



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mulili v Mutisya & another (Suing as the administrators of the Estate of the Late Philip Mutisya Mwove) (Environment and Land Appeal E033 of 2023) [2025] KEELC 7350 (KLR) (28 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7350 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ENVIRONMENT AND LAND APPEAL E033 OF 2023**  
**NA MATHEKA, J**  
**OCTOBER 28, 2025**

**BETWEEN**

**RICHARD MUSYOKI MULILI ..... APPELLANT**

**AND**

**KILONZO MUTISYA ..... 1<sup>ST</sup> RESPONDENT**

**KILUU MUTISYA ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE PHILIP  
MUTISYA MWOVE**

**JUDGMENT**

1. The Appellant above named being dissatisfied with the Judgment of the Chief Magistrate Hon. Ole Keiwua K.D sitting at Kangundo in his ELC. No. 98 of 2019 and delivered on 15<sup>th</sup> December, 2022 appeals to this Honourable Court against the said Judgment on the following principal grounds;
  1. The learned Magistrate erred in law and fact by finding that the Respondents herein acquired title to the suit property known as Matungulu/Kawethei/5 by way of adverse possession thereby addressing himself to an issue which falls within the jurisdiction of a superior court.
  2. The learned Magistrate misdirected himself by side-stepping the issue of jurisdiction thereby arriving at an erroneous finding.
  3. The learned Magistrate erred in law and fact by failing to take cognizance of indefeasibility of title in that Matungulu/Kawethei/5 is registered in the name of Mulili Mitu, who is the Applicant's deceased father.
  4. The learned Magistrate erred in fact in finding that the Plaintiffs were entitled to the entire Matungulu/Kawethei/5 by way of adverse possession without any evidence on whether the



Plaintiffs were either in occupation of the entire land parcel known as Matungulu/Kawethei/5 or part thereof for a period in excess of 12 years or at all.

5. The learned Magistrate erred in law and fact by failing to consider the Applicant's Counter-claim and/or any evidence tendered by the Applicant in support thereof.
2. The Appellant seeks for orders that;
  - a. That the Appeal be allowed.
  - b. That the Judgment delivered on 15<sup>th</sup> December, 2022 be set aside and be substituted with Judgment of this court in favour of the Appellants as the court deems fit.
  - c. That the costs of this Appeal and proceedings in the superior court be borne by the Respondents.
3. This court has considered the evidence and the submissions therein. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in *Mbogo and another vs Shah (1968) EA 93* where it was held that;

I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do.”

4. The Appeal is based on the fact that on the 31<sup>st</sup> July 2024 the trial court dismissed the Counter claim on the 1<sup>st</sup> Respondent's preliminary objection dated 14<sup>th</sup> November 2023 on the claim that the court lacks jurisdiction. That the title number Machakos/Nguluni/398 resulted from the provisions of the [Land Adjudication Act](#) and that the Appellants did not file an appeal under Section 29 of the Act.
5. According to the Black Law Dictionary a Preliminary Objection is defined as being;

"In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary....."
6. The above legal proposition has been made in the case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd. (1969) E.A. 696* where the court held that;

The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”
7. In the case of *Attorney General & Another vs Andrew Mwaura Githinji & another (2016) eKLR* the court outlined the scope and nature of preliminary objection as;



- (i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
  - (ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
  - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
8. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter.
9. In the case of Owners of the Motor Vessel M.V Lillian S. vs Caltex Oil (K) Limited (1989) KLR 1 the court held that without jurisdiction it has to down its tools. The jurisdiction of the ELC court flows from Article 162 (2)(b) of *the Constitution* of Kenya 2010. Section 13 (2) of the ELC Act vests this court with wide powers over any dispute relating to land it provides that;

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
10. After the 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 2<sup>nd</sup> 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.

11. The jurisdiction of this court to hear and determine this suit flows from the Constitution and the law. The jurisdiction of court is not conferred upon it by parties nor can the court confer upon itself jurisdiction. The Supreme Court in Samuel Kamau Macharia and Another vs Kenya Commercial Bank Limited & 2 others (2012) eKLR held that;

A court’s jurisdiction flows from either the constitution of 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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

12. In the case of Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & another (2020) eKLR the court held that 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.

13. Be that as it may, there has been conflicting decision as to whether or not subordinate court’s have jurisdiction to hear matters of adverse possession and these courts have adjudicated the same in the past without any objections and the decisions still stand. I find that at the time of the delivery of judgement by the trial court the general consensus was that the court had jurisdiction in adverse possession matters and hence find the objection is not merited and is overruled.

14. It is not disputed that the suit land is registered in the name of the late Mulili Mitu who is the Appellant’s late father. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows;

Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

15. Section 26 (1) of the Land Registration Act states as follows;

The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”



16. The Plaintiff/Respondents stated that they bought the suit property in 1973 and has lived there ever since. In other words, the Plaintiff claims adverse possession and/or that a trust existed and the has an overriding interest on the suit land. PW1 testified that his father bought Matungulu/Kawethei/5 and produced an agreement dated 10<sup>th</sup> June 1973. PW2 confirmed that her husband were purchased the suit land in 1973, developed it in 1989 and have been residing there since. That there have even buried relatives on the suit land.
17. The Supreme Court in PETITION NO. 18 (E020) OF 2022 Arvind Shah & 7 Others vs Mombasa Bricks & Tiles Limited & 5 Others stated as follows;

While Sections 25, 26 and 28 of the Land Registration Act recognize that the rights of a registered proprietor of land are absolute and indefeasible, these are only subject to rights and encumbrances noted in the register and overriding interests. The overriding interests include trusts. In our view, and in the absence of any limitation as to the trusts, this includes constructive trusts. Applying the provisions of Article 24 of the Constitution therefore, the limitation of the right to property is provided under law, and includes a constructive trust. (86) We have found that the doctrines of equity are part of our laws by virtue of Section 3 of the Judicature Act. And while the Constitution entitles every person to the right to property at Article 40, this right is not absolute. Article 24 provides that a right cannot be limited except by law. We have also established that, while Sections 25 and 26 of the Land Registration Act provide for the rights of a proprietor and that the certificate of title is conclusive evidence of proprietorship, Section 28 provides that the registration is subject to overriding interests. One of these overriding interests is trust, which includes constructive trust.

18. We have also established that constructive trusts can arise in various circumstances, including in land sale agreements. Trust is an equitable remedy which is an intervention against unconscionable conduct. Where the circumstances of the case are such that it would demand that equity treats the legal owner as a trustee, the law will impose a trust. It is imposed by law whenever justice and good conscience require it. On this issue and for the reasons given above, we therefore find that a constructive trust can be imported into a land sale agreement to defeat a registered title.”
19. In Archer & another vs. Archer & 2 others (Civil Appeal 39 of 2020) [2023] KECA 298 (KLR) this Court stated as follows:

A constructive trust is therefore generated by circumstances where through some prior agreement or bargain, a trustee takes a fiduciary role which he or she cannot be allowed to disavow, and where the assertion of absolute beneficial ownership thereby becomes unconscionable as a result of his or her previous dealings and actions. This Court upheld this view in Twalib Hatayan & another vs. Said Saggar Ahmed Al-Heidy & 5 others (supra) as follows:

“A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black’s Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. Halsbury’s Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment.



In the present case, a constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the third party. Therefore, there is no unjust enrichment to be forestalled.”

20. The Plaintiff PW1 led detailed evidence that his father bought the suit land and took possession in 1973. The survey report adduced in evidence confirmed the existence of two permanent buildings belonging to him. I am satisfied that the Plaintiff’s family has been in possession of the suit land from the 1973. It is not also in dispute. Looking at the totality of the evidence that was considered by the court and noting that the Plaintiffs were in peaceful occupation of suit land for 45 years before the Plaintiff filed the suit, we are persuaded that the Plaintiff lawfully purchased the said portion. DW1 stated that he got the title in 2018 and they demanded that the Plaintiffs move out. That the said sale agreement is a forgery. The Plaintiffs then filed this suit. I find that it was dishonest for the Defendant’s family to fail to transfer the suit plot to the Plaintiffs knowing very well the Plaintiffs were and/had been in possession for decades and had developed the land. If one was to believe the Defendant’s family for a moment that the suit land is theirs exclusively, why would they allow the Plaintiffs/Appellants to occupy the parcel of land for 45 years without raising any question?
21. I find that a constructive trust does exist and the Plaintiffs hold an overriding interest over the suit land. The Plaintiffs’ family bought the land in 1973 and have been in occupation ever since. Having found that the Plaintiffs have discharged the evidentiary burden on a balance of probability, this Court holds and finds that the Plaintiffs have proved their case on a balance of probabilities. I find that the learned Magistrate did not err in law and in fact by arriving at his decision. I find this appeal is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF OCTOBER 2025.**

**N.A. MATHEKA**

**JUDGE**

