



**Malela v Otieno (Suing as a Representative of the Estate of Charles Otieno Oyore - Deceased) (Environment and Land Appeal E036 of 2024) [2025] KEELC 4228 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4228 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E036 OF 2024**

**FO NYAGAKA, J**

**JUNE 5, 2025**

**BETWEEN**

**SAMUEL OKOYO MALELA ..... APPELLANT**

**AND**

**AGNES ATIENO OTIENO (SUING AS A REPRESENTATIVE OF THE ESTATE OF CHARLES OTIENO OYORE - DECEASED) ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Principal Magistrate, Homa Bay in ELC Case No. E007 of 2022 delivered on 11th day of July 2024)*

**JUDGMENT**

1. The Respondent commenced suit in the Trial Court as a Plaintiff vide a Plaint dated 02/02/2022. He sought the following reliefs:
  1. An order of permanent injunction restraining the Defendant, his agents, servants and/or employees from trespassing, occupying, owning and/or making use and enjoyment thereof any part of the share of the suit land belonging to the Plaintiff and/or disposing in any way whatsoever dealing with land parcel number GEM/KANYAJUA/561, until determination of this suit.
  2. An order thereby compelling the Defendant to execute transfer of the 1.5 acres of land parcel GEM/KANYAJUA/561 in favour of the Plaintiff.
  3. In the Alternative, a declaration that the title of the said Samuel Okoyo Malela to the proprietary interest in land has been extinguished by the Plaintiffs adverse possession thereof for a period of more than 12 years.



4. A declaration that the Plaintiff has acquired the proprietary interest in Land Parcel number GEM/KANYAJUA/561 by her adverse possession thereof for a period of more than 12 years, from at least 1998 to date.
  5. An order requiring and directing the Land Registrar Homa-Bay to register the Plaintiff in the place of Samuel Okoyo Malela and in the place of any other person succeeding the Defendant.
  6. Costs of this suit and interest thereon as from the date of filing the suit until payment in full.
  7. Any other relief the Honourable Court deems just and expedient to grant.
2. Upon service of Summons to Enter Appearance and lapse of the stipulated time, Respondent made an application for default Judgement dated 05/04/2022 on the basis that the Appellant had failed to enter appearance or file a defence. This Court notes at this point though that the request for and entry of judgment in default of appearance and defence were irregular, in terms of Order 10 Rules 9 and 10 of the Civil Procedure Rules, and the trial Court was right in holding so while refusing to enter interlocutory judgment because the claim was non-pecuniary. The suit proceeded to hearing by way of formal proof and, consequently, the trial court entered judgement in terms of prayer 1, 2, 5 and 6 of the Plaint in favor of the Plaintiff vide the default Judgement delivered on 23/09/2022.
  3. The Appellant filed an Application dated 04/07/2023 seeking stay of execution and setting aside of the ex parte judgement. Additionally, she filed a Draft Statement of Defence. The Application as opposed vide a replying affidavit dated 26/09/2023. Upon considering the Application on its merits, the trial court set aside the ex parte judgement and the matter proceeded for hearing.
  4. The matter proceeded for inter partes hearing and upon considering the evidence of the parties, the trial magistrate on 11/07/2024 entered judgement in favor of the Respondent in terms of prayer 1, 2, 3 and 6 of the Plaint.
  5. Aggrieved with the Judgement, the Defendant filed this appeal vide the Memorandum of Appeal dated 11<sup>th</sup> February 2024 premised on the following grounds;
    1. The Honourable Magistrate erred in law in deciding the case against the weight of evidence and the law.
    2. The Honourable Magistrate erred in fact and law in deciding the existence of a valid sale in spite of the absence of a sale agreement as contemplated under Section 3 (5) of the Law of Contracts Act.
    3. The Honourable Court erred in fact and law in deciding ownership of the suit land without any documentary evidence in proof thereof.
    4. The Learned Trial Magistrate failed to apply judicially and to adequately evaluate the facts and submissions on record and thereby arrived at a judgement unsustainable in law.

### **Hearing of the Appeal**

6. The Appeal was heard on the basis of the parties' respective submissions. The Appellant filed his submissions dated 26/02/2025. He argued that the law specifically bars the institution of suits for the recovery of land based on contractual terms if the same is not in writing. He cited the provisions of Section 3 of the *Law of Contract Act* in this regard. The Appellant submitted that the trial court placed reliance on Section 65 of the *Evidence Act* and expressed doubt as to whether the Court referred to Section 68(1) (c) of the *Evidence Act*. Further, that even if that were the position, there were different accounts as to the alleged contract itself and the terms therein.



