

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND COURT LAND APPEAL NO.
E035 OF 2024

**GRACE OBUYA OKUMU (Suing as
the administrator of the estate of
the late Obadia Abar Okumu)**

.....**APPELLANT**

VERSUS

JAMES AYUGI OTIENO.....1ST

RESPONDENT

LAND REGISTRAR HOMABAY COUNTY.....2ND

RESPONDENT

**LAND ADJUDICATION AND
SETTLEMENT OFFICER HOMABAY COUNTY.....3RD
RESPONDENT**

HON. ATTORNEY GENERAL.....4TH

RESPONDENT

MARY SIRO.....5TH

RESPONDENT

DIRIRI MOHAMMED DIRIRI.....6TH

RESPONDENT

***(Being an appeal against the judgement and decree by
Hon. J.A Orwa CM in Homabay ELCC No. 49 of 2019
delivered on 8th July 2024)***

JUDGEMENT

1. By way of an Amended Plaintiff dated 10th June 2023, the Appellant instituted a suit in the trial court seeking the following orders;

1) A declaration that land parcel known as Kanyada/Kotieno Katuma 'A'/1421 belongs to the Plaintiff.

2) A permanent injunction restraining the defendants, whether by themselves, agents, employees' servants and or representatives from interfering, encroaching, trespassing on to land parcel known as Kanyada/Kotieno Katuma 'A'/1421

3) An order for the rectification and or amalgamation of land parcels known C Kanyada/Kotieno Katuma 'A'/1421 and Kanyada/Kotieno Katuma 'A' 1462 and that the resultant title be registered under the name of the Plaintiff.

2. In the plaint, the Appellant pleaded that she was the rightful owner of land parcel known as Kanyada/Kotieno Katuma 'A'/1421, having inherited the same from her late husband. Further, that the suit parcel was originally a portion of land parcel No Kanyada/Kotieno Katuma "A" /1396 which her

husband bought from the late Jacob Olweya in 1975 before demarcation but later on it was fraudulently registered under the name of Siro Mogaka Kerindo who was a Land Adjudication Officer then and later on changed to James Okioga Siro. She pleaded that Mary Siro fraudulently transferred the suit property to the 1st defendant, as she was the administrator of the estate.

- 3.** For purposes of this Judgment the parcel numbers shall hereafter be referred to in their numerical references rather than quoting the whole parcel references.
- 4.** She pleaded that her husband realised the fraudulent registration and lodged an objection at the Land Adjudication office at Homa bay but the same was disallowed. He then requested a late objection to the Director of Land Adjudication and Settlement in Nairobi in 1979. It was allowed and her husband was issued with a new parcel number.
- 5.** By it, it was ruled that 0.3 acres be given to her husband and he was issued with a new number 1462. She stated that plot no. 1421 was to form part of 1462 as it had been ordered that the plots be amalgamated to form 1396 in the name of

Siro Mogaka. Further, that the land adjudication officer and the registrar ignored the order and fraudulently registered the parcel in the name of Joan Achieng Onyiono on 8th December 2015.

- 6.** She stated that the land is currently under the name of James Ayugi Otieno and further, that she has worked on the parcel for 35 years without any interruption until the year 2017 when she saw people fencing the property. She then listed the particulars of fraud and negligence and prayed that the court allow her claim.
- 7.** The 2nd, 3rd and 4th Defendants filed the 2nd, 3rd and 4th Defendants' Statement of Defence dated 30th October 2019. In it they denied the contents of paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 of the Plaint and the one containing the Demand Letter.
- 8.** Further, they denied the allegations of fraud and illegality enumerated in the plaint against them. They averred in the alternative that if there was a transfer of the suit parcel of land and subsequent registration, it was done lawfully and procedurally. They urged that the court to dismiss the suit.

They then filed a witness statement dated 7th July 2020 and a List of Documents dated 12th May 2020.

