



**Ooro v Okelloh (Land Case Appeal E002 of 2024)
[2024] KEELC 7390 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7390 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
LAND CASE APPEAL E002 OF 2024
AY KOROSS, J
NOVEMBER 7, 2024**

BETWEEN

CHRESENTIA WERE OORO APPELLANT

AND

JOHN OKOTH OKELLOH RESPONDENT

*(Being an appeal from the judgment of SPM hon. J.P. Nandi
delivered on 22/12/2023 in Bondo MC ELC Case No. 60B of 2021)*

JUDGMENT

Background of the appeal

1. In the lower court, the appellant was the plaintiff and the respondent the defendant. The parcel of land in dispute was land parcel no. Sakwa/Nyawita/7832 (suit property) registered in the appellant's name but allegedly occupied by the respondent.
2. In a plaint dated 21/11/2021, the appellant pleaded that when she purchased the suit property from Sam Odongo Nicanor (Nicanor), she found the respondent, who had Nicanor's permission, in occupation. The respondent had allegedly planted trees and crops therein and also put up a temporary fence thereat.
3. According to the appellant, Nicanor promised to terminate the permission but the respondent declined to vacate and she sought the following reliefs from the trial court: -
 - a. An order of eviction from the suit property against the respondent.
 - b. Permanent injunction against the respondent from interfering with the suit property.
 - c. General damages for trespass.
 - d. The OCS Bondo to assist in effecting the eviction process.



- e. Costs of the suit and interests at court rates.
4. In response, the respondent vehemently denied the averments contained in the plaint, and by an amended defence and counterclaim dated 2/02/2023, he averred he was a stranger to the appellant's claim.
5. He asserted that the suit property formed part of a parcel of land that he bought sometime in 1982 from Pius Achiego Adede (Adede) and had been using it since then. He counterclaimed adverse possession and sought the following reliefs: -
 - a. A declaration that he had acquired the suit property by adverse possession.
 - b. A declaration the appellant's title over the suit property had extinguished.
 - c. Cancellation of the suit property's title and an order be issued that it forms part of North Sakwa/Nyawita/3435.
 - d. Permanent injunction against the appellant from interfering with the suit property.
 - e. Costs of the suit and counterclaim.
6. In reply, the appellant filed a reply to the amended defence and defence to counterclaim dated 22/02/2023.
7. The matter proceeded for hearing and the appellant testified as PW1 and her evidence was led by 2 witnesses one of whom was Nicanor and the other, Adede's wife Wilkister Achiego. The respondent testified as a sole witness and summoned 2 independent witnesses.
8. In the course of the proceedings, the learned trial magistrate ordered the land registrar Bondo and district surveyor to visit the suit property and North Sakwa/Nyawita/3435, 3436, and 7832 (respectively to be referred to as 3435, 3436, and 7832) and file a report.
9. After hearing the parties, the matter was reserved for judgment. In the impugned judgment that the learned trial magistrate rendered, he identified 2 issues arising for resolution; whether the respondent was a trespasser and, whether the respondent's claim had met the threshold of adverse possession and costs.
10. In his conclusions on these issues, the learned trial magistrate found the respondent was not a trespasser but an adverse possessor and granted the respondent the reliefs sought in the counterclaim.

Appeal to this court

11. Dissatisfied by the impugned judgment, the appellant filed her memorandum of appeal dated 9/01/2024 in which she outlined several grounds that faulted the learned trial magistrate for grounds inter alia; failing to find she had proved trespass, finding the respondent was a trespasser, relying on the independent witnesses and concluding the respondent had purchased the suit property prior to Nicanor's purchase.
12. Accordingly, the appellant implored this court to allow the appeal, set aside or vary the impugned judgment, and enter judgment in her favour as sought in the plaint and costs of the appeal.



Submissions.

