

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ELC L. APPEAL CASE NO. E026 OF 2024

ISAIAH OUMA OTIENO.....
APPELLANT

VERSUS

RICHARD OKETCH
OLOO.....RESPONDENT

JUDGEMENT

1 Aggrieved by the judgement of Hon by Hon. L.A. Simiyu (SPM) in Siaya MCELC Cause No. E026 of 2022 delivered on 31st July 2024 the Appellant Isaiah Ouma Otieno has filed this appeal against the whole of the said judgement on 8 grounds of appeal and seeks the following orders; -

- 1) That the judgement and decree of the trial court be set aside and be substituted with an order allowing the Appellant suit and dismissing the Respondents Counterclaim.
- 2) In the alternative the judgement and decree of the trial court be set aside and or be substituted and or varied with orders appropriate to the circumstances of this Appeal.
- 3) The costs of the Appeal be awarded to the Appellant
- 4) Any other or further orders that the Honourable court may deem fit and just to grant.

2 The grounds of appeal are outlined in the Amended Memorandum of Appeal dated 30th January 2025; -

- 1) THAT the learned trial Magistrate erred in law and fact by entertaining the Counterclaim by the Respondent as relates to adverse possession and thereafter granting a declaration of adverse possession in relation to the Appellants Property Title No. Siaya/Masumbi/544 in the absence of jurisdiction contrary to section 38 of the Limitation of Actions Act.
- 2) THAT the learned trial Magistrate erred in law and fact by finding that all essential ingredients of adverse possession had been met by the Respondent
- 3) THAT the learned trial Magistrate erred in law and fact by disregarding evidence pointing to express or implied consent by the previous owner of Property Title No. Siaya/Masumbi/544 in favour of the Respondent, and of the Appellant's acquiesces to the said consent up to the point of transmission, thereby failing to discount the period between the date of the previous owner's demise to the point of transmission, whilst calculating the requisite period for adverse possession and/or consequently arriving at an erroneous finding that the Respondent's possession of the unspecified portion was non-permissive or non-consensual.
- 4) THAT the learned trial Magistrate erred in law and fact by failing to find that the Respondent's right to

claim for, or cause of action in, adverse possession, if any, became caught up by limitation in accordance with the Limitation of Acts Act.

5) THAT the learned trial Magistrate erred in law by interpreting and/or applying the Limitation of Actions Act, No. 21 of 1968 in a manner that was inconsistent with article 20 of the Constitution of Kenya, 2010 in the following respects:

- I. To the extent that the trial Magistrate interpretation of the Limitation of Actions Act resulted to extinction of a portion of the Appellants title in the suit land, the judgement failed to develop the law in order for it to give effect to the Appellants right to property under article 40 of the Constitution of Kenya 2010
- II. To the extent that the trial Magistrate adopted an interpretation that denied the Appellant the right and benefit of a defence of limitation, under either section 4((1) (e) or section 7 of the Limitation of Actions Act the judgement failed to adopt an interpretation that most favors the enforcement of a right under the Bill of Rights
- III. To the extent that the judgement adopted an interpretation that denied the Appellant the right to a defence of limitation under either section 4((1) (e) or section 7 of the Limitation of Actions Act the trial Magistrate failed to promote equality in application of the law contrary to article 27 of the Constitution of Kenya, 2010.

- 5 THAT the learned Magistrates judgement resulted to breach of the Appellants right to equality before the law under article 27 of the Constitution of Kenya 2010 by availing the Respondents rights based on section 7 of the Limitation of Actions Act while simultaneously denying the Appellant the benefit of Defence of a similar limitation arising therefrom
- 6 THAT the learned trial Magistrate erred in law and acted beyond Jurisdiction by applying structural interdicts to fill gaps in the respondent's case by directing an office devoid of the necessary legal mandate namely the Area chief to ascertain the portion of the suit property occupied by the Respondent for purposes of subdivision.
- 7 THAT the learned trial Magistrate erred in law and fact by entering judgement that was devoid of certainty, on unpleaded issues namely by finding that the respondent was entitled by adverse possession to an unspecified portion of the suit land.
- 8 THAT the learned trial Magistrate erred in law and in fact by disregarding evidence impugning the validity, propriety sanctity and accuracy of the alleged agreement for sale dated 20th December 1993 thereby erroneously finding that there was a proper Agreement for Sale of property title No. Siaya/Masumbi/544 that was only voided by want of a Land Control Board Consent.

SUBMISSIONS

- 9 Upon admission of the Appeal I directed that the Appeal proceeds by way of written submissions the party's filed submissions which are summarized as follows; -

APPELLANTS SUBMISSIONS

- 10 Appellants submissions are dated 22/6/2025 and 18th October 2025 in further response to the Respondents submissions on new issues of law.

