Sugawara v Kiruti (Sued in her capacity as the administratrix of the Estate of Mutarakwa Kiruti Lepaso alias Mutaragwa Kiruti Lepaso alias Mutaragwa Kiroti Leposo and in her own Capacity) & 3 others (Civil Appeal E141 of 2022) [2024] KECA 1417 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1417 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E141 OF 2022

AK MURGOR, S OLE KANTAI & A ALI-ARONI, JJA

OCTOBER 11, 2024

BETWEEN

PAULINE CHEMUGE SUGAWARA ..... APPELLANT

AND

NAIRUKO ENE MUTARAKWA KIRUTI (SUED IN HER CAPACITY AS THE ADMINISTRATRIX OF THE ESTATE OF MUTARAKWA KIRUTI LEPASO ALIAS MUTARAGWA KIRUTI LEPASO ALIAS MUTARAGWA KIROTI LEPOSO AND IN HER OWN CAPACITY) ..... 1ST RESPONDENT

MOSES ORIKAE MUTARAKWA ..... 2ND RESPONDENT

JOHN LESIAN MUTARAKWA ..... 3RD RESPONDENT

ADMINISTRATORS OF THE ESTATE OF KIRUTI LEPASO 4TH RESPONDENT

(Being an appeal against the Judgment and the Decree in Environment and Land Court at Kajiado (M. N. Gicheru, J.) delivered on 18th January 2022 in ELC Appeal No. E002 of 2020)

Magistrates Courts have no jurisdiction to determine claims of adverse possession.
The dispute revolved around whether Magistrates Courts had the jurisdiction to determine claims of adverse possession. The Court of Appeal recognized the difference in judicial reasoning of the Environment and Land Court, highlighting conflicting decisions on the issue. Ultimately, the Court of Appeal held that sections 37 and 38 of the Limitation of Actions Act, which provided that claims of adverse possession were to be heard by the High Court, should be construed to mean the Environment and Land Court (ELC) given the jurisdiction of the ELC under article 162(2)(b) of the Constitution. The Magistrates Courts did not have the jurisdiction to determine claims of adverse possession

Reported by John Ribia

Statutes *– interpretation of statutes – interpretation of sections 37 and 38 of the Limitation of Actions Act – where sections 37 and 38 of the Limitation of Actions Act provided that claims of adverse possession were to be heard by the High Court – implication of provision in light of article 162(2)(b) of the Constitution that gave the Environment and Land Court equal status to the High Court in determining matters relating to land and environment - whether sections 37 and 38 of the Limitation of Actions Act, which provided that claims of adverse possession were to be heard by the High Court should be construed to mean the Environment and Land Court (ELC) given the jurisdiction of the ELC under article 162(2)(b) of the Constitution.*

Jurisdiction *– jurisdiction of the Magistrates Court – jurisdiction to determine claims of adverse possession - whether Magistrates Courts had the jurisdiction to determine claims of adverse possession – Constitution of Kenya article 159(2)(d), and 162(2)(b); Limitation of Actions Act (Cap 22) sections 37 and 38; Environment and Land Court Act (Cap 8D) sections 13, 26(3) and (4); Magistrates' Courts Act (Cap 10) section 9.*

Civil Practice and Procedure *– pleadings – verifying affidavit – failure to file a verifying affidavit with a plaint or counter claim – effect - whether the requirement for filing a verifying affidavit was mandatory and the failure to file was fatal as a court may strike out the plaint or counterclaim either on its own motion or on application of the parties – Civil Procedure Rules (Cap 21 Sub Leg) order 4 and order 7 rule 5.*

Brief facts

The dispute in this case arose from a claim by the appellant seeking ownership of a parcel of land by adverse possession. The appellant alleged that they had been in continuous, exclusive, and uninterrupted occupation of the suit property for over 12 years, thereby acquiring ownership rights under the doctrine of adverse possession.

The respondent, as the registered owner, opposed the claim, arguing that the appellant's occupation was not adverse but permissive. The respondent further contended that any possession by the appellant had been interrupted, and thus, the claim did not meet the legal threshold for adverse possession.

When the matter was placed before the trial court, it found that it lacked jurisdiction to hear and determine the case. As a result, the court dismissed the appellant's claim without making any substantive findings on the merits of adverse possession.

Dissatisfied with that decision, the appellant filed an appeal before the first appellate court, challenging the trial court's finding on jurisdiction. When the first appellate court upheld the trial court's decision, the appellant lodged a second appeal, arguing that the lower courts erred in their interpretation and application of jurisdictional principles.

Issues

i. Whether sections 37 and 38 of the Limitation of Actions Act, which provided that claims of adverse possession were to be heard by the High Court, should be construed to mean that they should be heard at the Environment and Land Court (ELC) given the jurisdiction of the ELC under article 162(2)(b) of the Constitution.

ii. Whether Magistrates Courts had the jurisdiction to determine claims of adverse possession.

iii. Whether the requirement for filing a verifying affidavit was mandatory and the failure to file it was fatal as a court could strike out the plaint or counterclaim either on its own motion or on application by the parties.

Held

1. Questions of jurisdiction could be raised at any time, since it was trite law that jurisdiction was everything. The first appellate judge rightly took up the issue of jurisdiction to ascertain whether the trial court should have determined the claim for adverse possession.

