



Juma & 3 others v Adriano (Suing as the legal representative of the Estate of the Late Adriano Mbalilwa Shitembete) (Environment and Land Appeal E052 of 2022) [2024] KEELC 7054 (KLR) (22 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7054 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E052 OF 2022
DO OHUNGO, J
OCTOBER 22, 2024**

BETWEEN

**BERNARD MBALILWA JUMA 1ST APPELLANT
MARTIN KHATAKA JUMA 2ND APPELLANT
PAUL LIKHAYO JUMA 3RD APPELLANT
CELESTINE INJILA ALOGONGO 4TH APPELLANT**

AND

ZAKARIA MBALILWA ADRIANO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE ADRIANO MBALILWA SHITEMBETE) RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate's Court at Kakamega (Hon. H. Wandere, Senior Principal Magistrate) delivered on 1st November 2022 in Kakamega MCELC No. E008 of 2020)

JUDGMENT

1. The background of this appeal is that the Respondent moved the Subordinate Court in Kakamega MCELC No. E008 of 2020 through Plaint dated 16th September 2020 wherein he averred that he was the administrator of the estate of Adriano Mbalilwa Shitembete (deceased) which estate comprised the parcel of land known as Isukha/Lukose/937 (the suit property). He further averred that the Appellants herein together with Mary Lumonyo Juma had trespassed into the suit property and erected structures thereon. He prayed for their eviction together with their families, agents and servants.
2. Although Mary Lumonyo Juma was named as a Defendant in Kakamega MCELC No. E008 of 2020, it is apparent from the contents of a supporting affidavit sworn in the said case by the Respondent



on 16th September 2020, Mary Lumonyo Juma passed away on 13th September 2020. The Appellants' desire to bury her remains in the suit property is among the issues that provoked filing of Kakamega MCELC No. E008 of 2020 together with an application for interlocutory injunction.

3. The Appellants filed a statement of defence in which they stated that their family had been resident the suit property since 1950s and that they had filed Kakamega ELC No. 133 of 2019 against the Respondent seeking to be declared proprietors of the suit property through adverse possession. They denied the that the Subordinate Court had jurisdiction and prayed that the suit be struck out with costs.
4. Kakamega ELC No. 133 of 2019 was filed on 23rd December 2019, jointly by the Appellants and Mary Lumonyo Juma, through Originating Summons of the same date. The said case was brought against the Respondent herein. The Appellants and Mary Lumonyo Juma averred in the Originating Summons that they had acquired the parcel of land known as Isukha/Lukose/937 (the suit property) through adverse possession.
5. Pursuant to a ruling delivered on 21st April 2021 in Kakamega ELC No. 133 of 2019, the said case was transferred to the Subordinate Court and consolidated with Kakamega MCELC No. E008 of 2020, for hearing and determination.
6. Upon hearing the consolidated cases, the Subordinate Court (Hon. H. Wandere, Senior Principal Magistrate) delivered judgment on 1st November 2022. The learned Magistrate entered judgment in favour of the Respondent as prayed in the plaint.
7. Aggrieved by the outcome, the Appellants filed this appeal on 9th November 2022, through Memorandum of Appeal dated 7th November 2022. They prayed that the appeal be allowed, and that the judgment of the Subordinate Court be set aside and be replaced with an order allowing their adverse possession claim.
8. The following are the grounds of appeal, as listed on the face of the Memorandum of Appeal:
 1. The Learned Lower court erred in law and fact by failing to consider the defence of Adverse Possession as advanced by the Appellants against the Respondent's claim.
 2. The Learned Lower court erred in law and fact by failing to appreciate that the Appellants were disentitled to pursue ownership of Parcel No Isukha/Lukose/937 in succession proceedings as their rights thereto were based on 3rd Party Claim to an estate.
9. The appeal was canvassed through written submissions. The Appellants argued that the Respondent conceded in his replying affidavit that he filed in Kakamega ELC No. 133 of 2019 that the Appellants had been in occupation of the suit property since 1970 and that the Respondent's claim that the occupation was with the Respondent's father's permission was not supported by evidence. Relying on the cases of Gulam Miriam Noordin v Julius Charo Karisa [2015] eKLR and Cieni Plains Company Limited & 2 others v Ecobank Kenya Limited [2017] eKLR, the Appellants argued that they had established adverse possession.
10. On his part, the Respondent although the Appellants have lived on the suit property since 1973, they did so with permission of the Respondent's father and that they had failed to demonstrate non-permissive possession. He relied on the cases of Wambugu v Njuguna (1983) KLR 172, Mbira v Gachuhi (2002) 1 EALR 137 and Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018] eKLR and argued that the learned Magistrate arrived at the correct conclusion. He urged the court to dismiss the appeal with costs.



11. This being a first appeal, this court has an obligation to re-consider and re-evaluate the pleadings and the material on record and to determine whether the conclusions reached by the Learned Magistrate are to stand or not and to give reasons either way. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 and *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
12. I have considered the grounds of appeal, the pleadings, the evidence and the parties' submissions. The issues that arise for determination are whether adverse possession was established and whether the reliefs variously sought by the parties ought to have issued.
13. There is no dispute that as of the date of the trial, the suit property was registered in the name of Mbalilwa Shitembete, the Respondent's deceased father. The Appellant's contended as much in their Originating Summons dated 23rd December 2019 and even annexed a copy of a certificate of official search as on 14th November 2014, to support that contention. A perusal of the said certificate of official search shows that Mbalilwa Shitembete was registered as proprietor on 7th August 1973.
14. As registered proprietor of land, the estate of Mbalilwa Shitembete (deceased) is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Additionally, Section 26 of the Act obligates the court to accept the proprietor's certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. Besides the Appellants' claim of adverse possession, there was no other challenge to the proprietor's title, before the Subordinate Court. It follows therefore that if the Appellants' claim of adverse possession fails then the rights of the estate of Mbalilwa Shitembete (deceased) as a proprietor must be upheld, including granting the eviction that the Respondent had sought.
15. The statutory underpinnings of adverse possession are found at Section 7 of the Limitations of Actions Act which provides that an action may not be brought to recover land after the end of twelve years from the date on which the right of action accrued. Further, Section 13 (1) of the Limitations of Actions Act provides that a right of action in recovery of land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run.
16. The procedure for moving the Court is found at Section 38 (1) of the Act which provides:

Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.
17. Pursuant to the holding of the Court of Appeal in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, a party claiming adverse possession must assert hostile title in denial of the title of the registered proprietor. The process must start with a wrongful dispossession of the rightful owner. The proper way of assessing proof of adverse possession is whether the title holder has been dispossessed or has discontinued his possession for the statutory period of 12 years, as opposed to whether the claimant has proved that he or she has been in possession for 12 years. The party who claims adverse possession must demonstrate the date he came into possession, the nature of his possession, whether the fact of his possession was known to the registered proprietor and that the possession was open and undisturbed for the requisite 12 years.
18. I have considered the evidence that was tendered by the First Appellant both in oral testimony and in his affidavit in support of the Originating Summons. He stated that his father David Juma Asigi was an uncle to Mbalilwa Shitembete. It follows therefore that the Appellants and the Respondent share



close family relations. That much is also apparent from the fact that the Appellants got involved as protestors in the succession cause in respect of Mbalilwa Shitembete's estate.

19. The Court of Appeal had occasion to consider whether adverse possession could apply within families against close relatives in the case of *Samuel Kihamba v Mary Mbaisi* [2015] eKLR. The Court stated:

The suit filed by the respondent against the appellant was founded on adverse possession where the respondent claimed to have acquired adverse rights over the suit land having occupied the same for over twelve years. Could the doctrine of adverse possession apply against the parties to the suit before the learned Judge who were related by being mother and step-son? We think not. We are persuaded by various dicta which we have quoted and relied upon in this judgement and must state that it would create havoc for families and the society of Kenya generally if the principle of adverse possession applied within families against close relatives.

20. Considering the close family relationship between the Appellants and the Respondent, and in line with Section 13 (1) of the Limitations of Actions Act which stipulates that a right of action in recovery of land does not accrue unless the land is in possession of a person in whose favour the period of limitation can run, adverse possession is inapplicable in the circumstances.
21. The Appellants' case was that their father entered the suit property in the 1950s. Possession alone, however prolonged, does not suffice to establish adverse possession. The claimant must demonstrate a hostile title in denial of the title of the registered proprietor. The possession itself must bear clear hallmarks of a wrongful dispossession of the rightful owner.
22. Additionally, the Respondent testified that the Appellants' father entered the suit property pursuant to a consensual arrangement through which David Juma Asigi and his nephew Mbalilwa Shitembete exchanged plots temporarily. The Appellants did not dislodge that contention which was clearly asserted in the replying affidavit that was within their knowledge even as they went to trial. I am not persuaded that in the circumstances, the Appellants demonstrated any wrongful or hostile dispossession of Mbalilwa Shitembete. Time could not run in their favour for purposes of adverse possession.
23. In view of the foregoing discourse, I find that adverse possession was not established and that the Appellants were not entitled to the reliefs that they sought. Even though the learned Magistrate did not address adverse possession in the judgment, the final outcome cannot be faulted. As a registered proprietor, Mbalilwa Shitembete's estate was entitled to the reliefs that were granted.
24. I find no merit in this appeal, and I therefore dismiss it. In view of the relationship between the parties, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 22ND DAY OF OCTOBER 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Kundu for the Appellants

Mr K Mukavale for the Respondent

Court Assistant: M Nguyayi