7. The Appellant cited the Indian case of Rakesh Mohindra vs Anita Beri & Others Supreme Court of India Appeal No. 13361 of 2015 on the issue of secondary evidence and raised questions about the Plaintiff's witness statement. He pointed out that the Plaintiffs never produced a police report indicating the loss of the sale agreement and argued that all these inconsistencies tip the evidentiary scale in favor of the Defendant.
8. On the evidence of the existence of the subject matter, the Appellant argued that no title deed was ever produced and no search or Green Card was ever produced. He cited Section 107 (1) of the Evidence Act and submitted that the burden of proof does not shift.
9. On the issue of adverse possession, the Appellant submitted that the Court of Appeal has pronounced itself over the same, pointing out that the trial court did not have the jurisdiction to pronounce itself over the same and even if it did, it never canvassed this particular ground and the same could not be awarded in the clear absence of a certified copy of the register. He relied on the case of Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184 and additionally cited the provisions of Section 25(1) of the Land Registration Act states. Further, the Appellant submitted that the law of evidence is to the effect, simply put, that he who alleges must prove, of course with a few certain exceptions.
10. The Appellant prayed the court allow the appeal and reverse the judgement of the trial court and award him costs.
11. The Respondent, on her part, filed submissions dated 26/03/2024. She submitted that in the trial court, the Appellant confirmed that he owned the suit land property and that she, the Respondent, was residing on his land besides having buried her husband on the said parcel of land. Further, that in denying that he ever sold land to the Respondent, the Appellant was cognitive of the fact that as of the year 2003, the Respondent had been staying on his land and cultivating the same.
12. The Respondent further submitted that PW2, who was the Area Chief testified that the Appellant showed her his parcel of land, being the suit parcel of land and she found the home of the Respondent established on a portion of the said land. Additionally, that PW3, the Appellant's brother testified to the existence of the agreement and the settlement of the Respondent on the parcel, being the person who introduced them to one another for the sale to take place.
13. The Respondent urged that she in possession of the Appellants documents which they could not have ordinarily obtained without the Appellant consent. In addition, she submitted that the Defendant never denied issuing the said documents nor questioned how the Respondent came into possession of the said documents, thereby implying that he admittedly submitted the same to the Respondent willingly.
14. The Respondent further submitted that the lack of an agreement written in accordance with Section 3 of the Act, did not invalidate the fact that the Respondent and her late husband initially entered into the land with the permission of the Appellant, but having not gone to the Land Board after the required period under Section 6 (1) of the Land Control Act, the agreement became void and the Respondent began staying on the land adversely to the interest of the owner of the land. The Respondent urged the court to uphold the decision of the trial magistrate and dismiss the appeal with costs.

### **Analysis & Determination**

15. The role of this Court being a first appellate one is well settled and spelt out in many a decision. The findings in the longstanding case of Okemo -vs- Republic (1977) EALR 32 as well as that of Mark Oiruri Mose -vs- R (2013) eKLR are to the effect that such a court is duty bound to re-visit the



evidence tendered before the trial court, re-evaluate and re-analyse it and come to its own independent conclusions.

16. From the Plaint which instituted the suit in the trial court, it is clear that the Respondent sought orders for adverse possession. These were clearly articulated in reliefs No. 3 and 4 while others basically depended on the success of the two. Put differently, the predominant issue was a claim for adverse possession because the other reliefs were an injunction against the Defendant, his agents and or servants while the others were that the defendant does execute transfer documents for the 1.5 acres sought in favour of the claimant and an order for the land registrar of Homa Bay to register the Plaintiff in place of Samuel Okoyo Malela or any other person succeeding him and costs of the suit.
17. While the grounds of appeal did not refer to it, this Court opines that the success or otherwise of the Appeal herein revolves around the jurisdiction of the trial Court to determine the claim. This is because irrespective of how good the judgment and finding of the trial court was in terms of analysis and application of the evidence adduced before it, if it did not have jurisdiction, it could not arrogate itself the same or assume it to exist and make a finding on the matter. This is because the jurisdiction of a court is everything in so far as the issue before it goes. A court must first satisfy itself that indeed it has jurisdiction before embarking on determining an issue before it. Absent of it the court must down its tools forthwith.
18. The jurisdiction to handle adverse possession claims emanates from the provisions of sections 37 and 38 of the *Limitation of Actions Act* where it is specifically provided that such claims are to be heard by the “High Court”. With the establishment of the Environment and Land Court under Article 162(2) (b) of *the Constitution* to handle land matters in stead of the High Court, this Court being of equal status as the High Court was clothed with the jurisdiction referred to in the provision.
19. Section 38 of the *Limitation of Actions Act* provides:
  - “(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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) ...
  - (3) ...”
20. The learned justices in the Court of Appeal case of Pauline Chemuge Sugawara vs Nairuko Ene Mutarakwa Kirut (2024) KECA 1417 (KLR), expressed themselves as follows;

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.

21. The reasoning behind this determination was aptly explained by the court as follows;

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.

(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) ...”

22. In *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,

“46. In other words, reference is to the “High Court” as the court to which such cases are heard, and given the dictates of *the Constitution* set out above, this should be construed to mean the “Environment and Land Court”, as being the court donated with jurisdiction to hear and determine matters pertaining to adverse possession of land. The effect of this interpretation is that, it is only the Environment and Land Court established under article 162(2)(b) that is mandated to hear these cases. So that, notwithstanding the expansion of the jurisdiction of environment and land usage to Magistrates Courts, it is distinctive that under section 9(a) of the Magistrates Courts Act, various matters are specified for determination, but claims for adverse possession are not included.

47. In the case of *Republic v Karisa Chengo & 2 others [2017] eKLR* this Court held that: “A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

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.”

23. I cannot agree the more with the Court of Appeal. For long, there has been a false assumption in the legal filed in this country that the misinterpretation of the law regarding the jurisdiction of the magistrate courts to determine adverse possession claims means that the courts had jurisdiction hence the law changed with the finding of the Court of Appeal above. Far from the truth: the magistrates courts have never had such jurisdiction.

24. In the premises, the Appellant’s bid to challenge the trial court’s finding is merited though through the finding of this Court about the jurisdiction of the trial Court. Thus, the trial court had no jurisdiction to determine the suit at any point in time.



25. The upshot is that the Appeal succeeds in its entirety. The finding of the trial Court as made on 11<sup>th</sup> July 2024 and the subsequent decree thereto are set aside. They are substituted with an order to the effect that the entire suit is hereby struck out for want of jurisdiction.
26. Each party shall bear its own costs of the suit at the trial but the appellant will have the costs of this appeal.
27. Orders Accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 5<sup>TH</sup> DAY OF JUNE, 2025.**

**HON. DR. IUR NYAGAKA**

**JUDGE.**

In the presence of,

1. Ms. Ochieng for Appellant-Present.
2. No appearance for respondent.

