



Oketch (Suing as the administrator and legal representative of the Estate of Henry Okech Odiembo) v Ogwang & 2 others (Environment and Land Appeal E009 of 2023) [2024] KEELC 6944 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6944 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E009 OF 2023
AY KOROSS, J
OCTOBER 24, 2024**

BETWEEN

BEATRICE AWINO OKETCH (SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF HENRY OKECH ODIEMBO) APPELLANT

AND

JACOB OCHIENG OGWANG 1ST RESPONDENT

ALLOYS OMOLO NYAMWANDA 2ND RESPONDENT

KEPHER OTIENO ABONYO 3RD RESPONDENT

(Being an appeal from the judgment of SPM hon. J.P. Nandi delivered on 7/09/2023 in Bondo SPM ELC Case No. E019 of 2022 (0S))

JUDGMENT

1. In the trial court, the appellant was the plaintiff and the respondents were the defendants. This appeal impugns the appreciation of facts and evidence by the learned trial magistrate.
2. At the heart of contention were land parcels nos. South Sakwa/ Barkowino/4569 and 4570 (suit properties) which are respectively registered in the 1st and 3rd respondents' names.
3. From the record, these suit properties were subdivisions of land parcel no. South Sakwa/ Barkowino/2611 (mother parcel) which was originally registered in the 2nd respondent's name before its subsequent registration to the 1st respondent who eventually subdivided it to create the suit properties.



4. Now, turning to the pleadings and evidence, in the originating summons (OS) dated 31/05/2022 and affidavit in support thereof which she deposed on 31/05/2022, the appellant stated she had acquired the suit properties by adverse possession.
5. She testified as PW1 and called one witness who had taken photographs of her developments that allegedly subsisted in the suit properties. In giving evidence, the appellant and her witness who testified as PW2 produced documents and photographs that allegedly substantiated the appellant's case.
6. Thus, the appellant sought orders that she be registered as the proprietor of the suit properties and, a permanent injunction prohibiting the respondents from interfering with her occupancy and costs of the suit. The OS was vehemently opposed by all the respondents who had different counsels representing them.
7. The firm of Ms. Odhiambo B.F.O & Company Advocates filed the 1st respondent's replying affidavit which was deposed on 20/06/2022. In this affidavit which was relied upon by the 1st respondent who testified as DW1, the 1st respondent acknowledged that though he had purchased the mother parcel from the 2nd defendant, he had sold it entirely to the 3rd respondent and he had ceased having anything to do with either the mother parcel or suit properties. According to him, he was non-suited to the proceedings.
8. Although the law firm of Ms. Felix Oketch & Co. Advocates represented the 2nd respondent, his replying affidavit which he swore on 26/10/2022, did not disclose who the drawer was.
9. Be that as it may, in the replying affidavit, the 2nd respondent averred that having entered into a contract with the deceased appellant, it was not tenable for him to enter into a contractual relationship with the 1st respondent.
10. It is noted notwithstanding filing his replying affidavit, the 2nd respondent did not testify and as a result, assertions contained in his replying affidavit were mere allegations that were not substantiated.
11. Through the law firm of Ms. AAO Advocates, the 3rd respondent deposed his affidavit dated 20/06/2022. In it, the 3rd respondent averred that he purchased South Sakwa/ Barkowino/4570 from the 1st respondent. Further, he stated it was fenced, he regularly visited it, the appellant did not have access to it and, he had commenced developing architectural designs over it.
12. The 3rd respondent testified as DW3 and his evidence was led by his architect who testified as DW2 and his brother and alleged caretaker who testified as DW4.
13. The matter proceeded to trial, witnesses testified, parties' cases were closed, submissions were filed and the suit was eventually reserved for judgment.
14. In the impugned judgment that was rendered on 7/09/2023, the learned trial magistrate framed issues for determination which were whether the appellant had met the threshold for grant of orders for adverse possession and costs.
15. Based on his analysis and reasoning, the learned trial magistrate found the appellant had not proved her case on a balance of probabilities and thereby dismissed her case with costs to the respondents.

Appeal to this court

16. Dissatisfied by the impugned judgment, the appellant filed her memorandum of appeal dated 28/09/2023 in which she outlined several grounds that faulted the learned trial magistrate for grounds inter alia; failing to find the appellant had been in adverse possession of South Sakwa/ Barkowino/4569



from 1997 and South Sakwa/ Barkowino/4570 from 1998, failing to make a finding on the portion that contained the appellant's block of houses and the boundary of South Sakwa/ Barkowino/4570, making assumptions on the non-payment of the balance of the purchase price by the deceased appellant and failing to find the appellant had proved the ingredients of adverse possession.

17. Accordingly, the appellant implored this court to allow the reliefs sought in the OS together with the costs of the lower court suit and the appeal.
18. As directed by the court, the appeal is canvassed by written submissions. The appellant's law firm on record M/s. Achola Jaoko & Co. Advocates filed written submissions dated 16/01/2024 while the 1st and 3rd respondents' law firms on record that were earlier referenced in this judgment respectively filed theirs on diverse dates of 21/02/2024 and 19/02/2024.
19. It is noted without seeking leave for an extension of time to file submissions, the 2nd respondent's counsel blatantly filed his submissions on 21/02/2023 which was after this matter had been reserved for judgment, and on that basis, this court will not consider them.

