



**Josphat & 3 others v Masudi (Environment and Land Appeal
E003 of 2021) [2023] KEELC 884 (KLR) (20 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 884 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND APPEAL E003 OF 2021**

AE DENA, J

FEBRUARY 20, 2023

BETWEEN

LLOYD MUGO JOSPHAT 1ST APPELLANT

KAREN KANJIRU 2ND APPELLANT

**ASSENETH KANJIRU MURUNGE (SUING AS THE PERSONAL
REPRESENTATIVE OF THE ESTATE OF THE LATE GERRALD
MURUNGE) 3RD APPELLANT**

**MILLICENT MUTHONI KITHINJI (SUING AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF THE LATE EUTYCHUS KITHINJI
JOPHAT) 4TH APPELLANT**

AND

MWANAHAMISI MASUDI RESPONDENT

JUDGMENT

1. The appeal before this court is against the award of P N Wambugu Principal Magistrate delivered on November 26, 2021 in CMCC no 324 of 2006 Kwale. The appellants who were the plaintiffs in the said suit sued Mwanahamisi Masudi *vide* a plaint which was amended on December 11, 2015 claiming that he was wrongly in occupation of their land Kwale/Diani/529, Kwale/Diani/530, Kwale/Diani/531, Kwale/Diani/532 and Kwale/Diani/533 (herein suit properties) and therefore the need for the court to issue a declaration that the plaintiffs were the registered owners of the suit properties, an order for vacant possession and damages for trespass.
2. It was their case that on February 11, 1986, their deceased father Ereri M'chabare was issued with a certificate of outright purchase for plot no 295 by the Ministry of Lands, Settlement Physical Planning for an agreed purchase price of ksh 50,000/= upon which he was issued with title deed namely Kwale/Diani/295 on February 26, 1993 measuring approximately 2.0HA. He later subdivided



the same into titles, Kwale/Diani/529, Kwale/Diani/530, Kwale/Diani/531, Kwale/Diani/532 and Kwale/Diani/533.

3. According to the 1st plaintiff his deceased father later on June 2, 1993, with the approval of the Msambweni Land Control Board transferred the plots to his sons. To the 1st plaintiff he gave Kwale/Diani/529 and 530; 2nd Plaintiff Kwale/Diani/531, Kwale/Diani/532 to husband of the third plaintiff, and Kwale/Diani/533 to husband of the 4th plaintiff. All the titles were issued on February 3, 1994. That in April 1993 Omari Mohamed and his wife Mwanahamisi Masudi (the defendant herein) who were squatting on the land formerly agreed to vacate the same at the Diani police station in the presence of a police officer by the name Jackson Ndirangu.
4. That in 1998 the 1st plaintiff went to the suit property and fenced the 5 plots with an assurance from the defendants husband Omari Mohamed that he would vacate the land on his own volition without courts intervention only for the defendants husband to renege on his promise to vacate by demolishing the entire fence. Further that on August 25, 2006 the 1st plaintiff sought to forcefully evict the defendant but was restrained by the chief iani, directing him to formerly lodge his complaint in court.
5. The defendant's case vide her defence amended on December 10, 2018 claimed she was entitled to the suit properties by way of adverse possession having lived on the same for over 29 years and the 1st plaintiff was barred from claiming the same by dint of the *Limitations of Actions Act*. That her occupation had been openly uninterruptedly continuous, publicly, exclusively and adverse to the title of the registered owner and she could not be said to have encroached.
6. The Hon Wambugu P M after hearing the parties and considering the facts and evidence of the parties found that the defendant had satisfied the court on all the ingredients to warrant her acquire title to the land by adverse possession. He then declared the Ddfendant the rightful owner of all the subdivisions herein.
7. The plaintiffs being aggrieved filed the present appeal. The Memorandum of Appeal dated December 17, 2021 sets forth the following grounds of appeal:
 1. The learned magistrate erred in law and fact in considering issues that were not for determination between the parties in their pleadings.
 2. The learned magistrate erred in law and fact when canvassing the issue of adverse possession which was neither pleaded by either party not a matter for determination between the parties.
 3. The learned magistrate erred in law and fact in declaring that the respondent is the rightful owner of the suit parcels of land by way of adverse possession when the same had not been pleaded and/or counter-claimed by the respondent.
 4. The learned magistrate erred in law and fact, in addressing himself of the legal principle of adverse possession, by failing to consider substantive evidence to the principle of adverse possession, by failing to consider substantive evidence to demonstrate the respondent had met the legal qualifications to acquire the properties in dispute by way of adverse possession.
 5. The learned magistrate erred in fact in noting that the Respondent had an uninterrupted occupation of the properties in dispute for a period exceeding 12 years, yet there is a clear discrepancy as to when the statutory period started to run.



