



**Oduor v Anderea Kenyani Amwayi & another (Environment and Land Appeal E045 of 2023) [2025] KEELC 6926 (KLR) (8 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6926 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E045 OF 2023**

**A NYUKURI, J  
OCTOBER 8, 2025**

**BETWEEN**

**CLEMENTINA ALUOCH ODUOR ..... APPELLANT**

**AND**

**ANDEREA KENYANI AMWAYI ..... 1<sup>ST</sup> RESPONDENT**

**FRANCIS APOLO AMWAYI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This appeal was filed by Clementina Aluoch Oduor against Anderea Kenyanyi Amwayi and Frances Apolo Amwayi challenging the judgment and decree of Hon. E. Wasike, Principal Magistrate, delivered on 23<sup>rd</sup> November 2023 vide Butere Principal Magistrates ELC Case No. 12 of 2021 (OS).
2. In the impugned judgment, the learned trial magistrate found that the 1st respondent herein (the plaintiff before the trial court) had only proved having acquired by adverse possession, the parcel of land known as Kisa/Muhaka/102 and failed to prove his claim of adverse possession over land parcel No. Kisa/Muhaka/105.

**Background**

3. In an Originating Summons dated 26<sup>th</sup> April 2021, which was supported by the applicant's affidavit of even date, the applicant sought the determination of the following issues;
  - a. Whether the applicant has been in occupation, use and or possession of a portion measuring 1.00 Hectares constituted in land parcels No. Kisa/Muhaka/102 and Kisa/Muhaka/105 whose boundaries are clearly demarcated on the ground comprised in the parcels of land for a period of over 12 years exclusively, openly, peaceably, continuously and uninterrupted since 1953 to date.



- b. Whether the respondents being the current registered proprietors of the said parcels of land measuring 1.00 hectares hold the said title which is in use, possession and occupation of the applicant in trust for the applicant.
  - c. Whether the respondents' title to the suit land parcel No. Kisa/Muhaka/102 and Kisa/Muhaka/105 in occupation and use of the applicant became extinguished upon expiry of 12 years from 1953.
  - d. Whether the applicant has now acquired title to the said portion constituted in land parcels No. Kisa/Muhaka/102 and Kisa/Muhaka/105 measuring 1.00 hectares by virtue of adverse possession.
  - e. Whether the respondents should be ordered to transfer title to a portion of land parcels No. Kisa/Muhaka/ 102 and Kisa/Muhaka/ 105 measuring 1.00 Ha. which is in actual occupation and possession of the applicant and in default thereof the Deputy Registrar of this Honourable Court be directed to do so on behalf of the respondents.
  - f. Who should be condemned to bear the cost thereof.
4. The applicant subsequently sought the following orders;
- a. The applicant having been in actual, exclusive, peaceful, open, continuous and uninterrupted occupation, possession and use of the said parcel be declared to have become the legal owner entitled by adverse possession of over twelve (12) years since 1953 of a portion of land parcels measuring 1.00 Ha. and comprised in title No. LP No. Kisa/Muhaka/102 and Kisa/Muhaka/105 situated in Muhaka, Kakamega.
  - b. The said applicant be registered as the sole proprietor of the state parcel of land measuring 1.00 Ha. and comprised in LP No. Kisa/Muhaka/102 and Kisa/Muhaka/105 in place of the above-named respondents in whose favor the land is currently registered.
  - c. The applicant herein is entitled under sections 7, 17 & 18 of Limitations of Actions Act Cap 22 of the Laws of Kenya to be registered as the proprietor of a portion of the suit land L.P N0. Kisa/Muhaka/102 and Kisa/Muhaka/105 measuring 1.00 Ha.
  - d. The last original indentures in respect of LP No. Kisa/Muhaka/ 102 and Kisa/Muhaka/105 which are with the respondents be dispensed with their title to this land having been extinguished by operation of law and that they hold the parcel of land in trust for the applicant.
  - e. The respondents herein be ordered to execute all the necessary documents to effect the transfer of title L.P N0. Kisa/Muhaka/102 and Kisa/Muhaka/105 and vest a portion of the suit land measuring 1.00 Ha. in favour of the applicant herein in default whereof the Deputy Registrar of this Honourable Court be empowered to execute all such documents on behalf of the respondents.
  - f. Costs of this application be provided for.
  - g. Any further or other relief this Honourable Court deems fit to grant.
5. It was the applicant's case that the 1<sup>st</sup> respondent was administrator of the estate of Eli Amwayi (hereinafter referred to as Eli) the registered owner of land parcel No. Kisa/Muhaka/102 while the 2<sup>nd</sup> respondent was the registered owner of the parcel No. Kisa/Muhaka/ 105. He stated that he began cultivating a portion of parcel Nos. Kisa/Muhaka/102 and 105 measuring 1 hectare in 1953, prior to the land adjudication and registration process and built a home on the said parcel in 1959 at the



behest of his eldest brother Henry Maina. He maintained that he had been in occupation, use and or possession of a portion measuring 1 hectare constituted in parcel No. s Kisa/Muhaka/102 being 0.62 hectares and Kisa/Muhaka/105 being 0.38 hectares, whose boundaries are clearly demarcated on the ground for a period of over 12 years exclusively, openly, peaceably, continuously and uninterrupted since 1953 to date.

6. He further stated that his elder brother Henry Maina who is the father of the 2<sup>nd</sup> respondent had built his home on parcel No. Kisa/Muhaka/105. He maintained that the two parcels were registered upon adjudication being their first registration under the direction of his elder brother Henry Maina whereof he was the registered proprietor of parcel No. Kisa/Muhaka/66 while parcel No. Kisa/Muhaka/105 was registered in the name of Henry Maina and parcel No. Kisa/Muhaka/102 was registered in the name of Eli Amwayi now deceased. According to him, they lived peacefully on the said parcels for a very long time without knowing that registration did not reflect their living arrangements on the ground, because while he was registered as owner of parcel Kisa/Muhaka/66, the same was occupied by Eli while he was occupying one acre on parcels Nos. Kisa/Muhaka/102 and Kisa/Muhaka/105 registered in the name of Eli and the 2<sup>nd</sup> respondent respectively.
7. That it was not until 1988 when he obtained an official search certificate that he discovered that he was occupying the land in the names of Eli and Henry. That he occupied the two parcels pursuant to their family agreement dated 12<sup>th</sup> July 1988 and that his family has been living on the land peacefully for 63 years even during the lifetime of the deceased. That having feared that he may lose his rightful parcel, he placed a restriction on the suit property. That despite changing ownership of the suit property he has lived thereon with the knowledge of the respondents without paying them rent, licence fee or any consideration and in a manner that is adverse to their interest and that they have never interfered with his occupation.
8. He attached copies of official search; grant of letters of administration; certificate of confirmation; surveyors report and family agreement.
9. Opposing the suit, the respondents filed a joint replying affidavit sworn on 12<sup>th</sup> July 2021. They stated that Clementina was the widow of the late Eli, whose estate comprised of parcel No. Kisa/Muhaka/102. That the 2<sup>nd</sup> respondent was the registered owner of parcel No. Kisa/Muhaka/105. They further averred that the applicant had been allowed to use parcel No. Kisa/Muhaka/102 in 1988 by the late Eli, but denied the allegation of that the applicant had been on the property since 1953. They stated that the applicant had not been in continuous occupation of the two suit properties since 1953 and stated that the applicant was the sole registered proprietor of parcel No. Kisa/Muhaka/66 where he has settled his first wife's family who use the entire land. That the applicant was using the two properties from 1988 having been granted permission to use the same by the late Eli. That before Eli's death, he had asked the applicant to vacate parcel No. Kisa/Muhaka/102 and relocate to parcel No. Kisa/Muhaka/ Kisa/Muhaka/66. They stated that parcel No. Kisa/Muhaka/102 measures 0.65 hectares while parcel No. Kisa/Muhaka/105 measures 0.53 hectares and parcel No. Kisa/Muhaka/66 measures 0.45 hectares. That as the applicant claims 0.62 hectares the 1<sup>st</sup> respondent will only remain with 0.03 hectares on parcel No. Kisa/Muhaka/102 and his claim of 0.38 hectares will leave 0.17 hectares out of land parcel No. Kisa/Muhaka/105. That if the applicant is granted the two portions, he will also be the registered owner of parcel No. Kisa/Muhaka/66 measuring 0.45 hectares in addition to the portion of 1 hectare from parcels Kisa/Muhaka/ 102 and 105, meaning that his entire acreage will be totaling to 1.45 hectares. That therefore he will have taken the whole land. They denied allegations that the applicant had been in peaceful and continuous occupation of the two parcels of land but stated that he had been living on parcel No. Kisa/Muhaka/102 as a licensee of the 1<sup>st</sup> respondent because that is where his parents' houses were. That the applicant had been required to move to his parcel No. Kisa/



Muhaka/66 but remained with his second wife on parcel No. Kisa/Muhaka/102 against the wishes of the 1<sup>st</sup> respondent. That the applicant was an objector to the Succession proceedings in regard to the late Eli's estate but that he withdrew his claim.

10. The matter was heard by way of oral evidence. The applicant presented four witnesses while the respondents presented two witnesses

### **Applicant's evidence**

11. PW 1 was Anderea Amwayi who adopted the contents of his supporting affidavit as his evidence in chief and produced the attached documents. It was his testimony that he was claiming 0.38 hectares from parcel No. Kisa/Muhaka/105 and 0.62 hectares from parcel No. Kisa/Muhaka/102. He alleged to have been in exclusive and peaceful occupation of the said portions. According to him, the suit property was registered in 1967 after adjudication and that the three brothers, who are Henry, Eli and himself lived on the three properties without knowing which title was in whose name. He stated that he is the registered owner of parcel No. Kisa/Muhaka/66 but the same is occupied by the 1<sup>st</sup> respondent. That in 1988 when he obtained a search is when he discovered that he was occupying land which belonged to Eli. That he had occupied the suit property from 1953 openly and peacefully for several years.
12. In cross examination, he said that during registration of the land, he was away from home. That between 1954 and 1988 he would only visit home occasionally. That in 1966 he was told his land was parcel No. Kisa/Muhaka/66. He denied having been given the land registered in the name of the 1<sup>st</sup> respondent's husband to put up a temporary home. He confirmed that they held a meeting on 12<sup>th</sup> July 1988 and claimed that he was given land that was far away. That he was shown where to put up a home on parcel No. Kisa/Muhaka/102 by the family at the time the owner thereof was his mother. Further that the 1<sup>st</sup> respondent got married to Eli when he was already living on parcel No. Kisa/Muhaka/ 102.
13. He stated that his son had put up a home on parcel No. Kisa/Muhaka/66 and that he was aware that Eli's family undertook succession proceedings where he filed objection. He confirmed having buried his first wife in parcel No. Kisa/Muhaka/66 and stated that she could not be buried where he stayed because they were estranged. He denied having been approached by Eli to buy parcel No. Kisa/Muhaka/66 in exchange for the portion he occupies on parcel No. Kisa/Muhaka/102. He denied forcing himself on Eli's land. He was emphatic that he had no share on parcel No. Kisa/Muhaka/105.
14. PW2 was Joseph Amwayi Angojo, who adopted his witness statement dated 23<sup>rd</sup> July 2021. It was his testimony that he was related to the parties herein. He stated that the applicant began cultivating and residing on the two suit properties in the 1950s. That the applicant lives on the suit property with his second wife as his first wife died. That the applicant has been in occupation of the suit property for over 63 years.
15. In cross examination, he stated that he knows the applicant who lived in Nairobi from the 1950s while his wife and children lived on the suit property. That during registration of the suit property the applicant was in Nairobi but returned home in 1988. That Eli died in 1999 and was buried on parcel No. Kisa/Muhaka/105 in the home of Henry Maina his father. He stated that although parcel No. Kisa/Muhaka/66 is in the name of the applicant, he has never lived there and that that land is being used by the applicant's son and Eli's family. That after Eli died the 1<sup>st</sup> respondent went to live on parcel No. Kisa/Muhaka/66. He stated that the 1<sup>st</sup> respondent was not thrown out of parcel No. Kisa/Muhaka/102. The witness stated that parcel No. Kisa/Muhaka/102 belonged to the applicant while No. Kisa/Muhaka/105 belong to Eli. That the applicant was allowed to put up a home on parcel Kisa/Muhaka/102 by the family He maintained that the applicant does not occupy parcel No. Kisa/



- Muhaka/105 and only occupies a portion in parcel No. Kisa/Muhaka/ 102. That it was the mother of the applicant who asked Eli to allow the applicant to put up a home on parcel No. Kisa/Muhaka/102 and that by 1988, the applicant already had a home on parcel No. Kisa/Muhaka/102.
16. PW3 was Francis Omungo who adopted his witness statement dated 23<sup>rd</sup> July 2021 as his evidence in chief. His testimony was that he was the parties' distant relative. That the applicant resides on the suit property with his second wife. That there is a Euphorbia boundary on the land. That the applicant has been on the suit property from the 1950s. That Eli and the 1<sup>st</sup> respondent were moved to another parcel.
  17. In cross examination, he stated that he was not present when the applicant entered the suit property and that when he was born he found the applicant living on the land. That he attended two meetings in 2017 over the suit property. He confirmed that the applicant's son lives on parcel No. Kisa/Muhaka/66 and that when the applicant's first wife returned, she went to parcel No. Kisa/Muhaka/66. That the applicant is entitled to parcel No. Kisa/Muhaka/ 102 where his home is situated. That the 1<sup>st</sup> respondent lives on parcel No. Kisa/Muhaka/66 on one side while the applicant's son stays on the other side. That the applicant farms a small portion of parcel No. Kisa/Muhaka/105. That land parcel No. Kisa/Muhaka/66 should go to the 1<sup>st</sup> respondent.
  18. PW 4 was Moses Anzayi who adopted his witness statement dated 22<sup>nd</sup> July 2021 as his evidence in chief. It was his evidence that he was the applicant's neighbour. That when he was born he found the applicant residing on the suit property. He reiterated the evidence of PW2 and PW3. In cross examination, he stated that the applicant worked in Nairobi and that he had not been living peacefully with his nephews as they were having a long running land dispute. That Eli's wife should occupy her husband's rightful parcel and that there was confusion during registration. That marked the close of the applicant's case.
  19. On 1<sup>st</sup> August 2023 the applicant's case was reopened by an order of court for purposes of cross examination of the applicant. Therefore, on further cross examination, the applicant stated that parcel No. Kisa/Muhaka/66 was registered in his name and that his son buried his wife on that land. That he was not the one who showed the 1<sup>st</sup> respondent where to build her house but it is the family that did so. That he did not oppose the 1<sup>st</sup> respondent from residing on the said parcel where his son occupies a quarter of an acre thereof. That he fully utilizes parcel No. Kisa/Muhaka/ 102 and a half of land parcel No. Kisa/Muhaka/105. That he started utilizing parcel No. Kisa/Muhaka/105 in 2015. That together with his family they stay on parcel No. Kisa/Muhaka/ 102.

### **Respondents' evidence**

20. D W 1 was Clementina Aluoch Oduor. She adopted her witness statement dated 2<sup>nd</sup> August 2021 together with her replying affidavit sworn on 12<sup>th</sup> July 2021 as her evidence in chief. She started that it is the applicant who showed her where she currently resides and that her husband died in 1999. That she got married to Eli in 1980 and they were blessed with five children. That their homestead was on parcel No. Kisa/Muhaka/105 which is registered in the name of Henry Maina. That her husband died before putting up a house on his land, which title she did not know. That she was shown where to build by the applicant, being parcel Kisa/Muhaka/66. That when she was summoned by the chief in 2017, that is when she knew that her husband's parcel was No. Kisa/Muhaka/102. That the applicant objected to the succession proceedings she filed in regard to her late husband's estate.
21. In cross examination, she stated that she got married in 1980 when the applicant already had a home on parcel No. Kisa/Muhaka/102. That the House of the applicant's first wife is on parcel No. Kisa/Muhaka/66 and that the applicant has never moved out of land parcel NO. Kisa/Muhaka/102. That



