

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT SIAYA**  
**ELC APPEAL NO. E 021 OF 2024**

**MARGARET ADHIAMBO MAKOKHA.....**  
**APPELLANT**

**-Versus -**

**MARY HALONYERE KHASEDE.....1<sup>ST</sup>**  
**RESPONDENT**

**PHELOMENA AKINYI MAKOKHA.....2<sup>ND</sup>**  
**RESPONDENT**

**JUDGEMENT**

1. Aggrieved by the judgement and decree of the Senior Principal Magistrates Court at Ukwala Hon. E. Tsimonjero delivered on 24<sup>th</sup> June 2024 in Ukwala Magistrates Court ELC No. 47 of 2018, the Appellant proffered vide the Memorandum of Appeal dated 5/07/2024 on the following grounds; -

- 1) That the learned magistrate erred in law in misdirecting Himself on the law relating to the doctrine of adverse possession and failed to appreciate the doctrine as it is in law and failed to pin point the correct events when time started to run in favour or against the parties, leading to a wrong finding.

- 2) The Learned Magistrate thereafter erred in law, in failing to recognize that the suit parcel **UGENYA /DENGA/524** did not exist as at the time the suit was filed and that therefore the resultant judgement is incapable of execution.
- 3) The Learned Magistrate misdirected himself by proceeding with a suit involving parties who ought to have been joined in the suit and were not joined, thus delivering a judgement affecting said parties without their being heard.
- 4) The learned Magistrate misdirected himself by shallowly treating the issue of the relationship between the Appellant and the Respondents and deal with the issue of whether it is legally tenable for daughters in law to effectively disinherit a sister in law and take all the land due to the sister in law from her own father.
- 5) The Learned Magistrate erred in law by failing to take into account the function of the court to render substantial justice in that by their own evidence the Respondents entered the suit parcel with permission from the Appellant's father and that the Appellant was then a minor and that they in fact took care of her until she was of age; the court failed to appreciate that the parties herein operated as one family and the question of adverse possession could not arise.

- 6) The Trial Magistrate failed to find exactly how much of the 4.8 Ha and 0.9 Ha were actually being occupied by the Respondents and ended up awarding large tracks of land to the Respondents without any legal basis.
  - 7) The Trial Magistrate failed to appreciate the evidence in the Replying affidavit of the Appellant which clearly shows that the Respondents were and are on a land grabbing mission having taken and transferred all the other parcels belonging to the Appellant's father and her brothers and that the suit parcels are just two more in the long list of the grabbing exercise.
  - 8) The Learned Magistrate failed to properly analyze the evidence, make determination on the issues and give reasons for his findings contrary to a Magistrates' duty in delivering a judgement.
  - 9) Consequently, the entire judgement is a recipe allowing for gluttony and illegalities on the part of the Respondents, it is unreasonable oppressive and prejudicial to the appellant, capricious and is thus a travesty of justice.
2. On the basis of the above grounds the appellant seeks that the appeal be allowed and the judgement of the trial court be set aside and the respondents suit be dismissed with costs.

3. The Appeal was canvassed by way of written submissions. Directions were issued by this court for filing of submissions so as to dispose of the appeal.
4. **M/s M.A. OCHANJI-OPONDO & CO. ADVOCATES** for the appellant filed their submissions dated 30/5/2025. The Respondents appeared in person and filed their submission dated 31/07/2025.

#### **Appellant's submissions**

5. Rehashing the pleadings it was submitted that the trial court lacked jurisdiction to hear and determine the dispute based on the decision of Court of Appeal in **Civil Appeal E 141/2022 Pauline Sugawara V Nairuko Ene Mutarakawa Kiruti & Others.** to the effect that the Magistrates court has no jurisdiction to determine suits where the claim is for adverse possession. Effectively that would mean this appeal succeeds. That as the court which rendered the verdict being appealed against had no jurisdiction, then it follows that the honourable court finds in favor of the Appellant.
6. The appellant however proceeded to submit on the grounds of appeal as follows'-
7. On grounds 1,2 and 5 it was submitted that the trial court dealt at length on the ingredients that fortify a finding of adverse possession but failed to apply the same findings to the suit before it. Outlining the ingredients of adverse possession namely that occupation should not be with the land owners permission it was urged that time cannot run

where permission was given to occupy land, unless the permission is expressly determined.

8. Further that at the time the suit was filed, the Appellant tabled documents to confirm that LR no. UGENYA /DENGA/524 no longer existed as it had been closed and subdivided and had new owners, who were not parties to the suit. To that extent the judgment which allowed the transfer of UGENYA /DENGA/524 to the Respondents is incapable of execution.
9. It is contended that the trial court finding that the 1<sup>st</sup> Respondent was in occupation of the whole 4.8 HA of LR UGENYA /DENGA/524, without any evidence from the 1<sup>st</sup> Respondent of exactly how she was utilizing such a huge piece of land (12acres). That a surveyor's report would have confirmed occupation and therefore the court should not have found in her favour as that finding was not based on the evidence before the court.
10. On ground 4 it was argued that the Respondents were merely using their brother in law's land in the absence of their 'daughter' the Appellant, only to turn around when she returned to take care of her father's business.
11. Citing the case of **Mbui v. Maranya [1993] KLR 726 where Kuloba J** looking at the culture by Africans to invite relatives in need to their land until such a time they would be able to fend for their needs, cautioned that the doctrine of adverse possession if not reasonably qualified and properly trimmed shall destroy the cherished ideals and sound cultural foundations, and destabilize the

society. that from the very evidence tendered by both the Respondents and Appellant, the issue of Adverse possession does not arise.

12. On ground No. 3 it was submitted that the appellant having stated and proved that the suit parcel LR **UGENYA /DENGA/524** no longer existed as it had been closed and new numbers of LR **UGENYA /DENGA/1468,1469 AND 1470** had been created, the owners of the same ought to have been enjoined and their titles were cancelled without according them a hearing thus causing a miscarriage of justice.
13. As regards Grounds 7, 8 & 9 it is submitted that though courts are courts of law, they are manned by human beings who ought to always take cognizance of the human condition as they apply the law. There was a clear case of gluttony where the Respondents had more land of their own, which is more than what the average Kenyan has), but because the Appellant being a woman and married, the parcels of land due to her were brazenly taken from her and the law used to sanitize the discrimination. That the court failed to dispense justice.

### **Respondents' submissions**

- 14 It is submitted that the appeal is fundamentally flawed for the reason that the grounds of appeal raise no known issue of law.
- 15 Referring to the case of *Selle & Ano....* the court is invited to reevaluate the evidence led at the trial court and establish whether the respondents claim in the trial Court

had any chances of failing. It is submitted that the respondents satisfactorily established and demonstrated all the ingredients necessary for grant of Adverse Possession.

16. On jurisdiction it was submitted that the trial Court was clothed with requisite jurisdiction to award a claim for adverse possession on a specific parcel of land and or portion under Section 7 of Limitation of Actions Act (Cap 22) Laws of Kenya, and by virtue of Section 28 of Land Registration Act No. 3 of 2012.
17. Reliance is placed **on Wambugu Versus Njuguna (1983) eKLR 171 and Ng'ati Farmers C-operative Society Limited versus Councilor John Ledidi & 15 others Nakuru CA 64 OF 2004 (Un Reported)** on the principles to be considered by a court to determine whether a claim of adverse possession has been proved.
18. It is contended that even if the evidence in support of the claim were to be considered just as the trial Court did the evidence tendered on the whole pointed to the fact that the respondents satisfactorily proved beyond the standard of proof our claim for adverse possession and or use of land parcel No. UGENYA/DENGA/524 and UGENYA/DENGA/552, for a period exceeding 12 years and which period extinguished the rights of the registered owner, Appellant.

### **ANALYSIS AND DETERMINATION**

19. A jurisdictional issue has been raised. It must therefore be settled at the earliest opportunity since jurisdiction is

everything. It is trite that in the absence of jurisdiction the court should down its tools. In the case of **Phoenix of East Africa Assurance Co. Ltd V S M Thiga T/A Newspaper Service (2019) eKLR** the Court of Appeal while dealing with the question of jurisdiction, held as follows:

*“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint in the court seized with jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction on itself.”*

20. Also see the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR**.
21. While the question of jurisdiction ought to be raised at the earliest opportunity the same can also be raised for the first time on appeal on an issue of law as in the present case. See the holding in **Kenya Ports Authority v Modern Holdings (EA) Ltd [2017] eKLR**.
22. In **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service (Civil Appeal 244 of 2010) [2019] KECA 767 (KLR) (Civ) (10 May 2019) (Judgment)**, the Court of Appeal reiterated that “a jurisdictional issue is so fundamental that it may be raised at any time, even for the first time on appeal.

23. The background of this case is aptly explained in the judgement. The Respondents who were the applicants in the trial court confirm in their submissions filed herein that this case has been in the corridors of justice for close to 7 years, its journey having commenced in the High Court at Kisumu.
24. I have perused the proceedings available at pages 43 – 87 of the Record of Appeal. The record reveals that the suit in the trial court was commenced by way of Originating Summons filed in the Environment & Land Court Kisumu on 25<sup>th</sup> May 2016 by the firm of J.V. Juma & Company Advocates under Sections 7 and 38 of the Limitation of Actions Act and Order 37 Rule 7 of the Civil Procedure Rules (see page 4-5 of the Record of Appeal).
25. The record of 11/5/2015 shows that the Hon Justice Kibunja ordered a transfer of the suit to Ukwala law courts. Hon L.N.Sarapai heard the case but on 29/09/2022 issued orders that the trial court lacked jurisdiction to hear the case and transferred the file to Siaya HC/ELC for directions.
26. On 8/11/2022, Hon Lady Justice A. Koross ELC Judge at Siaya pointed that the trial court had acted ultra vires as he had no powers to transfer the matter but at the same time found that the Magistrates Court was seized of jurisdiction to handle the suit subject to pecuniary jurisdiction and ordered that the matter be remitted back to Ukwala for hearing and determination. The matter then proceeded for hearing and judgement rendered on 24/6/2024 and which has elicited the present appeal.

27. Based on the foregoing background the suit was filed in the correct forum and that is the Environment & Land Court. The jurisdiction of the ELC court is outlined under section 13 of the ELC Act read together with article 162 of the Constitution of Kenya 2010. I need not reproduce these provisions.
28. It is true that sometime in November 2024 the Court Appeal in the case of **Sugawara Vs Nairuko Ene Mutarakwa Kiruti (sued in her capacity as administrator of the estate of Mutarakwa Kirui Lopas alias) Civil appeal E141 of 2022 (2024)** resolved the issue on whether the Magistrates Court have jurisdiction to determine matters of adverse possession. I have noted the respondents observation that when the suit was transferred to Ukwala the Magistrates Courts were gazetted to hear and determine ELC Cases.
29. The Court of Appeal indeed discussed various decisions of the ELC court on the Jurisdiction of the Magistrates Court both for and against but with more recent decisions in the year 2023 taking the position that the Magistrates Courts are not seized with jurisdiction to adjudicate upon claims founded on adverse possession on the face of explicit provisions contained in section 37 & 38 of the Limitation of Actions Act.
30. The Court of appeal delivered its judgement on 11/10/2024 and held that the Magistrates court lacked jurisdiction to hear matters under the provisions of section

37 and 38 of the Limitation of Actions Act. The In clarifying the law, the court held thus; -

*‘notwithstanding the expansion of the jurisdiction of environment and land usage to the Magistrates Courts, it is instructive that under Section 9 (a) of the Magistrates Court Act, various matters are specified for determination, but claims for adverse possession are not included in that section. And that, it is only the Environment and Land Court which has jurisdiction to hear and determine claims for adverse possession.’*

31. Clearly from the foregoing dictum the Court of Appeal simply restated the law as it had been since time immemorial.
32. It is not in dispute that this matter was heard by Hon Tsimonjero Senior Principal Magistrate. I have already noted the provisions under which the Originating Summons commencing the suit were invoke. The respondents herein were seeking a declaration that the respondent right over the whole of land known as **NORTH UGENYA /DENGA/524** and **552** became extinguished by adverse possession. They also sought to be registered as the owners. The trial court lacked jurisdiction to hear and determine the matter and issue the orders that were sought.
33. What then should be the fate of the proceedings in the lower court. It is the finding of this court that the trial Magistrate having lacked jurisdiction the entire

proceedings were a nullity. Nothing comes from a nullity. The Court **of Appeal** in **Desai v Warsama [1967] EA 351 had this to say; -**

*“A judgment given without jurisdiction is void; it cannot be sanctified by the passage of time or the silence of the parties.”*

- 34 What orders therefore commend in view of the above findings. I have already noted that the suit as filed was properly before the ELC at Kisumu. The orders that commend in the circumstances is to recall the suit back to the ELC for hearing de novo.
35. The jurisdiction of the High Court to transfer suits from one Court to another is provided under Section 18 of the Civil Procedure Act which states as follows- “
- (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage — a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same;
  - (2) or b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter — i try or dispose of the same; or

c transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(3) retransfer the same for trial or disposal to the court from which it was withdrawn. (2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”

36. The appeal having succeeded on the point of jurisdiction I will not delve into the grounds of appeal.

37. As to costs I will order that each party bears its own costs on this appeal.

Orders accordingly.

**HON. JUSTICE A. E. DENA**

**JUDGE**

**4/01/2026**

**Judgement delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

Ms. Opondo for the appellants

Margaret Halongera Khaseda and Philemona Akinyi

Respondents Present

Court assistant: Ishmael Orwa