhi* [2002] 1 EALR 137, the court stated as follows:

... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”
21. In *Kisumu Civil Appeal No. 27 of 2013, Samuel Kihamba v. Mary Mbaisi* [2015] eKLR__ the court stated that:

Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land”
22. In *Gabriel Mbui v. Mukindia Maranya* [1993] eKLR the court stated as follows:
 - (3) The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, ie without permission from the true owner of the land occupied. It has been held many times that acts done under licence or permitted by, or with love of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession. Permissive occupation is inconsistent with adverse possession. The stranger must show how and when his possession ceased



to be permissive and became adverse. The rule on permissive possession is that possession does not become adverse before the end of the period during which one is permitted to occupy the land. Accordingly, where a permissive possession or occupation accorded on the ground of charity or relationship was intended, limitation operates from the time when possession first became adverse; a licensee (whose possession is only permissive) cannot claim title only by possession was adverse to that of the licensor to his knowledge and with his acquiescence; where possession was consensual or contractual in its inception, it cannot be called “adverse”. Thus, when possession is given by the vendor in pursuance of a sale, it is by leave and licence of the vendor; it is not just taken. It does not matter how one describes the nature or the giving or taking of possession, but if the occupier did not go into possession against the will of the owner, and if the owner’s will accompanied the occupier’s possession, the owner thereby gives leave, permission, or consent to the occupier, and the occupier is not a trespasser or anything like that. The actual possessor must have usurped the land without leave. Possession by leave and licence of the owner is not adverse possession, for then the owner who has given leave has no cause of action during the time span of his permission or licence and the limitation period does not run against him until the licence has ended. If possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse. So also in cases between mortgagor and mortgagee. The ingredient of unpermitted occupation is usually expressed as “hostile” possession, to emphasize that “hostility” is the very marrow of adverse possession. And to say that possession is hostile means nothing more than that it is without permission of the one legally empowered to give possession. Any kind of permissive use, as by a tenant, licensee, contract purchaser in possession, or easement holder, is rightful and not hostile. Any time an adverse possessor and owner have discussed the adverse possession, permissive agreement may have occurred, and that destroys adverse possession (Cobb v Lane [1952] 1 All E R 1199; Denning, MR, in Wallis’s Cayton Bay Holiday Camp Ltd v Shell-Mex and B P Ltd [1974] 3 All ER 575 at p 580; Chanan Singh, J, Jandu v Kirpal and another (1975) EA 225 at pp 233, 234, 237; Madan, J (as he then was), in Gatimu Kinguru v Muya Gathangi, 1[1976] Kenya L R 253, at pp 257, 258)” (underlining added)

23. In *Githu v. Ndeete* (1984) KLR 776, it was held that:

the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession”.

24. In *Kairu v. Gacheru* (1988)2 KAR 111 __, it was held that:

The law relating to prescription affects not only present holders of the title but their predecessor (S7, *Limitation of Actions Act*.)”

25. The Respondent’s case before the lower court as set out in his affidavit in support of the Originating Summons, witness statement and oral evidence tendered in court was as follows in summary: Kisumu/Wath-Oregu/213 (the original parcel) was registered in the name of Herina Owuor Metha and Sila



Amoke Metha to whom he was related. Sila Amoke Metha who was his cousin “allowed him” and pointed out to him the portion of the original parcel on which he was to build his homestead. Sila Amoke Metha died in 2003 and he constructed his homestead on the said portion of the original parcel in 2005 (See paragraphs 5 and 6 of the affidavit in support of the Originating Summons and paragraph 3 of the witness statement). After the death of Sila Amoke Metha, his son Tito Omollo Amoke got registered as the owner of the original parcel on 20th March 2013 and thereafter caused the same to be subdivided into two portions namely; Kisumu/Wath-Orego/4144 and 4145. This subdivision placed the portion of the original parcel on which the Respondent built his homestead on Kisumu/Wath-Orego/4144. Tito Omollo Amoke further subdivided Kisumu/Wath-Orego/4144 to give rise to among others, Kisumu/Wath-Orego/4872. After the death of Tito Omollo Amoke, his wife, Janet Akinyi Omollo, the Appellant herein became registered as the owner of Kisumu/Wath-Orego/4872 which she also subdivided into among others, Kisumu/Wath-Orego/5847 (the suit property) on which the Respondent’s homestead was situated. By the time the Appellant subdivided Kisumu/Wath-Orego/4872 to give rise to among others, Kisumu/Wath-Orego/5847(the suit property), the Respondent had occupied the land for over 12 years hence his adverse possession claim.

26. At the trial, the Respondent adopted his affidavit in support of the Originating Summons and his witness statement as his evidence in chief. On cross-examination, the Respondent stated that his father had lived on the suit property since 1992 and that before 1992 they lived in Tanzania. He stated further that he was allowed by Sila Amoke to build his homestead on the suit property. In re-examination by his advocate, the Respondent stated that “Sila Amoke gave me the authority to build on the land.”
27. The Appellant’s case that was set out in her affidavit in reply to the Originating Summons was that the Respondent occupied the suit property under a license agreement that the Respondent’s father, Mzee Ngune Ochola had entered into with the Appellant’s father-in-law, Sila Amoke Metha on 3rd August 1992 through which the Appellant’s said father-in-law allowed the Respondent’s father to occupy the suit property temporarily. The said agreement was produced in evidence by the Appellant.
28. From my analysis of the pleadings and the evidence that was adduced in the lower court, I agree with the Appellant that the Respondent did not prove his adverse possession claim. The evidence before the lower court overwhelmingly showed that the Respondent entered and occupied the suit property with the permission of the Appellant’s father-in-law who was the previous owner of the suit property, and that permission was withdrawn by the Appellant on or about 15th May 2020 when the Appellant demanded through Gathia & Otieno Company Advocates that the Respondent vacates the suit property. In my view, the time did not start running for the purposes of adverse possession until 15th May 2020 when the license that had been granted to the Respondent and his father to occupy the suit property was formally terminated by the Appellant and the Respondent asked to hand over possession of the suit property. The Respondent had not occupied the suit property for 12 years from the time his license to occupy the suit property was withdrawn by the Appellant by the time he brought the lower court suit in 2022. Even if it were to be taken that the license to occupy the suit property was withdrawn in 2013 as was claimed by PW3, still the Respondent would not have been in occupation of the suit property for 12 years by 2022 when he filed the lower court suit.

Conclusion

29. In conclusion, it is my finding that the lower court erred in its finding that the Respondent had proved his adverse possession claim against the Appellants. I therefore find merit in the Appeal before me. The judgment of the lower court delivered on 14th July 2023 and the decree extracted therefrom on 15th September 2023 are set aside and substituted with an order dismissing the Respondent’s Originating



Summons in the lower court dated 31st March 2022. The Appellant shall have the costs of the lower court suit and the appeal.

DELIVERED AND DATED AT KISUMU ON THIS 31ST DAY OF OCTOBER 2024.

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Cheruiyot h/b for Ms. Dima for the Applicant

Mr. Ariho for the Respondent

Ms. J.Omondi-Court Assistant

