



**Gitonga v M’Mwirichia & another (Environment and Land Appeal  
31 of 2023) [2025] KEELC 395 (KLR) (5 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 395 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL 31 OF 2023**

**JO MBOYA, J  
FEBRUARY 5, 2025**

**BETWEEN**

**NELSON MBAE GITONGA ..... APPELLANT**

**AND**

**DANIEL KAIRANYA M’MWIRICHIA ..... 1<sup>ST</sup> RESPONDENT**

**CHARLES KIRIMI M’CHOKERA ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the judgment delivered on 11th September 2023 by Hon.  
Wechuli – Principal Magistrate in Tigania ELC Case No. 80 of 2021)*

**JUDGMENT**

**Introduction and Background**

1. The Appellant herein filed/commenced the instant suit vide Originating Summons [OS] dated 17<sup>th</sup> August 2022; and wherein the Appellant sought for the following reliefs:
  - a. Declaration that the Plaintiff [now the appellant] has acquired by adverse possession title to the whole L.R No. 9434 Antuamburi Adjudication Section and therefore is entitled to be registered as the proprietor of the same.
  - b. Costs of the suit.
2. The suit by and on behalf of the Appellant was heard and disposed of vide judgment rendered on the 11<sup>th</sup> September 2023 by the Learned Principal Magistrate. Pertinently, the Learned Principal Magistrate found and held that the Appellant had not proved his claim concerning adverse possession to the requisite standard. In this regard, the Appellant’s suit was dismissed with costs.



3. Aggrieved and dissatisfied with the judgment and consequential decree, the Appellant filed the memorandum of appeal dated 14<sup>th</sup> September 2023 and in respect of which the Appellant has highlighted a plethora of grounds.

For coherence, the Appellant has raised the following grounds:

- i. The Learned Principal Magistrate erred in law and in fact in not finding that the appellant had proved his case on the required standard of proof.
  - ii. The Learned principal magistrate erred in law and in fact in basing his judgment on the testimony of one party.
  - iii. The Learned principal magistrate erred in law and in fact in writing one-sided judgment.
  - iv. The Learned principal magistrate erred in law and in fact by relying on technicalities to the detriment of the appellant.
  - v. The Learned principal magistrate erred in law and in fact in disregarding the evidence of Plaintiff witness Number 2.
  - vi. The Learned principal magistrate erred in law and in fact by finding that the appellant was not in occupation of the suit land.
  - vii. The Learned principal magistrate erred in law and in fact by implying that one party cannot own more than one parcel of land.
  - viii. The Learned principal magistrate erred in law and in fact by misinterpreting the doctrine of adverse possession.
  - ix. The Learned principal magistrate erred in law and in fact in differentiating between land parcel No. Antuamburi/9434 and Antuamburi/7239.
  - x. The Learned principal magistrate erred in law and in fact in misinterpreting the definition of fraud.
5. The Appeal beforehand was subjected to the usual directions in accordance with provisions of Order 42 Rule 13 of the Civil Procedure Rules, 2010. To this end, the advocates for the parties covenanted to canvass and dispose of the appeal by way of written submissions. In this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the submissions.
  6. The Appellant filed written submissions dated 10<sup>th</sup> November 2024; whereas the Respondents' filed written submissions dated 20<sup>th</sup> November 2024. Both sets of written submissions are on record.

### **Parties' Submissions:**

#### **a. Appellant's submissions:**

7. The Appellant filed written submissions dated 10<sup>th</sup> November 2024 and wherein the Appellant adopted and reiterated the grounds contained at the foot of the memorandum of appeal. Furthermore, the Appellant also referenced the Originating Summons dated 17<sup>th</sup> August 2022 and the supporting affidavit thereto.
8. Additionally, Learned counsel for the Appellant submitted that the Learned Principal Magistrate erred in fact and in law in finding and holding that the Appellant had neither proved nor established the requisite the ingredients underpinning the claim for adverse possession.



9. In this regard, Learned counsel for the Appellant submitted that the evidence by the Appellant was neither controverted nor challenged. In this regard, Learned Counsel contended that the evidence on record thus ought to have believed and relied upon by the Learned Magistrate.
10. It was the further submission by learned counsel for the Appellant that the Learned Principal Magistrate misconceived and misapprehended the evidence on record and thus arrived at an erroneous finding/conclusion.
11. Thirdly, Learned counsel for the Appellant submitted that having failed to properly appraise and analyze the evidence tendered by the Appellants, learned counsel contended that the Learned magistrate therefore arrived at a decision that is not only contrary, but perverse to the weight of the evidence on record.
12. Arising from the foregoing, learned counsel for the Appellant has invited the court to re-evaluate the evidence on record and thereafter to find and hold that the Appellant duly established and proved the requisite ingredients underpinning the claim for adverse possession.

**b. Respondents submissions:**

13. The Respondents filed written submissions dated 20<sup>th</sup> November 2024; and wherein the Respondent adopted the evidence that was tendered before the lower court and thereafter canvassed two [2] salient issues for consideration.
14. First and foremost, Learned counsel for the Respondent has submitted that the Appellant herein impleaded the claim based on fraud, but failed to provide the requisite particulars of fraud. Furthermore, it was contended that the Appellant also failed to tender and adduce plausible evidence to prove the claim founded on fraud.
15. Secondly, Learned counsel for the Respondents submitted that the Appellant sought for adverse possession. However, despite seeking for adverse possession, the Appellant herein also raised and canvassed the claim for fraud.
16. It was the submission by learned counsel for the Respondent that the Appellant herein cannot raise and espouse a claim for adverse possession on one hand; and at the same time contend that same has acquired the same property by way of adverse possession. In this regard, it was posited that the claim for fraud and adverse possession are contradictory and mutually inconsistent.
17. Flowing from the foregoing submissions, Learned counsel for the Respondent has implored the court to find and hold that the Appellant's suit before the lower court was devoid of merits.
18. Moreover, Learned counsel for the Respondent has invited the court to find and hold that the appeal beforehand is equally devoid of merits and thus courts dismissal.

**Issues for Determination:**

19. Having reviewed the pleadings filed herein [Originating Summons] dated 17<sup>th</sup> August 2022; and the Replying affidavit thereto; the evidence tendered before the trial court and upon consideration of the written submissions filed on behalf of the parties, one singular/salutary issue arise and thus merits determination.
20. For coherence, the salutary issue that does arise relates to whether or not the Magistrates' courts and in particular, the Trial Court herein was seized of the requisite jurisdiction to entertain and adjudicate upon the claim based on adverse possession.



## Analysis and Determination:

21. There is no gainsaying that the claim which was mounted by and on behalf of the Appellant touched on and concerned adverse possession. For good measure, the Appellant contended that same had been in occupation and possession of the suit property for more than the requisite duration and thus same [Appellant] was entitled to a declaration of adverse possession.
22. It is common ground that a claim based on adverse possession is premised and underpinned by the provisions of Sections 7, 12, 13 and 17 of the *Limitation of Actions Act* Cap 22 of Laws of Kenya. Pertinently, it is the said provisions of the law that underpin the claim pertaining to adverse possession; and furthermore lays down the requisite ingredients that must be established and proven by a claimant seeking adverse possession.
23. Fast forward, once a claimant is convinced that same [claimant] has met and satisfied the ingredients underpinning a claim for adverse possession, such a claimant, the Appellant herein not excepted, is enjoined to approach the court in accordance with the provisions of Sections 37 and 38 of the Limitations of Actions Act Cap 22 Laws of Kenya; as read together with the provisions of Order 37 of the Civil Procedure Rules 2010.
24. Pertinently, the provisions of Section 38 of the *Limitation of Actions Act* [supra] espouse the court that is vested with the requisite jurisdiction to entertain and adjudicate upon a claim for adverse possession. For good measure, the court that is spoken to and highlighted under the named provisions is the High Court. For good measure, the named provisions of the Law does not reference the Magistrates Court, which have been in existence long before the promulgation of *the Constitution*, 2010.
25. Given the significance of Section 38 of the Limitations of Actions Act [supra] in determining whether or not the magistrates court is seized of jurisdiction, it is imperative to reproduce the said provisions.
26. Same are reproduced as hereunder;
  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.
    - (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.
    - (3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.
    - (4) ) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.
    - (5) The Minister for the time being responsible for Land may make rules for facilitating the registration of titles to land or to easements acquired under this Act. [Underlining supplied]



27. Provisions of Section 38 of the Limitations of Action Act [supra] highlight that the jurisdiction to deal with and adjudicate upon adverse possession is vested in the High court and not otherwise. Nevertheless, there is no gainsaying that the Limitations of Actions Act is a statute that was enacted prior to and before the promulgation of *the Constitution* 2010.
28. Owing to the fact that the Limitations of Actions Act [supra] was enacted prior to the promulgation of *the Constitution*, 2010; it is settled law that the provisions of the said act are to be read with necessary adaptation, alteration and qualifications so as to enable same to comply with and or accord by the terms of *the Constitution* 2010. [see Section 7 of the 6<sup>th</sup> Schedule of *the Constitution* 2010].
29. Moreover, it is important to underscore that even though the High court was hitherto vested with the powers and mandates to entertain and adjudicate claims touching on ownership of; title to and use of land, the said mandate was taken away from the High court and vested in the Environment and Land court. [see Article 162 [2] [b] *the Constitution* 2010.]
30. Arising from the provisions of Article 162 [2][b] of *the Constitution*, it is common ground that the corresponding institution that took over the jurisdiction/mandate of the High court is the Environment and Land court. In this regard, the provisions of Section 38 of the *Limitation of Actions Act*; and in particular the aspect referencing the High court must be deemed to be referencing the Environment and Land court. Instructively, section 38 [supra] must be read alongside section 7 of the 6<sup>th</sup> schedule of *the constitution*.
31. Additionally, I beg to state and underscore that section 38 of the *Limitation of Actions Act* [supra] did not and does not vest and or confer the jurisdiction to entertain and adjudicate upon claims based on adverse possession upon the Chief Magistrates' courts or at all. Moreover, it is not lost on this court that neither the *Environment and Land court act* nor the Magistrates Court Act 2015; amended or repealed the provisions of Section 38 of the Limitations of Actions Act [supra].
32. On the other hand, it is also imperative to underscore that the primary law that underpins the claim for adverse possession is the limitations act. In addition, the same act is the one that highlights and speaks to the court vested with and seized of the requisite jurisdiction.
33. In the circumstances, there is no gainsaying that the Magistrates court[s], including the trial court herein; was not seized and or possessed of the requisite jurisdiction to entertain and or adjudicate upon the claim for adverse possession. In this regard, it suffices to posit that the claim that was mounted by and on behalf of the Appellant was indeed mounted before a court without jurisdiction.
34. Moreover, it is apposite to state and highlight that the question as to whether or not the Magistrates courts have jurisdiction to entertain or adjudicate upon a claim for adverse possession had been addressed by the Court of Appeal.
35. In the case of *Sugawara v Kiruti* (Sued in her Capacity as the Administratrix of the Estate of Mutarakwa Kiruti Lepaso alias Mutaragwa Kiruti Lepaso alias Mutaragwa Kiroti Leposo and in her own Capacity) & 3 others (Civil Appeal E141 of 2022) [2024] KECA 1417 (KLR) (11 October 2024) (Judgment), the Court of Appeal held thus;

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.

36. Moreover, this court [while sitting at Milimani-Nairobi] had also addressed the question of the jurisdiction of the Magistrates court as pertains to adverse possession in the case of *Njoki Wainaina vs Josephat Thuo Githachuri & 3 others; National Land Commission & another (Interested Parties)* [2021] Eklr; and wherein this Court observed thus:

“the magistrate's court, are not seized with jurisdiction to adjudicate upon claims founded on adverse possession on the face of the explicit provisions contained in Sections 37 & 38 of the *Limitation of Actions Act*.”

37. Flowing from the foregoing decisions, there is no gainsaying that the Chief Magistrates court [read, the Subordinate Courts] including the trial court whose decision underpins the instant appeal, is not vested with jurisdiction to address and adjudicate upon the issues pertaining to adverse possession.

38. In short, the proceedings beforehand and the resultant judgment were rendered by a court devoid and divested of jurisdiction under the law.

39. The next question that does arise is the legal implication[s] of proceedings undertaken by a court without jurisdiction. Instructively, any proceedings undertaken by a court without jurisdiction and any resultant decision arising therefrom, are a nullity ab initio.

40. To this end, it suffices to reference the decision in the case of *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR ; where the Court of Appeal stated thus;

1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?

2. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae. It is for this reason that this Court has to deal with this appeal first as the result directly impacts Civil Appeal No.6 of 2018 which



is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context.

41. In a nutshell, it is common ground that the entire proceedings that were conducted before the trial court and consequential judgment arising therefrom are void.

### **Final Disposition**

42. Flowing from the analysis [details highlighted in the body of the judgment], it must have become apparent that the appeal beforehand arises out of void proceedings. In this regard, there is no gainsaying that what is void is void and thus incapable of conferring/vesting any legal rights or at all. [See the dictum in the celebrated case of Mcfoy versus United Africa Limited [1952] ALL ER 1159, per Denning MR]
43. In the circumstances, the final orders that commend themselves to the court are as hereunder;
- i. The Appeal herein be and is hereby struck out.
  - ii. The Proceedings and the resultant Judgment rendered on the 11<sup>th</sup> September 2023 be and are hereby declared a nullity ab initio.
  - iii. Each Party shall bear their own costs of the appeal.
  - iv. The Order of costs awarded to the respondents herein by the lower court be and is hereby quashed.
  - v. Each Party shall bear own costs of the proceedings before the magistrates' court [trial court].
44. It is so ordered.

**DATED, SIGNED AND DELIVERED ON THE 5<sup>TH</sup> DAY OF FEBRUARY 2025**

**OGUTTU MBOYA,**

**JUDGE.**

In the presence of:

Mutuma – Court Assistant.

Mr. Elijah Ogot for the Appellant.

Mr. Mwiti Joshua for the Respondent.

