



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**MILIMANI LAW COURT**

**ELC CASE NO. 92 OF 2019**

**NJOKI WAINAINA ALIAS MAMA KANYONI.....APPELLANT**

**=VERSUS=**

**JOSEPHAT THUO GITHACHURI.....1<sup>ST</sup> RESPONDENT**

**ANTHONY MURIITHI GATHIGI.....2<sup>ND</sup> RESPONDENT**

**STANLEY KIPROTICH BOINET.....3<sup>RD</sup> RESPONDENT**

**JOHN NGULI.....4<sup>TH</sup> RESPONDENT**

**AND**

**THE NATIONAL LAND COMMISSION.....1<sup>ST</sup> INTERESTED PARTY/RESPONDENT**

**THE NAIROBI CITY COUNTY.....2<sup>ND</sup> INTERESTED PARTY/RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. On the **1<sup>st</sup> October 2019**, the Appellant herein, ( *who was the Defendant in the original suit*) filed Chamber Summons application whereby same sought the following Reliefs;

- i. *The Application be certified urgent and be heard ex-parte and be heard in the first instance.*
- ii. *The Honourable court be pleased to grant leave to the applicant to amend her written statement of defense date the 22<sup>nd</sup> December 2014, and filed on the 22<sup>nd</sup> December 2014, in terms of the annexed draft amended written statement of Defense and counter claim.*
- iii. *The draft amended written statement of defense and counter claim be deemed as duly filed subject to payments of the requisite of court fees.*
- iv. *Costs of Application to abide the cause.*

2. The said application was supported by affidavit sworn by the appellant herein, on the **1<sup>st</sup> October 2019**, and in respect of which the Appellant herein provided the reasons upon which same sought for leave to amend. For clarity, the Appellant herein sought to amend the statement of defense and to introduce a counter claim on the basis that she had been in occupation, possession and use of **L.R NO. 9042/80**, situate at Embakasi Village, within the City of Nairobi ( *hereinafter referred to as the suit property*) for a period of more than 27 years.

3. Upon the filing of the said application, same was opposed by the Respondents as well as the interested parties herein, who filed grounds of opposition dated the **4<sup>th</sup> October 2019**, respectively, whereby same raised various issues in opposition. Firstly, the Respondent and the interested parties contended that the application for amendment has been made with undue and/or inordinate delay, which has not been explained.

