



REPUBLIC OF KENYA



**Mbura & another v Muye (Environment and Land Appeal  
26 of 2022) [2023] KEELC 238 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 238 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND APPEAL 26 OF 2022  
EK MAKORI, J  
JANUARY 25, 2023**

**BETWEEN**

**HARRIET LOZI MBURA ..... 1<sup>ST</sup> APPELLANT**

**LEWA MBURA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**TEKLA MUYE ..... RESPONDENT**

*(Appeal against the Judgment of Hon. J.M. Kituku, SPM,  
delivered on 13th July 2022, in Kilifi ELC No. 40 of 2021)*

**JUDGMENT**

1. The Appellants in this matter seek to upset the Judgement and findings of the Lower Court at Kilifi in Kilifi ELC No. 40 of 2021.
2. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hear the witnesses firsthand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* [1968] EA 123.
3. In the trial court, the parties relied on the statements and documents filed. 1<sup>st</sup> Appellant relied on her witness statement dated April 27, 2021 and produced documents marked and produced as Plaintiff exhibit 1-4. She stated that her late father had left for the Nyali area where he was employed as a gardener at a Coffee Marketing Board he left behind one caretaker called Ngonyo Bea to take care of his land with a condition that he was to plant short-term crops on the land in question. He was not to build a permanent structure or house on the land. At the time of his retirement, he came and found one Peter Muye on the ground who said he had been leased the land for a term of 2 years by the caretaker. He



- extended the lease term for 7 years. After the end of 7 years, the said Peter Muye was to vacate the land in question. According to the 1<sup>st</sup> Appellant, her father left a note behind to that effect.
4. The father battled illness and later died. The Defendants embarked on a mission of wasting their father's property without let or hindrance. On being questioned – they were threats to kill directed at them.
  5. The 1<sup>st</sup> Appellant narrated several violent ordeals over the suit property with the family of the Respondent leading to criminal cases in the Shanzu Magistrates Court.
  6. According to the 1<sup>st</sup> Appellant attempts were made to have the matter resolved by their area administration which turned biased and uncooperative to them necessitating the institution of the suit subject of this appeal.
  7. The Appellants sought damages from the Respondent for trespass and injunctive orders against the Respondent and his agents to be restrained from further building on the suit property.
  8. The Respondent relied on her witness statement filed in court on October 28, 2022. She called two witnesses – Karisa Baya (DW2) and Aleck Nyinge (DW3).
  9. She stated that in the year 1991, her late husband Peter Muye entered into a sale of land agreement with one Ngonyo Bae concerning the suit property. Upon purchase of the land, they planted a variety of trees crops, and fruits - coconut, oranges, mangoes, and bananas. She has been in occupation of the land until when she got the suit papers concerning the present suit.
  10. Aleck Nyinge testified that he is a retired Chief and did write an agreement between Mr. and Mrs. Ngonyo Bea and Peter Muye.
  11. On the other hand, Karisa Baya stated that he was the Respondent's employee since 2002. In 2008 some people went to the land and cut down trees claiming ownership of the land. The issue was reported to the area Chief who confirmed the land belonged to the Respondent.
  12. Having heard the parties on merit. The trial Magistrate rendered his final decision on the matter. He found that the land in contestation was unregistered and none of the parties had title to it. The Appellants' claim over it was ostensibly by transmission from their late father – now deceased. He also found that the Appellants' claim rested on the doctrine of adverse possession he concluded that a claim under inheritance and adverse possession propagated at the same time. He further found that the pleadings by the Appellants and the evidence adduced were not in tandem at all. On the latter issue of mixed-up proceedings and evidence, this could have been because the Appellants were acting in person.
  13. On the inconsistency of the evidence and the pleadings, the trial Magistrate found that the doctrine of adverse possession was not pleaded at all. The Appellants instead had relied on the inheritance of the suit property from their late father. He held that a party is usually bound by his pleadings. He cited the cases of *Bwana Mohamed Bwana v Silvano Buko Bonaya* [2013] eKLR and *Mubamud Mubumed Sirat v Ali Hassan Abdirahman & 2 Others* [2010] eKLR. The decisions reiterated the position that a party is bound by his pleadings.
  14. The trial court found that the Appellants had no capacity to bring up this suit. They claimed that the land belonged to their late father. They had not taken out letters of administration as provided by law to sustain the suit. The case of *Julan Adoyo Ongunya v Francis Kiberenge Abayo* as cited in *Hawo Shanke v Mohammed Uta Shanko* [2018] eKLR. The holdings in those cases are such that a party who lacks locus standi even with a valid cause cannot sustain it in a trial if he has no capacity and it becomes



worse if the matter involves the estate of a deceased person – as in this suit. That failure to take up letters of administration was found to have been quite fatal to the Appellants’ case.

15. Quoting sections 7, 13, 16,17, and 38(1)(2) of the [Limitation of Actions Act](#) Cap 22 and section 28(h) of the [Registration of Land Act](#) No. 6 of 2012, the trial court found that the combined effect of the Sections is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years of occupation. To claim adverse possession the plaintiff had to prove that he has been in exclusive possession of the land openly and as a right without interruption for a total of 12 years either after dispossessing the owner or by discontinuation of possession by the owner of his own volition. If the Appellant’s father was the owner of the land as stated by the Appellants, the doctrine of adverse possession was not available as against the alleged trespassers. The court concluded that it could not be shown when the father of the Appellants took possession of the land and how he acquired it.
16. In the end the Appellants’ case was dismissed with costs to the Respondent precipitating the current appeal.
17. Dissatisfied with the trial court’s findings, the Appellants via Memorandum of Appeal dated July 19, 2022 have raised 6 grounds of appeal but when looked at the Appellant has raised issues with how the trial court appreciated the evidence and the documents produced and reached an erroneous decision.
18. In reply, the Respondent via response dated November 15, 2022 contends that the judgment by the trial Court was concrete and that there is no new evidence adduced to warrant overturning the same.
19. I now turn to decide whether the trial court’s findings were soundly based on the evidence and the applicable law. The issues framed by the Magistrate - that is the capacity to sue, adverse possession vis a vis inheritance, and the overall evidence on how to prove ownership on an unregistered parcel of land as adduced by the parties remain relevant.
20. The Appellants’ claim was based on unregistered land, which belonged to their father and which according to the pleadings – they have acquired adversely. The acreage of the land or its description is scanty.
21. On the issue of capacity to sue the Magistrate correctly found that one cannot sue without taking out letters of administration where the property in question belonged to a deceased person – as in this case the land in dispute is said to have belonged to the Appellants deceased father. The case of [Julian Adoyo Ongunya v Francis Kiberenge Abayo](#) as cited in [Hawo Shanke v Mohammed Uta Shanko](#) [2018] eKLR was properly applied with the holding that: -

“In the case of [Julian Adoyo Ongunya v Francis Kiberenge Abano](#) Migori Civil Appeal No.119 of 2015, Justice A. Mrima had this to say on the issue of a party filing a suit without having obtained a limited grant.

“Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”



22. In this case the Appellants did not only fail to take out letters of administration as required by law but also sued a Respondent whom it not established was the personal representative of the late Peter Muya. The Magistrate was right in holding that on the ground of capacity, the suit before him ought to have collapsed.
23. On the claim of adverse possession running contra with inheritance, the Magistrate held that the two could not run hand in hand. As for inheritance - no letters of administration had been taken out. On adverse possession, the trial court correctly applied the relevant provision of the law and found that adverse possession had not been proved.
24. For one to succeed in a claim of adverse possession and as held in the Court of Appeal in *Masambaga & 7 Others v Malindi Holdings and Estate Limited* (Civil Appeal 165 of 2019) KECA 782 - SG Kairu, P Nyamweya & Jw Lessit, JJA: -

“... As explained in *Elements of Land Law*, 5th Edition by Kevin Gray and Susan Francis Gray at page 1179

“Possession is attributed to the squatter (and his possession is adverse) only if he has both factual possession (factum possessionis) and the requisite intention to possess (animus possidendi). These elements of factum and animus interact significantly and must coincide continuously throughout the entirety of the required period of possession.

22. This position was also explained by Makhandia JA in *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR as follows:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisite being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in section 7 of the *Limitation of Actions Act*, which is in these terms:-

“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 or, if it first accrued to some person through whom he claims, to that person.”

25. The trial court correctly found that the Appellants did not prove adverse possession in their claim having also based it on Succession. In any event, from the available findings from the area administration where the parties had gone to ventilate their matter, the land is said to belong to the Government and hence not available to the Appellants.



26. This land was also unregistered. For one to prove ownership of unregistered land as held in the case of *Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & 2 others* [2015] eKLR Onguto J. stated that:

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history. The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly prove ownership. It is such documents which are basically

“the essential indicia of title to unregistered land”: per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.

The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al. The instant case is no exception. It is for the Court to interrogate the evidence, especially documentary evidence and ascertain who between the two antagonists that is to say the Plaintiffs on the one hand and the 1st Defendant on the other hand, is the true owner of the suit plot. For the court to conduct this rather wearisome and intricate task, it is proper that the documents unless otherwise agreed are produced in their original form or format.”

27. The document produced in the lower court were summonses and proceedings before the area Chief and area administration, which revolved around the feud between the parties. The findings in those alternative forums were negative to the appellants’ case.
28. There is thus nothing to consider establishing that the Appellants have any root claim over the subject matter.
29. I see no merit in the present appeal. It’s dismissed with costs to the Respondent.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 25<sup>TH</sup> DAY OF JANUARY 2023.**

**E. K. MAKORI**

**JUDGE**

**In the presence of: -**

Appellants in person

Respondent in person