6. The learned magistrate erred in law and fact in failing to address extraneous evidence on the issue of the trespass, destruction of property, and use of force by the respondent on the subject properties.
 7. That the learned magistrate erred wholly in disregarding the appellants' counsel submissions and the authorities submitted and proceeded to rely on his own views not backed by law.
 8. The learned magistrate erred in failing to analyze and synthesize evidence before him and arrived at a completely erroneous and ambiguous finding that cannot be implemented in law
8. The Appellant prays:
- A. This appeal be allowed with costs
 - B. This honourable court sets aside the judgment of the subordinate dated November 26, 2021.
 - C. This honourable court allows the suit as prayed in the amended plaint dated October 11, 2015

Submissions

9. The appeal was canvassed by way of written submissions which parties filed and exchanged.

Appellants submissions

10. Grounds 1,2, 3 were argued together. It was submitted that the defendant was bound by her pleadings. She neither counterclaimed nor prayed to be declared the owner of the suit properties. That evidence which is at variance with the pleadings ought to be disregarded as was held in *Independent Electoral and Boundaries Commission v Stephen Mutinda Mule & 3 Others* (2014) eKLR. Citing the provisions of sections 107 and 108 of the *Evidence Act* and the failure by the defendants to prove she was in exclusive possession of the suit properties it was submitted that the lower court should not have made such finding as the connotation of ownership was farfetched.
11. Submitting on the 4,5,6,7 and 8th grounds of appeal, it was contended that no evidence was produced to corroborate possession and or occupation of the suit properties by the defendant such as structures built thereon, cultivation and farming. Setting out the elements to be satisfied in a plea of adverse possession as set out in *Kasuve v Mwaani Investments Ltd & Others* 2004 1 KLR 184 it was urged that the defendant having taken possession in 1977, agreed to vacate the suit premises by the agreement dated April 24, 1993 and the plaintiffs fencing of the suit properties in 1988 effectively waived her right to claim adverse possession because of this interruption of the possession and which the trial court ignored. The case of *Githu v Ndete* (1984) KLR 776 was relied upon. Further that the plaintiffs asserted their ownership rights in 1988 and time started running afresh reference was made to vol 24 *Halsbury's Laws of England* 3rd Edition where fencing was pointed to be the best evidence of possession of surface land. That the trial court's decision was grounded on hearsay as no single evidence connoting possession was produced.
12. Additionally it was submitted that from 2006 that is 8 years after the fencing there has been no peaceful possession as parties were in court litigating over the suit properties.

Respondents Submissions

13. In response grounds 1, 2 and 3 of the appeal it was submitted that the issue of adverse possession was pleaded in paragraph 5 and 7 of the Amended Statement of Defence dated December 10, 2018 the learned magistrate was right to make a finding regarding the same.