4. On the other hand, the Respondent and the interested parties also contended that, to the extent that the Appellant had laid a claim to the suit property as being the registered owner thereof, the intended amendment to implead a counter claim based on adverse possession, would therefore generate a new and inconsistent claim or cause of action, contrary to the original position taken by the Appellant.
5. Thirdly, the Respondents and the interested parties also averred that the intended amendment, which was premised on introduction of a counter claim premised on a claim for adverse possession, would be outside the jurisdiction of the Magistrates Court. In this regard, the Respondents and the interested parties contended that the intended amendment would be thus an exercise in futility and thus amount to a waste of court time.
6. The subject application for amendment was canvassed before Hon. A. N. Makau, Senior Principal Magistrate, who thereafter rendered a ruling on the 15<sup>th</sup> November 2019, when the Application was found to be devoid of merits and was thus dismissed.
7. In the course of the Ruling, the learned Senior Principal Magistrate made five pertinent observations;
  - a. *The Intended counter claim, premised on a claim for adverse possession, would be outside the jurisdiction of the magistrate's court.*
  - b. *That the intended plea of adverse possession by way of a counter claim, would be contrary to the provisions of Order 37 of the Civil Procedure Rules and thus the court would not be disposed to entertain such a claim made contrary to procedure.*
  - c. *Fourthly, that the intended amendment would be inconsistent with the Appellant's pleaded statement of defense*
  - d. *In any event, the suit property is public land and thus the plea of adverse possession cannot arise*
  - e. *The application for amendment was made with undue delay and thus the Appellant was guilty of Laches*
8. Following the rendition of the said ruling, the Appellant herein felt aggrieved and/or dissatisfied and thus filed the current appeal, which was filed vide memorandum of appeal dated the 26<sup>th</sup> November 2019, and lodged in court on even date. For clarity, the Appellant has raised a total of 17 grounds of Appeal.
9. The Grounds of Appeal which have been raised by the Appellant are as hereunder;
  - i. *The Honourable magistrate erred in law and fact in dismissing the Appellant application dated the 1<sup>st</sup> October 2019.*
  - ii. *The Honourable magistrate erred in law and in principle in holding that a claim of adverse possession can only be made by way of originating summons and failed to consider that the Appellant being a party to the dispute would only have advanced a claim over the suit property in the same suit.*
  - iii. *The learned magistrate erred in law and in fact by holding that the Appellant was just but delaying the process of trial court and failed to appreciate that the Appellant had a right to be heard as well.*
  - iv. *The learned magistrate erred in law and in fact by holding that the suit land is a public land which issue is in dispute and is the subject of the entire suit hence wrongly and unprocedurally preempting the need for a fair and unbiased hearing and determination of the suit.*
  - v. *The learned magistrate misdirected herself by holding that the suit land is a public land without hearing all the parties and considering the evidence thereto in the dispute or at all.*
  - vi. *The learned magistrate misdirected herself by holding that the Appellants intention are baseless and an abuse of the court process.*
  - vii. *The learned magistrate erred in law and in fact by declining to grant the Appellant leave to amend her statement of defense.*
  - viii. *The Honourable magistrate misapprehended and misguided herself on interpretation of Order 8 rule 3 of the civil procedure rules 2010.*
  - ix. *The Honourable magistrate failed to appreciate that the proposed amendments are crucial in determining the real issues controversy.*
  - x. *The learned magistrate erred in law and in fact by in failing to appreciate the reason and the evidence given by the Appellant in her affidavit and written submissions as to why her application was merited and that her proposed amendment were essential in determining the dispute between the parties fairly and justly.*
  - xi. *The learned magistrate erred both in law and in fact by unjustly dismissing the Appellant application of the 1<sup>st</sup> October 2019, despite the general rule that amendment should be allowed at any time before the close of any case as in the case herein.*
  - xii. *The learned magistrate erred in law and in fact by failing to observe that by dismissing the Appellant application the court*

*unfairly denied the Appellant access to justice thereby denying her constitutional right to advance a claim over the suit property*

*xiii. The learned magistrate erred in law and in fact by disregarding the Appellant application and failing to appreciate the import and tenor of Articles 48 and 50 of the constitution of Kenya 2010, the civil procedure Act and the rules thereunder as well as case law on the issue of amendment.*

*xiv. The Honourable magistrate erred in law and in fact in finding the Appellant application offended the provisions of Section 41 of the limitation of Action Act and for being an abuse of the court process as the application was merely for amendment and not adverse possession.*

*xv. The learned magistrate erred in law and in fact in failing to realize that matters relating to land must be decided on merits for substantive justice to be done and not be dismissed on technicality.*

*xvi. The learned magistrate erred in law and in fact in finding against the Appellant.*

*xvii. Arising from the foregoing, the entire decision of the magistrate refusing to grant the Appellant leave to amend her statement of defense was wrong and unfair and went beyond the application that dealt with substantive issues that had not been heard on merit.*

### **SUBMISSIONS BY THE PARTIES**

10. The Appeal herein came up for directions on the 18<sup>th</sup> May 2021, when directions were given for purposes of disposal thereof. In this regard, the parties agreed and thus the court directed that the Appeal be canvassed and/or disposed of by way of written submissions.

11. Pursuant to the foregoing directions, the Appellant herein filed her written submissions on the 25<sup>th</sup> May 2021, whereas the Respondents filed their submissions on the 6<sup>th</sup> July 2021. For the avoidance of doubt, the Appellant also filed a list and bundle of authority on the same 6<sup>th</sup> May 2021.

12. On the other hand, the 2<sup>nd</sup> interested party filed her submissions and authorities on the 27<sup>th</sup> September 2021.

