



**Maenya [Suing as a Personal Representative to the Estate of Maenya
Onsabwa - Deceased) v Oirere & 2 others (Environment and Land Appeal
E007 of 2023) [2025] KEELC 4128 (KLR) (21 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4128 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E007 OF 2023**

M SILA, J

MAY 21, 2025

BETWEEN

**DAVID NDEGE MAENYA [SUING AS A PERSONAL REPRESENTATIVE TO
THE ESTATE OF MAENYA ONSABWA - DECEASED) APPELLANT**

AND

MARK OIRERE 1ST RESPONDENT

ALICE KEMUMA JOSEPH 2ND RESPONDENT

ELMELDA NYANG'AI 3RD RESPONDENT

*(Being an appeal against the judgment of Hon. C. Ocharo, Senior Principal Magistrate,
delivered on 10 February 2023 in the case Kisii CMCC/ELC No. 90 of 2019)*

JUDGMENT

(Suit commenced in the superior Environment and Land Court with appellant seeking orders to evict the respondents and a 1st defendant from the suit land; counterclaim on adverse possession raised; trial Judge transferring the case to the Magistrates' Court for hearing; Magistrate proceeding to hear the case and entering judgment dismissing both suit and counterclaim; on appeal, apparent that the case was transferred by the trial judge to a court without jurisdiction; error and/or mistake apparent on the face of record for the trial judge to have transferred the case to the Magistrates' Court; Court of Appeal having held that Magistrates' Courts do not have jurisdiction to hear a dispute of adverse possession; order transferring the case to the Magistrates' Court set aside; proceedings and judgment of the trial court declared null and void and set aside; case before the superior Environment and Land Court to proceed from where it had reached; no orders as to costs)



1. This suit was actually commenced in the superior Environment and Land Court vide a plaint filed on 13 July 2017 by the appellant. The appellant filed the suit on behalf of the estate of his late father, one Maenya Onsabwa (deceased). That suit was registered as Kisii ELC No. 145 of 2017. In the plaint he sued Kemunto Clement, Mark Oirere, Alice Kemuma Joseph, and Elmelda Nyang'ai as the 1st – 4th defendants respectively. He pleaded that the land parcel Majoge/Bosoti/906, measuring 1.8 Ha (the suit land), was registered in name of the deceased and contended that the defendants had trespassed into it. In his plaint, he wished to have orders of eviction and permanent injunction against the defendants.
2. The defendants entered appearance and filed a joint statement of defence and counterclaim. In their defence, they averred that the suit land had been leased to the deceased, and due to an error at the time of adjudication, the suit land got registered in name of the deceased. They pleaded that the 1st defendant and her late husband had occupied the land since 1969. They pleaded that the 2nd defendant (now 1st respondent in this appeal) was their son, and in occupation of the suit land. The 3rd and 4th defendants (the 2nd and 3rd respondent in this appeal) were described as wives of two deceased sons of the 1st defendant and it was said that they were buried in the suit land. In the counterclaim they sought to have title to the suit land through adverse possession, and they asked for orders to have the suit land transferred to the 1st defendant. The 1st defendant died in the course of trial but she was not substituted. That is why she is not named as a respondent in this appeal.
3. On 1 July 2019, Mutungi J, who was handling the suit, ordered it transferred to the Magistrates' Court at Kisii, believing that the Magistrates' Court had jurisdiction to hear the suit. The suit was duly transferred to the Chief Magistrates' Court at Kisii, and registered as Kisii CMCC/ELC No. 90 of 2019. The suit was heard, culminating in the impugned judgment that was delivered on 10 February 2023. In her judgment the trial Magistrate found no evidence that the registration of the suit land in the name of the deceased father of the appellant was erroneous. On the counterclaim, she found that the appellants and the deceased 1st defendant had been on the land, at worst from the year 2001, and therefore they had been in peaceful possession for over 12 years. In her judgment she found that the defendants are entitled to the suit land by virtue of adverse possession but she did not enter judgment in their favour and declined to make the order to transfer the land to the 1st defendant as they had sought in their counterclaim. She reasoned that she could not give the order since the 1st defendant was dead and there was no amendment to reflect the change in circumstances. She was further of opinion that the appellant could not be in a position to transfer the suit land because succession had not been done. In her view, the orders sought by the respondents were therefore incapable of being granted. Flowing from the above discourse, she was of the opinion that both the suit and the counterclaim must fail and she dismissed them both with an order for each party to bear their own costs.
4. It is this judgment that has provoked this appeal. The appellant inter alia urges that the trial Magistrate erred in failing to appreciate that the respondents were trespassers and therefore the appellant's rights had been violated. In this appeal, the appellant seeks that the judgment be set aside and the appellant's suit be allowed.
5. The appeal was argued by way of written submissions, but for reasons that will shortly be seen, it will be improper for me to delve into the substantive merits or demerits of the case of the parties. This is because there was a claim for adverse possession and the question arises whether the Magistrates' Court had jurisdiction to determine such dispute.
6. I see that in his submissions, Mr. Nyambati, learned counsel for the appellant, made submissions to the effect that the Magistrates' Court did not have jurisdiction to hear the claim for adverse possession and cited the fairly 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. What Mr. Nyambati did not do was to go further and give his opinion on what the court should do in the circumstances of this case. What he also did not say was that the case was transferred from the Environment and Land Court to the Magistrates' Court upon his request.

7. On his part, Mr. Omwoyo, learned counsel for the respondents, urged that the Magistrates' Court had jurisdiction to hear the dispute over adverse possession and cited the decision of Ohungo J, in the case of Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & another ([2020] Eklr where the good judge held that a case of adverse possession could be tried in the Magistrates' Court.
8. I would think that in light of the decision of the Court of Appeal in Pauline Chemuge Sugawara vs Nairuko Ene Mutarakwa Kiruti & 3 Others, it cannot be argued that the decision of Ohungo J, is tenable. Indeed, the Court of Appeal did analyse the opinion of Ohungo J, in Patrick Ndegwa Munyua vs Benjamin Kiiru Mwangi & Another, and was of the view that the Magistrates' Court had no jurisdiction to handle disputes of adverse possession. In the said case of Pauline Chemuge Sugawara vs Nairuko Ene Mutarakwa Kiruti & 3 Others, the Court of Appeal 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.
9. From the above, it will be seen that the Court of Appeal has now made a determination that Magistrates' Courts do not have jurisdiction to hear cases related to adverse possession. The Court of Appeal is superior to this Court and this Court is bound by its decisions. It follows that the case was heard by a court that was devoid of jurisdiction.
10. However, it will be recalled that the case was filed before the superior Environment and Land Court, which had jurisdiction to hear the case. In essence the parties presented their case for determination before a court of competent jurisdiction. The transfer of the suit to the Magistrates' Court was made by an order of the Judge who was handing the matter as he was of the view that the case could be heard by the Magistrates' Court. It now turns out that the good judge transferred the case to a court that had no jurisdiction and therefore it must be declared that this was an error and/or mistake apparent on the face



of the record. It also means that the entire proceedings before the Magistrates' Court and the judgment of the Magistrates' Court are null and void ab initio. Those proceedings and the judgment must be set aside for the reason that the same were conducted before a court that was devoid of jurisdiction.

11. What also needs to happen is for the parties to be taken back to the position before the transfer of the suit to the Magistrates' Court. In other words, the suit Kisii ELC No. 145 of 2017 is reinstated and it will proceed for hearing on merits.
12. In essence, I order as follows :
 - i. That the order made on 1 July 2018 transferring the suit Kisii ELC No. 145 of 2017 to the Magistrates' Court for hearing is hereby reviewed and set aside.
 - ii. That the proceedings and judgment of the Chief Magistrates' Court Kisii, in the suit Kisii CMCC No. 90 of 2019 are declared null and void and the same are hereby set aside.
 - iii. That the suit Kisii ELC No. 145 of 2017 is reinstated and the same to proceed from where it had reached before the order of 1 July 2018 transferring the suit to the Chief Magistrates' Court, Kisii.
 - iv. There will be no orders as to the costs of this appeal.
13. Judgment and orders accordingly.

DATED AND DELIVERED THIS 21 DAY OF MAY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Nyambati for the appellant

Mr. Omwoyo for the respondent

Court Assistant – Michael Oyuko

