



**Atingo v Mbalanya (Environment and Land Appeal E004 of 2022)  
[2023] KEELC 633 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 633 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT AND LAND APPEAL E004 OF 2022**

**E ASATI, J**

**FEBRUARY 9, 2023**

**BETWEEN**

**READON ELISHA ATINGO ..... APPELLANT**

**AND**

**OLIVER SHADRACK MBALANYA ..... RESPONDENT**

*(Being an appeal from the judgement of the Honourable RM NDOMBI  
SRM in VIHIGA CMCC E66 OF 2018 delivered on the 3RD MARCH, 2022)*

**JUDGMENT**

**Introduction**

1. The Appeal herein is against the judgement of the trial court in Vihiga Spmc ELC No 66 of 2018 (the suit) wherein the Respondent herein sued one John Atingo Amayi (the original Defendant) claiming for an order of permanent injunction restraining the original Defendant by himself, his agent, servants, workers, employees from trespassing upon or in any manner interfering with land parcel known as West Bunyore/ebusikhale/2028, an order for general damages for trespass and costs of the suit. The original Defendant died in the pendency of the suit and was substituted with the appellant herein who is his son.
2. The original Defendant *vide* his statement of defence dated January 21, 2014 denied the claim, and prayed that the suit be dismissed. He also raised a counter-claim to the effect that he was entitled to a portion measuring 50ft by 100ft of the suit land (herein called the disputed portion) by operation of the doctrine of Adverse Possession and that the Plaintiff held title to the disputed portion in trust for him. He prayed that the counter-claim be allowed.
3. The court heard the suit and *vide* its judgement delivered on March 3, 2022 found in favour of the Respondent and entered judgement in his favour for an order of permanent injunction restraining the Appellant from trespassing, continuing to interfere with the Plaintiff's rights and privileges as



registered owner of land parcel No West Bunyore/ebusikhale/2028, and an order for the Appellant to remove his illegal structure from the suit land and/or be evicted within 90 days and cost of the suit.

4. Aggrieved by the judgement, the Appellant preferred the present appeal vide the Memorandum of Appeal dated March 31, 2022. He sought for orders that the appeal be allowed, the decree be set aside and be substituted with a decree dismissing the Respondent's suit and allowing the counter-claim. He also prayed for costs of the appeal.
5. Directions were taken by consent of the parties that the appeal be canvassed by way of written submissions. Written submissions dated November 8, 2022 were filed by the firm of Oscar Wachelong'a & Associates on behalf of the Appellant. Written submissions of the same date were filed by the firm of Athunga & Company Advocate on behalf of the Respondent.

### **Issues for determination**

6. The grounds of appeal as contained in the Memorandum of Appeal raise the following issues for determination: -
  - a. Whether or not the trial Magistrate erred in law and in fact in finding that the Appellant had not proved his counter-claim.
  - b. Whether or not the learned trial Magistrate erred in law and in fact in finding that the Respondent had proved his case on a balance of probabilities.
  - c. Whether the trial Magistrate erred in law and fact when she failed to find that the Appellant had acquired the suit land by adverse possession.
  - d. Whether or not the trial court failed to appreciate the import of Section 7 of the *Civil Procedure Act* or put reliance on proceedings of the Land Dispute Tribunal which had no relevance to the case.
  - e. Whether or not the trial court failed to appreciate the operation of the doctrine of adverse possession.

### **Analysis and determination**

7. This being a first appeal, this court is obligated to re-analyse the evidence and draw its own conclusions. In *Selle & Another v Associated Motor Boat Company Limited and Others [1968] EA 123* it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact by the court below. It stated

“an appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.”

8. The evidence that was placed before the trial court on behalf of the Appellant comprised of the Appellant's own testimony and that of one witness. The Appellant who testified as DW1 adopted the contents of his witness statement dated June 25, 2021 as his evidence in chief. He stated that between the years 1960 – 1961 his late father John Atingo in conjunction with his grandfather bought a portion of land measuring 60 feet by 100 feet out of the land parcel No West Bunyore/ebusikhale/2028 from one Mbalanya Omakwe. That throughout his life, the plot was owned and used by his father till his



death. That the Plaintiff is a grandson to Mbalanya Omakwe, the seller. That Mbalanya Omakwe died in the year 1984 and in his life time, he had no dispute over the land. That the Plaintiff's mother had filed the case at the Tribunal but the Tribunal dismissed it in the year 2013. When the land was transferred in favour of the Respondent, he (Respondent) took over the case. That he was substituted in the case in place of the original Defendant who died in the year 2017 while the case was already in court. That the Respondent's claim was time barred. On cross-examination, he stated that he did not have documents to show that his father bought the land as the documents got burnt in the house.