13. However, the 1<sup>st</sup> interested party herein did not file any written submission and in any event, same has never participated in the subject Appeal.

14. Suffice it to say, that the submissions and the case law filed and relied upon by the respective parties herein are on record. For clarity, same have been considered and taken into account.

### **ISSUES FOR DETERMINATION**

15. Though the Appellant herein has raised a whopping 17 grounds of Appeal, however the said grounds can be clustered into four (4) groups and confined to specific thematic areas as hereunder;

***a. Grounds 1, 3, 6, 7, 8, , 11, 12 ,16 & 17 – relate to the general principal for amendment and the alleged failure by the trial court to apply the principals in accordance with various case law.***

***b. Ground 2 which concerns the mode and/or manner of commencement a claim for adverse possession.***

***c. Ground 4, 5 & 14 relates to whether the suit property is public land and whether a claim of adverse possession would suffice in respect of public land.***

***d. Ground 9, 10 & 15 relating to issue at the foot of the amendment, namely adverse possession and scope of the magistrate's court jurisdiction to deal with such a claim***

### **ANALYSIS AND DETERMINATION**

#### **Issue number 1**

***Grounds 1, 3, 6, 7, 8, , 11, 12 ,16 & 17 – relate to the general principal for amendment and the alleged failure by the trial court to apply the principles in accordance with various case law.***

16. As pertains to the first cluster of the grounds of Appeal, which generally deals with the principles that governs amendment of pleadings, it is the Appellant's complaint that the learned magistrate did not appreciate same properly and thereby failed to apply the said principles, while determining the chamber summons application dated the 1<sup>st</sup> October 2019.

17. It is the Appellant's contention, that had the learned magistrate followed and applied the well crystalized principles , same would no doubt, have arrived at a different conclusion pertaining to the application for the amendment. In short, the appellant herein contends that the learned magistrate failed to exercise her discretion in accordance with the law.

18. Before venturing to determine whether or not the learned magistrate misapprehended the issues before her and thus failed to apply the principles for amendments in a proper manner, it is important to understand what are these general principles.

19. In this regard, it is appropriate to reproduce the observation that have been made by various courts whilst dealing with and/or handling applications for amendments. First and foremost, I refer to the decision in the case of **Central Bank of Kenya v Trust Bank Limited & Others (2000) eKLR**, where the honourable court observed as hereunder;

*"that a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.*

20. The other case which also espouses the general principles of amendment is the decision in the case of **Joseph Ochieng & 2 Others v First National Bank of Chicago civil appeal no. 149 of 1991**, where the court set out the principals under which courts may grant leave to amend as hereunder;

*a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;*

*b) the amendments should be timeously applied for;*

*c) power to amend can be exercised by the court at any stage of the proceedings;*

*d) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;*

*e) the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.*

21. Besides, the other critical decision that illuminates the general principles for amendment is in the decision in the case of **Elijah Kipng'eno Arap B v Kenya Commercial Bank Limited (2013) eKLR**, where the court observed as hereunder;

*The law on amendment of pleading in terms of **section 100** of the Civil Procedure Act and **Order VIA rule 3** of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from **Bullen and Leake & Jacob's Precedents of Pleading** - 12th Edition, in the case of **Joseph Ochieng & 2 others vs. First National Bank of Chicago**, Civil Appeal No. 149 of 1991 as follows:-*

***"The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts."***

22. From the foregoing decisions, the general principles that guide courts whilst dealing with applications for amendments, have crystalized and have been well delineated. Consequently, an applicant seeking leave to amend must establish and/or otherwise satisfy the foregoing principles and also justify, if any, the delay attendant the making of such Application.

23. As concerns the subject matter, it must recalled that the substratum of the Appellant's defense, which was filed in the chief magistrate's court was/is that the Appellant purchased the suit property from one S. G Mwaura, who had been allocated same by the defunct city council of Nairobi in 1992. In any event, the Appellant contends in her defense that upon such purchase, she took vacant possession and has thereafter developed the suit property which belongs to her.