- 9.** The matter proceeded for full hearing.
- 10.** PW1 was Grace Obuya Okumu who adopted her witness statement as evidence in chief. She also adopted her written witness statements dated 7th October 2019 and 13th January 2024.
- 11.** During cross examination, she stated that her husband was residing in Homa Bay when he passed on. That the letters written by herself and her husband were provided as exhibits in this case. Further, that Kanyada/Kotieno Katuma A 1421 was sold to Gabriel Odoyo Makela, and James Ayugi who are the current holders of the land.
- 12.** The parties then closed their respective cases and were directed to file submissions. Upon considering the testimonies, evidence and submissions, the trial court entered judgement as follows;

1)A Declaration that land parcel known as Kanyada/Kotieno/Katuma A 1421 belongs to the plaintiff is disallowed.

- 2) A Permanent injunction restraining the Defendants, whether by themselves, agents, employees, servants and or representatives from interfering, encroaching, trespassing on to land parcel known as Kanyada /Kotieno Katuma "A71421 is disallowed.**
- 3) An order of rectification and amalgamation of land parcel known as Kanyada/Kotieno Katuma 'A1421 and Kanyada/Kotieno Katuma A/1462 and that the resultant title be registered under the name of the plaintiff is disallowed.**
- 4) A Declaration that the transfer and registration of Kanyada/Kotieno Katuma "A"/ 1462 in favour of the 6th Defendant was void ab initio, fraudulent, unlawful and hence illegal.**
- 5) An injunction is hereby issued restraining the 6th Defendant either by Himself, Agents and /or servants from re-entering and dealing with the suit property Kanyada/Kotieno Katuma A/1462.**
- 6) Costs of the suit to the plaintiff so to interest at court rates till payment in full.**

13. Dissatisfied with the decision of the trial court, the appellant instituted the present suit vide the Memorandum of Appeal dated 5th August 2024 premised on the following grounds;

1) That the learned magistrate erred in law and fact in finding that the appellants' claim of acquisition of land parcel number KANYADA/KOTIENO KOTUMA 'A'/1421 by adverse possession was statute barred.

2) That the learned trial magistrate erred in law and fact in disallowing the appellants' claim to land parcel number KANYADA/KOTIENO KOTUMA 'A'/1421.

14. The parties canvassed the appeal by way of written submissions.

Appellant's submissions

15. Learned counsel for the appellant submitted that the appellants' claim on the suit land was time barred. He cited Section 7 of the Limitation of Actions Act and the case of Oracha & another v Amkoa & 3 others [2025] KEELC 730 (KLR). Counsel additionally cited the case of Chevron (K) Ltd

v Harmon Chart) Wa Shutu (2016) KECA 248 (KLR) on the issue of adverse possession.

- 16.** Counsel submitted that in the trial court, the Adjudication Record for the suit land dated 4/7/1978 showed that the suit land was first adjudicated in favour of Siro Mogaka. Thereafter, according to the green card for the suit land certified on 19/3/2018, the suit land was registered in the name of the said Siro Mogaka. On 26/5/1994 and then in favour of Mary Siro, the 5th respondent, on 28/10/2014 upon transmission from Siro Mogaka. That the official search dated 19/3/2018 showed that the suit land was registered in the name of Ayugi James Otieno, the 1st respondent, on 11/12/2017.
- 17.** Counsel submitted that the trial court found that the 1st and 5th respondents did not enter appearance and/or file a statement of defence before the trial court. This was despite being served with the pleadings and summons to enter appearance. Therefore, they did not controvert the appellant's evidence that, as at 2019 her said late husband and her had been in possession of the suit land for 35 years, that is, from around 1984.

18. Counsel submitted that the appellant had pleaded at paragraph 15 of her original, amended and further amended complaints that she had worked on the suit land for 35 years until around 11/1/2017, when some persons, obviously agents of the 1st respondent, attempted to fence off the suit land. Further, that on 4/8/2004, the appellant's late husband had caused a restriction to be registered against the title of the suit land. This followed his successful objection no. 44 Kotieno Katuma Adjudication Section, which was heard on 24/5/1983. Therefore, once adverse possession had crystalized by around 1996 and the registration of the 1st respondent as the proprietor of the suit land was futile. This was because the title held by his predecessors in title, especially Siro Mogaka and Mary biro, had already been extinguished and they held the title in favour of the appellant.

