



REPUBLIC OF KENYA



**Akolo v Akolo (Environment and Land Appeal E025 of 2023)
[2025] KEELC 2921 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 2921 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E025 OF 2023
DO OHUNGO, J
MARCH 27, 2025**

BETWEEN

TOM JOSHUA AKOLO APPELLANT

AND

AINEAH OBARE AKOLO RESPONDENT

*(Being an appeal from the judgment of the Principal Magistrate's
Court at Butere (Hon. G. Ollimo, Senior Resident Magistrate)
delivered on 5th October 2023 in Butere MCELC No. E041 of 2022)*

JUDGMENT

1. The parties to this appeal are step brothers. They share a mother but have different fathers. The background of this appeal is that the Respondent moved the Subordinate Court at Butere on 2nd November 2022, through Plaint dated 1st November 2022, wherein he averred that he was the registered proprietor of the parcel of land known as Marama/Lunza/2098 (suit property) and that sometime in 1989, he invited his mother to settle on the suit property and permitted the Appellant to stay there with the mother while on school holiday. That the Appellant trespassed on the suit property, constructed a permanent house on it and laid claim to it.
2. The Respondent therefore prayed for judgment against the Appellant for a permanent injunction to restrain him, his relatives, servants, agents or any other person claiming through him from trespassing onto, alienating, laying claim to, utilizing, developing or in any other manner dealing with the suit property or interfering with his peaceful and exclusive ownership, possession, occupation and use thereof. He further sought eviction of the Appellant from the suit property and costs of the suit.
3. The Appellant reacted by filing Statement of Defence and Counterclaim dated 16th November 2022. He admitted the Respondent's proprietorship and stated that he had constructed a permanent house on the suit property. He averred that the Respondent had acquiesced in his developing the suit property



and that it was too late in the day for the Respondent to have a change of heart. He averred in the counterclaim that he had occupied the suit property peacefully, notoriously and exclusively for more than 30 years and that the Respondent's title had been extinguished through adverse possession. The Appellant therefore prayed for dismissal of the Respondent's case and for declarations that the Respondent's title had been extinguished through adverse possession and that the Respondent held the suit property in trust for him. He further prayed for cancellation of the Respondent's title and issuance of a title to him and for costs of both the suit and the counterclaim.

4. Upon hearing the matter, the Subordinate Court (Hon. G. Ollimo, Senior Resident Magistrate) delivered judgment on 5th October 2023 wherein she dismissed the Appellant's counterclaim and allowed the Respondent's claim with costs.
5. Dissatisfied with the outcome, the Appellant filed this appeal on 19th October 2023, through Memorandum of Appeal dated 16th October 2023. He prayed that the judgment of the Subordinate Court be set aside, that his counterclaim be allowed and that he be awarded costs of both the appeal and of the proceedings in the Subordinate Court.
6. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:
 1. That the learned trial magistrate grossly erred in evaluation of evidence before her.
 2. That the learned trial magistrate grossly erred in not holding that the appellant had an overriding interest in the suit property.
 3. That the learned trial magistrate grossly erred by failing to appreciate the doctrine of estoppel as it related to the suit property.
 4. That the learned trial magistrate grossly erred in not holding that the appellant has acquired the suit property through adverse possession.
 5. That the learned trial magistrate grossly erred in failing to find that the appellant had met the legal threshold of proving his counter-claim on a balance of probabilities.
 6. That the learned trial magistrate exhibited actual bias against the appellant.
 7. That the learned trial magistrate ignored the issues as framed by the appellant.
 8. That the learned trial magistrate's final orders were harsh, oppressive and manifestly un-just.
 9. That the learned trial magistrate did not exercise her discretion judiciously by awarding costs to the respondent.
7. The Appeal was canvassed through written submissions. The Appellant filed submissions dated 27th May 2024 wherein he argued that he had been in actual and physical possession of the suit property with his mother. He acknowledged that his occupation of the suit property when he was a minor was with the permission of the Respondent but added that when he constructed a permanent house in the year 2007, he no longer had the Respondent's permission. That since the Respondent was aware of his occupation and development of the suit property, the Respondent was estopped from evicting him in view of the doctrine of adverse possession. He also argued that the Respondent's right to recover the suit property expired in the year 2007 since by then he had been in possession for 12 years running from 1990. Relying on the case of *James Maina Kinya v Gerald Kwendaka* [2018] eKLR, he contended that there was no ambiguity on timelines and that he had established adverse possession.
8. The Appellant went on to argue that although he raised the issue of equitable estoppel, the Learned Magistrate did not address it. Relying on Section 80 of the *Evidence Act* and the cases of *Pickard v*



- Sears 112 E.R. 179 and Carol Construction Engineers Limited & another v National Bank of Kenya [2020] eKLR, he argued that the Respondent having testified that he permitted him to stay on the suit property and to construct thereon, the Respondent led him to believe that the suit property had been bequeathed to him. The Appellant concluded by urging this Court to allow his counterclaim and in the alternative uphold his arguments on equitable estoppel and on that basis order maintenance of status quo. Regarding costs, he urged that each party bear own costs in view of the close family relationship.
9. On the other hand, the Respondent filed submissions dated 27th March 2024. He argued that the Appellant failed to prove adverse possession, and that the Appellant's occupation of the suit property was by his express permission. Relying on the cases of *In re Estate of The Late Gedion Manthi Nzioka (Deceased)* [2015] eKLR and *Micheni Aphaxard Nyaga & 2 others v Robert Njue & 2 others* [2021] eKLR, he contended that the Appellant's argument that the suit property was bequeathed to him does not apply since a valid bequest could only be by way of a registered transfer, yet the Appellant did not produce such a document. He argued that the Appellant did not establish trust and urged the Court to dismiss the appeal with costs.
 10. This is a first appeal. The remit of a first appellate 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. See *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
 11. I have carefully considered the entire record, the grounds of the appeal and the parties' submissions. There is no dispute that the Respondent is the registered proprietor of the suit property. According to the copy of the register which was produced in evidence, the Respondent was registered as absolute proprietor on 19th April 1990.
 12. In his capacity as a registered proprietor of land, the Respondent is entitled to the rights, privileges, and benefits spelt out by the law at Article 40 of *the Constitution* and statutorily at Section 24 of the *Land Registration Act*. Section 26 of the *Land Registration Act* obligates the Court to accept his certificate of title as conclusive evidence of proprietorship. Save for the Appellant's claim of adverse possession and trust, there is no other challenge to the Respondent's title. Thus, unless the Appellant is able to establish his claim, there should be absolutely no reason to keep the Respondent from enjoying the full benefits of his proprietorship.
 13. The issues that arise for determination are whether adverse possession was established, whether trust was established and whether the reliefs sought by the parties were available.
 14. The law on adverse possession is well settled. It 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. There is no dispute that the Appellant entered the suit property with the Respondent's express permission. It must be remembered that adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. For a claim of adverse possession to succeed, the claimant must demonstrate that his occupation was without the proprietor's permission. Time for



purposes of adverse possession cannot run in favour of a person whose occupation is permitted by the proprietor as long as his presence on the land remains by such permission.

16. The Appellant did not demonstrate that his presence on the suit property was without the Appellant's permission for a continuous period of 12 years prior to the filing of the suit. Instead, he made it clear at paragraph 4 of his Statement of Defence that he was on the suit property to take care of the parties' ailing mother. His grouse with the Respondent seems to be that the Respondent watched him construct on the suit property but now wants him out.
17. The Appellant's presence on the suit property is directly connected to his being the Respondent's step-brother by virtue sharing a mother with the Respondent. They are close family members.
18. The Court of Appeal had occasion to consider whether adverse possession could apply within families against close relatives in the case of *Samuel Kihamba v Mary Mbaisi* [2015] eKLR. The Court stated:

The suit filed by the respondent against the appellant was founded on adverse possession where the respondent claimed to have acquired adverse rights over the suit land having occupied the same for over twelve years. Could the doctrine of adverse possession apply against the parties to the suit before the learned Judge who were related by being mother and step-son? We think not. We are persuaded by various dicta which we have quoted and relied upon in this judgement and must state that it would create havoc for families and the society of Kenya generally if the principle of adverse possession applied within families against close relatives.

19. The Appellant also contended that the suit property was bequeathed to him and that the Respondent holds it in trust for him. This claim of bequest flies directly in the face of the claim for adverse possession. It is also an affront to Article 40 of *the Constitution* and Sections 24 to 26 of the *Land Registration Act*. The Appellant did not produce any evidence that the suit property was ever transferred to him. On the contrary, the Respondent who is still very much alive dispute the Appellant's claims of a gift inter vivos.
20. In view of the foregoing, the Learned Magistrate did not err when she held that adverse possession was not established.
21. I will now consider the question of whether trust was established. As defined in Black's Law Dictionary, 9th Edition, a trust is a right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title.
22. A party who alleges existence of trust must prove it. See *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR. In *Dorcas Indombi Wasike v Benson Wamalwa Khisa & another* [2010] eKLR the Court of Appeal stated:

The appellant's counsel, Mr Amolo, cited several authorities and a careful reading of all those authorities reveal one thing. Whether or not a trust exists is a matter of evidence. Those authorities, and in particular *Mbothu & 8 Others vs Waitimu & 11 Others* [1986] KLR 171, are clear that: -

“The law never implies, the Court never presumes a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”



23. From the evidence on record, the Respondent permitted the Appellant to be on the suit property. In the course of the stay, the Appellant constructed thereon. There is however no evidence that beyond the permission to be on the suit property, any proprietorship interest was conferred on the Appellant. It seems to me that the construction was purely for the Appellant's convenience and cannot be the basis of a claim on the suit property. Trust cannot be simply implied or even presumed. I find that trust was not established.
24. The Appellant has also sought to rely on the doctrine of equitable estoppel. To begin with, the law is that estoppel cannot be raised against the provisions of a statute. See *Involate Wacike Siboe v Kenya Railways Corporation & Attorney General* [2017] KECA 655 (KLR). The Respondent's proprietorship rights under Article 40 of *the Constitution* and Sections 24 to 26 of the *Land Registration Act* cannot be defeated on the basis of equitable estoppel. As the Court of Appeal for Eastern Africa stated in *Nurdin Bandali v. Lombank Tanganyika Ltd* [1963] EA 304, before equitable estoppel can arise, one party must have made to another party a clear and unequivocal representation with the intention that it should be acted upon and the other party, in belief of the truth of the representation, acted upon it. The Appellant did not demonstrate any clear and unequivocal representation by the Respondent that he would permanently remain on and develop the suit property. The doctrine of equitable estoppel is not applicable in the circumstances.
25. In view of the foregoing discourse, this appeal is bereft of merit, and I therefore dismiss it with costs to the Respondent.

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 Mondia for the Appellant

Mr Nechesa Maina for the Respondent

Court Assistant: B Kerubo

