

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCA NO. 13 OF 2022

JOSEPH MOSWAGI MABEYA ..... 1<sup>ST</sup> APPELLANT

ALFRED GICHANA MABEYA ..... 2<sup>ND</sup> APPELLANT

(Suing as Legal Representatives of the Estate of the late Asita Mabeya Mogaka)

VERSUS

JOHN KEENE GICHANA ..... RESPONDENT

JUDGMENT

*(Being an appeal against the ruling of Hon. P.K Mutai, Senior Resident Magistrate, delivered on 30 May 2022 in the suit Kisii MCELC No. 31 of 2021)*

1. Through a plaint filed on 10 March 2021, the appellants herein sued the respondent inter alia seeking his eviction from the land parcel West Kitutu/Mwakibagendi/1099 (the suit land) and for an order of permanent injunction to restrain him from the said land. The respondent filed his appearance on 8 April 2021 and filed defence on 7 May 2021. He justified his stay on the suit land and also pleaded that he has filed a case for adverse possession before the superior Environment and Land Court at Kisii, though he did not provide the particulars thereof. The suit filed by the respondent was the suit Kisii ELCOS No. E005 of 2021 commenced vide an Originating Summons filed on 29 April 2021.
2. On 11 May 2022, the suit before the lower court came up for hearing before Hon. P.K Mutai, Senior Resident Magistrate, with Mr. Soire, learned counsel, being present for the plaintiffs (appellants herein) and Mr. Momanyi Aunga, learned counsel, being present for the defendant (respondent herein). Mr. Soire stated that he was ready for hearing. Mr. Momanyi on his part submitted that the suit was related to Kisii ELCOS No. E005 of 2021 and submitted that the Originating Summons should be heard first. Mr. Soire on his part submitted that he does not know the basis of that application though he conceded that the land and the parties were the same (in both cases). The court directed that it would deliver a ruling on 30 May 2022. On that day, the court pronounced itself as follows :

*“Clearly, the two cases are the same. It involves same parties and same subject matters (sic). The originating summons is before High Court. The plaint was filed in lower court. The most natural thing to do is to allow High Court deal with the matter, taking into account hierarchy of court. This suit is struck out with no orders as to costs.”*

3. Aggrieved by the striking out of their suit, the appellants have now preferred an appeal on the following grounds (slightly paraphrased for brevity) :
  - i. *That the trial Magistrate erred in striking out the suit which relief was not sought by the respondent in his application before the court.*
  - ii. *That the trial Magistrate misdirected himself in not considering that the reliefs sought in the suit were different from the ones in the Originating Summons.*
  - iii. *That the trial Magistrate decided the issue unprocedurally without according the appellants an opportunity to be heard on the issue before making the ruling.*
4. The appellants seek that their suit be reinstated for hearing and disposal, and the respondent be condemned to pay the costs of the appeal.
5. The appeal was argued through written submissions and I have taken note of the submissions filed by Mr. Soire, learned counsel for the appellants, and Mr. Momanyi, learned counsel for the respondent. I will be fairly brief in my disposition because to me the issues are very clear.
6. I will start by reiterating that this suit was filed on 10 March 2021 and the appellants wished to have the respondent evicted from the suit land. It would appear that it is after he was served with the plaint that the respondent proceeded to file the suit for adverse possession before the superior Environment and Land Court. The Originating Summons before the superior court was filed on 29 April 2021. Thus, it is apparent that it is the suit before the lower court that was filed first in time which has a significant bearing. Of course, these two suits sought diametrically opposite orders. It follows that if the suit for adverse possession was to succeed, the suit before the lower court could not ; the appellants could not proceed with the prayer for eviction before the lower court because it would have been declared that the respondent was owner through adverse possession. However, if the suit before the superior court failed, then the suit before the lower court could very well proceed.

7. In those circumstances, what the lower court ought to have done was either to direct the parties to apply to have the suit before the lower court transferred to the superior court so that the two suits are heard together, or stay the suit in the lower court, to await the decision of the superior court on the case for adverse possession.
8. It was wrong for the trial Magistrate to dismiss the suit for two reasons. One is that it was filed first in time. Secondly, there was possibility of the Originating Summons failing, in which event the appellants would have been fully entitled to pursue their case for eviction. In fact, the Originating Summons actually failed, for it was dismissed vide a judgment of this court delivered on 26 September 2024.
9. The other ground is that the trial Magistrate did not give counsel an opportunity to be heard. I agree. If the Magistrate thought that the issue was going to dispose of the matter, the prudent path to have taken would have been to invite the parties to submit on whether or not the suit should be struck out. Maybe if he had given opportunity to the parties to address him on the issue, he would have seen that this was not a suit for striking out, but rather, a suit for staying pending the outcome of the case before the superior court.
10. For the above reasons I find merit in this appeal and it is hereby allowed with costs.
11. The suit Kisii MCELC No. 31 of 2021 is reinstated for hearing and disposal.
12. Judgment accordingly.

DATED AND DELIVERED THIS 10 DAY OF MARCH 2026

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

KISII

Delivered in the presence of :

Mr. Soire for the appellants

N/A on part of Mr. Momanyi Aunga for the respondent

Court Assistant – Michael Oyuko