

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC APPEAL NO. E042 OF 2024**

**THOMAS MOTH OTANDO.....1<sup>ST</sup>**  
**APPELLANT**

**PATRICK OCHAM OWEGI.....2<sup>ND</sup>**  
**APPELLANT**

**=VERSUS=**

**MAURICE TAKO**  
**HONGO.....RESPONDENT**

**(Being an appeal from the judgment and decree of Hon. Maureen Shimenga SRM delivered on 20<sup>th</sup> June 2024 in Kisumu MCELC No. E102 of 2021)**

**JUDGMENT**

The Appellants brought a suit against the Respondent in the Chief Magistrate’s Court at Kisumu, namely, MCELC No. E102 of 2021 (hereinafter referred to as “the lower court”). The Appellants averred that the 2<sup>nd</sup> Appellant was at all material times the registered owner of all that parcel of land known as Title No. Kisumu/Ojola/688, (hereinafter referred to as “the suit property”). The Appellants averred that in 1981, the 2<sup>nd</sup> Appellant gave the suit property to the 1<sup>st</sup> Appellant as a gift. The Appellants averred that in March 2021, the Respondent went to the 1<sup>st</sup> Appellant’s home on the suit property and

demanded that he vacate the property. The Appellants averred that on 30<sup>th</sup> March 2021, they conducted a search on the suit property, which revealed that the Respondent was registered as the owner of the property on 9<sup>th</sup> November 1987, following a purported transfer of the property to him by the 2<sup>nd</sup> Appellant. The Appellants averred that the 2<sup>nd</sup> Appellant never transferred the suit property to the Respondent. The Appellants averred that the Respondent's registration as the owner of the suit property was carried out fraudulently and illegally, and as such was null and void.

The Appellants averred that since the 1<sup>st</sup> Appellant had occupied the suit property for 40 years, he had acquired an overriding interest in the property. The Appellants averred that the Respondent's title in the suit property had been extinguished by operation of law pursuant to Section 17 of the Limitation of Actions Act, Chapter 22 Laws of Kenya. The Appellants averred that the Respondent was holding the title to the suit property in trust for the 1<sup>st</sup> Appellant. The Appellants sought judgment against the Respondent for a declaration that the Respondent's title to the suit property was illegal, null and

void, and should be cancelled. In the alternative, the Appellants sought a declaration that the Respondent held the suit property in trust for the 1<sup>st</sup> Appellant by virtue of Section 17 of the Limitation of Actions Act. The Appellants sought a further order that the Deputy Registrar of the court execute the necessary transfer forms to facilitate the registration of the suit in the name of the 1<sup>st</sup> Appellant.

The Respondent filed a defence and a counterclaim against the Appellants in the lower court. The Respondent averred that he was the registered owner of the suit property, having acquired the same from the 2<sup>nd</sup> Appellant for valuable consideration. The Respondent denied that he had acquired the suit property fraudulently. The Respondent averred that the Appellants' suit was fatally defective, misconceived and amounted to an abuse of the process of the court to the extent that it was premised on the doctrine of adverse possession. The Respondent averred that the Appellants had jointly and severally entered a portion of the suit property without his permission and had started using it, thereby violating the Respondent's right to property guaranteed under Article 40 of the Constitution. The

Respondent averred that as a result of the Appellants' illegal occupation of the suit property, he had suffered loss and damage. The Respondent sought judgment against the Appellants for an order compelling the Appellants to vacate the portion of the suit property under their occupation and to hand over possession of the same to the Respondent, in default of which they be forcibly evicted from it. The Respondent also sought judgment for mesne profits at the rate of Kshs. 500/- per month from the date of the counterclaim until vacant possession was delivered by the Appellants to the Respondent or they were evicted from the suit property. Finally, the Respondent sought a permanent injunction restraining the Appellants from remaining on, trespassing into, tilling, cultivating, occupying and/or in any other way interfering with the Respondent's proprietary rights over the suit property.

The Appellants filed a reply to the defence and the defence to the counterclaim by the Respondent on 10<sup>th</sup> September 2021. The Appellants denied that the 2<sup>nd</sup> Appellant had sold and transferred the suit property to the Respondent. The Appellants averred further that no consent of the Land Control Board was

sought and obtained in respect of the purported transfer of the suit property to the Respondent. The Appellants averred that they occupied the suit property as of right, the 2<sup>nd</sup> Appellant as the first registered owner thereof and the 1<sup>st</sup> Appellant as a beneficiary of a gift of the same from the 2<sup>nd</sup> Appellant. The Appellants averred that their occupation of the suit property had been open, peaceful and uninterrupted by the Respondent. The Appellants averred that the Respondent's counterclaim was bad in law for being in breach of the law of limitation of actions. The Appellants averred that the Respondent held the suit property in trust for them, and that his title had been extinguished under Section 17 of the Limitation of Actions Act.

