Josphat & 3 others v Masudi (Civil Appeal E054 of 2023)
[2025] KECA 2103 (KLR) (5 December 2025) (Judgment)

Neutral citation: [2025] KECA 2103 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E054 OF 2023

AK MURGOR, KI LAIBUTA & GW NGENYE-MACHARIA, JJA

DECEMBER 5, 2025

BETWEEN

LLOYD MUGO JOSPHAT ..... 1ST APPELLANT

KAREN KANJIRU KIBERA ..... 2ND APPELLANT

ASSENATH KANJIRU MURUNGE (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE GERRARD MURUNGE) ..... 3RD APPELLANT

MILLICENT MUTHONI KITHINJI (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE EUTYCHUS KITHINJI JOSEPHAT) ..... 4TH APPELLANT

AND

MWANAHAMISI MASUDI ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Kwale (A. E. Dena, J.) delivered on 20th February 2023inELC Appeal No. E003 of 2021)

JUDGMENT

1. The right to property finds protection in the immutable letter and spirit of *the Constitution* and legislation whose intent and purpose traces back to the philosophical words of Charles de Secondat, Baron de Montesquieu in The Spirit of the Laws (Batoche Books 2001) Book XXVI Chapter 15 at p.512 where he states:

> " 15. ... the public good consists in everyone's having his property, which was given him by the civil laws, invariably preserved. Cicero maintains, that the Agrarian laws were unjust; because the community was established with no other view than that everyone might be able to preserve his property. Let us, therefore,

> lay down a certain maxim, that whenever the public good happens to be the matter in question, it is not for the advantage of the public to deprive an individual of his property, or even to retrench the least part of it by a law, or a political regulation. In this case we should follow the rigor of the civil law, which is the palladium of property. Thus when the public has occasion for the estate of an individual, it ought never to act by the rigor of political law; it is here that the civil law ought to triumph, which, with the eyes of a mother, regards every individual as the whole community."

2. According to Article 40(1) (a) and (b) of *the Constitution*, "every person has the right, either individually or in association with others, to acquire and own property of any description" in any part of Kenya. Though jealously guarded, the right to property is defeasible in such restrictive circumstances as are contemplated under statute law. An example of such circumstances is the acquisition of one's private property by adverse possession as was the claim in the suit leading to the impugned judgment to which this appeal relates.

3. This is a second appeal from the judgment and decree of the Environment and Land Court of Kenya (the ELC) at Kwale (A. E. Dena, J.) delivered on 20th February 2023 in determination of ELC Appeal No. E003 of 2021 from the judgment and decree of the Chief Magistrate's Court at Kwale (P. W. Mwangi, PM.) dated 26th November 2021 in CMCC No. 324 of 2006 in which the 4 appellants had sued the respondent seeking: an order declaring that they were the rightful owners of the properties known as Kwale/Diani/529, 530, 531, 532 and 533 (the suit properties); an order directing the respondent to surrender vacant possession of the suit properties; damages for trespass; costs of the suit and interest thereon.

4. Briefly stated, the appellants' case, as pleaded in their plaint dated 23rd April 2006 and amended on 11th December 2015, was that on 11th February 1986, their deceased father and/or [father-in-law] Ereri M'Chabare "was issued with a 'certificate of outright purchase' for plot No. 295 by the Ministry of Lands, Settlement and Physical Planning for an agreed purchase price of Kshs. 500"; that the deceased was duly issued with a title deed in respect of Kwale/Diani/295 on 26th February 1993 measuring 2.0 Hectares in the approximate (the original plot); that the deceased subdivided the said plot whereupon new titles were issued in respect of the subdivisions comprising the suit properties; that, on 2nd June 1993, the deceased applied to Msambweni Land Control Board for consent to transfer plot Nos. Kwale/Diani/529 and 530 into the 1st appellant's name whereupon he, the 1st appellant (Lloyd Mugo Josphat), was issued with title deeds for the two plots on 3rd February 1994; that the deceased transferred plot No. Kwale/Diani/531 to the 2nd appellant (Karen Kanjiru Kirera) who was issued with a title deed on 3rd February 1994; that the deceased transferred plot No. Kwale/Diani/532 to the 3rd appellant's deceased husband (Eutychus Kithinji Josphat), who was issued with a title deed on 3rd February 1994; and that, likewise, plot No. Kwale/Diani/533 was transferred to the 4th appellant's deceased husband (Gerald J. Murunge), who was issued with a title deed on 3rd February 1994.

5. According to the appellants, the respondent and her husband had entered into and trespassed on the suit properties, which they declined to vacate despite repeated requests and agreement to do so. Hence the suit in the trial court.

6. In her defence dated 4th September 2006 and amended on 10th December 2018, the respondent denied the appellants' allegations set out in their amended plaint and averred that she had lived on the original plot of land for over 29 years; that their suit was time barred under the *Limitation of Actions Act*, Cap. 22 (the Act); that the respondent had acquired adverse possession of the suit properties; that her occupation of the suit properties was open, uninterrupted, continuously public, exclusive and, above

all, adverse to the title of the registered owners; that she could not be said to have wrongfully encroached onto the suit properties; and that she was the rightful owner of the suit properties under and by virtue of section 38 of the Act. Without more, she prayed that the appellants' suit be dismissed with costs.

7. In its judgment dated 26th November 2021, the trial court (P. W. Mwangi, PM.) dismissed the appellants' suit and declared the respondent as the rightful owner of the suit properties. As the learned Magistrate observed:

> " It would seem in this case then noting that on 24th April 1993 the defendant herein signed an agreement to vacate the land by 30th July 1993 after harvesting her maize.
>
> Thus, to me the adverse possession was halted/disrupted by agreement of the parties from 27th April 1993 to 30th July 1993.
>
> Then when the defendant surpassed the occupation of the land beyond 30th July 1993 then the defendant was in adverse possession and time would run afresh [from] that time that is 30th July 1993.
>
> 30th July 1993 to 24th August 2006 the time of filing this suit would be 12 years and one month....
>
> Once time begins to run for purposes of limitation it will continue to do so unless the true owner brings an action to recover the disputed land....
>
> There seems to be no action that then disrupted this occupation of the land until 2006 when this case was brought to court thirteen years later.
>
> I thus find that the defendants have satisfied this court on all ingredients to warrant the defendant acquire title to the land by adverse possession."

8. Dissatisfied by the trial court's decision, the appellants moved to the ELC on appeal in ELCA No. E003 of 2021 on 8 grounds set out in their memorandum of appeal dated 17th December 2021, namely that:

> " 1. The learned Magistrate erred in law and fact in considering issues that were not for determination between the parties in their pleadings.
>
> 2. The learned Magistrate erred in law and fact when canvassing the issue of adverse possession which was neither pleaded by either party nor a matter for determination between the parties.
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> 3. The learned Magistrate erred in law and fact in declaring that the Respondent is the rightful owner of the suit parcels of land by way of adverse possession when the same had not been pleaded and/or counter-claimed by the Respondent.
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> 4. The learned Magistrate erred in law and fact, in addressing himself on the legal principle of Adverse Possession, by failing to consider substantive evidence to demonstrate the Respondent had not met the legal qualifications to acquire the properties in dispute by way of Adverse Possession.
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> 5. The learned Magistrate erred in fact in noting that the Respondent had an uninterrupted occupation of the properties in dispute for a period exceeding 12 years, yet there is a clear discrepancy as to when the statutory period started to run.

6. The learned Magistrate erred in law and fact in failing to address extraneous evidence on the issue of the trespass, destruction of property, and use of force by the Respondent on the subject properties.

7. The learned Magistrate erred wholly in disregarding the Appellants' Counsel's Submissions and the authorities submitted and proceeded to rely on his own views not backed by law.

8. The learned Magistrate erred in failing to analyse and synthesize evidence before him and arrived at a completely erroneous and ambiguous finding that cannot be implemented in law."

