



**Akumu & 2 others v Onyona & 2 others (Land Case Appeal  
E017 of 2023) [2024] KEELC 6846 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6846 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
LAND CASE APPEAL E017 OF 2023  
AY KOROSS, J  
OCTOBER 17, 2024**

**BETWEEN**

**JANE ATIENO AKUMU ..... 1<sup>ST</sup> APPELLANT  
CHARLES AKUMU OPIJA ..... 2<sup>ND</sup> APPELLANT  
BERNARD OTIEP AKUMU ..... 3<sup>RD</sup> APPELLANT**

**AND**

**JOHN OJWANG' ONYONA ..... 1<sup>ST</sup> RESPONDENT  
MARTIN JOHN ODHACH ..... 2<sup>ND</sup> RESPONDENT  
KEFA OCHOLA NYADUNDO ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the judgment of the Hon. PM E.Malesi  
delivered on 8/11/2023 in Madiany PM ELC Case No. E003 of 2023)*

**JUDGMENT**

**Background of the appeal**

1. Having considered the records that are before this court, it is significant for the appeal's history to be contextualized. In the lower court, the appellants were the plaintiffs and the respondents were the defendants.
2. From the record, all the parties are distant relatives and have a protracted history over several parcels of land which were all settled during the adjudication process of the Mema section within Siaya.
3. Following the internal adjudicative mechanisms envisaged under the [Land Adjudication Act](#) and particularly the highest appellate level presided over by the minister, the disputes were resolved.



4. The minister in Land Appeal Case no. 912 of 1986 which had been filed by the appellants' relative Oyieng Opija (Oyieng) against the respondents' relative Simeon Onyona (Simeon) was successful and land parcels no. 2965, 2966, 2968, 2967, and 2969 (appellants' adjudicated parcels) were awarded to some of the appellants' relatives.
5. Similarly, too, in Land Appeal Case no. 925 of 1985, the appellants' relative Samuel Akumu Opija appealed against Simeon over land parcel nos. 3004 and 3005 (respondents' adjudicated parcels). Upon hearing both parties, the minister awarded these parcels to the respondents' relatives namely Simeon and Walter Nyawanda (Walter).
6. Having followed the rigorous 4-tier adjudicative process in the 1980s, it was expected the matter would be settled. However, that was not to be as the appellants in their claim before the trial court resurrected these old disputes.
7. Additionally, the appellants' roped in another case of Appeal Native Tribunal Appeal Case No. 90/39 (native case) ostensibly filed by the appellants' patriarch Opija. From documentary evidence, it was a case against a non-disclosed person and the particulars of the parcels of land in dispute were not revealed.

### **Pleadings**

8. In a plaint dated 2/03/2023, the appellants who described themselves as the personal representatives of Michael Opija Molo (Opija) rehashed some of the background highlighted above and stated that at adjudication, land parcel nos. 2980, 3002, 3079, 3003, 2963, and 3078 (illegally acquired suit properties) were suspiciously registered in Simeon and Walter's names.
9. According to them, Opija thwarted Walter's occupation of 2980. They averred the descendants of Opija had been occupying land parcels no 2980, 3005, and 3078 for over 50 years and it was interrupted in 2022 by the respondents.
10. Despite claiming adverse possession over land parcels 2980, 3005, 3078, 2965, 2966, 2967, 2968, and 2969 some of which are the appellants' alleged adjudicated parcels, they sought orders over other several parcels of land.
11. These parcels of land against which they sought several reliefs against were land parcel nos. Siaya/Memba/3078, 2980, 2721, 2963, 3002, 3003, 3005, 2964, 2980 and 3079 (suit properties). They sought for the orders to be enforced by the OCS Aram police station or area chief and the costs of the suit.
12. The respondents strenuously opposed the appellants' claim by filing a joint defence dated 6/04/2023. In it, they denied the appellants' claim in totality and put the appellants to strict proof thereof.
13. Moreover, they asserted adjudication process was completed in the area in the 1970s, and parcels of land were duly registered in people's names.
14. They averred that Walter was the custodian of the respondents' family's land and that Walter and his wife Lucia Nyawanda (Lucia) lived on these lands, cultivated them, and were even buried on them.
15. As to land parcel no. 3078, they asserted that it was a subdivision of land parcel no. 3004 which originally belonged to Simeon. As for the other subdivision of 3004 which was land parcel no. 3079, they averred it was sold to a 3<sup>rd</sup> party. It was their position that they were strangers to land parcel no. 2078 that was registered in the name of Kennedy Owiti Odede.