### **The judgment of the trial court**

The trial court heard the claim and the counterclaim and delivered a judgment on 20<sup>th</sup> June 2024. In the judgment, the trial court found that the Respondent was the registered owner of the suit property, and that the Appellants failed to prove that the Respondent acquired the suit property fraudulently. The trial court found that the Appellants had failed to prove their case against the Respondent on a balance of probabilities. The

trial court dismissed the Appellants' suit with costs. With regard to the Respondent's counterclaim, the trial court found that the Respondent had proved his ownership of the suit property and that the Appellants were trespassers thereon. On the Respondent's mesne profits claim, the court found it was not proved. In conclusion, the trial court ordered the Appellants to vacate the suit property forthwith, in default of which they be evicted therefrom. The court also issued a permanent injunction restraining the Appellants from occupying, remaining on, tilling, cultivating, and/or in any way interfering with the Respondent's proprietary interest in the suit property. The court also awarded the Respondent the costs of the counterclaim.

### **The appeal**

The Appellants were dissatisfied with the trial court's decision and filed this appeal on 28<sup>th</sup> June 2024. In their memorandum of appeal, the Appellants challenged the judgment of the trial court on the following grounds;

1. That the learned magistrate erred in law and fact by finding that the Respondent had established a case for trespass against the Appellants.
2. That the learned magistrate erred in law and fact in finding that the Respondent's counter-claim was filed within time.
3. That the learned magistrate erred in law and fact in failing to consider and rule on the Appellants' defence to the Respondent's counterclaim premised on Section 17 of the Limitation of Actions Act.
4. That the learned magistrate erred in law and fact by finding that the Appellants had failed to establish a case of adverse possession of the suit property against the Respondent.
5. That the learned magistrate erred in law and fact in failing to consider the evidence that was laid before her in support of the 2<sup>nd</sup> Appellant's claim that the Respondent had acquired the suit property fraudulently.

The Appellants prayed that the appeal be allowed, the judgment of the trial court be set aside, and substituted with a

judgment in favour of the Appellants as prayed in their plaint in the lower court. The Appellants also prayed for the costs of the appeal and the lower court suit.

### **The submissions**

The appeal was argued through written submissions. The Appellants filed submissions dated 27<sup>th</sup> October 2025. The Appellants submitted that the trial court erred in finding that the Appellants were trespassers on the suit property despite evidence of their lawful and long-term possession of the property. The Appellants submitted that the Respondent's counterclaim was time-barred under Sections 7 and 17 of the Limitation of Actions Act, Chapter 22 Laws of Kenya. The Appellants submitted that they had acquired ownership of the suit property through adverse possession, as the Respondent's title was extinguished after 12 years of their open, continuous and uninterrupted possession of the suit property since 1981. The Appellants submitted that since the Respondent had no title to the suit property, he could not maintain an action for trespass. The Appellants submitted that they had acquired the suit property by adverse possession and, as such, they were

not trespassers thereon. In support of their submission on the issues of adverse possession and trespass, the Appellants cited Kweyu v. Omuto [1990] KLR 709 and Wambugu v. Njuguna [1983] KLR 172.

The Appellants submitted further that the trial court failed to consider the evidence regarding the fraudulent registration of the suit property in the name of the Respondent, including the lack of Land Control Board (LCB) consent, which is mandatory in land transactions pursuant to Section 6(1) of the Land Control Act, Chapter 302 Laws of Kenya, and lack of an agreement of sale between the Respondent and the 2<sup>nd</sup> Appellant in respect of the suit property. The Appellants submitted that the trial court also ignored evidence of the Appellants' long possession, the Respondent's failure to lodge any complaint for over three decades, and the removal of a caution placed by the 1<sup>st</sup> Appellant without due process. The Appellants submitted that the judgment of the trial court was based on a misapprehension of facts and misapplication of the law, and as such should be set aside.

The Respondent filed submissions dated 23<sup>rd</sup> October 2025. The Respondent submitted that he established by evidence that he was the registered owner of the suit property, and that he acquired the suit property lawfully from the 2<sup>nd</sup> Appellant. The Respondent submitted that, having regard to the evidence adduced by the Respondent, the 2<sup>nd</sup> Appellant's claim that he did not sell the suit property to the Respondent, and that the Respondent acquired the property fraudulently, was untenable. The Respondent submitted that the alleged fraud was not proved to the required standard. The Respondent submitted that his title to the suit property was indefeasible. The Respondent submitted that he proved his claim against the Appellants in the trial court on a balance of probabilities, and as such, the judgment in his favour was lawful and proper. The Respondent submitted that the Appellants failed to prove that they had acquired the suit property by adverse possession. The Respondent submitted that the Appellants failed to prove that their occupation was hostile to the Respondent and that it was open and continuous for the statutory period of 12 years. The Respondent submitted that the Appellants did not prove their case against the Respondent, and as such, the same was

properly dismissed. The Respondent urged the court to dismiss the appeal with costs. The Respondent cited several authorities, which I have considered.

### **Analysis and Determination**

I have considered the pleadings which were filed by the parties in the trial court, the proceedings of the trial court, the judgment of the court, the Appellants' memorandum of appeal, and the parties' submissions. As this is a first appeal, the court must reconsider and re-evaluate the evidence on record and draw its own conclusions regarding the lower court's findings on the issues that were before it for determination.

In Gitobu Imanyara & 2 Others v. Attorney General [2016] KECA 557 (KLR), the Court of Appeal stated as follows on the mandate of the court on a first appeal:

**“...this Court is not bound necessarily to accept the findings of fact by the court below and that 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. See *Selle and Another v. Associated Motor Boat Company Limited and others* [1968] EA 123 and *Williamson Diamonds Ltd. v. Brown* [1970] E.A.L.

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in *Peters -vs- Sunday Post Ltd* [1958] EA 424. In its own words: -

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.””

In *Kenya Ports Authority v. Kuston (Kenya) Limited* [2009] 2EA 212 the Court of Appeal stated that:

“On a first appeal from the High Court, the Court of Appeal should 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 allowance in that

**respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”**

It is also settled that on a first appeal, the court will not interfere with the findings of fact by the trial court unless they were not based on evidence at all, or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, Peter v. Sunday Post Ltd. [1958] E.A 424 and Makube v. Nyamuro[1983] KLR 403.

I will consider all four grounds of appeal together, in no particular order. The Appellants’ case against the Respondent was that the Respondent had, in 1987, fraudulently acquired the suit property, which the 2<sup>nd</sup> Appellant had given to the 1<sup>st</sup> Appellant as a gift in 1981. The Appellants sought a declaration that the Respondent’s title, which was a product of the Respondent’s fraud, was illegal, null and void, and should be cancelled. The Appellants also contended that the 1<sup>st</sup> Appellant had occupied the suit property openly for an uninterrupted period of 40 years at the time of filing the lower court suit. The

Appellants contended that by virtue of the 1<sup>st</sup> Appellant's occupation of the suit property for that period, the Respondent's title to the suit property had been extinguished under Section 17 of the Limitation of Actions Act, Chapter 22 Laws of Kenya. The Appellants contended that the Respondent was holding the suit property in trust for the 1<sup>st</sup> Appellant. In this regard, as an alternative to their prayer for the cancellation of the Respondent's title on account of fraud, the Appellants sought a declaration that the Respondent held the suit property in trust for the 1<sup>st</sup> Appellant, and that the property be transferred to the 1<sup>st</sup> Appellant pursuant to the said trust.

The Respondent filed a defence denying the Appellants' claim in its entirety. The Respondent contended that he was the registered owner of the suit property and that the Appellants were trespassers thereon. The Respondent sought possession of the suit property from the Appellants together with mesne profits. The Respondent also sought a permanent injunction restraining the Appellants from interfering with his enjoyment of proprietary rights in the suit property.

The suit property was registered in the name of the Respondent on 9<sup>th</sup> November 1987 under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the Registered Land Act provide as follows:

**“27. Subject to this Act -**

**a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**

**b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.**

**28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -**

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:**

**Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”**

The Registered Land Act was repealed by the Land Registration Act 2012. Sections 24, 25 and 26 of the Land Registration Act 2012 provide as follows:

**“24. Subject to this Act—**

**(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and**

**(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or**

**expressed agreements, liabilities or incidents of the lease.**

**25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—**

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.**

**(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.**

**26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or**

**endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

In John Gitiba Buruna & Another v. Jackson Rioba Buruna, Court of Appeal at Kisumu, Civil Appeal No. 89 of 2003, the Court of Appeal held that:

**“Although the rights of a registered proprietor of land are indefeasible under section 28 of the Registered Land Act, such registration does not as the proviso to section 28 states relieve a proprietor from any duty or obligation to which he is subject as a trustee.”**

From my analysis and evaluation of the evidence on record, I am unable to fault the trial court’s finding that the Respondent was the lawful registered owner of the suit property. The Respondent produced in evidence a transfer of land dated 5<sup>th</sup> November 1987, which was executed in his favour by the 2<sup>nd</sup> Appellant while transferring the suit property to him. The transfer bore the 2<sup>nd</sup> Appellant’s signature and identity card, neither of which was challenged by the Appellants at the trial.

The transfer was registered on 9<sup>th</sup> November 1987, and a title deed was issued in favour of the Respondent. The Respondent told the court that the Land Control Board's consent was sought and obtained for the transaction. The burden was on the Appellants, who claimed that the Land Control Board's consent was not obtained to prove the allegation. They failed to do so. I agree with the Respondent that the Appellants' allegation that the Respondent acquired the suit property fraudulently and illegally was not proved. There was therefore no basis upon which the trial court could have declared the Respondent's title to the suit property illegal, null and void.

As mentioned earlier in the judgment, the Respondent's counterclaim against the Appellants was based on trespass. Trespass is an intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18<sup>th</sup> Edition, page 923, paragraph 18-01. In Gitwany Investments Limited v. Tajmal Limited & 3 others [2006] eKLR, it was held that title to land carries with it legal possession. Halsbury's Laws of England 3<sup>rd</sup> edition, Volume 38, at page 739, paragraph 1205 defines trespass as follows:

**“A person trespasses upon land if he wrongfully sets foot on, or rides or drives over it, or takes possession of it, or expels the person in possession or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it, or it seems if he erects or suffers to continue on his own land anything which invades the air space of another, or if he discharges water upon another’s land, or sends filth or any injurious substance which has been collected by him on his own land to another’s land.”**

In the Court of Appeal, Fourth District, Division 1, California, in Ralphs Grocery Co. v. Victory Consultants Inc. (2017) 17Cal. App.5<sup>th</sup> 245, 261; CACI No. 2000, the court stated that:

**“In the instant action, Appellants have sued Respondents for trespass. “Trespass is unlawful interference with possession of property.” (Staples v. Hoefke (1987)189 Cal.App. 3d 1397,1406). The elements of trespass are: (1) the plaintiff’s ownership or control of the property; (2) the defendant’s intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) the defendant’s conduct was substantial factor in causing the harm. (See CACI No. 2000).”**

It was common ground before the trial court and this court that the 1<sup>st</sup> Appellant had entered and occupied a portion of the suit property. It was also common ground that the 1<sup>st</sup> Appellant's entry and occupation of the suit property was without the permission of the Respondent, who was the registered owner thereof. The 1<sup>st</sup> Appellant claimed that the suit property was a gift from the 2<sup>nd</sup> Appellant. It was therefore with the 2<sup>nd</sup> Appellant's permission that he took possession of the suit property.

I have held that the Respondent acquired the suit property lawfully from the 2<sup>nd</sup> Appellant, and was the lawful owner of the property. As the registered lawful owner of the suit property, the Respondent was entitled to possession thereof. The burden was on the 1<sup>st</sup> Appellant to establish that he had a justifiable cause for remaining in possession of the suit property without the Respondent's permission. The fact that the suit property was owned by the 2<sup>nd</sup> Appellant, who had given it to the 1<sup>st</sup> Appellant as a gift, could not justify the 1<sup>st</sup> Appellant's occupation of the property. The 2<sup>nd</sup> Appellant ceased to have

any interest in the suit property in 1987, upon the Respondent's lawful acquisition of the property.

The other justification put forward by the 1<sup>st</sup> Appellant for his occupation of the suit property was that of his long, open, and uninterrupted possession of the property in excess of 12 years. The Appellants contended that the suit property was given by the 2<sup>nd</sup> Appellant to the 1<sup>st</sup> Appellant as a gift in 1981, and that the 1<sup>st</sup> Appellant constructed his matrimonial home thereon in 1982. The Appellants contended that the 1<sup>st</sup> Appellant had been in occupation of the suit property since 1982. In their pleadings, the Appellants contended that the 1<sup>st</sup> Appellant had been in possession of the suit property since 1981, when the property was given to him as a gift. In their evidence, the Appellants reiterated that the 1<sup>st</sup> Appellant constructed his home on the suit property in 1982 and had remained in occupation since then. A copy of a letter dated 17<sup>th</sup> August 2021 from the Assistant Chief Ojola Sub-Location produced in evidence by the Respondent confirmed that the 1<sup>st</sup> Appellant had his homestead on a portion of the suit property.