- she stays on parcel No. Kisa/Muhaka/66 where she moved in 2006. That she moved from parcel No. Kisa/Muhaka/105 to parcel No. Kisa/Muhaka/66 and was utilizing  $\frac{1}{4}$  an acre of that parcel while farming on parcel No. 105. That the 2<sup>nd</sup> respondent had a house on parcel No. Kisa/Muhaka/105 but it was demolished.
22. DW2 was Francis Apolo Odiala the 2<sup>nd</sup> respondent. He adopted his witness statement dated 2<sup>nd</sup> August 2021 as his evident in chief. He stated that he inherited parcel No. Kisa/Muhaka/ 105 from his father Henry Maina through Succession. That his father died in 2001 and that the applicant started using his land in 2010. That the applicant forcefully removed the 1<sup>st</sup> respondent who was also using part of the said parcel and started using her portion. That the dispute was handled by the area chief in 2017. That it was the applicant who showed the 1<sup>st</sup> respondent where to build on parcel Kisa/Muhaka/66. He confirmed that the applicant is currently residing on parcel No. Kisa/Muhaka/ 102 and stated that he does not reside on parcel No. Kisa/Muhaka/105. That although the applicant had a house on parcel No. Kisa/Muhaka/105 he moved out.
  23. On cross examination, he stated that he currently stays in Busia and began staying in Busia in 2010. That he buried his child on parcel No. Kisa/Muhaka/105 and that he allowed the 1<sup>st</sup> respondent to farm on part of the said parcel. That his house on parcel Kisa/Muhaka/105 fell due to neglect. That he was a young child when the applicant started utilizing parcel No. Kisa/Muhaka/102 in 1971.
  24. DW3 was John Fred Omachi Ojuang, a Pastor and a former Senior Chief who retired in 2019. He adopted his witness statement dated 2<sup>nd</sup> August 2021 as he is evident in chief. According to him parcel No. Kisa/Muhaka/66 belongs to the applicant, parcel No. Kisa/Muhaka/105 belongs to Henry Maina the father of the 2<sup>nd</sup> respondent and parcel No. Kisa/Muhaka/102 belongs to the late Eli. On cross examination, he stated that he had been the area Chief from 1990 to 2019 and that he was a neighbor of the parties in this suit. He stated that he did not instigate eviction of the applicant from parcel No. Kisa/Muhaka/ 102 and has no interest in that land. He denied presiding over the dispute between the applicant and Henry Maina and stated that both the applicant and the 1<sup>st</sup> respondent used parcel No. Kisa/Muhaka/102. That the 1<sup>st</sup> respondent does not use parcel No. Kisa/Muhaka/105. But that when the applicant approached him with a request that he wanted to take over parcel No. Kisa/Muhaka/102 he referred the matter to the Senior Chief and that he does not know when the applicant began utilizing parcel No. Kisa/Muhaka/ 102. That he was not aware of any case where the applicant wished to evict the 1<sup>st</sup> respondent from parcel No. Kisa/Muhaka/ 102.
  25. Upon hearing the parties and considering the pleadings and the evidence as well as submissions, the trial court found that the applicant had proved part of his claim and entered judgment in favor of the applicant but only to the extent that the court found that the applicant had acquired parcel No. Kisa/Muhaka/102 by adverse possession. Regarding parcel No. Kisa/Muhaka/ 105, the trial court found that the applicant had failed to prove his claim.
  26. The first respondent who is the appellant before me, being aggrieved by the judgment of the trial court challenged the same through a Memorandum of Appeal dated 21<sup>st</sup> December 2023 citing 8 grounds of appeal as follows;
    - a. The learned Principal Magistrate lacked the required jurisdiction to entertain the suit in the lower court and or grant the remedies which he granted against the appellant in favor of the respondent.
    - b. The judgement and the orders and or decree of the learned Principle Magistrate is against the weight of evidence which heavily leaned in favour of the appellant against the respondent.



- c. The learned Principal Magistrate grossly erred in law on the correct principles of adverse possession with respect to L.P known as Kisa/Muhaka/ 102
  - d. The learned Principal Magistrate erred in law in dealing with the appellant's land parcel known as Kisa/Muhaka/ 102 as if he was distributing an estate of a deceased whereas what was before him was a claim for adverse possession.
  - e. The learned Principal Magistrate erred in fact and in law in his finding that L.P Kisa/Muhaka/102 was available for adverse possession in favour of the respondent when the evidence and the facts dictated otherwise.
  - f. The learned Principal Magistrate erred in law and in fact by delivering a judgment which is vague with regard to the subject matter and incapable of execution without occasioning injustice to the appellant.
  - g. They learned Principal Magistrate erred in law in not taking into account the respondent's demeanor as required by law in arriving at the judgment which, if he had done so, he would have found out that the respondent's untrustworthy and unreliable and rejected his claim to land parcel Kisa/Muhaka/ 102.
  - h. In all aspects of the case, the learned Principal Magistrate did not apply the correct principles of the law as a result of which he has occasioned failure of justice to the appellant.
27. The appellant sought the following orders;
- a. The appeal be allowed
  - b. The judgment and decree of the learned Principal Magistrate relating to land parcel known as Kisa/Muhaka/ 102 be set aside and or vacated.
  - c. The respondent's claim to land parcel known as Kisa/Muhaka/ 102 by adverse possession presented in the law court be dismissed.
  - d. The costs of this appeal and of the subordinate court be recovered from the respondent.
28. The appeal was disposed by way of written submissions. On record are the appellant's submissions dated 17<sup>th</sup> February 2025 as well as the 1<sup>st</sup> respondent's submissions dated 5<sup>th</sup> June 2025.

### **Appellant's submissions**

29. Counsel for the appellant summarized the entire appeal into one issue of whether the appeal was merited and submitted that the 1<sup>st</sup> respondent having testified in cross examination that he was shown parcel No. Kisa/Muhaka/66 as his land and that since he is the registered proprietor of the said land, he has been in occupation of the same land since 1966. Counsel also argued that the 1<sup>st</sup> respondent having conceded to burying his wife on parcel No. Kisa/Muhaka/66 and not parcel No. Kisa/Muhaka/102, the trial court was wrong in awarding him the suit property.
30. It was also argued for the appellant that the evidence on record does not show anywhere that the 1<sup>st</sup> respondent was given parcel No. Kisa/Muhaka/102. That P exhibit 5 (a) showed that each person was to cultivate the other's land and that the name of the parcel is not disclosed. Counsel argued that as the 1<sup>st</sup> respondent stated in evidence that parcel Nos. Kisa/Muhaka/102 and 105 were far hence that shows that he was not interested in the said land. Counsel referred to the 1<sup>st</sup> respondent's evidence at page 58 of the record to the effect that Elly had before his death asked him to vacate parcel No. Kisa/



Muhaka/102, and argued that the said evidence shows that he did not have peaceful occupation of the suit property.

31. Counsel also submitted that as it was conceded by the 1<sup>st</sup> respondent that he had stayed in Nairobi for some time, the exact period the appellant lived on the suit property was not demonstrated. It was also contended for the appellant that the trial court failed to apply correct principles for a claim of adverse possession since evidence showed that his occupation was not continuous yet the trial court granted him the suit property. Counsel stated that between 1953 and 1988, the 1<sup>st</sup> respondent was in Nairobi. That since parcel No. Kisa/Muhaka/66 was in the name of the 1<sup>st</sup> respondent he should stick to the same.
32. It was further argued for the appellant that there was no evidence to show that the 1<sup>st</sup> respondent was allowed by his mother to put up a home on parcel No. Kisa/Muhaka/102. Counsel maintained that the 1<sup>st</sup> respondent failed to prove his claim on a balance of probabilities. That when the 1<sup>st</sup> respondent returned home, the appellant had been in occupation of parcel 102 for over 12 years. That the appellant realized that parcel No. Kisa/Muhaka/102 was in her husband's name in 2017 and that the 1<sup>st</sup> respondent had buried his family on parcel No. Kisa/Muhaka/66 and not No. 102 hence the trial court fell in error in holding that the 1<sup>st</sup> respondent had been in continuous occupation of parcel 102.

#### **1<sup>st</sup> respondent's submissions**

33. Counsel for the 1<sup>st</sup> respondent submitted on the question of want of jurisdiction by the trial court, that the issue of jurisdiction was not raised before the trial court but that since this is a first appellate court, the same will be addressed. Counsel relied on Section 26 (3) and (4) of the *Environment and Land Court Act* and section 9(a) of the Magistrates Court Act and the case of Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & Another [2020] e KLR and submitted that the Magistrates court had jurisdiction to hear and determine the dispute. Counsel argued that as at 26<sup>th</sup> April 2021 when the suit was filed before the trial court, that court had jurisdiction to determine the matter.
34. On whether the 1<sup>st</sup> respondent proved his claim of adverse possession, counsel argued that grounds 2, 3, 5, 7 and 8 were repetitive and referred to the same issue of whether the 1<sup>st</sup> respondent presented sufficient evidence to prove his claim. On the question of proof, reliance was placed on the case of Mtana Lewa v Kahindi Ngala Mwangandi [2015] e KLR and Mombasa Teachers Cooperative Savings & Credit Society Limited v Robert Muhambi Katana & 15 Others [2018] e KLR. Counsel submitted that the 1<sup>st</sup> respondent proved the elements of adverse possession being non-permissive, actual, open, notorious and exclusive possession of 12 years.
35. Regarding non-permissive occupation, counsel submitted that the 1<sup>st</sup> respondent in his evidence demonstrated that he had been in occupation of the suit property since 1953 and that it was the appellants evidence that when she got married to her late husband in 1980, she found the 1<sup>st</sup> respondent on parcel No. Kisa/Muhaka/102 and that the appellants witness DW 2 confirmed that the 1<sup>st</sup> respondent began using the suit property in 1971 and has never moved out since. Counsel argued that the said evidence alone shows that the 1<sup>st</sup> respondent had been on the suit property for over 30 years. Counsel referred to the case of James Maina Kinya v Gerald Kwendaka [2018] e KLR 3155 (KLR) for the proposition that once time starts running it continues unless the owner files suit to recover the land.
36. It was maintained by counsel that the 1<sup>st</sup> respondent's occupation and use of parcel No. Kisa/Muhaka/102 was confirmed by all the witnesses in the case and that therefore the applicant had demonstrated adverse possession on a balance of probabilities. Regarding submissions made by the



appellant counsel submitted that the allegation that the appellant had been on parcel No. Kisa/Muhaka/102 from 1988 contradicts her evidence.

