



Mwirigi v Murang'a County Government & another (Environment and Land Appeal E028 of 2023) [2025] KEELC 3563 (KLR) (5 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3563 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E028 OF 2023**

MN GICHERU, J

MAY 5, 2025

BETWEEN

MARY MWIRIGI APPELLANT

AND

MURANG'A COUNTY GOVERNMENT 1ST RESPONDENT

ESTHER WAITHIRA FRANCIS 2ND RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment of the learned Senior Resident Magistrate Murang'a dated 16-11-2023 in ELC Case No. 187 of 2019. In the Judgment the Court found in favour of the 1st Respondent who was the Plaintiff.

The final orders of the Court were as follows.

- a. An order be and is hereby issued declaring the Plaintiff as the lawful and bonafide allottee of the parcel of Land known as L.R. 11674/1/3 situated within Makuyu town.
- b. An order be and is hereby issued declaring the allotment of the said plot to the 1st Defendant as null and void.
- c. An order be and is hereby issued compelling the 2nd Defendant to issue the Plaintiff with a lease over the suit parcel in the terms set forth in the letter of allotment dated 8-10-1990.
- d. A permanent injunction be and is hereby issued restraining the 1st Defendant whether by herself, employees, servants and/or agents and/or any persons claiming by or under her, from entering upon, surveying alienating, disposing of or howsoever dealing with the suit parcel.
- e. The Plaintiff is further awarded Kshs. 300,000/= as general damages for trespass and loss of user.



- f. Plaintiff is also awarded the costs of this suit and interest therein until payment in full.
2. Dissatisfied with the decision of the lower Court, the Appellant who was the 1st Defendant filed a memorandum of appeal dated 13-12-2023 in which she raises nine(9) grounds of appeal.

The ground of appeal are as follows.

The learned trial magistrate erred in law and in fact in-

- i. failing to set out issues raised in the pleadings and analyse each of them in her judgment in relation to the documentary evidence tendered,
 - ii. failing to appreciate that the Plaintiff's case was filed 12 years from the time the cause of action took place,
 - iii. failing to analyse all the issues raised by the Appellant in her pleadings, evidence and submissions,
 - iv. relying on irrelevant and unsupported allegations proffered by the 1st Respondent,
 - v. misconstruing the law on adverse possession,
 - vi. holding that the 1st Respondent had proved her case to the required standard,
 - vii. making an award of damages to the 1st Respondent against the weight of evidence adduced by the Appellant,
 - viii. failing to award the suit parcel to the Appellant and
 - ix. failing to rely on evidence on record and dismiss the 1st Respondent's case for lack of merit and being contrary to the law.
3. The brief facts of the case according to the 1st Respondent are as follows. In the year 1990, she was allocated Plot No. L.R. 11674/1/3, suit land, by Murang'a District Plots allocation committee. She paid survey fees and plot rent for the years 1990-2000. In the year 2001 when she went to pay plot rent, she found that her plot had been unlawfully allocated to the Appellant. She reported the dispute to the then Town Clerk David Ng'ang'a who was unable to resolve the dispute for a long time. In the year 2006, the 1st Respondent's visited the 2nd Respondent's offices for payment of plot rent but the dispute was still unresolved. The plots file showed that the suit plot had been allocated to the Appellant. Eventually, the town clerk failed to resolve the dispute after the Appellant failed to attend a meeting called by the Town clerk. Only the 1st Respondent attended. Eventually, she was advised to file a suit in Court to have the dispute resolved. She filed this case in March 2009. The case was eventually decided in her favour vide the judgment now under challenge.
4. The facts of the case according to the Appellant are as follows. On 11-4-1997 she was allocated the suit land. She was issued with a letter of allotment dated 19-6-1997. She paid the requisite charges to the commissioner of Lands. After sometime, her file went missing and she was unable to pay the charges. She found that some of her colleagues had colluded with the 1st Respondent to take the suit land from her. She is the one who has been utilizing the suit plot and the 1st Respondent is not the lawful owner.



5. The 2nd Respondent was totally non-committal in this dispute merely stating in their statement of defence dated 3-10-2013 as follows.

“The 2nd Defendant contends that if either of the parties claiming the subject plot has genuine allocation documents, it (the 2nd Defendant) shall proceed to allocate the said party the said plot.”

6. In her judgment of 16-11-2023 the trial magistrate made the following specific findings.

Page 11, 2nd line

“...This is contradictory with her above statement for how then did she take possession of the unsurveyed suit plot in 1996 and from 1990-2000 when she worked for Makuyu urban council, no such survey was ever carried out?

Further contradiction was in her next statement when she said the land was surveyed from 1994 and completed in 1997 and it was not by PW 5. Next contradiction was in the last paragraph of her evidence... She never produced her said application or proof that she ever applied to be allocated any plot...”

Page 12, line 11

“This therefore contradicts her earlier evidence by stating that she took possession of the suit plot in 1996 after the same was allocated to her by Makuyu urban council. How can the latter allocate her land before it came into existence?”

Page 12 last paragraph.

“She was to accept the terms within 30 days which she did but then immediately recanted her evidence by stating that she paid the money on 21-9-1999 for she was sick...she had no beacon certificate and she knew nothing about the PDP. She also admitted that by 1990, Murang’a County Council was giving out land.”

