



**Mwalimu & 6 others v Halal & another (Civil Appeal
E036 of 2023) [2025] KECA 1186 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1186 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E036 OF 2023
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
JULY 4, 2025**

BETWEEN

**ATHMAN MWALIMU 1ST APPELLANT
FADHILI MWALIMU 2ND APPELLANT
HAFUS MWALIMU 3RD APPELLANT
ABDULHAKIM MWALIMU 4TH APPELLANT
YUSUF MWALIMU 5TH APPELLANT
MIRIAM MWALIMU 6TH APPELLANT
OMARI MWALIMU 7TH APPELLANT**

AND

**NARAN RAMJI HALAL 1ST RESPONDENT
HIRJI RAMJI HALAL 2ND RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Environment
and Land Court of Kenya at Mombasa (N. Matbeka, J.) delivered
on 22nd November 2022 in E.L.C Suit No. 370 of 2010 (O.S))*

JUDGMENT

1. The genesis of the instant appeal is the Originating Summons dated 25th October 2010 as amended formally on 12th February 2020 and orally on 12th October 2020. The Summons was taken out by the appellants against the respondents claiming adverse possession of title No. Mombasa Island Block XV/29, but which was later amended to read Block XV/31 (the suit property), on which stood a godown where the appellants operated a motor garage in the name and style of Mwalimu Autoworks under a tenancy agreement previously entered into between their deceased father, Mwalimu Fadhili,



who died in 2005, and the then registered proprietor named Georgina Christian. In their Summons, the appellants posed the following questions for determination by the trial court:

- “ 1. Are the Plaintiffs/Applicants entitled to be declared as the proprietors of the Plot, Land or Premises known as Title No. Mombasa Island Block XV/31.
 - A. Was the transfer of Plot No. Title No. Mombasa Island Block XV/31 effected procedurally or by fraud?
 - B. If the answer to the above is yes, what was the fraud? What is the effect of the fraudulent Transfer?
 - C. What was the fraud?
 - i. Was the said Maria Vidalis alias Marie Vidalis in Kenya when the purported transfer took place?
 - ii. Did the said Marie Vidalis sign the transfer form in the purported transfer?
 - iii. Did she produce any document or identification to prove who she was?
 - iv. When and how did she depart from Kenya and was she in Kenya at the time of the transfer?
 - v. Was she paid part of the money? In what form? Cash, Money Transfer or account to account transfer?
 - D. Was there a Sale Agreement prepared? If so, where is it? Who executed it?
 - E.
 - (i) Was the Duty and other taxes paid to the Government as required?
 - (ii) If so, where is the evidence of payment?
2. Are the Plaintiffs/Applicants entitled to be registered as the owners of Plot, Land or Premises known as Title No. Mombasa Island Block XV/31.
 - A. If the property was fraudulently acquired, what are the orders appropriate in the circumstances?
 - B. Is the title amiable to cancellation and what other remedies are available?
3. If the answers to 1 & 2 is yes, then a declaration that Title No. Mombasa Island Block XV/31 belongs to the Applicants and the same be registered in the name of the Applicants by reason of adverse possession.
 - A. If the answer to questions 1A, 1B, 1C is yes, then a declaration be issued that the ownership by the defendant was illegal, unlawful and should be cancelled.



- B. If the answer to question No. 1D is No, then a declaration that the transfer was illegal and ought to be cancelled.
 - C. If the answer to question No. 2A and 2B is yes, a declaration be issued cancelling the Registration of the defendant as registered owner of Mombasa Island Block XV/31 and a declaration that the Plaintiffs as the Registered owners.
4. Are the Plaintiffs/Applicants entitled to the costs of this suit?"
2. The appellants' Summons were supported by the annexed affidavit of Athumani Mwalimu, the 1st appellant, sworn on 25th October 2010 deposing to the grounds on which their Summons was taken out, namely: that their deceased father, Fadhili Mwalimu, had resided and carried on business on the suit premises for a period of over thirty (30) years before his demise; that they have been paying utility bills and land rates to the Municipal Council of Mombasa in their deceased father's name for a period of over 30 years; that they have continuously and uninterruptedly lived on and carried out business on the suit premises for over 30 years; that they had met the legal requirement for entitlement to adverse possession of the suit property; and that it would be unjust, unconscionable and inhumane to deny them possession of the suit premises.
3. The 1st appellant's supporting affidavit was sworn on his own behalf and on behalf of the other appellants, all of whom swore separate affidavits authorising him to depose to the matters aforesaid on their behalf.
4. In response to the appellants' Summons, the 1st respondent filed a replying affidavit sworn on 15th March 2011 on his own behalf and on behalf of the 2nd respondent. The respondents' case was that the appellants were strangers to them since the tenant to the suit premises was Mwalimu Fadhili (deceased); that the appellants had no capacity to take out the Summons on behalf of the deceased's estate; that the respondents purchased the suit property on 10th January 2001 and a transfer effected in their favour on 1st February 2001; that the suit property comprised business premises in respect of which the appellants had never been in occupation as their tenants and, therefore, had no interest in the suit premises; and that, contrary to the appellants' allegations, they were never in occupation of the suit property for a period of 30 years. They prayed that the Summons be dismissed with costs.
5. It is noteworthy that the appellants' decision to orally amend its Summons to reflect the suit property as Mombasa Island Block XV/31 in place of the originally claimed Mombasa Island Block XV29, was followed by a consent order recorded on 4th February 2020 withdrawing their claim against the 1st respondent. For the avoidance of doubt, the consent order read as follows:

