



Eloto & another (Suing for themselves and as Administrators for the Estate of Peter Eloto Larai - Deceased) v Sirite & another (Environmental and Land Originating Summons E001 of 2023) [2024] KEELC 5886 (KLR) (20 August 2024) (Ruling)

Neutral citation: [2024] KEELC 5886 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E001 OF 2023
AK BOR, J
AUGUST 20, 2024

BETWEEN

MARY WANJIRU ELOTO 1ST PLAINTIFF

LUCY NAPUKEI ELOTO 2ND PLAINTIFF

SUING FOR THEMSELVES AND AS ADMINISTRATORS FOR THE ESTATE OF PETER ELOTO LARAI - DECEASED

AND

LOTIN EDAPAL SIRITE 1ST DEFENDANT

WILLIAM KIPLANGAT LELEI 2ND DEFENDANT

RULING

1. The Plaintiffs filed the application dated 19/2/2024 seeking to have this court transfer Nyahururu CMC ELC Case No E050 of 2022 to this court and an order for the consolidation of that suit with this case for hearing and disposal before the Environment and Land Court (ELC). The application was made on the grounds that vide the plaint dated 3/6/2022, the Defendants filed Nyahururu CM ELC Case No E050 of 2022 seeking to evict the 2nd Plaintiff in this suit and her family from the parcels of land known as Marmanet/Melwa Block 1/5769 and 5718 (Muhotetu).
2. The Plaintiff filed this suit on 11/7/2023 vide Originating Summons under Section 38 of the *Limitation of Actions Act* seeking declaratory orders that the Defendants' rights over the suit property had become extinguished and that the Plaintiffs should be registered as the owners of the land by virtue of adverse possession. The suit was brought by the Plaintiffs on their own behalf and as administrators of the Estate of Peter Eloto Larai who is dead.



3. The other ground was it was in the interest of justice to have the two cases heard together since it will be difficult for the two cases to be prosecuted differently before two courts with the possibility of embarrassing the court.
4. Mary Eloto swore the supporting affidavit deponing to the nature of the claims in the two suits. She exhibited copies of the pleadings and urged the court to transfer the other suit from the Magistrates Court and consolidate it with this suit.
5. Lotin Edapal Sirite swore the replying affidavit in which he deponed that he was the registered proprietor of parcel No 5769 and exhibited a copy of the title issued on 8/12/2021. The deponent averred that the two matters should be addressed before the Hon. Magistrate in Nyahururu CMC ELC Case No E050 of 2022 based on the fact that the magistrate's court had jurisdiction to deal with matters of adverse possession. Further, that the value of the parcels of land fell within the pecuniary jurisdiction of the Chief Magistrates Court in Nyahururu. The deponent added that Section 26 (3) and (4) of the ELC Act and Section 9 of the Magistrates Court provided that duly gazetted magistrates courts had jurisdiction over land and environmental disputes. The deponent urged the court to dismiss the application.
6. The court directed parties to file submissions which it has considered. In the submissions filed on 29/4/2024, the Plaintiffs relied on Section 38 of the Limitations of Actions Act which provides that where a person claimed to have become entitled by adverse possession to land registered under the Acts cited in Section 37 of that Act, he could apply to the High Court for an order to be registered as the proprietor of the land. The section went further to say that the proprietor or any person interested may apply to the High Court for the determination of any question arising under the section. Plaintiffs urged that since their claim was for adverse possession then Section 38 of the Limitation of Actions Act required their claim to be filed in High Court. That based on this they could not have filed their claim as a counterclaim before the magistrate's court. Additionally, that a claim for adverse possession has to be brought by a way of originating summons and hence they could not have raised a counterclaim for adverse possession.
7. They also relied on Section 18 (1) of the Civil Procedure Act on the power of the court to transfer of suits and urged that this court had unlimited jurisdiction to withdraw any suit pending in a subordinate court, transfer any proceedings before it, or dispose of the case or consolidate it with other proceedings before it or before any subordinate court. Regarding consolidation, they submitted that it was done for purposes of achieving the overriding objective of the Civil Procedure Act for the expeditious and proportionate disposal of civil disputes. Additionally, the purpose of consolidation of suits was to save costs, time and effort and make the conduct of several actions more convenient as they are treated as one suit.
8. The Defendants filed their submissions on 22/4/2024 in which they urged that the two matters ought to be consolidated and heard in the Chief Magistrates Court based on the jurisdiction of the Chief Magistrate court to adjudicate over claims for adverse possession. They relied on the decision in Patrick Munyua v Benjamin Kiiru Mwangi & another [2020] eKLR where the court had occasion to look at Section 26 of the ELC Act and Section 9 of the Magistrates Court Act and found that Magistrates who were duly gazetted and had the requisite pecuniary jurisdiction and power to handle cases involving occupation of and title to land. Further, that claims for adverse possession involved title to land and that so long as a magistrate was duly gazetted under Section 26 and had requisite pecuniary jurisdiction they had power to handle claims for adverse possession. They added that the monetary value of the suit property fell within the jurisdiction of the magistrate's court which is better placed to handle the claim.



9. In the supplementary submissions filed on 25/5/2024, the Plaintiffs pointed out that there were two schools of thought regarding the jurisdiction of Magistrate courts to deal with adverse possession. One school of thought was of the view that Section 38 of the [Limitation of Actions Act](#) specifically required that adverse possession claims be instituted at the high court irrespective of the value of the suit property. The second school of thought believed that magistrates court could exercise jurisdiction donated under Section 26 of the [ELC Act](#) subject to the pecuniary jurisdiction under Section 27 of the Act. They cited [Njoki Wainaina alias Mama Kanyoni v Josephat Thuo Gathachira & 3 others](#) [2021] eKLR where the court confirmed that a claim for adverse possession could be commenced and maintained on the basis of a counter claim or a plaint. The Judge expressed the view that adverse possession could not be handled by Magistrates court in light of Section 37 and 38 of the [Limitations of Actions Act](#). They also cited the Patrick Ndegwa Munyua case where the court ordered the transfer of the suit to the magistrates' court for trial alongside the case that was pending in the Magistrates court. The Plaintiff reiterated their position that the magistrate's court lacked jurisdiction to handle claims for adverse possession.
10. In their supplementary submissions filed on 23/5/2024, the Defendants argued that the main distinction between the two approaches to jurisdiction lay in the fact that the [Limitation of Actions act](#) did not consider the pecuniary value of the suit property as a crucial aspect of jurisdiction. They pointed out that the [Limitation of Actions Act](#) did not specify any other court in Section 38 based on the context that it predated the promulgation of the 2010 [Constitution](#). They urged that that that statute must be interpreted with the necessary alterations, qualifications and adaptations to align it with the [Constitution](#).
11. Moreover, that Article 169 of the [Constitution](#) which established Magistrates court, directed Parliament to enact legislation conferring jurisdiction, functions and powers on the magistrate's court as a result of which Section 26 (3) and (4) of the [ELC Act](#) was enacted, which stipulates that the Chief Justice may be by notice in the gazette appoint magistrates to preside over cases involving the environment and land. Such magistrates appointed would have jurisdiction and power to handle disputes relating to offences dealing with the environment and land and matters of civil nature involving occupation and title to land provided the value of the subject matter did not exceed the pecuniary jurisdiction set out in the [Magistrates Court Act](#).
12. They added that after the enactment of the [ELC Act](#) in 2011, Parliament enacted the [Magistrates Act](#) in 2016 which became operational in January 2016 with Section 9 (a) stipulating that a Magistrates' court would in the exercise of the jurisdiction conferred upon it by Section 26 of the [ELC Act](#) and subject to pecuniary limits under Section 7, hear and determine cases relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources. They opined that the introduction of the pecuniary value of property as a consideration stand for the necessity of maintaining efficiency in dispensing justice. Therefore, empowering magistrates' court to handle those cases was intended to enable the Environment and Land Court focus on matters within its higher pecuniary jurisdiction and alleviate it of the burden of cases suitable for the magistrates' court. They reiterated that the magistrates court had the necessary jurisdiction to deal with both claims and that the Plaintiffs would not encounter any prejudice if the matters were heard in the magistrates' court.
13. The issue for determination is whether this court should transfer Nyahururu CMC ELC Case No E050 of 2022 to this court and have it consolidated with this suit so that it can hear the two suits. The Plaintiffs base the present application on Sections 37 and 38 of the [Limitations of Actions Act](#), which as the Defendants correctly pointed out, were enacted before the 2010 [Constitution](#). The Limitations of Actions Act does not mention the jurisdiction of the ELC to handle disputes over land and the



environment and only refers to the High Court. The context in which Sections 37 and 38 of the Limitations of Actions Act were enacted and operated has to be taken into account and interpreted with the necessary alterations, qualifications and adaptations to align it with the Constitution and the existing legal framework. Adverse possession claims relate to the ownership of and title to land. Section 26 of the ELC Act clothes magistrates gazetted by the Chief Justice with the jurisdiction to preside over cases involving environment and land matters of any area of the country subject to their pecuniary jurisdiction. Appeals from the decisions of such Magistrates lie with the ELC under the ELC Act.

14. A Chief Magistrate presides over a claim for ownership of land valued at Kshs 20,000,000/= based on the Constitution, ELC Act and Magistrates Court Act, there is no reason why he cannot adjudicate over a claim for adverse possession of land whose value is Kshs 500,000/= then an appeal against his decision will lie to the ELC. This would ensure the efficient disposal of adverse possession claims for land whose value falls within the jurisdiction of the Magistrates. It would also assist in clearing the perennial backlog that afflicts the ELC. By having Magistrates with the requisite jurisdiction handle claims for adverse possession, it would promote the efficient use of the available judicial resources besides speeding up the resolution of such disputes since there are more Magistrates Courts in the country than the ELC and access to justice is one of the rights guaranteed under Article 48 of the Constitution. The interpretation that it is only the ELC which can handle adverse possession claims will deprive litigants with adverse possession claims who do not live close to an ELC court of their right to access justice from the closest court presided over by a gazetted Magistrate with jurisdiction.
15. It is noteworthy that the date of commencement of the Limitation of Actions Act was 1st December, 1967. The legal landscape in our country has changed significantly over the last fifty years especially with the coming into force of the 2010 Constitution which requires under Section 7 of Part 2 of the Sixth schedule that existing laws should be construed to bring them into conformity with the Constitution. Magistrates courts are established under the Constitution, which empowered Parliament to grant them jurisdiction, functions and powers as a result of which Parliament enacted Section 26 (3) and (4) of the ELC Act and Section 9 of the Magistrates Court Act granting Magistrates Courts power to determine claims relating to title over land. A claim for adverse possession challenges the title of the landowner.
16. Based on the decision in the Patrick Ndegwa Munyua case, it is this court's view that Magistrates Courts have the requisite jurisdiction to determine the dispute relating to adverse possession.
17. This suit is transferred to the Nyahururu Chief Magistrates Court for hearing and disposal. Once the matter has been transferred and given a new number in the Chief Magistrate's Court, parties will be at liberty to apply to have the suit consolidated with Nyahururu CM ELC Case No E050 of 2022.
18. The costs of the application dated 19/2/2024 shall abide the outcome of the suits.

DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF AUGUST 2024.

K. BOR

JUDGE

In the presence of: -

Mr. David Kaburu for the Plaintiffs

Mr. Samora Tirop for the Defendants

Court Assistant: Vanessa Muiruri

