



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE NO. 2 OF 2019

PATRICK NDEGWA MUNYUA PLAINTIFF

VERSUS

BENJAMIN KIIRU MWANGI1ST DEFENDANT

FREDRICK MAINA MWANGI2ND DEFENDANT

RULING

1. The plaintiff commenced proceedings in this case on 9th January 2019 through Originating Summons of even date whereby he seeks a declaration that he has acquired the parcel of land known as Bahati/Kabatini Block 1/9983 (hereinafter “the suit property”) through adverse possession. The record herein shows that the defendants entered appearance on 27th February 2019 but have so far not filed any response to the Originating Summons.

2. Shortly after filing the Originating Summons, the plaintiff filed Notice of Motion dated 14th January 2019 in which he seeks orders that **Nakuru CM ELC Case No. 330 of 2018 Benjamin Kiiru Mwangi vs. Patrick Ndegwa Munyua** be transferred to this court for trial and disposal and be consolidated with this case. The said application is the subject of this ruling. It is supported by an affidavit sworn by Mr Githui John, counsel on record for the plaintiff/applicant. He deposed that when the plaintiff herein started making claims of adverse possession in respect of the suit property, the 1st defendant herein filed **Nakuru CM ELC Case No. 330 of 2018 Benjamin Kiiru Mwangi vs. Patrick Ndegwa Munyua** in the subordinate court alleging trespass. He added that although both matters relate to the same parties and the same subject matter, the claim for adverse possession can only be heard by this court.

3. At the hearing of the application, Mr Chege learned counsel for the defendants argued, without citing any particular section, that the **Magistrates' Courts Act, 2015** grants subordinate court’s jurisdiction to handle adverse possession claims and that since the value of the subject matter is within the pecuniary jurisdiction of the subordinate court, this suit should instead be transferred to the subordinate court for consolidation with the matter pending there. In response, Mr Githui, learned counsel for the plaintiff stated that he would have no objection to transfer of this matter to the subordinate court if the said court has jurisdiction to handle claims in the nature of adverse possession.

4. I have carefully considered the application and the submissions of counsel. A perusal of the plaint in **Nakuru CM ELC Case No. 330 of 2018** shows that the said case was filed on 19th November 2018, almost 2 months before this case was filed. In the said case, Benjamin Kiiru Mwangi (the 1st defendant herein) alleges that he is the registered proprietor of the parcel of land known as Bahati/Kabatini Block 1/9983 and adds that Patrick Ndegwa Munyua (the plaintiff herein) has trespassed into the said property and is claiming its ownership. He therefore seeks a declaration that he is the absolute owner of the property, a permanent injunction restraining Patrick Ndegwa Munyua from trespassing into or dealing with the property and damages for trespass. It is thus clear that save for the issue of adverse possession, the parties and the subject matters in the two matters are the same.

5. In any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The Supreme Court stated **In the Matter of Interim Independent Electoral Commission [2011] eKLR** as follows:

[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.

6. If the magistrates’ court has jurisdiction to hear and determine claims in the nature of adverse possession, there would be no difficulty in having this matter transferred to Chief Magistrate’s Court Nakuru for hearing and determination. Parties are in agreement that the value of the suit property falls within the pecuniary jurisdiction of the magistrates’ court. Thus, the only issue for determination is whether magistrates’ courts have jurisdiction to hear and determine claims in the nature of adverse possession.

7. Asike-Makhandia, JA described adverse possession in Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR as follows:

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act, which is in these terms:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

8. Section 38 of the **Limitation of Actions Act** only specifies the High Court as the court before which a person who claims to have become entitled to land by adverse possession may seek an order that he be registered as the proprietor of the land. The section provides as follows:

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, 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) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

(3)

(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) ... [Emphasis supplied]

9. Further provisions regarding how to institute such proceedings are found at **Order 37 Rule 7** of the **Civil Procedure Rules** which states as follows:

7. (1) An application under section 38 of the **Limitation of Actions Act** shall be made by originating summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

(3) The court shall direct on whom and in what manner the summons shall be served.

10. Owing to the provisions of **Section 38 (1)** of the **Limitation of Actions Act** which specifically refer to the High Court, claims in the nature of adverse possession have traditionally been filed in the High Court and following the enactment of the **Environment and Land Court Act, 2011**, in this court. That is in line with the jurisdiction of this court to hear and determine disputes relating to the environment and the use and occupation of and title to land as provided for under **Article 162(2) (b)** of the **Constitution of Kenya, 2010** and at **Section 13** of the **Environment and Land Court Act, 2011**. The said **Section 13** provides as follows:

13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with **Article 162(2) (b)** of the **Constitution** and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under **Article 162(2) (b)** of the **Constitution**, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries,

rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land. [Emphasis supplied]

11. Despite the wording of **Section 38 (1)** of the **Limitation of Actions Act** which does not mention any other court, I am not aware of any decision or even argument that doubts the jurisdiction of the Environment and Land Court to hear and determine claims of adverse possession.

12. The judicial system in Kenya also includes the magistrates' courts as established under **Article 169** of the **Constitution of Kenya, 2010**. Pursuant to **Article 169 (2)**, parliament is mandated to enact legislation conferring jurisdiction, functions and powers on the magistrates' courts. In that regard parliament legislated the following provisions at **Section 26 (3)** and **(4)** of the **Environment and Land Court Act, 2011**:

(3) **The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.**

(4) **Subject to Article 169(2) of the Constitution, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —**

(a) **disputes relating to offences defined in any Act of Parliament dealing with environment and land; and**

(b) **matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.** [Emphasis supplied]

13. Indeed, the Chief Justice has, by various gazette notices, made appointments pursuant to **Section 26 (3)** and **(4)** of the **Environment and Land Court Act, 2011**. Such gazette notices include Gazette Notice No. 1472 dated 1st March 2016, Gazette Notice No. 1475 dated 1^{4th} March 2016, Gazette Notice No. 11930 dated 5th December, 2017 and Gazette Notice No. 2575 dated 28th February, 2019. Thus, there exist within the magistrates' courts, several magistrates duly gazetted and granted jurisdiction and power to handle cases involving occupation and title to land. In particular, I am aware that there are such magistrates serving in Nakuru where **Nakuru CM ELC Case No. 330 of 2018 Benjamin Kiiru Mwangi vs. Patrick Ndegwa Munyua** was filed.

14. Some four years after enactment of the **Environment and Land Court Act, 2011**, parliament also enacted the **Magistrates' Courts Act, 2015** so as to among others give effect to **Articles 23 (2)** and **169 (1) (a)** and **(2) of the Constitution** and to confer jurisdiction, functions and powers on the magistrates' courts. The Act came into operation on 2nd January, 2016 and its **Section 9 (a)** provides:

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 (Cap. 12A) 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**. [Emphasis supplied]

15. The upshot of the provisions at **Section 26 (3)** and **(4)** of the **Environment and Land Court Act, 2011** and **Section 9 (a)** of the **Magistrates' Courts Act, 2015** is that magistrates who are duly gazetted and have the requisite pecuniary jurisdiction have jurisdiction and power to handle cases involving occupation of and title to land. Claims in the nature of adverse possession involve title to land since the claimant ultimately seeks an order that he be registered as the proprietor of the land. Indeed, **Black's Law Dictionary, Ninth Edition** defines "**adverse possession**" thus:

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

2. The doctrine by which title to real property is acquired as a result of such use or enjoyment over a specific period of time.
[Emphasis supplied]

16. Although **Section 38 (1)** of the **Limitation of Actions Act** specifically refers to the High Court without mention of the magistrates' courts, it must be remembered that is an old statute that came into operation way back on 1st December 1967 compared to the more recent **Environment and Land Court Act, 2011** and the **Magistrates' Courts Act, 2015**, both of which were enacted after promulgation of the Constitution of Kenya, 2010. I have already mentioned at paragraph 14 above, the purposes of **Magistrates' Courts Act, 2015**. The purposes of the **Environment and Land Court Act, 2011** are captured in its preamble as follows:

An Act of Parliament to give effect to Article 162 (2) (b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.

17. Since **Section 38 (1)** of the **Limitation of Actions Act** predated the Constitution of Kenya, 2010, its interpretation must be guided by **Section 7 (1)** of the **Sixth Schedule** of the Constitution of Kenya titled **Transitional and Consequential Provisions** which provides:

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.

18. The alterations, adaptations, qualifications and exceptions referred to above must give **Section 38 (1)** of the **Limitation of Actions Act** conformity to **Section 26 (3) and (4)** of the **Environment and Land Court Act, 2011** and **Section 9 (a)** of the **Magistrates' Courts Act, 2015** both of which were enacted to give effect **Article 162(2) (b)** and **Article 169(1) (a) and (2)** of the **Constitution**. So as attain that conformity, **Section 38 (1)** of the **Limitation of Actions Act** must be construed as not depriving magistrates who are duly gazetted and have the requisite pecuniary jurisdiction, of the jurisdiction and power to handle cases involving occupation of and title to land, including adverse possession which is essentially a dispute on title to land. Such an interpretation is further in line with **Article 259** which enjoins the court to interpret the constitution in a manner that promotes its purposes, values and principles.

19. Among the principles of the constitution are devolution and access to services. **Articles 6(3)** and **48** of the Constitution have the combined effect of requiring devolution of and access to judicial services as well as access to justice for all persons. Allowing magistrates' courts to handle adverse possession claims will certainly make it possible for more litigants to access justice since magistrates' courts are more widely distributed in most parts of the country as opposed to this court which is yet to be stationed in all the counties. The Court of Appeal stated in **Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others [2017] eKLR** as follows:

... what then is the status of magistrates' courts vis a vis the jurisdiction to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land? ...

59. Lenaola, J (as he then was) grappled with the question "whether the jurisdiction to hear and determine new cases relating to the environment and use and occupation of, and title to land vested exclusively on the Environment and Land Court established under Article 162(2) of the Constitution" in the High Court in the case of **Edward Mwaniki Gaturu & another vs. Hon. Attorney-General & 3 others [2013] eKLR**. The learned Judge had no difficulty in rejecting the argument that magistrates' courts lack jurisdiction over those matters. The Judge held that the ELC court does not have exclusive jurisdiction to hear and determine such matters. ...

65. In our view, conferring jurisdiction on magistrates' courts to hear and determine does not diminish the specialization of the specialized courts considering that appeals from the magistrates' courts over those matters lie with the specialized courts. As urged by Mr. Kanjama, under the doctrine of judicial precedent, the decisions of the specialized courts would bind the magistrates' courts and the specialized courts would therefore undoubtedly imprint the specialized jurisprudence on the magistrates' courts. ...

67. Devolution, access to services and access to justice, among others, are critical pillars of our constitutional architecture. Article 6(3) of the Constitution demands reasonable access to services. Article 48 demands that the state "shall ensure access to justice for all persons." Access to justice has many facets. One facet is the geographical location of the courts and proximity of the courts to the people intended to be served by the courts. There are undoubtedly more magistrates' courts in Kenya than there are specialized courts or even High Court stations for that matter. The close proximity of magistrates' courts to the people ensures efficiency and access to justice at reasonable cost. It would be illogical and unreasonable to prohibit magistrates' courts from determining land and employment disputes, when it is undeniable that their reach to the citizenry is much wider than that of the specialized courts. Public interest, in our view, would be better served by increasing the number of courts with the capability of resolving such disputes.

20. Even if one were to argue that the procedure for commencing and prosecuting adverse possession claims as provided for under **Order 37 Rules 7, 16, 17 and 18** of the **Civil Procedure Rules** requires that such proceedings be commenced and prosecuted before a "judge", I note that the word "judge" is defined at **Section 2** of the **Civil Procedure Act** to mean "the presiding officer of a court". Thus as used in the **Civil Procedure Act** and the rules thereunder, "judge" does not exclusively refer to judges of the High Court or the Environment and Land Court as established under **Article 162** of the **Constitution**. It includes a magistrate.

21. Can adverse possession claims be said to be complex and requiring the attention of this court as opposed to magistrates' courts? Certainly not. Even if they were complicated, the subordinate courts already handle much more complicated matters. Adverse possession claims are commenced by originating summons, a procedure reserved for simple and uncomplicated matters. The Court of Appeal restated as much in **AHAD v CJE [2019] eKLR**:

... It is however established that the procedure of originating summons is not intended for complex matters or matters where facts are contested. As stated by the Court in *Kenya Commercial Bank Ltd vs. Osebe* (above):

“The procedure of originating summons is intended for simple matters and enables the court to settle them without the expense of bringing an action. The procedure is not intended for determination of matters that involve serious questions. The procedure should not be used for the purpose of determining disputed questions of fact.

The procedure of originating summons is designed for the summary or ad hoc determination of points of law, construction or certain specific facts for obtaining of specific directions of the court such as trustees, administrators or the courts execution officers”.

22. In fact, it is no longer a requirement that adverse possession claims be commenced by way of originating summons. Case law now allows one to commence them by plaint or even counterclaim. See *Gulam Miriam Noordin v Julius Charo Karisa* [2015] eKLR and *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR. From a procedural perspective, adverse possession claims are as ordinary as any other matters that one finds in the cause list in the magistrates’ courts.

23. In view of the foregoing discourse, there are ample reasons based on the express provisions of **Section 26 (3) and (4)** of the **Environment and Land Court Act, 2011** and **Section 9 (a)** of the **Magistrates’ Courts Act, 2015**, the principles of interpretation of the constitution as well as the principles of the constitution such as devolution, access to services and access to justice for all persons, to find as I hereby do, that so long as presided over by a magistrate who is duly gazetted under **Section 26 (3)** of the **Environment and Land Court Act, 2011** and who has the requisite pecuniary jurisdiction, magistrates’ courts have jurisdiction and power to handle cases involving claims of adverse possession.

24. As previously noted, *Nakuru CM ELC Case No. 330 of 2018 Benjamin Kiiru Mwangi vs. Patrick Ndegwa Munyua* was filed on 19th November 2018, almost 2 months before this case was filed. Since there exist in Nakuru magistrates duly gazetted under **Section 26 (3)** of the **Environment and Land Court Act, 2011** and granted jurisdiction and power to handle cases involving occupation and title to land, I make the following orders:

i. This matter (ELC No. 2 of 2019 Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & Fredrick Maina Mwangi (Nakuru)) is hereby transferred to Chief Magistrates Court Nakuru for hearing and determination.

ii. Parties are at liberty to make an appropriate application before the subordinate court for consolidation of this matter and Nakuru CM ELC Case No. 330 of 2018 Benjamin Kiiru Mwangi vs. Patrick Ndegwa Munyua.

iii. Costs shall be in the cause.

25. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 30th day of January 2020.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff/applicant

No appearance for the defendants/respondents

Court Assistants: Beatrice & Lotkomo