

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**ELCA NO. E003 OF 2025**

**DICKSON KIPKIRUI KORGORIN.....**  
**APPELLANT**

**VERSUS**

**RICHARD KIKWAI.....** **1<sup>ST</sup>**  
**RESPONDENT**

**NELSON KIKWAI.....** **2<sup>ND</sup>**  
**RESPONDENT**

**ALICE CHEBUGON.....** **3<sup>RD</sup>**  
**RESPONDENT**

*(Being an appeal arising from the judgement of Hon. Boke delivered on 28<sup>TH</sup> January, 2025 in Bomet CM ELC Case No. E010 of 2023)*

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**JUDGEMENT.**

**INTRODUCTION.**

1. By a Memorandum of Appeal dated 3<sup>rd</sup> February, 2025, the Appellant challenges the decision of Hon. Boke CM in Bomet CM ELC Case No. E010 of 2023.

**FACTUAL BACKGROUND.**

2. In the subordinate Court, the Appellant filed a suit against the Respondents herein vide the Plaint dated 18<sup>th</sup> April, 2023 wherein he sought the following orders;

***a. An order of Permanent injunction restraining the Defendants from interfering with the Plaintiff's quiet possession and trespassing on land registered as Kericho/Kapsimbiri/ 464.***

***b. To vacate and/or handover vacant possession of Kericho/Kapsimbiri/464 to the Plaintiff Dickson Kipkirui Korgorin with immediate effect.***

***c. Mesne profits from the date of expiry of the date of occupation of the parcel of land till possession is delivered up to the Plaintiff.***

***d. General damages for violation of the Plaintiff's right to quiet possession.***

***e. Interest thereon.***

***f. Costs of this suit, and***

***g. Any other relief the Court deems fit to grant.***

3. The Respondents filed their Statement of Defence and Counterclaim dated 30<sup>th</sup> May, 2023 wherein they denied the averments in the Plaint. In the counterclaim, they sought the following orders:

***a. The Defendants (now the Plaintiffs) seek a declaration to the effect that they have acquired ownership of 0.9 acres of LR NO. Kericho/Kapsimbiri/464 through adverse possession.***

***b. The Defendants (now Plaintiffs) seek an order that they be registered as the proprietors of 0.9 acres of LR NO. Kericho/Kapsimbiri/464.***

***c. The Defendants (now Plaintiffs) seek an order that the legal representative of the estate of Kikwai Arap Kones or the Executive Officer of this Court be authorized to sign all the requisite documents to facilitate the aforementioned registration.***

***d. The Defendants (now Plaintiffs) also seek an order that the consent of the relevant land control board be dispensed with.***

***e. The Defendants (now Plaintiffs) seek an order that any inhibition, injunction, caution or restriction that may be subsisting in respect to LR NO. Kericho/Kapsimbiri/464 be discharged.***

**4.** The Learned Trial Magistrate delivered judgement on 28<sup>th</sup> January, 2025 and held as follows;

***“Consequently, I find that Plaintiff’s case fails for it has no merit. It is dismissed with costs to the Defendants, and instead judgement is entered in favour of the Defendants in the terms of the Counterclaim.***

***Defendants to start the process of transferring the portion in issue to the estate of their late father, and if the Plaintiff fails to sign the transfer documents then the Court administrator will sign on his behalf. The Counterclaim is allowed as prayed...”***

5. The Appellant being aggrieved by the said judgement approached this Court by way of appeal.
6. The appeal was admitted for hearing on 16<sup>th</sup> July, 2025 and the Court issued directions that it be heard by way of written submissions.
7. On 29<sup>th</sup> September, 2025 the appeal was mentioned to confirm filing of submissions and then reserved for judgement.

### **THE APPEAL**

8. The grounds of appeal are as follows;

***1. That the learned Trial Magistrate erred in law and in fact by disregarding the Appellant's certificate of title despite the fact that it stood uncontroverted.***

***2. That the Learned Trial Magistrate erred in law and in fact by holding that the Appellant sold land to the Respondents herein without satisfying herself that the conditions for a***

***contract for disposition of an interest in land had been met.***

***3. That the Learned Trial Magistrate erred in law and in fact by allowing the Respondents' counter-claim despite the fact that they did not have the requisite locus-standi by way of a grant of letters of administration ad-litem to sue on behalf of their deceased father.***

***4. That the Learned Trial Magistrate erred in law and in fact by holding that the Respondents had proven their claim of adverse possession despite the fact that the Respondents did not produce a certified extract of the title to the suit parcel.***

***5. That the Learned Trial Magistrate erred in law and in fact in totally disregarding the Appellant's evidence thus arriving at a wrong decision.***

***6. That the Learned Trial Magistrate erred in law and in fact by failing to address the issues raised by the Appellant in his submissions 22<sup>nd</sup> of October 2024. (sic)***

**7. That the Learned Trial Magistrate erred in law and in fact by relying on the Respondents' unsupported testimonies and averments thus arrived at an erroneous decision not supported by law or facts.**

**8. That the Learned Magistrate erred in fact and law and in fact (sic) in failing to consider the submissions of the appellant's counsel together with the case law in support.**

**9. That the decision of the Learned Trial Magistrate as a whole as contained (sic) in the Ruling (sic) dated 28th January 2025 is legally untenable, against the weight of evidence and ought to be set aside in its entirety.**

**9.** The Appellant prays for orders that;

**a. That this appeal be allowed and the judgment of honourable Esther Boke in Bomet Magistrate's Court environment and land case number E010 of 2023 be set aside.**

***b. That the costs of this appeal be provided for.***

**ISSUES FOR DETERMINATION.**

- 10.** The Appellant filed submissions on 1<sup>st</sup> August, 2025. The said submissions are incomplete; some pages are missing.
- 11.** The Respondents filed their submissions on 29<sup>th</sup> September, 2025.

**Appellant's Submissions.**

- 12.** The Appellant submits on the following issues;
- a. Whether the Respondents had locus standi to defend the trial Court case based on a deceased person's interest in the suit parcel. (sic)***
  - b. Whether the Respondents have proved their claim for adverse possession.***
  - c. Who should bear costs of the appeal.***

- 13.** On the first issue, the Appellant submits that the Learned Magistrate erred in finding that since the Respondents were sued in their personal capacity, they could raise any issue in their defence.
- 14.** The Appellant also submits that legally, the Respondents could only defend the suit in their personal capacity just as they had been sued and they could not therefore raise issues about their deceased father's interests.
- 15.** The Appellant further submits that the Respondents had no legal capacity to represent the estate of the deceased and therefore their joint defence was a nullity *ab initio* and ought to have been struck out.
- 16.** On the second issue, the Appellant relies on **Order 2 Rules (1), (2), (3), (4) and (5)** of the **Civil Procedure Rules** and submits that the Respondents raised the issue of adverse possession by way of a Counterclaim but failed to attach a verifying affidavit.

- 17.** The Appellant also submits that he filed a Preliminary Objection on the said issue which was subsumed in the main suit.
- 18.** The Appellant further submits that a claim for adverse possession cannot be raised through a Counterclaim but should be filed through an Originating Summons with a Certified extract of title of the suit parcel of land annexed. The Appellant relies on **Order 37 Rule 7** of the **Civil Procedure Rules** and the judicial decision of **Titus Mutuku Kasuve versus Mwaani Investments and 4 Others [2004] 1 KLR 184** in support of his submissions.
- 19.** The Appellant relies on the judicial decisions of **Hyde versus Pearce 1982 ALL ER 1029, Samuel Miki Waweru vs Jane Njeri Richu Civil Appeal No. 122 of 2001 (UR), Mbira vs Gichuhi [2002] 1 EALR 137, Ramadhan Wanzala Omoro versus County Government of Kakamega [2020] KEELC 2994 (KLR)**

and submits that a party cannot claim adverse possession on land that he has purchased.

- 20.** The Appellant also submits that the Learned Trial Magistrate made the finding that the Respondents took possession of a portion of his land in the year 1979 after entering into a land sale agreement.
- 21.** The Appellant further submits, therefore, that the Respondents possession of a portion of the suit parcel of land was with his consent.