At page 15, 2nd paragraph, the learned trial magistrate found that once land has been allocated, the same cannot be reallocated unless the 1st allocation is validly and lawfully cancelled.

At page 17, line 10

“I found that the Plaintiff’s letter of allotment being not only a proper allotment but also a superior allotment to that of the 1st Defendant supersedes all other subsequent allotments. I further hold that the Makuyu Urban Council’s action of re-allocating a formerly allocated parcel of land to another is both unlawful and unjustifiable.”

7. In their written submissions dated 22-10-2024 and 12-11-2024 respectively, learned counsel for the parties did not identify any issues for determination. They treated the nine(9) grounds of appeal as the issues for determination.



8. I have carefully considered the appeal in its entirety including the grounds, the record of appeal, the submissions by learned counsel for the parties and the law cited in the submissions.

“This being a first appeal, this Court must reconsider the evidence of the lower Court, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

See *Selle Vs. Associated Motor Boat Company Ltd* and another 1968 EA 123. I have borne in mind the above principles and I find as follows on the nine grounds of appeal.

9. On the 1st ground of appeal, I agree with the Appellant’s Counsel that the trial magistrate did not identify the issues for determination. This contravenes Order 21 rule 4 of the Civil Procedure Rules which provides as follows.

“Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision.”

Rule 5.

“In suits in which issues have been framed, the Court shall state its finding or decision, with reasons therefor, upon each separate issue.”

The Appellant’s counsel in his submissions dated 12-10023 had identified three issues for determination as follows.

- a. Who is the rightful and legitimate allottee of the suit property?
- b. Is the Plaintiff’s suit time barred?
- c. What orders would be made regarding costs?

Looking at the judgment by the trial magistrate, we find that she made a finding on issues (a) and (c) above but no finding on the issue (b). Looking at the pleadings one finds that there was nothing therein concerning limitation. It is nowhere in the defence or the witness statement. It is something that came up abruptly in the submissions. It was not proper to raise the issue in submissions. Again, for a person to be declared to be entitled to land through the doctrine of adverse possession, one has to bring a suit by way of originating summons under Order 37 of the Civil Procedure Rules to the High Court. This is by dint of Section 38 of the *Limitation of Actions Act* that vests such jurisdiction in the High Court and not in the magistrate’s Court. See *Pauline Chemuge Sugawara vs. Nairuko Ene Mutarakwa Kirubi*: Civil Appeal No. E141 of 2022 which confirmed the exclusive jurisdiction of the High Court in cases of adverse possession.

Finally on this issue, the question of which party is in possession and when they took possession was not well canvassed by way of evidence. The parties were pre-occupied with proving the superiority of their documents over those of their opponent.

It is therefore immaterial that the trial magistrate did not make a finding on the second issue of time bar. This finding covers the second, third, fourth and fifth issues.

10. Regarding the sixth issue, I find that the learned trial magistrate did not err. In her judgment, the learned magistrate said why she found for the 1st Respondent. She found that the 1st Respondent having been allocated the land in 1990, the same land was not available for allocation to the Appellant. The



trial magistrate was spot on in this finding. The case of Benja Properties Ltd vs. Syedana Mohamed and Others (2015) eKLR is good authority for this proposition.

The suit land having been allocated to the 1st Respondent lawfully, it could only be taken away from her through a lawful process whereby she was told officially why she had to lose her land. This did not happen in the 1st Respondent's case. She adduced sufficient evidence to prove lawful allocation, payment of rates and absence of a lawful and open process that took away her land.

This finding covers the 8th and 9th grounds of Appeal.

11. As for the 7th ground, I find that the learned trial magistrate erred in awarding damages of Kshs. 300,000/= to the 1st Respondent. In her evidence the 1st Respondent did not testify on what she would have done with the land had the Appellant not obtained parallel registration documents. She said nothing at all in her evidence about the opportunity cost of the dispute with the Appellant and the second Respondent. The trial magistrate also failed to penalize the 2nd Respondent for playing a key role in fomenting the dispute by issuing the Appellant with an unlawful letter of allotment when the land was already allocated to the 1st Respondent. They compounded the problem further by failing to force the Appellant to attend their meetings to resolve the dispute. When she failed to attend, they should have upheld the allocation to the 1st Respondent so that she did not have to go to Court. The 2nd Respondent is to blame for this impasse that has lasted close to twenty years.

I find the award of Kshs 300,000/= to the 1st Respondent not supported by evidence.

12. Finally on costs, I find that they should be borne by the 2nd Respondent for fueling the dispute and for failure to resolve it at the earliest possible opportunity.

In conclusion and for the reasons already given, I dismiss the Appellant's appeal in regard to the decision of the Judgment of the learned trial magistrate in orders (a), (b), (c) and (d) of the judgment dated 16-11-2023.

I partially allow the appeal in terms of orders (d) and (e) where I order as follows.

Order (e) of the judgment dated 16-11-2023 is set aside.

As for Order (f) all the costs of the Appellant and the 1st Respondent in this Court and in the lower Court will be borne by the 2nd Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 5TH DAY OF MAY, 2025.

M.N. GICHERU

JUDGE.

Delivered online in the presence of; -

Court Assistant – Mwangi Njonjo

Applicant's counsel – Mr Kitheka

1st Respondent's counsel – Miss Lanoi holding brief

2nd Respondent's counsel – Mr Jese Kariuki

