



Njau (Being the Administrator of the Estate of Inasio M’Njau M’Acece - Deceased) & another v Mucece (Being the Administrator of the Estate of James M.Njeru - Deceased) & another (Environment and Land Appeal E010 of 2023) [2024] KEELC 3686 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KEELC 3686 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E010 OF 2023**

CK YANO, J

MARCH 15, 2024

BETWEEN

MARK MWENDA NJAU (BEING THE ADMINISTRATOR OF THE ESTATE OF INASIO M’NJAU M’ACECE - DECEASED) 1ST APPELLANT

JULIUS MEM M’MBOROKI 2ND APPELLANT

AND

JEREMIAH MUTHURI MUCECE (BEING THE ADMINISTRATOR OF THE ESTATE OF JAMES M.NJERU - DECEASED) 1ST RESPONDENT

KIMORO NJERU 2ND RESPONDENT

JUDGMENT

1. The appellants herein were the plaintiffs in the lower Nkubu PMC Court ELC Suit No.E006 of 2020 wherein they sued the respondents seeking orders of a permanent injunction restraining the respondents whether by themselves, their servants or agents from entering or occupying Land Parcels No. Kiamuri ‘A’/1461 and Kiamuri ‘A’/1592, eviction orders, costs as well as interest of the suit at the court’s rate and any other orders the Honourable Court shall deem fit.
2. It was the appellants’ case that at all material times relevant to the suit the 1st Appellant is and has been the legal owner and proprietor of land parcel No. Kiamuri ‘A’/1461 while the 2nd Appellant is and has been the legal owner and proprietor of land parcel No. Kiamuri ‘A’/1592. The Appellants averred that they became the proprietors of the aforesaid suits land after following the adjudication process under Cap 284 and their ownership of the suit lands was confirmed and the respondents never challenged the said decision.



3. The Appellants pleaded that on diverse dates, the respondents without any colour of right trespassed into their land parcels and have continued to illegally and unlawfully occupy the same.
4. The Appellants further pleaded that despite being awarded the suit lands, the respondents without any right trespassed into the Appellant's land and have continued to illegally and unlawfully occupy the same Lands, forcefully cultivating, negating the proprietary interests of the appellants over the suit lands, refusing to vacate despite demands by the Appellants to do so and perpetuating an illegality.
5. The Appellants further pleaded that the respondents have on numerous occasions chased away, threatened and intimidated the appellants' and their servants from the said pieces of land.
6. The Appellants averred that the actions of the respondents have caused loss and damage to the enjoyment of the Appellant's rights as they cannot utilize their lands for gain and as a result they claim damages for mesne profits.
7. The Appellants pleaded that due to the above they have suffered loss and damage.
8. The respondents filed a defence and counterclaim dated 9th November, 2020 in which they denied the appellants' claim. The respondent pleaded that although the Appellants' are the registered owners of the suit properties, the registration and issuance of the title deeds to the- Appellants' was irregular and unlawful since the respondents are in actual occupation and possession of the suit properties. They denied trespassing on the suit properties or chasing or threatening the appellants as alleged.
9. In their counterclaim, the respondents pleaded that they are brothers who live in the suit properties together with their families. That they entered the suit property in 1970 and took possession and occupation. The respondents pleaded further that at the time of entering the suit properties, the same were bare and inhabited by wild animals.
10. The respondents further averred that they gathered the properties where they live with their families since 1970. That they have lost family members who are buried in the suit properties, for instance their mother one Evangeline Kamende Njeru, their brother Stephen Muthui Njeru and the first respondent's wife Cecilia Gacoe Mucee who they stated are all buried in the suit property.
11. The respondents pleaded that despite the Appellants having the title deeds to the suit property, they have never been in actual occupation and possession of the property.
12. The respondents further pleaded that during the first registration of the suit properties, no enquiry was made of the persons who were in actual occupation of the same.
13. The respondents pleaded that they have acquired rights over the suit property pursuant to section 30 (f) of the *Registered Land Act* Cap 300 (repealed) which is an overriding interest which subsist without registration and accordingly, the issuance of title deeds to the Appellants has no effect and does not limit or oust their rights over the suit property.
14. The respondents' contention was the Appellants' claim over the suit property, if any, was extinguished by dint of section 7 of the *Limitation of Actions Act* Cap 22 as the respondents have been in occupation and actual occupation of the property for a period of more than 12 years. The respondents pleaded therefore that the Appellants' titles were obtained irregularly and are subject to revocation and cancellation.
15. The respondents prayed for the Appellants' suit to be dismissed with costs, a declaration that the respondents have acquired title over the suit property by adverse possession, an order directing the



- Land Registrar to cancel the Appellants' titles and issue a fresh title to the respondents and register the respondents as the proprietors of the property forthwith and costs of the counter claim.
16. Upon considering the matter, the trial court, Hon. S.K. Ngetich – PM in a judgment delivered on 21/12/2023 dismissed the Appellants' suit and allowed the respondents counterclaim.
 17. The appellants were aggrieved by that judgment and filed this appeal on the following grounds:-
 1. That learned principal Magistrate erred in law and fact in failing to find that magistrate's court have no Jurisdiction by dint of Section 38 (1) of the *Limitation of Actions Act* Cap 22 Law of Kenya to hear and determine cases of adverse possession to Land.
 2. That the Judgement of the said learned principal magistrate is against the weight of evidence adduced.
 18. The appellants pray that the judgement of the trial court be set aside and the Appellants case be allowed as prayed in the plaint.
 19. The appeal was canvassed by way of written submissions. The appellants filed their submissions on 20th December, 2023 through the firm of M/s A.G Riungu & Co. Advocates while the respondents filed theirs dated 29th January 2024 through the firm of M/s Jesse Mwititi Advocates.

Appellant's Submissions.

20. It was submitted on behalf of the appellants that a principal magistrate court is without any doubt not one of the courts contemplated under section 38 (1) of the *Limitation of Actions Act*. The Appellants counsel submitted that the effect of that is to lock out courts below the rank of the High Court from exercising jurisdiction over adverse possession as clearly encapsulated under the above provisions of the law.
21. The Appellants submitted that jurisdiction is everything in litigation and relied on the case of *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd* (1989). The Appellants submitted further that the jurisprudence arising from this precedent is clear that if a court does not have the requisite jurisdiction, it should then down its tools forthwith. It is therefore the appellants submission that the Principal Magistrate grossly erred in Law in dealing with the substance of an adverse possession matter. That the judiciary was conceived as the last resort to those seeking justice but as the case may be, that should be done in accordance with the Law because any deviation from that would not only be prejudicial to the litigants but also erode the very legal and jurisprudential foundations of the justice system and what it stands for.
22. It was further submitted on behalf of the appellants that access to justice and fairness is the pivot and the most critical tenet of the justice system as it was observed in the case of *Dry Associates Limited v Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd* High Court Constitutional Petition No.328 of 2011 (2012) eKLR.
23. It is the appellants' submission that the exercise of non-existent jurisdiction by the trial court on the matter was a thorn in the wound to the appellants herein as it not only prejudiced the appellants but also stripped them of the rightful ownership of their parcel of land, notwithstanding the enormous evidence presented in court in terms of ownership documents to prove absolute proprietorship of that piece of land. It is the appellants' submission that the matter was mishandled from the beginning when the court turned a blind eye on the profound jurisdictional authority of courts which can only be bestowed upon any court by the *Constitution* or an enabling legislation.



