



**Ajuoga & another v Amolo (Environment and Land Appeal E012 of 2023)  
[2024] KEELC 13673 (KLR) (10 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13673 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E012 OF 2023  
GMA ONGONDO, J  
DECEMBER 10, 2024**

**BETWEEN**

**JOHN NALLO AJUOGA ..... 1<sup>ST</sup> APPELLANT**

**JOSEPH ADERA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**OLUOCH AMOLO ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. J. S. Wesonga  
Principal Magistrate, delivered on 11th September 2023 in Homa Bay  
Chief Magistrate's Court Environment and Land Case No. E044 of 2022)*

**JUDGMENT**

1. This appeal arises from the trial court's judgment delivered on the 11<sup>th</sup> September 2023 by the Honourable J. S. Wesonga, Principal Magistrate, in Homabay Chief Magistrate's Court Environment and Land Case No. E044 of 2022 where she issued the orders infra:
  - a. That a permanent injunction is hereby issued restraining the defendants, either by themselves, their servants and/or agents from occupying, constructing any structure, putting to any use and/or in any other way dealing or interfering with Land Reference No. Kanyada/Kanyango/Kalanya/4759 (The suit land herein).
  - b. The defendants are ordered to vacate the suit property failure to, eviction shall be undertaken in accordance with Section 152 B of the Land Act, 2016 (2012).
  - c. General damages for trespass Kshs.200,000/-
  - d. That costs of the suit and interest thereon are awarded to the plaintiff.



2. The appellants who were the defendants in the suit were aggrieved thereby and through the firm of L. K. Obwanda Advocates, instituted this appeal by way of a memorandum of appeal dated 25<sup>th</sup> September 2023. The Appeal is anchored on grounds 1 to 14 as set out on the face thereof and the same include:
  - a. That the Learned Trial Magistrate erred in fact and law by finding that the Respondent had proved his case on a balance of probability and declared the defendants trespassers despite the evidence on record that could not qualify the defendants as trespassers.
  - b. That, the Learned Trial Magistrate erred in fact and law by failing to find that the defendant's entry was with reasonable excuse and that the entry was done before the Respondent became the registered owner with the full consent of the original owner.
  - c. That, the Learned Trial Magistrate erred in fact and law by failing to find that the evidence on record confirmed that the Respondent's acquisition of the title deed was marred with illegalities.
  - d. That, the Learned Trial Magistrate erred in law by failing to find that the Appellant had an overriding interest on the suit property.
  - e. That, the Learned Trial Magistrate erred in law and fact by misinterpreting the provisions of sections 7,13 and 38 of the Limitations of Actions, Chapter 22 Laws of Kenya in arriving at her impugned decision and failing to find that the respondent was statutorily barred from claiming the land.
  - f. That, the Learned Trail Magistrate erred in Law and fact in failing to find and hold that the act of the Respondent of filing an objection against the suit property and inviting a village elder to misrepresent himself as a son of the late original owners and failing to invite the Late Sabina who was a co-registered owner with his son despite the fact that she was still alive resulted in concealment of material fact which amounted to fraud on the part of the Respondent.
  - g. That, the Learned Trial Magistrate erred in fact and Law in that she disregarded the Appellant's defence submissions and Judicial authority with the resultant of justice to the Appellants and awarded the land to the Respondent despite the glaring illegalities on how he acquired the title deed.
3. Wherefore, the appellants pray that:
  - a. The appeal be allowed.
  - b. The judgment of the Learned Trial Magistrate dated 11<sup>th</sup> September 2023 be quashed and/or set aside and the same be substituted with an order allowing the appellants' suit in lieu of the reliefs sought in the Environment and Land Case No. E044 of 2022.
  - c. The costs of this appeal and in the subordinate court be awarded to the appellants.
4. The appeal was heard by way of written submissions pursuant to this court's directions of 21<sup>st</sup> May 2024.
5. The appellants' counsel filed submissions dated 10<sup>th</sup> June 2024 on 25<sup>th</sup> June 2024 and stated that the suit land does not constitute ancestral land. That the appellants have utilized the suit land for a period in excess of 12 years, despite the respondent being the legal proprietor of the same and have thus, acquired title thereto by way of adverse possession. Reliance was placed on the case of *Katana & 29*



- others v Nathoo (Environment & Land Case 208 of 2017) [2022] KEELC 2232 (KLR), to fortify the submissions.
6. The respondent's counsel, H. Obach and Partners Advocates, filed submissions dated 28<sup>th</sup> June 2024 and identified the following issues for determination:
    - i. Whether the title held by the respondent is protected by the doctrine of sanctity of title.
    - ii. Whether the appellants' claim for adverse possession is merited.
    - iii. Whether the appellants trespassed onto the suit land.
    - iv. Whether the respondent's award of general damages for trespass in the sum of Kshs. 200,000 is sustainable.
  7. Learned counsel submitted, inter alia, that the respondent proved that he is the registered owner of the suit land and according to Section 25 of the Land Registration Act, is entitled to quiet and peaceful enjoyment of proprietary rights. That the appellants cannot claim to have acquired the suit land by way of adverse possession, yet they do not recognize the respondent as the owner thereof. That equally, a claim for adverse possession cannot be made simultaneously with a claim for beneficial ownership and fraud.
  8. That further, the appellants did not deny trespassing into the suit land and PW3 admitted that the appellants have been in possession of the same since 2002. Thus, counsel urged the court to find in favour of the respondent. To reinforce the submissions, reliance was placed on various authoritative pronouncements including the case of Chairman Board of Governors Murang'a College of Technology Primary School vs Julius Ngigi Munjuga (2018) eKLR.
  9. Counsel highlighted their submissions on 15<sup>th</sup> October 2024. Ms. Obwanda, Learned Counsel for the appellants, referred the honourable court to their written submissions as well as the Record of Appeal and pointed out that the trial court found that the appellants had been utilizing the suit land since 2002. That in the pleadings and statements filed at the trial court, the issue of ancestral land as regards the suit land did not arise.
  10. Ms. B. Ochieng, Learned Counsel for the respondent, urged this court to find that the title to the suit land which is registered in the name of the respondent is indefeasible since no fraud was proven on the part of the respondent in acquiring the same. That the respondent obtained title to the suit land from one Selina Ouko, who is the appellants' step mother.
  11. In the foregone, the issues for determination are as captured in the grounds of appeal and boil down to:
    - a. Whether the appellants have acquired title to the suit land by way of adverse possession.
    - b. What just orders can be granted in this appeal to meet the ends of justice?
  12. It is noted that the instant appeal being the first one from the trial court in the matter, I am obliged to review the record of the trial court, evaluate it and arrive at independent conclusions in this appeal; see *Mwanasokoni-vs Kenya Bus Services Ltd (1982-88) 1KAR 278* applied in other cases, inter alia, *Titus Ong'ang'a Nyachieo-vs-Martin Okioma Nyauma and 3 others (2017) eKLR*.
  13. It is borne in mind that the plaintiff/respondent generated the suit by way of an amended plaint dated 2<sup>nd</sup> March 2023 against the defendants/appellants and two others, seeking the following orders:
    - a. An order of permanent injunction restraining both the 1<sup>st</sup> and 2<sup>nd</sup> appellants from interfering with the respondent's quiet possession and enjoyment of the suit land.



- b. General Damages for trespass.
  - c. Costs of this suit.
  - d. Interest thereon as from the date of filing the suit until payment in full.
  - e. Any other relief that this court may deem fit and just to grant.
14. The plaintiff/respondent (PW1) contended that the appellants herein, had trespassed upon the suit land in 2018. That the 1<sup>st</sup> appellant had erected a home for his 2<sup>nd</sup> wife thereon, whilst the 2<sup>nd</sup> appellant cultivates a portion thereof.
  15. PW1 relied on his statement on record and the list of documents filed in court on 27<sup>th</sup> September 2022, which were adopted as part of his testimony. During cross-examination, he stated that he served the appellants with a demand notice in 2002.
  16. PW2, Richard Onditi Oluoch, the respondent's son, relied on his statement on record which was adopted as part of his evidence. Under cross-examination, he conceded that the 1<sup>st</sup> appellant has a house on the suit land which belongs to his second wife. That the suit land is a subdivision of Land Parcel No. Kanyada/Kanyango/Kalanya/4759 and was purchased from one Sabina Ojunga (deceased).
  17. PW3, Fredrick Odhiambo Onyango, Chief - Asego East Division, Homa Bay Sub- County, testified that he handled a land dispute between the parties herein. That the dispute between the parties began a long time ago and it is the respondent who lodged a complain with his office, which was heard on 13<sup>th</sup> July 2022. On cross-examination, he stated that the appellants have occupied the suit land since 2002.
  18. The appellants filed an amended statement of defence and counterclaim dated 17<sup>th</sup> November 2022, denying the claim and urged the court to dismiss the suit with costs. In the counterclaim, the appellants sought the orders infra:
    - a. An order of declaration that the defendants/counterclaimants have an overriding interest in the suit land in accordance with Section 28(h) of the [Land Registration Act](#) having acquired title to the same through adverse possession.
    - b. An order of rectification of the register for the suit land by deleting the name of Oluoch Amolo therein and replacing with the name of John Nalo Ajuoga and Joseph Adera as the registered proprietors thereof.
    - c. Costs of the suit and interests thereon at court rates.
  19. DW1, John Nallo Ajuoga, the 1<sup>st</sup> appellant herein, relied on his statement dated 3<sup>rd</sup> November 2022 and list of documents of even date to wit, copies of National Identity Cards, Chief's letter dated 3<sup>rd</sup> November 2022, death certificates, Summons by Senior Chief and pictures of the suit land (DExhibits 1 to 5) as well as list of documents dated 17<sup>th</sup> February 2023, to wit, List of adjudication records for Land Parcel No. Kanyada/K/Kalanya/1534 and the suit land as well as objection proceedings No. 522 of 1991 (PExhibits 6 and 7). During cross-examination, he conceded that the respondent is the first registered proprietor of the suit land, such registration having occurred following objection proceedings during land adjudication process. That the respondent lodged a complaint against the appellants with the area Chief, who directed the 1<sup>st</sup> appellant to vacate the suit land.
  20. DW2, Joseph Okiya Odera, relied on his statement on record, which was adopted as part of his evidence. On cross-examination, he admitted that there have been disputes over the suit land since 2002 but later stated that he meant 2022. That he was still a minor when the respondent allegedly purchased the suit land from one Sabina (deceased)- the appellants' step mother.



21. It is noteworthy that the learned trial magistrate set out the parties' respective cases, framed four issues for determination, analysed them and arrived at her decision based on reasons. So, the impugned judgment was in consonant with Order 21 Rule 4 of the Civil Procedure Rules, 2010.
22. In her judgment, the learned trial magistrate observed, inter alia;

“...For this reason, the court finds that on a balance of probabilities, that the defendants/ counterclaimants have been using the suit property from 2002. However,... when the defendants/counterclaimants took occupation of the suit land, they did not do so with the intention of dispossessing the plaintiff. Because, they have admitted in their evidence that they were not aware that the land was sold to the plaintiff and that he was the registered proprietor of the suit property until 17/8/2022 when, PW3 held a meeting in an attempt to resolve the dispute between the parties...”
23. The learned trial magistrate further observed that;

“...Court further notes that the defendants/counterclaimants claim to the suit property is founded on the assertion that the suit land is ancestral and that the plaintiff obtained title to the land fraudulently... The defendants/ counterclaimants cannot claim the suit land by adverse possession yet they do not recognize the plaintiff as the true owner of that land. The claim of adverse possession is also extinguished by the fact that the defendants/ counterclaimants additionally claim beneficial interest. A claim of adverse possession cannot be made synonymously with a claim for beneficial ownership and fraud...”
24. I must note that the appellants contend that the trial court erred in law by failing to find that the appellant had an overriding interest on the suit land and that the respondent was statutorily barred from claiming the suit land pursuant to Sections 7 and 38 of the *Limitation of Actions Act*. Interestingly, they also aver that their entry into the suit land was with reasonable excuse and with the full consent of the original owner.
25. It is trite law that in a claim for adverse possession, the claimant must show that such possession was without the permission of the owner; see *Richard Wefwafwa Songoi -vs- Ben Munitywa Songoi* (2020) eKLR. Furthermore, I note that at paragraph 4 of the appellants' amended statement of defence and counterclaim dated 17<sup>th</sup> November 2022, the appellants stated that the suit land was ancestral land and originally belonged to their late grandfather.
26. To that end, I concur with the trial court's finding that mere possession of the suit land for a period in excess of 12 years, is not sufficient proof that the appellants have acquired title to the same by way of adverse possession. Therefore, it is the finding of this court that a claim for adverse possession is untenable in the circumstances.
27. Moreover, the appellants lament that the evidence on record confirmed that the respondent's acquisition of the title deed was marred with illegalities and fraud. From the evidence on record, in particular DExhibit 7 (the objection proceedings), it is observed that the respondent is the first registered proprietor of the suit land, such registration having occurred following objection proceedings number 522 of 1991 which was determined in his favour.



28. As regards fraud, I subscribe to the Court of Appeal decision in *Kinyanjui Kamau vs George Kamau* [2015] eKLR where the court expressed itself as follows;

“...It is trite law that any allegations of fraud must be pleaded and strictly proved...”

29. Clearly, the existence of fraud cannot be inferred from the facts; see *Vijay Morjaria -vs- Nansingh Madhusingh Darbar & Another* [2000] eKLR.

30. In the present case, the appellants neither pleaded the particulars of fraud on the part of the respondent nor adduced sufficient evidence as proof of the same as held in *Kamau and Morjaria* cases (both *supra*).

31. In the circumstances, I subscribe to the Court of Appeal decision in *Kirugi and another -vs- Kabiya and 3 others* (1987) KLR 347, where it was held that the burden was always on the plaintiff to prove his case on the balance of probabilities even if the case is heard by way of formal proof.

32. In that regard, I find that the respondent who was the plaintiff at the trial court proved his claim on a balance of probabilities, on one hand.

33. On the other hand, it is the finding of this court that the appellants who were the counterclaimants at the trial court, failed to prove their counterclaim to the requisite standard.

34. In the premises, the trial magistrate's judgment delivered on 11<sup>th</sup> September 2023 is faultless at law. I hereby endorse the same.

35. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated 25<sup>th</sup> September 2023, is devoid of merit. The same is hereby dismissed with costs to the respondent.

36. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 10<sup>TH</sup> DAY OF DECEMBER 2024.**

**G.M.A ONG'ONDO**

**JUDGE**

**Present**

1. Ms. Kimberly holding brief for L. K. Obwanda, Learned Counsel for the appellant
2. Ms. B. Ochieng, Learned Counsel for the respondent
3. Adongo, Court Assistant