9. In its judgment dated 20th February 2023, the ELC (A. E. Dena, J.) dismissed the appellants' appeal with costs to the respondent, upheld the trial Magistrate's decision and further ordered the Land Registrar, Kwale, to register the suit properties in the respondent's name and, in default, the Deputy Registrar ELC, Kwale, to execute all the requisite documents to facilitate transfer of the suit properties to the respondent. In her judgment, the learned Judge observed:

"28. This brings us to the issue whether adverse possession was proved... In February [1993] came the titles issued under the subdivisions herein but there is also the agreement dated 27/04/1993 where it was agreed that the defendant would stay until 30th July 1993 meaning the defendant was permitted to stay by the registered owners, consequently adverse possession wouldn't apply. This court is in agreement that for this period time stopped running and it would start running afresh thereafter.

29. The question that therefore arises is what action the Plaintiff took from 31st July 1993 when the period he granted the Defendant came to an end in other words did they assert their rights over the suit properties. PW1 testified in cross examination that '.... Between 1990 to 2006 the defendant was still on the land, in 2006 I was asked to go to court.' According to the amended plaint it is stated that on 25/08/2006 the 1st plaintiff sought to forcefully evict the defendant. It is therefore this time that they asserted their right. The plaintiffs had therefore stayed 13 years (counting from July 1993) before coming back to try and remove the plaintiff. While during re-examination PW1 clarified that all along he attempted to remove her but no further evidence was led to this effect, not even the alleged fencing that is said to have been undertaken in 1988 nor did PW2 corroborate this. PW2 from her oral testimony couldn't remember much anyway... To me the statutory period of 12 years has been met for the claim of adverse possession. This also speaks to the issue of whether adverse possession was interrupted upon lapse of the permission that was granted.

30. Having settled the above, we must look into the issue of possession. Indeed, possession must be actual and there must be animus possidendi on the part of the adverse possessor. I already observed that PW1 testified in cross examination that '.... Between 1990 to 2006 the defendant was still on the land, in 2006 I was asked to go to court.' I do not find it necessary to delve much into this point in view of the express admission of the Plaintiff that the defendant was still in the suit properties. What other proof would be required amidst the

Plaintiff's own admission under oath. It is therefore my finding that possession by the defendant was proved.

29. It has been urged that the learned magistrate erred in law and fact in failing to address extraneous evidence on the issue of the trespass, destruction of property, and use of force by the Respondent on the subject properties. My review of the evidence placed before court and the proceedings covering the viva voce hearing, I did not find any emerging issue in this regard.

30. The upshot of the above discussions and findings, I find no reason to disturb the judgement of the trial magistrate and make a finding that the Defendant is entitled to the suit properties ... by way of adverse possession."

10. Aggrieved by the learned Judge's decision, the appellants moved to this Court on appeal on 4 argumentative grounds set out in their memorandum of appeal dated 14th April 2023 essentially faulting the learned Judge for: erroneously concluding that the respondent was in adverse possession of the suit properties on account of the number of years that she was in occupation; in failing to determine whether the respondent was in exclusive and adverse use or possession of the suit properties; by holding that the legal test as to whether there was animus possidendi on the part of the adverse possessor had been satisfied merely by the appellants admitting that the respondent was in possession of the suit properties; and by employing an erroneous test requiring the appellants to assert their right over their own land during the subject period to negate a finding of adverse possession, thereby shifting the burden of proof onto the title holder to negate adverse possession instead of assigning it to the respondent to prove her alleged adverse possession.

11. In support of the appeal, learned counsel for the appellants, M/s. Muregi Okere Advocates, filed written submissions dated 5th October 2023 citing the cases of Wambugu v Njuguna (1983) KLR 173 for the proposition that the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years; Haro Yonda Juaje v Sadaka Dzengo Mbauro and Another [2014] eKLR for the proposition that the claimant can only prove that he had the requisite animus possidendi by showing the circumstances under which he dispossessed the true owner of the land or the circumstances under which the true owner discontinued his possession; and Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR, submitting that the person in possession is required to assert rights over the subject property for the relevant period to properly claim adverse possession. Counsel urged us to allow the appeal with costs to the appellants.