13. As directed by the court, the appeal was canvassed by written submissions. The appellant's law firm on record M/s. Ooro Awana & Co. Advocates filed written submissions dated 9/01/2024. The respondent's submissions were also filed by the law firm of Onyata & Co. Advocates dated 26/06/2024.
14. The appellant's submissions identified the following issues for determination; whether the appellant proved trespass, whether the respondent proved adverse possession, and whether the trial court misunderstood the facts of the case and thus arrived at wrong conclusions.
15. The respondent's issues were on the grounds of appeal which he summarised into 3 issues.
16. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the parties' arguments on the particular issue and also consider provisions of the law and judicial precedents that were relied upon to advance the arguments.

Preliminary issues

17. The nature and form of a memorandum of appeal is set out in 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.”

18. The essence of this law is to assist the court and parties in framing the issues and to identify the core grounds the appellant is aggrieved against. With due respect to the appellant, some of the grounds of appeal as charted out in the memorandum of appeal fell short of this law as they narratively stated the evidence.

Issues for determination

19. 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 thus arrived at an erroneous decision, undoubtedly exercised his discretion wrongly and occasioned injustice by such erroneous exercise.
20. Turning to the matter at hand, I have carefully considered the records, rival submissions, provisions of law relied upon, and judicial precedents cited. Given the unconcise grounds of appeal, this court has condensed the grounds of appeal into the following: -
 - a. Whether the learned trial magistrate erred in finding the respondent was not a trespasser.
 - b. Whether the learned trial magistrate erred in finding the respondent was an adverse possessor.
 - c. Whether the learned trial magistrate misconstrued the application of expert witness.
 - d. What orders should this court issue including an order as to costs?

Analysis and Determination

21. Issues (a) and (b) are related as an answer to issue (b) will render a resolution of issue (a) otiose and therefore, they shall be handled together.



22. Article 40 of *the Constitution* recognizes every person has the right to acquire and own property of any description and in any part of Kenya. Protections and limitations to such rights over land are protected by Sections 24, 25, and 26 of the *Land Registration Act* which sets out land's rights, privileges, appurtenances, liabilities, and interests.
23. Section 152A of the *Land Act* 2016 states as follows: -
- “A person shall not unlawfully occupy Private, Community or Public Land.”
24. Section 3 (1) of the *Trespass Act* defines trespass as: -
- “any person who without unreasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on private land without the consent of the occupier thereof shall be guilty of an offence.”
25. In the context of land, Blackstone, William. Commentaries on the Laws of England: Book III: of Private Wrongs, edited by Thomas P. Gallanis, Oxford University Press, 2016, pg 142 defined trespass in the following words: -
- “...it signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property. For the right of meum [mine] and tuum [thine], or property, in lands being once established, it follows as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil: every entry therefore thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression.”
Emphasis added.
26. In claims of trespass, the land owner must also be in possession by entry. In expounding on this, Blackstone pg 141-142 stated as follows: -
- “One must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass: or at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land.”
27. In claims of trespass, an alleged trespasser can lodge several defenses including justifying his actions, claiming he has a title, or that he has a right of entry.
28. In the circumstances of this case, when the appellant lodged his claim of trespass, the respondent properly contested this by contending that he was not a trespasser but an adverse possessor who had a right of entry. He alleged he had met the criteria of adverse possession and the appellant held the suit property in trust for him.
29. After hearing the parties, the learned trial magistrate had this to say on trespass: -
- “The plaintiff averred that the seller indicated that he had allowed the defendant to use the said piece of land...This means that the defendant had reasonable excuse to be on the suit land and cannot be termed to be a trespasser...The defendant is the one who started living on the suit land.”
30. The appellant's counsel has challenged this reasoning of the learned trial magistrate and argues the respondent did not have either Nicanor's or the appellant's permission to occupy the suit property.



Further, by registration in the appellant's name, the respondent was a trespasser and faulted the learned trial magistrate. On the contrary, the respondent's counsel agreed with the learned trial magistrate.

31. This court only agrees with the appellant's counsel to the extent that the respondent did not have permission to occupy the suit property. The averments on the plaint on permission from Nicanor were anchored on hearsay but Nicanor testified and asserted that the respondent was never granted permission.
32. On application of the definition of trespass and from evidence, neither Nicanor who purchased the suit property from Adede on 17/01/1992 nor the appellant have ever made an effective entry to the suit property and they both found the respondent in occupation of the suit property and has always done so.
33. In other words, they have never had possession. For these reasons, I concur with the findings of the learned trial magistrate that the appellant did not prove her claim of trespass.
34. On the 2nd limb, the defence of adverse possession brings the appellant's title to the suit property into question.
35. As well captured by counsels in their submissions, the doctrine of adverse
36. 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 had it for a sufficient period, as defined by the *Limitation of Actions Act*.
37. 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.”
38. 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.
39. 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.
40. 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.
41. 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.”

42. Suffice to say, a claim of adverse possession by purchase is an old hat and it is now settled in such circumstances, the limitation period will begin to run from the date of the payment of the purchase price in full or the last instalment thereof as was held in the Court of Appeal decision of *Public Trustee v Wanduru Ndegwa* [1984] eKLR.
43. In the impugned judgment, the learned trial magistrate did appreciate the settled principles of adverse possession by purchasers and stated that the respondent purchased the suit property from Adede on 17/06/1982 and paid the full purchase price of ksh.3000/- hence time started to run from then.
44. Further, the learned trial magistrate held that all the other ingredients of adverse possession had been met.
45. The respondent’s counsel agrees with the learned trial magistrate’s findings but the appellant’s counsel is of a different view and argues the document that persuaded the learned trial magistrate to arrive at his conclusions was dubious.
46. This court concurs with the appellant’s counsel. The document which was a declaration and not an agreement for sale has the particulars of the parcel no. blurred and it is uncertain if it is parcel no. 9, 494, 495, or as the case may be. The respondent testified that it was parcel no. 9 meaning it had nothing to do with the suit property. On that basis, I agree the trial magistrate erred in concluding time started to run on 17/06/1982.
47. The question that arises is did time ever start running and did the appellant meet the ingredients of adverse possession? My answer to this is in the affirmative.
48. A green card for the suit property was not produced but Adede and Nicanor presented themselves before the land registrar for registration of the suit property in Nicanor’s name on 22/01/1992. This court has taken that last date of 1992 as the date of registration of the suit property in Nicanor’s name.
49. Nicanor admitted he found the respondent in possession and there is no evidence he made efforts to eject him either by his entry into the suit property or filing of a suit. It follows time started to run for purposes of adverse possession from 31/12/1992 and crystallized on 31/12/2004.
50. Therefore, the appellant who became registered as the owner of the suit property on 28/10/2021 was never put in a better position than her predecessor in title as she purchased it subject to the rights of the respondent who was in occupation. Even if the suit before the trial court interrupted time, it took place late in the day as the 12-year period had crystallized. See *Peter Kamau Njau v Emmanuel Charo Tinga* [2016] KECA 167 (KLR).
51. The respondent’s evidence that he was in occupation of the suit property as shown by trees and crops that he planted on the suit property without interruption in a manner that was continuous, open, without force, and without the appellant’s permission and with her knowledge was never rebutted.
52. This evidence was lent credence by the appellant’s pleadings that asserted that when she purchased the suit property, she found the respondent in occupation. Save for this court’s reasoning on the agreement, I do not see fault in the learned trial magistrate’s reasoning. I find the consolidated grounds of appeal on issues (a) and (b) fail.
53. As to issue (c), I have scrutinized the records, and indeed, the respondent by a motion dated 14/04/2023 sought orders for the summoning of the land registrar and surveyor as his independent witnesses and the appellant did not object.



54. They were summoned as the respondent's independent witnesses. The appellant was allowed to cross-examine them and did not have any qualms about how the case was conducted. I find no fault in the manner in which the matter proceeded. This ground (c) equally fails.
55. Ultimately and save for the reasons herein stated, in addressing issue (d), 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 22/12/2023. Since it is trite law costs follow the event, the costs of this appeal are awarded to the respondent.

DELIVERED AND DATED AT SIAYA THIS 7TH DAY OF NOVEMBER 2024.

HON. A. Y. KOROSS

JUDGE

7/11/2024

**JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

In the presence of:

Mr. Ooro F. for the appellant

Mr. Onyatta for the respondent

Court assistant: Ishmael Orwa

