



**Nyaga & another v Mugambi (Environment and Land Appeal
E014 of 2024) [2025] KEELC 4069 (KLR) (19 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4069 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E014 OF 2024**

**BM EBOSO, J
MAY 19, 2025**

BETWEEN

REGINA GATERIA NYAGA 1ST APPELLANT

FRANCIS KINOTI MUTEGI 2ND APPELLANT

AND

ANNESTINE KANYUA MUGAMBI RESPONDENT

*(Being an Appeal arising from the Judgment of Hon Mbayaki Wafula, Principal
Magistrate, delivered on 22/8/2024 in Marimanti SPMC E&L Case No 5 of 2023)*

JUDGMENT

Introduction

1. This appeal challenges the Judgment of the Principal Magistrate Court at Marimanti (Hon Mbayaki Wafula, PM) rendered on 22/8/2024 in Marimanti PMC Environment & Land Case No E005 of 2023. The two appellants in this appeal were the defendants in the trial court. The respondent was the plaintiff. The three key questions that arose for determination in the trial court were:
 - (i) Whether the Principal Magistrate Court had jurisdiction to entertain the defence and counter claim of adverse possession which the appellants pleaded and canvassed;
 - (ii) Whether the appellants had acquired title to the suit land through the doctrine of adverse possession; and
 - (iii) Whether the appellants were trespassers on the suit land. Based on the grounds of appeal, the pleadings in the trial court and the submissions that were tendered in this first appeal, these are the key issues that fall for determination in the appeal. I will outline a brief background to the appeal before I dispose the issues.



Background

2. Vide a plaint dated 9/3/2023, the respondent sued the appellants in the trial court seeking:
 - (i) a declaration that the suit land was “not available for allocation and alienation” (sic) by the appellants or their agents;
 - (ii) a declaration that the appellants had no legal right to trespass into the suit land;
 - (iii) a permanent injunction restraining the 2nd appellant and his agents/servants against trespassing, digging, entering or constructing on the suit land or interfering with the suit land;
 - (iv) general damages; and costs of the suit and interest.
3. The case of the respondent was that the suit land initially belonged to her late husband, the late Gachiuru Mugambi, who died on 15/12/2020. Vide an amended certificate of confirmation of grant issued in Marimanti CMC Succession Cause Number 27 of 2020, the suit land devolved to her and was subsequently registered in her name through transmission. It was her case that the appellants illegally occupied the land and had continued to trespass on it. She contended that the appellants had refused to vacate the suit land despite her reporting the matter to the Area Chief, adding that the appellants were putting up houses on the suit land.
4. Upon being served with suit papers, the appellants filed a defence and counterclaim dated 20/4/2023, in which they admitted that the suit land was previously registered in the name of the late Gachiuru Mugambi, adding that the 1st appellant had occupied the suit land as an adverse possessor for 38 years while the 2nd appellant had occupied the suit land as an adverse possessor for 28 years. They contended that the title which the respondent was waving had been extinguished through their adverse possession of the suit land. They contested the respondent’s contention that they were trespassers on the land at the time the suit was filed, contending that they had a crystalized overriding interest in the suit land under the doctrine of adverse possession.
5. By way of counter claim, the appellants prayed for the following reliefs from the Magistrate Court:
 - (i) a declaration that they were in the process of acquiring the suit land under the *Limitation of Actions Act* and as such they were not trespassers;
 - (ii) an injunction restraining the respondent and her agents/servants against evicting them from the suit land; and
 - (iii) costs of the suit and interest.
6. Upon receiving evidence and submissions from the parties, the trial court rendered the impugned Judgment in which it found that the appellants “had not yet approached the High Court or any other court clothed with the requisite jurisdiction to crystalize their adverse claim to extinguish the absolute proprietary rights” of the respondent in the suit land. The trial court rendered itself thus

“Without a vesting order from the High Court, the counterclaimants cannot enjoy an adverse title superior to that of Anestine Kanyua Mugambi.”
7. The trial court made the following further verbatim findings

“Because a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because



it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court. Therefore, the plaintiff's claim prevails over the counterclaimants' claim of adverse possession. A declaration does hereby issue that the subject land matter LR No Tharaka/Chiakariga "A"/1317 measuring 0.84 ha or thereabout belongs to the plaintiff and the same is not available for allocation and alienation by the defendants and their agents."

8. Ultimately, the trial court allowed the respondent's claim and dismissed the appellants' defence and counterclaim. The trial court awarded the respondents costs of the suit.

Appeal

9. Aggrieved by the judgment and decree of the trial court, the appellants brought this appeal, advancing the following five (5) grounds:
1. The learned trial magistrate erred in law and fact by misdirecting himself that Section 7 of the *Limitation of Actions Act* did not apply to the respondent but to the appellant despite the couching of Section 7 of the *Limitation of Actions Act* Cap 23 Laws of Kenya.
 2. That the learned trial magistrate erred in law and fact by holding that Section 38 of the *Limitation of Actions Act* prescribed a fixed period within which an adverse possessor of land should institute a suit against the owner to be registered and be issued with the title to the portion held in adverse possession for a period in excess of 12 years.
 3. That the learned trial magistrate erred in law and fact by holding that the court had no requisite jurisdiction to hear and determine matters of adverse possession despite numerous judicial pronouncement that a sub ordinate court can hear and determine matters of OS and questions of adverse possession.
 4. The learned trial magistrate erred in law and fact by failing to deliver a judgment in favour of the appellants despite the trial magistrate making a finding of fact that the 1st appellant was on the suit land for a period in excess of 38 years and in excess of 28 years on the part of the 2nd appellant.
 5. That the learned trial magistrate erred in law and fact by failing to make a finding and hold that the respondent's title to the suit land LR Tharaka/Chiakariga "A"/1317 was subject to the overriding interest in favour of the appellant that requires no noting in the register.
10. The appellants urged this court to:
- (i) allow the appeal;
 - (ii) with an order allowing the appellants' counterclaim; and
 - (iii) award the appellants costs of the appeal and costs of the suit in the trial court.

Appellants' Submissions

11. The appellants filed written submissions dated 20/2/2025 through M/s I C Mugo & Co Advocates. Counsel for the appellants identified the following as the issues that fell for determination in the appeal:
- (i) Whether Section 7 of the *Limitation of Actions Act* only applies to the appellant and not both of the parties;



- (ii) Whether Section 38 of the *Limitation of Actions Act* gives a prescribed period within which an adverse possessor of land should apply to the court;
 - (iii) Whether the trial court had jurisdiction to hear and determine the appellant’s counterclaim which was premised on adverse possession;
 - (iv) Whether the trial court delivered a judgment that was against the weight of evidence; and
 - (v) Whether the appellants’ (sic) title LR Tharaka/Chiakariga “A”/1317 was subject to overriding interest for the benefit of the appellants which did not require noting on the register.
12. On whether Section 7 of the *Limitation of Actions Act* applied to both parties, counsel submitted that the trial court made a finding in favour of the respondent and ignored the principle set out in Section 7 of the *Limitation of Actions Act* and the principle of stare decisis. Counsel argued that the trial court seems to say the provision of Section 7 of the *Limitation of Actions Act* only applies to a person who asserts his right under the doctrine of adverse possession, and the section did not apply to the registered proprietor. Counsel submitted that Section 7 of the *Limitation of Actions Act* applies to the registered owner, adding that the registered owner of land cannot treat the adverse possessor as a trespasser after expiry of 12 years. Counsel submitted that the appellant moved the court for a claim of adverse possession through a counterclaim by way of a plaint. Counsel argued that the trial court was of the view that it lacked the requisite jurisdiction to hear and determine the counterclaim. Counsel submitted that many decisions indicated that adverse possession could be pleaded by way of a plaint and subordinate courts had jurisdiction to determine adverse possession disputes. Counsel relied on the decision in Malindi Civil Appeal No.26 of 2015, Gulam Miriam Noordin v Julius Charo Karisa (2015)eKLR.
13. On whether a subordinate court could hear an adverse possession claim pleaded by way of a counterclaim or a plaint, counsel relied on the case of Nakuru ELC Case No.2 of 2019(2020)eKLR, in which the court held that under Section 9(a) of the Magistrates’s Courts Act, 2015, magistrates who are duly gazetted have the pecuniary jurisdiction to hear adverse possession claims. Counsel urged the court to allow the appeal.

