



Mutwiwa & another v Mwatha (Being Sued as the Legal Representative of the Estate of Lawrence Mwatha Nyaga) & 2 others (Environment and Land Appeal E032 of 2024) [2025] KEELC 6512 (KLR) (1 October 2025) (Judgment)

Neutral citation: [2025] KEELC 6512 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E032 OF 2024
JM MUTUNGI, J
OCTOBER 1, 2025**

BETWEEN

RUTH THAMBI MUTWIWA 1ST APPELLANT

NICHOLAS MUTWIWA 2ND APPELLANT

AND

JESSEE NYAGA MWATHA (BEING SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF LAWRENCE MWATHA NYAGA) 1ST RESPONDENT

JESSEE MWATHA NYAGA 2ND RESPONDENT

ANNA KABURA MUTUGI 3RD RESPONDENT

(Being sued as the legal representative of the estate of Lawrence Mwatha Nyaga)

JUDGMENT

1. This Appeal is against the Ruling by Hon. Martha Opanga Principal Magistrate delivered on 21st May, 2024 in Wang'uru PM ELC No. E088 of 2023. The Ruling was on the Appellants application dated 20th December, 2023. By that application the Appellants who were the Applicants before the Lower Court, had inter alia prayed for orders:-
 1. That the Honourable Court do find that the 3rd Respondent herein Anna Kabura Mutugi is in contempt of Court orders issued on 19th October, 2023.
 2. That upon grant of prayer 1, the Court do issue a order that Anna Kabura Mutugi be committed to imprisonment and/or pay a fine of one Hundred Thousand shillings.
 3. Any other or further relief that the Honourable Court may deem fit to grant.



2. The application was supported on the grounds appearing on the face of it and on the Supporting Affidavit sworn in support thereof by the 1st Appellant. The 3rd Respondent swore a Replying Affidavit and filed a Preliminary Objection dated 22nd December 2023 in opposition to the application.
3. The brief background leading to the application whose Ruling is the subject of this Appeal is that the Appellant (Applicants before the Lower Court) filed an Originating Summons dated 25th September, 2023 predicated inter alia under Sections 7, 37 and 38 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya and Order 37(1) Rule I1) & (7) of the Civil Procedure Rules seeking to be declared as owners of land parcel Mbeere/Wachoro/58 by virtue of the doctrine of adverse possession. It was their contention that they had been in open, quiet and continuous possession of the suit land since 1978 and the therefore become entitled to be registered as the owners as the registered owners title had become extinguished through effluxion of time on account of they being adverse possessors.
4. The Appellants had sued Jessee Nyaga Mwatha as the legal representative of the estate of Lawrence Mwatha Nyaga and the 2nd and 3rd Respondents in their individual capacities. As per copy of the certificate of official search attached to the Replying Affidavit in support as “RMMI” Lawrence Mwatha Nyaga was the registered proprietor of the suit land. The Applicants under paragraph 2 of the Supporting Affidavit to the Originating Summons acknowledged the registered proprietor Lawrence Mwatha Nyaga was dead yet did not demonstrate Jesse Nyaga Mwatha who they indicated was sued as legal representative had authority to represent the estate of the deceased registered proprietor.
5. The 3rd Respondent in her Replying Affidavit in opposition to the Originating Summons denied the Applicants have been in exclusive possession of the suit land claiming that she had always been residing in and carrying out farming activities on the land. Regarding the Preliminary Objection, the Respondents pleaded the suit was defective, statute barred, incompetent and an abuse of the Court process. The Respondents urged that the Originating summons be struck out.
6. The Learned Magistrate in her Ruling correctly held that in a claim of adverse possession, the statute of limitation would be inapplicable against a claimant as essentially the doctrine of adverse possession operates against a proprietor who with knowledge that there is an adverse possessor on his land fails to assert his rights of ownership for a period exceeding twelve (12) years such that his title becomes extinguished. The Learned Magistrate however further held, the Appellants had sued persons who were not the owners of the land the subject of the suit, and/or Administrators of the estate of the estate of the registered proprietor and hence lacked capacity to be sued. On that account, the Learned Magistrate struck out the suit as it was unsustainable and discharged the interim orders that she had issued against the Respondents.
7. The Appellants were aggrieved and dissatisfied with the Learned Magistrate’s decision and have appealed to this Court on 11 grounds as set out in the Memorandum of Appeal dated 11th June 2024. The gist of the Appellants grounds of Appeal is that the Learned Magistrate erred in failing to consider the issues that were before her and determined the matter on consideration of issues and matters that were not before her.
8. The Court directed that the Appeal be canvassed by way of Written Submissions. The Appellants submissions are dated 13th January 2025. While the Appellants submissions rehash in considerable detail the facts and evidence as contained in the various Affidavits filed before the Lower Court, the Appellants argued their Appeal by compressing the 11 grounds of Appeal under two limbs, namely:-
 - i. Whether the Learned Magistrate erred in law and fact in determining matters that were not before her; and



- ii. Whether the Learned Magistrate erred in Law and fact in determining that the Respondents were wrongfully sued as beneficiaries of the estate of the deceased.
9. At the time of preparation of this Judgment, the Respondents submissions were not on record though they had been granted an opportunity to ensure the same were filed and on record.
 10. This is a first Appeal and the Court is under a duty to re evaluate and consider the evidence that was presented before the Lower Court to determine whether the decision reached by Lower Court was justified. See the case of *Selle & Another –vs- Associated Motor Boat Company & others* (1968) EA 123.
 11. I have reviewed and considered the Record of Appeal, the Memorandum of Appeal and the submissions made on behalf of the Appellants. This appeal easily turns on two issues namely:-
 - i. Whether the Respondents who were not the registered proprietors of land parcel Mbeere/Wachoro/58 had locus standi to be sued in a claim of adverse possession relating to the land?
 - ii. Whether the Magistrates Court had jurisdiction to handle a claim of adverse possession?
 12. Issues of capacity or locus standi of a party to sue or be sued go to the jurisdiction of a Court to sustain or entertain a suit and like the issue of whether a Court has jurisdiction can be raised at any point in the proceedings. The Court may on its own motion raise the issue for consideration and determination. The rationale is easy to understand. Where a party lacks capacity, a suit by it or against it, is a nullity abinitio, just like a suit filed in a Court bereft of jurisdiction is a nullity and any proceedings taken or orders issued by a Court without jurisdiction are null and void.

Section 38(1) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya provides as follows:-

38(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.

13. A suit for adverse possession essentially must be against the person who at the institution of the suit is the registered proprietor of the land the subject of the suit. It is the title of the registered proprietor that an Applicant seeks to have cancelled and therefore he or she must be afforded the opportunity to be heard. Where the registered proprietor is deceased as in the present case, the duly appointed administrator of his/her estate ought to be sued on behalf of the estate. Unless a beneficiary has been appointed as administrator of the deceased estate, he cannot be sued on behalf of the estate as he has not been vested with authority to represent the estate.

Section 82(a) of the *Law of Succession Act*, Cap 160 Laws of Kenya vests powers on personal representatives of a deceased estate to represent the estate. It provides thus:-

82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers:-
 - (a) to enforce by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative.
14. In the case of *Julian Adoyo Ongunga & Another –vs- Francis Kiberenge* (suing as the Administrator of the Estate of Fanuel Evans Amudari, deceased (2016) KEHA 4186 (KLR) Justice Mrima considering



an Appeal where the suit had been commenced on behalf of a deceased by a person who had not obtained a grant of representation stated thus:-

“--- the issue of locus standi is so cardinal in a Civil matter since it runs through the heart of the case. Simply put, a party without locus standi in a Civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since most cases, the estate involves several other beneficiaries or interested parties.”

15. It is my view that just like a person who is not an Administrator of a deceased estate cannot institute a suit on behalf of the estate, a Plaintiff or Applicant cannot institute a suit touching on the property of a deceased person against persons who have not been appointed administrators of the estate. That is what the Appellants did in the instant matter and for that reason, the Appellants suit was a nullity from inception. The suit was incompetent and not sustainable.
16. Although from what I have held above it should be evident that the Appeal is destined for dismissal, I need to point out that the Lower Court also lacked jurisdiction to hear and determine a claim of adverse possession as jurisdiction to hear such matters is vested on the Environment and Land Court.
17. In the recent case of Sugawara –vs- Kiruti & 3 Others (2024) KECA 1417 (KLR) (11 October 2024) the Court of Appeal considered whether or not the Magistrates Courts have jurisdiction to hear adverse possession claims and after reviewing several decisions (divergent) came to the conclusion that the Magistrate’s Courts had no jurisdiction to hear such matters. The Court of Appeal at Paragraphs 47, 48, 49 and 50 held as follows:-
 47. In the case of Republic v Karisa Chengo & 2 others [2017] eKLR this Court held that:

“ 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.”
 48. It is our view that, if it was intended that claims for adverse possession be determined by the Magistrates’ Court, nothing would have been easier than for Parliament to have expressly enacted such a provision. So that in view of the express provisions of the law, a strict interpretation of section 38 would mean that hearing and determination of such matters is specifically limited to the Environment and Land Court to the exclusion of Magistrates’ Court.
 49. We come to this conclusion also bearing in mind that the jurisdiction of Magistrates’ Courts is largely determined by the pecuniary interest designated for determination by each level of the Magistracy specified in the hierarchy of Courts, in terms of Section 7 of the Magistrates Courts Act. In claims for adverse possession where the value of the land in question may be unknown, as in the instant case, it could be that by the time of filing, the value of the land subject of determination may be far in excess of the particular Magistrates’ Court’s pecuniary jurisdiction, which for all intents and purposes was not what was intended by the Act.
 50. In the circumstances, in view of the express provisions of section 38 of the *Limitation of Actions Act*, as did the Environment and Land Court, we find that Magistrates’ Courts do not have jurisdiction to determine the claims of adverse possession. As a consequence, the trial



magistrate in the instant case rightly disregarded hearing and determining it. In the result, this ground is without merit and is accordingly dismissed.

18. Having regard to the doctrine of precedent, the decisions of the Court of Appeal are binding to this court. Accordingly, the Learned Magistrate lacked jurisdiction to entertain a claim of adverse possession and the proceedings before her, were a nullity and therefore in striking out the Originating Summons, she acted as was appropriate and within her powers.
19. The Appeal in the premises is without any merit and the same is dismissed. Each party shall bear their own costs of the Appeal.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 1ST DAY OF OCTOBER 2025.

J. M. MUTUNGI

ELC JUDGE