2. Section 13 of the Environment and Land Court (ELC) Act gave the ELC the original and appellate jurisdiction to hear and determine all disputes on environment and land in accordance with article 162(2)(b) of Constitution. Section 26(3) and (4) of the Environment and Land Court Act provided 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 Kenya. The provisions were replicated under

section 9(a) of the Magistrates' Courts Act, 2015, which gave the Magistrate's court's jurisdiction over environment and land matters.

3. A consideration of jurisprudence on the jurisdiction of the Magistrates Court since the expansion of environment matters to Magistrates' Courts demonstrated that the decisions on the issue were not in accord. There were decisions that had reached the conclusion that the Magistrates Court had jurisdiction to hear claims for adverse possession. *Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & another* [2020] eKLR the ELC held that where the matter was in the pecuniary jurisdiction of the Magistrates Court, then the said court could handle the matter. The decision was followed in the cases of *Philip Kithaka v Mercy Karimi Nyaga* [2021] eKLR and *Christopher Kangogo Cheboiboch v Susan Chepichi Chepkiyeng* [2021] eKLR. Other decisions of the ELC held contrary views, which seemed to be the more predominant position. In *Jesee Njoroge Gitau v Kibuthu Macharia & another* [2019] eKLR, *Michael Chebii Toroitich v Peter Mogin Yatich Chebii* [2013] eKLR, *Njoki Wainaina v Josephat Thuo Githachuri & 3 others; National Land Commission & another (Interested Parties)* [2021] eKLR, and *Reuben v Mwangangi & 7 others (Environment & Land Case E011 of 2023) [2023] KEELC 21899* (KLR) the ELC held that the Magistrates Court had no jurisdiction in matters adverse possession.
4. The controversial question of jurisdiction of the Magistrates' Courts in claims for adverse possession emanated from sections 37 and 38 of the Limitation of Actions Act where it was specifically provided that such claims were to be heard by the High Court. Reference was to the "High Court" as the court to which such cases were heard, and given the dictates of the Constitution, that should be construed to mean the Environment and Land Court, as being the court donated with jurisdiction to hear and determine matters pertaining to adverse possession of land. The effect of that interpretation was that, it was only the Environment and Land Court established under article 162(2)(b) that was mandated to hear those cases. So that, notwithstanding the expansion of the jurisdiction of environment and land usage to Magistrates Courts, it was distinctive that under section 9(a) of the Magistrates Courts Act, various matters were specified for determination, but claims for adverse possession were not included.
5. A court's jurisdiction flowed from either the Constitution or legislation or both. Thus, a court could only exercise jurisdiction as conferred by the Constitution or other written law. It could not arrogate to itself jurisdiction exceeding that which was conferred upon it by law.
6. If it was intended that claims for adverse possession be determined by the Magistrates' Court, 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 of the Limitation of Actions Act would mean that hearing and determination of such matters was specifically limited to the Environment and Land Court to the exclusion of Magistrates' Court.
7. The jurisdiction of Magistrates' Courts was largely determined by the pecuniary interest designated for determination 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 may be 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 in excess of the particular Magistrates' Court's pecuniary jurisdiction, which for all intents and purposes was not what was intended by the Act.
8. Magistrates' Courts did not have jurisdiction to determine the claims of adverse possession. The trial court rightly disregarded hearing and determining it.
9. The appellant had not produced any agreements for sale, land control board consent, transfers in respect of the suit parcels and evidence of payment of the purchase price or stamp duty as proof of acquisition, she failed to establish her case; that furthermore, as she had not also demonstrated that the 1st respondent, as the administrator of the estate of her late husband, the registered proprietor of the suit parcels had sold them to her, she could not, have obtained a proper title to the parcels of land.

10. On a second appeal, the Court of Appeal was only concerned with points of law. Both the trial court and the High Court having concurrently found as of fact that due to the lack of proper documentation, the appellant had failed to prove the legitimacy of her ownership of the suit parcels, the court could not interfere with the concurrent findings of fact. The court was not persuaded that the appellant established that she obtained proper title to the suit parcels.
11. The inference of order 4 of the Civil Procedure Rules was that the requirement for filing a verifying affidavit was mandatory and the failure to file was fatal as a court may strike out the plaint or counterclaim either on its own motion or on application by the parties. However, failure to include a verifying affidavit was not fatal and where none was filed, the court may give the party an opportunity to file one. The power to strike out was only permissive and not mandatory. Both the trial court and the first appellate court rightly declined the invitation to strike out the respondents' counterclaim.

Appeal dismissed with costs to the respondents.

