



Child Welfare Society of Kenya Registered Trustees v Njubi (Environment and Land Appeal E057 of 2023) [2024] KEELC 13893 (KLR) (16 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13893 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E057 OF 2023
BM EBOSO, J
DECEMBER 16, 2024**

BETWEEN

THE CHILD WELFARE SOCIETY OF KENYA REGISTERED TRUSTEES APPELLANT

AND

SAMUEL NGANGA NJUBI RESPONDENT

(Being an Appeal against the Ruling of Hon P Muholi, Principal Magistrate, delivered on 14/9/2023 in Githunguri Principal Magistrate Court MCCC Misc Case No E001 of 2023 (OS))

JUDGMENT

Introduction

1. This appeal challenges the ruling rendered on 14/9/2023 by Hon P Muholi, PM, in Githunguri PMC MCCC Misc Case No. E001 of 2023 [OS]. The key issue that fell for determination in the impugned ruling was whether the trial court was seized of jurisdiction to hear adverse possession claims. The same question is the key issue that falls for determination in this appeal. Before I analyse and dispose the key issue in the appeal, I will outline the following: (i) a brief background to the appeal; and (ii) parties' respective submissions on the appeal.

Background

2. The Child Welfare Society of Kenya Registered Trustees [the appellant in this appeal] was the defendant in the lower court. Samuel Nganga Njubi [the respondent in this appeal] was the plaintiff. The suit in the lower court was initiated by the respondent through an originating summons dated 23/1/2023. He sought the following reliefs against the appellant: (i) a declaration that he had acquired title to land parcel number Komothai/Igi/371 under the *Limitation of Actions Act* and by the doctrine of adverse possession; (ii) an order that he be registered as the proprietor of the said land in place of



- the appellant; (iii) an order that the appellant do transfer or provide necessary papers and execute all documents necessary to enable him acquire title for the land and in default, the relevant Officer of the Court do execute the requisite transfer documents on behalf of the appellant; (iv) a permanent injunction restraining the appellant against interfering with his occupation and enjoyment of the suit land; and (v) an order providing for costs of the suit.
3. Together with the originating summons, the respondent filed a notice of motion dated 23/1/2023, seeking interlocutory injunctive reliefs. The respondent was granted interim injunctive orders pending the interpartes hearing and determination of the application.
 4. The appellant entered appearance and subsequently filed a replying affidavit dated 12/7/2023 and a notice of preliminary objection dated 12/7/2023. Through the preliminary objection, the appellant urged the court to strike out the suit on the ground that the court lacked jurisdiction to entertain a claim of adverse possession under Section 38 (1) of the *Limitation of Actions Act*. The respondent opposed the notice of preliminary objection. The respondent's case was that the lower court was seized of jurisdiction to deal with a claim for adverse possession. He urged the court to dismiss the preliminary objection. On 13/7/2023 parties were directed to file written submissions. The appellant filed written submissions dated 24/7/2023 while the respondent filed written submissions dated 9/8/2023. Upon confirming the filing of submissions on 24/8/2023, the lower court reserved its ruling for 14/9/2023.
 5. On 24/8/2023, the lower court rendered the impugned ruling in which it found that the court was properly seized of the requisite jurisdiction to hear and determine a claim of adverse possession. The lower court further found that the preliminary objection was devoid of merit and dismissed it with costs.

Appeal

6. Aggrieved by the ruling of the lower court, the appellant brought this appeal, advancing the following single ground:
 1. The learned magistrate erred in law in finding that the Senior Principal Magistrates Court has jurisdiction to hear and determine a claim for adverse possession.
7. The appellant prayed for the following reliefs from this Court: (i) an order allowing the appeal; (ii) an order setting aside the ruling of the lower court dated 14/9/2023; (iii) an order striking out the originating summons dated 23/1/2023; and (iv) an order condemning the respondent to bear costs of the appeal.

Appellant's Submissions

8. The appeal was canvassed through written submissions dated 5/12/2023, filed by M/s Hamilton Harrison & Mathews Advocates. Counsel for the appellant submitted that the decision in the case of Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR1 set out the principles and context for the determination of jurisdictional questions. Counsel also relied on the decision in the case of Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 Others [2012] eKLR where the Supreme Court held that a court can only exercise jurisdiction as conferred by *the Constitution* or other written law. Counsel further relied on Section 38 of the *Limitation of Actions Act* and Section 7 of the 6th Schedule of *the Constitution*. Counsel referred this Court to the decision of the Court in the cases of Njoki Wainaina vs Josephat Thuo Githachuri & 3 Others; National Land Commission & Another (Interested Parties) [2021]eKLR and Jesse Njoroge Gitau vs Kibuthu Macharia & Another [2019] eKLR. Counsel stated that there were many conflicting decisions of the High Court and the Environment and Land Court on the issue. Counsel urged the court to be persuaded by the decision



in *Njoki Wainaina vs Josephat Thuo Githachuri & 3 Others; National Land Commission & Another (Interested Parties)* supra.

