



**Athman v Mchanga (Environment and Land Appeal E003 of 2024)
[2025] KEELC 3963 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3963 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E003 OF 2024**

**EK MAKORI, J
MAY 15, 2025**

BETWEEN

ABDULKADIR MACHICHA ATHMAN APPELLANT

AND

JARED MWACHOFI MCHANGA RESPONDENT

(This appeal arises from the judgment delivered by the Honorable J. Kituku on December 19, 2023, in Kilifi ELC Suit No. E100 of 2021)

JUDGMENT

1. This appeal arises from the judgment rendered by the Honorable J. Kituku (Senior Principal Magistrate) on 19 December 2023 in Kilifi ELC Suit No. E100 of 2021.
2. Pursuant to the Memorandum of Appeal dated 19 January 2024, the appeal is based on the following grounds:
 - i. That the learned magistrate erred in both law and fact by dismissing the Appellant’s defense and counterclaim while allowing the Plaintiffs’ claim on adverse possession, despite sufficient material and facts warranting the orders sought in the counterclaim.
 - ii. That the learned magistrate erred in both law and fact by dismissing the Appellant’s counterclaim and allowing the Plaintiffs’ claim based on hearsay and contested evidence.
 - iii. That the learned magistrate erred in both law and fact by concluding that the Respondent had met the threshold for granting adverse possession, notwithstanding the compelling evidence presented by the Appellant regarding ownership and trespass.
 - iv. That the learned magistrate erred in both law and fact by permitting the Respondent’s application for striking out the suit, despite the evidence and materials before the court favoring the Appellant.



3. In light of the grounds mentioned above, the Appellant respectfully requests that:
 - i. The appeal is granted.
 - ii. The honorable court's judgment and/or decision be overturned.
 - iii. Costs associated with the appeal be awarded.
4. Before examining the merits of this appeal, it is essential to provide a brief overview of the case. Through an originating summons dated September 2, 2021, the Respondent initiated legal proceedings against the Appellant, asserting that he had acquired the Appellant's land through adverse possession. The land in question is designated as L.R No. 18378/7 Survey Plan No. 187026 CR 31943, encompassing approximately 0.1012 hectares, located north of Mtwapa Creek in the Kilifi District (hereafter referred to as the suit property). The Respondent contended that he had maintained open, uninterrupted, and exclusive physical possession of the suit property for over twelve years, beginning in 1971, and that the Appellant had exhibited no interest in the suit property. The Originating Summons was substantiated by an affidavit sworn by the Respondent on September 2, 2021.
5. In response to the summons, the Appellant submitted a defense and counterclaim dated November 7, 2022, in which he asserted ownership of the suit property, having purchased it from the original owners, Josiah Muli Wambua and Robert Zakayo Muli, around 2005. He stated that at the time of purchase, the suit property was unoccupied and free of any encumbrances, and that he promptly constructed a stone house and erected a fence. The Appellant alleged that while conducting business on the suit property, the Respondent trespassed and vandalized the structure and fence, prompting him to file a report at Mtwapa Police Station on October 31, 2021. Subsequently, he erected a barbed wire fence and appointed a caretaker for the property. It was not until later that he learned the Respondent had constructed a stone wall around the suit property based on a court order issued by the trial court. Notably, an ex parte order had been issued against the Appellant on June 23, 2022, which was rescinded on May 31, 2023. In his counterclaim, the Appellant sought a permanent injunction against the Respondent, a declaration affirming his ownership of the suit property, and damages for trespass.
6. Subsequently, the case was scheduled for hearings on October 18, 2023, and November 1, 2023, during which the parties presented their testimonies and concluded their cases.
7. The Respondent testified as PW1. He adopted his written statement dated September 2, 2021, as an integral part of his evidence in chief and produced documents listed in the two submission lists dated September 2, 2021, and July 27, 2023, respectively, referred to as PEXH 1-11. He testified that he has resided on the suit property since 1992, when it was unoccupied and lacked development. He stated that he began farming on the suit property in 1998 and had appointed a caretaker to oversee the site. Additionally, he mentioned that he constructed a fence around the property and asserted that the Appellant had never requested that he vacate the suit property.
8. In cross-examination by Mr. Gitonga, counsel for the Appellant, the Respondent informed the court that his caretaker, one Kevin, has resided on the suit property since 1998; however, when Kevin's house was destroyed, he would visit the land daily. The Respondent stated that after obtaining the ex-parte injunction, he remitted land rates totaling Kshs. 600,000/-. Furthermore, he indicated that the fence was constructed between August 2020 and 2021.
9. Kennedy Omondi Ogutu (PW2) also presented his written statement dated July 27, 2023. He informed the court that he has never resided on the suit property since his employment as a caretaker by the Respondent. The witness was unable to identify the Appellant. During cross-examination,



PW2 testified that he resided on adjacent land, where the Respondent had constructed a house that he subsequently demolished.

10. The Appellant was the sole witness in his case. He also relied on his written statement dated November 7, 2021, and submitted the documents listed evenly dated as Exhibit DEXH 1-3. He asserted that he had continuously utilized the suit property until the COVID-19 pandemic in 2021, when he was informed that an individual, the Respondent, was claiming the exact property. This claim took aback the Appellant, as he had always believed the land to be vacant and uninhabited.
11. In cross-examination by Mr. Obuya, counsel for the Respondent, the Appellant stated that following his acquisition of the suit property, he erected a temporary store and a wire fence, which remained intact until 2019 when he visited the suit property.
12. Subsequently, the parties submitted their written submissions, and the trial magistrate delivered his judgment on 19 December 2023 as follows:

- “ 25. In this case, the plaintiff has stated he has been on the land since 1971. He had been utilizing the land and had erected fence and a temporary structure which he demolished as it was being used a hideout by criminals. He tills the land.
26. That evidence was supported by PW2, who said he has been the Plaintiff's caretaker since 1998.
27. On the other hand, defendant has stated he bought the land in 2005 from the registered owner and then transfer into his name effected. It was vacant and he constructed a temporary store and a barbed wire which was destroyed by the Plaintiff during the corona period, and he reported to police.
28. Going by the evidence of PW1, if he had been on the property since 1971 since it was not in the name of the defendant, the registered owner as per the certificate of title were Josiah Muli Wambua and Robert Zakayo Muli and was with effect from 1/7/1996.
29. When does the time start running? Is it from 1971, 1996, or 2005?...
- 30 ...
31. My analysis on judicial precedent is that time begun to count from 1/7/1996 when the land was leased to Josiah Muli and another and not 25/11/2005 when it was transferred to the defendant.
- 32 ...
33. In this case, the defendant has not produced the sale agreement to show the status of the land when he bought it. He has not called the persons who sold the land to tell the court if it was vacant or plaintiff was in occupation as he has claimed.
34. When the court visited the scene, it saw it was being cultivated and it had a concrete wall fence. PW1 said the structure was demolished. PW2 confirmed he was on the land since 1998, even before the defendant acquired it.
35. From 1996 to 30/1/2021, when he reported to police, it was 45 years.



36. I find the Plaintiff has, on a balance of probabilities, proved adverse possession. Consequently, the Originating Summons is allowed as prayed with costs to the Plaintiff. The counter-claim is dismissed with costs to the Defendant.”

13. The Appellant has submitted this Appeal in opposition to the judgment as mentioned earlier, relying on the grounds previously articulated within this judgment.
14. With the agreement of the involved parties, the court ordered that the Appeal be resolved through written submissions.

The Appellant’s submissions

15. According to Mr. Gitonga, the primary issue for determination in this appeal is whether the Respondent has satisfied the requisite threshold for granting orders based on the doctrine of adverse possession as established by the trial court. Citing the definition of adverse possession as articulated by the court in *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, counsel contended that adverse possession can only arise from non-permissive possession maintained continuously for a duration exceeding 12 years. Counsel argued that the Respondent has never been in actual possession of the suit property; rather, he has persistently trespassed upon it by damaging the structures erected by the Appellant. Furthermore, Mr. Gitonga asserted that the Respondent did not prove that he was in actual, open, notorious, exclusive, and adverse use or occupation of the suit property for even a single year, as all his endeavors were obstructed and reported. Additionally, he failed to demonstrate that his purported occupation occurred without the permission of the Appellant or the previous proprietors of the suit property. To substantiate this assertion, he referenced the case of *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] eKLR.

The Respondent’s submissions

16. Mr. Odongo presented the grounds of appeal separately. Regarding the first and third grounds, counsel asserted that for a claim of adverse possession to be successfully established, the following requirements must be demonstrated: the claimant has maintained exclusive possession of the disputed property openly, as of right, and without interruption for twelve years; that such possession has not been acquired through force, stealth, or under the license of the owner; and that the claimant has utilized the land *nec vi nec clam*. Mr. Odongo reaffirmed the evidence presented during the trial. He contended that the Respondent’s case at trial sufficiently met the criteria for granting the sought orders, and that the decision of the trial court is both correct and appropriate.
17. With respect to grounds two and four, counsel contended that they were not substantiated by the Respondent, even in his submissions.

Analysis and determination

18. From the foregoing, the issues that are at the core of this appeal are:
 - i. Whether the trial magistrate erred in determining that the Respondent had established adverse possession of the suit property.
 - ii. Did the trial court possess jurisdiction over adverse possession claims?
 - iii. Remedies.
19. Given that this constitutes a preliminary appeal, I remain cognizant of the court’s duty and obligation to evaluate, reassess, and reanalyze the evidence on record to determine whether the conclusions drawn



by the esteemed magistrate were warranted based on the evidence presented and the relevant law. In the pivotal case of *Okeno v Republic* [1972] EA 32 at 36, the East African Court of Appeal articulated the responsibilities of the Court during an initial appeal as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”

20. The Black's Law Dictionary, 11th Edition, defines the term "Adverse Possession" on page 67 in the following terms:

“The enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open, and notorious.

The doctrine by which title to real property is acquired as a result of use or enjoyment over a specific period of time.”

21. The Court of Appeal in the case of *Richard Wefwafwa Songoi v. Ben Munyifwa Songoi* [2020] eKLR delineated several factors that an individual asserting adverse possession must demonstrate. The court concluded:

“30. The law and requirements for adverse possession was reiterated in the case of *Mbira v Gachuhi*, [2002] IEALR 137, where it was held that:

“..... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption.....”

36. For a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted user of the land. Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are important factors in a claim for adverse possession.

39. In *Wambugu v Njuguna*, [1983] KLR 173, this Court held that adverse possession contemplates two concepts: possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.

40. A person who claims adverse possession must inter alia show:



- (a) on what date he came into possession.
- (b) what was the nature of his possession’
- (c) whether the fact of his possession was known to the other party.
- (d) for how long his possession has continued, and
- (e) that the possession was open and undisturbed for the requisite 12 years.”

22. In a similar vein, in the case of *Kim Pavey & 2 others v Loise Wambui Njoroge & another* [2011] eKLR, the Court of Appeal articulated the following:

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also necessary to prove that the possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner.”

23. The court additionally asserted that an alternative foundation for establishing a claim through adverse possession is the cessation of possession, which occurs when the owner relinquishes their claim. The Court of Appeal articulated:

“...dispossession means that the owner has been driven out of possession by another. This point was discussed in the case of *Wambugu v Njuguna* [1983] KLR 173, where it was held: -
 “In order to acquire by Statute of Limitation title to land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it or having discontinued his possession of it. Dispossession of the proprietor that defeats his action are acts which are consistent with his enjoyment of the soil for the purpose of which he intends to use it for a continuous 12 years. The Limitation of Actions on possession contemplates two concepts; dispossession and discontinuous of possession. The proper way of assessing proof of title is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved he has been in possession for the requisite number of years.”

24. In his originating summons, the Respondent asserted that he took possession of the suit property in 1971. However, his testimony indicated that he occupied the premises in 1998. Furthermore, he claimed in his witness statement that he has resided on the suit property since 1992. The Respondent’s evidence was inconsistent regarding the timeline of his occupancy and concerning the matters of possession and habitation. In one instance, he stated that he resided on the suit property but subsequently altered his position by stating that he utilized the suit property solely for agricultural purposes, beginning in 1998.

25. Additionally, the Appellant testified that the suit property was unoccupied when he purchased it in 2005. Furthermore, the court’s inspection confirmed that it was indeed vacant, enclosed by a perimeter wall, which the Respondent conceded to have erected in 2021.

26. Given the circumstances, I am inclined to believe the Appellant, and I find that the Respondent’s purported possession and/or dispossession for adverse possession was not sufficiently established. It is imperative to remember that the burden of proof resides consistently with the Plaintiff or claimant; thus, it was the responsibility of the Respondent to substantiate his case based on a balance of



probabilities. There is no dispute regarding the fact that the suit property is registered in the Appellant's name; consequently, it would be unjust to nullify his title when the Respondent has failed to fulfill the burden imposed upon him.

27. Before concluding and having presented the merits of the appeal, I am compelled to discuss whether the trial court possessed the jurisdiction to adjudicate adverse possession claims. 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 stated the following:

“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.”

28. Regarding an application to strike out the petition of appeal in *Sugawara v Kiruti* (Sued in her Capacity as the Administratrix of the Estate of Mutarakwa Kiruti Lepaso alias Mutarakwa Kiroti Lepaso and on her Own) & 3 others [2025] KESC 9 (KLR), the Apex Court ruled as follows:

“The Court of Appeal on its part held that, notwithstanding the expansion of the jurisdiction of environment and land usage to the Magistrates Courts, it is instructive that under Section 9 (a) of the Magistrates Court Act, various matters are specified for determination, but claims for adverse possession are not included in that section. And that, it is only the Environment and Land Court which has jurisdiction to hear and determine claims for adverse possession.....

From the long history of the matter set out above, there is clearly no live controversy relating to constitutional interpretation or application. The issues related to ownership of the suit premises which have substantively been determined from the trial court, the High Court, then mandated to hear environment and land matters, and later at the Court of Appeal. In



the circumstances, we lack jurisdiction to delve into the issues now before us and we must therefore down our judicial tools.”

29. Therefore, the decision of the Court of Appeal stands, as the magistrates' court lacks the jurisdiction to adjudicate adverse possession claims.

30. The outcome is that the current appeal is merited; it is hereby allowed as prayed with costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY IN MALINDI ON THIS 15TH DAY OF MAY 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Gitonga for the Appellant

Mr. Odongo for the Respondent

Happy: Court Assistant