9. The Appellant called one witness, one Oliver Elkana Amayi who testified as DW2. He stated *vide* his witness statement dated June 25, 2021 that his father bought land from Mbalanya Omwakwe in 1960 and took immediate vacant possession and constructed a premise for buying and selling skins and hides. That since his birth, it was his father who was using the land. There was no dispute between the seller and his father over the land. That it is the Respondent who is a grandson to the seller who filed the suit in the year 2013. That at the time the suit was filed, his father had been in occupation of the land for 53 years. That the claim is therefore time barred. That the Respondent was thus supposed to transfer the suit land measuring 50ft by 100ft to the Defendant (Appellant).
10. The Respondent testified as PW1 and called three (3) witnesses. He testified that he was the registered owner of land parcel known as Bunyore/Ebusikhale/2028 which he inherited from his father. That the suit land is his ancestral land. That John Atingo (the original Defendant) was running a business of hides and skins at the road side bordering the suit land. That when the road was expanded, John Atingo's business premises were demolished and he requested the Respondent's grandfather to permit him to use part of the suit plot for his business temporarily. That his grandfather on various occasions asked the said John Atingo to leave the land. That when his (Respondent's) father took over the land, he asked the said John Atingo to leave the land. That he got registered as a beneficiary of the suit land after his mother succeeded the estate of the deceased.
11. He testified further that he, with the help of his mother and the area Assistant Chief, asked John Atingo to leave the land but John Atingo insisted that he bought the land. He sought that John Amayi be evicted from the land because he (Respondent) is the rightful owner and he wished to use his plot. That the tenants in the neighbourhood complain of polluted air from the skins. That the Public Health Officer has asked him to move the hides and skins business from the place because it is unhealthy for the residents. On cross-examination, he confirmed that John Atingo entered the land around 1959-1960. That by the time he was born in the year 1974, John Atingo was already on the land. The Respondent produced national identity card, Notice, title deed and green card as exhibits. A document called proceedings of Land Adjudication Tribunal were marked for identification but not produced.
12. PW2 was the Respondent's mother. She testified that the suit land was an ancestral land. That both her father-in-law and her deceased husband asked the late John Atingo the father of the Appellant to vacate the land. That she succeeded the estate of her late husband and transferred the land to the Respondent and that she asked John Atingo to leave the suit land. On cross examination, she stated that when she got married she found the said John Atingo in occupation of the suit land.
13. DW3 testified according to her witness statement dated January 8, 2020 that he knew the suit land initially belonged to the late Mbalanya Omakwe who gave it to his son Okiya Mbalanya- who is also deceased and that the land was inherited by the Plaintiff (Respondent herein). That John Atingo( the original Defendant) was permitted to use Mzee Mbalanya's building for his hides and skins while he sought a place to operate. That John Atingo did not buy the land. That he was told to vacate on a number of times. That there was a tribunal case that gave the land to the Plaintiff. On cross examination he stated that Mbalanya never sued John Atingo to evict him from the land. He also stated that he lived in Mombasa and Tanzania and was only informed.



14. PW4 testified that the Plaintiff is the son of her brother. That John Atingo (the original Defendant) was permitted to use Mbalanya's building for his hides and skins temporarily while looking for his place of operation. She however admitted on cross examination that she was only informed of these happenings as she resided in Mombasa.
15. Issue numbers (a), (c) and (e) hereinabove for determination herein concern the doctrine of adverse possession. Adverse possession is a doctrine of law vide which a person obtains legal title to land by reason of actual, open, hostile and continuous occupation of it to the exclusion of the registered owner for a prescribed period. Under the provisions of the *Limitation of Actions Act* cap 22 Laws of Kenya, the requisite period is 12 years. The doctrine is anchored on Section 7, 13 and 38 of the *Limitation of Actions Act*. Section 7 prohibits filing of actions for recovery of land after the expiry of 12 years from the date the right of action accrued. In the case of *Kweyu v Omutut [1990] KLR, 709* where Gicheru JA defined adverse possession as:
- “By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers infeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality.) Adverse possession is made out by the co-existence of two distinct ingredients, first, such a title as will afford colour, and, second such possession under it as will be adverse to the right of a true owner---.”
16. It is not disputed that the original Plaintiff John Atingo entered the suit land around the year 1960. This was long before the Respondent was born. It is also not disputed that as at the time of filing the suit in October 2013, the original Defendant was alive and in active occupation of the disputed portion of the suit land. The Appellant contends that his father entered the suit land on account of a land sale agreement between the Respondent's grandfather who was the registered owner of the land and the Appellant's father (the original Defendant). That although no title was given to the Appellant's father for the sold portion, he nonetheless remained on the suit land to the date of his demise in the year 2017. Though the land sale agreement was not shown to the court the evidence on record shows that the original Defendant had exclusive occupation and possession of the disputed portion of suit land. He conducted the business of hides and skins on the premises. The activities of the Appellant's father on suit land were clearly adverse to the interest of the registered owner.
17. The Respondent on the other hand contended that the original Defendant entered the suit land on account of permission given by his grandfather to the original defendant to occupy the disputed portion of land temporarily. None of the parties herein or the witnesses who testified was present at the time the original Defendant entered the suit land. But it is clear that none of the previous registered owners had interfered with the original Defendant's occupation of the disputed portion.
18. In disallowing the counter claim for adverse possession, the court relied on a decision of a Tribunal. The court held that it could not sit on appeal of the decision of the Tribunal and hence proceeded to dismiss the counter claim. Perusal of the proceedings before the trial court reveals that the Respondent marked a document titled Land Adjudication Tribunal as PMFI2. The document was never formally produced as an exhibit in the suit. In *Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR* the Court of Appeal observed at paragraph 18 – 24, that

“the mere marking of a documents for identification does not dispense with the formal proof thereof.....Once a documents has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay



foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the documents is not marked as an exhibit, it is not part of the record”.

The Court of Appeal found that the Judge had erred in basing his decision on a document which was only marked and not formally produced as an exhibit. The court further observed that it was a fatal error on the part of the Respondent not to call any witness to produce the document marked for identification.

19. Guided by the above cited authority and the findings of the Court of Appeal therein, I find that in the present case, the document relied upon to dismiss the claim for adverse possession was a document which was not formally produced but only marked for identification. That such document was not part of the record and that the same was of no evidential value. I find that the trial court erred in finding that the Appellant had not proved the counter claim and in failing to find that the Appellant had acquired title by adverse possession to the disputed portion of the suit land. It is my finding that on the basis of the evidence on record adverse possession was proved.
20. The next issue is whether the court erred in law and fact in finding that the Plaintiff (Respondent herein) had proved his case on a balance of probabilities. On this, the trial court found that the Respondent had “satisfied the principles of granting injunction as stated in Giella Case and has proved his case on a balance of probability”. The Respondent’s exhibit P5 was a copy of register (green card) for the suit land. It shows that the register in respect of the suit land was first opened on August 5, 1981 and the suit land registered on the same day in the name of Okiya Omwakwe who transferred the title on November 10, 1981 to Arthur Okiya Mbalanya who in turn transferred it to Aggrey Opicha Mbalanya on December 3, 1981. On May 5, 2004, title was transmitted to Naomi A. Opicha Mbalanya and Noah Mbalanya and on the same day transferred to Jofris Okiya Mbalanya who also transferred the land to the Plaintiff/Respondent on the same date May 5, 2004. All the registered owners mentioned in the green card held title while the original Defendant held possession and had active occupation of the disputed portion of the suit land. There is no evidence that any of the previous registered owners and particularly the Respondent’s grandfather and father made efforts to assert their rights or title over the disputed portion of the suit land. The Respondent’s predecessor had had title from December 3, 1981 to May 5, 2004. A period of 23 years. All this time, the original Defendant was in occupation.
21. Under Section 7 of the *Limitation of Actions Act*, the Respondent’s predecessor’s claim had become time barred and could not file suit for recovery of the land. An overriding interest in terms of Section 30 of the Registered *Land Act* (repealed) and Section 28(h) of the *Land Registration Act* had been created in favour of the original Defendant who was in occupation. When the Respondent received title to the suit land on May 5, 2004, the same was subject to the overriding interest. In this regard, the trial court erred in finding that the Respondent had proved his case on balance of probabilities.
22. On the basis of the foregoing findings, I hold that the appeal has merit. I allow the appeal in the following terms
  - a. The judgement of the trial court is hereby set aside and substituted with judgement in favour of the Appellant as prayed in the counterclaim for :
    - i. A declaration that the original Defendant herein, John Atingo Amayi, deceased, had acquired title to a portion measuring 50 ft by 100ft occupied by him of land parcel No West Bunyore/ebusikhale/2028.



- ii. A declaration that the title of the Respondent's predecessor in title to the disputed portion of the suit land had become extinguished by effluxion of time.
  - iii. A declaration that the Respondent's title to the suit land is subject to an overriding interest in favour of the original Defendant and the Respondent holds the portion measuring 50 ft by 100ft in trust for the estate of the original Defendant herein, John Atingo Amayi.
  - iv. An order for transfer by the Defendant to the Appellant on behalf of the estate of John Atingo Amayi of the disputed portion of land measuring 50 ft by 100ft out of land parcel No West Bunyore/ebusikhale/2028 forthwith in default of which the Deputy Registrar of the Court to sign the requisite forms to effect the transfer.
- b) Each party to bear own costs of the appeal.

Orders accordingly.

**JUDGEMENT DATED, DELIVERED AND SIGNED IN OPEN COURT AT VIHIGA THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**E. ASATI,**

**JUDGE**

**In the presence of:**

Patricia- Court Assistant.

Appellant present in person.

No appearance for the Respondent.