"By Consent

- 1. Leave be granted to the plaintiff to amend the originating summons by substituting Plot No. Mombasa Block XV/29 with Plot No. Mombasa Block XV/31.
- 2. In view of the decree of the court given in ELC No. 134 of 2015, which declared Plot No. Mombasa Block XV/31 to belong to Naram Ramji Patel, the suit as against [the] 1st defendant in ELC No. 370 of 2010 (O.S) be withdrawn with no order as to costs.
- 3. The suit herein be converted to a plaint."



6. To our mind, the 3rd order that the suit “be converted to a plaint” was intended to facilitate the admission of oral evidence and cross-examination in proof of the competing claims as opposed to only affidavit evidence usually considered in proceedings founded on such Summons.

7. In its judgment dated 22nd November 2022, the ELC (N. A. Matheka, J.) dismissed the appellants’ Summons with costs to the respondents. According to the learned Judge:

“ 11. ... the applicants cannot claim adverse possession under the respondents’ title because their possession only became hostile to the applicants on April 29, 2002 when the respondents through the firm of KA Kasmani wrote to the 1st applicant demanding for rent arrears and threatened legal action and auctioning the applicants to recover the arrears (DEX-4). The time between the demand letter and the institution of this suit does not accumulate 12 years as required by section 7 of the *Limitation of Actions Act*.

... ..

14. Fraud is a question of evidence and the plaintiffs failed to not only particularize fraud but also to prove fraud on a standard of proof that is more than a mere balance of probabilities. for [the] court to take [the] draconian measure of canceling [the] title as prayed by the applicants, there has to be simple, credible and consistent evidence of fraud committed by the respondent in acquiring title. In the absence of such evidence, the court finds no merit in the originating summons.”

8. Aggrieved by the learned Judge’s decision, the appellants moved to this Court on appeal on 8 grounds set out in their memorandum of appeal dated 8th March 2023 thus:

1. That the learned Judge erred in law and in fact by not appreciating the Land Registrar’s evidence that the transfer was fraudulent.
2. That the learned Judge erred in law and in fact by totally ignoring the compelling evidence of the Land Registrar as the custodian of government and land records.
3. That the learned Judge erred in law and in fact in totally failing to mention or take into consideration the Land Registrar’s evidence.
4. THAT the learned Judge erred in law and in fact by not finding that the transfer of the land was illegal and unlawful for non-payment of stamp duty.
5. That the learned Judge erred in law and in fact by her failure to hold [that] the land was fraudulently transferred with conflicting two transfer forms filed at the registry on the same day.
6. That the learned Judge erred in law and in fact by her failure to conclude that Mansur Satchu could not transfer property based on the Power of Attorney donated to Abdul Kasim Satchu which terminated on his death.
7. That the learned Judge erred in law and in fact by her failure to find that the Plaintiffs had proved and brought evidence of fraud through the evidence of the Land Registrar
8. That in totality the learned Judge erred in law and in fact by not appreciating the evidence in totality and her failure to evaluate the evidence as a whole resulted in error.”



9. A cursory look at the 8 grounds of appeal shows that the appellants essentially fault the learned Judge for: failing to find that the 2nd respondent acquired the suit property fraudulently; and for failing to consider the appellants' evidence.
10. In support of the appeal, learned counsel for the appellants, M/s. Ambwere T. S. & Associates, filed written submissions and list of authorities dated 8th August 2023 followed by a supplementary list of authorities dated 3rd June 2024. In all, counsel cited 5 judicial authorities, namely: *Dina Management Limited v County Government of Mombasa & 5 Others* [2021] eKLR; [2023] KESC 30 (KLR), submitting that property acquired by fraud, forgery and unprocedurally cannot pass the test of integrity and the rule of law, and is not protected by the doctrine of indefeasibility; *Sagoo & Another v Mwicigi & 3 Others* [2022] KECA 83 (KLR) and *Katende v Haridas & Company Limited* (2008) EA 173, submitting that non-payment of stamp duty renders any transfer of title illegal, null and void; and *Njonjo v Attorney General & 2 Others* [2024] KECA 599 (KLR) where this Court highlighted the importance of documentary evidence in tracing the history of a title.
11. In rebuttal, learned counsel for the 2nd respondent, M/s. Gikandi & Company, filed written submissions, a list and bundle of authorities dated 23rd October 2023 citing 9 judicial authorities, namely: *Eviline Karigu (Suing as Administratrix of Estate of Late Muriungi M'Chuka alias Miriungu M'Gichuga) v M'Chabari Kinoro* [2022] KEELC 1483 (KLR); *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR; *Urmilla w/o Mahendra Shah v Barclays Bank International Ltd & Another* [1979] eKLR; and *Silas Make Otuke v Attorney General & 3 Others* [2014] eKLR, highlighting the legal principle that any allegations of fraud must be pleaded and strictly proved, and that it is not enough to simply infer fraud from the facts; *Mursal & Another v Manese* [2021] KEHC 282 (KLR), highlighting the mandate of the first appellate court; *Munyaka Company Limited v Bernardo Dicezo De Masi* [2018] eKLR on what a litigant is required to prove so as to establish adverse possession; *Abdirashi Adan Hassan v the Estate of W. H. E. Edgney* [2022] eKLR for the proposition that a claim for adverse possession must be brought against the registered proprietor and in respect of the correct parcel of land whose ownership is verified by an annexed extract of the title; *Murithi Wanjau v Samuel Mundati Gatabaki & Another* [2015] eKLR, submitting that an omnibus application is incapable of proper adjudication by the court, and that this alone makes the application incurably defective and a candidate for striking out; and *Njue v Matiabe & 3 Others* [2023] KEELC 17361 (KLR), submitting that one cannot advance a claim in fraud and adverse possession in the same cause.
12. This Court's mandate on 1st appeal was espoused in *Ng'ati Farmers' Co-Operative Society Ltd v Ledidi & 15 Others* [2009] KLR 331 as follows:

“An appeal to this Court from a trial by the High Court is by way of re-trial 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 witness and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”



13. This mandate was underscored in the case of *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 as follows:

“On a first appeal from the High Court, the Court of Appeal should 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 allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

14. However, we are conscious as cautioned by the predecessor to this Court in *Peters v Sunday Post Ltd* [1958] EA 424 that:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”

15. In our view, the main issues that fall for determination in this appeal are: whether the learned Judge was at fault in declining to grant the appellants’ claim in adverse possession of the suit property; whether the learned Judge erred in declining to find fraud on the part of the 2nd respondent in acquisition of the suit property; and whether the learned Judge failed to consider the appellants’ evidence.

16. Before pronouncing ourselves on the three issues, we hasten to observe that what began as a claim for adverse possession in the ELC curiously metamorphosed into an appeal grounded on alleged fraudulent acquisition by the 2nd respondent of the suit property. These are two incongruent causes of action that are incapable of riding on the wheels of justice in tandem. Be that as it may, it would be remiss of us not to pronounce ourselves albeit obiter on both heads of claim so as to lay the matter to rest.

17. On the 1st issue as to whether the appellants had proved adverse possession of the suit property, the statutory underpinnings of such a claim was set out by this Court in *Teresa Wachuka Gachira v Joseph Mwangi Gachira* [2009] eKLR as follows:

“Adverse possession is statutorily provided for in this country. Ordinarily such claim would be pleaded under Section 7 of the *Limitation of Actions Act*, Cap 22, which provides:

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 its first accrued to some person through whom he claims, to that person.

The following provisions of Section 13 of the same Act also apply:

- (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession) and

Section 38 of the Act also provides as follows:



38. Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

18. It must be borne in mind, though, that occupation beyond the period of limitation (12 years) does not of itself guarantee success in a claim for adverse possession. Simply put, there is more to it than mere occupation as was enunciated in *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] eKLR where this Court held:

“18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, *nec vi nec clam nec precario*. See *Jandu vs. Kirplal & Another* (1975) EA 225.

In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court’s decision in *Wambugu vs. Njuguna* [1983] KLR 173” [Emphasis ours]

19. In the instant case, the pertinent question is whether the appellants’ use and occupation of the suit premises was “non-permissive or non-consensual, actual, open, notorious, exclusive and adverse” In answer to this issue, the evidence points to the contrary, in that, their deceased father was a tenant of the then registered proprietor, namely Georgina Christian, who transferred the suit property (Mombasa Island Block XV/31) to the 2nd respondent in 2001. On the property stood a warehouse where the deceased carried on a motor garage business which, upon his demise in 2005, the appellants continued to operate. In effect, the appellants’ continued occupation of the suit premises jointly with their deceased father, and thereafter on their own, was permissive and consensual. This was notwithstanding their neglect to pay rent as demanded by the 2nd respondent’s counsel on 29th April 2002, and in response to which they took out an Originating Summons purportedly claiming adverse possession of the demised premises in a bid to resist the threat of distress for rent and eviction. Their Summons came only 8 years later, Consequently, a claim for adverse possession could not stand on account of their capacity either as continuing tenants or licensees after their father’s demise only 9 years earlier.

20. As correctly observed by the High Court at Malindi in *Haro Yonda Juaje v Sadaka Dzenzo Mbauro & another* [2014] KEHC 6665 (KLR):

“If one is in possession as a result of permission given to him by the owner, or if he is in possession as a licensee, he cannot claim to be in adverse possession. It has been held that any time an adverse possessor and the true owner discuss the issue of adverse possession, permissive agreement may have occurred and that act destroys the claim for adverse possession. (See *COB B Vs Lane* (1952) 1 All ER 1199; AND *Wallis Cayton Bay Holding Company Ltd Vs Shell Mex and BP Ltd* (1974) 3 All ER 575).”

21. Turning to the 2nd issue as to whether the learned Judge was at fault in failing to uphold the appellants’ claim of adverse possession on the ground that the 2nd respondent had fraudulently acquired title to



the suit property, their allegations of fraud were founded on quick sand in so far as they were intended to bolster their claim in adverse possession. As rightly pointed out by the learned Judge,, no particulars of fraud were specified or and proved in evidence to support such allegations (see: Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR). As we have already observed, a claim in adverse possession is incompatible with a claim in fraud.

22. In this regard, we are persuaded by the decision of the High Court of Kenya at Malindi in Haro Yonda Juaje v Sadaka Dzenzo Mbauro & another [2014] KEHC 6665 (KLR) where the court aptly held that:

“29. One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff’s averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered Land Act and not adverse possession.”

23. In the same vein, the Environment & Land Court at Nairobi in Njue v Matiabe & 3 others [2023] KEELC 17361 (KLR) rightly emphasised that:

“the moment the person claiming adverse possession contests and impugns the validity of the registered proprietors title, the claim for adverse possession is defeated and thus becomes legally untenable. In such a situation, the claimant is at liberty to pursue a cause of action for fraud or better still, trust, which causes of action are antithetical to and cannot co-exist with a claim for adverse possession.”

24. Finally, the appellants contend that the learned Judge did not consider their evidence. Having carefully combed through the record of appeal, we fail to see what evidence escaped the learned Judge’s scrutiny. The fact that the learned Judge did not agree with the appellants’ affidavit evidence, testimonies and submissions on the alleged fraud in respect of acquisition of the suit property by the 2nd respondent does not of itself impute sheer disregard of such statements and contentions. Neither is the trial court expected to provide a word-for-word transcript of the evidential material analysed in reaching its conclusion. To our mind, nothing turns on this issue in the absence of specific indications as to what evidential material was disregarded, and which could have turned the tide to justify a finding that the appellants had acquired adverse possession of the suit property. We find none.

25. Having carefully considered the record of appeal, the grounds on which it was anchored, the impugned judgment, the rival submissions, the cited authorities and the law, we find that the appeal has no merit and is hereby dismissed. Consequently, the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (N. Matheka, J.) delivered on 22nd November 2022 are hereby upheld.

26. The appellants shall jointly and severally bear the 2nd respondent’s costs of the appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