**Respondents Submissions.**

- 22.** The Respondents submit on the following issues;

***a. Whether the Respondents had locus standi in respect to the Counterclaim.***

***b. Whether the Respondents have been in occupation, use and peaceful possession of the suit parcel of land thereby acquiring***

***the land through adverse possession.***

***c. Costs of the appeal.***

- 23.** The Respondents rely on the judicial decision of **Peter M. Kariuki vs Attorney General [2014] eKLR** and submit that this Court has a duty to examine issues of both fact and law and draw its own conclusion from the evidence that was tendered before the trial Court.
- 24.** On the first issue, the Respondents rely on the judicial decision of **Rugiri vs Kinuthia & 3 Others [2024] KECA 1601 (KLR)** and submit that in the trial Court, the Appellant filed a Notice of Preliminary Objection dated 17<sup>th</sup> July, 2023.
- 25.** The Respondents also submit that in the said Notice of Preliminary Objection, the Appellants contended that they did not have *locus standi*.
- 26.** The Respondents further submit that the Appellant abandoned the said Preliminary Objection and in their own

words state that “it is *horrific*” that he has included the issue raised in the said Preliminary Objection in his grounds of appeal.

- 27.** It is the Respondents submissions that in the Counterclaim, they sought to be declared to have acquired a portion of land parcel No. **Kericho/Kapsimbiri/464 measuring 0.9** acres.
- 28.** It is also the Respondents submissions that they did not state in the Counterclaim, that they were suing as the legal representatives of their deceased father one **Kikwai Arap Kones** and neither did the Appellant aver in the Plaint, that he was suing them as legal representatives of the estate of their deceased father.
- 29.** It is further the Respondents submissions that the Appellant sued them and they had every right to defend themselves and raise any issue in their defence.

- 30.** With regard to the second issue, the Respondents submit that from the evidence tendered before the trial Court, it was evident that the Appellant was the registered owner of the suit parcel of land.
- 31.** The Respondents also submit that it was not disputed that they were in possession of a portion of the suit parcel of land.
- 32.** The Respondents rely on **Sections 7, 13 and 38** of the **Limitation of Actions Act**, the judicial decision of **Mtana Lewa vs Kahindi Ngala Mwangandi [2015] eKLR** and submit that a claim of adverse possession can only arise out of non-permissive possession of land.
- 33.** The Respondents also submit that in the present suit, they took possession of the suit parcel of land after a land sale agreement was executed in the year 1979.

- 34.** The Respondents further submit that they took possession of a portion of the suit parcel of land with the permission of the registered owner.
- 35.** It is the Respondents submissions that adverse possession can arise out of a land sale agreement if nothing subsequent to the sale agreement is in contravention of any law. The Respondents rely on the judicial decision of **Gabriel Mbui vs Mukindia Maranya [1993] eKLR** in support of their submissions.
- 36.** It is also the Respondents submissions that their deceased father paid the entire purchase price of kshs. 6,570/= and their possession became adverse on the date the purchase price was paid in full.
- 37.** It is further the Respondents submissions that upon the lapse of twelve years, a purchaser would be entitled to become the registered owner of land under the doctrine of adverse possession.

- 38.** The Respondents submit that if the purchase price is paid in installments, then time begins to run on the date of payment of the last installment.
- 39.** The Respondents also submit that the Learned Trial Magistrate found that the Respondents bought a portion of the suit parcel of land and were in open, peaceful, continuous and uninterrupted possession of the suit parcel of the land since the year 1979.
- 40.** The Respondents also submit that the Appellant therefore held the title of the suit parcel of land in trust for the Respondents after his title was extinguished upon the lapse of twelve years.
- 41.** The Respondents rely on **Section 38** of the **Limitation of Actions Act**, the judicial decisions of **James Maina Kinya vs Geral Kwendaka [2018] eKLR**, **Mate Gitabi vs Jane Kabubu Muga & Others Civil Appeal No. 43 of 2015**,

**Wambugu vs Njuguna [1983] KLR 173, Thika Garissa Road Developers Limited v Mwangi & 4 others (As duly Elected Officials of Gachagi Land Committee Representing Residents of Gachagi) & 4 others (Sued as the Chairman, Secretary and Vice Chairman respectively of Thika Municipality Block 31 Welfare Group) [2023] KECA 269 (KLR)** and submit that they have been in possession of a portion of the suit property for a period of over forty five years.

- 42.** The Respondents also submit that they have planted tea bushes and trees on a portion of the suit parcel of land which is evidence of possession and/or occupation.
- 43.** The Respondents rely on the judicial decision of **Gatimu Kinguru vs Muya Gathangi [1976] eKLR** and submit that the land they are in occupation of is clearly identifiable and it measures 0.9 acres.

**44.** On the issue of costs, the Respondents rely on the judicial decision of **Rosemary Wairimu Munene Ex-parte Applicant v Ihururu Party Farmers' Cooperative Society J.R. No. 4/2014** and urge the Court to dismiss the appeal with costs.

**ANALYSIS AND DETERMINATION.**

**45.** The issues that arise for determination are as follows;

***a. Whether the Learned Trial Magistrate erred in allowing the Counterclaim and yet the Respondents did not have the locus standi to file it.***

***b. Whether the Learned Trial Magistrate erred in finding that the Respondents acquired a portion of land parcel No. Kericho/Kapsimbiri/464 by way of adverse possession.***

***c. What is the fate of the other grounds of Appeal?***

***d. Who should bear costs of the appeal?***

**A. Whether the Learned Trial Magistrate erred in allowing the Counterclaim and yet the Respondents did not have the *locus standi* to file it.**

**46.** This question for determination addresses Ground (3) of the Appellant's Memorandum of Appeal.

**47.** The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of **Gitobu Imanyara & 2 others Vs Attorney General [2016] eKLR**. It was held as follows;

***"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.”**

(Emphasis mine)

- 48. In Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** the Court held as follows;

**“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”** (Emphasis mine)

- 49.** The Appellant contends that the Learned Trial Magistrate erred in allowing the Respondents Counterclaim and yet they did not have the *locus standi* to sue on behalf of the estate of their deceased father.

- 50.** The Appellant submits that before the trial Court, the Respondents could only defend the suit in their personal capacities.
- 51.** The Appellant also submits that the Respondents did not therefore have the capacity to sue on behalf of the estate of their deceased father.
- 52.** The Appellant further submits that he filed a Preliminary Objection raising this issue, which preliminary objection was subsumed in the main suit.
- 53.** The Respondents on the other hand submit indeed the Appellant filed a Preliminary Objection dated 17<sup>th</sup> July, 2023 where the Appellant raised the issue of *locus standi*.
- 54.** The Respondents also submit that the Appellant abandoned the said preliminary objection only to raise the issue of *locus standi* on appeal.

55. The Respondents nonetheless submit that the Appellant did not sue them as legal representatives of their deceased father and neither did they file the Counterclaim as legal representatives of the estate of their deceased father.
56. The Respondents also submit that since they were sued, they had a right to raise any issue in their defence.
57. The Learned Trial Magistrate at paragraph 3 of page 4 of the judgement observed and held as follows;

***“Plaintiff has also asked if Defendants have Locus standi, but he has forgotten that he is the one who has sued the Defendants in their capacity as Defendants and occupiers of suit property (sic), and not as legal representatives of the estate of their late father. So, that is why they are defending the suit because it is them who have been sued and not them who have sued on behalf of their late father. Therefore, they have a right to defend themselves and raise any***

***issue in their defence because they have been sued in their capacity as the Defendants and or occupiers of the land in issue.”***

**58.** A perusal of the trial Court record shows that the Appellant filed a Preliminary Objection dated 17<sup>th</sup> July, 2023. The Preliminary Objection was on the following grounds;

***a. That the Counter-claim is in violation of Order 2 Rule 1-5 of the Civil Procedure Rules Cap 11 Laws of Kenya.***

***b. That the Defence and Counter-Claim should be dismissed with costs.***

**59.** A further perusal of the trial Court record shows that on 19<sup>th</sup> September, 2023, the matter was mentioned before the Learned Trial Magistrate and Counsel for the Appellant informed the Court that he had filed a Preliminary Objection. Counsel sought that the Preliminary Objection be canvassed by way of written submissions.

- 60.** The Learned Trial Magistrate issued directions that the preliminary objection be canvassed by way of written submissions.
- 61.** On 24<sup>th</sup> October, 2023, the matter was mentioned to confirm filing of submissions when Counsel holding brief for Counsel for the Appellant informed the Court that the Appellant intended to abandon the preliminary objection.
- 62.** The Court then marked the Preliminary Objection as abandoned.
- 63.** From the trial Court's record, it is evident that the Preliminary Objection dated 17<sup>th</sup> July, 2023 was abandoned.
- 64.** It is important to note that the preliminary objection dated 17<sup>th</sup> July, 2023 did not specifically raise the issue of *locus standi* and instead the Appellant contended that the Counterclaim violated **Order 2 Rules 1, 2, 3, 4 and 5** of the Civil Procedure Rules.

**65. Order 2 Rules 1, 2, 3, 4 and 5** of the Civil Procedure Rules generally provides for the nature and form of pleadings.

**66.** It is therefore my finding that the preliminary objection dated 17<sup>th</sup> July, 2023 was not subsumed in the hearing as contended by the Appellant and did not also raise the issue of *locus standi*.

**67.** I will now address the issue of whether the Respondents had the *locus standi* to file the Counterclaim.

**68.** In the judicial decision of **Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)** [2016] KEHC 4186 (KLR) the Court held as follows;

***“...Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi***

**in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction since it all amounts to null and void proceedings.”**

(Emphasis mine)

- 69.** In the Plaint filed before the trial Court, the Appellant averred that he was the registered owner of land parcel No. **Kericho/Kapsimbiri/464.**
- 70.** The Appellant also averred that sometime in the year 2017, the Respondents took possession of several portions of the suit parcel of land without his permission.

- 71.** The Appellant further averred that he issued an **Eviction Notice** dated 8th March, 2023 to the Respondents that required them to vacate the suit parcel of land.
- 72.** It was the Appellant's averment that the Respondents refused to vacate the suit parcel of land and that was why he filed the said suit.
- 73.** Among the prayers sought in the Plaintiff was an order for the Respondents to vacate the suit parcel of land and a permanent injunction be issued against them.
- 74.** In the Statement of Defence, the Respondents stated that their deceased father purchased a portion of land parcel No. Kericho/Kapsimbiri/464 measuring 1.5 acres in the year 1979 from the Appellant.
- 75.** The Respondents also stated that they took possession of the suit parcel of land in the year 1979 with permission of the Appellant.

- 76.** The Respondents then denied the averments in the Plaint.
- 77.** In the Counterclaim, the Respondents sought a declaration that they have acquired a portion of land parcel No. **Kericho/Kapsimbiri/464** by way of adverse possession.
- 78.** It is evident that the defence of adverse possession was mounted by the Respondents in their personal capacity. The declaratory orders sought by them in the counterclaim arise from the defence of adverse possession.
- 79.** The Respondents also sought, among other orders, that they be registered as the proprietors of the said portion of the suit parcel of land and the legal representative of the estate of **Kikwai Arap Kones** or the Executive Officer of the Court, be authorized to sign the requisite documents to facilitate the registration.
- 80.** From the foregoing, it is evident that it is only at the point of listing prayers sought that the Respondents ask that the

legal representative of the estate of **Kikwai Arap Kones** (them) be allowed to execute the requisite documents to facilitate registration.

**81.** It is therefore my finding that the Learned Trial Magistrate made no mistake in determining the counterclaim and also find that it was not necessary for the Respondents to obtain letters of administration before mounting the defence of adverse possession as they did so in their personal capacities; the same capacity in which they were sued.

**82.** This ground of appeal therefore fails.

**B. Whether the Learned Trial Magistrate erred in finding that the Respondents acquired a portion of land parcel No. Kericho/Kapsimbiri/464 by way of adverse possession.**

- 83.** This question for determination addresses ground (4) of the Memorandum of Appeal.
- 84.** The Appellant contends that the Learned Trial Magistrate erred in finding that the Respondents proved their claim for adverse possession and yet they had not produced an extract of title of the suit parcel of land.
- 85.** The Appellant submits that the Learned Trial Magistrate made the finding that the Respondents took possession of a portion of his land in the year 1979 after entering into a land sale agreement.
- 86.** The Appellant also submits that the Respondents possession of a portion of the suit parcel of land was therefore with his consent and they could not claim to have acquired the said portion by way of adverse possession.
- 87.** The Respondents on the other hand submit that they took possession of a portion of the suit parcel of land in the year

1979 after their father purchased the said portion from the Appellant.

