



Ochieng (Suing as Legal Representative and or Beneficiary of the Estate of Aggrey Ochieng Ogutu and in her Personal Capacity) v Ogutu (Suing as Administrator, Representative and or Beneficiary of the Estate of Hezron Nyadweny Ogutu and his Representative Personal Capacity) (Environment and Land Appeal E001 of 2024) [2024] KEELC 13288 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13288 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E001 OF 2024
AY KOROSS, J
NOVEMBER 21, 2024**

BETWEEN

**YUNIA ATIENO OCHIENG APPELLANT
SUING AS LEGAL REPRESENTATIVE AND OR BENEFICIARY OF THE
ESTATE OF AGGREY OCHIENG OGUTU AND IN HER PERSONAL
CAPACITY**

AND

**MOSES ELISHA OGUTU RESPONDENT
SUING AS ADMINISTRATOR, REPRESENTATIVE AND OR BENEFICIARY
OF THE ESTATE OF HEZRON NYADWENY OGUTU AND HIS
REPRESENTATIVE PERSONAL CAPACITY**

*(Being an appeal from the judgment of PM Hon. J.P. Nandi delivered
on 19/12/2023 in Bondo PM ELC Case No. E18 of 2023 (OS))*

JUDGMENT

Background of the appeal

1. In the lower court, the appellant was the plaintiff, and the respondent was the defendant. The parties are siblings, as the appellant Aggrey Ochieng Ogutu is a younger brother of the respondent Hezron Nyadweny Ogutu. In the trial court proceedings, their representatives were respectively their wife and son.
2. At the heart of contention is land parcel no. East Yimbo/Nyamonye/705 (suit property) measuring 8.04 ha and registered in the respondent's name.



3. In a claim of customary trust by adverse possession, the appellant's representative by an OS dated 29/03/2023 claimed the appellant and herself had lived on a portion of the suit property measuring 2.80 ha (disputed portion) for about 60 years.
4. According to her, the respondent's title on the disputed portion had by Section 17 of the Limitation of Actions Act, expired. The appellant's representative therefore sought the following reliefs from this court.
 - a. An order that she subdivides and registers the disputed portion in the appellant's name.
 - b. At his cost, the respondent does subdivide and transfer the disputed portion to the appellant and in default, the deputy registrar executes the transfer instruments.
 - c. Permanent injunction prohibiting and/or restraining the respondent, his representative, agents, employees, servants, personal representatives, and assigns from threatening, evicting, removing, dispossessing, alienating, and/or interfering in any other manner with the appellant's ownership and possession of the disputed portion.
 - d. Costs of the suit.
5. The appellant's claim was strenuously opposed by the respondent's representative Moses Elisha Ogutu who filed a replying affidavit that he deposed on 12/04/2023.
6. In it, he contended that the suit property had never been held in customary trust and that the appellant's representative's claim lay in land parcel no. East/Yimbo/Nyamonye/704 (704) which belonged to the appellant and it measured 7.33 ha.
7. According to him, the suit property was not family land as the appellant using his own means, entered the suit property in 1965, and thereafter in 1967, his mother Agnes Ogutu (Agnes), and his siblings who were the appellant and Wycliff Jwenge Ogutu (Wycliff) joined him with the understanding that Agnes would permanently reside therein but the appellant and Wycliff would source for their own land- which they did as the appellant acquired 704.
8. Subsequently, both parties filed rejoinders. The appellant's representative filed a supplementary affidavit she deposed on 6/06/2023. She confirmed that 704 was acquired by the appellant using his personal resources. She asserted the appellant and Wycliff cultivated portions of the suit property that were allocated to them.
9. The respondent's representative filed a further affidavit sworn in 2023 and asserted the respondent relocated from the family land in Sakwa to establish his own home in the suit property which is in Yimbo- Nyamonye and that clan elders of Yimbo gave him this land which was unoccupied and unclaimed. He stated the respondent assisted the appellant to acquire 704.
10. The matter proceeded to a hearing. The appellant's representative testified as PW1 and she called 2 witnesses who were a husband and wife. She also produced several documents in support of her case including an official search certificate of the suit property.
11. Whereas, the respondent's representative testified as DW1 and his evidence was led by Wycliff. Remarkably, despite annexing a copy of the official search of 704 to his affidavit, he did not produce it as evidence.
12. It is possible that because he was self-represented, he may not have been conversant with the process of production and admission of documentary evidence.



13. The parties and their witnesses were heard, cases closed, submissions filed and impugned judgment rendered. In the impugned judgment, the learned trial magistrate identified several issues for resolution-whether the appellant met the threshold of adverse possession and who should bear costs.
14. On these issues, the learned trial magistrate found the appellant's claim had not met the required standards and dismissed his claim with each party bearing their respective costs.

