



REPUBLIC OF KENYA



**Wisai & another v Makongo & 4 others (Environment and Land Appeal E002 of 2022) [2023] KEELC 720 (KLR) (14 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 720 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E002 OF 2022  
DO OHUNGO, J  
FEBRUARY 14, 2023**

**BETWEEN**

**ANDREW MANYONYI WISAYI ..... 1<sup>ST</sup> APPELLANT**

**MUSA RAMADHANI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FLORAH KHATENJE MAKONGO ..... 1<sup>ST</sup> RESPONDENT**

**MERCELINE IMISA LIKHANGA ..... 2<sup>ND</sup> RESPONDENT**

**MACTILDA KHATENJE JOMO ..... 3<sup>RD</sup> RESPONDENT**

**ELIMINA IMBITI SHIBWONI ..... 4<sup>TH</sup> RESPONDENT**

**PROTUS AMAYI LIKHANGA ..... 5<sup>TH</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Kakamega (Hon Dolphina Alego, Senior Principal Magistrate) delivered on 21st December 2021 in Kakamega MCLE Case No. 932 of 2018)*

**JUDGMENT**

1. The background of this appeal is that through a plaint dated 21<sup>st</sup> June 2018, the first to fourth respondents averred that they were the registered owners of land parcels numbers Isukha/Virhembe/1822, Isukha/Virhembe/1823, Isukha/Virhembe/1824 and Isukha/Virhembe/1825 respectively which parcels were subdivisions of the original parcel of land known as Isukha/Virhembe/1167 which was registered in the names of the late Likhanga Lukhalo Petro, their father. That land parcel Isukha/Virhembe/1167 was the subject of High Court Succession No 495 of 2011 wherein the first to fourth respondents were each allocated 0.2 hectares of the parcel and that they obtained title deeds confirmation of grant. That the appellants trespassed into the parcels, erected temporary structures, and occupied the parcels thereby denying the first to fourth respondents' access



and ownership of their parcels. They therefore prayed for eviction of the appellants together with their agents and servants from the parcels.

2. The appellants filed defence and counter claim dated December 17, 2018 wherein they averred that the subdivision was illegal and that the first to fourth respondents cunningly conducted succession proceedings in Nairobi and failed to mention the first appellant as a purchaser of an acre of Isukha/Virhembe/1167 from the fifth respondent herein. In the counterclaim, the first appellant averred that he took possession of a portion of Isukha/Virhembe/1167 measuring 1 acre pursuant to an agreement dated May 6, 1997 and that he had been in peaceful and uninterrupted possession of the portion which was subdivided into Isukha/Virhembe/1822 to 1825 for a period of 21 years since 1997. That consequently, he was in adverse possession of the portion. The appellants therefore prayed that the first to fourth respondents' suit be dismissed with costs, that the registration of Isukha/Virhembe/1822 to 1825 be cancelled and that the portion of Isukha/Virhembe/1167 measuring 1 acre be transferred and registered in the first appellant's name.
3. The fifth respondent was joined to the suit by the appellants as a third party. He filed his statement of defence on July 22, 2021 and stated that the first to fourth respondents are his sisters. He averred that he entered in to an agreement with the first appellant in 1997 for an unspecified parcel of land upon terms that were never fulfilled by both parties and that he never surrendered possession of the land to the first appellant. That the first appellant never settled the agreed purchase price and never made any claim against him since 1997 either for the land or refund. He therefore prayed that the appellant's suit against him be dismissed with costs.
4. The matter came up for hearing before the Subordinate Court severally, but the hearing did not proceed. Ultimately, the parties recorded a consent on October 4, 2021 as follows:

“By consent the statements of the plaintiff and list of documents are adopted as evidence in this case. Equally the documents and statements by the defendants are adopted together with list of documents in support of the defence and counterclaim. Both cases for the plaintiff and the defendant are deemed as closed. Parties to file their written submissions and exchange within three weeks. The plaintiffs to file their submissions first.”
5. The matter was then scheduled for mention on November 15, 2021 to fix date of judgment. Come November 15, 2021, only the plaintiffs' submissions were on record. The learned magistrate (Hon D Alego, Senior Principal Magistrate) proceeded to schedule a date for delivery of judgment. Judgment was delivered on December 21, 2021. The first to fourth respondents' suit was allowed as prayed in the plaint.
6. Aggrieved by the judgment, the appellants filed this appeal on January 27, 2022. The following grounds of appeal are listed on the face of the Memorandum of Appeal:
  1. That the learned trial magistrate erred in law and in fact in proceeding to determine the suit without according the defendants chance to be heard since directions were taken that the matter was to proceed by way of written submissions and proceeded to write judgment without ascertaining if all parties had complied as required.
  2. That the learned trial magistrate erred in both law and fact in failing to pronounce herself totally on the counterclaim by the defendants/appellants herein.