### **Analysis and determination**

37. The court has carefully considered the appeal, parties' rival submissions and the entire record. This being a first appeal, the duty of this court is to re-evaluate and reconsider the evidence on record and make its own independent conclusions, bearing in mind that it did not have the opportunity to see or hear the witnesses who testified in the matter and give due allowance for that.
38. In the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, the Court of Appeal held as follows;
- “An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
39. Similarly, in the case of *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machura t/a Machira & Co. Advocates* [2013] eKLR, the court described the duty of a first appellate court as follows;
- “This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-valuate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
40. In the instant appeal, although the Appellant raised eight grounds of appeal. Those grounds can be summarized into three grounds as follows;
- a. Whether the trial court had jurisdiction to hear and determine the dispute.
  - b. Whether the 1<sup>st</sup> respondent proved on the required standard that he had acquired parcel No. Kisa/Muhaka/ 102 by way of adverse possession
  - c. And whether the trial court decided the dispute as if it was distributing the estate of a deceased person and not determining a claim for adverse possession.
41. I have considered the record and it is clear that the question of jurisdiction was not raised by the appellant before the trial court, although the same was her first ground of appeal. Even in her counsel's submissions, there was no attempt to address the question of jurisdiction. However, as jurisdiction is a fundamental matter which the court must be satisfied as possessing before embarking on determining the matter, this court will first address the question of jurisdiction.
42. Jurisdiction is the power of the court to hear and determine a matter. Jurisdiction flows from *the Constitution*, statute or judicial pronouncement. (See *Samuel Kamau Macharia & Another v Kenya Commercial Bank and Another* [2012] e KLR.)
43. Section 37 of the *Limitation of Actions Act* grants the Environment and Land Court the jurisdiction to hear and determine claims of adverse possession. While parties have always filed adverse possession claims in the Environment and Land Court (ELC), in a 2020 decision of the ELC being *Patrick Ndegwa Munyua v Benjamin Kiiru & Another* [2020] KEELC 3911 (KLR), the court held that the



Magistrates courts had jurisdiction to hear and determine claims of adverse possession. This had been the position until the Court of Appeal in the case of *Pauline Chemuge Sugawara v Nairuko Ene Mutarakwa Kiritu & 4 Others Civil Appeal No. E141 of 2022*, delivered in October 2024, held that Magistrates Courts had no jurisdiction to hear and determine claims based on adverse possession. Between 2020 and October 2024, many matters on adverse possession have been determined by Magistrates Courts throughout the Republic. I therefore take the view that as there was in existence a Superior Court’s pronouncement in 2021 when the instant suit was filed; that the Magistrates Court had jurisdiction to hear and determine adverse possession claims, I find and hold that, that that being the legal position at the time, the trial court had jurisdiction to hear and determine this dispute.

44. Regarding the question as to whether the 1<sup>st</sup> respondent proved his claim of adverse possession, it is trite that a claimant for adverse possession has to demonstrate that they have been occupied the disputed property openly, notoriously, exclusively, as of right and without the owner’s permission for a continuous period of 12 years. They must demonstrate without ambiguity that they have for a continuous period of 12 years dispossessed the true owner of the suit property.
45. The doctrine of adverse possession is governed by provisions of the *Limitation of Actions Act*. Sections 7, 13, 17 and 38 of the *Limitation of Actions Act* Cap 22 Laws of Kenya are some of the statutory provisions upon which the doctrine of Adverse Possession is anchored. The said provisions provide as follows;

Section 7 states as follows;

“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.”

Section 13 provides as follows;

1. “A right of action to recover land does not accrue unless the land is in the possession of some persons in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under Sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.
2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.
3. For purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land.”

Section 17 provides that;

“Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

Section 38(1) and (2) provides as follows;

SUBPARA 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 these 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.

SUBPARA 2.

An order made under sub-section (1) of this Section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

46. Therefore, on the expiry of 12 years, a person who has disposed the true owner of their land may apply to this court for an order that he be registered as owner thereof.

47. The principles of establishing adverse possession are now well settled. In the case of *Mbira v Gachuhi* [2002] IEALR 137, the court held as follows;

“.....a person who seeks to acquire title to land by the method of Adverse Possession for the applicable Statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption.”

48. Similarly, in *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, the court described adverse possession in the following terms;

“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 Possession 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.”

49. Thus, to claim land under the doctrine of adverse possession, a claimant must demonstrate that they have been in possession of the land in issue peacefully, openly, continuously, without force, publicly, without the owner’s permission and not in secrecy for a period of 12 years.