The appellant's submissions

20. In her submissions, the appellant collapsed her grounds of appeal into a singular ground- whether she had met the ingredients of adverse possession, and in doing so, she advanced two principles of adverse possession; uninterrupted occupation for more than 12 years and exclusive possession.
21. On these principles, the appellant's counsel submits that transactions between the respondents were a nullity since at the time, she had an overriding right over the suit properties by adverse possession.
22. Further, the act of the 3rd respondent fencing off South Sakwa/ Barkowino/4570 in 2015 is an act of trespass. To buttress his argument, counsel relies on the Court of Appeal decision of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR where the court stated: -

“In terms of Sections 7, 9,13,17,37 and 38 of the title of a registered owner of land will be extinguished and vested in a third party who proves that he has been in possession of the land continuously and uninterrupted for a period of 12 years; that such possession has been open and notorious to the knowledge of the owner; that the possession has been without the permission of the owner; and that the third party has asserted a hostile title and dispossessed the true owner.”

1st respondent's submissions

23. In arguing all the other 5 grounds separately, his counsel submits the appellant did not prove her claim of adverse possession and the learned trial magistrate could not be faulted in his analysis of the principles of adverse possession or in arriving at the decision he did.
24. It is noteworthy, that the competency of the record of appeal as counsel contends, was dealt with in a ruling rendered by this court on 9/05/2024. It follows the appeal is ripe for disposal on merits.
25. Counsel submits by claiming adverse possession by purchase, the appellant's claim was outside the confines of adverse possession and the learned trial magistrate properly considered when time started to run and appreciated the suit properties were separated by a barbed wire fence and the appellant did not exclusively occupy the suit properties.



3rd respondent's submissions

26. On the condensed issue of whether the appellant proved the elements of adverse possession to the requisite standards, counsel places heavy reliance on the persuasive decision of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR which outlined the principles of adverse possession in the following terms: -

- “(1) the intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period...
- (2) The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else...
- (3) The occupation of the land by the intruder who pleads adverse possession must be nonpermissive use, ie without permission from the true owner of the land occupied...
- (4) The nonpermissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi, that is to say, occupation with the clear intention of excluding the owner as well as other people...
- (5) Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the incroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purposes for which he intended to use it...
- (6) The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community, of the exercise of dominion over the land...
- (7) The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period...
- (8) the rightful owner or paper title holder against whom adverse possession is raised, must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period...
- (9) The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession...”

27. Anchoring on this decision, counsel submits the appellant has not met the threshold, and being a purchaser, the deceased appellant could not lay a claim of adverse possession. Counsel further submits the appellant was not in exclusive possession and dealings between the respondents and eventual subdivision of the mother parcel and occupancy by the 3rd respondent, amounted to interruption.



Preliminary issues

28. The nature and form of a memorandum of appeal is set out in Order 42 Rule 1 (2) of the Civil Procedure Rules in the following manner: -

“The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”

29. The essence of this law is to assist the court and parties in framing the issues and to identify the core grounds the appellant is aggrieved against. With due respect to the appellant, the grounds of appeal as charted out in the memorandum of appeal fell short of this law as they were not concise, argumentative, and narratively stated the evidence.

Issues for determination

30. Being a 1st appeal, the power of this court is set out in Order 42 Rule 32 of the Civil Procedure Rules. Being steered by the principles enunciated in the well-cited case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, this court will not interfere with the impugned judgment save this court satisfies itself the learned trial magistrate misdirected himself thus arrived at an erroneous decision, undoubtedly exercised his discretion wrongly and occasioned injustice by such erroneous exercise.

31. Turning to the matter at hand, I have carefully considered the records, rival submissions, provisions of law relied upon, and judicial precedents cited. Given the unconcise grounds of appeal, this court has condensed the appellant’s grounds of appeal into a singular ground; whether the learned trial magistrate erred in finding the appellant had not met the threshold of adverse possession.

32. Consequently, the following issues commend themselves for resolution as they will effectively dispose of the appeal: -

a. Whether the learned trial magistrate erred in finding the appellant had not met the threshold of adverse possession.

b. What orders should this court issue including an order as to costs?

a. Analysis and Determination

33. Since the two issues that were identified earlier for determination are interconnected, this court shall deal with them together.

34. As well captured by counsels in their submissions, the doctrine of adverse possession arises where a person in possession of land owned by a registered proprietor may by some colour of right acquire valid title to it, so long as certain common law requirements are met, and the adverse possessor has it for a sufficient period, as defined by the [*Limitation of Actions Act*](#).

35. Section 7 of the [*Limitation of Actions Act*](#) states the definition of adverse possession as follows:

“an action that may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.”