Respondent’s Submissions

14. The respondent opposed the appeal through written submissions dated 19/3/2025, filed by M/s Kigora Arithi & Associates. Counsel relied on the case of Rhoda S Kiilu v Jiangxi Watter and Hydropower Construction Kenya Limited (2019)eKLR. Counsel argued that the actions of the appellants led to the loss of benefits and profits by the respondent, contending that the respondent was unable to occupy, utilize and enjoy her land. Counsel argued that the respondent was rightfully awarded the suit land.
15. Counsel argued that according to Section 7 of the *Limitation of Actions Act*, the limitation period for recovery of land is 12 years. Counsel contended that in the appellants’ statement of defence and counterclaim, they pleaded that they had been in continuous occupation of the land for 6 years, hence they had not met the threshold of 12 years.
16. Counsel contended that the appellants had not been in quiet and peaceful occupation of the suit land for 12 years, adding that the respondent had, on several occasions, issued warnings to the appellants through Government Officers as well as area residents. Counsel submitted that the claim for adverse possession by the appellants was not proved. Counsel argued that having proven her proprietary rights over the suit land, the respondent was entitled to the orders sought in the plaint.



Analysis and Determination

17. I have read and considered the entire original record of the trial court, the record filed in this appeal, the grounds of appeal and the parties' respective submissions. I have also considered the relevant legal frameworks and the jurisprudence relevant to the key issues in the appeal. As pointed out in the opening paragraph of this judgment, the three key issues that fall for determination in the appeal are:
- (i) Whether the trial court had jurisdiction to adjudicate the defence and counterclaim of adverse possession which the appellants pleaded and canvassed;
 - (ii) Whether the appellants had acquired title to the suit land through the doctrine of adverse possession; and
 - (iii) Whether the appellants were trespassers on the suit land. I will be brief in my analysis and disposal of the issues. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
18. The principle upon which a first appellate court exercises jurisdiction is well settled. The principle was summarized by the Court of Appeal in the case of *Susan Munyi Vs. Keshar Shiani* [2013] eKLR as follows:
- “As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all the evidence and arrive at our own independent conclusions.”
19. The above principle was similarly outlined in *Abok James Odera t/a A.J Odera & Associates Vs. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR as follows:
- “This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
20. Did the trial court have jurisdiction to adjudicate the defence and counterclaim of adverse possession which the appellants pleaded and canvassed? The trial court was a Principal Magistrate Court. The impugned decision was rendered on 22/8/2024. The jurisdictional legal frameworks which existed in August 2024 are the same frameworks that exist now.
21. The trial court cited Sections 7, 37 and 38 of the *Limitation of Actions Act* and contended that the appellants ought to have approached the “High Court or any other court” to obtain a vesting order under the above framework before raising the defence and counterclaim of adverse possession. It was the view of the trial court that without a vesting order from the High Court, the appellants could not “enjoy an adverse title superior to that of the plaintiff (respondent).” In essence, the trial court told the appellants that it had no jurisdiction to entertain the defence and counterclaim of adverse possession without a vesting order from the High Court. The trial court did not down its tools at that point. It proceeded to determine the dispute on merits and subsequently dismissed the defence and the counterclaim on merits.
22. This court has reflected on the reasoning and decision of the trial court. The court does not agree with both the reasoning and the decision. This court's reading and understanding of the prevailing jurisprudence on the question of jurisdiction of Magistrate Courts in adverse possession disputes



leads to the conclusion that the trial court did not have jurisdiction to adjudicate the defence and counterclaim of adverse possession which the appellants had pleaded and subsequently canvassed through evidence and submissions. Secondly, in the absence of jurisdiction, the trial court ought to have downed its tools as opposed to proceeding to determine the dispute on merits in the absence of jurisdiction. (See Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR)

23. Not too long ago, 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]KECA1417 (KLR) the Court of Appeal was confronted with the question as to whether Magistrate Courts had jurisdiction to adjudicate disputes relating to questions of adverse possession under the Limitations of Actions Act. The Court of Appeal analysed the provisions of the *Limitation of Actions Act* and the framework on successor courts created under *the Constitution* of Kenya 2010. The Court of Appeal came to the conclusion that post-2010, the court vested with jurisdiction to adjudicate disputes relating to adverse possession is the Environment and Land Court. The Court of Appeal was unequivocal that under the *Limitation of Actions Act*, Magistrate Courts do not have jurisdiction to adjudicate disputes relating to adverse possession.
24. The Court of Appeal rendered itself in the above appeal as follows:
 - “ 4. The controversial question of jurisdiction of the Magistrates’ Courts in claims for adverse possession emanated from Sections 37 and 38 of the *Limitation of Actions Act* where it was specifically provided that such claims were to be heard by the High Court. Reference was to the “High Court” as the court to which such cases were heard, and given the dictates of *the Constitution*, that 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 that interpretation was that, it was only the Environment and Land Court established under Article 162 (2) (b) that was mandated to hear those cases. So that, notwithstanding the expansion of the jurisdiction of environment and land usage to Magistrates Courts, it was distinctive that under Section 9(a) of the Magistrates Courts Act, various matters were specified for determination, but claims for adverse possession were not included.
 5. A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court could only exercise jurisdiction as conferred by *the Constitution* or other written law. It could not arrogate to itself jurisdiction exceeding that which was conferred upon it by law.”
25. The foregoing is the prevailing law. Unless the Court of Appeal itself departs from the above pronouncement or the Supreme Court overturns the pronouncement, it remains the prevailing law. Under the principle of stare decisis, the contrary pronouncements by third tier superior courts which the appellants cited and relied on are not the prevailing law. It is therefore my finding that the trial court did not have jurisdiction to entertain the appellants’ defence and counterclaim.
26. Given that initially the trial court was properly seized of a plea for a declaration that the appellants were trespassers and a plea for a permanent injunction against the appellants, what should the trial court have done the moment the defence and counterclaim of adverse possession were raised by the appellants who were sued as defendants in the suit? Put differently, what should the appellants (defendants) have



- done when they were served with the suit papers through which the respondent technically sought to evict them from land they considered to have acquired through adverse possession?
27. The court is alive to the fact that the law required the appellants to present defences to the respondent's claim within strict and specific timelines. Secondly, the common defence which the appellants had was that of adverse possession. In addition, they had a counterclaim. Thirdly, the trial court did not have jurisdiction to entertain both the defence and the counterclaim of adverse possession.
 28. Taking into account the above circumstances and the prevailing jurisprudence as spelt out by the Court of Appeal, this court takes the view that the moment the defence of adverse possession was raised, the trial court, which hitherto had jurisdiction, was enjoined to give the defendants in the suit an opportunity to make an application under Section 18 of the *Civil Procedure Act* and procure an order transferring the suit to the Environment and Land Court. In the absence of a transfer order within a reasonable time, the trial court was required to strike out the defence and the counterclaim and proceed to dispose the respondent's (plaintiff's) claim as an undefended cause.
 29. In the suit giving rise to this appeal, the trial court proceeded to exercise full jurisdiction and determined the question as to whether the appellants' title to the suit land had crystalized under the doctrine of adverse possession. This was a dominant issue in the dispute and the trial court had no jurisdiction to adjudicate the issue.
 30. Given the above unique circumstances of this appeal, this court takes the view that, both the trial proceedings and the judgment of the trial court should be set aside. Similarly, the appellants' defence and counterclaim should be struck out. Lastly, the appellants should be given an opportunity to procure a transfer order whereafter they will have the opportunity to plead the defence and counterclaim of adverse possession in a court properly seized of jurisdiction to deal with the intertwined issues of trespass and adverse possession.
 31. Having come to the above finding on the first issue, and being cognizant of the fact that parties are entitled to be heard afresh on the issues in the suit, including the issue of adverse possession, the court will not make any pronouncement on the second and third issues. I take the above view because making pronouncements on the two issues at this point may prejudice the parties when the two issues fall for hearing and determination before a competent court.
 32. Lastly, noting that the trial court substantially contributed to the situation in which parties to this appeal now find themselves, parties will bear their respective costs of the appeal.

Disposal Orders

33. In the end, this appeal is allowed in the following terms:
 - a. The trial proceedings and the Judgment in Marimanti PMC E&L Case No 5 of 2023 are set aside on the ground that the trial court did not have jurisdiction to adjudicate the question of adverse possession under the *Limitation of Actions Act* which was a dominant issue in the dispute.
 - b. The appellants' defence and counterclaim of adverse possession are struck out.
 - c. Proceedings in Marimanti PMC E&L Case No 5 of 2023 are hereby stayed for a period of 120 days within which the appellants shall procure from the Environment and Land Court orders transferring the above suit to a court seized of jurisdiction to entertain the defence and counterclaim of adverse possession.



- d. In the absence of a transfer order, the Marimanti Principal Magistrate Court shall proceed to hear the respondent's claim as an undefended claim.
- e. Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT CHUKA THIS 19TH DAY OF MAY, 2025.

B M EBOSO [MR]

JUDGE

In the Presence of:

Mr. I.C Mugo for the Appellants

Ms. Mugo for the Respondent

Court Assistant – Mr. Mwangi

