Mugambi & 5 others v Mwithi & 7 others (Civil Appeal E079 of 2021)
[2025] KECA 2156 (KLR) (11 December 2025) (Judgment)

Neutral citation: [2025] KECA 2156 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL E079 OF 2021

W KARANJA, S OLE KANTAI & A ALI-ARONI, JJA

DECEMBER 11, 2025

BETWEEN

ZIPPORAH KARIGU MUGAMBI ..... 1ST APPELLANT

JOHN MWATHI MUGAMBI ..... 2ND APPELLANT

JEREMIAH MURAUKO MUGAMBI ..... 3RD APPELLANT

BEATRICE GACUNKI ..... 4TH APPELLANT

DAVID MUTIGI KARIGU ..... 5TH APPELLANT

JOSEPHAT NJERU KIAYA ..... 6TH APPELLANT

AND

SABERA GAKUNDI MWITHI ..... 1ST RESPONDENT

BEATRICE KATHAMBI ..... 2ND RESPONDENT

CHARITY KAINDI ..... 3RD RESPONDENT

VIRGINIA MUTHONI ..... 4TH RESPONDENT

JOHN KIMATHI ..... 5TH RESPONDENT

ALICE KARIMI ..... 6TH RESPONDENT

JAMES MUTUGI ..... 7TH RESPONDENT

GERALD MUGAMBI ..... 8TH RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Chuka (P.M. Njoroge, J.) delivered on 25{{^th}} May, 2021 in ELC OS No 1 of 2019 Consolidated with ELC OS No. 20 of 2019)

JUDGMENT

1. This is a first appeal arising from the judgment delivered on 25th May, 2021 where the Environment and Land Court (hereinafter "ELC") dismissed the 1st appellant's claim for adverse possession.

2. Our mandate on a first appeal is as stated in the case of Nairobi Bottlers Limited vs. Imbuga (Civil Appeal E661 of 2022) [2024] KECA 434 (KLR) as follows:

> " Our mandate in a first appeal as donated by rule 31 of the Court of Appeal Rules, 2022 is to re- appraise the evidence and to draw inferences of fact; to retry the case. That mandate has been the subject of various judicial pronouncements in such cases as Nicholas Njeru vs. Attorney General & 8 Others [2013] eKLR where it was stated: "[In] a first appeal, we are required to re-evaluate the evidence and arrive at our own independent findings and conclusions of the matter."

3. A reading of the record shows that Originating Summons (hereinafter "OS") No. 1 of 2019 was filed by the 7th respondent against Dedan Mugo Mwangi, who was the registered owner of the suit property South Tharaka/Tunyai 'A'/390. He claimed that he and his family had lived on the land for more than 20 years openly and that the respondent therein who served as Land Surveyor of the area had used his position at the survey office to have their family land registered to himself. Service of Summons of the suit was effected by substituted service and the defendants therein did not file a memorandum of appearance or defence. OS No.1 of 2019 was determined via judgment on 30th July, 2019 when the court held that the suit land would be awarded to the respondents by virtue of adverse possession and the same would be registered to be held equally by each listed family member. That suit was, therefore, determined without any defence led by the respondents therein.

4. OS No. 20 of 2019 was filed by the appellant against the respondents where the appellants sought declarations that they had each become entitled to different portions of the suit property LR No. South Tharaka/Tunyai 'A'/390 by way of adverse possession. The properties are registered in the name of the respondents and it was the appellant's case that the respondents were holding 18 acres of the suit properties in trust for them. They asked the court to have their respective portions registered in their favour. It was the appellants' case that the suit property was previously registered in the name of Dedan Mugo Mwangi but the respondents deceived the court in Chuka ELC No. 1 of 2019 that they were in possession of the entire property while they only occupied 7 out of 29 acres. The 1st appellant told the court that she entered the suit property in 1986 when it was unoccupied and she set up a home in the land as her in laws were hostile to her after her husband died. She entered the suit property with her children, the 2nd to 4th appellants, and the 5th appellant was born on the suit land. She stated that the respondents were occupying 7 acres of the suit land after the 1st appellant allowed the 1st respondent to enter the land and cultivate. She and her children claimed to occupy 15 acres. The respondents were accused of filing Chuka ELC OS No. 1 of 2019 where they supposedly hoodwinked the court to have the entire land given to them based on adverse possession and their suit succeeded. The appellants asked the court to cancel the titles which were given to the respondents.

5. The 1st respondent in this appeal told the court that the suit property belonged to her late husband and it was she who had invited the appellant into the property, and not vice versa. She stated that the 1st appellant's son was given 0.61 hectares out of pity to hold for the family but the other sons were not happy and proceeded to invade other parts of the property with their cattle and crops. They also stated

that the property as named no longer existed after subdivision of the land. The court gave directions consolidating OS No. 1 of 2019 and OS No. 20 of 2019.

6. In the impugned judgment of 25th May, 2010, the court held that the 1st appellant was insincere as to how she entered the property and that the case for adverse possession was not proved. The ELC "reinstated" the judgment of 30th July, 2019 from OS No. 1 of 2019 and deemed it to be the judgment in OS No. 20 of 2019.

7. The Memorandum of Appeal is dated 9th August, 2021 asking the court to set aside the judgment of 25th May, 2021 and to have the OS motions heard afresh before another court. The appellants state that the court erred in the way it heard both applications simultaneously and rendered the same judgment despite the matters concerning different parties. The court is also faulted for writing several judgments for the same file and for failing to address the issues. The appellants state that they have been denied fair hearing and the judgment given was against the weight of evidence. The appellants have filed submissions dated 16th June, 2025 asking this Court to set aside the decision of 25th May, 2021 and restore the suit property Tharaka/Tunyai "A"/390. They ask the Court to allow them pursue their case before another ELC Judge.

9. The respondent's submissions are dated 20th January, 2024 stating that no violation of natural justice or any reason has been tabled to justify interference with the judgment. They urge the Court to dismiss the appeal with costs.

10. This appeal was heard on 17th June, 2025 on the Court's virtual platform. Learned counsel Mr. Njagi was present for the appellants, while learned counsel Mr. Kaai appeared for all 7 respondents. Both counsel relied entirely on their written submissions and differed as to whether there were one, two or even possibly three judgments in the ELC file.

11. Firstly, we take note of the procedural issues that arise in the manner in which the ELC Judge undertook the hearing and determination of the matter. We are in agreement with the respondent's counsel that it is highly irregular for a court to consolidate a concluded file, which has a final judgment, with a file that is for a fresh hearing. The Civil Procedure Rules do not contemplate such a scenario, nor do they contemplate the withdrawal and thereafter reinstating of a judgment. In any case, the court became functus officio after delivery of judgment and should not have rehashed the issues of the file on merit once more.

12. We are also of the view that the Judge missed the ball on the application of consolidation of matters. We reiterate the sentiment of the Supreme Court in Omoke v Kenyatta & 83 Others (Petition 11 (E015) of 2021) [2021] KESC 27 (KLR) (Civ) (9 November 2021) (Ruling):

> "Consolidation of suits or appeals will be ordered where there are common questions of either law or fact in two or more suits or appeals and where it is desirable that all the related matters be disposed of at the same time... When considering an application for consolidation, this court will bear in mind the guiding principles it pronounced in the case of the Law Society of Kenya v Centre for Human Rights & Democracy & 12 others, SC Petition No 14 of 2013, [2014] eKLR, that:
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> "The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it."

13. We reiterate that consolidation of suits is for the purpose of resolution of similar pending disputes, and cannot be utilized to revisit concluded disputes.

14. Having said so, it bears consideration as to whether the actions by the court caused great prejudice to the appellants, to justify the allowing of this appeal. It comes down to a matter of procedural justice versus substantive justice. We echo the sentiments of this court in Abdirahman Abdi vs. Safi Petroleum Products Ltd & 6 Others [2011] eKLR:

> " Article 159 (2)(d) of *the Constitution* makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party..."

15. In our view, we are not persuaded that the appellants were gravely prejudiced by the procedural issues at the ELC; to warrant fresh hearing of both suits.

16. We further find that a look at the evidence on record supports the finding of the court. The matter before the court was one based on a claim of adverse possession. This Court in Thaitumu vs. Iguathu & 8 Others (Civil Appeal 220 of 2019) [2024] KECA 1084 (KLR) (19 August 2024) (Judgment) stated that:

> " The elements to be proved in a claim of adverse possession have been aptly stated by various decisions of this Court. In Samuel Kihamba v. Mary Mbaisi [2015] eKLR, this Court observed thus:
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> "Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner."
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> 18. In essence, a party claiming adverse possession has to prove that they have occupied the land in question openly without license or permission of the land owner, with the intention to have the land, and that they have dispossessed the registered owner of the suit property for the statutory period, as opposed to merely establishing that they have been in possession of the land for twelve years. The onus of proving these elements remains on the party claiming such rights."

17. We are in agreement with the ELC Judge that the appellants did not prove their claim for adverse possession. We also believe that OS No. 20 of 2019 was overtaken by events for two reasons. Firstly, the appellants never sued Dedan Mugo Mwangi who was the registered owner throughout the claimed years in occupation of the property. They sued the respondents who had only become registered as proprietors following a very recent judgment of the court. Their case was, therefore, doomed to fail in any event. Secondly, the property in issue, Tharaka/Tunyai "A"/390 had already ceased to exist following enforcement of the judgment in ELC OS No. 1 of 2019. For all the foregoing reasons, this appeal fails and is dismissed with costs to the respondents.

DATED AND DELIVERED AT NYERI THIS 11TH DAY OF DECEMBER, 2025.

W. KARANJA

JUDGE OF APPEAL

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S. ole KANTAI

JUDGE OF APPEAL

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ALI- ARONI

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR