



**Obae & another v Ogeko (Suing as the Legal Representative of  
the Late Edward Ogeko Keburi) (Environment and Land Appeal  
E018 of 2021) [2025] KEELC 1204 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1204 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL E018 OF 2021**

**M SILA, J  
MARCH 13, 2025**

**BETWEEN**

**JAMES ONYONKA OBAE ..... 1<sup>ST</sup> APPELLANT**

**JOSEPHINE KEMUNTO MONARI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**EDNA KWAMBOKA OGEKO ..... RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVE OF THE LATE EDWARD OGEKO  
KEBURI**

*(Being an appeal from the decision of Hon. P.K Mutai, Senior Resident Magistrate,  
delivered on 11 August 2021 in the suit Kisii CMCCELC No. 355 of 2018)*

**JUDGMENT**

(Respondent filing suit for adverse possession in the superior court; judge transferring the matter to the Magistrates' Court; case heard culminating in the impugned judgment; in the judgment trial Magistrate not persuaded that a case for adverse possession was made out but making an order for the land to be held for the benefit of the estate of the plaintiff as it was sold without succession being done; on appeal held that it was erroneous for the Magistrate to delve into the issue relating to the land belonging to the estate of the deceased as that was not the cause of action; the cause of action was on adverse possession and suit ought to have been dismissed upon a finding that adverse possession was not proved; be that as it may, the suit was erroneously transferred to the Magistrates' court as the lower court had no jurisdiction to hear the suit for adverse possession pursuant to the Court of Appeal decision in Sugawara vs Kiruti & Others; appeal allowed and matter remitted for fresh hearing before the superior Environment and Land Court)



1. The suit from which this appeal emanates was commenced through a plaint which was filed before the High Court at Kisii on 24 September 2015 and registered as Kisii HCCC No. 437 of 2015 through the law firm of M/s Nyariki & Company Advocates. The prayers in the plaint were as follows :-
  - a. A declaration that the plaintiff and other siblings have had uninterrupted and quietly enjoyed the occupation of land parcel West Kitutu/Bogusero/4385 since 1997 and hence they have acquired title by way of adverse possession.
  - b. Costs of the suit.
  - c. Any other relief this Honourable Court may deem fit and just to grant.
2. Despite being filed in the High Court, this was clearly a matter that fell within the jurisdiction of the Environment and Land Court as created vide the *Environment and Land Court Act*, 2011, pursuant to the provisions of Article 162 (2) (b) of the *Constitution* 2010, and the High Court did not have jurisdiction to hear the matter. Unsurprisingly therefore, the case was never handled within the High Court but by the judge sitting in the Environment and Land Court at Kisii, who was then Mutungi J. The case however continued bearing the number 437 of 2015 but now described as Kisii ELC No. 437 of 2015. The good judge handled an application for injunction and ordered that status quo be maintained and the case came up for hearing on 1 November 2017 before him. It was however adjourned at the instance of the plaintiff/respondent who was said to be indisposed and adjourned for hearing on 11 June 2018. There is no record of the matter being in court on 11 June 2018. What followed next is that on 14 November 2018, Mutungi J ordered that the matter be transferred to the Chief Magistrates' Court at Kisii, as in his view, the court had jurisdiction to hear it. The case was duly transferred to the Chief Magistrates' Court at Kisii and assigned the number Kisii CMCC/ELC No. 355 of 2018. It was heard by Hon. P.K. Mutai Senior Resident Magistrate, culminating in the impugned judgment.
3. The respondent is daughter of one Edward Ogeko (deceased). Her evidence was that her late father purchased a portion of land measuring 0.06 Ha out of the land parcel No. 940 through a sale agreement entered into on 11 March 1997. He then took possession and built a two bedroomed house and six single rooms. Her father died in 2003 before the land could be transferred to him. He had two wives, Sabina (mother to the respondent, deceased) and one Josephine Nyansiaboka (Nyansiaboka, also deceased). She claimed that in 2015 the 1<sup>st</sup> appellant (sued as 1<sup>st</sup> defendant) came to the land alleging to have purchased the land and wanted to remove the tenants therein which is what prompted her to file the suit. She denied that Nyansiaboka, her step mother, ever sold the suit land and asserted that they have been on the land since 1997.
4. The case of the 1<sup>st</sup> appellant (sued as 1<sup>st</sup> defendant) was that he purchased the land from Nyansiaboka. She needed to sell the land to attend to her medical expenses. He paid her, and with the concurrence of the 2<sup>nd</sup> appellant, who was the registered proprietor, the land was transferred to him. He added that Nyansiaboka died in March 2006. The 2<sup>nd</sup> appellant testified that the suit land was initially sold to Edward Ogeko who aimed to settle his second wife (Nyansiaboka) on the land. After Edward died, Nyansiaboka sold the land to the 1<sup>st</sup> appellant and instructed her to transfer it directly to him and that is how title ended up being with the 1<sup>st</sup> appellant. She stated that Nyansiaboka died about 3 months thereafter.
5. The learned trial Magistrate assessed the evidence and was not persuaded that the evidence presented supported the claim for adverse possession. However, he proceeded to make a finding that the land had been purchased by Edward Ogeko and therefore it formed part of his estate. He continued to hold that selling of his land without first undergoing succession was null and void. He finally held that the



suit land will form part of the estate of Edward Ogeko until such a time that succession will be done to ascertain the interests of the dependants and alleged buyer. He ordered each party to bear his/her own costs.

6. It is this decision which has provoked this appeal. Inter alia it is raised that the trial Magistrate erred by granting a relief which was not pleaded or prayed for. The appellants wish to have the judgment set aside and an order made dismissing the suit with costs.
7. The appeal was argued by way of written submissions and I have taken note of the submissions filed by Mr. Ombachi, learned counsel for the appellants, and Mr. Nyariki, learned counsel for the respondent. I have taken the submissions into account before arriving at my decision.
8. The prayers in the suit were not ambiguous. The respondent wished to have an order that she is entitled to the suit land by way of adverse possession and there was no other prayer save for costs. The sole cause of action was an action for title to the land through adverse possession. There was no other cause of action. Thus what the trial court ought to have restricted itself was to determine whether the case of adverse possession had been proved. That was the sole issue in the case and there was no other. After proceeding to make a finding that the respondent had not proved her case for adverse possession, the trial Magistrate simply ought to have dismissed the case of the respondent. What he did was to proceed to now make a determination on a new cause of action that was never before him, i.e whether the land formed part of the estate of Edward Ogeko pursuant to a purchase. This was erroneous as there were no prayers in the plaint to that effect. In essence what happened is that the trial Magistrate proceeded to hear a dispute that was not before him and which the appellants could not have adequately prepared themselves to defend. The effect was to have a determination made for which there were no pleadings, no prayers, and for which the defendants were not given notice to defend. This was in essence an unfair trial and it is clear to me that the appellants were not given a fair hearing. On that basis, the appeal must succeed and the judgment must be set aside.
9. There is however more to this case as it turns out that the trial court did not have jurisdiction in the first place to handle the dispute over adverse possession. Disputes of adverse possession were traditionally reserved for hearing by the High Court pursuant to Section 38 of the *Limitation of Actions Act*, which provides as follows :
  38. Registration of title to land or easement acquired under Act
    - (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of this Act, 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 the land or lease in place of the person then registered as proprietor of the land.
10. It will be seen from Section 38 above that jurisdiction to hear a suit for adverse possession was reserved for the High Court (which now in light of Article 162 (2) (b) must be read as referring to the Environment and Land Court). There was controversy however, as to whether Magistrates were empowered to hear cases related to adverse possession when the *Environment and Land Court Act* and The Magistrate's Court Act were amended in 2015 to give Magistrates jurisdiction to hear land matters. Thus in the case of Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & another [2020] eKLR, Ohungo J, held as follows :
  15. The upshot of the provisions at Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the *Magistrates' Courts Act*, 2015 is that 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. Claims in the nature of adverse possession involve title to land since the claimant ultimately seeks an order that he be registered as the proprietor of the land.

11. This holding, that Magistrates' Courts have jurisdiction to hear disputes of adverse possession, has since been overturned by the recent Court of Appeal decision in the case of *Pauline Chemuge Sugawara vs Nairuko Ene Mutarakwa Kiruti & 3 Others*, Court of Appeal at Nairobi, Civil Appeal No. E141 of 2022, judgment of 11 October 2024. It was held as follows :
  48. It is our view that, if it was intended that claims for adverse possession be determined by the Magistrates' Court, nothing would have been easier than for Parliament to have expressly enacted such a provision. So that in view of the express provisions of the law, a strict interpretation of section 38 would mean that hearing and determination of such matters is specifically limited to the Environment and Land Court to the exclusion of Magistrates' Court.
  49. We come to this conclusion also bearing in mind that the jurisdiction of Magistrates' Courts is largely determined by the pecuniary interest designated for determination by each level of the Magistracy specified in the hierarchy of courts, in terms of section 7 of the Magistrates Courts Act. In claims for adverse possession where the value of the land in question may be unknown, as in the instant case, it could be that by the time of filing, the value of the land subject of determination may be far in excess of the particular Magistrates' Court's pecuniary jurisdiction, which for all intents and purposes was not what was intended by the Act.
  50. In the circumstances, in view of the express provisions of section 38 of the *Limitation of Actions Act*, as did the Environment and Land Court, we find that Magistrates' Courts do not have jurisdiction to determine the claims of adverse possession. As a consequence, the trial magistrate in the instant case rightly disregarded hearing and determining it. In the result, this ground is without merit and is accordingly dismissed.
12. From the above, it will be seen that the Court of Appeal has determined that Magistrates' Courts do not have jurisdiction to hear cases related to adverse possession. This being the position, it was an error apparent on the face of the record, for this court to have transferred the case to the Magistrates' Court for determination for the Magistrates' Court had no jurisdiction to take up the suit. It also means that the decision of the Magistrates' Court on the suit, which was for adverse possession, was null and void. In other words, the trial Magistrate had no jurisdiction to hear the case.
13. Given that the case was properly filed in this court, and it was erroneous for this court to have transferred the matter to the Magistrates' court, the result of which was a trial that was a nullity. The best order to make in the circumstances of this case is to have the case remitted back to this court for a fresh hearing on the question of adverse possession. In essence I declare a mistrial of the case.
14. I therefore set aside the judgment and order the case to start de novo before the Environment and Land Court at Kisii. There will be no orders as to costs.
15. Judgment and orders accordingly.

**DATED AND DELIVERED THIS 13 DAY OF MARCH 2025.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

Delivered in the presence of :



Mr. Ombachi for the appellant - Present

Mr. Nyariki for the respondent – Absent

Court Assistant – Allan

