



**Derry alias Margaret Atieno Kasyoki v Lwango (Civil Appeal  
E221 of 2022) [2025] KECA 339 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 339 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL E221 OF 2022  
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA  
FEBRUARY 21, 2025**

**BETWEEN**

**MARGARET ATIENO DERRY ALIAS MARGARET ATIENO  
KASYOKI ..... APPELLANT**

**AND**

**TOBIAS OCHIENG LWANGO ..... RESPONDENT**

*(Being an appeal from the judgment decree of the Environment and Land Court of  
Kenya at Kisumu (Ombwayo, J.) dated 13th May, 2022 in ELC Appeal No. 7 of 2020)*

**JUDGMENT**

1. Vide a further amended plaint dated 26<sup>th</sup> April, 2019, the appellant instituted a suit against the respondent and his mother, Angeso Odito Lwango (now deceased), before the Principal Magistrate's Court at Winam. The appellant alleged that she was the registered proprietor of land parcel Kisumu/Pandpieri/1833, located within Kisumu County (hereinafter "suit land"). That sometime in 2018, she discovered that the respondent had without her consent and authority trespassed upon the suit land, and erected thereon homes and other structures. The appellant averred that she had suffered immense losses as a result of the trespass, including loss of user and damages. That despite several demands, the respondent had failed to vacate the suit land.
2. The appellant prayed for orders of eviction against the respondent; directing the respondent to demolish illegal structures erected on the land; of permanent injunction restraining the respondent from interfering in any way with the suit land; directing the respondent to exhume the body of John Omungi Lwango (deceased) buried on the suit land; general damages for trespass; and costs of the suit.
3. In response, the respondent filed an amended statement of defence and counterclaim dated 31<sup>st</sup> May, 2019. The respondent averred that his family had resided on the suit land since before he was born in 1996, and denied the claims of trespass alleged by the appellant in the amended plaint. In the



counterclaim, the respondent urged that the suit land formed part of a larger parcel of land which was ancestral land, originally owned by his grandfather who is now deceased. That the suit land was allocated to his family by his grandfather, and that they have resided on it ever since. The respondent urged that the suit land was registered in the name of their uncle, Patrick Okunga Odundo, to hold in trust for them. That the subsequent transfer of the suit land from Patrick Okunga Odundo, to one Benson Were Siandha, and finally to the appellant was illegal and fraudulent.

4. The respondent therefore prayed for orders cancelling the first and second entries in the land registry as relates to the suit land entered on 22<sup>nd</sup> February 1993; a declaration that the suit land belonged to the respondent's family; and in the alternative, a declaration that title to the suit land had been obtained by the respondent's family by virtue of the doctrine of adverse possession, and that the appellant held the suit land in trust for the respondent's family; and finally, he prayed to be awarded cost of the suit and counterclaim.
5. The appellant filed a reply and defence to the respondent's amended defence and counterclaim dated 1<sup>st</sup> July, 2019. She denied the averments made by the respondent and reiterated the averments made in her amended plaint. She averred that the respondent and his family took possession of the suit land sometime in 2017 and not earlier as alleged. She denied the allegations of fraud particularized by the respondent and maintained that she was the lawful registered owner of the suit land.
6. The case was heard by way of viva voce evidence. The appellant (PW1) told the court that she purchased the suit land from one Benson Were Siandha in 1993, for the sum of Kshs. 35,000/= and that she was registered as the owner on 22<sup>nd</sup> February, 1993. She stated that the suit land was vacant at the time of purchase. It was her evidence that the respondent and his family illegally trespassed into the suit land sometime in 2017. She wrote to them on 20<sup>th</sup> June, 2018, demanding they vacate the suit land. She averred that respondent and his family however refused to vacate the suit land, which prompted her to file the suit before the trial court.
7. PW2, Nashon Okulo Otinga, a village elder at Nyalenda, told the court that he was at the Assistant Chief's office when the appellant's husband came to lodge a complaint that strangers had occupied his property. PW2 stated that he knew both the appellant's and respondent's family well, and that the suit land belonged to the appellant. It was his evidence that the respondent's family owned a piece of land that was close to the suit land, but he was unable to give the specific title number of the land alleged to belong to the respondent's family.
8. The respondent gave evidence as DW1. It was his testimony that the suit land formed part of their ancestral land which originally belonged to his grandfather, Mathew Lwango. That the suit land was registered in the name of his uncle, Patrick Okunga, since he was the first-born son. He stated that his father, John Omungi Lwango, settled his family on the suit land, and that he was born thereon in 1996. That his father died in 2018, but he continues to occupy the suit land together with his mother and siblings.
9. At the end of the trial, the learned trial magistrate found in favour of the respondent. The trial magistrate determined that the root of the appellant's title had been successfully challenged by the respondent. The learned magistrate found that the appellant failed to avail proof of purchase, such as a sale agreement, and further failed to explain how the suit land, which had been registered to Patrick Okunga on 22<sup>nd</sup> February 1993, was on the same day transferred to one Benson Were Siandha, and then to the appellant, and a title deed issued to her on the same day. The learned magistrate determined that the respondent sufficiently demonstrated that the suit land was ancestral land which was registered to his uncle, Patrick Okunga, to hold in trust for the entire family, and that the respondent and his family had acquired title to the suit land by adverse possession, but that the learned magistrate was



not vested with requisite jurisdiction to give any orders on the issue of adverse possession. The learned trial magistrate dismissed the appellant's suit, and allowed the respondent's counterclaim, save for the prayer that the respondent had acquired title to the suit property by adverse possession.

10. The appellant, aggrieved by the said decision, lodged an appeal before the Environment and Land Court at Kisumu. In summary, the appellant faulted the learned trial magistrate for: misapprehending the evidence tendered by the parties, the pleadings and the relevant law; ruling on the question of trust which was never pleaded or proved by the respondent; failing to evaluate the credibility of the defence witness, and relying on his sole evidence which was uncorroborated; making a finding on matters outside the trial court's jurisdiction, which greatly influenced the final determination; making adverse findings against the appellant based on the absence of a sale agreement, which issue was not raised by either party; and for finding in favour of the respondent, who did not establish his case to the required standard of proof.
11. Ombwayo J., in a judgment dated 13<sup>th</sup> May, 2022, affirmed the decision of the trial court, and dismissed the appellant's appeal for lack of merit.
12. The appellant is now before us on a second appeal. She has proffered seventeen (17) grounds of appeal. In brief, the appellant was aggrieved that the learned Judge misinterpreted the facts of the case on the issues of adverse possession and customary trust, thereby arriving at a wrong finding. She was aggrieved that the learned Judge confused her lack of development on the suit land with failure to take possession. She faulted the learned Judge for finding that the appellant's suit before the trial court was time barred. She took issue with the fact that the learned Judge based his findings on uncorroborated hearsay evidence by the respondent. She was aggrieved that the learned Judge determined that the suit land was ancestral land, and that she acquired the title to the suit land fraudulently, in the absence of any proof to that effect. She faulted the learned Judge for proceeding as if the respondent had filed a cross-appeal, thereby raising new issues which were not in contention in his judgment. She surmised that the learned appellate Judge mechanically endorsed the trial court's judgment, without re-assessing the issues as mandated by the law, and thereby made findings that were against the weight of the evidence adduced. The appellant in the ultimate urged us to allow the appeal as prayed, and set aside the decision of the first appellate court.
13. The respondent, vide a notice of cross-appeal dated 21<sup>st</sup> September, 2023, faulted the learned Judge for upholding the decision of the trial court, where the court held that it had no jurisdiction to grant any orders on the question of adverse possession. The respondent invited us to vary the decision of the first appellate court, by granting orders sought in prayer (b) (i) of his counterclaim before the trial court.
14. The appeal and cross-appeal were heard by way of written submissions. Mr. Opiyo for the appellant submitted that the question of whether the appellant's suit was time barred was never advanced by the parties during trial, but was referred to in the first instance in the first appellate court, through the respondent's submissions. He urged that the learned Judge misapplied Section 7 of the *Limitation of Actions Act* in determining that the appellant's suit was time barred. Counsel stated that the two courts below erroneously determined that the respondent was born and had resided on the suit land, in the absence of any evidence to establish the same. Counsel maintained that the respondent and his family trespassed on the suit land in 2017, and that this evidence was corroborated by PW2.
15. On issue of adverse possession, counsel submitted that this prayer was dismissed by the trial court for want of jurisdiction, and should not have been entertained by the first appellate court. Counsel was of the firm view that no evidence was led to prove that the respondent had been on the suit land for 24 years as alleged. On the issue of fraud, counsel submitted that the appellant produced a certificate of title with respect to the suit land, as well as a certificate of an official search, all of which proved that she



was the legal owner of the suit land. Counsel stated that the learned Judge, in requiring the appellant to provide the sale agreement, or call the vendor as a witness to prove that she purchased the suit land, was in essence shifting the burden of proving the alleged fraudulent acquisition of title to the suit land to the appellant. He asserted that the respondent bore the burden of proving the alleged fraud, and that he failed to discharge this burden. He urged that Section 26 of the *Land Registration Act* mandated the court to take a certificate of title issued by the Registrar as conclusive evidence that the person named on the title is the absolute and indefeasible owner.

16. Mr. Odhiambo, learned counsel for the respondent, with respect to the issue of adverse possession, was of the view that the import of the decisions of the two courts below was that the respondent had sufficiently established his claim to the suit land by way of adverse possession, but that the trial court lacked jurisdiction to issue said orders. Counsel submitted that the trial court did in fact have jurisdiction to grant the prayer for adverse possession, as this Court held in the case of *Law Society of Kenya Nairobi Branch v. Malindi Law Society & 6 others* [2017] eKLR determined that gazetted Magistrate's Courts have jurisdiction over all land title disputes subject to limitations therein stated. It was the respondent's submission that the two courts below erred in holding to the contrary. Counsel submitted that the fact that the respondent and his family lived on the suit land for a period of over twelve years was established by the respondent's testimony, and corroborated by PW2's evidence.
17. On the issue of fraud, counsel submitted that although the appellant produced a title to the suit land, she failed to establish how she acquired the said title, after the root of title was put to question. Counsel urged that the appellant was unable to explain how title to the suit land changed hands among three different owners in a single day, and how her title was issued on the same day, which transactions suggested an intent to defraud. Counsel stated that the evidential burden shifted to the appellant, given that the details of how she purchased and acquired the suit property were within her knowledge. He submitted that the first appellate court discharged its mandate of re-evaluating the case, and coming to its own conclusion. He invited us to dismiss the appellant's appeal, and allow the respondent's cross-appeal as prayed.
18. We are alive to our mandate as a second appellate court to resist the temptation of delving into matters of facts, and confine ourselves to matters of law only, unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See the decisions of this Court in *Kenya Breweries Ltd v Godfrey Oduyo* [2010] eKLR; and *Stanley N Muriithi & another v Bernard Munene Ithiga* [2016] eKLR).
19. Having evaluated the record of appeal, as well as submissions by parties to the appeal, the issues arising for our determination can be summed up as follows:
  - i. Whether the appellant's suit was time barred;
  - ii. Whether the appellant sufficiently established the tort of trespass as against the respondent with respect to the suit land;
  - iii. Whether the learned Judge erred in finding that the trial court lacked jurisdiction to issue any orders relating to the question of adverse possession; and,
  - iv. Whether the respondent had requisite locus standi to lodge his counterclaim before the trial court.
  - v. Whether the trial court failed to exercise its mandate of re-evaluation of the evidence as the first appellate Court.



20. On the first issue of whether the appellant's suit was time barred, the learned Judge relied on Section 7 of the *Limitation of Actions Act*, and determined that the respondent enjoyed quiet, peaceful and uninterrupted possession of the suit land for a period of over twelve (12) years, and that his occupation was adverse to that of the appellant, which meant that the appellant's suit was time barred. It was the appellant's submission that the learned Judge misapprehended the law as her suit was based on the tort of trespass, and not on the doctrine of adverse possession. The respondent on the other hand urged that the evidence on record sufficiently established that he and his family had been residing on the suit land for a period of over twelve years, and therefore the appellant's suit for recovery of the said land was time barred.
21. Our perusal of the appellant's amended plaint clearly shows that her suit was founded on the tort of trespass. In the plaint, the appellant averred that she had been the registered proprietor of the suit land since 1993. She accused the respondent and his family of entering the suit land sometime in 2018, without her consent, and erecting their homes thereon. The learned Judge was therefore required to determine whether the appellant's claim of trespass was time barred.
22. Section 3(1) of the *Trespass Act*, Cap 294, defines trespass as an act by "any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier." Its trite law that every continuance act of a trespass is a fresh trespass of which a new cause of action arises day to day for as long as the trespass continues. In the case of *Muthiora v. Marion Muthama Kiara* (Suing on behalf of the Estate of Erastus Muthamia Kiara - Deceased) (Civil Appeal 43 of 2017) [2022] KECA 28 this Court observed as follows:
- "From the above definitions of the term "trespass" by the eminent learned authors, it is clear that any unauthorized entry whether present or continuous is trespass. In this case, it is indeed common ground that the appellant entered into and has remained in occupation of the suit property. The appellant's continued occupation of the said property from the 1<sup>st</sup> date of entry in so far as it is unauthorized by the respondent amounts to trespass and remains as such to date. The respondent's claim for trespass being a continued tort is, therefore, not time barred."
23. In the instant appeal, it was the respondent's contention that his family had occupied the suit land for many years; that he was born on the suit land in 1996; and that he continued to reside thereon peacefully, until the appellant lodged her suit in 2018. We find that, with respect to the appellant's claim against the respondent, the respondent's continued occupation of the suit land constituted a continuing trespass, and the appellant suit was therefore not time barred. The learned Judge overlooked the fact that the appellant's claim was founded on the tort of trespass and not adverse possession, and as such, he misapprehended the law in applying the provisions of Section 7 of the *Limitation of Actions Act* in finding that the appellant's suit was time barred.
24. On the second issue, it was the appellant's case that she purchased the suit property from one Benson Were Siandha for a consideration of Kshs. 35,000/= and that she was registered as the legal owner thereof on 22<sup>nd</sup> February, 1993. In support of her case the appellant produced a title deed of the suit land, a green card and a certificate of official search in evidence. The appellant accused the respondent of entering into the property without her consent in 2017, and erecting illegal structures thereon.
25. The appellant's title was challenged by the respondent who contended that the suit land formed part of a larger parcel of land that constituted ancestral land, originally owned by his grandfather, Mathew Lwango. The respondent argued that the suit land was allocated to his family. He urged that his



grandfather had two sons, Patrick Okunga Odundo (the eldest) and his father, John Omungi Lwango. That the suit land was registered in the name of his uncle Patrick Okunga Odundo, as he was the eldest son to hold in trust for the family. It was his evidence that his family has resided on the suit land for a period of over twenty years; that he was born on the suit land in 1996; and that he has lived peacefully thereon with his family, until 2018 when the appellant filed the present suit before the trial court. It was the respondent's case that the appellant illegally obtained title to the suit land, without any proof of purchase, and that the transfer of the suit land to the appellant did not follow due procedure laid down by the law.

26. The appellant, in her grounds of appeal, urged that the respondent failed to prove that she had acquired her title illegally. Further, she faulted the learned Judge for shifting the burden of proof to her, to establish that her title was genuine, by requiring her to avail proof of purchase.

27. Section 26 (1) of the [Land Registration Act](#) provides thus:

“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.”

28. In the case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR this Court held thus:

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony.”

29. From the foregoing, once the title to the suit land was challenged, the appellant had a duty to go the extra mile and establish that she acquired the same legally, formally, and free from any irregularities. The appellant did not avail any proof of purchase of the suit land, such as a sale agreement, or proof of payment of purchase price. She was also unable to provide transfer documents which enabled the suit land to be transferred to her. The two courts below further observed that the title to the suit land was transferred from the original owner, Patrick Okungu, to Benson Were Siandha on 22<sup>nd</sup> February 1993, and was again on the same date transferred to the appellant, and a title deed issued to her on the same date. The appellant was unable to explain how this unprocedural and unusual transfers in one day. It obviously smacks of mischief.

30. We agree with the finding of the learned Judge that the appellant acquired title to the suit land unprocedurally, and her title cannot therefore be clothed with indefeasibility, in the manner pleaded by the appellant. The respondent's evidence, on the other hand, that his family has resided on the suit



property since 1996, was corroborated by the evidence of PW2, who upon cross-examination, told the court that the respondent and his family have resided on the suit land for a period of over twenty years. It was PW2's evidence that the respondent's home got destroyed. They however constructed a new house in 2017. The respondent stated that his father died and was buried on the suit land. We are satisfied that the learned 1<sup>st</sup> appellate court was right in holding that the respondent's possession of the suit property was inconsistent with the tort of trespass.

31. The next issue for determination is whether the learned 1<sup>st</sup> appellate Judge erred in affirming the decision of the trial court, to the effect that the trial court lacked jurisdiction to issue any orders pertaining to issue of adverse possession, pleaded by the respondent in his counterclaim. The trial court observed that by virtue of Section 38 of the *Limitation of Actions Act*, the jurisdiction to hear and determine matters relating to adverse possession was vested upon the Environment and Land Court. This decision was affirmed by the first appellate court.

32. The respondent, vide a cross-appeal filed before this Court, urged that the trial court did in fact have jurisdiction to grant the prayer relating to the respondent's claim on the suit land by adverse possession. It was the respondent's submission that this Court in the case of *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others* [2017] eKLR determined that gazetted Magistrate's Courts have jurisdiction over land title disputes. It was the respondent's submission that the two courts below erred in holding to the contrary.

33. Sections 26 (3) and (4) of the *Environment and Land Court Act*, 2011, provide that:

subPARA 3.

“The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.

subPARA 3.

Subject to Article 169(2) of *the Constitution*, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle:

SUBPARA a.

disputes relating to offences defined in any Act of Parliament dealing with environment and land; and

SUBPARA b.

matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.”

34. This Court in a recent decision in the case of *Pauline Chemuge Sugawara v. Nairuko Ene Mutarakwa Kiruti* (Sued in her Capacity as the Administratrix of the Estate Mutarakwa Kiruti Lepaso alias Mutarakwa Kiroti Lepaso and in her own capacity) and 3 others, Civil Appeal No. E141 of 2022, clarified that this scope of jurisdiction of the Magistrates' Courts to deal with land disputes does not extend to claims for adverse possession, which by virtue of Section 38 of the Limitations of Actions Act, are reserved for the Environment and Land Court. The Court observed as follows:

“It is our view that, if it was intended that claims for adverse possession be determined by the Magistrates' Courts, 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.



We come to this conclusion also bearing in mind that the jurisdiction of Magistrates' Courts is largely determined by each level of the Magistracy specified in the hierarchy of courts, in terms of Section 7 of the Magistrates' Courts Act. In claims for adverse possession where the value of the land in question maybe unknown, as in the instant case, it could be that by the time of filing, the value of the land subject of determination may be far excess of the particular Magistrates' Court's pecuniary jurisdiction, which for all intents and purposes was not what was intended by the Act.

In the circumstances, in view of the express provisions of Section 38 of the Limitations of Actions Act, as did the Environment and Land Court, we find that Magistrates' Courts do not have jurisdiction to determine the claims of adverse possession.”

35. From the foregoing, the two courts below correctly held that the trial court lacked jurisdiction to issue orders relating to the respondent's prayer that he was entitled to the suit land by adverse possession. The respondent's cross-appeal can therefore not succeed.
36. The final issue for determination is whether the respondent had the requisite locus standi to maintain the counterclaim lodged before the trial court. The appellant, in her grounds of appeal, faulted the 1<sup>st</sup> appellate court for misapprehending her contention as regards the locus standi of the respondent, thereby inappropriately framing and determining the issue. We note that no arguments were advanced by the appellant in her submissions with respect to this ground. In her submissions before the first appellate court, the appellant contended that the respondent lacked the requisite locus standi to seek prayers sought in the counter-claim lodged before the trial court, as he had not taken out a grant of letters of administration with respect to estate of Patrick Okunga, who was the original registered owner of the suit land. The respondent on the other hand urged that it was the appellant who dragged them to court, and therefore the argument that he lacked locus standi was self-serving.
37. We note that the appellant never canvassed this issue before the trial court, and only raised it on first appeal. We agree with the finding of the first appellate court that the respondent was sued in his capacity as an occupant of the suit land, and in response, the respondent laid out his interest in the suit land, to counter the allegations of trespass levelled against him and his family. That alone gave the respondent the necessary locus standi to seek cancellation of the appellant's title to the suit land. We agree with the respondent's submission that it defeats logic why the appellant would sue him, and when confronted with a statement of defence and counterclaim, turn around and claim that the respondent has no locus standi. This begs the question whether the respondent had locus standi to be sued by the appellant in the first place. This ground of appeal must therefore fail.
38. In the circumstances, we are satisfied that the first appellate court addressed itself correctly on the law, and properly carried out its duty of review and re-evaluation of evidence tendered before the trial court. The appeal before us has no merit. It is hereby dismissed. The respondent's cross-appeal dated 21<sup>st</sup> September, 2023, equally lacks merit and is similarly dismissed. Each party shall bear their own costs of the appeal.

**DATED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2025.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**H.A. OMONDI**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