Citations

Cases

1. Cheboiboch, Christopher Kangogo v Susan Chepichi Chepkiyeng (Environment & Land Case E002 of 2021; [2021] KEELC 2797 (KLR)) — Mentioned
2. Gitau, Jesee Njoroge v Kibuthu Macharia & another (Environment & Land Case 81 of 2017; [2019] KEELC 4559 (KLR)) — Explained
3. In re Estate of Jamin Inyanda Kadambi (Deceased) (Succession Cause 415 of 2013; [2021] KEHC 4513 (KLR)) — Explained
4. Kithaka, Philip v Mercy Karimi Nyaga (Environment & Land Miscellaneous Case E004 of 2020; [2021] KEHC 5202 (KLR)) — Mentioned
5. Korir, Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 6 others (Petition 1 of 2013; [2013] KEHC 399 (KLR)) — Mentioned
6. Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others (Civil Appeal 287 of 2016; [2017] KECA 231 (KLR)) — Mentioned
7. M'nthieri, M'rarama v Luke Kiumbe Murithi (Civil Appeal 91 of 2012; [2015] KEHC 1097 (KLR)) — Explained
8. Muchambindwiga & another v Octavian Mwaniki Kariuki (Environment & Land Case 42 of 2017; [2021] KEELC 3804 (KLR)) — Explained
9. Munyua, Patrick Ndegwa v Benjamin Kiiru Mwangi & another (Environment & Land Case 2 of 2019; [2020] KEELC 3911 (KLR)) — Explained
10. Muriithi, Stanley N. & another v Bernard Munene Ithiga (Civil Appeal 12 of 2014; [2016] KECA 821 (KLR)) — Explained
11. Njoroge v Republic (Criminal Appeal 28 of 1979; [1982] eKLR; [1982] KLR 388) — Explained
12. Owners Of The Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1) — Explained
13. Public Trustee v Wanduru (Civil Appeal 73 of 1982; [1984] KECA 72 (KLR); [1984] KLR 314) — Explained
14. Republic v Chengo & 2 others (Petition 5 of 2015; [2017] KESC 15 (KLR)) — Explained
15. Reuben v Mwangangi & 7 others (Environment & Land Case E011 of 2023; [2023] KEELC 21899 (KLR)) — Explained
16. Toroitich, Michael Chebii v Peter Mogin Yatich Chebii (Environment & Land Case 62 of 2013; [2013] KEELC 60 (KLR)) — Explained
17. Wainaina, Njoki v Josephat Thuo Githachuri & 3 others; National Land Commission & another (Interested Parties) (Environment & Land Case 92 of 2019; [2021] KEELC 1553 (KLR)) — Explained

Statutes

1. Civil Procedure Act (cap 21) — section 72(1) — Cited

2. Civil Procedure Rules 2010 (cap 21 Sub Leg) — order 7 Rule 5 — Cited
3. Constitution of Kenya — article 159(2) (d); 162(2) (b) — Cited
4. Environment And Land Court Act (cap 8D) — section 13; 26 — Cited
5. Land Registration Act (cap 300) — section 26 — Cited
6. Law of Succession Act (cap 160) — section 32, 33, 45, 82 (b)(ii) — Cited
7. Limitation of Actions Act (cap 22) — section 26; 38 (1) — Cited
8. Magistrates' Courts Act (cap 10) — section 9(a) — Cited

Advocates

None mentioned

JUDGMENT

1. The appellant, Pauline Chemuge Sugawara filed the suit against the respondents before the Kajiado Chief Magistrate's Court seeking the following orders:

    a. "The court be pleased to issue a permanent injunction restraining the defendants, their servants, agents, employees and or anyone else working under their direction, instruction and or employment from further disturbing, trespassing, alienating, claiming ownership and or interfering with the plaintiff's quiet, peaceful possession, enjoyment and or ownership of all the parcels of land registered as Kajiado/Kitengela/1xxxx,Kajiado/Kitengela/10xxxx,Kajiado/Kitengela/106xxx and Kajiado/Kitengela/xxxxx or any part thereof.

    b. A declaration that the plaintiff is the *bona fide*, legal and beneficial owner of all those parcels of land known and Kajiado/Kitengela/ 100624, Kajiado/Kitengela/10xxxx,Kajiado/Kitengela/106xxx and Kajiado/Kitengela xxxxx by virtue of registration and having been in uninterrupted and continuous possession of the said properties for more than 12 years.

    c. Without prejudice to any of the above. the court be pleased to Issue a declaration that the defendants' claim of, and or right to ownership of Kajiado/Kitengela/1xxxx,Kajiado/Kitengela/10xxxx, Kajiado/Kitengela/106xxx and Kajiado/Kitengela are time and statute barred and the plaintiff is entitled to ownership and or is the valid proprietor of Kajiado/Kitengela/1xxxx,Kajiado/Kitengela/10xxxx,Kajiado/Kitengela/106xxx and Kajiado/Kitengela/xxxxx by virtue of adverse possession.

    The court be pleased to issue an order for the Immediate removal and or cancellation of the restrictions registered against the plaintiff's parcels of land known and registered as Kajiado/Kitengela/1xxxx, Kajiado/Kitengela/10xxxx, Kajiado/Kitengeia/106xxx and Kajiado/Kitengela/xxxxx be removed and or canceled.

    d. The defendants be condemned to pay the costs of this suit."

2. The appellant claimed that she is the registered proprietor of Land Reference Numbers Kajiado/Kitengela/1xxxx, Kajiado/ Kitengela/10xxxx, Kajiado/Kitengela/ 106xxx and Kajiado/ Kitengela/xxxxx (the suit parcels) and that she acquired them from the 1st respondent in late 2003; that she immediately took possession and constructed a restaurant and bar on the suit parcels called Mabwai House Bar and Restaurant.

3. It was her case that sometime in 2003 the 1st respondent approached her with a request for financial assistance through sale to her of Kajiado/Kitengela/1xxxx. She claimed that she accepted the offer and negotiated the price at Kshs 90,000 of which she paid Kshs 10,000 at the time of signing the agreement

and the balance of Kshs 80,000 upon receipt of the title deed which she obtained two weeks after signing the agreement.

4. She claimed that the agreement was witnessed by the 2nd and 3rd respondents and one, Kiruti Lepaso the 1st respondent's brother- in -law who subsequently handed over the title deed to her; that thereafter she constructed the hotel on Kajiado/Kitengela/1xxxx; that soon after that, the 1st respondent approached her with another request for purchase of property and they again transacted on Kajiado/Kitengela/106xxx and xxxxx which she claimed she purchased for Kshs 100,000. Later in 2005 she purchased Kajiado/Kitengela/10xxxx in the same way.

5. She stated that she had been residing on the suit parcels, and that as at the time of filing suit, she had been in occupation of parcel Numbers Kajiado/Kitengela/106xxx,xxxxx and 1xxxx for more than 14 years and Kajiado/ Kitengela/10xxxx since 2005, a period of more than twelve (12) years.

6. However, in May 2018, she learned that the 1st respondent reported to the Police that she was illegally occupying her late husband's land which led to her being charged with forcible detainer, even though she holds valid titles to the suit parcels and had been in possession for more than 13 years prior; that she filed the suit when the 2nd and 3rd respondents invaded and trespassed on the suit parcels and her place of business, in a bid to stop them from trespass, persistent harassment and threats against her and her staff.

7. She stated that she has been in possession of the properties until she was alerted by her neighbor, Dr Koskei that there were restrictions on the parcels. A search on the titles disclosed the restrictions placed on her parcels. The Lands Registrar referred her to Ongata Rongai Police Station where she was informed that there was a complaint that the properties had been illegally and fraudulently acquired hence the restrictions placed on the parcels of land. She further stated that due to flooding of her house, she had lost most of her documents and that the only available documents she had were the original Certificates of Title of the suit parcels; that the sale Agreements were lost in the flood. he maintained that she bought the properties from the 1st respondent in the presence of 1st respondent's brother in law.

8. In response, the respondents filed a defence and counterclaim in which they sought;

    a. "A declaration that the titles Kajiado/ Kitengela/1xxxx, Kajiado/ Kitengela/10xxxx, Kajiado/ Kitengela/106xxx and Kajiado/ Kitengela/xxxxx were fraudulently and improperly produced and the same canceled. -

    b. A declaration that the 1st defendant's deceased husband one Mutaragwa Kiruti Lepaso is the legal owner of the suit properties land reference number Kajiado/ Kitengela/1xxxx, Kajiado/ Kitengela/10xxxx, kajiado/Kitengela/ 106xxx and Kajiado/ Kitengela/xxxxx a declaration that the register of the titles of land reference numbers Kajiado/ Kitengela/1xxxx, Kajiado/ Kitengela/10xxxx, kajiado/Kitengela/ 106xxx and Kajiado/ Kitengela/xxxxx be rectified so as to remove the entries in favour of the deceased and the titles to revert back to the proprietorship of the deceased .

    c. Costs of this suit and of the counter claim together with the interest thereon from the date of this suit are awarded to the defendants."

9. The respondents' case was that the suit parcels formed part of the estate of the deceased and that as beneficiaries, they obtained a Grant of Letters of administration dated September 17, 2012 pending the confirmation of grant to date; that their deceased father owned Kajiado/Kitengela Plot Number 8479 which was subdivided into 137 plots before his demise and that the 4 suit properties allegedly

purchased by the appellant were among the 137 plots; the respondents each denied participating in the sale of the suit parcels as alleged asserting that they did not have the capacity at the time to sell them.

10. The 1st respondent on her part contended that neither her, nor her late husband the deceased ever sold the 4 suit parcels to the appellant nor had they received any cash since she did not have the capacity, as the letters of administration had not been obtained. It was her evidence that she is illiterate, further, she denied signing sale agreements with regard to the suit properties or receiving any money from the appellant; further, her husband had not sold the land to the appellant. She however stated that, her brother-in-law used to collect land titles from Kajiado and that she reported to the police when she saw people putting up structures on her land.

11. The 2nd, 3rd and 4th respondents stated that they never witnessed any transaction as alleged; that further, while still alive, the deceased sub-divided the parcel of land into 137 plots. He had sold 16 plots while he was alive and the appellant's plots were not among them. They stated that the 1st respondent applied for a grant of letters of Administration to the Estate of the deceased vide PMCC No 74/2018 Mutarakwa Kiruti Lepaso in 2012, which was issued in September 2012. They claimed that the deceased gave the titles for the subdivisions to his brother Kiruti Lepaso for safe custody and that he had sold all the parcels of land illegally and fraudulently, following which, they lodged a complaint with the police and placed restrictions on the parcels of land; that they came to learn that the appellant together with other persons, had fraudulently acquired their land and they reported the matter to the police.

12. Paul Tunoi, the County Land Registrar Kajiado produced in evidencegreen Cards for parcels of land registration numbers Kajiado/Kitengela/1xxxx, 106xxx and 10xxxx, indicating that the parcels were subdivisions of LR No Kajiado/Kitengela/8479 registered in the name of the Mutiarakwa Kiruti Lepaso (Deceased); that the parcels were transferred to the appellant on August 28, 2003 and November 20, 2003; that they learnt from the beneficiaries that the deceased had died on August 29, 2002. He also stated that the land being agricultural land, the Land Control Board consent was required in respect of the transfer, since no consent was on record, the transfer was fraudulent. He further stated that stamp duty had not been paid on the alleged transfers and that in the absence of the completion documents, it meant that the transfers were fraudulent; that for a transfer to be valid, the Land Control Board Consent was necessary, as well as an application for Transfer and payment for Stamp Duty.

13. The trial Magistrate upon considering the parties' dispute dismissed the appellant's claim and allowed the respondents' counterclaim on the basis that the appellant had not established her case as she had not produced any agreements for sale, the land control board consent, transfers in respect of the suit parcels and evidence of payment of stamp duty to prove the transactions occurred. It was also observed that if at all, the 1st respondent sold the parcels she, could not do so as she had not obtained the requisite letters of administration.

14. Aggrieved by the decision, the appellant filed an appeal to the Environment and Land Court on grounds: that the trial Magistrate should have found that the appellant was entitled to the land through adverse possession; having occupied the land for over 12 years; that the records for the suit parcels were missing; and the appellant should not have been blamed for this; that the counterclaim was defective as it was statute barred and not supported by a verifying affidavit; that the 1st respondent had come to court with unclean hands having admitted that she had intermeddled with the estate of her deceased husband; that the respondents have not proved fraud on her part and that she was an innocent purchaser for value and should have been treated as such; and finally, that the 1st respondent is estopped from denying that she had the authority to sell and transfer the suit property to the appellant.

15. The first appellate judge upon considering the appeal, in a Judgment dated January 18, 2022, dismissed the appeal for want of merit. In arriving at that decision, the judge framed six issues for consideration, namely: i) whether the trial Magistrate had jurisdiction to declare that the appellant was entitled to the parcels through adverse possession, and whether or not adverse possession was pleaded and proved; ii) whether fraud was the only ground under which a certificate of title can be defeated under the *Land Registration Act*; iii) whether the respondents' counterclaim was defeated by the absence of a verifying affidavit; iv) whether the appellant could be described as a purchaser for value without notice of defect in the title; v) whether the respondents were stopped from seeking to recover the suit parcels by reason of limitation and vi) the effect of section 32 and 33 of the *Law of Succession Act* on title.

16. On the first issue, the learned judge found that the trial magistrate had no jurisdiction to hear claims for adverse possession. On the second issue, the judge found that under section 26 of the *Land Registration Act*, fraud is not the only ground that can defeat a certificate of title, as the provision provides for other grounds including the acquisition of a certificate illegally and unprocedurally or through a corrupt scheme. Third, the judge found that the counterclaim was not defeated by the failure to file a verifying affidavit. Fourth, the appellant could not be considered a *bona fide* purchaser for value as no evidence was produced to show that she had paid valuable consideration for the suit parcels. Fifth, the Judge held that the counterclaim was not statute-barred as under section 26 of the *Limitation of Actions Act*, there is no limitation for land transferred by mistake, and sixth, that sections 32 and 33 of the *Law of Succession* had no bearing on the suit since the issues in dispute pertained to land and not to succession.

17. Further aggrieved, the appellant has filed an appeal to this court on grounds set out in a memorandum of appeal dated March 18, 2022 that; the learned judge was in error in holding that the Magistrates' court had no jurisdiction to hear questions of land ownership claims for adverse possession since neither party had raised the issue, and therefore, it was not a matter for the court's determination; in failing to appreciate that the counter -claim was filed without a verifying affidavit which rendered it incompetent and fatally defective; that the learned judge did not take into account that fraud was not specifically proved; and that the learned judge was in error in holding that the appellant's titles were fraudulently acquired.

18. Both the appellant and the respondents filed written submissions which they briefly highlighted when the appeal came up for hearing on a virtual platform. Learned counsel for the appellant, Mr Murage submitted that the learned judge did not take into account that the respondents' counter-claim was defective since it was not accompanied by a verifying affidavit and that for this reason, it ought to have been struck out.

19. Counsel further submitted that the respondents did not specifically plead that the appellant acquired the suit parcels fraudulently, nor did they prove that the suit parcels were fraudulently acquired; that the Land Registrar testified that the documents pertaining to the transfer of the suit parcels to the appellant were missing from the Registry, which pointed to the fact that the parcels had been acquired legitimately.

20. Counsel went on to submit that the appellant having resided on the parcels of land for more than 16 years, she had acquired them by virtue of adverse possession. Counsel faulted the trial judge for failing to reach such finding based on the evidence. On record. Counsel relied on the case of *Public Trustee v Wanduru*, [1984] KLR 314, where Madan JA held that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years. Concerning the issue of whether the trial Magistrates court had jurisdiction to consider the issue of adverse possession, counsel asserted that the issue was properly before the 1st appellate court, yet the court did not address

the question of adverse possession. Finally, counsel submitted that, Land Control Board consent was inapplicable in cases of adverse possession.

21. On their part learned counsel, Mr. Mbithi holding brief for Ms. Gikonyo appeared for the 1st to 3rd respondents, counsel relied entirely on the respondents' written submissions. In their submissions, it was asserted that the appellant had not met the threshold required to prove a claim for adverse possession; that her stay on the parcel of land was interrupted when she was charged in court with fraud, and restrictions were placed against the titles to the suit parcels. Counsel relied on the case of *Muchambindwiga & another v Octavia Mwaniki Kariuki* [2021] eKLR which set out the requirements necessary to satisfy a claim for adverse possession. It was submitted, that the appellant's claim was not proved as the evidence did not disclose when the period of limitation began to run.

22. Furthermore, it was submitted that the lack of evidence of purchase of the suit parcels meant that the appellant's claim could not be substantiated, more particularly because, the appellant could not have obtained title from the 1st respondent since by the time of the alleged acquisition, the 1st respondent had not obtained letters of administration in respect of the deceased's estate; that any alleged transfer would have amounted to intermeddling with the deceased's estate. Counsel relied on the case of *Re Estate of Jamin Inyanda Kadambi (Deceased)* [2021] eKLR, where it was held that any sale transaction that is carried out by the administrators contrary to the strictures of sections 45 and 82 (b)(ii) of the *Law of Succession Act*, is invalid for all intents and purposes.

23. With regard to the counter-claim, it was submitted that the omission in filing a verifying affidavit did not warrant a dismissal of the counter -claim. Counsel urged us to disregard the objection given the purport of article 159(2)(d) of the *Constitution* regarding technicalities, and to uphold both the lower court and the Environment and Land Court Judgments as was held in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR.

24. This is a second appeal. And in a second appeal this court's mandate is limited to matters of law only and the court should refrain from considering matters of fact, unless it is demonstrated that the 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 as prescribed under section 72(1) of the *Civil Procedure Act*.

25. This position was succinctly explained by this court in the case of *Stanley N Muriithi & another v Bernard Munene Ithiga* [2016] eKLR thus:

> "...In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This court, on second appeal, confines itself to matters of law 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.
>
> We hasten to observe, however, that failure on the part of the first appellate court to re-evaluate the evidence tendered before the trial court and as a result, arriving at the wrong conclusion is a point of law."

26. Upon considering the appeal, the pleadings, the evidence on record, the judgments of the courts below, the grounds of appeal, and the rival submissions of the parties, the issues that arise for consideration are; i) whether the first appellate court rightly found that the trial Magistrates' court had no jurisdiction to determine a claim for adverse possession; ii) whether the appellant proved that the suit parcels were properly acquired; and iii) whether the respondents failure to file a verifying affidavit rendered their counterclaim defective.

27. On the claim for adverse possession, a consideration of the trial Magistrate's Judgment discloses that the question of adverse possession was neither considered nor determined. The issue was first raised in the first appellate court which held that by virtue of section 38(1) of the *Limitation of Actions Act*, it was the High Court, and in this case the Environment and Land Court and not the Magistrates' courts that has jurisdiction to hear and determine a claim for adverse possession. Having so found, the matter ended there.

28. As to whether the first appellate court rightly concluded that the Magistrates' Court did not have jurisdiction to hear claims for adverse possession, we begin from the standpoint that questions of jurisdiction can be raised at anytime, since it is trite law that jurisdiction is everything.

29. In the case of the *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR it was held that:

> " It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court." (emphasis ours)

30. As a consequence, there is no doubt that the first appellate judge rightly took up the issue of jurisdiction to ascertain whether the trial court should have determined the claim for adverse possession.

31. Having said that, did the Magistrates' Court have jurisdiction to hear and determine claims for adverse possession? The question of whether the Magistrates' courts have jurisdiction to hear and determine some claims has recently become a vexing question for courts following the establishment of the Environment and Land Court under article 162(2)(b) of the *Constitution* 2010 to hear and determine disputes relating to the environment, use and occupation of and title to land, and the expansion of the hearing and determination of land disputes to the Magistrates courts.

32. Section 13 of the *Environment and Land Court Act* provides that:

> " The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land. (2) In exercise of its jurisdiction under article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes— (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; (b) relating to compulsory acquisition of land; (c) relating to land administration and management; (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (e) any other dispute relating to environment and land."

33. Whereupon, section 26(3) and (4) of the *Environment and Land Court Act*, 2011 provides that:

> " (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.
>
> 4. Subject to article 169(2) of the *Constitution*, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —

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

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. These provisions are replicated under section 9(a) of the *Magistrates' Courts Act*, 2015, which gives the Magistrate's Court's jurisdiction over environment and land matters. It is provided inter alia that:

> " A magistrate's court shall in the exercise of the jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* (No 19 of 2011) and subject to the pecuniary limits under section 7(1) hear and determine claims relating to —
>
> i. environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
>
> ii. compulsory acquisition of land;
>
> iii. land administration and management;
>
> iv. public, private and community land and contracts, chose in action or other instruments granting any enforceable interests in land; and
>
> v. environment and land generally.

35. Over time the Chief Justice has variously gazette notices, and made appointments pursuant to section 26(3) and (4) of the *Environment and Land Court Act*, 2011.

36. Subsequently, the jurisdiction of the Magistrates' Courts to hear and determine disputes relating to environment and the use and occupation of, and title to, land was endorsed by this court in the case of *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others* [2017] eKLR.

37. However, the distinctive issue in this appeal is concerned with a claim for adverse possession and whether under section 9(a) of the *Magistrates' Courts Act*, magistrates can determine such claims. It is instructive that, a consideration of jurisprudence on this issue since the expansion of environment matters to Magistrates' courts clearly demonstrates that the decisions on this issue are not in accord. A sampling of case law on the question makes this quite evident.

38. For instance, there are decisions that have reached the conclusion that the Magistrates Court has jurisdiction to hear claims for adverse possession. For instance, in the case of *Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & another* [2020] eKLR DO Ohungo, J held:

> " Based on the express provisions of section 26(3) and (4) of the *Environment and Land Court Act*, 2011 and section 9(a) of the *Magistrates' Courts Act*, 2015, the principles of interpretation of the *Constitution* as well as the principles of the *Constitution* such as devolution, access to services and access to justice for all persons, to find as I hereby do, that so long as presided over by a magistrate who is duly gazetted under section 26(3) of the *Environment and Land Court Act*, 2011 and who has the requisite pecuniary jurisdiction, magistrates' courts have jurisdiction and power to handle cases involving claims of adverse possession."

39. This decision was followed in the cases of *Philip Kithaka v Mercy Karimi Nyaga* [2021] eKLR and *Christopher Kangogo Cheboiboch v Susan Chepichi Chepkiyeng* [2021] eKLR both decisions were rendered by LN Mbugua, J.

40. Other decisions of the Environment and Land Court hold contrary views, which seems to be the more predominant position. It was held in the case of *Jesee Njoroge Gitau v Kibuthu Macharia & another* [2019] eKLR, that:

> " It is clear from the above provisions of the law that the Magistrate's court has no jurisdiction to try matters where a party is seeking adverse possession. Indeed, if both matters had been filed in this court, the best order suited to issue upon this application would have been an order for consolidation of both the matters. However, this is not the case in question."

41. In the case of *Michael Chebii Toroitich v Peter Mogin Yatich Chebii* [2013] eKLR M Sila, J held:

> " The matters in issue in Iten RMCC No 9 of 1994 and in the land disputes tribunal, in my view, were whether the defendant holds a half share of the land in trust for the plaintiff. The question whether the plaintiff is entitled to the suit land by way of adverse possession never arose in those proceedings. Indeed, they could not have arisen, as the Magistrate's court does not have jurisdiction to entertain a claim of adverse possession. Neither could adverse possession have been made a ground of attack or defence in those two proceedings. The issue of adverse possession could not have been raised and was never raised in those proceedings."

42. Similarly, in the case of *Njoki Wainaina v Josephat Thuo Githachuri & 3 others; National Land Commission & another (Interested Parties)* [2021] eKLR Mboya, J held that:

> " the magistrate's court, are not seized with jurisdiction to adjudicate upon claims founded on adverse possession on the face of the explicit provisions contained in sections 37 & 38 of the *Limitation of Actions Act*."

43. Recently in the case of *Reuben v Mwangangi & 7 others* (Environment & Land Case E011 of 2023) [2023] KEELC 21899 (KLR) Yano, J expressed:

> " I am aware that there exists within the magistrate's court, duly gazetted magistrates who are granted jurisdiction and power to handle cases involving occupation of and title to land. I am however, not persuaded that the magistrates courts have jurisdiction to adjudicate title on account of adverse possession. It is therefore my finding that the learned trial magistrate rightly declined jurisdiction over the respondents' claim of adverse possession".

44. The controversial question of jurisdiction of the Magistrates' Courts in claims for adverse possession emanates from sections 37 and 38 of the *Limitation of Actions Act* where it is specifically provided that such claims are to be heard by the "High Court".

45. In particular, section 38 of the *Limitation of Actions Act* provides:

> " (1) 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.

(2) ...

(3) ...

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.

(5) ..."

46. In other words, reference is to the "High Court" as the court to which such cases are heard, and given the dictates of the *Constitution* set out above, this should be construed to mean the "Environment and Land Court", as being the court donated with jurisdiction to hear and determine matters pertaining to adverse possession of land. The effect of this interpretation is that, it is only the Environment and Land Court established under article 162(2)(b) that is mandated to hear these cases. So that, notwithstanding the expansion of the jurisdiction of environment and land usage to Magistrates Courts, it is distinctive that under section 9(a) of the Magistrates Courts Act, various matters are specified for determination, but claims for adverse possession are not included.

47. In the case of *Republic v Karisa Chengo & 2 others* [2017] eKLR this Court held that:

> " A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

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

49. We come to this conclusion also bearing in mind that the jurisdiction of Magistrates' Courts is largely determined by the pecuniary interest designated for determination 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 may be 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 in excess of the particular Magistrates' Court's pecuniary jurisdiction, which for all intents and purposes was not what was intended by the Act.

50. In the circumstances, in view of the express provisions of section 38 of the *Limitation 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. As a consequence, the trial magistrate in the instant case rightly disregarded hearing and determining it. In the result, this ground is without merit and is accordingly dismissed.

51. Turning to the next issue of whether the appellant established that she was a *bona fide* purchaser for value of the suit parcels. In her plaint the appellant sought a permanent injunction against the respondents to restrain them from interfering with her peaceful and quiet enjoyment of the suit parcels for the reasons that she is the *bona fide*, legal, and beneficial owner of all those suit parcels having purchased the parcels from the 1st respondent and the subsequent transfer into her name. According to the appellant, the initial suit parcel was purchased from the 1st respondent in 2003 when the 1st respondent approached her to purchase it as she was in need of money. Later she purchased the other

three parcels. She stated that she purchased the 4 parcels for a total of Kshs 250,000 where upon the parcels were transferred into her name.

52. The 1st respondent denied having sold the suit parcels to the appellant. She stated that she had not at any time received monies from her in respect of the suit parcels, but, that there was the possibility that the titles may have been given to the appellant by her brother -in -law who was since deceased; that further, since she did not have capacity to enter into a sale agreement with the appellant because she had yet to acquire the letters of administration in respect of her late husband estate, and the suit parcels were in the name of her deceased husband the appellant could not have acquired proper title to the suit parcels; that on this basis the appellant could not claim to be a *bona fide* purchaser for value.

53. In addressing the issue of whether the appellant had procedurally and legitimately acquired the suit parcels, both the trial court and the first appellate court reached concurrent findings of fact that, since the appellant had not produced any agreements for sale, land control board consent, transfers in respect of the suit parcels and evidence of payment of the purchase price or stamp duty as proof of acquisition, she failed to establish her case; that furthermore, as she had not also demonstrated that the 1st respondent, as the administrator of the estate of her late husband, the registered proprietor of the suit parcels had sold them to her, she could not, have obtained proper title to the parcels of land.

54. The effect of concurrent findings of fact on a second appeal was considered in the case of *Njoroge v Republic* [1982] KLR 388, where this court held:

> " On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on no evidence."

55. In the instant case, both the trial court and the High Court having concurrently found as of fact that due to the lack of proper documentation, the appellant had failed to prove the legitimacy of her ownership of the suit parcels, we decline to interfere with the concurrent findings of fact. In the circumstances, we are not persuaded that the appellant established that she obtained proper title to the suit parcels, with the result that this ground is without merit.

56. Finally, there is the issue of whether the respondents' counterclaim ought to have been struck out for failure by the respondents to file a verifying affidavit.

57. The relevant provisions of rule 4 of the *Civil Procedure Rules* on the verifying affidavit provides:

1) ....

2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.

3) Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.

4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

5) The provisions of sub-rule (3) and (4) shall apply mutatis mutandis to counterclaims.

6) The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2)(3), (4) and (5) of this rule.

58. Furthermore, order 7 rule 5 of the *Civil Procedure Rules* also provides as follows:

> " The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—
>
> a. an affidavit under order 4 rule 1(2) where there is a counterclaim;
>
> b. a list of witnesses to be called at the trial:
>
> c. written statements signed by the witnesses except expert witnesses; and
>
> d. copies of documents to be relied on at the trial. Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under order 11.

59. The inference of rule 4 above is that the requirement for filing a verifying affidavit is mandatory and the failure to file is fatal as a court may strike out the plaint or counterclaim either on its own motion or on application of the parties.

60. This issue was however discussed by this court in the case of *M'rarama M'nthieri v Luke Kiumbe Murithi* Civil Appeal No 91 of 2019 [2015] eKLR, where it was discerned that:

> " ...the position taken by the court in *Research International East Africa Ltd v Julius Arisi & 213 others* (supra), was reiterated in the case of *Kenya Oil Company Limited v Javantilal Dharamshi Gosrami* [Nairobi Civil Appeal No 324 of 2005] (UR). There, we said: "The provisions of rule 1(6) of order 4 (formerly rule 1(3) of order VII), gives the court power to strike out a plaint which is not accompanied by a verifying affidavit containing the stipulated particulars. The power to strike out the plaint or [counterclaim] under the rule is not mandatory but permissive. The phrase "the court may....' in order 1(3) and in the new order 1(6) gives the court discretion whether or not to strike out a plaint as the court held in Arisi case (supra)"

61. Clearly, it was observed that failure to include a verifying affidavit was not fatal and where none was filed, the court may give the party an opportunity to file one. It further explained that the power to strike out is only permissive and not mandatory.

62. A consideration of the record discloses that both courts below declined to strike out the respondents' counterclaim for the reason of the failure to file the verifying affidavits. Given the position taken by this court that the striking out of a plaint or counterclaim on account of the omission is discretionary, we are satisfied that both the trial magistrate and first appellate Judge rightly declined the invitation to strike out the respondents' counterclaim. This ground is also without merit and is accordingly dismissed.

63. In sum, the appeal lacks merit and fails, and as such is dismissed with costs of the appeal to the respondents.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

A. K. MURGOR

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

ALI- ARONI

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR