



**Orao v Ogola (Environment and Land Appeal E013 of 2023)
[2024] KEELC 13398 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13398 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E013 OF 2023**

E ASATI, J

NOVEMBER 21, 2024

BETWEEN

ANDREW JOHN YOA ORAO APPELLANT

AND

LAWI OCHIENG OGOLA RESPONDENT

*(Being an Appeal from the Judgement of Honourable Court C.I. Yalwala
– Senior Principal Magistrate at the Senior Principal Magistrate’s Court
at Maseno Law Courts on the 1st of March, 2023, ELC 21 OF 2019)*

JUDGMENT

Background

1. A brief background of the appeal herein as can be gathered from the record of appeal is that the appellant was the plaintiff and the Respondent the Defendant in Maseno Srmc E & L Case No 21 OF 2019 (herein called the suit). Vide the amended plaint dated 30th June, 2021, the Appellant sued the Defendant over a parcel of land known as Kisumu/Karateng/936. The appellant’s case was that he was the owner by inheritance and family demarcation of the land from the year 1964 and had been in peaceful possession without any legal claim from the defendant through the courts. That the Defendant had resorted to damaging trees and crops and had brought a surveyor on 22/10/2019 with an intention of selling and encroaching onto the appellant’s portion unlawfully. He therefore sought for orders of;
 - a. A permanent injunction against the Defendant together with his agents restraining them from wasting, sub-dividing and selling or damaging or alienating the suit land.
 - b. Adverse possession of a portion of the suit land parcel number Kisumu/Karateng/936.
 - c. Cos of the suit.



2. In response to the suit, the Respondent filed a defence and counter-claim dated 23rd September, 2021. The Respondent's case was that he is the absolute registered proprietor of the suit land. That sometime in November 2019 the appellant unlawfully and without any color of right entered onto part of the suit land and commenced cultivation thereon. That sometimes in February 2020 the appellant constructed temporary structures on the land. The Respondent therefore denied the appellant's claim and prayed by way of the Counterclaim for judgement in his favour for;
 - a. An order of eviction and a permanent injunction restraining the Plaintiff either by himself, agent or servant or any other persons from claiming through him from staying, remaining upon, entering, using or in any other manner interfering with the Defendant's use of the said parcel NO. Kisumu/Karateng/936.
 - b. Costs.
 - c. Interest.
- 3.. The record shows that the suit was heard before the trial court which, vide the judgement dated 1st March, 2023, found that the Appellant's claim had failed. That the Appellant and his family members had no right of claim to the subject land. The court therefore proceeded to dismiss the Appellant's claim and allowed the Respondent's counterclaim by issuing orders of eviction and permanent injunction.

The appeal

4. Aggrieved by the judgement, the Appellant filed the present appeal vide the Memorandum of Appeal dated 17th March, 2023. The grounds of appeal as contained in the Memorandum of Appeal are that:
 1. The learned trial magistrate erred in law and in fact by finding that the Plaintiff and his extended family members have no right of claim to the subject portion of land, they have been in possession since 1964 to date.
 2. The learned Trial Magistrate erred in law and in fact in stating that there was no clear evidence of the definite and distinct portion of NO.Kisumu/Karateng/936 as against the Defendant and the Plaintiff and his extended family has been exclusive adverse possession of against the Defendant.
 3. The learned Trial Magistrate erred in law that the Defendant had proved his case on balance of probability.
 4. The learned Trial Magistrate erred in law by in fact disregarding the Plaintiff's evidence which was authentic, elaborate, clear and consistent.
 5. That the learned Trial Magistrate erred in law in failing to find that the Defendant's defence was inconsistent.
 6. The Trial Magistrate erred in law by neglecting the report filed by chief of West Kisumu, arising from an order from His court.
 7. The learned Trial Magistrate erred in law in finding that the Defendant had obtained letters of administration to the estate of his father, by concealment of information during succession.
 8. The learned Trial Magistrate erred in law by failing to find that the suit portion of NO.KSM/Karateng/936 was to be south of NO.KSM/Karateng/937 (Plaintiff's father's part).



9. The learned Trial Magistrate erred in law by finding that the Plaintiff's family entry, possession and occupation was permissive to the suit portion.
 10. The learned trial Magistrate erred in law in finding that the suit portion of land was registered in the name of Defendant's father's name in February, 1977.
 11. The learned Trial Magistrate erred in law in finding there is no clarity as to whom the claim was being laid against.
 12. The learned Trial Magistrate erred in law in finding that the Plaintiff did not state in his pleadings the measurements of the portion he claims to have acquired by adverse possession against the Defendants
 13. The learned Trial Magistrate erred in law in finding that there has been dispute from the Defendants several times.
 14. The learned Trial Magistrate erred in law in finding that, before 1st February, 1977, the subject land was unadjudicated and undermarked.
 15. Learned Trial Magistrate erred in law in finding that Plaintiff's claim for adverse possession against the subject land parcel number Kisumu/Karateng/936 could only have started from 1st February, 1977.
 16. The learned Trial Magistrate erred in law in finding that before filing the suit herein, there was proceedings before elders and local administration in regard to the ownership, occupation and use of the subject land.
 17. The learned Trial Magistrate erred in law in finding that the Plaintiff and family members took possession of the subject land at varied time up to 2008 and that the various periods of possession are beyond statutory frame time of 12 years to entitle the Plaintiff to a claim of adverse possession over the land.
5. The Appellant seeks for orders that the appeal be allowed and the judgement of the trial court be set aside with costs, the costs of the appeal be borne by the Respondent and that the court makes further or other orders as it may see just and expedient.

Submissions.

6. The appeal was argued by way of written submissions. The Appellant filed written submissions dated 6th February 2024. He submitted that although the Respondent claims to be the registered owner of the suit land through a grant in MASENO PMC SUCCESSION CAUSE NO.29 OF 2019, section 79 of the *Law of Succession Act* was not complied with. That the title deed was issued under unclear circumstances. That the Appellant's father failed to understand how his step brother could have annexed the suit portion to his land without his consent.
7. That there was no interruption or claim laid in court for eviction by the step brother one Apollo Ogolla, deceased, despite having a title deed including his portion.
8. That the suit portion was annexed to land parcel NO. Kisumu/Karateng/ 936 but the boundary demarcation was not removed.
9. That documents filed by the Respondent were full of inconsistencies.



10. The Appellant submitted further that after expiry of 12 years without the registered owner of the land taking action to recover the land the title of the registered owner is extinguished by operations of the law. The Appellant referred to Section 17 of the *Limitation of Actions Act* for this submission. That the Appellant's extended family have been on the suit land for over 50 years having taken possession in the year 1964. That they inherited the land from their grandfather and have continuously, openly and actually developed it, uninterrupted for that long period without the Defendant laying claim to it. The Appellant relied on the case of Maweu -vs- Liu Ranching and Farming Corporation Society (1985)eKLR among others where it was held that adverse possession is a fact to be observed upon the land. It is not to be seen in a title.
11. The Appellant also relied on the cases of Malindi Application NO.56 of 2024 Mtana Lewa -vs- Kahindi Ngala Mwangandi and Mbira -vs- Gachui (2002) EALR 137, where it was held that a claimant under adverse possession must prove non-permissive and non-consensual, actual and adverse use by him or those under him when he claims for the statutory period without interruption.
12. That there is no evidence in the instant case that the Respondent ever attempted to repossess the land or at any stage cultivate the land in the last over 50 years.
13. On behalf of the Respondent, it was submitted that the Appellant purported to bring the suit on behalf of other family members, some of whom were witnesses in the case. That the Appellant admitted on cross-examination that he doesn't stay on the suit land but had filed the suit on behalf of his family members.
14. That the Appellant not being in occupation could not sustain the claim of adverse possession. That the family members were not parties in the suit and also gave no consent for the suit to be filed on their behalf.
15. That the entry onto the suit land was not hostile but consensual. That
16. PW2 was one of the said family members but that stated that he built on the land in the year 2017. That PW3 stated on cross-examination that she stays on parcel No. Kisumu/Karateng/739 and not on the suit land. That PW4 stated in cross-examination that he has constructed his house on parcel number Kisumu/Karateng/951.
17. Counsel concluded that the Appellant had failed to prove his case and urged the court to dismiss the appeal with costs.

Issues for Determination

18. The substantive issue that arises for determination is whether or not the trial court erred in dismissing the Appellant's claim and in allowing the counterclaim

Analysis and Determination

19. This being a first appeal, the court reminds itself of the duty to re-examine and analyse the evidence placed before the trial court with a view to arrive at its own independent conclusion. See section 78 of the *Civil Procedure Act* and *Selle & another vs Associated Motor Boat Company Ltd & Another* (1968) IEA 123) where it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact and law by the court below but has a duty to re-examine the evidence placed before the trial court.
20. The record of appeal shows that the evidence placed before the trial court by the Appellant comprised the testimony of the Appellant and the three witnesses he called.



21. The record further shows that the Appellant narrated at length how the suit land was part of land that belonged to his grandfather and how his family members entered the suit land as relatives of his grandfather.
22. In cross examination he stated that his case was that land lawfully belonging to his family was fraudulently annexed to the Defendant's land. He stated further that it was his mother and brother who were staying on the suit land. He stated that he does not stay on the land but was fighting for his father's estate. He further stated that succession to his father's estate was filed by two of his younger brothers. That they are the administrators of the estate.
23. The Respondent also described the common ancestry of the parties herein and stated that he shares a common grandfather with the appellant whose name was Onyango. He stated that the Appellant lacked basis for claiming the land as it did not belong to him.
24. On cross-examination, he stated that he brought a Surveyor to determine the land and that when the surveyor found that the people the Appellant had brought to construct were on the Respondent's land, the Appellant filed the suit.
25. The findings of the trial court were that the entry of the Appellant and his family members onto the suit land was permissive and would not be a basis for a claim of adverse possession.
26. The court also found that the various periods of possession of the suit land by the Appellant and his family members are beyond the statutory time frame of 12 years' occupation to entitle the Plaintiff to a claim of adverse possession. That possession of the subject land by the Appellant has not been uninterrupted or undisturbed.
27. The court found that the Appellant had failed to establish the crucial ingredients of adverse possession. That the Appellant did not state in his pleadings the measurements of the portion he claims to have so acquired by adverse possession and did not lead evidence on the same.
28. I have considered the record of appeal particularly the evidence placed before the trial court, the grounds of appeal and the submissions filed. The Appellant's claim was based on adverse possession. Adverse possession is a doctrine of law *vide* which a person obtains legal title to land by reason of actual, open and continuous occupation of it to the exclusion, with the knowledge but without the permission of the registered owner for a prescribed period. In Kenya, the doctrine is anchored on sections 7, 13 and 38 of the *Limitation of Actions Act*. Section 7 sets the prescribed period at 12 years. It 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.”

29. Section 13 of the *Limitation of Actions Act* provides:
 - (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is this Act referred to as adverse possession), 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 cease 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 purpose 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.
30. The burden of proof under the provisions of Section 107 to 109 of the *Evidence Act* rested with the appellant. He had the burden to adduce credible evidence and prove on a balance of probabilities that he had acquired title by adverse possession, that his possession of the suit land was as of right and in a manner inconsistent with the rights of the registered owner that is to say: that he had had occupation of the suit land which was open, actual, continuous, uninterrupted, peaceful, exclusive and with the knowledge but without the consent or permission of the registered owner for the prescribed period of 12 years. In *Kimani Ruchure vs Swift Rutherfords & Co. Ltd* (1980)KLR 10 it was held that
- the Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)
31. Similarly in the case of *Gabriel Mbui vs Mukindia Maranya* [1993]eKLR adverse possession was defined as
- ..the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner’s enjoyment of land for purposes for which the owner intended to use it.”
32. From his evidence, the manner of entry onto the suit land was permissive and not adverse. The claimed that the land belonged to his family as an ancestral land inherited from his grandfather. That his family members entered the suit land as relatives or descendants of his grandfather. On cross examination he stated that his case was that a portion of land that lawfully belonged to his family was fraudulently annexed to the Respondent’s land. That he discovered the fraud in the year 1985. If this be true that the land was fraudulently registered in the name of the Respondent, then a claim of adverse possession on title that was fraudulently acquired cannot be sustainable. I agree with the court’s holding in *Haro Yonda Juaje -vs- Sadaka Dzenge Mbauro & Kenya Commercial Bank* (2014) eKLR, that
- 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.”
33. Regarding his occupation of the suit land, the appellant pleaded in the amended plaint that he was the owner of the suit land by inheritance and had had the land since 1964 having peaceful occupation. In the Reply to Defence and defence to Counterclaim, he pleaded that his extended family is the owner of the portion of land. He stated in his evidence that his family had always had occupation of the suit portion although he does not occupy the land, that it was his mother and brother who were using the land. The witnesses who were called as PW2, PW3 and PW4 testified that they reside elsewhere. PW2



stated that he built on the land in 2017. PW3 testified that he stays on land parcel number Kisumu/Karateng/939. PW3 stated that he only ploughs on the suit land but lives on land parcel No. Kisumu/Karateng/951. He however did not disclose for how long he has been ploughing the land.

34. Secondly, the appellant claimed that he had brought the suit on behalf of his father's estate. He is not the personal representative of his father's estate. In his testimony he stated that it was his younger brothers who were the personal representatives of his father. The appellant did not prove that he had capacity to bring the suit on behalf of the estate of his father, the extended family or anybody else.
35. The appellant's claim was on only a portion of the suit land that belonged to his father which he testified was fraudulently annexed to the suit land. He testified that the portion of land was what his father got from the appellant's grandfather and which the appellant's family had always occupied. He however did not specify the size of the portion of land.
36. The respondent on the other hand testified he was the registered owner of the suit land and that the appellant only entered the suit land in the year 2019.
37. The totality of the evidence placed before the trial court did not prove the elements of adverse possession.
38. Having read the judgement, I find that the trial court analyzed the evidence correctly and came to the right findings and decision. I find no basis to interfere with the findings and decision of the trial court.
39. As regards costs, under section 27 of the *Civil procedure Act*, the costs of any action, cause or other matter or issue shall follow the event unless the court shall for good reason otherwise order.
40. In conclusion I find that the appeal lacks merit and hereby dismiss it. Costs to the Respondent.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 21ST DAY OF NOVEMBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Appellant in person.

Kowinoh for the Respondent.

