



REPUBLIC OF KENYA



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**Afubwa & another v Salano (Environment and Land Appeal
E011 of 2023) [2025] KEELC 2956 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 2956 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E011 OF 2023**

DO OHUNGO, J

MARCH 27, 2025

BETWEEN

IS-HAQ IBRAHIM AFUBWA 1ST APPELLANT

ERNEST JOMO AFUBWA 2ND APPELLANT

AND

MATAYO MUSUNGU SALANO RESPONDENT

*(Being an appeal from the judgment of the Chief Magistrate's Court
at Kakamega (Hon. J. R. Ndururi, Principal Magistrate) delivered
on 16th February 2023 in Kakamega MCELC No. E075 of 2021)*

JUDGMENT

1. The background of this appeal is that the Appellants moved the Subordinate Court at Kakamega on 18th May 2021, through Plaint dated 11th May 2021, wherein they averred that they were the registered proprietors of land parcel number Butso/20833 (the suit property) and that the Respondent had trespassed into the suit property, unlawfully erected structures and cultivated thereon. They therefore sought judgment against the Respondent for eviction and a permanent injunction restraining him, his agents, servants, assigns or anybody claiming through him from trespassing, laying claim, cultivating or in any manner interfering with the suit property. They further prayed for mesne profits and costs of the suit.
2. The Respondent reacted by filing Statement of Defence and Counterclaim dated 22nd June 2021 in which they denied the claim of trespass and averred that the Appellants were holding the suit property in trust for him. He further averred that in 1997, he purchased one acre of land that later became the suit property and that he had used it openly, continuously, and peacefully for 24 years. He therefore prayed that the Appellants' case be dismissed with costs and that judgment be entered against the Appellants



for cancellation of the Appellants' title and that he be registered instead as the proprietor. He further prayed for costs of the counterclaim.

3. Upon hearing the matter, the Subordinate Court (Hon. J. R. Ndururi, Principal Magistrate) delivered judgment on 16th February 2023 and dismissed the Appellants' case. He further held that the Respondent had established adverse possession and was entitled to be registered as proprietor. He declared that the Appellants held title to the suit property in trust for the Respondent and ordered them to execute transfer of the suit property in favour of the Respondent within three months of the delivery of the judgment failure to which the Executive Officer/Court Administrator of the Subordinate Court would be authorised to execute the transfer and any such documents. Each party was ordered to bear own costs of the proceedings.
4. Dissatisfied with the outcome, the Appellants filed this appeal on 13th March 2023, through their Memorandum of Appeal of even date. They prayed that the judgment of the Subordinate Court be set aside, that the Respondent's counterclaim be dismissed and that their claim be allowed. They further sought costs of both the appeal and of the proceedings before the Subordinate Court.
5. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:
 1. That the learned trial Magistrate erred both in law and in fact in finding that the appellants' right to bring the claim became extinguished a long time ago and was therefore time-barred when overwhelming evidence was tendered to the contrary.
 2. That the learned trial Magistrate erred both in law and fact in finding that the respondent had proved that he was in adverse possession of the suit property and was entitled to become the registered owner thereof when the required standard of proof had not been met.
 3. That the learned trial Magistrate erred both in law and in fact in making a declaration that the appellants hold the title to the suit properly in trust for the respondent when the respondent did not prove all the ingredients/elements for a claim of ownership by adverse possession.
 4. That the learned trial Magistrate erred both in law and fact in finding in favour of the respondent on the strength of an invalid agreement of sale.
 5. That the learned trial Magistrate erred both in law and fact in giving credence to a document that was not produced into evidence.
 6. That the learned trial Magistrate erred both in law and fact in shifting the burden of proof of the counter claim to the appellants.
 7. That the learned trial Magistrate failed to analyze the appellants' pleadings and submissions.
 8. That the decision of the learned trial Magistrate has led to a miscarriage of justice.
6. The Appeal was canvassed through written submissions. Appellants filed submissions dated 22nd December 2023 wherein they collapsed the grounds of appeal into three issues for determination: firstly, whether all ingredients of adverse possession were proved to the required standard; secondly, whether sale agreement dated 24th June 1997 and whether extrinsic evidence used to discern the intentions of the parties, vary and add terms to it; and lastly, whether Assistant Chief's letter dated 24th May 2021 formed part of the evidence on record.
7. On the first issue, it was argued on behalf of the Appellants that it is not enough to prove only some of the ingredients of adverse possession and that all must be proved. That since the Respondent's claim was based on a sale agreement, he needed to prove the point at which permission to occupy the suit



