



REPUBLIC OF KENYA



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**Kosgei v Mugun (Civil Appeal E121 of 2021)
[2025] KECA 1507 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KECA 1507 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL E121 OF 2021
JM MATIVO, PM GACHOKA & WK KORIR, JJA
SEPTEMBER 19, 2025**

BETWEEN

GEOFFREY KIPSEREM KOSGEI APPELLANT

AND

SIMON KIMARU MUGUN RESPONDENT

(An appeal against the Ruling and Order of the Environment and Land Court at Kapsabet (M. Mwanyale, J.) dated 17th March 2021 in ELC Case No. 37 of 2021)

JUDGMENT

1. In a ruling delivered on 17th March 2022, Mwanyale, J. dismissed the preliminary objection dated 27th January 2016 raised by the appellant, (Geoffrey Kipserem Kosgei), against the counterclaim filed by the respondent, (Simon Kimaru Mugun), as part of his response to the appellant's suit. In the counterclaim, the respondent was seeking orders of adverse possession over parcel number Nandi/Ndulele/308 ("the suit property"). According to the appellant, the counterclaim contravened Order 37 Rule 7 of the Civil Procedure Rules and section 38 of the *Limitation of Actions Act*. The learned Judge rejected the appellant's argument that a claim for adverse possession can only be brought by way of originating summons and therefore sustained the respondent's counterclaim. The appellant appeals against that decision.
2. Dissatisfied with the ruling, the appellant is before us raising a whopping 18 grounds of appeal which we have condensed into two questions as to whether the learned trial Judge erred in holding that a claim of adverse possession can be raised through a counterclaim, a procedure presumably contrary to Order 37 Rule 7 of the Civil Procedure Rules which provides for instituting such a claim through an originating summons; and whether the respondent's claim of adverse possession was barred by the *Limitation of Actions Act*.



3. To give a brief background to the dispute, the appellant in a plaint dated 16th November 2015 claimed ownership of the suit property and sought the eviction of the respondent. He also sought an order of permanent injunction restraining the respondent from dealing with the suit land. In a statement of defence dated 15th December 2015, the respondent denied the appellant's claim and moved to assert his ownership over the suit property by way of adverse possession on the ground that his late father bought part of the property and that he had lived thereon for 45 years. It is this line of defence that led to the appellant to raise an oral preliminary objection, which, as we have already stated, was dismissed, leading to this appeal.
4. When the appeal came up for hearing on 8th May 2025, learned counsel Mr. Kimaiyo Segó appeared for the appellant, while his counterpart, Mr. Chemwok, represented the respondent. Apart from making oral submissions, counsel for the parties relied on their respective written submissions, which they had already filed, while also orally responding to clarifications sought by the Court.
5. In submissions dated 13th July 2024, learned counsel Mr. Segó submitted that the learned Judge erred by dismissing his client's preliminary objection. He argued that the procedure for claiming land by way of adverse possession is provided in Order 37 Rule 7 of the Civil Procedure Rules, which requires the proceedings to be commenced through an originating summons. He asserted that, as such, the respondent's counterclaim, filed as a defence, was incompetent and procedurally flawed. According to counsel, Order 37 Rule 7 of the Civil Procedure Rules is mandatory and grounded in the *Civil Procedure Act*. To support this argument, counsel relied on *Njenga Karume vs. The Speaker of the National Assembly [1992] eKLR* to emphasize that parties are bound to comply with the procedures provided by statute. While acknowledging that courts have developed jurisprudence allowing adverse possession claims through counterclaims, counsel insisted that the specific circumstances of this case concerning the alleged long-term occupation and development of a 6-acre parcel valued at Kshs. 3,500,000 did not present complex issues that would warrant deviation from the originating summons procedure. According to counsel, the ruling of the High Court was therefore erroneous.
6. In respect of the issue as to whether the respondent's claim for adverse possession was statutory barred, counsel argued that the defense of adverse possession was stale. According to counsel, the counterclaim of adverse possession could not provide a reasonable defense to a claim of trespass, which is a continuous tort. Counsel referred to *Jowitt's Dictionary of English Law, 2nd Edition*, to define continuous trespass as being permanent in nature, and cites *Black's Law Dictionary, 8th Edition*, to define trespass as an unauthorized entry or sign of unlawful possession. Counsel also cited *Clark and Lindsel on Torts, 16th Edition*, for the proposition that a new cause of action arises each day as long as the trespass continues. Counsel cited several decisions, including *Seventh-Day Adventist Church East Africa Limited vs. Joseph Wachira alias Joe T/A Mugumoini Garage & 7 Others [2005] eKLR* and *Michael Kithimji Kimotho vs. Nicholas Muratha Mugo [1995] eKLR*, to support the appellant's claim of trespass and the right to eviction.
7. Finally, counsel raised concerns about the multiplicity of legal proceedings involving the same parties and the subject matter across different courts. He pointed out that issues related to the respondent's father's estate (Kapsabet High Court Succession Case No. 120 of 2014) and the appellant's applications for annulment of a grant and revocation of title (Eldoret High Court Miscellaneous Applications No. 5 of 2016) are still pending in court. He argued that such multiplicity of suits is unlawful under the *Environment and Land Court Act*, as it obstructs the administration of justice and contributes to case backlogs. He cited *Barclays Bank of Kenya Limited vs. Elizabeth Agidza & 2 Others [2012] eKLR* to suggest that controversies in subsequent suits ought to have been adjudicated in the previous cases by applying the provisions of sections 1A and 1B of the *Civil*



Procedure Act. Ultimately, learned counsel prayed that the appeal be allowed and the preliminary objection be upheld.

8. In opposition to the appeal through the submissions dated October 3rd, 2022, learned counsel Mr. Chemwok acknowledged that the central aspect of the respondent's defence is the claim of adverse possession over 6 acres of the suit property. He submitted that the respondent or his late father, Mr. Machii Kimugun Boit, purchased 6 acres from the late Mariah Jemaiyo Boit Kibirgen in 1970 and has maintained continuous, uninterrupted possession since then. The respondent's counsel asserted that a claim for adverse possession can be initiated as a defence, counterclaim, or through an originating summons. Accordingly, counsel argued that the learned trial Judge correctly appreciated the laws governing the matter. Counsel pointed out that the method of filing a claim for adverse possession has been addressed in several decisions, reflecting a paradigm shift in the thinking of the Court, thus allowing a claim of adverse possession to be commenced and maintained based on a counterclaim or a plaint. Counsel relied on various decisions, including *Mariba vs. Mariba*, Civil Appeal No. 188 of 2002; *Wabala vs. Okumu* [1997] LLR 609 (CAK); and *Gulam Mariam Noordin vs. Julius Charo Karisa*, Civil Appeal No. 26 of 2015, to support the argument that adverse possession proceedings can be commenced through procedures other than originating summons and that the limitation period for land recovery does not apply to the respondent's counterclaim. Counsel also referenced *Bayete Co. Ltd vs. Kosgey* [1998] LLR 813, where, despite the plaintiff not specifically pleading adverse possession, the plea was nonetheless granted. Counsel further urged that when interpreting the provisions of sections 37 and 38 of the Limitation of Actions Act, the term "High Court" should be understood to mean the Environment and Land Court, which is the corresponding court of equal status. According to counsel, the learned trial Judge was diligent in understanding the applicable law and procedures as a whole. In conclusion, counsel urged that the appeal should be dismissed in its entirety.
9. As was held in *Abok James Odera T/A A.J. Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates* [2013] KECA 208 (KLR), and as required by rule 31(1)(a) of the Court of Appeal Rules, an appellant's expectation on a first appeal, like the instant one, is that the Court will re-evaluate, re-assess, and re-analyze the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. In that endeavour, we have reviewed the record and the submissions by counsel for the parties. In our view, the only issue for determination is whether the appellant's preliminary objection was merited.
10. The main question in this appeal is whether a claim for adverse possession can be brought by way of a defence or counterclaim. As appreciated by the learned trial Judge and counsel for the parties, this Court has in numerous decisions held that such a claim can indeed be initiated by way of a counterclaim or defence and not strictly through an originating summons as urged by Mr. Sege for the appellant. On this, we need not look further but extensively quote *Gulam Miriam Noordin vs. Julius Charo Karisa* [2015] KECA 188 (KLR), where this Court held as follows:

“The appellant contended that for the court to find for the respondent the claim ought to have been brought by way of originating summons. That contention is based on the provisions of Order 37 rule 7 of the Civil Procedure Rules. It has been held that although that is the procedural requirement, a party is not precluded from articulating his claim by way of a plaint. See *Mariba vs. Mariba* Civil Appeal No. 188 of 2002. In *Njuguna Ndatho vs. Masai Itumo & 2 others* Civil Appeal No.231 of 1999, this Court held that the respondent's counter-claim for adverse possession was misconceived because it ought to have been brought by originating summons. The orders vesting the property in the respondent by the High Court was set aside. The Court went further and held that the defence of limitation would, however, succeed, and the appellant's suit in the High Court



would succeed, but the respondent would have to take such action necessary to enable him to obtain title to the property.

That position is no longer tenable. 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 vs. 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 vs. Kosgey* [1998] LLR 813 where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.”

11. Similarly, in *Teresa Wachuka Gachira vs. Joseph Mwangi Gachira* [2009] KECA 445 (KLR), the Court held that:

“The mandatory procedure for invoking that section is in Order 36 r 3D of the Civil Procedure Rules and ordinarily the failure to follow that procedure is fatal to the suit. That is because under rule 10 an originating summons may be continued as if the cause had begun by filing a plaintiff, but the converse is not acceptable – see *E. vs. E.* [1970] EA 604. In this case, however, adverse possession was made in a counterclaim, a procedure which was adopted and received acceptance in the *Gatimu Kinguru* case (supra). Whatever the procedure, the onus is on the person claiming adverse possession to prove...”

12. The position adopted above clearly captures the subsisting jurisprudence of this Court, which, by way of precedence, the learned Judge was bound to follow. During the hearing of the appeal, the Court inquired from Mr. Segor for the appellant whether he had any persuasive reason as to why the Court should move away from this position. Unfortunately, learned counsel did not proffer any reason save to reiterate that under Order 37 Rule 7 of the Civil Procedure Rules, a claim of adverse possession must be brought by way of originating summons. According to counsel, the alternative procedures as permitted in *Gulam Miriam Noordin vs. Julius Charo Karisa* (supra), were a subversion of explicit statutory provisions through judicial craft.

13. To debunk this assertion by Mr. Segor, we refer to Order 7 Rule 3 of the Civil Procedure Rules, which provides as follows:

“A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.”

[Emphasis ours]



14. In our view, the procedure set down under Order 37 Rule 7 of the Civil Procedure Rules requiring a claim of adverse possession to be brought by way of an originating summons does not deny a defendant or respondent the right to bring a claim for adverse possession by way of a counterclaim, as was done in this case. That is what Order 7 Rule 3 of the Civil Procedure Rules speaks to. The Supreme Court of India in *Sh. Jag Mohan Chawla & Another vs. Dera Radha Swami Satsang & Others* [1996] 2 SCJ 502, while considering Rule 6A of the Indian Civil Procedure Code, which is closely similar to Order 7 Rule 3 of our Civil Procedure Rules stated as follows:

“The defendant may set up a cause of action which has accrued to him even after the institution of the suit. The counter-claim expressly is treated as a cross suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection, the legislature intended to try both the suit and the counter-claim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit.”

15. Back home, this Court in *County Government of Kilifi vs. Mombasa Cement Limited* [2017] KECA 633 (KLR) considered Order 7 Rule 3 of the Civil Procedure Rules and held that:

“In our view, a plain reading of the above provision allows or gives a defendant in a suit permission or a carte blanche, to raise a counterclaim based on any right or claim against a plaintiff. That provision says nothing to the effect that such counterclaim must be related to the original subject matter of the suit and neither does it attract such an implication...

In view of the foregoing, it is safe to conclude that a defendant is permitted to raise a counterclaim against a plaintiff on any right and claim he may have against the plaintiff even where the subject matter or cause of action maybe different from the original suit. The rationale is to avoid multiplicity of proceedings and claims based on same or different cause of action between parties to the suit to enable a court to pronounce a final judgment in the suit both on the original claim and on the counter claim. However, Order 7 rule 3 of the Civil Procedure Rules gives court a wide discretion such that, on the application of the plaintiff, the court may reject a counterclaim where it would not be convenient or where in the opinion of the court, the counterclaim ought not to be allowed. No doubt, that is a wide discretion and the reasons as to why a court would disallow a counterclaim would be many and varied to be decided on a case-by-case basis.”

16. We entirely associate ourselves with the above holding. Perhaps to understand the intention of the drafters of the rules, we would hold that the procedure established under Order 37 rule 7 is meant for instituting a fresh and independent suit. However, where there is an already filed suit, and the defendant is desirous of asserting his right of adverse possession, such a defendant is allowed to assert such right through a counterclaim pursuant to Order 7 Rule 3 of the Civil Procedure Rules. It would not make sense to ask a defendant who wants to lay claim to the plaintiff’s land through adverse possession to go and file a separate suit commenced through an originating summons against the defendant. Not only will such a course of action be untidy, it will also be wasteful of scarce judicial resources. It would amount to paying homage to procedural requirements at the expense of substantive justice and common sense.



17. Flowing from the foregoing, we conclude that the learned trial Judge correctly interpreted the law in relation to the preliminary objection and rightly dismissed the objection. All the other issues raised by learned counsel Mr. Sego were not part of the preliminary objection and are, in any event, matters to be taken up in the suit pending before the Environment and Land Court.
18. Consequently, we do not find any merit in this appeal, and we hereby dismiss it. The appellant having not established any exception to the general rule that costs follow the event, it follows that the respondent shall have the costs of the appeal from the appellant.
19. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 19TH DAY OF SEPTEMBER 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

