

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC APPEAL NO. E020 OF 2023

SHAMIRA CHEPKEMEI CHELANGA-----1ST APPELLANT
RAHILA CHERUTO CHELANGA-----2ND APPELLANT
MOHAMED KIPKOSKEI CHELANGA-----3RD APPELLANT
IBRAHIM KIPKORIR CHELANGA-----4TH APPELLANT

VERSUS

ALPHONCE BUNDI-----1ST RESPONDENT
NICHOLAS ONDUKO BUNDI-----2ND RESPONDENT
JOHN MOGAKA BUNDI-----3RD RESPONDENT
REBECCA BISIERI BUNDI-----4TH RESPONDENT
NAOMI MORAA BUNDI-----5TH RESPONDENT

[Being an appeal against the entire Judgment and Decree of Hon. S.K. Mutai (SPM) delivered on 05/06/2024 in Kitale CMC ELC No. E075 OF 2021 formerly Kitale ELC No. 52 of 2019 (OS)]

JUDGMENT

1. The appellants before this court had been sued as the defendants by the respondents through an Originating Summons dated **15/7/2019**, seeking the

court to declare them as entitled to **Title No. Kapkoi/Mabonde Block 1/Ex-Prison/206** by virtue of adverse possession. The suit was initially filed before this suit. It was transferred by this court to *suo moto*, to the lower court on **7/4/2021**.

2. The applicants opposed the originating summons through a replying affidavit sworn on their behalf by Shamira Chepkemei Chelanga on **11/9/2021**.
3. At the trial, Nicholas Onduko Bundi, John Mogaka Bundi, Jumina Juma, and Copernicus Mutoka testified as PW1 - PW4. They relied on a witness statement dated **27/11/2019** as their evidence in chief.
4. PW1 told the court that he, together with his siblings and parents, entered into occupation of **Title No. Kapkoi/Mabonde Block 1/Ex-Prison/206**, whose registered owner was Ismael Juma Chelanga in **December 1999**, for their previous home in Tulwet Kitale. PW1 said that they fenced, cut down trees and erected semi-permanent houses, a 2-roomed timber house, and began cultivating assorted crops and keeping cattle. Eventually, PW1 said that his father dug a borehole and a small dam for irrigation during dry seasons.

5. Further, PW1 said that about **2000**, they constructed a 5-roomed semi-permanent plastered house. At the time, PW1 said that his brother Alphonse was **20** years while John and Rebecca were **17** and **20** years old.
6. PW1 said that all three of his brothers and sisters, then in primary and secondary schools at St. Joseph's Boys High School, Kitale Academy, Mwencha Academy, and Mt. Elgon Academy, would spend all their school holidays on the suit land.
7. PW1 said that the family continued living on the land until **7/7/2003**, when his mother, Grace Bosibori Njoga, died and was buried on the suit land. Similarly, PW1 said that after his father, James Bundi Nyairo Tengeya, died on **11/11/2017**, he was also buried therein with elaborate ceremonies, which were also permitted by the area chief, with no objection from anyone.
8. PW1 said that the family was commercially growing maize every year, which it would sell to the National Cereals and Produce Board with permission from the area chief. PW1 said that his late mother was a teacher in a nearby public primary school, and they

would sell vegetables, milk, maize, and other farm produce to the local shopping centers and markets.

- 9.** PW1 said that his family and parents were known as owners of the land to an extent that on **11/2/2005**, there was a boundary dispute between the suit land and **four** other neighbouring plots, which was handled by the Land Registrar with his late father being summoned to attend. PW1 said that due to the long occupation, the family was entitled to adverse possession; otherwise, the title held by the beneficiaries to the estate of the late Ismael Juma Chelanga has been extinguished by virtue of **Section 38** of the Limitation of Actions Act.
- 10.** PW1 relied on a copy of the title deed, death certificates of his parents, photographs, copy of letter of verification from the agriculture officer, copy of summons dated **11/2/2005** from the Land Registrar West Pokot, copy of chief's letter dated **5/7/2019**, copy of official search certificate dated **15/7/2019**, copy of grant of letters of administration for the estate of Ismael Juma Chelanga dated **15/1/2011** and a copy of a confirmation of grant dated **22/11/2011** as **P. Exhibit. No. (1) - (10)** respectively. PW2, PW3, and PW4 corroborated the

evidence of PW1, confirming that they have been in uninterrupted, exclusive, and continuous occupation of the suit land since **1999**.

- 11. Shamira Chepkemei Chelanga** testified as **DW1**. She relies on a witness statement dated **20/12/2019** as her evidence-in-chief. DW1 told the court that she was one of the administrators of the estate of the late Philemon Chelang'a, who was the registered owner of Title No. **Kapko/Mabonde Block 1/Ex-Prison/206**.
- 12.** DW1 said that before registration, the suit land in **1992**, the deceased had appointed one Francis to be in charge of the land before one James Nyairo replaced him in **2000**, who settled on the land, at a time the deceased had placed a caution dated **11/8/2000** on the title, to preserve it from any alienation which subsists to date.
- 13.** DW1 said that the respondents have now erected structures on the suit land; otherwise, their late father was the caretaker of the suit land before he passed on. DW1 said that the occupation of the land by the respondents was consented to by the deceased owner, which licence to occupy terminated with the death, and they ought to vacate the land.

- 14.** DW1 termed the claim for adverse possession as lacking merit since the occupation was consented to and out of a licence by the deceased. DW1 said that her late father passed on in **1996**, leaving the late Francis as the caretaker. DW1 said that her late father had erected a structure on the suit land and they would periodically visit the land. DW1 confirmed that most of her late mother and father's properties had caretakers.
- 15.** After the close of the defence case, the trial court allowed the respondents' claim. The appellants have appealed against the judgment based on an amended Memorandum of Appeal dated **18/3/2025**, among them that the court lacked jurisdiction to entertain the suit.
- 16.** The respondents relied on written submissions dated **30/7/2025**, isolating two issues for determination.
- 17.** On jurisdiction, the respondents rely on **Sections 26(3) and (4)** of the Environment and Land Court Act and **Section 9(a)** of the Magistrates' Court Act to state that, as held in ***Patrick Ndegwa Munyua -vs- Benjamin Kiiru Mwangi & Another [2020] eKLR***, the lower courts had jurisdiction to deal with adverse possession.

- 18.** It is submitted that the jurisdiction only changed with the holding on **Sugawara -vs- Kiruti [2024] KECA 1417 [KLR] (11th October 2024) (Judgment)**. The respondents submit that the cited authority of **Patrick Ndegwa Munyua -vs- Benjamin Kiiru Mwangi & Another** (*supra*) was good law, and being so, there was a legitimate expectation that cases before a new judicial regime, created by statute, would be determined under the law in force at the time.
- 19.** In this case, the respondents submit that they had filed the suit at the Environment and Land Court on **15/7/2019**, but it was this court that, *suo moto*, transferred the suit to the lower court, and they were only notified of the same on **2/6/2021**. The respondents submit that they should not be punished for an inadvertent administrative action and or omission of the court.
- 20.** On whether the trial court properly found the claim merited, the respondents submitted that the judgment was found and followed the principles to found adverse possession as held in **Chevron (K) Ltd -vs- Harrison Charo Wa Shutu [2016] eKLR**

and **Celina Muthoni Kithinji -vs- Safiya Binti Swaleh & Others [2018] eKLR.**

21. The issues calling for my determination are two:
- (1) ***If the lower court had jurisdiction to hear and determine the suit.***
 - (2) ***Whether the appeal has merit.***
 - (3) ***What is the order as to costs?***
22. A claim for adverse possession is brought on the strength of **Section 38** of the Limitation of Actions Act. The court that the Section refers to as having jurisdiction is the High Court. The case of **Sugawara -vs- Kiruti** (*supra*) simply restated the law. There has been no change of judicial regime following the Sugawara decision. Unfortunately, the parties herein had their suit transferred to the lower court without their prompting. The mistake cannot be attributable to the parties. Equity suffers no wrong without a remedy.
23. Jurisdiction is everything; without it, a court has to put down its tools. See **Owners of Motor Vessel Lillian 'S' -vs- Caltex Oil (K) Ltd [1989] eKLR.** In **John Mwangi Karanja -vs- Alfred Ndiangui [2011] eKLR,** the court said that if a suit finds itself in the wrong court, it is in the interest of justice and in the interest of all concerned that the suit be

forwarded to the appropriate court with jurisdiction so that the issues in dispute can be properly and finally adjudicated.

- 24.** In this appeal, the applicant urges the court to find that the judgment by the trial court was a nullity. Indeed, in **Macfoy -vs- United Africa Co. Ltd [1961] 3 ALLER 1169**, the court said that a nullity is a nullity.
- 25. Section 78** of the Civil Procedure Act grants the court powers to hear and determine an appeal finally. **Order 43 Rule 25** of the Civil Procedure Rules provides that where the evidence upon the record is sufficient to enable the court in which an appeal is preferred to pronounce judgment, the court may, after resettling the issues, finally determine the suit.
- 26.** Unfortunately, the evidence was taken by a court without jurisdiction. Everything done by a tribunal without jurisdiction in law is also a nullity. The court finds that the best cause of action is to declare the proceedings and the judgment at the lower court a nullity. The implications are that there is no sufficient evidence available for the court to determine the suit on appeal. The court directs that the matter proceed

for hearing before this court on a priority basis. There will be no order as to costs.

27. Orders accordingly.


Judgment dated, signed, and delivered via **Microsoft Teams/Open Court** at **Kitale** on this **15th** day of **October 2025**.

In the presence of:

Court Assistant - Dennis

Rotich for Martin for applicant - present

Mwangangi for the 1st, 5th Respondents - present



**HON. C.K. NZILI
JUDGE, ELC KITALE.**