16. Consequently, they contended that the suit was dubious, vexatious, devoid of merit, full of falsehoods, contradictory, and an abuse of the court process and urged the trial court to dismiss the suit with costs. In response to the defence, the appellants filed a reply to the defence dated 11/04/2023.

### **Trial**

17. The matter was slated for hearing and all parties testified. The appellants respectively testified as PW3, PW2, and PW1 with the 3<sup>rd</sup> appellant producing several documents supporting their case.
18. The respondents chronologically testified as DW3, DW1, and DW2 with the 2<sup>nd</sup> respondent producing several documents in support of their defence.
19. Upon hearing the parties, closing their cases, and submissions being filed, the learned trial magistrate in his impugned judgment framed 3 issues for determination; what was the fate of the adjudicated suit properties, whether there had been an illegality in the registration of any of the parcels of land in dispute and lastly, whether the appellants' claim had met the threshold of adverse possession.
20. On the 1<sup>st</sup> and 2<sup>nd</sup> issues, the learned trial magistrate found he lacked jurisdiction because the Land Adjudication Act had its internal dispute resolution mechanisms. On the 3<sup>rd</sup> issue, he found the appellants had not proved their claim to the required standards.
21. In his obiter dictum on the 3<sup>rd</sup> issue, he asserted that the claim of adverse possession had several shortcomings- some of the owners of various parcels of land named in the claim were not made parties to the suit. Therefore, orders could not be issued against them.

### **Appeal to this court**

22. The above outcome did not go down well with the appellants and dissatisfied with the impugned judgment, the appellant moved this court on 8 grounds of appeal set out in the memorandum of appeal dated 1/12/2023 in which they faulted the learned trial magistrate for grounds inter alia: -
- a. Failing to abide by the decision of the native case over land parcel nos. Siaya/ Memba 2980, 2721, 3005 and 2963.
  - b. Failing to abide by the Minister's decision over land parcel nos. Siaya/ Memba 2965, 2966, 2968, 2967 and 2969.
  - c. Failing to find Opija's dependants had occupied land parcel nos. 2980, 3005, and 3078 for over 50 years and had acquired them by adverse possession.
  - d. Failing to find Siaya/Memba/2980 and 3078 were illegally registered in Simeon's name.
  - e. Failing to find Siaya/Memba/2980 and 3005 were illegally registered in Walter's name.
  - f. Failing to find the 2<sup>nd</sup> appellant was the legal representative of Simon's estate.
  - g. Failing to find Siaya/Memba/3078, 2721, 2963, 3002, 3003, 3005, 2964, 2980 and 3079 were awarded by the Land Adjudication Officer to Opija.
  - h. Erred in dismissing the appellants' claim with costs.
23. Accordingly, the appellants implored this court to set aside the impugned judgment and allow the reliefs sought in the plaint together with the costs of the appeal.



## **Submissions**

24. As directed by the court, the appeal was canvassed by written submissions, and upon the law firm of M/s Achola Jaoko & Co. Advocates ceasing to act for the appellants, they filed their written submissions dated 6/05/2024.
25. The submissions addressed 3 issues; who lived within the general area of the land in dispute, what was the relationship between the people within the general area of the dispute, current occupants, and claimants, and who were the original owners of the general area in dispute.
26. The respondents' law firm on record of M/s Ben Aduol Nyanga & Co. Advocates filed written submissions dated 25/05/2024 in which counsel framed 2 issues for determination; whether the appellants demonstrated their case warranted granting of the orders sought and who should bear costs.
27. On the 1<sup>st</sup> issue, counsel argued them on 3 sub-issues- acquisition of land by the respondents' patriarch, how the 1<sup>st</sup> appellant became registered as owner of the land parcel nos. Siaya/Memba 2980, 3078, 3079, 3005, and 3002.

## **Preliminary issues**

28. However, a scrutiny of these grounds of appeal reveal they are repetitive and all challenge the trial magistrate's finding on whether the appellants had met the threshold of adverse possession. Additionally, they do not meet the threshold of Order 42 Rule 1 (2) of the Civil Procedure Rules.
29. The nature and form of a memorandum of appeal are set out in this 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.”
30. The essence of this law is to assist the court and parties in framing the issues and to identify the core grounds the appellants are aggrieved against. With due respect to the appellants, the grounds of appeal as charted out in the memorandum of appeal fell short of this law as they were not concise, were argumentative, and narratively stated the evidence.
31. Given the unconcise grounds of appeal, this court has condensed the appellants' grounds of appeal into a singular ground; whether the learned trial magistrate erred in not finding the appellants' claim of adverse possession met the legal threshold.

## **Issues for determination**

32. Being a 1<sup>st</sup> appeal, the power of this court is set out in Order 42 Rule 32 of the Civil Procedure Rules. As submitted by the respondents' counsel, being an appellate court, this court will not interfere with the impugned judgment save this court satisfies itself the learned trial magistrate misdirected himself and thus arrived at an erroneous decision, undoubtedly exercised his discretion wrongly and occasioned injustice by such erroneous exercise.
33. The role of an appellate court was aptly stated in the Court of Appeal decision of Peter M. Kariuki v Attorney General [2014] eKLR which is binding on this court and in this decision, the court stated: -

“We have also, as we are duty bound to do as a first appellate court, reconsidered the evidence adduced before the trial court and revaluated it to draw our own independent conclusions



and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See *Ngui V Republic*, (1984) KLR 729 and *Susan Munyi V Keshar Shiani*, Civil Appeal No. 38 of 2002 (unreported).”

34. Reminding itself of the role of an appellate court, I have carefully considered the records and parties’ rival submissions, provisions of law and authorities relied upon and the issues that arise for determination are:-
  - a. Whether the learned trial magistrate erred in not finding the appellants’ claim of adverse possession met the legal threshold.
  - b. What orders should this court issue including an order as to costs?
35. These two issues shall be handled cumulatively.

### **Analysis and determination**

36. The common law doctrine of adverse possession is statutorily underpinned in our *Limitation of Actions Act* and it is one of the ways of acquiring land in Kenya.
37. The relevant provisions are underpinned in Sections 7, 13, and 38 of this Act and the onus was on the appellants who claimed it to prove the elements thereof.
38. By the provisions of Section 17 of the *Limitation of Actions Act*, at the expiration of the period of 12 years from the date of entry to land, a person can bring an action to recover land, and the title of the registered proprietor may be extinguished.
39. In addition, by Section 38 of the Act, the adverse possessors may apply to this court or any other competent court for it to determine their claim and upon a favourable determination, an order to register them as such takes effect on its registration, subject to any unextinguished entry on the register.
40. The guiding principles of adverse possession were well outlined in the Supreme Court of India decision of *Karnataka Board of Wakf vs. Government of India & Others* (2004) 10 SCC 779) that was cited with approval in the Court of Appeal decision of *Raphael Kahindi Kawala v Mount Elgon Beach Properties Limited* [2018] eKLR. The Karnataka Board case (Supra) summarized these principles thus: -

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

41. When the appellants pleaded adverse possession, the learned trial magistrate was bound to apply a strict interpretation of the law. Further, the learned trial magistrate had to satisfy himself that the appellants had met not one but all the elements of adverse possession.
42. It must be borne in mind and as held in the case of *Mweu vs. Kiu Ranching & Farming Co-operative Society Ltd.* [1985] KLR 430, adverse possession is a matter of fact that is observed on the land.



43. It is settled law that claims of adverse possession must be against the registered owner of the suit property and proof of existence of the suit property and its registration must be demonstrated.
44. After considering the matter that was before him, the learned trial magistrate held that the appellants had failed to adduce sufficient evidence to prove their claim. Given this, this court has to revisit the records to establish if the learned trial magistrate erred in arriving at this conclusion.
45. With all due respect to the appellants, their claim before the trial court was in discordance- their claim and the reliefs were not in tandem.
46. Be that as it may, it is a settled principle in law that remedies must flow from pleadings. This position was pronounced by the Court of Appeal decision of *David Katana Ngomba v Shafi Grewal Kaka* [2014] eKLR which stated: -

“It is a firmly established rule of pleading that a judgment and remedies must flow from pleadings and that a court of law will determine only pleaded issues. In *Galaxy Paints Company Ltd V. Falcon Guards Ltd, Civil Appeal No. 219 of 1998*, the Court stressed this point saying: -

“The issues for determination in a suit generally flowed from the pleadings and the trial court could only pronounce judgment on the issues arising or such issues as the parties framed for the court’s determination.”

47. Although the appellants claimed adverse possession over the suit properties, they also claimed these suit properties as of right and averred Simeon and Walter acquired them illegally and by dubious means. These assertions were made in paragraphs 5 and 9 of their plaint.
48. Although the learned trial magistrate did not address this issue in the impugned judgment, by the appellants making claims over the suit properties as of right and asserting Simeon and Walter obtained them illegally, their claim of adverse possession was doomed from the onset.
49. This court notes that the appellants contended that the respondents derived ownership of the illegally acquired suit properties from Simeon and Walter.
50. In claims of adverse possession, a claimant must first concede the legality of the title held by the registered owner as to do otherwise would be legally unsustainable as the two claims cannot be combined. In arriving at this, I adopt the holding of *Haro Yonda Juaje –v- Sadaka Dzenge 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 where the court stated: -

“In *Haro Yonda Juaje –v- Sadaka Dzenge 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.”

51. Even assuming for a moment that the appellants did not challenge the legality of the respondents’ title over the suit properties which without contradiction they did, their claim of adverse possession would not have succeeded for reasons that the appellants did not prove the respondents were the registered owners of the suit properties save proving the 3<sup>rd</sup> respondent was the owner of land parcel no. Siaya/Memba 2980.
52. The descendants of Opija by minutes of a meeting held on 18/11/2013 admitted most of the suit properties including Siaya/Memba 2980 were possessed by 3<sup>rd</sup> parties which no doubt defeated their claim of adverse possession. This document stated: -

“In our meeting of 18/11/2023 (today) we the 18 members of Mzee Michael Opija Mol has (sic) agreed to look (sic) ways of repossessing our land parcels which has(sic) been occupied by unknown people through unsatisfactory means.

The parcels in question are 2980 (3002, 3003, 3004- 3078-3079, 3005) 2963 and 2962)”
53. Although the reasons of this court for finding the appellants did not prove their claim of adverse possession to the required standards differed from that of the learned trial magistrate, it arrives at the same conclusion as the trial court that the appellants did not prove their claim to the required standards.
54. 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 8/11/2023. 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 17<sup>TH</sup> DAY OF OCTOBER 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

**17/10/2024**

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

In the Presence of:

1<sup>st</sup> appellant acting in person

2<sup>nd</sup> appellant acting in person

3<sup>rd</sup> appellant acting in person

Miss Achieng for the respondents

Court assistant: Ishmael Orwa

