



Odiango & another v Orege; Land Registrar Bondo (Interested Party) (Environment and Land Appeal E019 of 2023) [2024] KEELC 13322 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13322 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E019 OF 2023
AY KOROSS, J
NOVEMBER 21, 2024**

BETWEEN

MAURICE OTIENO ODIANGO 1ST APPELLANT

LEWNIDA OKIRI ODIANGO 2ND APPELLANT

AND

CAREY OKWIRI OREGI RESPONDENT

AND

THE LAND REGISTRAR BONDO INTERESTED PARTY

(Being an appeal from the judgment of SPM Hon. J.P. Nandi delivered on 22/05/2023 in Bondo PM ELC Misc. Case No. E005 of 2022)

JUDGMENT

Background of the appeal

1. The gravamen of the appeal are land parcel nos. South Sakwa/Barkowino/4589 and South Sakwa Barkowino/4445 (suit properties) that are registered in the respondent's name.
2. In the lower court, the appellants who are respectively mother and son were the plaintiffs, and the respondent was the defendant. The interested party (IP) was joined to the proceedings for the purpose of registering South Sakwa/Barkowino/4589 in the appellants' favour.
3. In an amended originating summons dated 27/04/2022 which was supported by the appellants' affidavit deposed on 27/04/2022, the appellants contended they had acquired the suit properties by adverse possession as they had lived in them for over 60 years and sought the following reliefs: -
 - a. They be registered as the proprietors of South Sakwa/Barkowino/4589 in place of the respondent.



- b. The IP does initiate the transfer of the whole of South Sakwa/Barkowino/4589 to them and the respondent does execute the instruments of transfer and in default, the deputy registrar does so.
 - c. The respondent be prohibited from evicting them or interfering in any way with the suit property.
 - d. Costs of the suit be borne by the respondent.
4. In opposition, the respondent deposed a replying affidavit on 10/05/2022 denouncing the appellants' assertions. He averred he purchased the suit properties in 2011 and he was the registered owner thereof.
 5. He asserted the registers of the suit properties were opened in 2003 and the appellants had never been in occupation. The IP did not participate in the lower court proceedings.
 6. In the lower court, the appellants respectively testified as PW1 and PW2, and their evidence was led by Maurice Otieno who was their relative and he testified as PW3. To buttress their case, the 1st appellant produced a bundle of photographs and certificates of official searches.
 7. The respondent testified as DW1 and apart from certificates of official searches of the suit properties, he produced an official search certificate and green card of South Sakwa Barkowino/4588.
 8. His evidence was led by Johannes Kwango Odiango who was the 2nd appellant's son and a brother to the 1st appellant. He testified as DW2.
 9. The parties were heard, their respective cases closed, submissions filed, and judgment delivered on 22/05/2023. The impugned judgment only dealt with one issue- whether the appellants' claim was prematurely before the court.
 10. The learned trial magistrate found in the affirmative and dismissed the appellants' claim with costs to the respondent.

Appeal to this court

11. Disgruntled by this decision, by the law firm of Ms. Oduol Achar & Co. Advocates who is on record for them, the appellants filed a memorandum of appeal dated 11/06/2023 which faulted the learned trial magistrate for: -
 - a. Failing to find and hold the appellants were in adverse possession of the suit properties.
 - b. Failing to find and hold the appellants proved their case to the required standards against the respondent.
 - c. Determining issues not pleaded or canvassed during trial.
 - d. Failed to appreciate the facts of the case and evidence adduced by the appellants which were uncontroverted.
 - e. Entering judgment in the respondent's favour that exceeded the weight of facts and evidence adduced by the appellants thus arriving at a wrong decision.
 - f. Failed to exercise his discretion judiciously in awarding costs.
12. Accordingly, the appellant beseeched this court to allow the appeal, the impugned judgment to be set aside, and judgment to be entered for them as sought in the amended OS and costs of the appeal and the lower court suit.



Submissions.

13. As directed by the court, the appeal was canvassed by written submissions. The appellant's law firm on record filed written submissions dated 14/09/2024.
14. It was apparent in these submissions that the appellants abandoned grounds (c) and (f) of their memorandum of appeal and consolidated the residual grounds into a singular ground: whether the learned trial magistrate erred in law and fact by not finding the appellants' claim had met the threshold of adverse possession.
15. The respondent's law firm on record Ms. Odongo Awino & Co. Advocates filed written submissions dated 8/10/2024. Counsel identified a singular issue for determination which was whether the trial court erred in law and fact in failing to find in favour of the appellants on their claim of adverse possession.
16. The respondent's issue is similar to the appellants' consolidated ground of appeal as raised in their submissions. Just like in the lower court, the IP did not file any written submissions.
17. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the appellants' and respondent's arguments on the particular issue and the provisions of the law and judicial precedents relied upon to advance the arguments.

Issues for determination

18. This being a first appeal, this court is reminded that the task at hand is to reappraise, reassess, and reanalyze the evidence as asserted by the parties and to establish if the findings reached by the trial court should stand and give reasons if they do not. See *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR.
19. In line with the case of *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212, the court must keep in mind that it neither saw nor heard the witnesses and should make due allowance in that respect. Further, this court is called upon not to be quick to interfere with the discretion of the lower court unless it is satisfied that the decision of the trial court was clearly wrong because of some misdirection, failed to take into consideration relevant matters, considered irrelevant matters and as a result arrived at a wrong conclusion or abused its discretion.
20. Consequently, this court adopts the consolidated ground of appeal as set out in the appellants' submissions as the issue arising for determination and will also consider the nature of disposal orders it will issue. Thus, the following 2 issues which shall be dealt with together commend themselves for resolution.
 - a. Whether the learned trial magistrate erred in law and fact by not finding the appellants' claim had met the threshold of adverse possession
 - b. What orders should this court issue including an order as to costs?

Analysis and Determination

21. The doctrine of adverse possession is statutorily underpinned in our *Limitation of Actions Act*. The relevant provisions are found in Sections 7, 13 and 38 thereof.



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.”

22. 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.
23. These principles are settled and were summarized by the Court of Appeal decision of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR thus: -

“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.”

24. Upon considering the matter that was before him, the learned trial magistrate in his analysis and determination stated as follows: -

“...I find that the defendant acquired title to the suit parcels on 9/9/2011 and 14/12/2011 ... The suit was filed on 25/2/2022 which is a period of 11 years and not twelve (12) years as stipulated in Section 7 of the *Limitation of Actions Act*. I find and hold that by the time the current suit was filed, the title held by the defendant/respondent had not extinguished by the applicants’ alleged adverse possession of the suit property. This disposes of this case and find no need to belabor with other issues.”

25. The appellants’ counsel has faulted the learned trial magistrates’ reasoning and argues that since an adverse possession claim accrues on the land and not on the title, the commencement of time could not be anchored on registration.

26. To buttress his argument, counsel relies on the Court of Appeal decision of *Maweu v Liu Ranching & Farming Cooperative Society* [1985] eKLR where the court stated that time can accrue for purposes of adverse possession even before the registration of title takes place. In this decision, the court stated: -

“There is nothing in the concept of an overriding interest which is new to the law; it is merely an acknowledgement of existing common law. No title which passed to a new owner before registration was provided for, curtailed the period of limitation.”

27. The respondent’s counsel disparaged the appellants’ line of argument and maintained the learned trial magistrate did not err as his decision was supported by the Court of Appeal decision of *Francis Gitonga Macharia vs Muiruri Waithaka* [1998] KECA 277 (KLR) which arrived at the following conclusion: -

“He deponed that he went into possession of the suit land sometime in March 1974... As we stated earlier he became registered as owner on 16th December, 1974, and by 15th April, 1986, a period of twelve years had not run. Consequently the appellant’s claim based on adverse possession was premature and therefore incompetent.”

28. These 2 decisions are binding on this court. Nevertheless, the circumstances of this case and that of *Maweu* (Supra) are distinguishable. In the former, the court was dealing with land registered under the repealed Registration of Titles Act yet the suit properties herein were registered under the repealed Registered *Land Act*.

29. The two regimes were distinct and *Maweu* (Supra) did appreciate this position, particularly on the question of commencement of time for purposes of adverse possession under the two laws by stating: -

“The learned judge pointed out that it was only in the Registered *Land Act* (cap 300) that provision was made for an overriding interest status to be conferred on those acquiring title. The absence of such a provision in the Registration of Titles Act (cap 28) showed that he was bound to construe the latter act in accordance with authority. With that point in view, I would, with respect, quite agree. But so far from supporting the decision in *Alibhai*’s case, section 30(f) of the Registered *Land Act* (cap 300) illustrates the warning of the Privy Council, that the Registration of Titles Act (cap 281) does not deal with possession. Emphasis added.



30. Since the suit properties were registered under the repealed Registered *Land Act* and as held in Maweu (Supra) and Francis Gitonga Macharia (Supra), time for purposes of adverse possession could only start running from the date of the 1st registration of the suit properties.
31. The appellants did not tender sufficient evidence of the history of the registration of suit properties. The 1st appellant merely stated South Sakwa Barkowino/4444 and 4445 were subdivisions of 610 but did not elaborate on the particulars of this property or avail its green card.
32. The green card of South Sakwa Barkowino/4589 shows it was a subdivision of South Sakwa Barkowino/4444 whereas that of South Sakwa Barkowino/4445 demonstrates it was a subdivision of Plot 3856.
33. The only possible dates of calculation of registration of Plot 3856 and South Sakwa Barkowino/4444 are respectively 27/12/2000 and 12/5/2003 which are their dates of registration.
34. Nonetheless, time could not start running on these respective dates since at the time, they were registered in the name of Bathlimayo Odiango Omuko (Omuko) who was respectively the father and husband of the appellants. See the Court of Appeal decision of Samuel Kihamba v Mary Mbaisi [2015] eKLR.
35. From the green cards, Omuko at consideration transferred South Sakwa Barkowino/4589 to Joyce Mkabahati Obonyo (Joyce) on 11/06/2003 who transferred it to the respondent on 9/09/2011 meanwhile, Omuko also at consideration transferred South Sakwa Barkowino/4445 to Martin Umayu Suri (Suri) on 17/1/2001 who then transferred it to the respondent on 14/12/2011.
36. As held in the Court of Appeal decision of Peter Gichuki Wanjohi v Juliah Mumbi Muturi [2021] KECA 1049 (KLR), the calculation of time for purposes of adverse possession was cumulative against both Joyce and Suri who were the original owners and the respondent who was their successor in title.
37. The mere change of ownership from Joyce and Suri on the suit properties allegedly adversely occupied by the appellants did not interrupt or stop time from running. 12 years had lapsed to the time of filing suit. I find the learned trial magistrate fell in grave error in the computation of time. I find the claim of adverse possession was not premature or incompetent.
38. Since the learned trial magistrate did not consider the merits of the case and considering the sufficiency of the evidence on record it falls on this court to determine if the appellants' case met the threshold of adverse possession.
39. But before I do that, I must consider the appellants' amended OS. The Court of Appeal decision of Chumo Arap Songok v David Kibiego Rotich [2006] KECA 106 (KLR) had this to say on pleadings filed by parties: -

“The law is now settled, that parties to a suit are bound by the pleadings in the suit and the court has to pronounce judgment only on the issues arising from the pleadings unless a matter has been canvassed before it by parties to the suit and made an issue in the suit through the evidence adduced and submissions of parties.”
40. Although the amended OS claimed the appellants had adversely acquired the suit properties, reliefs were only sought against South Sakwa/Barkowino/4589.
41. This notwithstanding, the issue of adverse possession over both suit properties was canvassed throughout the entire proceedings and this court will render a determination on both of them.



42. Turning to the evidence, the appellants stated several homes on South Sakwa/Barkowino/4589 belonged to the appellants and other sons or son of the 2nd appellant. They produced photographs to substantiate this.
43. A scrutiny of these photographs depicts a different picture as they portray only a single semi-permanent house exists therein. The 2nd appellant testified that the house was hers, she occupied land that was registered in her name and she lived there with her sons.
44. My understanding of this line of evidence is that she and her sons lived on another property that was not South Sakwa/Barkowino/4589 and this lent credence to the respondent's evidence and that of DW2 that the appellants occupied an adjacent parcel of land which was no. South Sakwa/Barkowino/4588 that was registered in the 2nd appellant's name.
45. The respondent's evidence and that of the DW2 was consistent. The appellants did not dislodge the respondent's evidence by filing a survey report to demonstrate they occupied South Sakwa/Barkowino/4589 and not South Sakwa/Barkowino/4588. I find the appellants are not in occupation of this suit property.
46. As for the other suit property of South Sakwa Barkowino/4445, the clear testimonies of the appellants show there were material contradictions and inconsistencies in their evidence.
47. The 2nd appellant contended she had been tilling it for decades but the 1st appellant contradicted her and testified that farming commenced therein in April 2022. I find the appellants' claim did not meet the settled threshold of adverse possession. I find they did not prove their case to the required standards.
48. Notwithstanding the reasons of this court in arriving at its finding that the appellants' claim did not meet the threshold of adverse possession differs from that of the learned trial magistrate, I arrive at the same conclusion as him that the appellants' claim was ripe for dismissal.
49. Therefore, I will not interfere with the learned trial magistrate's judgment delivered on 22/05/2023 save that I vary the judgment by finding the appellants' claim was not premature but competently before the court. I uphold the judgment that dismissed the appellant's case. It is trite law costs follow the event, since the appellants were partly successful in their appeal, they shall bear one-half of the respondent's costs of this appeal. The IP did not participate in these proceeding and costs are not awarded to it.

It is so ordered.

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:

N/A Appellant

Mr. Siworo h/b for Mr. Odongo for 1st respondent

N/A for 2nd respondent

Court assistant: Ishmael Orwa



14 days right of appeal.