19. Counsel urged that the trial court erred in finding that the appellants' claim for adverse possession was statute barred and urged the court allow the appeal as prayed.

20. There were no submissions on record for the Respondents. Be that as it may, since submissions are not pleadings but

constitute only a marketing language of the parties as they endeavour to convince the Court to find in their favour, absence or presence of submissions does not prejudice any party's case. The court is not bound by the opinion in or position of parties' submissions since such may at times be skewed towards favouring the side that presents the argument thereby missing the point. In any event there are many cases decided without courts relying on parties' submissions. For this humble view, the court is guided by the Court of Appeal decision on **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] KECA 642 (KLR)** wherein it was held;

“Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

21. Thus, in the instant case, this court still proceeds on decides the merits of the case.

Analysis and Determination

22. I have carefully considered the appeal before me, more specifically the only two grounds of appeal and their import. I have also considered the law, the facts of the matters in the trial court and the submissions of the parties on appeal. I am of the humble view that three issues lie for determination, and they should be determined in sequence. They are:

- a) Whether the trial court followed the law thereby according all parties an opportunity to be heard**
- b) Whether the appeal is merited**
- c) Who to bear the costs of the appeal**

23. I begin by restating the position of this court as an appellate one: it is that it must analyse the evidence afresh and arrive at its own independent conclusion, being careful not to substitute its opinion to that of the trial magistrate. As the law is, the duty of an appellate court was set out in **Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** where the Court held as follows;

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyse 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.”

24. The role of the Appellate Court was, additionally, stated by the Court of Appeal in the judicial decision of **Gitobu Imanyara & 2 others Vs Attorney General [2016] eKLR**. It was held as follows;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

25. This court thus now begins the analysis, in sequence, of the issues it identified above. The first one is whether all parties

were given an opportunity to be heard. Upon considering the record of appeal, two more emerged sub issues of concern arose. They are whether the right to be heard, of all the parties, as envisaged Article 25 (c) as read with Article 50(1) both of the Constitution of Kenya, afforded them? An analysis of the proceedings that raises the question as to whether some of the defendants were ever accorded an opportunity to be heard right from the beginning of the hearing. This can only be discerned from and the question answered by the record but before then, the legal position on parties' right to be heard cannot be gainsaid.

26. The right to be heard is enshrined in the Constitution of Kenya under **Article 47** which provides as follows:

1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

27. This is an issue which has been extensively discussed in our jurisprudence. In **Evans Odhiambo Kidero & 4 others vs. Ferdinand Ndung'u Waititu & 4 Others - Petition**

No. 18 of 2014 as consolidated with Petition no. 20 of 2014 [2014] eKLR, Justice Njoki SCJ concurring stated:

“[257] Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo iudex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, Judicial Review: Law, Procedure and Practice 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that “although the necessity of hearing is well established, its scope and contents remain unsettled.”

28. In Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998

the Court of Appeal held that:

“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party

not utilising the opportunity can be heard is why he did not utilise it.”

29. The right explained above is closely intertwined with the right to fair hearing which is envisioned in **Article 50(1) of the Constitution**. It provides that,

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

30. In the instant case, the Record of Appeal, and the original court record (of the trial court) reveals that on 21st June 2022, the Plaintiff sought leave through an application dated 10th June 2022 to Amend the Plaint in Case 49 of 2019. It was fixed for hearing on 13th July 2022 when it did not proceed because the trial magistrate was on transfer. It was put off to 19th July 2022. On that date, it was allowed by consent. The Amended Plaint filed as a result was that of 20th July 2022. The Amended Plaint introduced the 5th Defendant, one Mary Siro.

31. By 18th January 2023 when the matter went before the trial court, it was reported by the Plaintiff's counsel that the Plaintiff could not trace the said 5th Defendant. The court gave a last adjournment to the Plaintiff and fixed the matter for hearing on 22nd February 2023. Then on 22nd February, 2023 the Plaintiff, through counsel, filed an application dated 21st February 2023 in which she sought to effect Summons to Enter Appearance and other pleadings on the 5th Defendant by way of Substituted Service either in the Daily Nation or the East African Standard newspapers. Thus, the matter could not proceed. It was fixed for 21st March 2023 when the entire suit was dismissed with no order as to costs.

32. The following day, the Plaintiff made an application dated 22nd March 2023. She sought in it the setting aside of the orders of dismissal of the suit, and instead its reinstatement. After it being served and coming up for directions on 26th March 2023, it was allowed by consent on 20th April 2023 and the suit fixed for hearing on 25th May 2023. However, on 9th May 2023 the Plaintiff moved the court vide another application dated 8th May 2023 by which

she sought, among others, that Homabay CMELC No. E049 of 2019 between Grace Obuya Okumu (Suing as the Administrator of the late Obadia Abar Okumu) versus/ and James Uyugi Otieno & 4 others be consolidated with Homabay CMC ELC No. E041 of 2021 Grace Obuya Okumu versus Diriri Mohamed Diriri and 2 others. Further, that upon consolidation the Plaint be amended to incorporate and amalgamate the issues arising from the two suits.

- 33.** The Application was argued and on **6th September, 2023** the court delivered a Ruling on the same. It allowed the Notice of Motion dated **08th May 2023**, with no order as to costs. The Plaintiff was to amend the Plaint within **14 days** and file and serve it within the said period. Further directions were to be given on 27th September 2023.
- 34.** The Plaintiff 'filed' a Further Amended Plaint dated 25th September, 2023. This was way after the end of the fourteen days period granted by the Court on 6th September 2023. By the further amendment the Plaintiff introduced the 6th Defendant in file Homabay CMC ELC No.49 of 2019.
- 35.** Be that as it may, on the 25th September 2023 the Plaintiff indicated to the court that she was not able to serve. A

further date for pre trial directions was fixed, being 19th October, 2023. On the latter date the Plaintiff once more pleaded with the court that she was unable to serve the 5th Defendant by way of advertisement. It was the same indication on 19th October 2023 and 16th November 2023. The three mentions that followed this last date were for compliance with Order 11 of the Civil Procedure Rules. After that there was no indication whatsoever that both the 5th and 6th Defendants had been served with Summons to Enter appearance.

36. The hearing proceeded on 11th April 2024. But there is no proof whatsoever that the two additional defendants, the 5th and 6th, were ever served with any of the amended pleadings. The record shows that on the Plaintiff's Advocate and that of the 2nd to 4th Defendants were present when the hearing took place on the said date all the way to the close of the Plaintiff's case. A date for defence hearing was then fixed for 15th May 2024. On that date the defence was close without calling any evidence. There was record to show that even on the subsequent date the other parties were ever served to attend the hearing but they did not. Judgment

was fixed for 28th June 2024 while parties were required to file submissions in between.

37. There is no record whatsoever that evidences the service of the Summons to Enter Appearance or even the Further Amended Plaintiff on the part of the 5th and 6th Defendants. Again, there was no record whatsoever, to show that leave was extended to the Plaintiff to file and serve Further Amended Plaintiff after the expiry of the fourteen (14) days the Court granted her on 6th September, 2023. What the record bears is that after all that is shown (above) as having taken place comes the impugned Judgment of the trial Court. The findings of the trial court in the judgment were given in paragraph 11 above.

38. Furthermore, with respect to the suit, Chief Magistrates ELC No. E041 of 2021, the record shows that it was instituted by the plaintiff herein against on Diriri Mohamed Diriri, the Land Registrar, Homabay, and the Attorney General. In it, the Plaintiff sought the following reliefs:

a) Declaration that the transfer of land parcel number Kanyada/Kotieno/Katuma "A"/1462 was

void ab initio, fraudulent, unlawful and hence illegal.

b) An order of restriction of the register in respect to the property Kanyada/Kotieno/Katuma "A"/1462 and restoration of the name of Obadia Ambar Okumu as the lawful registered proprietor thereof.

c) Declaration that the sale, transfer and registration of the suit property, Kanyada/Kotieno/Katuma "A"/1462 in the name of the 1st Defendant is void unlawful, illegal, and invalid and hence his title therefore be cancelled forthwith.

d) Permanent injunction restraining the 1st Defendant either by himself, agents and or servants from entering and or dealing with parcel Kanyada/Kotieno/Katuma "A"/1462 in any other way.

e) An order directing the first defendant to hand over vacant possession of the suit property. Sutherland.

f) An order directing the Officer Commanding Station to assist the plaintiff in enforcement and implementation of these quotes. Order.

g) Cost of this suit.

39. The court record in respect of this matter does not bear any evidence that the 2nd and 3rd Defendants were served ever served with the Summons to Enter Appearance in respect of this matter. However, with respect to the first defendant it shows that the Summons to Enter Appearance and file defence was served by way of advertisement in one of the local dairies and an affidavit of service filed thereto. The party did not enter appearance or file a defence.

40. Even assuming then that there was an oversight in filing the Affidavit of Service with respect to the service of Summons to enter appearance on the 2nd and 3rd Defendants, there is no evidence that the said defendants ever entered appearance or filed a defence. Further, and of critical importance is that when the suit proceeded to hearing or before it was set down for hearing, the record does not show whether Summons to enter appearance were ever collected within the period stipulated, that is, in thirty

days, or the suit against them abated. Moreover, if the Summons were served it is not clear whether that the Plaintiff therein complied with the mandatory provisions of Order 10 Rules 8 of the Civil Procedure Rules, 2010 which is to the effect that, "No judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than seven days before the return day," by making a formal application to proceed ex parte against the two parties, being government entities. This means that this procedure having not been followed, the proceedings in the suit which was finally consolidated with Suit No. 49 of 2019 were irregular and cannot stand. It also means further that the proceedings in Suit No. 49 of 2019 also were irregular.

41. Besides the flaw in the record as noted above, the lower court record shows further that the suit did not proceed in any manner for a while. Therefore, on 23rd September 2022, it was fixed for notice to show cause why it should not be dismissed for want of prosecution on 13th October 2022. On 13th October 2022, it was dismissed for want of prosecution. Subsequently, the plaintiff applied to reinstate it through an

application dated 1st February 2020. On 13th April 2023, the application was allowed. The suit was reinstated. Then on 11th September 2023, one of the directions given in it was that it had been consolidated with suit No. 49 of 2019 on 6th September 2023. Those were the last proceedings regarding this file, before the instant appeal.

42. This court has carefully perused the Record of Appeal herein. It does not contain any of the proceedings with respect to the consolidated suit. Further, other than the record showing that the Plaintiff filed a belated Further Amended Plaint in CMC ELC No. 49 of 2019, the proceedings running from the date of the order of consolidation of the two lower court matters on 6th September 2023 do not in any way show that order was effected. This situation is further borne from the Judgment delivered on 08th July 2024, which is the subject of this appeal: the judgment does not in any way refer to the consolidated suit. It appears it was completely forgotten or left out, inadvertently, or because of the high turnover of and or the many Judicial Officers who handled the two suits in quick succession because it appears four handled the two matters within two years.

43. This series of events as outlined above therefore raises the following fundamental issue for determination “**Whether all the parties given an opportunity to be heard**”, and the simple straight answer thereto is, “**No**”.

44. The orders issued by the trial court are adverse to all the defendants, including the 5th and 6th defendants who never participated throughout the proceedings even on the face of lack of service of process and summons upon them. Their right to property is going to be affected by the reliefs granted, before they are heard. It does not necessarily mean that they have a good case or defence. This court does not know their defence yet. But it would be futile to let the judgment of the lower court stand as it is, with such fundamental flaw as noted. As established above, it would be unconstitutional to allow a decision condemning a party unheard to stand. In **Msagha vs. Chief Justice & 7 Others Nairobi HCMCA no. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553** it was held:

“The Court observes firstly that the rules of natural justice “audi alteram partem” hear the

other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days we of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice.

The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.” (emphasis mine).

45. Given that there was a miscarriage of justice and thus some of the defendants were not even served or involved in the

matter, the next port of call would have been to determine the outcome of the appeal. The court cannot delve into the merits of the decision of the trial court as the same is already tainted with proceedings that were in violation of the Constitution. To go into the substance of the same would be to sanction an unconstitutional decision which this court cannot do.

46. This court noted that the judgment of the trial court, particularly, under paragraph C the last line where the trial court held, **“The Plaintiff’s claim having been deemed as statute barred, the averment of acquisition of the land parcel number Kanyada/Kotieno Katuma “A”/1421 by dint of adverse possession is disallowed”** referred to a claim of adverse possession. Also, the Appellant submitted extensively regarding the claim of adverse possession and urged this Court to find that the findings of the trial court in disallowing the claim was erroneous.

47. The Court has carefully examined the Plaint, the Amended Plaint and even the Further Amended Plaint (though filed out of time as noted) all of which are the claimant’s

pleadings in Homabay CMC ELC. No. 49 of 2019 and the
Plaint in Homabay CMC ELC Case No. E041 of 2021. In none
of those documents is there a relief sought, for adverse
possession. In any event of there would have been a claim
of the sort before the subordinate court that court would
not be clothed with jurisdiction to determine such a claim
under Sections 7, 13 and 38(1) of the Limitation of Actions
Act. The holding in the Court of Appeal case of **Sugawara v
Kiruti (Sued in her capacity as the administratrix of
the Estate of Mutarakwa Kiruti Lepaso alias
Mutaragwa Kiruti Lepaso alias Mutaragwa Kiroti
Leposo and in her own Capacity) & 3 others (Civil
Appeal E141 of 2022) [2024] KECA 1417 (KLR) (11
October 2024) (Judgment)** is instructive on this point.
Thus, if that is the claim the appellant had in mind then as
this matter is being returned to the trial court, she needs to
seek proper legal advice on the proper course of events to
take. Moreover, she needs to elect whether her claim is on
fraud or adverse possession or even a claim whether the
registrations of the Defendants as owners of the titles in

question still exist pursuant to Sections 7, 13 and 17 of the Limitation of Actions Act.

48. As I conclude, the provisions of Section 78 of the Civil Procedure Act stipulate that;

“(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power;

a) To determine a case finally;

b) To remand a case;

c) To frame issues and refer them for trial;

d) To take additional evidence or to require the evidence to be taken;

e) To order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein”.

49. Having considered the circumstances of the trial and the gave errors in principle committed during the trial and the manner in which the same was conducted, I order as follows;

- i) The judgement in Homabay ELCC No. 49 of 2019 delivered on 8th July 2024 is hereby set aside.**
- ii) The parties are directed to move the subordinate court regarding the rectification of the numerous procedural missteps or errors noted in the trial court records before hearing, if any takes place.**
- iii) The suits (as consolidated or as the trial court will determine), if they proceed, shall be heard afresh before a different magistrate of competent jurisdiction.**
- iv) There shall be no order as to costs in this appeal.**
- v) The original file of the lower court be returned forthwith to the Court for urgent action.**

50. Orders accordingly.

Judgment **dated, signed and delivered virtually via the Teams Platform this 18TH day of November 2025.**

HON. DR. IUR NYAGAKA

JUDGE

In the presence of,

Court Assistant: Md. Fiona M.

Mr. Mike Okelloh Advocate for the Appellant

Alfrick Rioba State Counsel for Sarah Juma SC the 2nd to 4th

Respondents

No appearance for other Respondents

Original