14. On grounds 4 and 5 of the appeal it was argued that the learned magistrate properly analysed the evidence placed before court and came to the sound decision that the respondent had acquired the suit properties by way of adverse possession. The court had correctly made a finding that the adverse possession was halted/disrupted by agreement of parties from April 27, 1993 to July 30 1993 when the respondent agreed to move out of the suit properties after harvesting her maize but again time started to run as from July 30, 1993 when the respondent continued to occupy the suit properties until the filling of the case against the respondent on August 24, 2006 after the lapse of 13 years and 1 month. Additionally, that PW-1 Llyod Mugo Josphat admitted during cross examination that between 1990 to 2006 the defendant was still in the suit land.
15. On ground 7 and 8 it was submitted that all the issues for determination and the appellants' submissions were fully captured by the learned magistrate in arriving at the judgement. The court was invited to dismiss ground 6 for want of clarity. The court was urged to uphold the judgment of the lower court and dismiss the current appeal with costs.

Analysis and Determination

16. The jurisdiction of this court to determine this appeal is not in dispute. This being a first appeal the court is enjoined to re-evaluate the facts and the evidence that was led before the trial court and come up with its own conclusions. In doing so this court will bear in mind that the trial court had a greater advantage having seen and heard the witnesses. I will therefore make due allowance in this respect, see *Selle v Associated Motor Boat Co* (EA.123).
17. The trial magistrate after considering the facts framed the issues as follows; -
 1. Who are the real owners of the parcels of land known as Kwale/Diani/531-33
 2. For how long has the defendant stayed on the land
 3. When does the time to claim adverse possession run
 4. Is the defendant entitled to claim the land under adverse possession?
18. The first issue was rightly framed but I would have reframed it to, whether the plaintiffs were the lawful owners of the suit property drawing from prayer I (a) of the amended plaint. The plaintiffs were therefore required to prove that they were the lawful registered owners of the suit properties. The trial Magistrate referring to the provisions of section 26(1) of the *Land Registration Act*, made a finding and rightly so that *prima facie* the persons registered are the absolute and indefeasible owners of the land by dint of registration. It is noteworthy however that under the said section 26(1) (a) and (b) such title can be impeached on the grounds of fraud or misrepresentation to which the holder of the title is proved to be a party or where it is acquired illegally, unprocedurally or through a corrupt scheme.
19. From the amended statement of defence dated December 10, 2018 it is clear that in the present suit the defendant were not questioning the plaintiff's registration on the basis of fraud but on the basis of adverse possession. However, it was DW1 oral testimony that she was born at Diani settlement scheme and entered the suit properties in the year 1977 had lived on the suit property since then and since the subdivision herein. She stated in her witness statement dated November 29, 2018 that she did not get a title to the original plot 295 which she claims to be hers together with her husband Omar Mohamed Mwachamba. She further states that upon following up on the issue she learnt the same was issued to Hassan Mwalichengo and produced as part of her evidence Accountability list in this regard. That the said Hassan Mwalichengo never claimed the said plot to be his. The defendant further goes to add in



her statement that according to her investigations and inquiries the said plot 295 was wrongly allocated to Hassan Mwalichengo and not Eleri Muchabare the Plaintiffs father.

20. It is trite he who wants the court to believe certain facts exist must prove. To prove the claims, the defendant produced an accountability list dated November 30, 2018 from the land adjudication and settlement Officer Matuga/Msambweni/Lungalunga sub- counties Ministry of Lands & Physical Planning. It confirms that at the time of allocation land p/no 295 was recorded in the names of the said Hassan Mwalichengo as exists on the accountability list. She also exhibited a news paper cutting titled ‘NLC orders probe on fraud claims in Diani allocations.’ The statement is attributed to the then Vice Chairman of the National Land Commission following a meeting with the residents. Upon cross examination DW1 stated that she was never given the land and never complained about the same to anybody. No other evidence was led. The report of the audit was never availed and no other witness was called to corroborate the defendant’s evidence. To me there was no sufficient evidence to impeach the plaintiffs title as the defendant would have wanted. In any event nowhere in the amended defence is the issue of misrepresentation or irregularity raised neither are the particulars of fraud raised. The only defence that could stand was the plea of adverse possession.
21. I have considered the grounds of appeal and to me the main issue is whether the said plea of adverse possession was pleaded by the defendant and whether it was proved to the required standard.
22. I will first dispense wether the claim of adverse possession and whether it was pleaded. It is stated that the trial court erred by considering the issue of adverse possession when it was not pleaded yet it was trite that parties are bound by their pleadings – see grounds 1,2 and 3 of the appeal). The answer to this lies in the pleadings. I perused the Amended Statement of Defence as amended on December 10, 2018 and filed on December 13, 018. I noted that the Ddfendant at paragraph 5 in addition to denying the contents of paragraphs 5,6,7 and 8 of the plaint adds that ‘she has lived on the piece of land for over 29 years now...this suit is time barred under the Limitation of Action Act (cap 22 of the laws of Kenya) and the defendant has acquired adverse possession over the aforesaid parcel of land.....’ Paragraph 7 goes on to state interalia how the possession had been open continuously and uninterrupted. The only thing the Defendant did not do was to include a counterclaim to seek that she be declared owner of the suit properties by virtue thereof.
23. The Court of Appeal has pronounced itself on the above discourse in the case of Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR where it held as follows:-

‘The courts, have since this decision, held that a claim by adverse possession can be brought by a plaint. See *Mariba v Mariba* Civil Appeal no 188 of 2002, counter-claim or defence as was the case here. See *Wabala v Okumu* (1997) LLR 609 (CAK). In *Gulam Mariam Noordin v Julius Charo Karisa*, Civil Appeal no 26 of 2015, where the claim was raised in the defence, this court in rejecting the objection to the procedure, stated the law as follows;

“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of *Wabala v Okumu* [1997] LLR 609(CAK), which, like this appeal the claim for adverse possession was in the form of a defence in an



action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in *Bayete Co Ltd v Kosgey* [1998] LLR 813 where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.”

Clearly then in the present case the claim of adverse possession was pleaded as earlier stated except for the counterclaim. This court bound by the above dictum I make a finding that grounds 1,2 and 3 of the memorandum of appeal cannot be sustained.

24. The above leads me to the determination of the issue of Whether the defendant proved the plea of adverse possession wherein lies grounds 4,5,6 and 7 of the appeal. The law applicable for a claim of land by way of adverse possession is the *Limitation of Actions Act* chapter 22 Laws of Kenya. The specific provisions are contained in Section 7, 13, 17 and 38[1] and 37 of the Act.

Section 7 deals with the limitation period as follows;

Section 7 ‘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’

Section 13 speaks to when a cause of action accrues and stipulates that; -

- 13 (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....’

Upon the above, section 38 kicks in and provides; -

- 38 (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 land or lease in place of the person then registered as proprietor of land”.
- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

25. The elements to be met by a party claiming adverse possession have already been set by counsel for the appellants/plaintiffs. Simply put the suit property must have a known owner; That the said known owner must have lost his right to the land by being dispossessed by the applicant; That the applicant’s possession of the land was without the true owner’s permission; That the discontinuance by possession has been open for a continuous period of 12 years; The defendant has not taken any action against the plaintiff to extinguish their occupation of the suit land or interrupt the same over the minimum statutory period of 12 years and that the applicant has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it. See *Wambugu v Njuguna* (1983) KLR 172, The court of appeal in *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR as well as *Chevron (K) Ltd v Harrison Charo Wa Shutu* (2016)eKLR .

26. In my determination of the issue of adverse possession herein this court with therefore be guided by the legal provisions cited earlier and the above elements derived from the judicial decisions I have cited.

27. In addressing the issue of adverse possession, the trial magistrate set out the legal principles underpinning the doctrine and referred to several authorities which largely rehashed the elements listed



earlier in this judgement. In his analysis and referring to the agreement dated April 24, 1993 where the defendant agreed to vacate the suit properties after harvesting her maize crop he stated; -

‘Thus, to me the adverse possession was halted/disrupted by agreement of the parties from April 27, 1993 to July 30, 1993.

Then when the defendant surpassed the occupation of the land beyond July 30, 1993 then the defendant was in adverse and time would run afresh form(sic)that time that is July 30, 1993.

July 30, 1993 to August 24, 2006 the time of filing this suit would be 12 years and one month.

Once time begins to run for purposes of limitation it will continue to do so unless the true owner brings an action to recover the disputed land.

.....There seems to be no action that then disrupted this occupation of the land until 2006 when this case was brought to court thirteen years later’ (emphasis is mine)

Based on the above the trial court found that the defendant had satisfied all the ingredients to warrant title to the suit properties by adverse possession and proceeded to declare as such.

28. This brings us to the issue whether adverse possession was proved. The suit properties are registered in the names of the plaintiffs and this resolves the first element with regard to there being a known owner. The date of registration of the titles is material because ordinarily this is when time would start running. We have the title in the name of the deceased for plot Kwale/Diani/295 registered on February 26, 1993. For the period 1977 to 1993 there cannot be adverse possession because there was no registration or let me say title. In February 1994 came the titles issued under the subdivisions herein but there is also the agreement dated Aril 27, 1993 where it was agreed that the defendant would stay until July 30, 1993 meaning the defendant was permitted to stay by the registered owners, consequently adverse possession wouldn’t apply. This court is in agreement that for this period time stopped running and it would start running afresh thereafter.
29. The question that therefore arises is what action did the plaintiff take from July 31, 1993 when the period he granted the defendant came to an end in other words did they assert their rights over the suit properties. PW1 testified in cross examination that ‘Between 1990 to 2006 the defendant was still on the land, in 2006 I was asked to go to court.’ According to the amended plaint it is stated that on August 25, 2006 the 1st plaintiff sought to forcefully evict the defendant. It is therefore this time that they asserted their right. The plaintiffs had therefore stayed 13 years (counting from July 1993) before coming back to try and remove the plaintiff. While during reexamination PW1 clarified that all along he attempted to remove her but no further evidence was led to this effect, not even the alleged fencing that is said to have been undertaken in 1988 nor did PW2 corroborate this. PW2 from her oral testimony couldn’t remember much anyway. It is trite that submissions cannot take the place of evidence. To me the statutory period of 12 years has been met for the claim of adverse possession. This also speaks to the issue of whether adverse possession was interrupted upon lapse of the permission that was granted.
30. Having settled the above, we must look into the issue of possession. Indeed, possession must be actual and there must be tr on the part of the adverse possessor. I already observed that PW1 testified in cross examination that ‘Between 1990 to 2006 the defendant was still on the land, in 2006 I was asked to go to court.’ I do not find it necessary to delve much into this point in view of the express admission of the plaintiff that the defendant was still in the suit properties. What other proof would



be required amidst the Plaintiff's own admission under oath. It is therefore my finding that possession by the defendant was proved.

31. It has been urged that the learned magistrate erred in law and fact in failing to address extraneous evidence on the issue of the trespass, destruction of property, and use of force by the respondent on the subject properties. My review of the evidence placed before court and the proceedings covering the *viva voce* hearing, I did not find any emerging issue in this regard.
32. The upshot of the above discussions and findings, I find no reason to disturb the judgement of the trial magistrate and make a finding that the Defendant is entitled to the suit properties Kwale/Diani/529, Kwale/Diani/530, Kwale/Diani/531, Kwale/Diani/532 and Kwale/Diani/533 by way of adverse possession.
33. It is hereby further ordered that the land registrar, Kwale shall register the suit properties Kwale/Diani/529, Kwale/Diani/530, Kwale/Diani/531, Kwale/Diani/532 and Kwale/Diani/533 in the name of the defendant in default, the deputy registrar Environment and Land Court Kwale is hereby ordered to execute all the appropriate documents necessary to effect the transfer to the defendant.
34. Costs shall be to the respondent/ defendant.

DELIVERED AND DATED AT KWALE THIS 20TH DAY OF FEBRUARY 2023

A E DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr Otieno for the plaintiff/appellant

Mr Okanga for the defendant/respondent

Mr Daniel Disii- court assistant.

