

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT
SIAYA
ELC APPEAL NO E050 OF 2024

**DAGAMA ONYONAH (Suing for and on behalf of the
Estate of Daniel Owiti Onyona alias Owiti Onyona)**
.....**APPELLANT**

-VERSUS-

**SAR ISAAC KASERA. (Sued as the Administrator of the
Estate of Samuel Olu Kasera)**
.....**RESPONDENT**

JUDGEMENT

1. The Appellant herein being dissatisfied with the judgment of the Learned Trial Magistrate Hon. E. Malesi (Principal Magistrate), Madiany Magistrate's Court in ELC (OS) No. E013 of 2024 delivered on 20th November, 2024 together with its subsequent Orders delivered on the 2nd December, 2024 appeals against the whole of the said judgment, ensuing Orders and decree.
2. The Appellant in its Amended Memorandum of Appeal dated 30/5/2025 sets out 5 grounds of appeal as follows; -

- i. THAT the trial Court lacked Jurisdiction to hear and entertain the suit
- ii. THAT the learned trial Magistrate erred both in law and facts by holding that the respondent had proved all elements and ingredients of adverse possession and therefore arriving at a wrong decision.
- iii. THAT the learned trial Magistrate erred in both law and facts by holding that the parties to the suit had locus standi to prosecute the case and as a consequence arrived at a wrong decision
- iv. THAT the learned trial Magistrate erred in both law and facts by relying on a land sale agreement dated 29th September, 2009 which was unlawful as the purported seller of the suit land had no legal authority to sell the deceased's said land and as a consequence the trial magistrate arrived at a wrong decision.
- v. THAT the trial magistrate erred in both law and fact by awarding the entire suit land to the Respondent

3. On the strength of the above grounds the Appellant sought that; -

- 1) This Honourable Court do set aside the judgement dated 20-11-2024, orders dated 02 -12- 2024 and decree dated 06-2-2025 respectively by the Principal Magistrate in MCELC No. E013 of 2024 at Madiany Magistrate Law Courts and substitute the

same with appropriate judgment, decree and orders of this Honourable Court.

2) Cost and interest in this Appeal be awarded to the Appellant.

4. Upon admission of the Appeal the court directed that the Appeal proceeds by way of written submissions. The parties filed the said submissions and which are summarized as follows; -

Appellants Submissions

5. On the jurisdiction of the trial court it is submitted the Principal Magistrates Court at Madiany Law Courts lacked jurisdiction to entertain this suit as it was a matter of adverse possession and only the High Court is clothed with jurisdiction to hear the suits concerning adverse possession. Reliance is placed on the Court of Appeal decision in **Pauline Chemuhe Sugawara Vs/ Nairuko Ene Mutarakwa Kiruti, Moses Orikae Mutarakwa & 2 Others, Civil Appeal No. E141 of 2022**
6. On ground No. 2 it is submitted that from the testimony of Salome Achieng and Samuel Onyona Ouma the earliest date by which the respondent took possession of the suit land is likely to be from 2018 onwards thus the 12 years period to fulfill adverse possession had not yet lapsed as of the time of filing this suit in the lower court. Moreover, the occupation by the Respondent was not adverse as it was with consent and under an incomplete sale agreement. Reliance was placed on the cases of **Mtana**

Lewa v Kahindi Ngala Mwangandi [2005] eKLR and Kweyu v Omuto [1990] KLR 709.

7. On ground No. 3 on locus standi by the Applicant it is submitted that the Appellant did not hold letters of administration to the estate of the registered proprietor **(Daniel Owiti Onyona)**. He therefore lacked standing to be sued on behalf of the Estate of his deceased brother, who was the proprietor of the suit **land parcel SIAYA/MASALA/1186**.
8. It is contended that the Respondent herein also did not file and adduce any evidence that he held letters of Administration for the estate Samuel Oulu Kasera and therefore, he lacked the capacity to sue on behalf of the estate of Samuel Oulu Kasera. The whole of the said Originating Summons is a suit between the Respondent and the Appellant in their own capacities. That the suit should have been struck out at its inception.
9. To buttress the above position the court is referred to the case **Otieno v Ougo & Another [1986-1989] EA 468**.
10. As to ground No. 5 on reliance on the sale agreement it is submitted the Respondent relied heavily on a sale agreement dated 29/09/2000 executed between two now-deceased individuals — Samuel Oulu Kasera and Samuel Onyona Molo — neither of whom had letters of administration for the estate of the registered proprietor, Daniel Owiti Onyona. That no proprietary interest can pass

under a land sale agreement entered into by persons lacking legal authority over the land. Further that the learned magistrate misdirected himself in converting a contractual expectation into a claim for adverse possession. The appellants cites **Isaya Masai Mwita v Joseph Mwangi Mbugua [2017] eKLR and Public Trustee v Wanduru [1984] KLR 314**, to support these arguments.

