

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ELC (LA) E007 OF 2025

SUSAN NYAWIRA MUNENE.....1ST

APPELLANT

IGNATIUS CEGE MWANGI.....2ND

APPELLANT

VERSUS

COUNTY GOVERNMENT OF NAROK.....1ST

RESPONDENT

CEO - PUBLIC ROADS NAROK COUNTY.....2ND

RESPONDENT

ADMINSTRATOR TRANSMARA WEST SUBCOUNTY.....3RD

RESPONDENT

PHYSICAL PLANNER-TRANSMARA WEST SUBCOUNTY.....4TH

RESPONDENT

LAND REGISTRAR-TRANSMARA WEST SUBCOUNTY.....5TH

RESPONDENT

SURVEYOR-TRANSMARA WEST SUBCOUNTY.....6TH

RESPONDENT

HON. ATTORNEY GENERAL.....7TH

RESPONDENT

NAROK COUNTY NATIONAL LAND COMMISSION.....8TH

RESPONDENT

NATIONAL LAND COMMISSION-NAIROBI.....9TH

RESPONDENT

JUDGMENT

1. Susan Nyawira Munene and Ignatius Chege Mwangi the Appellants herein were aggrieved by the whole of the Judgment of Hon. C.W Waswa SRM delivered in Kilgoris C.M ELC No. E002 of 2024.

2. They penned a whopping 28 grounds of Appeal Vide their Memorandum of Appeal dated 13th February 2025 and sought the following prayers;
 - (I) The Appeal be allowed.
 - (II) The subordinate court judgment delivered on 30th day of January 2024
 - (III) Enter judgment as prayed on the Plaint.
 - (IV) Any other further remedies that the Honorable court may think just and fit to grant.
3. The court shall not set out the grounds of Appeal seriatimly but shall handle them in the course of this judgment.
4. The gravaman of the Appeal is that the Learned trial Magistrate miscalculated the commencement date of the limitation period in view of the fact that issue at hand involved a public access road; which constitutes public property and the learned Magistrate failed to consider that the road linking the Migingo area of Kilgoris to the tarmac road (Kilgoris - Kisii road) is a public road which has been designated as a public road but had been taken over by private individuals.
5. The dispute whose decision provoked this Appeal was commenced by a Plaint which was later amended on 23rd January 2024.
6. In the Amended Plaint, the 1st Appellant as the 1st Plaintiff, pleaded interalia being the registered owner of Transmara/Ololchani/369 and Transmara/Ololchani/371. That the Defendants had allowed encroachment of the access road connecting Migongo estate within Kilgoris Township and Kilgoris - Kisii road, which the access road was meant to give the residents access public amenities. The said road was established in 1956, and alleged that the Defendants had failed in their duty to protect the public from the said encroachment, and he sought the main relief of re-establishing and opening access and/or public road connecting Migingo estate to Kisii - Kilgoris tarmac road .

7. The 1st to 7th Defendants entered appearance but did not file their respective defences. While the 8th and the 9th Defendants neither entered appearance nor filed defence. The 1st to 4th Defendants before the trial court were the County Government of Narok and its agencies, while the 5th to 7th Defendants were the Land Registrar Transmara west, Land Surveyor Transmara west and the A.G, the 8th and 9th Defendants were Narok County National Land Commission and the National Land commission Nairobi.
8. Despite the matter being undefended Vide the judgment delivered on 30th January 2025 the trial court found the suit to have been time barred as the pleaded cause of action was said to have being in 2007 as pleaded at paragraph 12 of the Plaint, hence the virtue of section 7 of the limitation of Actions, the suit was deemed time barred and struck out provoking this appeal.
9. Upon admission of the Appeal directions were issued for the Appeal to proceed by way of written submissions.

Appellant's submissions.