9. Counsel contended that adverse possession is a claim which must be founded on provisions of the Limitations of Actions Act. Counsel further argued that it is only Section 38 (1) of the *Limitation of Actions Act* that provides the mechanism for an adverse possessor to be registered as proprietor of land if the court finds in his favour. Counsel argued that for the Magistrate Court to purport to have jurisdiction to hear claims for adverse possession and ignore the express provisions of Section 38 (1) of the *Limitation of Actions Act* is to lack fidelity to the letter of the law which empowers the court to order that a successful claimant be registered as proprietor of the land.
10. Counsel submitted that the monetary value of the land is inconsequential given that it is only the High Court and the Environment and Land Court that are empowered by statute to deal with claims of adverse possession. Counsel further submitted that the reference by the Learned Magistrate to the Gazette Notices is erroneous, adding that a gazette notice does not confer jurisdiction where there is a contrary express provision in the statute.
11. Counsel relied on the decision in the case of *County Government of Nyeri & Another vs Cecilia Wangechi Ndugu* [2015]eKLR where the court pronounced itself on the interpretation of statutes. Counsel contended that this Court was being called upon to interpret Section 38 (1) of the *Limitation of Actions Act* and determine the court that has the jurisdiction to hear claims for adverse possession. Counsel submitted that the statute should be construed according to the intention expressed by the legislature. Counsel added that given that the statute vested jurisdiction in the “High Court”, it would be against the intention of Parliament were the “High Court” to be interpreted to include the Magistrate Courts. Counsel argued that if Parliament intended Magistrate Courts to hear claims for adverse possession, the statute would have stated as much. Counsel further argued that the lower court attempted to arrogate to itself jurisdiction it did not have. In conclusion, counsel urged the court to set aside the impugned ruling, allow the preliminary objection dated 12/7/2023, strike out the originating summons dated 23/1/2023, and condemn the respondent to pay costs of the proceedings.

Respondent’s Submissions

12. The respondent opposed the appeal through written submissions dated 6/2/2024, filed by B G Mwangi & Company Advocates. On whether the Senior Principal Magistrate Court had jurisdiction to entertain an adverse possession claim, counsel submitted that it was not disputed that the property which was the subject matter of the suit in the lower court was within the pecuniary and territorial jurisdiction of the lower court. Counsel further submitted that the only issue in dispute was whether the lower court had the requisite jurisdiction to hear and determine a claim for adverse possession. Counsel contended that on 30/1/2020, the Environment and Land Court delivered a ruling in *Patrick Ndegwa Munyua vs Benjamin Kiiru Mwangi & Another* [2020] to the effect that Magistrate Courts had jurisdiction and power to handle cases involving claims of adverse possession so long as the Presiding Magistrate was duly gazetted under Section 26 (3) of the *Environment and Land Court Act*, 2011.
13. Counsel further argued that the Environment and Land Court is a specialized superior court, adding that the decisions of the Court are binding on Magistrate Courts. Counsel relied on Section 26 (3) and (4) of the *Environment and Land Court Act* and Section 9 (a) of the *Magistrates’ Court Act* to support his submissions. It was counsel’s submission that the Presiding Magistrate was duly gazetted under *The Magistrates’ Courts Act*, 2015 and through Gazette Notice Number 11930, Vol.CXIX-No 180 dated 8/12/2017 to hear disputes relating to land and environment within its pecuniary jurisdiction. In conclusion, counsel submitted that the appeal and authorities cited were misplaced and that they



were not sufficient to upset the decision of the lower court. Counsel urged the court to dismiss the appeal with costs.

Analysis and Determination

14. I have read and considered the original record of the lower court; the record filed in this appeal; the grounds of appeal; and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. As observed in the opening paragraph of this Judgment, the key issue to be determined in this appeal is the question as to whether the Magistrate Court had the requisite jurisdiction to hear and determine a claim of adverse possession. Before I analyse and dispose the issue, I will outline the principle that guides this court when exercising appellate jurisdiction.

15. This is a first appeal. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”

16. The principle was similarly outlined in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

17. The originating summons giving rise to the impugned ruling was taken out in the Githunguri Senior Principal Magistrate Court on 26/1/2023. The originating summons was expressed as taken out under Section 38 of the *Limitation of Actions Act*; Order 37 rule 7 and Order 38 of the Civil Procedure Rules and Section 7(d) of the *Land Act*. Through the originating summons, the respondent sought the following verbatim reliefs:

1. A declaration that the plaintiff/applicant has acquired title to land parcel to wit Komothai/Igi 134 and Komothai/Igi 371 by Limitations of Actions Act and by the doctrine of adverse possession.
2. That the plaintiff/applicant be registered as the proprietor of the said land parcel to wit Komothai/Igi /134 and Komothai/ Igi /371 in place of the defendant/respondent who presently claim title to the same.
3. That the defendant/respondent do transfer or provide necessary papers and execute all documents requisite to enable the plaintiff/applicant acquire title for land parcels to wit Komothai/Igi /134 and Komothai/ Igi/371 and in default the Deputy Registrar of this court to execute the requisite transfer documents on behalf of the defendant/ respondent in execution of this courts decree.
4. That an order of permanent injunction to restrain the defendant/Respondent, itself or through is servants, agents, or employees from entering, occupying, evicting, the plaintiff/applicant from or in any other way interfering with the plaintiff's occupation and enjoyment of the suit land to wit Komothai/ Igi/134 and Komothai/ Igi/371.



5. Costs of the application be provided for.
18. Does the Senior Principal Magistrate Court have jurisdiction to entertain an originating summons under Section 38 of the *Limitation of Actions Act*? Put differently, does a magistrate court have jurisdiction to entertain a suit for orders of adverse possession under Section 38 of the *Limitation of Actions Act*?
19. Section 38 of the *Limitation of Actions Act* provides as follows:
- “38(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.
- (3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.
- (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) The Cabinet Secretary for the time being responsible for Land may make rules for facilitating the registration of titles to land or to easements acquired under this Act.”
20. Judges of the Environment and Land Court have, in a number of past decisions, rendered conflicting jurisprudence on the jurisdiction of the Magistrate Courts over claims of adverse possession initiated under Section 38 of the *Limitation of Actions Act*. The uncertainties created by the conflicting jurisprudence of the third tier superior court was recently addressed by the Court of Appeal in Pauline Chemuge Sugawara V Nairuko Ene Mutarakwa Kiruti & 4 others; Nairobi Civil Appeal No E141 of 2022. The Court of Appeal analysed the legal frameworks in Section 38 of the *Limitation of Actions Act*; Section 26 of the *Environment and Land Court Act* and Section 9 of the Magistrate’s Courts Act. The Court of Appeal rendered itself on the issue as follows:

“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.”



21. The Court of Appeal added:

“It is our view that, if it was intended that claims for adverse possession be determined by the Magistrates’ Courts, nothing would have been easier than for Parliament to have expressly enacted such a provision. So that in view of the express provisions of the law, a strict interpretation of Section 38 would mean that hearing and determination of such matters is specifically limited to the Environment and Land Court to the exclusion of Magistrates’ Courts.”

22. The Court of Appeal ultimately concluded as follows:

“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 claims of adverse possession. As a consequence, the trial magistrate in the instant case rightly disregarded hearing and determining it.”

23. The tenor and import of the above interpretation by the Court of Appeal is that, Magistrate Courts do not have jurisdiction to entertain claims of adverse possession under Section 38 of the Limitation of Actions Act. Only the Environment and Land Court has primary jurisdiction to hear and determine claims of adverse possession under Section 38 of the Limitation of Actions Act.

24. Secondly, it is settled law that where a court does not have jurisdiction to hear and determine a dispute, the court is required to down its tools. This principle was emphasized by Nyarangi JA in Owners of Motor Vessel “Lillian S” Vs. Caltex Oil (Kenya) Ltd [1989]eKLR in the following words:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the materials before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

25. For the above reasons, this appeal succeeds in terms of prayers (a), (b), and (c) of the memorandum of appeal. On costs, it is noted that the jurisprudence from a section of the Environment and Land Court contributed to the legal uncertainties that resulted in the ill-fated suit. Parties to this appeal were victims of the conflicting jurisprudence. Consequently, the respondent will not be condemned to bear costs of litigation in the two courts.

26. In the end, this Appeal succeeds in the following terms:

- a. The appeal is allowed.
- b. The ruling of Hon Muholi dated 14/9/2023 is hereby wholly set aside.
- c. The Preliminary objection dated 12/7/2023 in Githunguri Senior Principal Magistrate Court MCCC Misc Case No E001 of 2023 [O.S] is allowed and the said suit is struck out.
- d. Parties shall bear their respective costs of this appeal and costs of litigation in Githunguri Senior Principal Magistrate Court MCCC Misc Case No E001 of 2023 [O.S].

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 16TH DAY OF DECEMBER 2024.



B M EBOSO

JUDGE

In the Presence of: -

Mr Oyare for the Appellant

Mrs Fundi for the Respondent