- 88.** The Respondents also submit that their deceased father paid the full purchase price and that time, for purposes of adverse possession, begun to run from the date of payment of the purchase price.
- 89.** The Respondents further submit that a party can seek orders of adverse possession after purchase of land if *“nothing subsequent to the sale agreement is in contravention of any law or equity.”*
- 90.** The Learned Trial Magistrate at paragraphs 4 & 5 of page 5 of the judgement and paragraphs 1, 2, 3 & 4 of page 6 of the judgement observed and found as follows:

***“Like in this instant case, Defendants claim that their father bought the land from the Plaintiff in the year 1979 when they were still young, and they occupied the land from that time for their father***

***entered the land immediately and started farming on it by growing tea. Even when he passed on, they continued farming on it openly and uninterrupted, until 2023 March when Plaintiff wrote them a letter demanding them to vacate the land. Plaintiff in his evidence has not been able to rebut that fact that he had sold the land and that it has been in occupation by the buyer's side, and he admits during cross examination that he indeed sold that portion to the late father of the Defendants (1st and 2nd Defendants). But he claims that the Defendants have no contract with him so they are strangers they should leave his land. (sic) He also claims that their father did not clear the purchase price balance. He also claimed that Defendants entered the land in the year 2017, but though the Court doubts, he wrote them a letter to vacate in March 2023, five years down the line. (sic)***

***After considering all that, I cannot hesitate but to find that Plaintiff is not being sincere. Since 1979 to 2023 if the purchase price balance was not cleared would he have waited for the purchaser to live on the land peacefully for more than 30 years and raise issues many years after his death? The answer is a big NO. That makes the Court agree with the Defendants that their father paid the purchase price in full. That is the only reason why he occupied the land peacefully by farming on it with his family the 1st and 2nd Defendants included without any disruption.***

***The Defendants have then proved that they have been in occupation of the land peacefully and openly from year 1979 with their father and even after the demise of their father they continued doing so. They have therefore proved all the ingredients of adverse possession.***

***Section 7 of the Law of Limitation of actions Act provides that, “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”***

***The Plaintiff having left the Defendants to occupy the land in issue for all those years more than 40 years or more than 17 years after the demise of their father whom they say that died in the year 2004, he is stopped by the section 7 of the limitation of actions Act from raising his claim to recover that portion of land after all those years (sic).”***

- 91.** Before further addressing this issue, it is not only prudent but also imperative for me to address the issue of whether the Learned Trial Magistrate had jurisdiction to determine the question of adverse possession and make a declaration on it.

**92.** It is important to note that none of the parties herein have raised and/or addressed the said issue of jurisdiction on the part of the Trial Court.

**93.** The Supreme Court in **Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR** held as follows;

**“[40] A jurisdictional issue is fundamental and can even be raised by the Court suo motu as was persuasively and aptly stated by Odunga J in Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 stated thus:**

**“25. What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...”**

**Consequently, while the parties have not given the jurisdiction issue the much premium that it deserves, upon evaluation of the matter before us, it is our considered opinion that the issue of jurisdiction of this Court to hear and determine this appeal warrants settlement upfront.”**

(Emphasis mine)

- 94.** As was held by the Supreme Court in **Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others (supra)** cited above, the Court can consider the issue of jurisdiction *suo motu* and I hereby do.

95. The Court of Appeal in **Jamal Salim v Yusuf Abdulahi**

**Abdi & another [2018] KECA 14 (KLR)** held as follows;

***“17. Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;***

***“1) ...***

***2) The jurisdiction either exists or does not ab initio ...***

***3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.***

***4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.”***

***18. It follows that even where a party initially admits to***

*jurisdiction, as in this case, the same does not clothe a Court with jurisdiction it did not have to begin with. Similarly, an objection to jurisdiction can be raised at any stage. Nonetheless, such an objection ideally should be raised at the earliest opportunity.*

*19. Therefore, did the trial Court have jurisdiction to entertain the respondents' claim?..."* (Emphasis mine)

96. The Court of Appeal in **Jamal Salim v Yusuf Abdulahi Abdi & another (supra)** cited the judicial decision of **Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577** where the Court of Appeal held that jurisdiction is such an important issue that it can be raised at any stage of the proceedings even on appeal.

97. In answer to the question whether the Learned Trial Magistrate had jurisdiction to determine the question of adverse possession and make any declaration on it, I am

guided by the decision of the Court of Appeal 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 [2024] KECA 1417 (KLR)** where it was held as follows;

**“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 v 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."**

(Emphasis mine)

- 98.** In the above cited judicial decision, the Court of Appeal held that the Magistrate's Courts do not have jurisdiction to hear and determine claims of adverse possession.
- 99.** Consequently, I find that the Learned Trial Magistrate did not have jurisdiction to determine the Respondents claim of adverse possession.

**C. What is the fate of the other grounds of Appeal?**

- 100.** Before penning off, it is important to note that none of the parties herein have submitted on grounds 1, 2, 5, 6, 7, 8 and 9 of the Memorandum of Appeal.

**101.** The said grounds have been set out in the preceding paragraphs but I will nonetheless replicate them as hereunder;

***1. That the Learned Trial Magistrate erred in law and in fact by disregarding the Appellant's certificate of title despite the fact that it stood uncontroverted.***

***2. That the Learned Trial Magistrate erred in law and in fact by holding that the Appellant sold land to the Respondents herein without satisfying herself that the conditions for a contract for disposition of an interest in land had been met.***

***5. That the Learned Trial Magistrate erred in law and in fact in totally disregarding the Appellant's evidence thus arriving at a wrong decision.***

***6. That the Learned Trial Magistrate erred in law and in fact by failing to***

***address the issues raised by the Appellant in his submissions 22nd of October 2024. (sic)***

***7. That the Learned Trial Magistrate erred in law and in fact by relying on the Respondents' unsupported testimonies and averments thus arrived at an erroneous decision not supported by law or facts.***

***8. That the Learned Magistrate erred in fact and law and in fact (sic) in failing to consider the submissions of the Appellant's counsel together with the case law in support.***

***9. That the decision of the Learned Trial Magistrate as a whole as contained (sic) in the Ruling (sic) dated 28th January 2025 is legally untenable, against the weight of evidence and ought to be set aside in its entirety.***

**102.**In **Khetshi Dharamshi & Company Ltd v Obuyumbi (Appeal 10 of 2023) [2023] KEELRC 2664 (KLR) (30 October 2023) (Judgment)** the Court held as follows;

***“4.To answer the 1<sup>st</sup> issue, the Court returns (sic) that the Appellant has made no submissions on the issue of want of jurisdiction by the trial Court per Grounds 1 and 2 of appeal and as submitted for the Respondent, the Appellant is deemed to have abandoned the two grounds. The Court returns that the two grounds stand abandoned accordingly.”***

**103.**In the judicial decision of **Kamonde v Mulonzya & another (As Administrators of the Estate of Paul Vinzi - Deceased) (Civil Case E213 of 2022) [2024] KEHC 5648 (KLR) (9 May 2024) (Judgment)** the Court held as follows;

***“There was no submission on other grounds of Appeal hence they are deemed abandoned.”***

**104.** Similarly, I shall deem grounds **1, 2, 5, 6, 7, 8** and **9** of the Memorandum of Appeal abandoned since the Appellant did not submit on them.

**D. Who should bear costs of the appeal?**

**105.** The general rule is that costs shall follow the event. This is in accordance with the provisions of **Section 27** of the **Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

**106.** In the judicial decision of **Kimingi & another v Onuko [2025] KEHC 6268 (KLR)**, the Court held that since it, on appeal, raised the jurisdictional question *suo motu*, each party was to bear own costs of the appeal.

**107.** Similarly, in the appeal under consideration, the Court has raised and determined the question of jurisdiction *suo motu* and therefore each party shall bear own costs of the appeal.

**DISPOSITION.**

**108.** In the result, I find that the Learned Trial Magistrate lacked

jurisdiction to hear and determine the question of adverse possession.

**109.** Consequently, I orders as follows:

***a. The judgement delivered in Bomet CM ELC Case No. E010 of 2023 is hereby set aside.***

***b. Each party shall bear own costs of the appeal.***

**110.** It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO  
THIS 5<sup>TH</sup> DAY OF MARCH, 2026.**

**L. A. OMOLLO  
JUDGE.**

**In the presence of: -**

**Mr. Nandi for the Appellant.**

**Miss Chirchir for the Respondents.**

**Court Assistant; Mr. Joseph Makori.**

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