36. Section 38 of the *Limitation of Actions Act* authorizes a person who claims to have been entitled to land by adverse possession to apply to the court for an order that she be registered as the proprietor in place of the registered proprietor.
37. Section 28 (h) of the *Land Registration Act* is also key. It states that land is subject to certain overriding interests such as rights acquired or in the process of being acquired by any written law relating to the limitation of actions or by prescription. This overriding interest subsists and affects the interests of proprietors even when it is not noted on the register.
38. As was held in *Kweyu v Omuto*, C A Civ Appeal 8 of 1990 that was cited with approval in the case *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, the primary function of the court in dealing with adverse possession is to draw legal inferences from proved facts and such inferences are matters of law. In such claims, proof of all principles of adverse possession must co-exist and be strictly proved.
39. The decision of *Maliamu Ncurubi M'ibiri v Francis M'imanyara M'ringera* [2011] eKLR was quoted with approval in the well-cited decision of *Mbira Vs. Gachuhi* [2002] 1 EA which summarized the principles thus: -
- a) That there had been absence of possession by the true owner through abandonment.
 - b) That the adverse possessor had been in actual possession of the piece of land;
 - c) That the adverse possessor had no colour of right to be there other than his entry and occupation;
 - d) That the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;
 - e) That there was a sufficient animus to dispossess and an animus (sic) possidendi;
 - f) That the statutory period, in this case twelve years, had elapsed.
 - g) That there had been no interruption to the adverse possession throughout the aforesaid statutory period; and
 - h) That the nature of the property was such that, in the light of the foregoing, adverse possession would result.”
40. Suffice to say, a claim of adverse possession by purchase is an old hat and it is now settled in such circumstances, the limitation period will begin to run from the date of the payment of the purchase price in full or the last instalment thereof as was held in the Court of Appeal decision *Public Trustee v Wanduru Ndegwa* [1984] eKLR.
41. In the impugned judgment, the learned trial magistrate did appreciate the settled principles of adverse possession by purchasers and stated that because the appellant had not tendered proof of payment of the balance of the purchase price, time for purposes of adverse possession could not run.
42. From the evidence, I agree with the learned trial magistrate. The agreement for sale provided that the purchase price of the mother parcel was kshs. 8000/-.



43. A 1st instalment of the purchase price of kshs. 2,000/= was paid by the deceased appellant to the 2nd respondent who was then the mother title's registered owner. Nonetheless, there was no evidence that the balance of ksh.6,000/- was ever paid.
44. To this extent, I agree with the learned trial magistrate that time for purposes of adverse possession could not be anchored on this agreement for sale for as long as the balance remained unpaid to the 2nd respondent.
45. However, with all due respect to the learned trial magistrate, he failed to appreciate that the mother title had been fragmented to create the suit properties and they had even changed hands.
46. In my humble upon, once the ownership of the title was altered - from the 2nd respondent to the 1st and 3rd respondents, the deceased appellant could claim adverse possession against the new owners. Still, he needed to fulfill the ingredients of adverse possession.
47. One of the principles of adverse possession is that the claimant must first concede to the validity of the registered owner's title. The decision of Haro Yonda Juaje –v- Sadaka Dzengo Mbauro & Kenya Commercial Bank [2014] eKLR which was cited by the Court of Appeal decision of Catherine Koriko & 3 others v Evaline Rosa [2020] eKLR stated: -

“In Haro Yonda Juaje v Sadaka Dzengo Mbauro & Kenya Commercial Bank [2014] eKLR it was stated:

- (29) One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff's averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered *Land Act* and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.

In the application, the appellants sought to lay claim to the suit property on the basis of adverse possession. A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person. In the original suit, the appellants did not concede that indeed the respondent was the true owner of the suit property.”

48. In this case, the appellant's testimony as depicted by her affidavit challenged the 1st and 3rd respondents' titles to the suit properties apparently because the 2nd respondent informed her he had put the mother title's custody in the 1st respondent hand to hold as security over another parcel of land but instead, he (1st respondent) subdivided it to create the suit properties and transferred one part of it to the 3rd respondent.
49. None of the parties' submissions addressed this principle of adverse possession but suffice to say, the moment the appellant disputed the 1st and 3rd respondents' titles to the suit properties, her claim of adverse possession was legally untenable and could not see the light of the day.



50. Accordingly, I will not belabour in considering the other principles of adverse possession as considered by the learned trial magistrate. I find the learned trial magistrate did not err in finding the appellant did not prove her claim of adverse possession.

51. Ultimately, I find and hold that this appeal is devoid of merit. I hereby dismiss it and uphold the judgment of the learned trial magistrate delivered on 7/09/2023. Since it is trite law costs follow the event, costs of this appeal are awarded to the respondents.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 24TH DAY OF OCTOBER 2024.

HON. A. Y. KOROSS

JUDGE

24/10/2024

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

In the Presence of:

Mr. Jaoko for the appellant

Mr. Odhiambo B.F.O. for 1st respondent

Mr. Oreda for 2nd respondent

Miss Otieno for 3rd respondent

Court assistant: Ishmael Orwa

