



REPUBLIC OF KENYA



KENYA LAW
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**Oduol v Adinda & another (Land Case Appeal E002 of 2023)
[2024] KEELC 7550 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7550 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
LAND CASE APPEAL E002 OF 2023
AY KOROSS, J
NOVEMBER 14, 2024**

BETWEEN

JOSEPH OKOTH ODUOL APPELLANT

AND

HESBORN ODUOL ADINDA 1ST RESPONDENT

JARED JUMA ADINDA 2ND RESPONDENT

*(Being an appeal from the judgment of PM Hon. L. Simiyu
delivered on 16/06/2021 in Siaya MCELC Case No. 28 of 2018)*

JUDGMENT

Background of the appeal

1. In the lower court, the appellant was the plaintiff, and the respondents were the defendants. The parcel of land in dispute was no. North Ugenya/Nyalenya/816 (suit property) registered in the respondents' joint names.
2. In an originating summons dated 13/05/2012 which was supported by an affidavit and annexures, the appellant contended he had acquired the suit property by adverse possession and sought the following reliefs: -
 - a. A declaration he had acquired the suit property by adverse possession.
 - b. The suit property's register be rectified and the respondents' names be deleted as proprietors and be replaced with his name.
 - c. Costs be provided for.



3. In opposition, the 1st respondent deposed a replying affidavit on 17/04/2012 denouncing the appellant's assertions. He contended the appellant who was his step-uncle was at adjudication, registered as the owner of the land parcel no. North Ugenya/Nyaleya/255 (255).
4. He also averred the matter had been handled under several dispute resolution mechanisms envisaged under the repealed Land Disputes Tribunals Act (Chapter 303A) resting with the decision of the defunct Nyanza provincial appeals committee (Nyanza appeals committee) that was adopted as an order of the court on 28/06/2011 in Siaya PM LDTC No. 80 of 2008 (previous case).
5. In the lower court, the appellant's case was led by 2 witnesses, and the respondents' case by 3 witnesses. After hearing the parties, the matter was reserved for judgment.
6. In the impugned judgment that the learned trial magistrate rendered, she identified a single issue for determination- whether the suit was res judicata. The learned trial magistrate found in the affirmative, held she lacked jurisdiction, and dismissed the suit with costs to the respondents.

Appeal to this court

7. Dissatisfied by the impugned judgment and upon being granted leave, the appellant filed his memorandum of appeal dated 8/01/2023 in which he outlined several grounds that faulted the learned trial magistrate for grounds inter alia; denying him his land rights, not considering his submissions, finding she did not have jurisdiction, did not consider evidence and the impugned judgment was bereft of sound reasoning or law.
8. Accordingly, the appellant implored this court to set aside the impugned judgment, and restore the suit property to him, and the costs of the appeal.

Preliminary issues

9. Outlandishly, the record of appeal contained a strange memorandum of appeal that differed from what was filed on 12/01/2023. Leave was never granted to the appellant to file an amended memorandum of appeal or any other for that matter. This strange memorandum of appeal filed on 21/05/2024 is hereby expunged from the record.

Submissions.

10. As directed by the court, the appeal was canvassed by written submissions. The appellant's law firm on record M/s. Mwamu & Co. Advocates filed written submissions dated 31/05/2024. Despite the respondents being extended for time to file written submissions, they did not comply.
11. It is evident from these submissions the appellant abandoned most of the grounds of appeal and in his view, only 2 main issues arose for resolution- whether the learned trial magistrate erred in finding she lacked jurisdiction and whether the appellant's claim of adverse possession should be determined on merits.
12. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the appellant's arguments on the particular issue and provisions of the law and judicial precedents his counsel relied upon to advance the arguments.

Issues for determination

13. 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 herself and thus arrived at an erroneous decision, undoubtedly exercised her discretion wrongly and occasioned injustice by such erroneous exercise.

14. Turning to the matter at hand, I have carefully considered the records, abandoned grounds of appeal, appellant's submissions, provisions of law relied upon, and judicial precedents cited.
15. Consequently, this court adopts the grounds of appeal as set out in the appellant's submissions as the issues arising for determination. Hence, the issues are as follows: -
 - a. Whether the learned trial magistrate erred in finding she lacked jurisdiction.
 - b. Whether the appellant met the threshold of adverse possession.
 - c. What orders should this court issue including an order as to costs?

Analysis and Determination

16. The issues which were identified earlier in this judgment shall be addressed herein in a consecutive manner. I will now proceed to deal with issue (a).
 - a. Whether the learned trial magistrate erred in finding she lacked jurisdiction.
17. The doctrine of res judicata is provided for under Section 7 of the [Civil Procedure Act](#) in the following terms: -

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

18. The essence of this doctrine is to thwart a party claiming under the same title, from seeking a second bite of the cherry by returning to court claiming a similar relief or additional reliefs other than the ones earlier claimed in the previous suit.
19. The Supreme Court of Kenya decision of Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another [2016] eKLR summarized the principles of res judicata thus: -

“This test is summarized in Bernard Mugo Ndegwa v. James Nderitu Githae & 2 Others, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.”

20. As illuminated in Kenya Commercial Bank Limited (Supra), the doctrine enhances the effectiveness of the adjudication process, eliminates multiplicity of suits, reduces backlog, brings litigation to an end, and saves parties from unnecessary costs.
21. As rightfully held by the learned trial magistrate, the doctrine of res judicata is a substantive issue that touches on the jurisdiction of the court. The Court of Appeal in the case of John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015]



eKLR expressed itself as follows on the process of moving the court when the doctrine of res judicata is imminent in a suit;

“The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court may be raised as a valid defence to a constitutional claim even on the basis of the court’s inherent power to prevent abuse of process ...”

22. The essence of the doctrine is to bring litigation to finality and affords parties closure and respite from the spectre of being vexed by multiple suits that have already been determined by a competent court.
23. The intent of the doctrine was aptly summarized by the Supreme Court of Kenya decision of John Florence Maritime Services Limited & another vs. Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR as follows: -

“It is primarily founded on the following three maxims:

1. nemo debet bis vexari pro una et eadem causa: no man should be vexed twice for the same cause.
 2. interest republicae ut sit finis litium: it is in the interest of the State that there should be an end to a litigation; and
 3. res judicata pro veritate occipitur: a judicial decision must be accepted as correct.”
24. The principles of res judicata are conjunctive and since the existence of the previous case was undisputed before the trial, the previous case and the case that was before the learned trial magistrate will be assessed based on the principles drawn from Section 7 of the *Civil Procedure Act* and Kenya Commercial Bank Limited (Supra). Such an appraisal will determine the issue at hand.
 25. The appellant’s counsel has challenged the reasoning of the learned trial magistrate and argues that the Nyanza appeal committee did not have jurisdiction to entertain the dispute.
 26. After all, counsel argues, the suit property had already been registered and the issue therein was on ownership of the suit property and not adverse possession, therefore, according to counsel, the suit was not res judicata. Counsel argues the decision was null and void.
 27. Although the learned trial magistrate held the previous case resolved the claim with finality, I respectfully disagree with her.
 28. It is noteworthy, by Section 38 (1) of the *Limitation of Actions Act*, the High Court at the time, had exclusive jurisdiction over adverse possession claims and it was not tenable for other bodies to adjudicate over such a claim.
 29. Without belabouring into merits of the tribunal and appeal cases, it emerges the appellant’s claim before the land tribunal and Nyanza appeal committee was challenging the respondent’s ownership over the suit property and not a claim of adverse possession. I find this ground of appeal succeeds. I find and hold that the defendant’s counterclaim is not res judicata.
 - b. Whether the appellant met the threshold of adverse possession.
 30. As well captured by the appellant’s submissions, the doctrine of adverse possession arises where a person in possession of land owned by a registered proprietor may by some colour of right acquire



valid title to it, so long as certain common law requirements are met, and the adverse possessor has had it for a sufficient period, as defined by the *Limitation of Actions Act*.

31. Section 7 of the *Limitation of Actions Act* states the definition of adverse possession as follows:

“an action that may not be brought by any person to recover land after the end of 12 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.”

32. Section 38 of the *Limitation of Actions Act* authorizes a person who claims to have been entitled to land by adverse possession to apply to the court for an order that he be registered as the proprietor in place of the registered proprietor.

33. Section 28 (h) of the *Land Registration Act* is also key. It states that land is subject to certain overriding interests such as rights acquired or in the process of being acquired by any written law relating to the limitation of actions or by prescription. This overriding interest subsists and affects the interests of proprietors even when it is not noted on the register.

34. As was held in *Kweyu v Omuto*, C A Civ Appeal 8 of 1990 that was cited with approval in the case *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, the primary function of the court in dealing with adverse possession is to draw legal inferences from proved facts and such inferences are matters of law. In such claims, proof of all principles of adverse possession must co-exist and be strictly proved.

35. The principles of adverse possession are well settled and can be drawn from the Court of Appeal decision of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] which summarized them as follows: -

“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.”

36. In the impugned judgment, the learned trial magistrate having erroneously found she did not have jurisdiction, downed her tools and did not consider the merits of the case. This notwithstanding, the evidence on record is sufficient and this court shall render a determination on this issue.

37. The appellant testified that he entered the suit property in 1992. The suit was filed on 13/3/2012 which was 20 years later. Nevertheless, during the intervening period, the parties had several disputes before adjudicative bodies which rested with the appeal by the respondents before the Nyanza appeal committee.

38. The decision of the Nyanza appeal committee was adopted as a judgment of the court on 28/06/2011. These proceedings and adoption are significant as they had the effect of stopping time. This court draws guidance from the rendition in *Titus Kigoro Munyi v Peter Mburu Kimani* [2015] KECA 952 (KLR) which held: -

“In order to stop time which has started running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land. See *Njuguna Ndatbo V Masai Itumu & 2 Others Civil Appeal No 231 of 1999*.”



39. Having appealed, the respondents took a positive step to assert their rights. The adoption of the judgment took place on 28/06/2011. The appellant's claim could only crystallize 12 years later which was 28/06/2023 yet his claim was prematurely filed on 13/3/2012.
40. Additionally, in adverse possession claims, courts are reluctant to make a positive finding where parties are relatives as was the case herein. This position has been upheld in a line of court decisions including the Court of Appeal decision of Samuel Kihamba v Mary Mbaisi [2015] eKLR.
41. Further, even if this court were to consider an adverse possession claim under customary trust as was determined in the Court of Appeal decision of Eunice Karimi Kibunja v Mwirigi M'ringera Kibunja [2013] eKLR, the appellant would have failed as at adjudication, 255 was registered in his name while the suit property which appears to be non-existent because of a subdivision, was registered in the respondents' father's name. Meaning, that each party intended to own their respective parcels of land.
42. In conclusion, I find his claim of adverse possession fails. This ground of appeal fails.
- c. What orders should this court issue including an order as to costs?
43. Ultimately and save for the reasons herein stated, in addressing issue (c), I find the appeal is partly merited.
44. Therefore, I will not interfere with the learned trial magistrate's judgment delivered on 16/6/2021 save that I vary the judgment by finding the court had jurisdiction to entertain the suit. I uphold the judgment that dismissed the appellant's case. It is trite law costs follow the event, since the appellant was partly successful, each party shall bear their respective costs in respect of the appeal.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 14TH DAY OF NOVEMBER 2024.

HON. A. Y. KOROSS

JUDGE

14/11/2024

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

In the Presence of:

Miss Machuka for the appellant

N/A for respondent

Court assistant: Ishmael Orwa