24. It is also worthy to note that the same sentiments, which were contained in paragraphs 12 & 13 of the original statement of defense have been retained in paragraphs 12 & 13 of the proposed amendment statement of defense and counter claim.

25. Notwithstanding the plea that the appellant is the lawful owner of the suit property, having purchased same from one Mr. S. G Mwaura, the Appellant has now made 360 degree about turn to amend the same and now implead adverse possession.

26. Similarly, it is worthy to note that the intended amendment, which seeks to introduce a counter claim for adverse possession, has not been made in the alternative and without prejudice the of claim of ownership.

27. Suffice it to say, that the proposed amendments, which was the basis of the application for leave amendment was calculated to introduce a new case which would have changed the nature and/or character of the action in to one of a substantially different character, at variance with the position *hitherto* ventilated and/or pleaded.

28. On the other hand, the proposed amendments was geared to and calculated on introducing a new and inconsistent cause of action, so

inconsistent with the cause of action contained in the statement of defense that had been filed and/or lodged by the Appellant herein.

29. In view of the foregoing, it is my finding and holding, that the proposed amendment, which was disallowed, ran contrary to the general principles that govern amendment of pleadings. For clarity, a party cannot be allowed to amend his/her pleadings in a bid to introduce a cause of action that is new and inconsistent with the cause of action that have *hitherto* been pleaded.

30. In support of the foregoing holding, I take guidance from the decision in the case **Catherine Koriko & 3 others v Evaline Rosa [2020] eKLR**, where the court of appeal held as follows;

*In the application, the appellants sought to lay claim to the suit property on the basis of adverse possession. A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person. In the original suit, the appellants did not concede that indeed the respondent was the true owner of the suit property. The appellants' application to amend the statement of defence and counterclaim was nothing but an indirect attempt to re-open litigation over the suit property with a view to circumventing the substantive effect of, and the rights of the parties as had been determined in the Kisii High Court Succession Cause No. 105 of 2010. I cannot be blind to this attempt and I decline to condone the same. A party cannot be allowed to amend pleadings in one case in order to re-open litigation between the same parties in another case.*

31. Other than the attempt by the Appellant to change the nature and character of the cause of action, from being the owner of the suit property, to laying a claim thereto on account of adverse possession, there was also an issue of inordinate delay in the filing of the application for leave to amend, which delay was neither explained nor accounted for.

32. According to the Appellant the application for leave to amend was informed by the filing of the statement of defense on the part of the 2<sup>nd</sup> interested party/Respondent, which was filed on the 12<sup>th</sup> June 2015. However, it is imperative to note that the Application for amendment was only filed on the 1<sup>st</sup> October 2019, that is four (4) years after the event.

33. It was incumbent upon the Appellant herein to explain to the court why the Application for leave to amend was not filed timeously or better still, why the application took four (4) years, before same was filed.

34. In my humble view, the Appellant herein did not offer any explanation, whatsoever for the delay and/or dilatoriness, in the mounting of the subject application and in this regard the Appellant did not exercise due diligence. Consequently, the conduct of Appellant was wrought with slovenliness and thud the honourable Court must not be seen to condone or otherwise sanitize such want of diligence.

35. In any event, it behooves any party who seeks to benefit from the discretion of the court, to approach the court in good faith and to avail to the honourable court all the reasons, that have occasioned the failure to act with promptitude. Simply put, the discretion of the honourable court would be exercised in favor of a litigant, who has been forthright, but not to reward slovenliness. For clarity, candour and forthrightness, are keys to unlock the Courts favourable discretion.

36. Having reviewed the chamber summons application for amendment, as well as the reasons advanced to ground the intended amendment and having taken into consideration the length of time taken prior to the filing of the application, I find and hold that the Appellant herein, was not entitled to leave, which was sought. Consequently, the leave was properly refused.

## **Issue number 2**

### **Ground 2 which concerns the mode and/or manner of commencement a claim for adverse possession.**

37. In respect of the second issue herein, it was the Appellant's complaint that the learned magistrate fell in error in finding and holding that a claim for adverse possession can only be commenced by way of adverse possession. On this account, I do agree with the Appellant

38. Nevertheless, I must observe that the learned magistrate proceeded on the basis of the decisions of the court of appeal, including the decision in the case of **Patrick A. Odako & Another v William W Kireu Civil Appeal No. 262 of 1999 (unreported)**, where the court of appeal emphasized as much.

39. However, the position pertaining to the mode of filing a claim for adverse possession has been addressed in a number of decisions whereby there has been a paradigm shift in the thinking of the honourable court of appeal. Consequently, a claim for adverse possession can now be commenced and maintained on the basis of a counter claim or a Plaintiff.

40. In support of the foregoing position, I take guidance from the decision in the case of **Chevron (K) Limited v Harrison Charo Wa Shutu (2016) eKLR**, where the Court of Appeal observed as hereunder;

*The courts, have since this decision, held that a claim by adverse possession can be brought by a plaintiff. See Mariba v Mariba Civil Appeal No. 188 of 2002, counter-claim or defence as was the case here. See Wabala v Okumu (1997) LLR 609 (CAK). In Gulam Mariam Noordin v Julius Charo Karisa, Civil Appeal No 26 of 2015, where the claim was raised in the defence, this Court in rejecting the objection to the procedure, stated the law as follows;*

***“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that***

*as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of **Wabala v Okumu** [ 1997] LLR 609 (CAK), which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in **Bayete Co. Ltd v Kosgey** [ 1998] LLR 813 where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.”*

41. Other than the foregoing decisions, the position that a claim for adverse possession can also be commenced by way of Plaintiff was also underscored in the case of **Richard Wefwafwa Songoi v Ben Munyifwa Songoi (2020) eKLR**, where the Court of Appeal reiterated the same position as in the chevron’s case.

### **Issue number 3**

#### **Ground 4, 5 & 14 relates to whether the suit property is public land and whether a claim of adverse possession would suffice in respect of public land.**

42. In respect of this cluster, the Appellant has complained that the learned trial magistrate erred in finding and holding that the suit land was public land and thus a claim for adverse possession, cannot arise and/or ensue.

43. Despite the complaint by the Appellant herein, it is worthy to recall that the intended amendment, with a view to claim the suit property on account of adverse possession was precipitated by the 2<sup>nd</sup> Interested Party/Respondent statement of defense, which confirms that the suit property was public land.

44. Similarly, it is worthy to note that the Respondents herein, had also adverted to the fact the suit property was public land meant for parking and such other related purpose. Simply put neither of the Respondents contended that the suit property belongs to and/or is registered in their name.

45. To the extent, that the Appellant herein was compelled to file the Application for amendment on the basis of the 2<sup>nd</sup> Interested Party/Respondent statement of defense, whose purport was that the suit property is public land, it is common ground that the Appellant was conceding that the suit property was not registered in her name, but was essentially public land.

46. I would hasten to add, that the issues as to whether the land was public land or otherwise, ought to have awaited determination of a plenary hearing .But, given the position taken by the Appellant herself, I cannot be reach the same finding and holding by the Learned trial Magistrate.

47. Nevertheless, if ultimately the suit property would be confirmed to public land, then the Appellants claim thereto, on the basis of adverse possession, would be an act in futility, insofar as such a claim is statutorily prohibited by the provision of **Section 41 of the Limitation of Actions Act Chapter 22 Laws of Kenya**.

48. Notwithstanding the foregoing, the issues as to whether the suit property is public land or otherwise, did not constitute the basis and fulcrum upon which the amendment was declined.

### **Issue number 4**

#### **Ground 9, 10 & 15 relating to issue at the foot of the amendment, namely adverse possession and scope of the magistrate’s court jurisdiction to deal with such a claim**

49. In respect of this cluster, the Appellant complained that the learned magistrate, was in error in finding and holding that the claim for adverse possession, was outside of the jurisdiction of the magistrate’s court. In fact, the Appellant seems to suggest that the magistrate’s court would have been seized of jurisdiction to entertain and/or adjudicate upon the claim for adverse possession.

50. Before responding to the complaint by the Appellant herein, it is imperative to take cognizance of the provisions of **Section 37 & 38 of the Limitation of Actions Act, Chapter 22, Laws of Kenya**. For ease of reference, the said sections are reproduced as hereunder;

*37. Application of Act to registered land This Act applies to land registered under the Government Lands Act (Cap. 280), the Registration of Titles Act (Cap. 281), the Land Titles Act (Cap. 282) or the Registered Land Act (Cap. 300), in the same manner and to the same extent as it applies to land not so registered, except that—*

*(a) where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act;*

*(b) an easement acquired under section 32 of this Act does not come into being until a copy of the judgment establishing the right to the easement has been registered against the title to the land affected thereby, but is, until that time, held by the person for the time being registered as proprietor in trust for the person who has acquired it. CAP. 22 Limitation of Actions [Rev. 2012] [Issue 1] L19 - 22 38. Registration of title to land or easement acquired under Act (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act

. (3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.

(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) The Minister for the time being responsible for Land may make rules for facilitating the registration of titles to land or to easements acquired under this Act

51. The foregoing sections provides that a claim to be registered as a proprietor of land by way of adverse possession can only be made to the High Court. For clarity, it is important to note that the limitation of actions act is one of the statute that was enacted prior to the promulgation of the constitution of Kenya 2010. In this regard, the statute must be read with necessary alterations, qualifications and/or adaptations to bring same in line with the constitution 2010.

52. On the other hand, it is also important to take cognizance of the provisions **of Section 7 of the 6<sup>th</sup> Schedule of the Constitution, which provides as hereunder;**

“Existing laws

**(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.**  
**(2) If, with respect to any particular matter—**  
**(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer;**  
**(b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer,**  
**the provisions of this Constitution prevail to the extent of the conflict.”**

53. Taking into account the provision of section 7 of the 6<sup>th</sup> schedule, the corresponding institution to the high court, *(which has been adverted to)* by the provision of the limitation of actions act, Chapter 22, Laws of Kenya, is the Environment and Land Court, established pursuant to the provisions of Article 162 (2) (b) of the Constitution 2010.

54. In the premises, it is my humble opinion that reading and/or construing the provisions of **Section 37 & 38 of the Limitation of Actions Act**, with the requisite qualification and adaptation, the term high court is construed to mean the Environment and Land court, same being the corresponding institution/court of equal status and not otherwise.

55. Having come to the foregoing conclusion, I must now revert to the complaint by the Appellant, which relates to whether the magistrate court would be seized with jurisdiction to hear a claim for adverse possession and in this regard my answer is in the negative.

56. For the avoidance of doubt, I find and hold that the magistrate’s court does not and would not have had jurisdiction, to hear and determine a claim founded on adverse possession. Such a claim, can only be heard and determined by the Environment and Land Court.

57. Be that as it may, I am alive to the fact that the magistrate’s court Act 2015, conferred upon the magistrate’s court, jurisdiction to deal with and/or entertain dispute pertaining to the environment and title, occupation and use in line with the provisions of section 9 thereof. Perhaps it suffices, to reproduce the provisions of Section 9 and same is reproduced as hereunder;

**“9. Claims in employment, labour relations claims; land and environment cases**

**A magistrate's court shall —**

**(a) in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (No. 19 of 2011) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to —**

**(i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**

**(ii) compulsory acquisition of land;**

**(iii) land administration and management;**

**(iv) public, private and community land and contracts, choses in action or other instruments granting any**

**enforceable interests in land; and**

**(v) environment and land generally.**

58. Nevertheless, I beg to point out that the cause of action pertaining to adverse possession, is neither covered by the provisions of the Environment and Land Court Act, 2011, the Land Registration Act, 2012, nor the Magistrates Court Act 2015. For clarity, the cause of action on adverse possession is premised on Section 7, 9, 17, 37 & 38 of the Limitation of Actions Act, Chapter 22, Laws of Kenya and thus the operative Act, for purposes of determining jurisdiction, is the said Limitation of Actions Act and not otherwise.

59. I must also say, that the debate as to whether the magistrate court, have jurisdiction to deal with or entertain claims founded on adverse possession, has been ongoing, but in my humble view the said debate would not have ensued, if the decision of the Court Of Appeal in the case of **Mtana Lewa v Kahindi Ngala Mwagandi (2015) eKLR**, was appreciated and taken into account. For clarity, the honourable court of appeal had occasion to interrogate the import and tenor of the two sections namely, Section 37 & 38 of the Limitation of Actions Act, Chapter 22 Laws of Kenya.

60. Be that as it may, it would be remis of me not to acknowledge the considered decisions in the case of **Jesee Njoroge Gitau v Kibuthu Macharia & another [2019] eKLR**, where the court as hereunder;

*“It is clear from the above provisions of the law that the Magistrate’s court have no jurisdiction to try matters where a party is seeking adverse possession. Indeed, if both matters had been filed in this court, the best order suited to issue upon this application would have been an order for consolidation of both the matters. However this is not the case in question.”*

61. Similarly, I also beg to acknowledge the decision of Justice Munyao Sila in the case of **Michael Chebii Toroitich v Peter Mogin Yatich Chebii [2013] eKLR** where the court held as hereunder;

*The matters in issue in Iten RMCC No. 9 of 1994 and in the land disputes tribunal, in my view, were whether the defendant holds a half share of the land in trust for the plaintiff. The question whether the plaintiff is entitled to the suit land by way of adverse possession never arose in those proceedings. Indeed, they could not have arisen, as the Magistrate's court does not have jurisdiction to entertain a claim of adverse possession. Neither could adverse possession have been made a ground of attack or defence in those two proceedings. The issue of adverse possession could not have been raised and was never raised in those proceedings.*

62. I salute the findings and holdings by Hon. Justices M. C Oundo & Munyao Sila, Judges, in the forecited decisions and I add my voice to the position that the magistrate’s court, are not seized with jurisdiction to adjudicate upon claims founded on adverse possession on the face of the explicit provisions contained in Sections 37 & 38 of the Limitation of Actions Act.

63. So much for the debate on whether the magistrate’s court have jurisdiction on adverse possession. I must now return back to the subject appeal and render an answer to the Appellants complaint.

64. In my humble view, the proposed amendments by the Appellant, with a view to introducing a claim for adverse possession, would not have been within the jurisdiction of the magistrate’s court.

65. In the premises, the intended amendment sought, would have been an act in futility, and hence the magistrate court, would not have been competent to pronounce itself on, on account of lack and / or want of jurisdiction.

66. In any event, it is imperative to take note that jurisdiction is everything and without jurisdiction a court of law must down it tools. In this regard, I reiterate the observations of the supreme court in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, where the court observed as hereunder;

*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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.*

## **FINAL DISPOSITION**

67. Having discussed all the grounds of appeal raised by the Appellant herein and having considered the general principles applicable as pertains to amendments of pleadings, I come to the conclusion that the Appellant herein was not entitled to the leave sought for purposes of amendment.

68. In the premises, I find and hold that the chamber summons dated 1<sup>st</sup> October 2019, was rightly dismissed .For clarity, the learned trial Magistrate reached the correct ending even though, there were errors committed in course of the journey

69. In a nutshell, the Appeal by the Appellant is devoid of merits and is hereby Dismissed.

70. Lastly, costs ordinarily follow the event and I have not seen any good reason why same should not follow the event in this matter. In this regard costs are hereby awarded to the Respondents and the 2<sup>nd</sup> Interested Party and same shall be borne by the Appellant.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER 2021.**

**HON. JUSTICE OGUTTU MBOYA,**

**JUDGE,**

**ENVIROMENT AND LAND COURT,**

**MILIMANI.**

In the Presence of;

**June      Court Assistant**