12. Opposing the appeal, learned counsel for the respondent, M/s. Okanga & Company, filed written submissions dated 3rd April 2025 urging us to dismiss the appeal with costs to the respondent. Citing no authorities, counsel submitted that the learned Judge did not deviate from the principles laid down in the case of Wambugu v Njuguna (supra) relied on by the appellants, even though the facts of the case differ materially from those in the instant appeal; that the Wambugu case involved a contract of sale of the suit land, which did not materialize after the respondent therein failed to complete the purchase thus forcing the appellant therein to file suit for vacant possession; that, in the instant appeal, the respondent was given a limited period to vacate the suit properties by 30th July 1993 in terms of the agreement dated 24th April 1993; that the respondent's occupation of the suit properties continued beyond 30th July 1993 and, as at the time of filing suit, the respondent had been in occupation of the suit property for 12 years and 1 month without the appellants' consent; that this was within the 12 years limitation period stipulated in section 7 of the Act; and that, therefore, the superior court properly

found that the respondent was entitled to a declaratory order that she had obtained the suit properties by way of adverse possession.

13. Counsel further submitted that the appellants filed suit in an attempt to have the respondent evicted; and that, in the amended plaint, the appellants pleaded that the respondent was in occupation of the suit properties against their wishes. Counsel urged us to dismiss the appeal with costs to the respondent.

14. Unless otherwise provided, this Court's mandate on 2nd appeal is limited to points of law. Section 72 (1) of the *Civil Procedure Act* provides that:

> 72. Second appeal from the High Court
>
> (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely—
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> a. the decision being contrary to law or to some usage having the force of law;
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> b. the decision having failed to determine some material issue of law or usage having the force of law;
>
> c. a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

15. In Stanley N. Muriithi & another v Bernard Munene Ithiga[2016] eKLR, this Court held that:

> " e are conscious of our limited jurisdiction when dealing with a second appeal. Our reading of Section 72(1) of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, which provides for the circumstances when a second appeal shall lie from the appellate decrees of the High Court, indicates that the appeal must be on matters of law."

16. In the same vein, this Court held thus in Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR that:

> " In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the case of Stephen Muriungi and another v Republic (1982-88) 1 KAR 360, Chesoni Acting JA (as he then was) said at page 366:
>
> 'We would agree with the view expressed in the English case of Martin v Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.'"

17. Having considered the record of appeal, the grounds on which it is anchored, the rival submissions and the law, we find that two points of law commends themselves for our determination, namely: whether the respondent had raised a counterclaim praying for declaratory orders that she was entitled to any part of the suit properties by adverse possession; and whether the learned Judge was at fault in upholding

the trial Magistrate's decision to the effect that the respondent had acquired the suit properties by adverse possession.

18. It is not in contention that the respondent was in occupation of a portion of the original plot No. Kwale/Diani/295 measuring 2.0 Hectares in the approximate; that the original plot of land was registered in the deceased's name and a title deed issued on 26th February 1993; that the original plot of land was subdivided into the suit properties from the year 1993 before registration into the appellants' names in February 1994; that the appellants entered into an agreement with the respondent on 27th April 1993 whereby the respondent agreed to vacate the occupied portion of the suit properties on or before 30th July 1993; that she refused, failed or neglected to vacate, thereby prompting the appellants to file suit in 2006 for her eviction.

19. The statutory underpinnings of a claim founded on adverse possession were clearly enunciated by this Court in Teresa Wachuka Gachira v Joseph Mwangi Gachira [2009] eKLR in the following words:

> " Adverse possession is statutorily provided for in this country. Ordinarily such claim would be pleaded under Section 7 of the *Limitation of Actions Act*, Cap 22, which provides:
>
> '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 its first accrued to some person through whom he claims, to that person.'"

20. As the Court went on to say:

> " The following provisions of Section 13 of the same Act also apply:
>
> (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession) and ....'
>
> Section 38 of the Act, which is referred to in the prayer made by the appellant also provides as follows:
>
> '38. (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those 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.'"

21. It is instructive that, apart from pleading adverse possession in her defence, the respondent did not raise any counterclaim in that regard or take any steps to separately apply for a declaratory order that she had obtained a particular and identifiable portion of the suit properties by way of adverse possession as required under section 38 of Cap. 22. All she did was to pray that the appellants' suit to be dismissed. For the avoidance of doubt, section 38 allows a person who has become entitled to land or a lease through adverse possession to apply to the High Court for an order to be registered as the proprietor thereof. She did not.