11. On Ground No. 6 faulting the trial court for awarding the entire suit land to the Respondent it is submitted that the respondents surveyor acknowledged an encroachment of **0.07 Ha** from **Parcel No. SIAYA/MASALA/803**, owned by the Respondent's family. This means that the planting, occupation, and "possession" may well be accidental or unlawful extension, not actual occupation and possession of the disputed land. That a party relying on adverse possession must demonstrate not just passive use, but overt acts manifesting intention to exclude the true owner and there was no evidence in this regard. The court is referred to the case of **Kazungu Ngari Yaa v Masha Mwakalu [2021] eKLR (CA)**.

Respondents Submissions

12. The respondents submissions are dated 24th September 2025 and addressed the grounds of appeal as pleaded.
13. It is submitted that this court being an appellate court of first instance, it is not bound to accept factual findings of a

trial court. However, the power to review the factual findings of the trial court must be exercised with caution taking into account the fact that, this court has not seen or heard from the witnesses directly or seen their demeanour and advantage that the trial court had before making their decision.

14. On ground No. 1 citing the case of Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & Another (2020, Environment & Land Court, Nakuru) it is submitted that the magistrates' courts could hear and determine adverse possession claims provided the magistrate is duly gazetted under Section 26(3) of the Environment and Land Court Act, 2011, and provided the suit falls within the pecuniary jurisdiction of the magistrate court. Further that the court of Appeal in **Pauline Chemuhe Sugawara vs/ Nairuko Ene Mutarakwa Kiruti, (supra)** did not invalidate previous decisions and the pronouncement could not apply retrospectively. Reference is made to the case of **Douglas Odhiambo Apel & Another v Telkom Kenya Ltd [2006] eKLR.**
15. Courts are also enjoined to uphold substantive justice over technical objections especially where parties have invested time, resources and evidence in a properly filed claim. They must also uphold the rights to fair hearing and access to justice as envisaged under articles 50 and 48 of the Constitution.

16. On ground No 2 it is submitted that the Respondent rightly and conclusively proved on a balance of probability that he had actual, open, exclusive and uninterrupted possession of the land for a period of at least 12 years and has been over 40 years.
17. There is no contrary report from any survey office brought before the trial court disputing the findings of the report by the Respondent. Further, the Appellant's witnesses at the trial court were his family members who from and Samuel Onyona Ouma, the Appellant's nephew, who was present during the ground status survey where the findings were that the land in question had been occupied by the Respondent and his family. Samuel Onyona Ouma did not in his adopted witness statement, state that he had objected to the ground status survey report's findings.
18. On locus and capacity it is submitted that The Appellant did not make any plea or submission at trial concerning lack of legal capacity. This court cannot now be invited to determine a matter that was never placed before the trial court. The appellant, having participated fully in the proceedings before the trial court without raising capacity, must be taken to have waived that right.
19. Referring to the holding in Court of Appel in **Kenya Hotels Limited v Kenya Commercial Bank & Another [2004] eKLR**, it is submitted the court affirmed that parties must raise all issues at the earliest opportunity or risk being estopped. It is urged that permitting the

appellant to raise this point now would amount to allowing him to approbate and reprobate, which is an abuse of the appellate process. Raising capacity at this late stage prejudices the Respondent because: a) No opportunity existed to lead evidence on the issue at trial. b) The trial court never made findings on capacity. c) The record is silent, leaving this Honourable Court without a factual basis to determine the matter.

20. On reliance on the impugned sale agreement, it is contended that the maker of the sale agreement was present at the trial court and gave evidence that the purchaser was to facilitate the succession proceedings up until the seller was in a position to acquire the requisite interest to pass title to the buyer. The court is referred to the witness statement by George Agolla Ochola page 22 of the record of appeal. That the trial Magistrate took judicial notice of this fact at paragraphs 16 and 17 of the judgement . The same is in the record of appeal at page 130. The sale agreement confirms that both the buyer and seller intended to enter into a legally binding agreement. However, they both passed on and the seller did not therefore acquire the requisite interest to pass title to the buyer. The sale agreement does not negate the Respondents occupation since the 1970s up until the adverse possession claim was brought before the trial court for determination.

21. It is posited that Respondent did not receive title, their occupation was never legally interrupted neither have they been evicted from the suit land.
22. The agreement could not be repudiated because the seller had not yet acquired the requisite interest to pass to the buyer.
23. On the last ground it is urged that the ground status survey report's finding is very clear and has not been disputed that the Respondent and his family have been using the suit land for over 40 years. The surveyor, as at the time of survey found the parcel of land half-way shrubby with little to no economic activity, the other half was cultivated with maize plantation. It is evident from the said report that all the members present at the survey, including the Appellant's nephew, confirmed that the Respondent and his family have been in occupation of the said land for over 40 years.

ANALYSIS AND DETERMINATION

24. Having analysed the record of appeal and the submissions of the parties as well as considered the law. The main issue for determination is whether this appeal is merited. In answering this question I will analyse each ground of appeal as raised starting with the answering the question Whether the trial court had jurisdiction to entertain a claim of adverse possession. This is for the reason that the rest of the grounds of appeal are dependent upon the outcome of this issue.

25. In order to determine the above the court shall exercise its duties as a first Appellate Court, to re-analyse the evidence, re-evaluate and arrive its own conclusion as was stated in the case of **Selle and another vs Associated motor Boat Limited Co. (EA.123)**. I also agree with the respondents' submissions based on the case of **Ngugi Vs. Gitau & 2 Others (supra)**.
26. The first ground of appeal questions the trial Court Jurisdiction to hear and entertain the suit as brought before it. This submission is premised on the decision of the Court of Appeal in the case of **Pauline Chemuge Sugawara Vs Nairuko Ene Mutarakwa Kiruti (2024) KECA 1417 (KLR)**.
27. It is now established that the question of whether the Magistrates court is seized with jurisdiction to preside over and determine claims based on the doctrine of adverse possession was put to rest by the Court of Appeal in the above case. I have taken time to read the decision.
28. 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 cap 22 of the Laws of Kenya.

29. 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. In clarifying the law, the learned judges 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.'

30. Clearly from the foregoing dictum the Court of Appeal simply restated the law as it had been since time immemorial.

31. But what were the implications of the above decision on cases that were heard and determined before the decision of the Court of Appeal herein. I have noted the respondents' submissions in this regard urging that at the time the suit was filed the Magistrates Court was seized of jurisdiction, that the decision cannot apply retrospectively, that upholding this ground of appeal would be a wastage of time and resources as well as hampering access to justice and the right a fair hearing. In the present proceedings the trial court decision was delivered on 2^{0th}

November 2024 while the Court of Appeal rendered its decision in 11th October 2024.

32. Can the proceedings of the trial court be salvaged? I have already noted that the Appellate Court simply clarified the law as it has always been.
33. 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. My hands are tied by the decision of the Court of Appeal. It is the finding of this court that the trial Magistrate having lacked jurisdiction the entire proceedings were a nullity.
- 35.. The first ground of appeal must succeed.
36. Having arrived at the foregoing conclusion therefore I see no need to analyse and make a determination on the rest of the grounds of appeal which arise from the impugned proceedings and judgement of the trial court.
37. On costs the same is discretionary and I think based on the circumstances of this case I will make an order that each party bears their own costs of this appeal as well as the costs in the trial court.
38. The appeal therefore succeeds based on the ground that the trial court lacked jurisdiction to hear and determine the suit as filed in the Magistrates Court.

Orders accordingly.

Dated at Siaya this 25th Day of February, 2026

HON. JUSTICE A. E. DENA

JUDGE

25/02/2026

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

Ms. Nyabundi Holding Brief for Mr. Onyata for the Appellant

Ms Achieng for Respondent

Court assistant: Ishmael Orwa