property ceased yet he failed in that regard when the alleged final payment was denied by the alleged author of the agreement. They also argued that having failed to demonstrate how and when his licence was determined, the Respondent's claim for adverse possession ought not have been allowed. The Appellants relied on the cases of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, *Samuel Kihamba v Mary Mbaisi* [2015] eKLR and *Samuel Miki Waweru v Jane Njeri Richu* [2004] eKLR in support of those arguments.

8. On the second issue for determination, the Appellants argued that a written agreement must be construed exclusively within its provisions and that the trial Court erred in relying on oral evidence to explain and add terms to the agreement dated 24th June 1997. They relied on the case of *Speaker of the County Assembly - Kisii County & 2 others v James Omariba Nyaoga* [2015] eKLR and argued that such details as to the subject of agreement being Butsotso/Shikoti/12, the seller having a share of it and the registered owner being tasked with transfer of the purchased portion were not terms of the agreement. That pursuant to Section 3 (3) of the *Law of Contract Act*, only terms of a written agreement can be the basis of a suit for disposition of interest in land.
9. It was further argued on behalf of the Appellants that Assistant Chief's letter dated 24th May 2021 was only marked for identification but not produced and did not therefore form part of the evidence on record, yet the learned Magistrate relied on it. The Appellants cited the case of *Kenneth Nyaga Mwigwe v Austin Kiguta & 2 others* [2015] eKLR in support of that argument and urged the Court to allow the appeal with costs.
10. In response, the Respondent filed submissions dated 8th March 2024 wherein it was argued on his behalf that since the Appellants acquired ownership of the suit property by way of partition of Butsotso/Shikoti/12 following succession proceedings in respect of their late father's estate, they assumed the ownership together with the overriding interest of trust in his favour pursuant to Section 62 of the *Law of Succession Act* and Section 28 of the *Land Registration Act*. Relying on Sections 4 and 7 of the *Limitation of Actions Act*, the Respondent contended that his uninterrupted use of the suit property since 1997 was undisputed and that the Appellants lost their right to recover the suit property in the year 2010. Further, that he had occupied the suit property openly, without force, secrecy or licence from the Appellants. The Respondent concluded by relying on the authorities that he used before the Subordinate Court and urged the Court to dismiss the appeal with costs.
11. This is a first appeal. Consequently, the remit of this Court is to re- evaluate the evidence in the trial court both on points of law and facts and to come up with its own findings and conclusions. As the Court of Appeal held in *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR:

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess, and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

12. I have carefully considered the entire record, the grounds of the appeal and the parties' submissions. There is no dispute that the Appellants are the registered proprietors of the suit property. According to the copy of certificate of official search which was produced in evidence, they were registered as joint absolute proprietors on 19th January 2021, following subdivision of Butsotso/Shikoti/12. As registered proprietors of land, the Appellants are entitled to the rights, privileges, and benefits spelt out by the law, ranging from Article 40 of *the Constitution* to Section 24 of the *Land Registration Act*. Further, Section 26 of the Act obligates the Court to accept their certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) were established. Save for



the Respondent's claim of trust, there is no other challenge to the Appellant's title. Thus, unless the Respondent is able to establish his claim, there should be absolutely no reason to keep the Appellants from enjoying the full benefits of their proprietorship.

13. The issues that arise for determination are whether the Respondent pleaded adverse possession, whether adverse possession was established and whether the reliefs sought by the parties were available.
14. The law on adverse possession is well settled and is founded on Sections 7, 13, 17 and 38 of *Limitation of Actions Act*. The Court of Appeal discussed the law relating to adverse possession in the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR where it stated that a party claiming adverse possession must assert hostile title in denial of the title of the registered proprietor. The process must start with a wrongful dispossession of the rightful owner and the proper way of assessing proof of adverse possession is whether the title holder has been dispossessed or has discontinued his possession for the statutory period of 12 years, as opposed to whether the claimant has proved that he or she has been in possession for 12 years. The party who claims adverse possession must demonstrate the date he came into possession, the nature of his possession, whether the fact of his possession was known to the registered proprietor and that the possession was open and undisturbed for the requisite 12 years.
15. Much earlier, in *Wines & Spirits Kenya Limited & another v George Mwachiru Mwangi* [2018] eKLR, Court of Appeal discussed the circumstances under which the cause of action accrues as follows:

So when does the cause of action accrue? Section 13 provides that:

- “(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 in this Act referred to as adverse possession.....” (Emphasis added)

Further, under Section 17, if the registered proprietor fails to recover the land within 12 years of uninterrupted adverse occupation, the proprietor's title to the land stands extinguished. The legal implication of the doctrine was well summarized by this Court in the case of *Benjamin Kamau Murima & Others vs. Gladys Njeri*, C A No. 213 of 1996 where it was held that:

“The combined effect of the relevant provisions of sections 7, 13 and 17 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”

Once an adverse possessor is eligible for title under the doctrine, he must move court Section 38 of the Act; which provides 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, 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.”
- (13) Having the above pre-requisites in mind, it therefore follows that the onus is on the person or persons claiming adverse possession to prove that they have used this land which they claim as of right. This is the Latin maxim of *nec vi, nec clam, nec precario*



(which means that the occupation of the land must have no force, no secrecy, no evasion). Accordingly, the respondent herein was beholden to not only show his uninterrupted possession, but also that the 1st appellant had knowledge (or the means of knowing) actual or constructive of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; (See *Wanyoike Gathure v/s Berverly* (1965) EA 514, 519, per Miles J.)

(14) Consequently and as rightly submitted by the appellants' counsel, the burden of proof in adverse possession lies primarily with the adverse possessor who wishes to rely on the doctrine.

16. The Respondent went about pleading his claim in a roundabout manner. A perusal of the Defence and Counterclaim does not reveal any express plea of adverse possession. Instead, what is evident is a claim that the Appellants held the suit property in trust for them. They sought cancellation of the Appellant's title on account of the trust.
17. As has been stated above, a claim for adverse possession is grounded on the law of limitation of action, specifically Sections 7, 13, 17 and 38 of *Limitation of Actions Act*. Such a claim relies primarily on Section 7 of the Act which states 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." To the extent that the Respondent's claim was introduced through his defence, Order 2 Rule 4 of the Civil Procedure Rules, 2010 became relevant. The rule requires that a party who desires to avail himself of a defence under a statute of limitation must specifically plead the defence. The Respondent did not specifically plead limitation and by extension adverse possession.
18. Nevertheless, I am aware that case law on adverse possession has widened its doorways with the result that there is less focus on form. See *Gulam Miriam Noordin v Julius Charo Karisa* [2015] eKLR. Further, in *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] KECA 248 (KLR), the Court of Appeal stated thus:

The last matter for us relates to the final orders. We alluded at the beginning of this judgment to a statement in the trial court's judgment to the effect that the respondent was not entitled to an order directing that he be registered as the proprietor of the suit premises for the reason that the claim was not brought by suit pursuant to section 38 (1) of the Act. We reiterate that section 38 provides that whenever an adverse possessor claims to have become entitled to land he "may apply to the High Court for an order that he be registered as the proprietor...."

In the case of *Gulam Mariam* (supra) in which a similar question arose, this Court resolved it thus;

"When the respondent elected to raise the defence of adverse possession without a counter-claim, he denied himself the opportunity to apply to be registered the proprietor of the suit property. The power of the court to do substantive justice is today wider than before. We see no harm to make appropriate orders flowing from a finding that the respondent's occupation of the suit property was adverse to that of the appellant; and that the latter's was so extinguished."

For all the reasons given above the appeal fails and is dismissed. Like in the above authority, we make the order that the appellant shall transfer to the respondent the property at the



latter's expense within 30 days from the date hereof, failing which the Registrar of the High Court at Malindi shall execute, on behalf of the appellant the necessary transfer documents.

19. Despite the failure expressly plead adverse possession and the non-compliance with Order 2 Rule 4 of the Civil Procedure Rules, 2010, I will consider the Respondent's claim, in the interest of justice. I also bear in mind that the Appellants addressed the issue of adverse possession in their submissions before the Subordinate Court. There is thus no question of ambush or surprise to any of the parties.
20. The Respondent's case is that he purchased the portion of land that later became the suit property through a sale agreement dated 24th June 1997 and that he took possession the same year. By its very nature, adverse possession presupposes a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It follows that for a claim of adverse possession to succeed, the claimant must demonstrate that her occupation was without the proprietor's permission. Entry and possession pursuant to a sale agreement is by the proprietor's permission and time for purposes of adverse possession does not run in favour of such a purchaser for as long as his presence on the land is by permission of the proprietor. Nevertheless, once a purchaser completes paying the purchase price, his possession and occupation of the purchased property is no longer by permission of the seller. In such a scenario, time for purposes of adverse possession starts to run in favour of the purchaser from the moment of final payment of the purchase price. See *Public Trustee v Wanduru Ndegwa* [1984] eKLR.
21. The Respondent's case was that the purchase price was KShs 70,000. He did not testify on whether the said sum was paid in full. The sale agreement that the Respondent produced was between him and Bonfasio Amboka Afubwa who testified before the Subordinate Court and stated that he did not receive any money from the Respondent. The agreement states that a total of KShs 38,000 had been paid by 24th June 1997, leaving a balance of KShs 32,000. The Respondent did not offer any evidence on how and when the balance of KShs 32,000 was paid, if at all. He merely produced a copy the agreement and remained mum as to payment of the purchase price. A perusal of the agreement and other documents produced by the Respondent does not offer any clear chronology of payments. The agreement and related documents are copies which are not entirely legible.
22. The Respondent's own witness, DW2, who was the Assistant Chief and a witness to the agreement dated 24th June 1997, stated that he only witnessed payment of the first instalment of the purchase price and was not aware of payment of the balance. The learned Magistrate did not address the issue of full payment of the purchase price which would be the entry point at which time for purposes of adverse possession would start to run in favour of the Respondent. Possession alone, however prolonged, is not enough to establish adverse possession.
23. While the Appellants have not denied the Respondent's possession and have even denied the existence and validity of the sale agreement, it must be remembered that it is the Respondent who is claiming adverse possession. He opted to peg his entry into the suit property through a sale transaction. That is the case he advanced and by which his fate succeeds or fails. Having failed to demonstrate that his possession is no longer by permission of the proprietors, his adverse possession claim was not proven. The learned Magistrate erred in finding that the Respondent had established adverse possession. It follows therefore that the Respondent was not entitled to the reliefs that he had sought.
24. On the other hand, the Appellants are the undisputed proprietors of the suit property since 19th January 2021. Equally, the Respondent confirmed that he has been in occupation and use of the suit property before 19th January 2021 and remains therein. His presence thereon amounts to trespass. The Appellants are therefore entitled to vacant possession as they sought.



25. The Appellants also prayed for mesne profits. Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves. Mesne Profits must be pleaded and proved. See *Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees* [2020] eKLR. The Appellants did not specifically plead the mesne profits that they sought and neither tendered evidence on it nor made submissions to form a basis for both liability for mesne profits and quantum thereof. In the circumstances, the prayer for mesne profits must fail.
26. In view of the foregoing discourse, I find merit in this appeal, and I therefore allow it. I set aside the judgment of the Subordinate Court and replace it with an order dismissing the Respondent's Counterclaim. I enter judgment in favour of the Appellants for an order that the Respondent to vacate the parcel of land known as Butsotso/Shikoti/20833 within 120 (One Hundred Twenty) days from the date of delivery of this judgment. In default, the Appellants shall be at liberty to evict him. I further grant a permanent injunction restraining the Respondent, his agents, servants, assigns or anybody claiming through him from trespassing, laying claim, cultivating or in any manner interfering with the parcel of land known as Butsotso/Shikoti/20833. Considering the circumstances of the dispute, I order that each party shall bear own costs of this appeal and of the proceedings in the Subordinate Court.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 27TH DAY OF MARCH 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Mr Ligare holding brief for Mr Nandwa for the Appellants

No appearance for the Respondent

Court Assistant: B Kerubo