10. In their submissions the 1st and 2nd Appellants framed and submitted on 3 issues for determination.
Issue 1 and 3 are connected as they related to whether or not public Land could be affected by adverse possession and whether the Learned Magistrate had jurisdiction to hear and determine a claim of adverse possession. The independent issue being whether the decision was legally sound.
11. In respect of the issue of whether public land could be affected by adverse possession, the Appellant submits placing reliance on the decision of the Registered Trustee Gospel Evangelistic Church of Kenya vs. Mwangi and 11 Others KEELC 21371 where the court held that;
“ 53. The doctrine of adverse possession is inapplicable where Land is Public Land or Trust Land or is owned by the

Government section 41 of Limitation of Actions Act excludes public Land for the application of the Act...”

12. Further reliance was placed on the decision in the case of Sammy Mwangangi and 10 Others vs. Commissioner of Lands and 3 Others.
13. On the related issue as to whether the trial court had jurisdiction to hear and determine adverse possession matter, the Appellants submitted that the learned Magistrate did not have jurisdiction to hear and determine an adverse possession matter. Reliance was placed on the decision in the case of Biwotts and Another vs. Amin Tanui (2025) KEELC 3391.
14. On the last issue, the Appellants submit that the learned trial court made findings on issues that were not pleaded hence the impugned decision was not sound.
15. The Appellants urges the court to allow the Appeal on the strength of the above submissions.

Respondent’s Submissions

16. All Respondents as Defendants before the trial court did not file their respective defences neither did they take part in the said proceedings nor filed submissions before the said trial court.
17. In this Appeal however, the 1st to 4th Respondents and framed and submitted on 3 issues for determination.
18. On issue number 1, they submitted that as the cause of action was pleaded to have been in 2007, and suit filed in 2024, 17 years later the trial court was right in holding that the suit was filed outside 12 years on contravention of section 7 of the Limitations of Actions Act hence the suit was statute barred and that the Learned Trial Magistrate was right in striking out the same.

19. The Respondent submit that the **“alleged public road”** did not exist and re-opening the same would mean to allow a private access to the Appellants’ properties as opposed to a public access road.
20. That the alleged **“public road”** was not gazzeted as a public road or reserved access road under the County or National planning records and was merely an assertion, by the Appellants.
21. The Respondents submitted that the suit was prematurely filed as the road has not been declared a public road by the 5th and 6th Respondents so as to warrant filing of the suit.
22. On the third issue, the 1st to 4th Respondent submit that public property is not amenable to adverse possession.
23. On the strength of the above submission, the 1st to 4th Respondent submit the court to dismiss the Appeal, by holding that the suit was rightly found to be time barred.

Issues for Determination

24. Having analyzed the Record of Appeal and the submission as well as considered the law, an issue arising out of the Respondents’ submission is that the suit before the trial court was filed prematurely without confirmation of the nature of the, access road, issue being a jurisdiction issue shall be considered as the first issue. Hence the issue for determination are as follows;
 - (I) What was the nature of the dispute before the trial court and whether or not the trial court had jurisdiction to hear and determine the dispute.
 - (II) Whether or not the Appeal herein is merited, and in deciding this issue, the court shall consider whether or not the suit before the trial court was merited.
 - (III) What order ought to issue
 - (IV) Who bears the cost of the Appeal.

Analysis and Determination

25. The court in exercise of its power as a first appellate ***court “the powers to re-evaluate the evidence, re-analyze the same so as to reach its own conclusions”*** as stated in Selle and another vs Associated Motor Boat and 3 Others, has firstly to determine the nature of the dispute before the trial court; -

26. The nature of the dispute, is revealed in the Amended plaint and is pleaded at paragraphs 12 to 14 of the Amended plaint set out as follows; -

“12. On or about 2007, the Defendants allowed persons and entities to construct and establish structures on the access Road connecting Migingo Estate within Kilgoris Township and Kilgoris - Kisii Road.

13. The plaintiffs contend, that the said access road was purposely meant to enable persons access their homes, work places and public amenities without any difficulties and / or problems and not otherwise.

14. It is further averred by the plaintiffs, that the road as it now is impassable taking into consideration its diminishing width.”

27. The prayers sought in particular prayers A and B of the Amended Plaint equally give a clue as to the nature of the dispute.