50. The burden of proof in every claim lies with the claimant. Once the claimant has given evidence to show their claim, the evidentiary burden then shifts to the defendant to disapprove what has been proved.

51. Therefore, the burden of proof as to the acquisition of the suit property by adverse possession was placed on the 1<sup>st</sup> respondent herein. It was upon him to show that he had been in open, continuous exclusive non-permissive occupation of the suit property. It is only after 1<sup>st</sup> respondent had discharged the burden of proof placed on him, that the evidential burden of proof then shifted to the appellant to rebut the former’s evidence. Section 108 of the *Evidence Act* provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given by either side. Section 109 of the Act provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.



52. In the case of *Raila Amollo Odinga & Another v IEBC & 2 Others* [2017] eKLR, the Supreme Court held as follows;
132. Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant through a trial with the Plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
132. It follows therefore that once the court is satisfied that the Petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the 1st respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the Petitioner bears an evidentiary burden to adduce "factual" evidence to prove his/her allegations of breach, then the burden shifts and it behoves the 1st respondent to adduce evidence to prove compliance with the law.
53. Having set out the threshold that was supposed to have been met by the 1<sup>st</sup> respondent herein, the question therefore is whether he discharged his burden of proof to the required threshold. In the Originating Summons, the 1<sup>st</sup> respondent averred that he had occupied the suit property since 1953 to date. At paragraph 9 of the replying affidavit, the appellant and 2<sup>nd</sup> respondent stated that the 1<sup>st</sup> respondent had been in occupation of parcel No. 102 since 1988 but his occupation was with permission from the appellant's husband. Now, the 1<sup>st</sup> respondent's suit in the lower court was filed on 20<sup>th</sup> April 2021. That means that as of 1988, the 1<sup>st</sup> respondent's occupation had been for a period of 33 years. This is already far longer than the statutory period of 12 years. None of the other elements that accompany occupation in regard to adverse possession was contested other than the question of permission. That being the case, since it was the appellant's assertion that the 1<sup>st</sup> respondent's occupation was based on permission, it was the appellant's duty to prove permission.
54. It was the appellant's case that when she got married to Eli in 1980, she found the 1<sup>st</sup> respondent already occupying parcel No. Kisa/Muhaka/102. She also confirmed in cross examination that the 1<sup>st</sup> respondent had never moved out of parcel No. Kisa/Muhaka/102. It is clear therefore that the appellant having not been present when the 1<sup>st</sup> respondent entered the suit property and having not availed evidence of permission, she failed to disapprove the 1<sup>st</sup> respondent's position that he has occupied the suit property openly and exclusively without the owner's consent for over 12 years. It was evident from the record that the 1<sup>st</sup> respondent's occupation was with the appellant's knowledge and there was no evidence that there was a suit by the appellant to attempt to assert her right over the suit property. In any event, she confirmed that the 1<sup>st</sup> respondent had left parcel No. Kisa/Muhaka/102 I therefore conclude that the 1<sup>st</sup> respondent indeed proved his claim of adverse possession over parcel No. Kisa/Muhaka/102. Therefore, the trial court was right in arriving at that conclusion.
55. Regarding the appellant's complaint that the trial court decided the dispute as if it was distributing the estate of a deceased person and not determining a claim for adverse possession, I have considered the judgment, and the same shows that in addressing the question as to whether the 1<sup>st</sup> respondent had acquired parcel No. Kisa/Muhaka/105 by adverse possession, the trial court stated as follows; "I think the claimant should be human enough to allow other family members to have a share of the estate otherwise allowing his entire claim will amount to dispossessing other family members thus rendering them landless." Looking at the trial court's position, I agree with the appellant that the trial court, while exercising the jurisdiction of an Environment and Land Court was wrong in invoking matters



touching on the family sharing the deceased's estate as the court had no jurisdiction to determine that question in an ELC dispute. However, as the same was raised in regard the question of whether the 1<sup>st</sup> respondent had proved his claim over parcel No. Kisa/Muhaka/105, whereof the court declined to award that land to the 1<sup>st</sup> respondent, and which position is not challenged in this appeal, I find and hold that the position taken by the trial court, although wrong, is immaterial to this appeal.

56. The upshot is that this appeal lacks merit and the same is hereby dismissed. Taking into account the fact that parties in this appeal are related, I order that each party shall bear its own costs of the appeal.

57. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THIS 8<sup>TH</sup> DAY OF OCTOBER 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of;

Ms Malanda holding brief for Mr. Musiega for the appellant

Ms Chesire holding brief for Mr. Kombwayo for the 1<sup>st</sup> respondent

Assistant- Delphine

