

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT THIKA**  
**ELC APPEAL NO. E078 OF 2024**

**MERCY KANYI** .....

**APPELLANT**

**VERSUS**

**FRANCIS NGUGI GITAU** .....

**RESPONDENT**

(Being an appeal from the judgment of Hon. Joseph Were C.M delivered on 12<sup>th</sup> July 2024 in RUIRU CM ELC Case No.160 of 2022)

**JUDGMENT**

1. The appeal herein arises from a suit that commenced in the Ruiru Chief Magistrate's court where the Respondent sued the Appellant claiming that after he purchased land parcel number RUIRU/KIU/BLOCK 4 /1784 (herein the suit property) in Githurai from Mboi-Kamiti Farmers Limited, the Defendant trespassed on the suit property and constructed a perimeter wall and permanent structure.
2. The Respondent therefore prayed for a permanent injunction restraining the defendant from trespassing on the suit property or interfering with the plaintiff's ownership and quiet possession of the same.

3. Upon being served with the Plaint and Summons to enter appearance, the Appellant filed a Defence and Counterclaim dated 8<sup>th</sup> December 2022. She denied the Appellant's claim and claimed that she had purchased the suit property from Mwhoko Housing Company Limited. She stated that she thereafter took possession of the suit property and had been in continuous occupation thereof for a period of more than 12 years. She claimed that the Respondent had fraudulently acquired a title to the suit property while being aware that the Appellant was the owner thereof.
4. The case was set down for hearing and after both parties and their witnesses testified, the trial magistrate delivered his judgment in which he dismissed the Appellant's Counterclaim and entered judgment in favour of the Respondent. He held that the Respondent was the bona fide owner of the suit property. He then proceeded to issue a permanent injunction restraining the Appellant from trespassing or interfering with the Respondent's ownership and quiet possession of the suit property.
5. Being aggrieved by the said judgment, the Appellant filed the instant appeal citing the following grounds;
  - i. That the trial Magistrate erred in failing to consider and appreciate the evidence adduced by the Appellant.
  - ii. That the trial Magistrate erred in not appreciating that the Respondent's title was obtained irregularly as the Plaintiff had ownership documents for the same property.

- iii. The Honourable trial Magistrate erred in not finding that the Appellant had fulfilled the requirements of defeating the Respondent's ownership rights by adverse possession.
  - iv. The Honourable trial Magistrate ignored and totally overlooked the issue of adverse possession advanced by the Appellant.
  - v. The Honourable trial Magistrate erred in law and in fact in failing to appreciate the ownership documents tendered by the Appellant.
6. The Appellant urged the court to allow the appeal and set aside the judgment of the lower court. The appeal was canvassed through written submissions.

### **Appellant's Submissions**

7. In his submissions dated 8<sup>th</sup> July 2025 learned counsel for the Appellant condensed the grounds of appeal into two as follows:
- i) Whether the Respondent's title was lawfully and procedurally obtained;
  - ii) Whether the court considered the Appellant's evidence on the issue of adverse possession.
8. On the first ground, counsel submitted that the trial magistrate failed to appreciate that at the time they bought the suit property it did not have a title deed and that the Respondent who claimed to have bought the land from Mboi Kamiti Farmers Limited processed his title while the Appellant was in possession of the suit property.

9. It was his submission that this was irregular and unprocedural and in his opinion the Respondent's title had been obtained illegally. He relied on the case of **Munyu Maina V Hiram Gathiha Maina Civil Appels no. 239 of 2009 (2013) eKLR** for the proposition that where a registered proprietor's title is under challenge, he must go beyond the instrument of title to show that the acquisition was legal and free from any encumbrances including any interests which need not be noted on the register.
10. With regard to the second ground, counsel submitted that the trial magistrate failed to analyze or comment on the issue of adverse possession yet there was sufficient evidence to prove the Appellant's counterclaim.

### **Respondent's Submissions**

11. Learned counsel for the Respondent identified three issues for determination;
  - i. Whether the trial magistrate failed to consider the appellant's evidence.
  - ii. Whether the Respondent has demonstrated ownership of the suit property
  - iii. Whether the magistrate's court has jurisdiction to determine adverse possession.
12. With regard to the first issue, counsel submitted that the trial magistrate did not disregard the Appellant's evidence as he took into account the register produced by the Appellant which showed

that parcel had been transferred to Mboi Kamiti Farmers Company Ltd from whom the Respondent acquired his land. He also pointed out that the letter dated 31.3.2018 produced by the Appellant did not bear her name and it could not be construed to confer any interest in the Appellant.

13. On whether the Respondent had demonstrated that he owned the suit property, counsel submitted that the Respondent demonstrated ownership of the suit property by producing a title deed. He also called a Lands Officer who testified as PW 4 and confirmed that from the documents held at the Lands office, the suit property was lawfully acquired by the Respondent.
14. It was counsel's submission that on her part, the Appellant had failed to prove the allegations of fraud against the Respondent. He relied on the case of **Charles Karathe Kiarie & 2 Others v The administrator of the estate of John Wallace Mathare (deceased) and 5 Others (2013) eKLR** where the court held that in the absence of fraud a title is absolute and indefeasible.
15. With regard to the question of adverse possession, counsel submitted the trial magistrate had no jurisdiction to entertain a claim for adverse possession. He relied on the case of **Sugawara v Kiruti (Sued in her capacity as the administratrix of the estate of Mutarakwa Kiruti Lepaso alias Mutaragwa Kiruti Lepaso and in her own capacity ) z& 3 Others Civil Appeal No.E141 of 2020 [2024] KECA 1417 (11 October 2024**

( **Judgment**) where the Court of Appeal held that only the Environment and Land Court established under Article 162 (2) (b) has jurisdiction to hear and determine matters pertaining to adverse possession of land.

### **ANALYSIS AND DETERMINATION**

16. I have considered the judgment of the lower court, the Record of Appeal and rival submissions and in my view, there are two issues for determination:

- i) Whether the Respondent proved that he has a valid title to the suit property.
- ii) Whether the appellant's claim to the suit property by virtue of adverse possession ought to have been considered.

17. Both the Appellant and Respondent lay claim to the suit property. It is not in dispute that the Respondent is registered as the owner of the suit property. However, since the Appellant has challenged his title, it is necessary to investigate the root of the said title, as was held in the case of **Munyu Maina v Hiram Gathiha Maina (2013) eKLR:**

*“when a registered proof of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is the instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances...”*

19. Whereas the Appellant claims to have purchased the suit property from Mwihoko Housing Company Limited in 2008, the Respondent claims to have purchased the said plot from Mboi Kamiti Farmers Company Limited vide a sale agreement dated 14.10.2009.
20. From the evidence on record, it is clear that the suit property was among the parcels of land that had been transferred from Mwihoko Housing Company Limited to Mboi Kamiti Farmers Company Limited. The said parcels of land were the subject of investigations by the Director of Criminal Investigations as there were allegations that Mwihoko Housing Company continued to sell the land to unsuspecting buyers after it had transferred the same to Mboi Kamiti Farmers Company Limited.
21. The Respondent produced a letter dated 4<sup>th</sup> November 2016 from the Director of Criminal investigations, Ruaraka to show that after investigations, the suit property was found to have been genuinely obtained and it was cleared for processing as per the directions of Mboi-Kamiti Farmers Company Limited.
22. Although the Appellant claims to have purchased the suit property from Mwihoko Housing Company Limited in 2008, she did not produce any sale agreement. It is trite that a contract for the sale of land must be evidenced in writing. This was restated in the case of **Kimuri Housing Company Limited v John Kiumi Wambugu & Another [2024] KEELC 717 (KLR)** where the court observed as follows;

*“To start with, the transaction pertaining to the suit property touched on disposition of an interest in land. In this regard it was therefore imperative that the transaction between the Plaintiff and the vendors ( if any) be reduced in writing and thereafter to be executed by both parties chargeable with the contract.”*

23. Furthermore, the register that the Appellant produced as an exhibit shows that by the time she bought the suit property in 2008, it had already been transferred to Mboi-Kamati Farmers Company Limited and therefore Mwhoko Housing Company Limited had no capacity to sell it to the Appellant.
24. The Director of Land Administration who testified as PW4 confirmed that the investigations had revealed that the Respondent’s title had been obtained genuinely. In the circumstances, the Respondent proved that he had a valid title to the suit property as the Appellant had failed to produce any evidence that the Respondent had obtained his title fraudulently. I can therefore not fault the trial magistrate for arriving at the conclusion that the Respondent’s title was valid.
25. The second issue for determination is whether the trial magistrate should have considered the Appellant’s claim to the suit property by virtue of adverse possession considering that the Appellant was in possession of the suit property at the time the Respondent processed his title.
26. Having carefully read the judgment, I note that the trial magistrate steered clear of the issue of adverse possession, and for good reason. As correctly submitted by counsel for the Respondent, the

trial magistrate did not have the jurisdiction to delve into the question of adverse possession as this is the preserve of the Environment and Land Court. This was clearly stated in the case of **Sugawara v Kiruti (Sued in her capacity as the administratrix of the estate of Mutarakwa Kiruti Lepaso alias Mutaragwa Kiruti Lepaso and in her own capacity ) z& 3 Others Civil Appeal No.E141 of 2020 [2024] KECA 1417 (11 October 2024 ( Judgment)** where the Court of Appeal held as follows:

*“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.”*

27. In the final analysis, it is my finding that the appeal lacks merit and it is hereby dismissed with costs to the Respondent.

**Dated, signed and delivered virtually at Thika this 22<sup>nd</sup> day of January 2026.**

**J. M ONYANGO  
JUDGE**

**In the presence of:**

1. Miss Njoki for Mr. Gatumuta for the Appellant
2. Mr Eredi for the Respondent

Court Assistant: Hinga

ORIGINAL