28. The said prayers A and B are set out here bellow;

“a, re-establishing and opening access and/ or public road connecting Migingo Estate and Kisii - Kilgoris tarmac road, that passes along slaughter house, Mosque and SDA Church to the tarmac road land to ensure it is inspected, surveyed, identified, marked out, mapped, pegged or beacons and also extend of the said road and its reserve as adjoining the said properties be identified by the 5th and 6th Defendants and protected by the 1st and 3rd Defendant.

b, The 1st and 4th Defendant to provide and maintain the said road and stop any encroachment and ensure its usable and motorable standard to and by everyone.”

29. From the foregoing, the Appellants dispute before the trial court is evidently a Physical and Land Use Planning dispute and it falls squarely under the ambit of the Physical and Land Use Planning Act (PLUPA) which Act provides as one of its objectives at section 3(e)” a ***mechanism for dispute resolution to physical Land use and planning.”***

30. The issue of re-opening and re-establishing the access road as sought for by the Appellants are issues of Physical and Land Use development reserved for the County Government under section 45(1) and 46(b)of the PLUPA.

31. In their submissions the 1st to 4th Respondents dispute that the access road herein was a public road, this is not helpful since the 1st to 4th respondents did not file any defence in the trial court, and the court treats this limb of submission as not part of pleading or evidence.

32. The Appellant in their pleadings before the trial court, pleaded that despite demands to have the access road opened the same was not done hence the suit.

33. The PLUPA reserves the duty to plan cities, municipalities, town and urban areas to the County Government and a party aggrieved with the decisions of the County Executive member in relation to planning and/or planning authority has a Right of Appeal to the County Physical and Land Use Planning Liason committee under section 40(4) of the PLUPA, and an appeal against the decision of the County Physical and Land Use Planning Liason committee lies with the ELC under section 40(7) of the PLUPA. This Internal Dispute Resolution Mechanism was not exhausted, but the Appellants as Plaintiff filed the dispute before the Chief Magistrate’s court.

34. There was no proof that the matter was raised with the relevant County Executive Committee member. There was proof of a letter sent to the 2nd Respondent, but in terms of the Act, the 2nd Respondent is not the correct CEC, as the County Executive Committee member defined as section 2 of PLUPA “means, the County Executive Committee member responsible for matters relating to Physical Land Use Planning in the respective county. Consequently the dispute was not brought to the attention of the relevant officials for the handle, and the court agrees with the submission of the 1st to 4th Respondents, that the suit before the trial court was prematurely filed, since an Internal Dispute Resolution Mechanism that was elaborate existed and was not utilized a practice frowned upon by the courts as was stated in the case of Samson Chembe Vuko and Another Vs. Nelson Kilumo and 2 Others 2016 eKLR, which Appeal dealt with provisions of the repealed physical planning Act, and the court held that parties ought to exhaust the Alternative Dispute Resolution Mechanism under the said Act.
35. The Appellants did not exhaust the internal dispute resolution mechanism, and the Act ousted the jurisdiction of the trial court as was held in the case, Speaker of National Assembly Vs. Njenga Karume where the court held,
“Where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or by an Act of parliament, that procedure should be strictly followed.”
It follows that the trial court was bereft of jurisdiction in view of the existence of the internal dispute resolution mechanism and had no jurisdiction to hear the matter as filed.
36. In answer to issue number 1, the dispute before the trial court was a planning and land use dispute which the Appellants ought to have filed before the CEC in the first instance and an appeal to the County physical and Land Use planning liaison committee and not in the Magistrate’s court.

37. Having found that the trial court had no jurisdiction, the decision that it reached was a nullity and the same is hereby set aside, and suit before the trial court is struck out.

The fate of the appeal is that the same is struck out with costs to the 1st to 4th Respondents, as the court shall not dwell in its merits, but the Appellants are at liberty to institute the dispute in the proper forum.

Dated at Kilgoris this 20th day of November, 2025.

Hon. M.N Mwanyale
Judge

In the presence of

CA - Emmanuel/Sylvia/Sandra

Mr. Leteit for 1st to 4th Respondents

Mr. Ignatius Chege Mwangi 2nd Appellant in person.