The Appellants' alternative claim in the lower court was that the Respondent was barred by law from recovering the suit property from the 1<sup>st</sup> Appellant. The Appellants contended that the Respondent's counterclaim based on trespass was bad in law in that the claim was time-barred under Section 7 of the Limitation of Actions Act, and the Respondent's title to the suit property had become extinguished under Section 17 of the same Act. The Appellants contended that the 1<sup>st</sup> Appellant had acquired the suit property by adverse possession and that the Respondent held it in trust for him. The Appellants contended that the 1<sup>st</sup> Appellant was not a trespasser on the property, but an owner awaiting only the formal transfer.

I agree with the Appellants that the trial court did not consider their alternative claim over the suit property, which was based on adverse possession. The court only considered the main claim, which was based on fraud. From the evidence on record, I find no defence to the Appellants' claim that the Respondent's suit in the lower court was time-barred under Section 7 of the Limitation of Actions Act. The Respondent did not adduce any evidence to challenge the 1<sup>st</sup> Appellant's claim that he had

occupied the suit property since 1982, even before the Respondent acquired it. The evidence on record shows that after purchasing the suit property from the 2<sup>nd</sup> Appellant in 1987, the Respondent cultivated it for only 3 years, after which he left for Mombasa. The Respondent did not return to the suit property until 2021, 31 years later, when he began the process of recovering the property from the 1<sup>st</sup> Appellant, who was in occupation of it. The evidence adduced by the Appellants that the 1<sup>st</sup> Appellant had occupied the suit property continuously since 1982 was not rebutted.

Section 7 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya, provides that an action for the recovery of land cannot be brought more than 12 years after the accrual of the cause of action. The Respondent's cause of action against the Appellants accrued on 9<sup>th</sup> November 1987 when he acquired the suit property from the 2<sup>nd</sup> Appellant. From that date, the 1<sup>st</sup> Appellant could only occupy the suit property with the Respondent's permission. The 1<sup>st</sup> Appellant's continued occupation of the property or a portion thereof after that date was adverse to the Respondent's proprietary interest in the

property. The Respondent should have brought an action for the recovery of the suit property from the 1<sup>st</sup> Appellant by 9<sup>th</sup> November 1999. After that date, the Respondent's right to recover the suit property from the 1<sup>st</sup> Respondent became time-barred. Section 17 of the Limitation of Actions Act provides as follows:

**“17. Title extinguished at end of limitation period**

**Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”**

I agree with the Appellants that the trial court erred in failing to consider the limb of their claim, which was based on Sections 7 and 17 of the Limitation of Actions Act. Contrary to the submissions by the Respondent, there was sufficient evidence on the basis of which the trial court should have found and declared that the Respondent's claim against the Appellants for the recovery of the portion of the suit property occupied by the 1<sup>st</sup> Appellant was time-barred and that the Respondent's title to the said portion of the suit property had become extinguished.

As to whether the lower court should have declared that the 1<sup>st</sup> Appellant had acquired the suit property as a beneficiary of a trust based on Section 17 of the Limitation of Actions Act and ordered the property transferred to the 1<sup>st</sup> Appellant, my answer is no. The Appellants' alternative claim, in my view, was an adverse possession claim presented as a claim based on trust to avoid the jurisdictional question that was raised by the Respondent. I agree with the Appellants that nothing prohibits a Magistrate Court from making a declaration that a claim over land is time-barred under Section 7 of the Limitation of Actions Act or that a claimant's title to land has become extinguished under Section 17 of the Limitation of Actions Act. I am of the view, however, that a Magistrate Court has no jurisdiction under Sections 7 and 17 of the Limitation of Actions Act to order that a person who has occupied land for a period of 12 years be registered as the owner of the land. I am of the view that once the registered owner's right to recover land has become time-barred and his title has become extinguished, the occupier of such land acquires a beneficial interest in the land. Such an occupier of land can only obtain a legal title to the land concerned by making an application to be registered as an

owner of the land under Section 38(1) of the Limitation of Actions Act, and Order 37 Rule 7 of the Civil Procedure Rules.

It is upon an application made under Section 38(1) of the Limitation of Actions Act being allowed, and an order made by the court registered against the title that the occupier of the land becomes the legal owner thereof. Sections 7, 17 and 38 of the Limitation of Actions Act must be read together. It is pursuant to Sections 7 and 17 of the Limitation of Actions Act that the court is moved under Section 38 of the Limitation of Actions. Contrary to the contention by the Appellants, I am of the view that save as I have stated above, Sections 7 and 17 of the Limitation of Actions Act do not create a cause of action based on trust, which can be enforced in the Magistrates court distinct from the cause of action based on adverse possession that accrue under Section 38(1) of the Limitation of Actions Act which can only be enforced in the Environment and Land Court. So long as the trust arises from the beneficial interest acquired through adverse possession, the court with jurisdiction to determine its existence and enforceability is the Environment and Land Court, not the Magistrates' Court.

It is my finding that the Appellants' alternative claim over the suit property was based on adverse possession, and that the lower court had no jurisdiction to declare that the 1<sup>st</sup> Appellant had acquired the property by adverse possession and should be registered as the owner thereof. In 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 No.E141 of 2022) [2024] KECA 1417 (KLR) (11<sup>th</sup> October 2024) (Judgment), the Court of Appeal stated as follows:

**“44. The controversial question of jurisdiction of the Magistrates' Courts in claims for adverse possession emanates from sections 37 and 38 of the *Limitation of Actions Act* where it is specifically provided that such claims are to be heard by the “High Court”.**

**45. In particular, section 38 of the *Limitation of Actions Act* provides:**

**“ (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.

(2) ...

(3) ...

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.

(5) ...”

46. In other words, reference is to the “High Court” as the court to which such cases are heard, and given the dictates of *the Constitution* set out above, this should be construed to mean the “Environment and Land Court”, as being the court donated with jurisdiction to hear and determine matters pertaining to adverse possession of land. The effect of this interpretation is that, it is only the Environment and Land Court established under Article 162(2) (b) that is mandated to hear these cases. So that, notwithstanding the expansion of the jurisdiction of environment and land usage to Magistrates Courts, it is distinctive that under section 9 (a) of the Magistrates Courts Act, various matters are specified for determination, but claims for adverse possession are not included.

**47. In the case of Republic vs Karisa Chengo & 2 Others [2017] eKLR this Court held that:**

**“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”**

**48. 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.”**

Arising from the foregoing analysis, I find merit in grounds 1 and 2 of the appeal. The lower court erred in finding that the Appellants were trespassers on the suit property, in ordering them to vacate the property, and in restraining them from having any dealings with the same. The Appellants had shown a justifiable cause for the 1<sup>st</sup> Appellant’s continued occupation of the suit property. The Appellants established that the

Respondent's title to the portion of the suit property occupied by the 1<sup>st</sup> Appellant had become extinguished pursuant to Sections 7 and 17 of the Limitation of Actions Act, and that the 1<sup>st</sup> Appellant had acquired a beneficial interest in the said portion of the suit property. The 1<sup>st</sup> Appellant's beneficial interest in the suit property was an overriding interest to which the Respondent's title was subject under Section 28(h) of the Land Registration Act 2012. The Appellants were therefore not trespassers on the suit property. The lower court erred in failing to find that the Respondent held the said portion of the suit property in trust for the 1<sup>st</sup> Appellant. The lower court was, however, right in not ordering that the said portion of the suit property be transferred and registered in the name of the 1<sup>st</sup> Appellant. I will therefore set aside the orders of vacant possession and a permanent injunction granted by the lower court in favour of the Respondent. I will also set aside the order wholly dismissing the Appellants' claim, and would allow the claim in part.

## **Conclusion**

In conclusion, I hereby make the following orders in the matter;

1. The judgment delivered by Hon. Maureen Shimenga SRM on 20<sup>th</sup> June 2024 and the decree extracted therefrom are set aside.
2. Judgment is entered for the Appellants against the Respondent for a declaration that the Respondent holds the portion of all that parcel of land known as Title No. Kisumu/Ojola/688, which is occupied by the 1<sup>st</sup> Appellant in trust for the 1<sup>st</sup> Appellant.
3. Each Party shall bear its costs of the lower court suit, while the Appellants shall have the costs of the appeal.

**Written and signed at Kisumu by**

**S. OKONG'O**

**JUDGE**

**Delivered, dated and countersigned at Kisumu on this  
17<sup>th</sup> day of February 2026**

**E. ASATI**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Platform in the presence of:

for the Appellants

for the Respondent

-Court Assistant