22. In Peter Kamau Njau v Emmanuel Charo Tinga [2016] eKLR, this Court set out the circumstances under which the title of a registered owner may be defeated by a claim of adverse possession as follows:

> " A registered owner of land, may not, by the provisions of section 7 of the *Limitation of Actions Act* bring an action to recover land after the end of twelve years from the date on which the right of action accrued to him. At the expiration of that period the

owner's title will be extinguished by operation of the law. Section 38 of the Act permits the person in peaceful possession, without the land owner's permission, for a continuous and uninterrupted period of 12 years, but who has also done acts on the land which are inconsistent with the registered owner's enjoyment of the soil for the purpose for which he intended to use it, to apply to be registered as its owner."

23. In the absence of a counterclaim or separate suit praying for declaratory orders in favour of the person claiming adverse possession, the trial court lacks power to grant orders not sought. This general rule was enunciated by this Court in the case of Wambui Kimithi & 2 others v Mary Wangui Muhindi [2021] KECA 672 (KLR) where the Court held that a court will not grant a remedy which has not been sought, and that parties are bound by their pleadings.

24. In David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR, this Court, while dealing with a similar issue, had this to say:

> " It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings." (see also: GAT v MM [2023] KEHC 27332 (KLR)).

25. Having failed to raise a counterclaim and pray for specific declaratory orders in her favour, the trial court, as well as the first appellate court, had no power to grant orders not sought. In principle, it behoved the respondent to either raise a counterclaim in the trial court or file a separate suit for appropriate orders to effectively assert her claim in adverse possession, which the respondent failed or neglected to do.

26. Turning to the 2nd issue, it is not lost on us that, as a general rule, a person claiming adverse possession of land must demonstrate that they have used the land openly, exclusively, and continuously for a period of 12 years, without the owner's permission, and without interruption. This use must be apparent to the true owner and the public, effectively dispossessing the rightful owner. However, the land claimed to be occupied must be identified with reference to the specific land registration number, the area claimed to be occupied and its specific location.

27. In the instant case, the respondent claimed to have been in occupation of a "portion" of the original plot of land known as Kwale/Diani/295 before subdivision into plot Nos. Kwale/Diani/529, 530, 531, 532 and 533. It is noteworthy that the respondent did not adduce any evidence at the trial to prove, on a balance of probabilities, which of the five subdivisions aforesaid comprised the portion of which she was allegedly in occupation. In effect, she failed to clearly identify or describe the portion, size and location of the portion allegedly i her possession.

28. In Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015] KECA 728 (KLR), this Court heldthat:

> " The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of Githu v Ndele [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations

of those in their respective possession from the larger suit premises that they sought to have decreed to them."

29. In Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] KECA 224 (KLR), this Court held that:

> " To succeed, a person claiming to be entitled to be registered owner of a parcel of land by adverse possession must adduce cogent evidence. A property owner is not to be deprived of their property unless in the clearest of cases. In Peter Njau Kairu v. Stephen Ndung'u Njenga & Another C.A. 57of 1997, this Court stated the principle as follows:
>
> 'In order that a registered owner of land may be deprived of his title to such land, in favour of a trespasser (who claims by adverse possession), stringent but straightforward proof of possession is necessary.'
>
> We would add, not only of possession, but also of the specific area that the adverse possessor claims to be in possession of."

30. Having carefully considered the record of appeal, the grounds on which it is anchored, the rival submissions of learned counsel, the cited authorities and the law, we reach the inescapable conclusion that the appeal succeeds and is hereby allowed. Consequently, the Judgment and Decree of the Environment and Land Court of Kenya at Kwale (A. E. Dena, J.) delivered on 20th February 2023 be and is hereby set aside.

31. Each party shall bear their own costs of the appeal. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 5TH DAY OF DECEMBER 2025.

A. K. MURGOR

JUDGE OF APPEAL

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DR. K. I. LAIBUTA CArb, FCIArb.

JUDGE OF APPEAL

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G. W. NGENYE-MACHARIA

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR