Sanga & 3 others v Karimi (Civil Appeal E072 of 2022)
[2025] KECA 184 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 184 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E072 OF 2022

AK MURGOR, GWN MACHARIA & KI LAIBUTA, JJA

FEBRUARY 7, 2025

BETWEEN

CHRISPUS SANGA ..... 1ST APPELLANT

LENNOX SANGA NYAMAWI ..... 2ND APPELLANT

DANSON MAZURI ..... 3RD APPELLANT

BARTHOLOMEW MWANYUNGU ..... 4TH APPELLANT

AND

FLORENCE DEAN KARIMI ..... RESPONDENT

(Being an appeal from the Ruling and Orders of the Environment and Land Court at Mombasa (Sila Munyao, J.) Delivered on 7th June 2022 in ELC Case No. 231 of 2020 (O.S))

JUDGMENT

1. The appellants (Chrispus Sanga, Lennox Sanga Nyamawi, Danson Mazuri and Bartholomew Mwanyungu) come on appeal against the ruling of the ELC at Mombasa (M. Sila, J.) dated 7th June 2022 in ELC Case No. 231 of 2020 (OS).

2. The précis of the dispute leading to the impugned ruling is that the respondent, Florence Dean Karimi, took out an Originating Summons against the appellants seeking the following orders:

    "a. A declaration that the Applicant is entitled to the Parcel of Land known as Plot Number 473 Mtwapa Settlement Scheme measuring 6 acres by virtue of adverse possession.

    b. In the alternative to prayer (a) above, a declaration that the Applicant is entitled to the parcel of land Known as Plot Number 473 Mtwapa Settlement Scheme measuring 6 acres by virtue of a constructive trust created by the late Charo Sanga Lugukia.

c. Further to prayer (b) above, a declaration that the 1st to 3rd Respondents are estopped from questioning the Applicant's occupation of the suit property.

d. An order directing the Land Registrar, Kilifi to register the Applicant as the proprietor of the Parcel of Land known as Plot Number 473 Mtwapa Settlement Scheme measuring 6 acres.

e. In the alternative to prayers (a to d) above the 1st to 3rd Respondents be directed to compensate the Applicant the value of the suit property at the current market value together with the developments thereon .

f. A permanent injunction restraining the Respondents, their agents and servants from dealing in whatever manner and/or interfering with the Applicant's occupation and developments on the Parcel of Land known as Plot Number 473 Mtwapa Settlement Scheme measuring 6 acres.

b. Costs of this application be provided for."

3. The respondent's case was that she entered into a purchase agreement dated 6th March 1986 with one Charo Sanga Lugukia (now deceased) for the purchase of a 6 acre portion of his Plot No. 473 Mtwapa Settlement Scheme (the suit property) at a consideration of Kshs. 72,000; that, soon thereafter, the respondent paid the full purchase price to the deceased, took possession of the suit property, built a house thereon, and started cultivating the land; that the deceased embarked on subdivision of the parcel of land, and the suit property became Plot No. Kilifi Mtwapa/774B; that, however, the deceased died in November 1996 before the suit property was transferred to the respondent; and that the 1st to 3rd appellants agreed to take out letters of administration to the estate of the deceased, complete the sale aforesaid and give the respondent the title document in respect of the 6 acre portion of the suit property.

4. The respondent further claimed that, sometime in 2009, the 4th appellant encroached into the respondent's property and began cultivation; that, upon enquiry, the 4th appellant claimed that he had bought the suit property from the 1st to 3rd appellants; that the 4th appellant's claim prompted the respondent to file Mombasa CMCC No. 3321 of 2009 against the appellants seeking, inter alia, an order that the Executive Officer of the court do execute all necessary documents to effect a valid transfer of the suit property in favour of the respondent; that, on 1st April 2016, the court delivered judgment in favour of the respondent, but that the appellants appealed against the judgment in Mombasa HC Appeal No. 8 of 2016; and that, on 18th April 2018, the court delivered judgment in that appeal declaring the agreement for sale between the respondent and the deceased void for all purposes for want of a valid Land Control Board consent.

5. In addition to the foregoing, the respondent averred that she had been in continuous and uninterrupted occupation of the suit property for over 12 years since 1986; that she had fully developed the suit property by building permanent structures, planting trees, planting an orchard of fruits and carrying out subsistence farming since 1986; that her claim in Mombasa CMCC No. 3321 of 2009, which was based on the agreement for sale dated 6th March 1986, could not be married with the adverse possession claim in this case and that, therefore, her claim could not be said to be res judicata; that, in the alternative, since the deceased put the respondent in possession of the suit property, the appellants were estopped from evicting the respondent or in any manner interfering with her quiet and peaceful possession thereof; that, by obtaining the purchase price and putting the respondent in possession, the deceased created a constructive trust in favour of the respondent; that the 1st to 3rd appellants could not purport to sell the suit property to the 4th appellant while they were fully aware that the deceased had received the purchase price and put the respondent in possession thereof pending surrender of the title document in respect of her portion; that, despite dismissal of her claim to enforce the agreement for

sale, nothing in law prevented her from lodging a claim in equity seeking a declaration of a constructive trust in her favour; that the suit property and the respondent's investment of Kshs. 72,000 to purchase the property had attracted interest equivalent to the current value of the suit property; that the 1st to 3rd appellants should not be allowed to benefit from the alleged illegal contract, unjustly enrich themselves by refunding the respondent the original purchase price, and keep the suit property, which has appreciated in value since 1986; that it was only fair that the 1st to 3rd appellants be directed to compensate the respondent to the value of the suit property at the current market price together with the developments thereon; that the respondent was still in possession of the suit property; and that there was a real threat that the appellants would interfere with her occupation thereof, which necessitated injunctive orders against the appellants pending hearing and determination of the suit.

6. In response, the appellants filed a Notice of Motion dated 8th May 2021 seeking orders that the suit be struck out with costs on the grounds that it was frivolous and vexations; that it was otherwise an abuse of the process of the court; and that her suit was res judicata Mombasa CMCC No. 3321 of 2009 between the same parties as finally determined in ELC Appeal No. 8 of 2016.

7. The appellant's Motion was supported by an affidavit sworn by the 1st appellant according to whom the respondent's suit as framed against him and his co-administrators was incompetent, bad in law and in contravention of the rules of procedure, and that it ought to be struck out; that the suit against the 4th appellant was also liable to be struck out since the 4th appellant did not, at the time, have any proprietary interest in the suit property; that the suit was an abuse of the court process because the respondent's alleged interest was first presented over 17 years late as an ill-disguised specific performance claim vide Mombasa CMCC No. 3321 of 2009, which claim was eventually annulled by the ELC in ELC Appeal No. 8 of 2016 vide its judgment dated 18th April 2018; and because the respondent had filed an application for revocation of grant made to the 1st and 2nd appellants in HC P&A No. 367 of 2008 in which she effectively sought orders whose effect would be to vest in her the suit property; and that the respondent's present suit was res judicata CMCC No. 3321 and ELC Appeal No. 8 of 2016.

8. In addition to the foregoing, the 1st appellant deponed that the respondent could not be all over the courts asserting different causes of action; and that the respondent needed to elect the capacity in which she wished to approach the courts – whether under a contract of sale on which her claim in CMCC No. 3321 of 2009 was founded; whether she was suing as a beneficiary of the deceased's estate as may be surmised from her application in HC Probate and Administration Cause No. 367 of 2008; or whether she claimed in adverse possession as pleaded in the present proceedings.

9. The 1st appellant further deponed that, in so far as the claim for adverse possession was concerned, the respondent had been out of the suit property since 1997, which was why the 1st appellant allowed the 4th appellant to cultivate the land several years later, and as a reason of which the respondent found it necessary to join the 4th appellant in her claim in CMCC NO. 3321 of 2009; that the respondent's alleged continuous occupation of the suit property had long been interrupted; and that the issues being raised could and ought to have been presented within the previous proceedings between the same parties.