- 11 The Appellant condensed the grounds of appeal herein into 4 issues summarized as follows

Whether the Magistrates' courts are clothed with jurisdiction to try a claim for adverse possession (ground-1A).

- 12 It is submitted that Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal. The rationale is that a decision by a court or tribunal without jurisdiction is a nullity and of no legal effect.

- 13 That it has always been the position under section 38 of the Limitation of Actions Act that a claim to adverse possession is a preserve of the High Court (now replaced by the Environment and Land Court).

- 14 That a counterclaim is a case in its own right, completely different from the plaintiff's case and it will fall or succeed on its own merits and it matters not that it is brought within a claim in which the court would be seized of jurisdiction.

- 15 To buttress the foregoing reliance was placed upon the cases of *Kibona vs. Tanscan Timber Co. Ltd Mbeya HCCC No. 8 of 1999 [1995-1998] 1 EA 121* (quoted by Odunga J in *Michael Muuthoka Makau (Suing as Personal Representative of the Estate of Ernest Daudi (Deceased) vs. Simon Nganga Mbugua, Stephen Ndirangu & Kevin Njoroge; Monarch Insurance Company Ltd (Interested Party) (Civil Suit 5 of 2015) [2018] KEHC 2003 (KLR)* to buttress the foregoing position.
- 16 The court is urged to find that the trial court erred in accepting jurisdiction to entertain the Counterclaim by the Respondent to the extent that the same was founded on adverse possession. Reliance is placed on the decision of the Court of Appeal in **Pauline Chemuge Sugawara v Nairuko Ene Mutarakwa Kiruti (Sued in her capacity as the administrator of the estate of Mutarakwa Kirui Lepas alias Mutaragwa Kiruti Lepas alias Mutarakwa Kiroti Lepas Civil Appeal E141 of 2022 (20240 KECA 1417 (KLR))**

Whether the Respondent's right to claim for, or cause of action in, adverse possession, if any, became caught up by limitation in accordance with the Limitation of Acts (grounds 3, 4 and 5).

- 17 It has been submitted that just like any other cause of action, adverse possession ought to equally be subjected to the laws of limitation. That once a party becomes

entitled to bring an action in adverse possession, that party must be understood to have 6 years under section 4 (1) (e) of the Limitation of Actions Act to lodge his claim failure to which the same ought to similarly be caught up by limitation.

- 18 That the Honourable Magistrate having found that the agreement for sale had become void after six (6) months from 20/12/1993, that is to say on 20/06/1994, she ought to have proceeded to find that under section 4 (1) (e) of the Limitation of Actions Act, the Respondent had up to six (6) years to bring a claim for adverse possession, that is up to 20/12/2000.
- 19 It is contended that whereas adverse possession has been held not to amount to an arbitrary contravention of the right to property, the courts ought to proscribe adverse possession by imposing similar limits as those imposed upon the registered proprietor, namely, by subjecting the right to apply for registration on account of adverse possession to limitation period.
- 20 That it would be inequitable application of the law and contrary to article 27 of the constitution for the Respondent to wait for a whopping 38 years before purporting to bring a suit for adverse possession, and in fact only after the Appellant sought to injunct him.

Whether the trial Court had jurisdiction to apply structural interdicts to fill gaps in the Respondent's case (grounds 6 and 7).

21 Rehashing the final orders of the trial court counsel submitted that the Respondent's case did not involve any alleged violation of rights that would call for involvement of state actors, or the court's supervision, and that in any event, no special circumstances were laid before the court as to warrant issuance of structural interdicts as the court did. It was urged that the judgment went beyond the court's jurisdiction to the that extent that it called upon third parties to ascertain the Respondent's claim and to supervise the enforcement of its orders.

Whether all the essential ingredients of adverse possession had been met by the Respondent (grounds 1, 2 and 8)

22 It is emphasized the moment a claimant opens his lips to state that he purchased the land, or a portion of it, from the registered owner, the element of non-permissive or non-consensual use is lost and he can no longer sustain an action based on adverse possession. That even in the absence of the alleged Agreement for sale, the Respondent's occupation of the land was always consensual.

RESPONDENTS SUBMISSIONS

23 The Respondents submissions are dated 10th August 2025 and identified the following issues/questions for determination:

Whether the Appellant discharged the burden of proof to the required standard at the trial court?

- 24 It is submitted the Appellant has failed to meet the threshold set out in **sections 107, 108, 109, and 112** of the Evidence Act requiring him to prove existence of facts through evidence. That the Appellant based his claim on trespass following an alleged gifting of the land to his father that he subsequently passed down to himself through succession in 2020. That the Appellant failed to adduce sufficient evidence to demonstrate that indeed his father was gifted the Suit Property as alleged. That Appellant's father had no rights over the suit property that was capable of being trickled down to the Appellant through succession. The title, therefore, as held by the Appellant is held in trust for the Respondent. That the Appellant failed to prove his uninterrupted possession and occupation of the Suit Property as the evidence on record shows that it is the Respondent and his family that has had possession and occupation of the Suit Property since 1993 to date.
- 25 That the Respondent cannot be said to be a trespasser on Land, which he has had exclusive possession and occupation for over 30 years now uninterrupted and moreover there are documents to support his purchase.

Whether the Respondent purchased the suit property?

26 It is submitted that the Respondent proved his purchase of the suit property. That the purchase by the Respondent was not a private affair, as it was something that was known within the clan. The only lapse, which the Respondent has accounted for, was that the transfer was not effected immediately. Nonetheless he took vacant possession immediately after the purchase. It was clear that before 1993, the Respondent never utilized the suit property but began utilizing it after the 1993 purchase. It is also in 1993 that he began planting trees on the suit property.

Whether the Respondent acquired constructive and resultant rights over the Suit Property through the doctrine of adverse possession?

27 It is submitted that the Respondent acquired constructive and resultant rights over the Suit Property through the doctrine of Adverse Possession as the Respondent and his family members have been in quiet possession of the Suit Property *nec vi, nec clam and nec precario* (no force, no secrecy and no permission). That it was questionable that the appellant waited until 28 years later to assert that claim and never took possession of the suit property as the Respondent did. All witnesses including the chief and the assistant chief testified that it is the Respondent that has had actual possession, utilization, and occupation of the suit property since 1993.

28 Further that as at 1997, the Respondent and his mother wanted the Respondent out of the suit property but the

Respondent refused; this cannot be interpreted to imply that they gave permission for the continued occupation by the Respondent. The conduct of the Respondent of refusing to vacate the suit property even after their alleged fight would amount to dispossession. That is, the Respondent technically dispossessed the Appellant of the suit property – reliance is placed on the case of **Thomas Muka Maulo & Ano Vs Robert Ouma Oduor (2021) eKLR**

29 It is contended that the late Oluoko transferred permanent rights to the buyer who is the Respondent. The Respondent, therefore, occupied the suit property as of right and not permission. It was the Respondent that was capable of granting permission over the suit property and not the Appellant. Moreover, the Appellant was about 10 years old when the Respondent took occupation of the suit property and had no capacity to grant permission to the Respondent to take occupation of the suit property.

whether the trial magistrate had jurisdiction to hear and determine a claim of adverse possession?

30 It is submitted at the time the judgment in the case of Pauline Sugawara (supra) was delivered on **31st July 2024**, the law as pronounced in binding and persuasive decisions of the Environment and Land Court affirmed that magistrates' courts, duly gazetted and within

pecuniary jurisdiction, had jurisdiction to entertain adverse possession claims. The court is referred to the **Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi [2020] eKLR ; Philip Kithaka v Mercy Karimi Nyaga [2021] eKLR (L.N. Mbugua J); and Christopher Kangogo Cheboiboch v Susan Chepichi Chepkiyeng [2021] eKLR**

31 It is also submitted that the law does not apply retrospectively. That the courts in civil and land matters have applied article 50 (2)(n) of the Constitution by extension to avoid injustice. Reliance is placed on the case **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR.**

32 It is urged that Courts must uphold certainty and stability in judicial processes. If judgments validly rendered under the law at the time are retrospectively overturned due to subsequent jurisprudence, it would create chaos and unpredictability in the justice system. The court is referred to the Court of Appeal holding in **Benjoh Amalgamated Ltd & Another v Kenya Commercial Bank Ltd [2014] eKLR**

33 Counsel proceeded to additionally submit on the grounds 2, 3, 4&5, 6, 7&8, 9 of the amended Memorandum appeal as follows.

34 It is contended that the Appellant who only acquired title in 2020 found the Respondent already in exclusive possession and that a successor in title takes land subject to overriding interest including adverse possession. Reliance

was placed on the case of **Kweyu Vs. Omuto (1990-1994)EA 234.**

35 That the claim of implied consent is unsustainable. The Respondent had had been in possession for over 30 years and the applicant never took steps to recover possession.

36 It is urged that Counsel misunderstood the Limitation of Actions Act since the limitation is meant to protect the interests and rights of the person in active possession and who is the Respondent.

37 Counsel added that both parties were subjected to the same law. The respondents rights matured under section 7 while the Appellants rights lapsed under the same provision. This is not discrimination.

38 The trial court was within its discretion to direct the chief to assist in identifying the exact portion and being an administrative step to facilitate execution not a re-litigation of issues.

39 Citing the holding in **Public Trustee Vs. Wanduru Ndegwa (1984) KLR 314** it is posited that a purchaser in possession under a void transaction can rely on adverse possession exceeds 12 years.

40 The court is invited to dismiss the appeal in its entirety and uphold the judgement of the trial court and award costs of the appeal to the Respondent.

41 The Appellant responded further on new issues of law raised by the Respondents.

ISSUES FOR DETERMINATION

42 Having analyzed the Record of Appeal, Submissions and considered the law the court frames the following issues for determination.

1) Whether the trial court was seized of jurisdiction to entertain a claim for adverse possession.

2) If the answer to 1) above is yes

a) Whether the Plaintiff claim met the requirements for adverse possession

b) Whether the Court Respondent's right to claim for, or cause of action in, adverse possession, if any, became caught up by limitation in accordance with the Limitation of Acts

3) What reliefs ought to issue

4) Who bears the costs of the Appeal?

Grounds 2) and 3) are hinged upon the outcome of issue No.1.

ANALYSIS AND DETERMINATION

43 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)**.

44 The first ground of appeal questions the trial Court Jurisdiction to hear and entertain the counterclaim whose basis was adverse possession. 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)**.

45 The issue of the jurisdiction of the Magistrates court was not an issue during the proceedings at the trial court. None of the parties raised it. Has it therefore been properly raised at the point of this appeal? I raise this issue because the same has been termed by Counsel on record for the Respondent as being belated and improperly raised

46 It is trite that jurisdiction is everything and without which a court cannot move a single step. Moreover, any decision arrived at in the absence of jurisdiction would be irregular null and void. Therefore, an issue touching on jurisdiction of a court may be raised at any stage of the proceedings including at appeal to prevent invalid judgements.

47 The Court Appeal in the case of **Kenya Ports Authority Vs Modern Holdings Ltd (EA) Limited (2017) KECA 293 KLR** stated thus; -

This Court in Adero & Another V Ulinzi Sacco Society Limited [2002] 1 KLR 577, quite sufficiently summarised the law on jurisdiction as follows;

“1.....

2. The jurisdiction either exists or does not ab initio and the non-constitution of the forum created by statute to adjudicate on specified disputes could not of itself have

the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.

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.

5. Where a cause is filed in court without jurisdiction, there is no power on that court to transfer it to a court of competent jurisdiction.

6.

7." (Our emphasis).

We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised: "...at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself - provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard."

48 I have read the Court of Appeal decision in **Pauline Chemuge Sugawara (supra)** indeed the court discussed various decisions of the Environment and Land Court on

the Jurisdiction of the Magistrates Court to hear claims of adverse possession. The decisions included those in support of the proposition that the Magistrates Court is vested with Jurisdiction and decisions 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.

49 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.

50 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.’

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

52 The Defendants Amended Statement of Defence & Counterclaim, raises interalia the following prayers

- 1) A declaration that the suit parcel of land has been acquired by the counterclaimant through adverse possession.
- 2) A declaration that whatever rights the defendant had on the portion of land parcel known as SIAYA/MASUMBI/544 currently under the utility of the counterclaimant through adverse has since extinguished with passage of time.
- 3) The name of the defendant in the counterclaimant be deleted from the register and replaced with the name of the counterclaimant one RICHARD OKETCH OLOO as he claims adverse possession.
- 4) A permanent injunction does issue restraining the defendant in the counterclaim, his agents, servants, employees, and/or anybody whatsoever and however acting under him from entering, disposing, charging, trespassing or in any way interfering with the counterclaimant 's parcel of land namely SIAYA/MASUMBI/544

53 The trial court therefore allowed the claim which there is no doubt was based on the plea of adverse possession.

54 But I think of importance in relation to this appeal is the implication of the Court of Appeal decision on cases that were filed, 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 and judgement delivered the Magistrates Court was seized of jurisdiction. That the Court of Appeal decision cannot apply retrospectively. In the present proceedings the trial court decision was delivered on 31/07/2024 while the Court of Appeal rendered its decision on 11th October 2024.

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

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

56 My hands are tied by the decision of the Court of Appeal and I cannot depart from it. It is the finding of this court that the trial Magistrate having lacked jurisdiction to entertain a claim of adverse possession the entire proceedings were a nullity.

57 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.

58 On costs the same is discretionary and I think based on the unique 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. In this regard the court is guided by the Supreme Court decision in **Jasbir Singh Rai & 3 other v Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012 [2014] eKLR**

59 The appeal therefore succeeds on the ground that the trial court lacked jurisdiction to hear and determine a claim based on adverse possession and thereafter granting a declaration of adverse possession in relation to the Appellants Property Title No. Siaya/Masumbi/544. Each Party shall bear their own costs of the Appeal as well as costs in the trial court.

Orders accordingly.

DATED at SIAYA this 14th Day of April 2026

HON. JUSTICE A. E. DENA

JUDGE

14/04/2026

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

Mr. B. Otieno for the Appellant

Mr. Osala for the Respondent

Court assistant: Doroth Awuor

ORIGINAL