7. The appeal was canvassed through written submissions. The appellants filed their submissions on October 12, 2022 and submitted that upon the matter coming up for hearing on October 4, 2021, directions were taken to adopt statement and produce documents as per the lists and matter be canvassed by way of written submissions and that when the matter was slated for mention of submissions on November 15, 2021, nothing transpired as the court file was missing in physical court yet the court was sitting virtually thereby denying the appellants the opportunity to address the court on the submissions to be filed and that miraculously from the court records the sitting magistrate recorded a judgment date in the absence of both parties thereby depriving the appellants their right to a fair hearing as they did not have an opportunity to put in their submissions as the directions that parties adopt statements and rely on listed documents was not sufficient to move the court to reach a justifiable determination.
8. In submitting on the second ground of appeal, the appellants submitted that the third party who was enjoined in the suit never produced evidence in challenging or agreeing with the counter claim and further submitted that the sole issue of the counter claim between the defendants in the trial court and the third party was never addressed and as such the trial court's decision without hearing parties ought not to stand. In further submitting that this court as a first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment, the appellant's relied on *Selle & another v Associated Motor Boat Co Ltd & another*.
9. The respondents filed their submissions on June 6, 2022 and in opposing the first ground of appeal, the respondents submitted that no party was denied any chance to be heard as both parties were heard as per the directions given and both cases were closed where all documents were produced by consent. That the mention date for submissions was equally taken by consent and that the fact that the appellants never complied with the court's order does not mean that they were never granted an opportunity to be heard.
10. In opposing the second ground of appeal, the respondents submitted that if the appellants felt that the magistrate failed or erred in failing to pronounce herself on the defence, then it would be fair for the appellants to apply for review other than subjecting the issue for appeal and further that the first appellant's allegations that he bought a portion of land vide an agreement dated July 11, 1997 was false as at by the aforementioned date, land parcel No. Isukha/Virhembe/1167 was registered in the deceased's name and the then seller lacked capacity to contract since no grant or letters of administration had been granted by court and as such the learned trial magistrate could not pronounce herself on an a nullity as the decision of the subordinate court was within the law. The respondents therefore urged that the appeal be dismissed with costs.
11. This being a first appeal, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. Further, it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR.
12. With the above guidelines in mind, I have carefully considered the record, the grounds of appeal and the parties' respective submissions. The issues that arise for determination are whether the appellants were granted an adequate opportunity to be heard and whether the reliefs sought ought to have issued.
13. The appellants' first ground of appeal is essentially that the learned magistrate proceeded to render judgment without having sight of the appellants' written submissions. As is manifest in the consent that the parties themselves recorded, they agreed to file and exchange their written submissions within three weeks from October 4, 2021. Following the consent, the matter was scheduled for mention on



November 15, 2021 to fix date of judgment. The mention date was given in the presence of counsel for the appellants. The appellants cannot turn around and blame the court for proceeding to render judgment come the agreed mention date. If they had any valid reason for failing to file the submissions within the agreed period, they should have moved the subordinate court for more time or for setting aside, as opposed to filing an appeal. In such an application, they would have had an opportunity to explain their failure to file submissions, the respondents would have been heard in regard to the application and the subordinate court would have rendered itself on whether to indulge them. As it is, the appellants are faulting the subordinate court on a matter that the said court has not had an opportunity to rule on. I find that the appellants have failed to demonstrate that they were not granted an adequate opportunity to be heard.

14. There is no dispute that the first to fourth respondents are the registered proprietors of the parcels of land known as Isukha/Virhembe/1822, Isukha/Virhembe/1823, Isukha/Virhembe/1824 and Isukha/Virhembe/1825. The parcels are subdivisions of Isukha/Virhembe/1167 which was registered in the names of the late Likhanga Lukhalo Petro, the first to fourth respondents' father. They acquired the parcels pursuant to a certificate of confirmation of grant issued in High Court Succession Cause No 495 of 2011 (Nairobi) on January 30, 2013, in respect of their late father's estate.
15. The first appellant claimed to have purchased a one acre portion of Isukha/Virhembe/1167 from the fifth respondent through a series of agreements made from May 6, 1997 to December 14, 2002. Suffice it to state that the fifth respondent was not the registered owner of Isukha/Virhembe/1167 and that according to letters of administration issued in High Court Succession Cause No 495 of 2011 (Nairobi), Likhanga Lukhalo Petro who was the registered proprietor passed away in 1985.
16. As registered proprietors of land, the first to fourth respondents are entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Among other rights, they are entitled to possession of their parcels. Further, Section 26 of the *Act* obligates the court to accept their certificates of title as conclusive evidence of proprietorship, unless of course the provisos under Section 26 (1) (a) or (b) are established. The appellants failed to establish any grounds that warrant impeaching the first to fourth respondents' titles. Their arguments concerning alleged shortcomings in the succession proceedings should have been raised before the succession court.
17. The first appellant claimed in the counterclaim that he took possession of a portion of Isukha/Virhembe/1167 measuring 1 acre pursuant to an agreement dated May 6, 1997 and that he had been in peaceful and uninterrupted possession of the portion which was subdivided into Isukha/Virhembe/1822 to 1825 for a period of 21 years since 1997. For a litigant to successfully claim adverse possession, he must among others prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period of 12 years without interruption. See *Mbira v Gachubi* (2002) IEALR 137. Adverse possession starts with dispossession of the rightful owner and the claimant must demonstrate that the registered owner had knowledge or constructive means of knowing that the adverse possessor was in possession of the suit property. As the Court of Appeal held in *Titus Kigoro Munyi v Peter Mburu Kimani* [2015] eKLR, computation of time starts from when there is actual or constructive knowledge by the registered proprietor.
18. There is evidence on record that Likhanga Lukhalo Petro, who was the registered proprietor of Isukha/Virhembe/1167, died on May 24, 1985 and that it was not until August 11, 2011 that an administrator was appointed for his estate. Consequently, time could not run prior to August 11, 2011 since there was nobody who could have actual or constructive knowledge of dispossession by the first appellant. The requisite 12 years had not been met by the time the counterclaim was filed on February 5, 2019. I find that the appellants did not establish adverse possession.



19. In view of the foregoing discourse, the first to fourth respondents were entitled to the reliefs that they had sought. On the other hand, the appellants' counterclaim was not proven.
20. I find no merit in this Appeal and I therefore dismiss it with costs to the respondents.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 14<sup>TH</sup> DAY OF FEBRUARY 2023.**

**D. O. OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

Mr Okali for the appellants

The respondents in person

**Court Assistant: E. Juma**