10. Opposing the appellants' application, the respondent filed a replying affidavit sworn on 9th June 2021 in which she reiterated the averments in her Originating Summons and deponed that she had filed the present suit since she had been in continuous and uninterrupted occupation of the suit property for over 12 years and that, for that reason alone, the suit was not res judicata as her earlier claim was premised on the agreement for sale which was declared null and void for lack of a valid Land Control Board consent; and that the previous suits did not deal with the issue of adverse possession, but that they related to different causes of action.

11. In its ruling dated 7th June 2022, the ELC (M. Sila, J.) held that the claim for adverse possession was in fact a completely different cause of action from that presented earlier, which was a suit for specific performance of a land sale agreement. On the question as to whether the claim of adverse possession could have been made a ground of attack in the earlier suit, the court held that the Civil Procedure Rules prescribe that a claim for adverse possession is by Originating Summons; and that the school of thought that had emerged prior to the promulgation of the 2010 Constitution was that a claim for adverse possession could not be mixed with another claim for the same land by reason of the fact that the applicable procedures were different; that the different school of thought that it was not fatal if a claim for adverse possession was not brought through an Originating Summons but, instead, through a plaint or defence and/or counterclaim, gained considerable momentum after the promulgation of the 2010 Constitution; that the latter reasoning did not prevail in 2009 when the respondent first filed suit; that her suit stood the risk of being struck out if adverse possession was a ground of attack in the same suit in which she sought specific performance; and that to dismiss the present suit would be tantamount to punishing the respondent for a position taken by the authorities at the time. The court therefore dismissed the appellant's application with costs.

12. Dissatisfied with the learned Judge's decision, the appellants filed this appeal on the grounds set out in their memorandum of appeal dated 26th July 2022, namely that the learned Judge erred: in failing to strike out the respondent's Originating Summons; in failing to strike out the respondent's suit when it was clear from her own filings/pleadings that the claim for adverse possession had been presented prior to the lapse of 12 years from the date on which the respondent was dispossessed of the suit property and ceased to have occupation or control thereof in 2009; in preserving the respondent's action on the basis of the subsistence of a claim based on a constructive trust when the existence of such a trust was an issue that fell to be determined in the context of her prior claim for specific performance of a contract, which had been determined; in exercising his discretion wrongly in sustaining the respondent's suit on the ostensible basis that there were special circumstances in so far as her suit for adverse possession and/or trust had not been heard, yet any claim that the respondent would have had in respect of adverse possession was premature and, therefore, the question of trust could have been properly heard in the previous suit and was therefore res judicata; in misconstruing the appellants' submissions; in failing to appreciate that the totality of the proceedings and interventions by the respondent over the same subject matter amounted to blatant abuse of the court process; and in reaching a finding whose effect would be to promote piecemeal litigation.

13. In support of the appeal, learned Counsel for the appellants, M/s. Moses Mwakisha & Company, filed written submissions dated 28th March 2023 and a List of Authorities & Case Digest dated 29th March 2023. Counsel cited 3 judicial authorities, which we will shortly consider.

14. Opposing the appeal, learned Counsel for the respondent, M/s. Gikandi & Company, filed written submissions, a List & Bundle of Authorities dated 14th July 2023. Counsel cited 12 judicial authorities to which we will shortly return.

15. Having considered the record as put to us, the impugned ruling, the grounds on which the appeal is anchored, and the rival submissions, we form the view that the following five main issues fall to be determined, namely: (i) whether the respondent's suit was fatally defective for want of form and ought to have been struck out; (ii) whether the learned Judge erred in declining to strike out the respondent's Originating Summons on the appellants' contention that it was taken out prematurely; (iii) whether the learned Judge erred in sustaining the respondent's suit on the grounds that a claim based on constructive trust existed; (iv) whether the contract of sale of the suit property was invalid for want of the Land Control Board consent, and whether the respondent's suit in ELC Case No. 231 of

2020 (O.S) was res judicata CMCC No. 3321 of 2009 and the subsequent appeal in ELCA No. 8 of 2016; and (v) whether the learned Judge's decision had the effect of promoting piecemeal litigation.

16. We need to point out right at the outset that counsel made comprehensive albeit rival submissions, all of which appear to invite us to pronounce ourselves with finality on the parties competing claims. It is not lost on us, though, that the instant appeal does not constitute a challenge on the decision in ELCA No. 8 of 2016. For the avoidance of doubt, it is an interlocutory appeal in respect of which our simple mandate is to pronounce ourselves on the issue as to whether the learned Judge ought to have struck out the respondent's Originating Summons as sought in the appellants' Motion. In the event that we form a contrary view, we would be obligated to remit the respondent's Summons to the trial court for determination on its merits and, in doing so, refrain from expressing our views thereon lest we embarrass the trial court.

17. On the 1st issue as to the formal defect of the respondent's suit, the appellants contended that the respondent's claim was bad in form and ought to have been brought by way of a plaint instead of an Originating Summons and that, therefore, it ought to have been struck out. Taking to mind the constitutional edict in Article 159(2) (d), which mandates courts to administer justice without undue regards to technicalities of procedure, and considering this Court's pronouncement in AHAD v CJE [2019] eKLR, we reach the conclusion that the learned Judge was not at fault in dismissing the appellants' Motion on that score so as to accord the parties the opportunity to prove their respective claims on merit.

18. In the afore-cited case, which bolsters the learned Judge's decision, this Court held that:

> " 16. ... there can be no basis for complaining that the respondent did not invoke the correct process by instituting her action by way of originating summons. It is however established that the procedure of originating summons is not intended for complex matters or matters where facts are contested ....
>
> 17. Where serious questions arise in a suit or where there are disputed facts relevant to the resolution of the dispute, an originating summons may not be the appropriate process. In that regard, Order 37 Rule 19(1) of the Civil Procedure Rules provides leeway. It provides that:
>
> '(1) Where, on an originating summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits.'"

19. In view of the foregoing, we reach the conclusion that the learned Judge was not at fault in declining to strike out the respondent's Summons merely on the grounds that it raised substantive claims and issues that ought to have been pleaded in a plaint. To our mind, nothing stands in the way of parties calling oral evidence and cross-examining witnesses over and above the affidavit evidence in support of the Summons and in reply thereto.

20. Turning to the 2nd issue as to whether the learned Judge erred by declining to strike out the respondent's Originating Summons, the appellants faulted the learned Judge for allegedly failing to find that the Summons were taken out prematurely. Counsel for the appellants submitted that, as of 9th November

2009 when the respondent moved the court in CMCC No. 3321 of 2009 for declaratory orders sought in her plaint, she was no longer in what would be considered as exclusive and continuous possession upon which a prescriptive right in the nature of adverse possession may be founded. According to them, the basic ingredients that underpin a claim for adverse possession were not satisfied. Counsel argued that the element of continuous occupation for a period of 12 years was not met in view of the fact that she instituted her suit in November 2020, only 11 years since the respondent's possession had been truncated. According to them, even if the respondent had resumed possession a day after filing CMCC No. 3321 of 2009, she was still short of the 12 years statutory requirement as of the day she filed suit in November 2020.

21. In support of their rebuttal and submission that the appellants had not tendered any concrete evidence to dispute the fact that the respondent enjoyed peaceful and uninterrupted occupation of the suit property for over 12 years, counsel for the respondent cited the case of Timsales Limited v Harun Thuo Ndungu [2010] KEHC 1124 (KLR) for the proposition that, when a party fails to rebut relevant evidence adduced by the opposing party, it may be presumed that such failure points to the receiving party's admission, albeit tacitly, that such evidence represents the truth of the facts in issue.

22. In addition, counsel cited the cases of James Maina Kinya v Gerald Kwendaka [2018] KEELC 3155 (KLR), submitting that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property in view of the fact that, from that date, the true owner is dispossessed of the land, and that the period of limitation begins to run in favour of the purchaser in possession thereof from the date of payment of the purchase price; and Wilson Njoroge Kamau v Nganga Muceru Kamau [2020] KEELC 3904 (KLR) where the ELC allowed a claim of adverse possession in the absence of any evidence that possession of the suit property by the plaintiff was with permission of the defendant and held that, since adverse possession had accrued by the time the defendant changed the title to his name, the defendant held the title to the suit property in trust for the plaintiff.

23. In conclusion, counsel further submitted that the respondent had at all times enjoyed open, peaceful and uninterrupted occupation of the suit property for more than 12 years since 1986 when she took possession thereof; and that the appellants had not tendered any evidence to controvert that fact. According to counsel, the appellants' reliance on the plaint in CMCC 3321 of 2009 for the contention that the respondent's occupation of the suit property had not accumulated to 12 years simply because the respondent had identified herself as a resident of Mombasa does not hold water.

24. In the impugned ruling, the learned Judge had this to say on the issue:

> " 5. .... Although in his submissions, Mr. Mwakisha went further to assert that even [if] the claim for adverse possession is misplaced, on the basis that the plaintiff has in her affidavit mentioned that the 4th defendant came into the land in the year 2009, I opt not to go into that, as to me, this is an issue of evidence, which ought to be canvassed at a hearing .... In the event that I do not strike out this suit, the defendants can have an avenue to pursue that line if they so wish, at a later stage of this suit. In essence, I will restrict myself to only one issue, that is, whether this suit is res judicata."

25. It is noteworthy that the issue as to whether the respondent's occupation and possession of the suit property was interrupted by the 4th appellant's alleged entry thereon is disputed. While the 1st appellant deponed in his affidavit that the respondent had been out of the suit property since 1997, the respondent, on the other hand, deponed that she has been in continuous and uninterrupted occupation of the property for over 12 years since 1986. It is not lost to us that none of the parties

had laid any evidential basis for the rival positions taken in their respective affidavits by the time the appellants filed their Notice of Motion to strike out the Originating Summons. In our considered view, it was not enough for the appellants to merely point to the respondent's averment in her plaint in CMCC 3321 of 2009 to the effect that the 4th appellant moved into the suit property and planted seedlings thereon. The respondent's averment in that regard may well have been a mere description of the manner in which she alleged that the 4th appellant had encroached onto the suit property, a contested issue that remained to be proved either way by factual evidence at the trial. In view of the foregoing, and in light of the glaringly contested facts, the learned Judge was not at fault in declining to entertain the issue at an interlocutory stage in the proceedings; by declining to strike out the respondent's Summons; or by concluding that it was best suited for determination on evidence to be adduced at the hearing.

26. On the 3rd issue as to whether the learned Judge was at fault in sustaining the respondent's suit on the grounds that a claim based on constructive trust existed, counsel for the appellants submitted that the learned Judge sustained the respondent's suit on the notion that there may have been special circumstances as contemplated in Henderson v Henderson (1843) 67 ER 313 followed in Yat Tung v Dao Heng [1975] UKPC 6 or that there was a triable issue turning on the possible existence of a constructive trust; that, although the existence or otherwise of a constructive trust was not one of the specific questions set out on the face of the Originating Summons, the respondent had sought to advance the same via her grounds in support of the Originating Summons, the argument being that the circumstances of the case were such as supported a constructive trust - that the 1st to 3rd appellants held the suit property in trust for her; that the question as to whether such a trust existed was not an issue for trial; that such a trust may be asserted where, for instance, a party has financed a purchase through another who retains possession in his name; that, in this case, the appellants had not come into possession of the property by virtue of the inchoate conveyance to the respondent; and that they (the appellants) were on the land independent of that transaction.

27. Counsel further submitted that, more importantly, the suit property was subject to the provisions of the *Land Control Act* (Cap. 302); that in the judgment in ELC Appeal No. 8 of 2016, the ELC held that the purported Land Control Board consent produced by the Respondent as underpinning the 1986 sale to her was invalid for reasons stated therein; that the finding in that regard still stands; and that allowing the respondent to advance her claim under a constructive trust would be tantamount to sanctioning an illegality.

28. On their part, counsel for the respondent appreciated that the Court of Appeal in Aliaza v Saul [2022] KECA 583 (KLR), dealt a blow on those who purchase land but, for one reason or another, fail to obtain the necessary Land Control Board consent. On the other hand, counsel drew our attention to the Court's holding that the doctrine of constructive trust was the most efficacious manner of going round the injustice that would have been occasioned in such a matter where an innocent purchaser for value would stand to lose his property merely because the Land Control Board Consent was not obtained for one reason or the other.

29. According to counsel, the respondent finds herself in a similar position. He urges this Court to find itself bound to the cited decision and hold that the 1st to 3rd appellants hold the suit property in trust for the respondent and that the Land Registrar Kilifi should be directed to register the vesting order in the suit property in favour of the respondent.

30. With profound respect to counsel, the orders and directions we are being urged to grant are not available in the interlocutory appeal before us. Such substantive orders and directions are the preserve of the trial court to determine on the merits of the respondent's Summons as correctly held by the trial Judge.

31. As alluded to in the foregoing paragraphs, these disputed issues are not for us to judge in the instant appeal. Suffice it to observe that they deserve full scrutiny on evidence by the trial court.

32. The same applies to the newly-raised 4th issue vide the appellants' submissions that failure to obtain Land Control Board Consent rendered the sale agreement between the respondent and the deceased null and void; and whether the respondent's Originating Summons was res judicata CMCC No. 3321 of 2009 and the subsequent appeal in ELCA No. 8 of 2016. Once again, we refrain from saying more lest we pre-empt or embarrass the trial court. Our present remit is to determine whether the learned Judge properly declined to strike out the respondent's Summons as sought in the appellants' Motion on the further ground that it was res judicata CMCC No. 3321 of 2009 and the subsequent appeal in ELCA No. 8 of 2016. To our mind, he was not at fault in view of the fact that determination of the contentious issues raised in the appellants' Motion calls for more than the affidavit evidence advanced in the interlocutory proceedings.

33. Turning to the 5th and final issue as to whether the learned Judge's finding had the effect of promoting piecemeal litigation, counsel for the appellants submitted that the Judge took the view that, when filing CMCC 3321 OF 2009, there was still uncertainty as to whether a claim for adverse possession could be pursued in the subordinate court; that it would constitute a serious abuse of the court process to allow a litigant who in one breath recognizes that his nexus with the suit property is contractual and seeks to enforce that contract in CMCC No. 3321 of 2009 and, thereafter, return to court in the guise of an adverse possessor or beneficiary under a trust; that such conduct was compounded by the respondent resorting to the succession court vide her Summons for Revocation of grant where she sought to gain a foothold by a different guise; that the proper course would behove the respondent to elect in what capacity to sue – as an adverse possessor, a beneficiary under a trust or as a beneficial owner under a contract of sale as urged in CMCC No. 3321 of 2009; that at the inception of CMCC No. 3321 of 2009, the respondent had all facts necessary to elect the procedure by which to approach the court; that she elected to assert her contractual right; and that the High court, which was equally clothed with jurisdiction to entertain the claim as presented in CMCC No. 3321 of 2009 would have had the jurisdiction to entertain the alternative claim under a constructive trust, but that the respondent chose to assert her right under the contract.

34. With regard to the respondent's claim for adverse possession, the appellants' argument was not that the claim for adverse possession ought to have been litigated together with the claim in contract for specific performance as pleaded in CMCC No. 3321 of 2009 by which she was bound but that, on the pleadings in the suit aforesaid, she had admitted 11 years earlier to dispossession of the suit property, which negated continuous and uninterrupted possession. Notably, counsel for the respondent made no reply to the appellants' submissions in this regard.

35. In the impugned ruling, which we take the liberty to cite in extenso, the learned Judge held that:

> " 10. .... The question which I need to address in this application is whether the claim for adverse possession is caught up by explanation (4) that is, whether it is a claim which may have been made a ground of defence or attack in the former suit. This is indeed the gist of Mr. Mwakisha's submissions, for he argued that the claim of adverse possession was one of the reliefs that the plaintiff had opportunity to agitate .... In the case of Yat Tung Investment Limited the following dictum from the case of Henderson vs Henderson (1843) 3 Hare 100, 115 was cited:-

'... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

11. After citing the above dictum, the court continued to state as follows at pg 590:-

'The shutting out of a "subject of litigation" - a power which no court should exercise but after scrupulous examination of all the circumstances – is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require non-application of the rule.

