

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCLA NO. E004 OF 2024

PERIS GESARE ALOYIS APPELLANT

VERSUS

JOSEPHINE ONDABU RESPONDENT

JUDGMENT

(Being an appeal against the judgment of Hon. B.O Omwansa, delivered on 30 January 2024 in the suit Kisii MCELC No. 172 of 2018)

(Suit having been filed in the superior Environment and Land Court; matter transferred by the Judge to the Magistrates' Court for disposal; cause of action by the appellant being eviction on the basis that she has title to the suit land; respondent filing defence and counterclaim wherein she pleaded trust and adverse possession; adverse possession could not be heard by the Magistrates' Court; suit heard by a court with no jurisdiction; no fault of the parties as they had presented their case before the superior Environment and Land Court; court persuaded to set aside the judgment as the suit was heard by an incompetent court; the suit to be heard de novo before the competent superior Environment and Land Court)

1. The suit from which this appeal arises was commenced by the appellant, through a plaint which was filed on 15 August 2017 in the superior Environment and Land Court at Kisii. It was registered as Kisii ELC No. 152 of 2017. The plaint was subsequently amended on 28 September 2017. The appellant pleaded that through a sale agreement entered on 12 April 2004, she purchased the land parcel Kisii/Majoge/Bokimonge/2201 from the then registered proprietor, one Cement Ondara at a consideration of Kshs. 230,000/=. She averred that she paid the purchase price in full and the property was transferred to her and she displayed a title in her name issued on 25 August 2004. She pleaded that she was married to one Charles Ondabu Onuko but that she is the one who solely purchased the suit land as she was gainfully employed as a teacher. She pleaded that she resided with her husband on the suit land, but owing to marital differences, her husband chased her away about the year 2005. She pleaded that in the year 2010, her husband married the

respondent and he stayed with her on the suit land. She pleaded that her husband is deceased (the certificate of death showing that he died on 20 June 2010) but despite several demands the respondent refused to vacate the suit land. She contended that the respondent is a trespasser and in the suit she asked for a declaration that she is the owner of the suit land; that the respondent is a trespasser; orders of eviction against the respondent; damages with interest; and costs.

2. The respondent entered appearance and filed defence on 8 December 2017.
3. I need to pause here and mention that on 17 July 2018, Mutungi J, who was then handling the matter, ordered that the case be transferred to the Chief Magistrates' Court at Kisii on the basis that the Magistrates' Court had jurisdiction to handle the matter.
4. I stated that the respondent filed defence on 8 December 2017. She later amended this defence on 18 March 2019 in which she introduced a counterclaim. She pleaded that the appellant has never been a wife to Charles Ondabu Onuko and has never resided on the suit land with Charles as she alleged. She also denied that the appellant was the registered owner of the suit land and contended that if she was so registered then she obtained registration through fraud and thus not entitled to possession of the suit land. She further pleaded that the sale agreement exhibited by the appellant was a figment of her imagination and denied that the appellant paid the purchase price. She denied that she got married to Charles in 2010 as claimed in the plaint and denied moving into the suit land in that year 2010. She pleaded that her husband Charles was an equal share purchaser of the suit land and that his estate is entitled to a half portion of it. In the counterclaim, she pleaded that if the appellant's claim to the whole or part of the land is upheld, then she claims prescriptive rights to it. She pleaded that she entered into the suit land together with her husband Charles in the year 2000 and she has thus been on the land for 17 years to the time of filing suit and 13 years after the registration of the appellant as proprietor. She pleaded that she had seven issues with Charles and they resided together on the suit land. She pleaded that her husband died on 20 June 2010 aged 52 years and she and her daughter, one Zainab, were granted letters of administration on 23 November 2013. She pleaded that no objection to the grant was filed by the appellant. She contended that her late husband and the appellant co-purchased the suit land on 15 August 2003, but in a process shrouded by secrecy and fraud the appellant transferred the whole of the land to herself on 25 August 2004. She pleaded that she came to know of the transfer when this suit was filed. She pleaded that the even after the death of her husband she continued to

pay the balance outstanding in the sale agreement of 15 August 2003. In the counterclaim she asked for the following :

- (i) That her counterclaim be upheld.
 - (ii) An order of cancellation of the appellant's title and in place a new title be issued to the administrators of the estate of Charles Onuko Ondabu (deceased).
 - (iii) Or that the court grants prescriptive rights to her for the whole of the suit land or a portion as she may be found to be entitled to.
 - (iv) In the alternative to (ii) and (iii) above, the court do find that she is entitled to half share by virtue of co-purchase and the same be transmitted to the administrators of the estate of Charles Onuko Ondabu (deceased).
 - (v) The Land Registrar to effect prayers (ii) and (iii) and (iv)
 - (vi) Costs of the counterclaim
 - (vii) Any other order deemed just and fair to grant.
5. The appellant filed a reply to defence and defence to counterclaim. She repeated that she is the one who entered into an agreement for the purchase of the suit land from Clement Ondara and that the suit land was transferred to her on completion of the purchase price. She also repeated that she was married to Charles. On the claim for prescriptive rights she pleaded that the respondent has not satisfied the same. She reiterated that she was in possession of the suit land with Charles until the year 2005 when he chased her away. She contended that the respondent failed to disclose all beneficiaries when filing for letters of administration. She denied that the suit land forms part of the estate of the deceased.
6. The parties testified and the respondent called one other witness culminating into the impugned judgment delivered on 30 January 2024. In his judgment, the trial Magistrate was persuaded that the land was co-purchased and ordered that the suit land be divided into two and two separate titles to the half portions be issued, one to the respondent, and the other to the administrators of the estate of Charles Onuko Ondabu.
7. Unsatisfied, the appellant has preferred this appeal. Several grounds are raised but in a nutshell the appellant is aggrieved by the judgment as she believes that she deserves the whole of it.
8. The appeal was argued through written submissions and I have taken into account the submissions filed.

9. The suit by the appellant was one of eviction of the respondent. The respondent filed defence but also lodged a claim which inter alia including an assertion of prescriptive rights for having been on the suit land for more than 12 years which was essentially a claim for adverse possession. It will be recalled that the case was filed in the superior ELC but was subsequently transferred to the Magistrates' Court for disposal by an order of the Judge. At the time of transfer the claim for adverse possession had not yet been lodged but was lodged after the case was before the Magistrates' Court. It remains therefore that one of the claims before the court was one of adverse possession.

10. The Court of Appeal in the fairly recent decision in the case of *Pauline Chemuge Sugawara vs Nairuko Ene Mutarakwa Kiruti & 3 Others, Court of Appeal at Nairobi, Civil Appeal No. E141 of 2022*, judgment of 11 October 2024 held as follows :

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.

11. It is apparent from the above, that the claim for adverse possession was not one that could be entertained by the Magistrates' Court. I cannot fault the parties because the transfer of

the suit was done by the court and not the parties. It follows that there was a critical component about the case which the court had no jurisdiction to determine. It still remains an issue for determination even in this appeal, for if the court finds that the appellant's case on the issue of purchase and title is valid, then it will need to now look at whether the claim for adverse possession is merited. As I have stated however, the Magistrates' Court could not have entertained the claim for adverse possession, and it is as good as if that claim was never heard, yet it is a claim that was supposed also to be heard and considered in the first instance.

12. I am afraid that I will have to declare a mistrial of the case for it was tried by a court that had no jurisdiction to hear it in the first place. As I have said, I cannot fault the parties because it is the court on its own motion which transferred the case to the lower court. At that time it was of course thought that Magistrates' Courts could hear all disputes related to land only limited by the value of the subject matter. Now on hindsight it will be seen that it was a mistake for the court to have transferred the suit to the lower court, and the case ended up being heard by an incompetent court.
13. Given the above I have no choice but to declare the proceedings before the Magistrates' court as null and void. The judgment is also declared a nullity and is hereby set aside. Since the transfer was not of the parties' fault, I will order the case transferred back to this court and for it to retain its original number i.e Kisii ELC No. 152 of 2017 and for the case to continue from where it had reached prior to being transferred to the lower court.
14. The mistake was of the court and therefore there will be no orders as to costs.
15. The case to commence de novo before the superior Environment and Land Court.
16. Judgment accordingly.

DATED AND DELIVERED THIS 12 DAY OF NOVEMBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Ms. Magoma instructed by M/s Meritad Law LLP for the appellant

Mr. Bosire instructed by M/s Moronge & Company Advocates for the respondent
Court Assistant – Michael Oyuko