24. The Appellants' counsel submitted on the issue of adverse possession and relied on the case of *David Munene Wamwati & 4 others vs The Registered Trustees of the Anglican Church of Kenya & Another* (Nyeri Civil Appeal No.36 of 2015 (unreported), and submitted that the court was very critical and alive to the dilemma manifested in the law on adverse possession as it allows strangers to just encroach on someone's piece of Land and by lapse of time claim ownership of the Land.
25. Regarding the elements to be considered in an adverse possession application, the appellants' counsel relied on the cases of *Mate Gitabi vs Jane Kabubu Muga & Others* (Nyeri Civil Appeal No. 43 of 2015 (unreported), *Eliva Nyongesa Lusenaka & Another vs. Nathan Wekesa Omacha* - Kisumu Civil Appeal No. 134 of 1993 and *Kasuve vs Mwaani Investments Ltd & 4 Others* (2004) KLR 184.
26. The Appellants counsel submitted further that the Kelsen's Pure Theory of Law posits that the pyramidal structure of the Law is based on a basic norm. It was submitted that in the Kenyan context of Kelsen's jurisprudential grund norm context, Article 162 (2) (b) gives Parliament the authority to establish a court with the status of a High Court to hear and determine disputes relating to the environment and use and occupation of and title to Land and therefore Parliament enacted the *Environment and Land Court Act* to give effect to that provision.
27. The Appellants counsel further cited Section 38(1) of the *Limitation of Actions Act* Cap 22. It was also submitted that section 26 (2) as amended provides that 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.
28. The Appellants submitted that the instant Appeal is meritorious on the very reason that the learned magistrate erred in Law when he proceeded to adjudicate over a matter which the trial court had no jurisdiction to hear despite an objection by the appellants herein. That it is trite law from the above analysis that for a magistrate court to hear a matter of this nature, the pecuniary nature of the matter must be within its jurisdiction and must be gazetted.
29. With regard to ground 2 of the appeal, it was submitted on behalf of the appellants' that the onus on the appellants' side was fully discharged in terms of proof of procurement, ownership and proprietorship of the disputed piece of land. The appellants' counsel submitted that the statutory presumption of indefeasibility and conclusiveness of title under the legal system is rebuttable only by proof of fraud or misrepresentation in which the buyer/proprietor is involved. The Appellants counsel submitted that the object of that system was summarized in the Privy Council decision in *Gibbs v Messer*, and also relied on the case of *Dr. Joseph Arap Ngok Versus Justice Moiyo Ole Keiwua*.
30. It was submitted on behalf of the appellants that the procedure for commencing and prosecuting adverse possession claims as provided for under Order 37 Rules, 7, 16, 17 and 18 of the *Civil Procedure Rules* requires that such proceedings be commenced and prosecuted before a "Judge". That employing all the necessary tools of interpretation of laws, nothing could be further from the truth. That the word "Judge" as used in the *Civil Procedure Act* and the rules thereunder exclusively refer to judges of the High Court or the Environment and Land Court as established under Article 162 of the *Constitution*, and includes a Magistrate. The appellants counsel relied on the case of *Patrick Ndegwa Munyua Versus Benjamin Kiiru Mwangi & Another* [2020] eKLR.
31. The Appellants counsel submitted that the appellants' lives are at stake and have suffered prejudice since the court abrogated to itself a non-existent jurisdiction despite an objection on the same by their previous counsel and as a consequence they risk the possibility of losing their land to complete strangers.



32. The Appellants counsel further submitted that the appellants have proven absolute ownership of the land via the ownership documentation presented before the trial court herein and called upon the court to guarantee the Appellants right to be heard in an open, free and fair court as provided for in the [Constitution](#).

Respondents' Submissions.

33. The respondents gave brief facts of the case and submitted on the Power of the court to hear the Appeal and to vary the decision of the trial court if it was found to have been given without evidence or using wrong principle of the Law. The respondents relied on the case of [Samson Wafula Wanyonyi Versus Ngugi Njuguna t/a Golden Eagle Bus Services](#) (2016) eKLR and submitted that an appeal court has the jurisdiction to review the evidence in the trial court in order to determine whether the conclusion reached upon that evidence should stand or fail. That this jurisdiction however should be exercised in caution bearing in mind that the appeal court has not the advantage of hearing or seeing the witnesses.
34. The respondents counsel identified the issues for determination to be whether the appeal is defective and incompetent and whether the Appellant's suit in the trial court was time barred and extinguished by virtue of section 7 of the [Limitation of Actions Act](#).
35. With regard to the first issue, it was submitted on behalf of the respondents' that the appellants filed the appeal on 8th September, 2023 and did not attach to the appeal a certified copy of the decree or at all. The respondents submitted that failure by the appellants to attach to the record of appeal a copy of the decree appealed against is fatal to the appeal. The respondents relied on order 42 Rule 2 and 13(4) of the [Civil Procedure Rules](#).
36. It is the respondents' submission that a decree is one of the documents referred in paragraph (f) of order 42 rule 3 (4) and that the judge cannot dispense with the production of the decree in the record of appeal. That failure to attach the decree in the record of appeal is defective and renders the appeal incompetent, and divests the court of the jurisdiction to consider the issues raised in the appeal whether factual or legal. The respondents relied on the cases of [Lucas Otieno Masaye v Lucia Olewe Kidi](#) (2022) eKLR and [Chege v Suleiman](#) (1988) eKLR and urged the court to find and strike out the appeal.
37. With regard to the second issue, it was submitted on behalf of the respondents that the appellants filed the suit in the trial court on 30th September 2020 claiming the suit properties from the respondents. That during the hearing the respondents testified that they entered the suit properties in 1970 and further that the Appellants on their part testified that they did not live in the suit properties and testified that they were unable to work on the properties since the respondents were in actual possession and occupation.
38. It is the respondents' submission that they entered the suit properties in 1970 without consent of the appellants and have been living on the properties ever since. That their occupation of the suit properties is "*Nec vi nec clam nec precario*", that is without force, without secrecy and without permission. The respondents submitted that from the year 1970 to 2020 when the appellants filed the suit to recover the suit properties the respondents had already possessed and occupied the suit properties for a period of about 50 years. That even taking the years 1992 and 1993 when the title deeds to the properties were issued, the respondents continued to possess and occupy the suit properties for a period of 27 years without any interruptions from the appellants. The respondents therefore submit that the appellants' suit in the trial court which was only filed on 30th September 2020 when the respondents had been in actual occupation and possession for a period of over 12 years is barred by the Law of [Limitation of Actions Act](#). The respondents' counsel cited Section 7 of the [Limitation of Actions Act](#) and relied on



the cases of *Haron Onyancha versus National Police Commission & another* (2017) eKLR, *Iga versus Makerere University* (1972) E.A 65.

39. The respondents submitted further that in cross examination, the appellants confirmed that the respondents had been in possession and occupation of the suit property for long and therefore denying them access to the suit property. The respondents relied on the case of *Patrick Kirimi M'nganabu v Njeru Muchai* (2021) eKLR and *Suleiman Kinyamu Reuben versus Andriano Mwangangi & 7 Others* ELCA Case No. E011 of 2023 and submitted that the appellants claim was barred by the *Limitation of Actions Act* which operates to bar the claim or remedy sought for and that when the suit is barred by limitation the court is barred from granting the remedy or the relief sought. The respondent therefore, submitted that the trial court was correct in holding that the appellants' claim is barred by limitation and urged the court not to disturb the lower court's decision which was given on sound legal principles.
40. The respondents argued that looking at the memorandum of appeal, it is clear that the appellants did not appeal against the dismissal of the suit for being statutory barred pursuant to Section 7 of the *Limitation of Actions Act*. The court was therefore urged not to disturb the trial court's decision on the issue which has not been appealed against. That all what the appellants appeal against is allowing of the respondents' counterclaim for adverse possession. The respondents submitted however, that since the trial court found that the appellants suit was statutory barred pursuant to Section 7 of the *Limitation of Actions Act* this court should hold the same and leave the respondents to move to the High Court to institute their claim for adverse possession if they so wish. The respondents relied on *Suleiman Kinyamu Rueben* [*supra*].
40. The respondents urged the court to hold and find that the trial magistrate's decision was sound and this court should not disturb it and therefore should dismiss the appeal.

Analysis and Determination

41. I have perused the record of appeal and the grounds of appeal. I have also considered the submissions made and the authorities cited. This being a first appeal, I am obliged to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusion reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. This was settled in the case of *Selle & another vs Associated Motor Boat co. Ltd* (1968) EA 123.
42. The issues I find for determination are:
 - i. Whether the Appeal is defective and incompetent for failure to attach the decree.
 - ii. Whether the principal Magistrate court has jurisdiction to deal with Adverse possession cases.
 - iii. Whether the appellants' suit was time barred and if not whether the appellants were entitled to the orders sought.
 - iv. Whether the decision of the trial court was against the evidence on record.

Whether the Appeal is Defective and Incompetent for Failure to Attach the Decree.

43. The respondents have raised the issue that the Appellants filed the Appeal and did not attach a certified copy of the decree and submitted that their failure to attach the copy of decree in the record is fatal to the Appeal. It is the respondents' submission that the appeal is defective and incompetent and should be struck out.



44. Order 42 Rule 2 of the [Civil Procedure Rules](#) provides as follows: -

“Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such a time as the court may order, and the court need not consider whether to reject the Appeal summarily under Section 79B of Act until a copy is filed.”

45. Order 42, Rule 13(4)(f) of the [Civil Procedure Rules, 2010](#) provides;

“(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

- (a) the memorandum of appeal;
- (b) the pleadings;
- (c) the notes of the trial magistrate made at the hearing;
- (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

- (i) a translation into English shall be provided of any document not in that language;
- (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”

46. There are conflicting decisions on this issue. The Supreme Court of Kenya in the case of [Bwana Mobamed Bwana v Silvano Buko Bonaya & 2 others](#) [2015] eKLR held as follows at paragraph 41:

“Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the [Constitution](#), where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”



47. Further the Court of Appeal in *Chege v Suleiman* [1988] eKLR firmly stated that the issue of failure to attach the decree is a jurisdictional point, and held thus:

“But we concur positively in the submission of Mr Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of section 66 of the *Civil Procedure Act* which confers a right of appeal from the High Court to this Court from “decrees and orders of the High Court”. And those holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal.”

48. In the case of *Lucas Otieno Masaye versus Lucia Olewe Kidi* (2022) eKLR Justice Anthony Ombwayo held:

“From the foregoing it is clear that an appeal can be rendered fatally defective in the absence of a decree. The Appellant herein has not attached a copy of the decree it follows therefore that his appeal is incompetent and should be and is hereby struck out with costs to the Respondent”.

49. However, in the case of *Allen A. Lelekuti versus Samuel Thumbi* [2022] eKLR, it was held that:

“I have considered the application and taking into account the position that the current appellant’s advocate has activated the appeal by filing the record of appeal which included the Judgment of the trial court, this court finds that the appeal should not be struck out on the basis of procedural technicality which does not go to the substance of the appeal”.

50. Further in *Odera versus Adoyo & Another (Suing as the Legal Representatives of the Estate of Vincent Ochieng Adoyo – Deceased)* [2023] KEHC 17962 (KLR), it was held:

“In my view, a decree for purpose of an appeal is an extract of the decision appeal against. While it may be improper for a litigant to attach the Judgment appealed against and omit the decree, I do not find such an omission fatal. I am inclined to agree with findings in *Nyota Tissue Products versus Charles Wanga Wanga & 4 others* [2020] eKLR where the court held that:-

“The rule applicable to the appeals to the High Court makes provision under Order 42 Rule 13 (f) of the *Civil Procedure Rules* for the filing of a copy of the Judgment, Order or decree appealed from” and does not make it mandatory to attach the judgment and the decree. The record of Appeal herein attached the judgment of the trial court according to the requirements of order 42 rule 13 (4) (f) of the *Civil Procedure Rules*, and in my respectful view, I would agree with the court in silver Bullet Bus Case on the point, that it would be too draconian to strike out the appeal in these circumstances”.

51. In *Paul Lawi Lokale versus Auto Industries Limited & another* [2020] eKLR Nyakundi J, when discussing whether a litigant ought to attach both a judgment and a decree stated that:

“To my mind, the use of the conjunction “Or” suggest that litigants are not mandatorily obliged to attach both the judgment and the decree”.



52. I am persuaded by the latter aforementioned authorities and, I find that it would be draconian to strike out the appeal for lack of a certified copy of the decree. The appellant has attached a certified copy of judgment appealed against and I therefore find that the appeal should not be struck out on the basis of a procedural technicality which does not go to the substance of the appeal. It is therefore my finding that the appeal is competent.

Whether the Principal Magistrate Court had Jurisdiction to Deal With a Claim for Adverse Possession.

53. The appellants submitted that a principal magistrate court is not one of the courts contemplated under Section 38 (1) of the *Limitations of Actions Act* to deal with adverse Possession cases. The respondents appear to be in support of the appellants' argument in this respect. The respondents relied on this court's holding and finding in *Patrick Kirimi M'Nganabu versus Njeru Muchai* [2021] eKLR. In view of the fact that the wording in Section 38(1) of the *Limitation of Actions Act* refers the High Court and does not mention any other court, including the Magistrate's Court, it is my respectful finding that the learned trial Magistrate had no jurisdiction to adjudicate over the claim of adverse possession. The trial court should have declined jurisdiction to hear and determine the respondent's claim which was a claim of adverse possession.

Whether the Appellants' Suit was Time Barred or Whether the Appellant was Entitled to the Orders Sought.

54. The Appellants filed the suit in the trial court on 23rd September 2020 seeking for orders of permanent injunction and eviction of the respondents from the suit properties. The 1st appellant testified that the respondents entered and occupied the suit land registered in his name in 1975. The 1st appellant's evidence was that he was issued with a title deed in 1993. On his part, the 2nd Appellant testified that he bought the land Kiamuri A/1952 and he has a title deed to the said parcel of land that was registered in his name in the year 1992 and the title deed was issued in the year 1993. The 2nd appellant's evidence was that the respondents encroached his parcel of land in 2007. It was the respondents' contention that the suit was time barred since the suit in the trial court was only filed on 30th September, 2020 when they were in actual occupation and possession for a period of over 12 years. The respondents relied on the provisions of Section 7 of the *Limitations of Actions Act*.
55. Section 7 of the *Limitation of Actions Act* provides as follows-;

“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.”

56. In matters of land, it should be appreciated that time starts running in favour of the occupant, who can claim adverse possession if 12 years lapse when his occupation is undisturbed. To me failure by the appellants to bring action against the respondents before the expiry of 12 years from the year 1992 and 1993 would be akin to allowing the respondents quiet occupation of the suit land, and after 12 years any action which attempts to reclaim the suit land would be time barred.
57. In *Anaclet Kalia Musau v Attorney General & 2 Others* [2020] eKLR, Civil Appeal 111 of 2017, the Court of Appeal stated as follows:

“The solitary issue in this appeal is, whether the suit before the High Court was statutorily time barred. To demonstrate that time limitation is a jurisdictional question and that if a



matter is statute-barred a court has no jurisdiction to entertain it, we cite the decision of the Supreme Court in the case of *Nasra Ibrahim Ibren v. Independent Electoral and Boundaries Commission & 2 others*, Supreme Court Petition No. 19 of 2018, where that court stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue suo motu. It said:

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:

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...”.

58. The Court of Appeal for East Africa in *Iga v. Makerere University (supra)* stated that:-

“The limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time-barred, the court cannot grant the remedy or relief..... The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, and no grounds of exemption are shown in the plaint, the plaint must be rejected.” The learned Judge in this appeal, no doubt did not err when she determined whether, by operation of the law, she had to down tools for want of jurisdiction.”

59. Having considered the evidence on record, I come to the conclusion that appellants’ suit against the respondents was time barred. It is my finding that the learned trial Magistrate reached the right conclusion that the appellants herein were locked out of the limitation period and their suit was time barred, and I find no reason to upset the decision. However, the learned trial Magistrate was not justified in allowing the respondent’s claim for adverse possession.

60. In the premises, I therefore allow this appeal partly, set aside the decision of the Principal Magistrate issued by Hon. S. K. Ngetich, PM dated 21st December, 2022 in Nkubu PMC ELC. Case No. E006 of 2020. I substitute therefor the following orders:

- a. The appellants’ suit was time barred and the decision of the trial court to dismiss it is upheld.
- b. The order declaring that the respondents’ have acquired the suit properties by adverse possession is set aside, and I substitute therefore an order striking out the respondents’ counterclaim.
- c. Since the appeal is partly successful, I order that each party bears their own costs of both the appeal and in the case in the lower court.

61. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 15TH DAY OF MARCH, 2024

HON. C. YANO

ELC – JUDGE



In the presence of:-

Court Assistant: Tupet

Mwirigi for Respondent

No appearance for the Appellants

