



REPUBLIC OF KENYA



**Ouma & 3 others v Okumu (Environment and Land Appeal 25 of 2022)
[2023] KEELC 15665 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15665 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 25 OF 2022**

E ASATI, J

FEBRUARY 23, 2023

BETWEEN

**JOSHUA OUMA 1ST APPELLANT
JAMES OTIENO 2ND APPELLANT
CAREN OMWARE 3RD APPELLANT
SAMSON GUYA 4TH APPELLANT**

AND

HEZEKIAH ONGÚNDI OKUMU RESPONDENT

(Being an appeal from the judgement of the Principal Magistrate's Court at Maseno delivered by Honourable C. L. Yalwala on 22nd May 2020 in the Maseno PMC E & L Case No.23 of 2018)

JUDGMENT

Introduction

1. The appellants, Joshua Ouma, James Otieno, Caren Omware And Samson Guya were the Defendants in Maseno PMC E&L Case No 23 of 2018 (the suit). They had been sued in the suit by the Respondent, Hezekiah Ongúndi Okumu who sought the following relief against them: -
 - a. An eviction order directing the Defendants to vacate the property land parcel No Kisumu/ Karateng/839 and mesne profits.
 - b. Costs of the suit.
 - c. Any other relief the honourable court deems fit.
2. The suit was initially filed in the ELC at Kisumu as Kisumu ELC Case No 6 of 2017 but was vide court order made on 23rd of March 2018 transferred pursuant to the provisions of section 18 of the



Civil Procedure Act to the PM's Court at Maseno where it was registered as Maseno PMC E&L Case No 23 of 2018.

3. The Respondent's claim in the suit, as contained in the Plaint dated January 12, 2017, was that he was the legal administrator of the estate of his deceased father one Phaniel Okumu Ongúndi, deceased, who was the registered proprietor of land parcel known as Kisumu/Karateng/839 measuring approximately 1.5 Ha (the suit land herein) and that the court vide Succession Cause No 652 of 2004 ordered that the suit land be shared among Joab Angugo Okumu, James Olangó and the Respondent who were the dependants of the remainder of the estate of the deceased. That between the year 2009 and 2016 the appellants trespassed onto the suit land and interfered with the Respondent's and other beneficiaries' interest in the suit land He therefore filed the suit seeking court's intervention to remove the appellants from the land.
4. The appellants defended the suit vide their written statement of defence and counterclaim dated February 24, 2017. They denied the Respondent's claim in the suit and contended that they were entitled to a portion measuring 1.0 Ha of the suit land which the deceased held in trust for them and that the deceased 's estate was only entitled to 0.5 Ha of the land. That the Succession Cause was done illegally as the Respondent did not disclose to the Respondents about it or involve them in it. That they have their home on the suit land where they have resided for the past 40 years with the full knowledge of the plaintiff.
5. The appellants lodged a counterclaim for adverse possession for the 1.0 Ha portion of the suit land.
6. The case was heard and concluded before the Principal Magistrate's court at Maseno and judgement delivered on May 22, 2020 in which the trial court entered judgement in favour of the Respondent against the appellants for an order that the appellants vacate the suit land within 90 days from the date of the judgement and hand over possession to the Respondent failing which eviction to issue. The court dismissed the counterclaim and awarded costs of the suit to the Respondent.
7. The appellants were dissatisfied with the judgement and preferred the appeal herein vide the Memorandum of Appeal dated June 17, 2020 seeking for orders that: -
 - a. The appeal be allowed,
 - b. The judgement in favour of the Respondent be set aside,
 - c. By virtue of their counter claim before the Principal Magistrate's court, the Defendants be declared as the lawful owners of the property Kisumu/Karateng/839 and the title deed thereof registered in the plaintiff's name be cancelled and registered in the Defendants' names,
 - d. The appellants be awarded the costs of the appeal and costs of the suit.

Submissions

8. The appeal was urged by way of written submissions. The appellants filed their written submissions dated January 12, 2023 through the firm of Gordon Ogola, Kipkoech & co Advocates acting for them and the Respondent filed written submissions dated January 23, 2023 through the firm of Cecil Kouko & Associates Advocates acting for him.

Issues for Determination

9. The Judgement is challenged on the eight (8) grounds of appeal contained in the Memorandum of Appeal. These are that the learned trial magistrate: -



- i. Erred in law in finding that the Principal Magistrate’s court does not have any jurisdiction to hear and determine claims of adverse possession.
- ii. Misdirected herself and based her findings as to ownership and occupation of land parcel Kisumu/Karateng/839 on wrong considerations.
- iii. Erred in law and fact in finding that the Respondent’s title to Kisumu/Karateng/839 was indefeasible.
- iv. Erred in fact by failing to take into account and to consider the evidence adduced by and on behalf of the appellants more so, evidence relating to aspects of adverse possession and evidence relating to the fraudulent manner in which the plaintiff caused the suit property to be registered in his name.
- v. Failed to appreciate the submissions of the appellants by finding in favour of the Respondent herein.
- vi. Erred in fact and in law by failing to consider that the appellants herein have been in open, uninterrupted and non-permissive possession of the suit property herein for over 40 years and were entitled to be declared the owners of the suit property by virtue of adverse possession.
- vii. Erred in fact and in law by proceeding to set for hearing and determination the Plaintiff’s suit despite the same being time barred, and
- viii. In all the circumstances of the case, the findings of the trial magistrate are unsupportable in law or on the basis of the evidence adduced.

From the record of appeal filed and the ground of appeal, I identify 3 main issues for determination in this appeal namely: -

- a. whether the trial court had jurisdiction to entertain a claim of adverse possession,
- b. whether the court erred in allowing the Respondent’s claim and
- c. whether the trial court erred in dismissing the appellant’s counter-claim.
- d. What orders to make on costs.

Determination

10. This being a first appeal, this court is under a duty to re-examine and reconsider the evidence adduced before the trial court and make its independent findings. I will do this by discussing the identified issues in the light of the evidence placed before the trial court and the applicable law.
11. On whether or not the trial court had jurisdiction to hear and determine a claim of adverse possession-

The trial court after hearing the evidence and submissions on the counterclaim for adverse possession, held that the court had no jurisdiction to entertain a claim of adverse possession which ought to be filed in the High Court.

The appellants submitted that this holding was erroneous. They relied on the case of *Mtana Lewa vs Kabindi Ngala Mwangandi* [2015] where it was held that: -

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The



process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license 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....”

They also relied on section 38 of the [Limitation of Actions Act](#), section 13 of the [Environment and Land Court Act](#) and section 26 (3) and (4) of the [Environment and Land Court Act 2011](#). Counsel for the Appellants submitted that the Chief Justice has by various gazette notices made appointments pursuant to section 26 (3) and (4) of the [Environment and Land Court Act 2011](#) of several Magistrates who are now duly gazetted and granted jurisdiction and powers to handle cases involving occupation and title to land.

12. Counsel submitted that the [Magistrate Court's Act, 2015](#) was enacted so as to among other things give effect to article 23 (2) and 169 (1) (a) and (2) of the [Constitution](#) to confer jurisdiction, functions and powers upon the magistrate courts. That hence Magistrates who are duly gazetted and have the requisite pecuniary jurisdiction, have jurisdiction and power to handle cases involving occupation of and title to land. That claims of adverse possession involve title to land since the claimant ultimately seeks an order that he be registered as the proprietor of the land.
13. Counsel further submitted that the interpretation of section 38 of the [Limitation of Actions Act](#) which predated the [Constitution of Kenya 2010](#) must be guided by section 7 of the Sixth Schedule of the [Constitution of Kenya](#) on the transitional and consequential provisions. Counsel relied on case of [Patrick Ndegwa Munyua vs Benjamin Kiiru Mwangi & another](#) [2020]eKLR and concluded that the Principal Magistrate's court has jurisdiction to handle claims of adverse possession.
14. Counsel for the Respondent submitted that a Magistrate's Court cannot make an order of adverse possession. That under sections 37 and 38 of the [Limitation of Actions Act](#) for a claimant to be registered as proprietor of land by adverse possession the order can only be made by the High Court. That taking into account the provisions of section 7 of the Sixth schedule of the [Constitution](#), the corresponding institution to the High Court is the Environment and Land Court established pursuant to the provisions of article 162 (2) (b) of the [Constitution of Kenya 2010](#).
15. Counsel submitted that claims of adverse possession are neither covered by the provisions of the [Environment and Land Act](#), the [Land Registration Act](#) nor the [Magistrates Courts Act 2015](#). That because a cause of action on adverse possession is premised on sections 7, 9, 17, 37 and 38 of the [Limitation of Actions Act](#) Cap 22 of the Laws of Kenya, the operative Act for purposes of determining jurisdiction is the [Limitation of Actions Act](#) and not otherwise and is specific to the High court having jurisdiction. Counsel relied on the cases of [Jesse Njoroge Gitau vs Kibuthu Macharia & another](#) [2019] eKLR and [Michael Chebii Toroitich vs Peter Mogin Yatich Chebii](#) [2013]eKLR to support the submissions. Counsel submitted that the trial court was right in dismissing the claim for adverse possession.
16. I have considered the rival submissions on the issue of jurisdiction. I have noted that neither the Respondent in his reply to defence and defence to counterclaim filed in court on 31/3/2017 nor the trial court on its own motion raised or inquired on the issue of jurisdiction. The parties submitted themselves to the jurisdiction of the Principal Magistrate in as far as the counterclaim was concerned and the court proceeded to hear the claim to the end. This however is not to say that this failure did confer jurisdiction on the court. Section 38 of the [Limitation of Actions Act](#) provides that a person claiming on adverse possession may apply to the High Court for determination. However, this court has already held that the Magistrate's court has jurisdiction. In the case of [Patrick Ndegwa Munyua vs](#)



Benjamin Kiiru Mwangi & another [2020]eKLR Ohungo J extensively discussed the issue and held that the magistrate's court has jurisdiction to determine claims of adverse possession if the magistrate presiding over the case is duly gazetted to handle land matters and if the value of the subject matter is within the pecuniary jurisdiction of the magistrate. I'm persuaded by the findings and holding. Further the procedure provided by the *Civil Procedure Rules* for initiating a claim of adverse possession is by way of Originating summons, though a claim of adverse possession may also be raised by way of counter claim (see *Gulam Mariam Noordin vs Julis Charo Karisa* (2015). In *Kibutiri vs Kibutiri* [1983] eKLR it was held that the procedure by way of Originating Summons is intended to enable simple matters to be settled by the court without the expense of bringing an action in the usual way. In my view, such matters can be handled by the magistrates' courts. The trial court could only lack jurisdiction if it wasn't gazetted to hear land matters and if the value of the subject matter was beyond the court's pecuniary jurisdiction. This was not the case in the matter before the trial court. My finding therefore is that the trial court erred in finding that claims of adverse possession could only be entertained by the High Court.

17. The second issue is whether the trial court erred in allowing the Respondent's claim.

The Respondent's claim as contained in the Plaintiff was for recovery of land from the appellants who had trespassed onto the same thereby depriving the Respondent and other beneficiaries of the deceased of the suit land. He sought for an order of eviction to remove them from the land. The court allowed the claim. Section 7 of the *Limitation of Actions Act* on which both parties relied on in their submissions prohibits any person from bringing an action to recover land after the expiry of 12 years from the date on which the right of action accrued. Though the Respondent pleaded in paragraph 8 of the Plaintiff that it was between the years 2009 and 2016 that the appellants trespassed onto the suit land, the evidence on record showed that the appellants had been on the land for 40 years. The suit land was registered in the name of the deceased father of the Respondent on April 20, 1977 when the register was opened. The appellants were on the land then. He ought to have acted to assert his rights by removing them. He did not and his right of action became time barred twelve years thereafter.

Under section 28 of the *Land Registration Act* registered land is subject to overriding interests listed thereunder, one of which is rights acquired or in the process of being acquired under adverse possession. Title of the original owner had become extinguished after 12 years of the appellants' adverse possession of the land. The land was therefore subsequently held in trust for the appellant to the extent of 1.0 Ha.

I find that the trial court erred in allowing the Respondent's claim firstly because the claim was time barred and secondly, against the court's own finding that the appellants had a good case of adverse possession.

18. The last issue is whether the trial court erred in dismissing the appellant's claim as contained in the Counter claim.

The appellants' claim was based on adverse possession. They pleaded in paragraphs 2, 4, 5 and 6 of the Counterclaim that they have occupied a portion of the suit land measuring 1.0 Ha for a period of over 40 years. That although the land was registered in the name of the deceased father of the Respondent, the said deceased did not interfere with their occupation. That they lived on the land with their families in actual, open exclusive and adverse and continuous use of the portion of land. That they buried their parents and close family members who died on the suit land and that they have their homes thereon,



have planted bananas, trees, vegetable and mangoes, ploughed and currently depend on the land. After hearing the evidence the trial court found that:-

“The evidence on court record which is admitted by the Plaintiff is that the Defendants have been staying on the subject land for long and have established their houses and farms thereon. They have also buried their deceased kin on the said land. The Defendants thus appear to have good grounds to pursue their claim of adverse possession against the plaintiff. This court however has no jurisdiction to entertain such claim which ought to be filed in the High Court. In the premises, I find that it is in the interest of justice to accord the Defendants an opportunity to pursue that claim before the order of eviction sought herein is affected.”

19. The court did find that the Defendants had a good case but could not grant it for lack of jurisdiction. Having found herein that the court did have jurisdiction to entertain and grant claim of adverse possession and on the basis of the appellant’s pleadings, evidence adduced and submission in the lower court I find that adverse possession was proved, and that the trial court erred in disallowing the claim.
20. On costs, under section 27 of the *Civil Procedure Act*, costs follow the event.
21. On the basis of the findings herein namely that the trial court had jurisdiction to entertain a claim of adverse possession, that the trial court erred in allowing the Respondent’s claim which was time barred and in disallowing the counterclaim which had been proved, I find that the appeal herein is merited. I allow the appeal and set aside the judgement of the trial court. I dismiss the Respondent’s case before the trial court and enter judgement in favour of the appellants on the counter claim as follows: -
 - i. A declaration that the appellants have acquired title to a portion measuring 1.0 ha occupied by them of land parcel No Kisumu/Karateng/839 by adverse possession
 - ii. A declaration that the deceased registered owner’s title over the 1.0Ha portion of Kisumu/ Karateng/839 occupied by the appellants had been extinguished by effluxion of time
 - iii. A declaration that the Respondent holds the portion measuring 1.0Ha occupied by the appellants of land parcel No Kisumu/ KARateng/839 in trust for the appellants.
 - iv. An order for immediate transfer of the portion of land measuring 1.0 Ha occupied by the appellants of land parcel known as No Kisumu/Karateng/839 in favour of the appellants jointly in default of which the Deputy Registrar of the court will sign the requisite documents so as to effect transfer.
 - v. Each party to bear own costs of the suit in the trial court.
 - vi. Costs of the appeal to the appellants.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED VIRTUALLY THIS 23RD DAY OF FEBRUARY, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE

In the presence of:

Maureen: Court Assistant.

Olili Advocate for the Appellant



Kouko Advocate for the Respondent.