Appeal to this court

15. This decision did not augur well with the appellant's representative. By the law firm of Ms. Achola Jaoko & Co. Advocates, she filed a memorandum of appeal dated 15/01/2024 and raised 9 grounds of appeal. Some of the grounds are entwined and in summary, they faulted the learned trial magistrate for: -
 - a. Failing to consider and declare that from 1965, the appellant had overriding interests as envisaged by Section 28 of the *Land Registration Act*.
 - b. Failing to consider the testimonies of the appellant's representative and those of her witnesses.
 - c. Failing to consider the demenours of the respondent's representative and of Wycliff.
 - d. Failing to consider the respondent's representative's admission of liability in the supporting affidavit to a petition in Bondo Succession cause no. E426 of 2021.
 - e. In the alternative and without prejudice to grounds (a) (b) (c) and (d) above, failed to find the appellant had met the ingredients of adverse possession.
16. Accordingly, the appellant's representative implored this court to allow the appeal, allow prayers sought in the OS, the costs of the lower court suit, and the appeal.

Submissions.

17. As directed by the court, the appeal was canvassed by written submissions. The appellant's submissions were filed by his counsel dated 11/06/2024 and they identified several issues for determination. They were whether the appellant lawfully instituted the lower court suit as administrator and legal representative of the appellant; and
18. Whether from 1965, the appellant occupied the disputed portion; whether upon the demise of the appellant on 11/05/1984, the appellant's representative and her adult children occupied the suit property; whether the respondent has claimed ownership of the suit property including the disputed portion and disturbed the appellant's representative's peace; and
19. Whether the respondent's interest over the disputed portion has been extinguished; whether the appellant's representative and family would suffer loss and damage if restraining orders are not issued; whether the appellant's representative was deserving of injunctive reliefs and who should bear costs.
20. This court has noted that some of these issues have introduced new evidence on appeal. In arguing these issues, the appellant's counsel argued them as one ground; whether the learned trial magistrate erred in not finding the appellant had met the threshold of adverse possession.
21. The respondent's law firm on record M/s. Odhiambo Kanyango & Co. Advocates submitted undated submissions to the court and despite an assessment of payable fees being remitted to them, they did not bother to make the requisite payment. On that basis, this court will not consider the unfiled submissions.



22. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the appellant's submissions on the particular issue and also consider provisions of the law and judicial precedents relied upon to advance the appellant's arguments.

Issues for determination

23. 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 and thus arrived at an erroneous decision, undoubtedly exercised his discretion wrongly and occasioned injustice by such erroneous exercise.
24. Turning to the matter at hand, I have carefully considered the records, appellant's submissions, provisions of law relied upon and judicial precedents cited. This court has condensed the grounds of appeal into the following: -
- a. Whether the learned trial magistrate erred in not finding the respondent held the suit property in customary trust for the appellant by adverse possession.
 - b. What orders should be issued?

Analysis and Determination

25. Since the outcome of issue (a) will determine the nature of the disposal orders that will be issued by issue (b), these 2 issues which had earlier been identified shall be dealt with together.
26. The appellant's OS presented 2 facets of law in advancing his claim- customary law and adverse possession.
27. The 1st facet is grounded in Section 24 (a) of the [Land Registration Act](#) which states the registration of a person as the proprietor of land shall vest in that person the absolute ownership together with all such rights and privileges thereto. Nonetheless, Section 28(b) thereof expressly recognizes customary trusts as one of the overriding interests over land.
28. These rights are also compounded by Section 25 thereof which provides that a registered proprietor holds title to land subject to leases, charges, encumbrances, conditions, restrictions, liabilities, rights, and interests including overriding interests such as customary trusts that have been recognized by Section 28 (b) of the same Act.
29. As submitted by the appellant's counsel, the 2nd facet is grounded in Sections 7, 13, and 38 of the [Limitation of Actions Act](#).

Section 7 provides that:

“An action may not be brought by any person to recover land after the end of twelve 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.”

Section 13 states that: -

“

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run



(which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”

Lastly Section 38 (1) elucidates that: -

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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.”

30. The principles of law on adverse possession are settled in Kenya and the burden is usually on the adverse possessor to strictly prove all the elements of adverse possession to the required standards.
31. As was held in the Court of Appeal decision of Samuel Kihamba v Mary Mbaisi [2015] eKLR, courts would ordinarily not enter a judgment in favour of a claimant in claims of adverse possession amongst family members since in the African culture of socialism, family members usually permit other members to occupy their land.
32. The principles of adverse possession have been settled in a line of court decisions including the well-cited decision of Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR.
33. Nevertheless, the learned trial magistrate failed to consider a multifaceted approach to the claim that was before him by not applying the non-exhaustive criteria of customary trust as settled by the Supreme Court of Kenya in the case of Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another [2018] eKLR.
34. The manner in which the appellant advanced his case in the OS is not strange and when faced with similar circumstances as this case, the Court of Appeal in the case of Eunice Karimi Kibunja v Mwirigi M’ringera Kibunja [2013] eKLR had this to say: -

“First, that there was no dispute Eunice was in continuous, uninterrupted possession of the suit land as of right without permission of Mwirigi; secondly, the Law of Succession did not distinguish a male or female child or their marital status, lastly in the yester years, customary practices did not favour women for registration of ancestral land, thus it was necessary to examine the circumstances under which Eunice caused the title to land be registered in Mwirigi’s name.”

35. Be that as it may, it is a settled principle of adverse possession that in instances of 1st registration, time starts running from when the registered owner acquires propriety interests over the suit property. The



Court of Appeal decision of Titus Kigoro Munyi v Peter Mburu Kimani [2015] KECA 952 (KLR) illuminated on this as follows: -

“In the case of *Francis Gitonga Macharia – v- Muiruri Waitbaka, - Civil Appeal No. 110 of 1997* this Court stated that the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the respondent. It follows that in the instant case; time for adverse possession could not run against the respondent prior to the year 1978 as he had no proprietary interest in the suit property. Time for adversity cannot run against a person who has no interest in the property.”

36. The learned trial magistrate did not consider this principle. However, even if the appellant alleged he entered into occupation of the suit property in 1965 or about 60 years ago, the respondent was not registered as the proprietor of the suit property until 19/01/2015. This was 8 years to the time of filing suit on 29/03/2023.
37. Consequently, I find that the appellant’s claim was premature and arrive at the same conclusion as the learned trial magistrate that the appellant’s claim did not meet the legal threshold of adverse possession.
38. Although this court is cognizant that it would be an academic exercise to analyze the legal aspect of customary trust. It is my humble opinion it would be appropriate to consider it.
39. Even assuming for a moment, that the respondent’s title was issued 12 years before the appellant’s suit was filed, which for the benefit of doubt it was not, his claim would be unsuccessful.
40. By Sections 107 to 109 of the *Evidence Act*, the onus was on his representative and witness to prove that it was the intention of the parties or family members that the suit land would be registered in the respondent’s name to hold in trust for him and his representative. Once this onus was discharged, then the court would have rendered its decision on the intent as the court never infers trust. See Isack M’inanga Kiebia (Supra).
41. Accordingly, courts are called upon to interrogate the circumstances surrounding 1st registration to determine the purpose of the registration.
42. The appellant’s representative's evidence does not mention her presence during the exodus from Sakwa by Agnes, the appellant, the respondent, and Wycliff. Her witnesses too did not appear to have been present and did not even disclose the sources of their information of how Agnes became the alleged owner of the suit property.
43. Meanwhile, Wycliff testified as a defence witness and he corroborated the respondent’s representative’s evidence and stated the suit property was never family land capable of being held in trust for him or the appellant.
44. He testified the respondent merely hosted him and the appellant with the understanding they (appellant and Wycliff) would source for their personal parcels of land.
45. According to him, he acquired his own land and had no interests in the suit property as alluded by the appellant. The appellant’s representative too admitted the appellant had his parcel of land which was 704.
46. I find the evidence of Wycliff credible as he was present during the migration from Sakwa which was where the family land was to the new frontier in Yimbo that had been discovered by the respondent.



47. Wycliff's evidence was also corroborated by the chief's letter dated 12/10/2020 which was a culmination of a meeting that had been held by family members, clan elders, village headmen, and interested parties, and the chief wrote: -

“In the same land title deed number 705 in Nyamonye/East Yimbo there are two interested people named below

1. Yunia Atieno Ochieng
2. Elisha Orego Ogutu

The named two interested people were given some piece of land in the stated title deed 705 by the late Hezron Nyadweng Ogutu over 30 years ago...” Emphasis added.

48. Based on these reasons, I would have found the suit property was not family land. I would have found it was never the intention of the parties for the respondent to hold the land in trust for his siblings. I would have found and as rightfully concluded by the learned trial magistrate that the appellant, his representative, and or his family are in occupation with the respondent's permission and he did not have customary rights over the suit property. Eventually, I would have dismissed the claim of customary trust.

49. In the end, for the reasons stated above I will not disturb the learned trial magistrate's judgment. I uphold the judgment that dismissed the appellant's case. It is trite law costs follow the event, since the parties have close relations and to foster reconciliation, each party shall bear their respective costs.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 21ST DAY OF NOVEMBER 2024.

HON. A. Y. KOROSS

JUDGE

21/11/2024

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

In the Presence of:

Mr. Jaoko for Appellant

Mr. Odhiambo Kanyangi for respondent

Court assistant: Ishmael Orwa

14 days right of appeal.