... .

13. .... Strictly, following the above dictate, a suit for adverse possession could not be made through plaint. Courts, however, were ambivalent in the manner in which they appreciated a suit for adverse possession which was not brought by way of originating summons. Whether such suit was liable to be struck out, or combined with a suit pressing for an alternative claim to the land, say, by way of trust, was a subject that never elicited unanimity prior to the 2010 Constitution and the 2010 Civil Procedure Rules. There was initial emphasis that a suit for adverse possession must be filed by way of Originating Summons and no other procedure.

... .

18. Reading the decisions above, it will be seen that there was a school of thought, which was of opinion that the claim for adverse possession, could not be mixed with another claim for the same land, for reason that the procedures to be employed were different. If one needed to present a suit for adverse possession, he needed to file a separate suit commenced by way of Originating Summons. Indeed, one risked dismissal of a plaint which had a claim for adverse possession combined with another cause of action for the same land ....

    18. There was a different school of thought which was of opinion that it was not fatal if a claim for adverse possession was not brought through an Originating Summons and that it was a mere technicality if such claim was originated by way of plaint or by way of a defence and/or counterclaim. This school of thought gained considerable momentum after the promulgation of the 2010 Constitution, which, under Article 159(2) (d), mandates

courts to dispense justice without undue regard to procedural technicalities.

18. I think in the present time, one may very well argue that a person is at liberty to present the whole of his claim in one suit, and combine a claim for adverse possession with a claim for specific performance and/or trust over land. That may be a powerful argument, but I am not persuaded that this reasoning prevailed in the year 2009, when the plaintiff first filed suit. It is apparent from the authorities that I have displayed above, that there was considerable doubt as to whether, in the year 2009, a claim for adverse possession could have been entertained in a plaint together with a claim for the land under contract and which plaint sought orders for specific performance. There was a risk, at the time, that if the plaintiff had combined the cause of action for specific performance with the cause of action for adverse possession, her suit may very well have been struck out. That is why, I said earlier that benefit of doubt must be given to the plaintiff. I am not persuaded to hold that as at the year 2009 she could have made adverse possession a ground of attack in the same suit as that which sought specific performance without risk of her suit being struck out .... The fact that she filed suit by way of specific performance cannot be held as having prevented her from presenting a suit for adverse possession through Originating Summons. To dismiss the plaintiff's suit herein would be to punish her for a position taken by the authorities at the time that a suit for specific performance could not be combined in the plaint with a suit for adverse possession. Her suit for adverse possession and/or trust has never been heard and the plaintiff deserves a hearing on the same. In my view, there are special circumstances herein, as espoused in the case of Yet Tung vs Dao Heng Bank, which militate against dismissal of the plaintiff's suit for being res judicata."

36. The learned Judge sufficiently explained the uncertainty that prevailed at the time on the issue as to whether an adverse possession claim could be mixed with other claims not instituted through Originating Summons. To our mind, the learned Judge correctly held that this uncertainty, along with the fact that the adverse possession claim had not been heard with the risk of the respondent being unjustly deprived of the suit property, constituted the special circumstances justifying the non-application of the res judicata principle that any matter which might and ought to have been made a ground of defence or attack in a former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

37. We need not say more. What is clear to us, though, is that the learned Judge was by no means at fault for dismissing the appellants' Motion to strike out the respondent's Summons on any of the grounds advanced in their application. In our considered view, the respondent's claim, however articulated in her Originating Summons or other pleadings, deserves consideration on its merits. Having carefully considered the record of appeal, the grounds on which it is anchored, the rival submissions of learned counsel, the cited authorities and the law, we reach the inescapable conclusion that the appeal fails and is hereby dismissed with costs to the respondent. Consequently, the ruling and orders of the ELC at

Mombasa (Sila Munyao, J.) dated 7th June 2022 in ELC Case No. 231 of 2020 (OS) is hereby upheld. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF FEBRUARY, 2025.

A. K. MURGOR

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar