



**Kathoka v Kasyula & another (Environment & Land Case  
E001 of 2022) [2023] KEELC 18961 (KLR) (18 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18961 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT & LAND CASE E001 OF 2022**

**LG KIMANI, J**

**JULY 18, 2023**

**BETWEEN**

**JUSTUS MAITHYA KATHOKA ..... PLAINTIFF**

**AND**

**ARON MUEMA KASYULA ..... 1<sup>ST</sup> DEFENDANT**

**GEOFFREY KASYULA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This suit was instituted by way of the Originating Summons dated 1<sup>st</sup> February 2022 filed under Order 37 Rules 7 of the *Civil Procedure Rules*, Section 7, 17, 37 & 38 of *Limitations of Actions Act*. The Applicant claims to be the equitable owner, or in the alternative have been in adverse possession of the whole of that property known as land parcel No Kyangwithya/Ndumoni/428, for a period of over 12 years. He seeks orders directed to the land Registrar Kitui County to register him as absolute proprietor of the said land.
2. He further seeks an order of permanent injunction restraining the defendant, his agents and or his servants from cultivating, alienating, transferring, growing crops, grazing or in any other way interfering with or dealing with land parcel number Kyangwithya/Ndumoni/428.

**The Applicant's Case**

3. The applicant states that prescriptive rights have accrued in his favour and he is entitled by the operation of law to be registered as absolute proprietor of land title No Kyangithya/Ndumoni/428.
4. The Application is grounded on the Applicant's supporting affidavit sworn on 24<sup>th</sup> January 2022 deponing that in the year 1986 the he agreed with his uncle the late Mutia Nzyuko (who at the time was the proprietor of the suit property) that he would sell the land to him in portions. The seller Mutia Nzyuko passed on before the transaction was completed and the Applicant transacted with the



- deceased's son the late Kasyula Mutia and his grandson Aaron Muema Kasyula (the 1<sup>st</sup> plaintiff and Administrator of the estate of Mutia Nzyuko). That he paid money to the 1<sup>st</sup> respondent and his father as part of the purchase price and that the 1<sup>st</sup> Respondent had the grant of letters of administration to the estate of Mutia Nzyuko confirmed in the year 1996. He stated that the agreement with the seller did not contain the sellers signature since it was then not a requirement of the law that an agreement of sale be in writing.
5. The Applicant stated that he took possession of the suit land from the deceased Mutia Nzyuko in 1986 and has since developed it by building a permanent house where he lives, a pit latrine, tilled the land, planted trees and also utilized the said land.
  6. He stated that all has been well until sometime in the year 2021 when the 2<sup>nd</sup> Respondent herein, Geoffrey Kasyula, in the company of a person the Applicant did not know came to the suit property; and upon inquiry the Applicant was informed that the said Geoffrey was the proprietor of the land and had intended to sell the property. The 2<sup>nd</sup> Respondent claimed that the Applicant was only a squatter on the land without recognized rights or claim to the land.
  7. The Applicant claims that he engaged the administrator of the estate of Mutua Nzyuko and the family since they were all members of the same family but they refused to transfer the property to him.
  8. That he inquired from the Ministry of lands in Kitui, and he confirmed that the Respondent was registered as the proprietor of the land as a result of succession proceedings.
  9. The Applicant claims that his occupation of the entire suit land has been continuous without any secrecy or force, and the same has never been interrupted in any way by the Respondents and he has dispossessed the Respondents for over 36 years. Further, that his possession has been adverse and inconsistent with the interests of the Respondents and that the 2<sup>nd</sup> Respondent's title to the land comes second to his as he is holding the land in trust for the Applicant.
  10. The Applicant produced in evidence a certified copy of the green card and official search certificate for Kyangwithya/Ndumoni/428. He also produced photographs of the suit land.
  11. The parties took directions and the matter proceeded by way of viva voce evidence. During the hearing the Applicant Maithya Kasyoka, testified as PW1. He adopted his supporting affidavit sworn on 24<sup>th</sup> January 2022 and produced in evidence all the attached documents. He stated that at the time of testifying in court he was still using the land and no one had ever prevented him from using the land.
  12. He further stated that he occupied the entire parcel of land and had put a fence of tree cuttings around the whole parcel of land.

### **The Respondent's Case**

13. The Respondents filed a replying affidavit sworn by the 1<sup>st</sup> Respondent on his own behalf and on behalf of the 2<sup>nd</sup> Respondent where he confirmed that he is the administrator of the estate of the late Mutia Nzyuko (deceased). He denied ever transacting with the applicant together with Kasula Mutia over the suit land as alleged. He further denied receiving any money or promising to transfer the property or at all to the Applicant and that if at all there was any such promise, the applicant fell short of attaching any evidence.
14. He further denied as completely untrue the allegation that the applicant has been in exclusive possession of the suit land and/or has extensively developed it save for some temporary structures which he only put up on or about the year 2020. The Respondents state that the applicant has only cultivated on a small portion of land occasionally and is now hell bent on hoodwinking the honourable



court to believe that he has been cultivating the whole land in a bid to create a false sense of entitlement where none exists.

15. The Respondents challenge the claim stating that the applicant claims the land as a purchaser on one hand and on the other he claims to have acquired the same under adverse possession. Further, the Respondents stated that the land is an open area with no clearly marked boundaries and the applicant has never been in exclusive possession of the same.
16. During the hearing, DW 1 Aaron Muema Kisula the 1<sup>st</sup> Respondent herein testified on behalf of the 2<sup>nd</sup> Respondent. He adopted his affidavit sworn on 8<sup>th</sup> March 2022. Upon cross-examination he confirmed being the administrator of the estate of Mutua Nzyuko who was his grandfather. He further stated that the Applicant only built temporary structures on the land and started cultivating on a small portion in the year 2020. He further testified that he was not sure if the Applicant bought the suit land and he had only heard that he could have bought it. He further stated that he did not know how the Applicant got onto the land. He stated that his evidence was that the Applicant was a land grabber who was forcefully cultivating on the land.
17. On re-examination the 1<sup>st</sup> Respondent stated that even though the Applicant claimed to have bought the land from his grandfather, his father and grandfather did not inform him of the sale.

### **The Applicants written submissions**

18. Counsel for the Applicant filed written submissions and suggested that the issues for determination as (a) What the law requires of the Applicant in a suit of Adverse Possession and (b) Whether the plaintiff has met the threshold for grant of an order for adverse possession.
19. Counsel submitted that the application herein was grounded on Section 7; 13 and 38 of the Limitations of Actions Act, Order 37 Rule 7 of the *Civil Procedure Rules*, 2010. On case law, the Applicant stated that the law requires the applicant in a suit of adverse possession to prove on a balance of probabilities that he has been in possession of the suit property for a period of more than 12 years to annex as evidence proof that the land is registered in the name of the person under whom the right to adverse possession has accrued. He stated that the Applicant annexed a certified extract of the title deed to the suit land in compliance with Order 37 Rule 7 of the *Civil Procedure Rules*.
20. Further Counsel submitted that he has proved on a balance of probabilities that he has been in occupation of the suit land by exhibiting photographs of houses, a well maintained compound with a pathway; pit latrine and a maize plantation. It is therefore the applicant's submission that he bought the land in the year 1896 from the late Mutia Nzyuko who at the time was in occupation of the suit property. Counsel for the applicant stated that the first Respondent had confirmed that he had heard that the applicant had bought the land from his grandfather but he was not sure of that fact. The applicant submitted that in the year 1986 it was not a requirement that a sale of land be in writing and the position only changed in 1999.
21. On whether the plaintiff met the threshold on adverse possession, counsel submitted that the applicant's claim is that he has been on the said parcel of land for over twelve years; cultivating it without interference from the respondent; that in the first Defendant's Response to the claim he confirmed that it is the Applicant who has been cultivating the land; the Applicant provided evidence of developments on the land.
22. The Applicant' Counsel submitted that the Applicant has complied with prerequisites on adverse possession as set out in the case of *Mate Gitabi v Jane Kabubu Muga & others* (Nyeri Civil Appeal No 43 of 2015 (unreported)); that "For one to succeed in a claim for adverse possession one must prove and



demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin maxim *nec vi, nec clam, nec precario*.

23. This was the position in *Maweu v Liu Ranching & Farming Cooperative Society* [1985] eKLR as quoted in Civil Appeal No 164 of 2011 *Gachuma Gacheru v Maina Kabuchwa* [2016] eKLR where the Court held “Adverse possession is a fact to be observed upon the land. It is not to be seen in a title.”
24. The Applicant also relied on the Court of Appeal decision in Civil Appeal No 121 of 2006.- *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR affirmed the sentiments of the Court in *Amos Weru Murigu v Marata Wangar Kambi & another* won what constitutes interruption in running of time for adverse possession claims.  
  
The Plaintiff further relies in the case *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR where the court of Appeal defined adverse possession
25. The Applicant submits that by virtue of his purchase of the suit property from the late Mutia Nzyuko he gained possession of the suit property in the year 1986; the first respondent herein was aware of his entry into the land as he used to receive funds for his grandfather.

#### **Defendants Written Submissions**

26. The Respondent’s Counsel filed written submissions where he identified issues for determination as whether the plaintiff has been in exclusive possession of the subject matter. It was submitted that the plaintiff failed to prove the claims exclusive possession of the land subject matter for more than 36 years and having dispossessed the Respondent of the land for all that period until 2021. That he failed to prove he had indeed been in exclusive possession as he claims. Counsel submitted that the Respondent rebutted the allegation by testifying that the Applicant only came upon the land in the year 2020 and put up a temporary house and started cultivating on a small portion of the land and has never been in exclusive possession of the subject matter land. Secondly, the defendant testified that the land subject matter is an open land with no clearly marked boundaries. He relied on the case of *John Nyang’au v Ogotu Mang’are Osoro* [2021] eKLR where Judge observed that a beneficiary of the doctrine of adverse possession must show with exactness is the definite portion he occupies and that the land, or portion of land, adversely possessed must be a definitely defined or at least an identifiable portion, with a clear boundary or identification. Counsel submitted that the plaintiff did not prove exclusive possession to be worthy of the orders herein.
27. Counsel similarly relied on the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR Kuloba enumerated the elements that need to be proved by a party invoking the doctrine of adverse possession as follows;
  - a. The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for statutory period.
  - b. The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
  - c. The occupation of land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupant.



- d. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi that is it say occupation with the clear intention of excluding the owner as well as other people.
  - e. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, given reason for notice to the owner and the community, of the exercise of dominion over the land.
  - f. The possession must be continuous uninterrupted, unbroken, for the necessary statutory period.
  - g. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
28. The Respondents Counsel submitted that the plaintiff did not tender any proof to show that he has been in possession of the suit property for more than 12 years.

### **Analysis and Determination**

29. The Court has considered the Originating Summons herein, the affidavits filed, evidence adduced in court and submissions by Counsel. The issue that arises for determination is “Whether the Applicant’s claim meets the threshold for a claim for adverse possession of land parcel Kyangwithya/ Ndumoni/428.”
30. The Applicant seeks to enforce a right to the suit land under Adverse possession. This right is anchored under the provisions of the law set out hereunder. Section 7 of the *Limitation of Actions Act* of 1968 provides that:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

Section 9(1) provides for the accrual of right of action in case of present interest in land and states that;

“Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance.”

Further Section 13:

- “1. A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.



2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land. (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”
31. The procedure for making such an application is set out by Order 37 rule 7 of the [Civil Procedure Rules](#) (2010) which provides that:
- “An application under section 38 of the [Limitation of Actions Act](#) shall be made by originating summons. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.”
32. Under Section 38(1) of the [Limitation of Actions Act](#), CAP 22, 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.
33. The extract of title and certificate of official search relied upon by the Applicant shows the history of ownership of the suit land as the law provides that legal ownership of land includes a right to possession of the same. In [Kamataka Board of Wakf v Government of India & others](#) [2004] 10 SCC 779 quoted in the Court of Appeal case of [Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui](#) [2017] eKLR the court stated thus: -
- “In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner.
34. For a right to possession of land by the true owner to be defeated the law has set out the prerequisites that a party claiming the land must show. In the same case of [Kamataka Board of Wakf v Government of India & others](#) [2004] 10 SCC 779 quoted in the Court of Appeal case of [Ruth Wangari Kanyagia v Josephine Muthoni](#) (*supra*) the court stated thus: -
- “It is a well settled principle that a party claiming adverse possession must prove that his possession is “*nec vi, nec clam, nec precario*”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”
35. Courts have many times determined the prerequisites on adverse possession and as stated by Counsel for the Applicant the same are set out in the case of [Mate Gitabi v Jane Kabubu Muga & others](#) (Nyeri Civil Appeal No 43 of 2015 (unreported)); which was relied on by the Applicant.
- “For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license



or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin maxim nec vi, nec clam, nec precario.”

36. This was also held by the Court of Appeal in Kisumu Civil Appeal No 27 of 2013 [Samuel Kihamba v Mary Mbaisi](#) [2015] eKLR, where the court held:

“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”

37. The court has considered the uncontroverted evidence adduced by the Applicant and find that the suit land was registered in the name of Mutia Nzyuko (deceased) on 19<sup>th</sup> November, 1985 and a title deed issued in his name on 21<sup>st</sup> January, 1990. There is controversy over whether or not the Applicant purchased the land from the deceased. The Applicant claims that he did purchase the said land but no evidence was adduced at the trial on the purchase. The Applicant’s Counsel made an attempt to introduce certain documents attached to his submissions claiming that the same was evidence of sale.

38. In the court’s view counsel was precluded from filing any documents as attachments to submissions. Directions on the hearing of the suit herein were taken as provided under Order 37 Rule of [CPC](#) on 26<sup>th</sup> April 2022 and on 20<sup>th</sup> July 2022.

39. Order 37 Rule 18 of the [Civil Procedure Rules](#) provides for evidence and directions upon hearing of summons and states that;

“At the time of directions, if the parties do not agree to the correctness and sufficiency of the facts set forth in the summons and affidavit, the judge may order the summons to be supported by such further evidence as he may deem necessary, and may give such directions as he may think just for the trial of any issues arising thereupon, and may make any amendments necessary to make the summons accord with existing facts, and to raise the matters in issue between the parties”.

40. The Applicant was granted opportunity to amend the Originating Summons herein and file any documents he deemed necessary but he did not do so. The said documents are not on oath and the respondent did not had an opportunity to reply to them and interrogate them by way of cross-examination. The documents attached to the Applicant’s written submissions are thus struck out and expunged from the court record.

41. Did the Applicant take possession of the suit land and did he clearly assert title in denial of the title of the true owner as alleged and dispossessed the rightful owner of the land? It is the courts view that from the evidence on record the Applicant did take possession of the suit land as claimed in the year 1986 from the deceased Mutia Nzyukoki. The Court is persuaded that the Applicant and the deceased did have some form of agreement to purchase the suit land. However, it appears that as stated by the Applicant the said agreement was not signed by the deceased and this was the reason the Applicant did not attach the same to the supporting affidavit or adduce the same at the trial. It is on the strength of this agreement that the Applicant took possession of the suit land.



42. The 1<sup>st</sup> Respondent in his evidence tried to explain the presence of the Applicant on the suit land and at some point he stated that the Applicant was given the land to cultivate but he later on confirmed that he has a house on the land. He stated as follows;

“He was given the land to cultivate”

“Justus is the one who cultivates the land. I can’t say he lives there since it is far”

“I did not say Justus bought the land. I heard that he could have bought but I do not know. I do not know how he got into the land. My evidence is that Justus is a land grabber grabbing my land”

“Justus said he bought the land from Mutia Nzyuko but I have no information my grandfather and father would have told me Justus bought the land.”

43. From the above extracts of the 1<sup>st</sup> Respondents testimony it appears he had information that the Applicants possession of the land arose out of purchase from the deceased Mutia Nzyuko but he had no personal knowledge of the said transaction. He seemed to deny the Applicant’s claim to the land on the ground that his own father and grandfather never told him about it. In the courts view the presence of the Applicant on the land and the developments thereon seem to give credence to his claim of initial purchase and entry onto the land before the completion of the transaction.

44. The 1<sup>st</sup> Respondent testified that the Applicant started constructing on the land in the year 2020. However, there is no evidence that this indeed happened. He did not show that he did anything to evict the Applicant from the land or stop him from constructing on the same or in any other way to assert his rights to the land yet the land was already registered in his name. The 1<sup>st</sup> Respondent confirmed that he obtained letters of administration to the estate of Mutia Nzyuko through succession cause 17 of 1995, and that the title deed to the suit land was transferred to him on 5<sup>th</sup> February 2016 and a title deed issued, meaning that at the time of the alleged construction the land belonged to him.

45. There is also no evidence that any action was taken by the deceased Mutia Nzyuko to evict the Applicant from the suit land prior to his death. There is therefore no interruption of the Applicants possession of the land as envisaged by the law and his possession was therefore continuous and open.

46. The extract of title to the suit land shows that the title deed was transferred to the 2<sup>nd</sup> Respondent on 18<sup>th</sup> September, 2020 and a title deed issued two days later. In the Courts view the events that took place subsequent to the 2<sup>nd</sup> Respondent getting the title deed as was stated by the Applicant were that the 2<sup>nd</sup> Respondent went to the suit land and upon inquiry from the Applicant he stated that he was the registered owner of the land and that he had found a buyer and that the Applicant had no right to the said land since he was a squatter. The court thus is not convinced that the Applicant started constructing on the suit land in the year 2020.

47. The photographs attached to the Applicants supporting affidavit are of houses that appear to the court much older than the two years the Respondents seem to insinuate they were at the time of filing this suit in February 2022. A look at the said photographs further show the existence of a mature fence surrounding the home that would also be probably older than the time stated by the Respondent.

48. Further, construction of the several houses and a pit latrine would have taken time within which the Respondent had the opportunity to act and prevent the said construction.

49. The presence of the Applicants home on the suit land and those of his two adult children Kathoka Kaithya and Joseph Kaithya is in the court’s view further indication that the Applicant occupied the



land with the unmistakable animus possidendi, that is the intention to have the land excluding the owner and which intention was contrary to the rights of the registered owner to have and occupy the land.

50. The Court is therefore satisfied that the evidence by the Applicant that he got onto the land in 1986 is more probable than the evidence by the Respondent that the applicant got onto the land in the year 2020. The court further finds that the seller Mutia Nzyuko died before the sale of the land was completed and thus the Applicant's occupation and possession of the land became adverse to the rights of the owner of the land since the transaction of sale had not been completed. The Court further finds that the 1<sup>st</sup> Respondent as administrator of the estate of Mutia Nzioka did not take any action that would have interrupted the Applicants possession of the suit land
51. The Respondents have claimed that the Applicant only occupies a small portion of the suit land and not the whole. Counsel for the Respondent relied on the case of *John Nyang'au v Ogutu Mang'are Osoro* [2021] eKLR where the Judge observed that a beneficiary of the doctrine of adverse possession must show with exactness the definite portion he occupies and that the land, or portion of land, adversely possessed must be a definitely defined or at least an identifiable portion, with a clear boundary or identification.was visible, open and notorious.
52. The Court has considered also the case of *Gatimu Kinguru v Muya Gathangi* [1976] KLR 253 where the court observed that:

“the land or portion of land adversely possessed must be definitely identified, defined or at least an identifiable portion with a clear boundary...”

The portion occupied by the defendant is not a separately surveyed piece of land with a plot number and title number to it. There is no deed plan in respect of it, at least none has been produced to the Court. It is, however, a definitely identified and identifiable portion with a clear boundary. That which can be ascertained is certain; that which is definitive is positive. It is so plotted that if not certain it can be made certain. I think the absence of a plot and title number should present no difficulty or be a bar to the defendant in establishing his claim on the ground of adverse possession. The defendant has established a title to his portion by adverse possession.”

53. In *Stephen Mwangi Gatunge v Edwin Onesmus Wanjau (Suing in her capacity as the administrator of the estates of Kimingi Wariera (Deceased) and of Mwangi Kimingi (Deceased))* [2022] eKLR the court held

“The Applicant has attached a copy of a title deed extract as required by law. The title shows that the land is registered in the name of Kimingi Wairera measuring 4.0acres identified as Fort Hall Loc. 13 Gitugi/ 424. This Court has not had the benefit of being able to identify the exact occupation of the Applicant out of the entire parcel Fort Hall Loc. 13 Gitugi/ 424, but what is not in dispute is that the Applicant is occupying part of the land which is one acre. It would not be difficult for this Court to conclude that the Applicant and the Respondent are aware of the Applicant's confines and or borderlines the larger portion notwithstanding.

In totality, the Court finds and hold that the Applicant has on a balance of probability demonstrated that he is entitled to one (1) acre piece of land to be excised from Fort Hall Loc. 13 Gitugi/ 424.”



54. In this case the Applicant claims that he purchased and occupies the entire suit land. The Respondents on the other hand stated that the Applicant only occupies and uses a small portion of the suit land while other portions are occupied by other people. The Respondents did not state who the other people occupying the land are and did not exhibit any evidence of occupation by these other people. Having admitted that the Applicant does indeed occupy a part of the land, the Respondent did not tell the court even the approximate size of the land they claim is occupied by the Applicant.
55. The Respondents have also contended that the Applicants occupation can only be ascertained by having the boundaries shown by surveyors. However, the court is of the view that a surveyor's report is not the only way to ascertain the size of the land in the possession of the Applicant. From the totality of the evidence adduced by the parties and the photographs taken of the suit land, the court sees a fenced homestead with houses. The court further observed photographs of the Applicants farm with food crops and trees. The said photographs show an expansive parcel of land that in the courts view would on a balance of probability be the size of the suit land as shown on the official search.
56. The court is thus satisfied that the Applicant has proved his possession of the entire suit parcel of land No Kyangwithya/Ndumoni/428 "nec vi, nec clam, nec precario," peaceful, open and continuous with the intention to have the land and is entitled to the prayers sought.
57. The Court thus enters judgement in favour of the Applicant against the Respondents as follows;
- a. The Applicant be and is hereby declared to be entitled by adverse possession for over 12 years to all that parcel of land known as title No Kyangwithya/ Ndumoni/428.
  - b. That the Applicant be registered as absolute proprietor in respect of title number. Kyangwithya/ Ndumoni/428.
  - c. That the Land Registrar, Kitui County do register the Applicant as the absolute proprietor of land title number Kyangwithya/ Ndumoni/428 in place of the 2nd Respondent.
  - d. An order of permanent injunction be and is hereby issued restraining the Respondents, their agents and or servants from cultivating, alienating, transferring, growing crops, grazing or in any other way interfering with or dealing with land parcel number Kyangwithya/ Ndumoni/428.
  - e. Costs of the originating summons are hereby awarded to the Applicant.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 18TH DAY OF JULY, 2023.**

**HON. L. G. KIMANI**

Judgement read in open court and virtually in the presence of-

C/A Musyoki

Nzioki for the Respondents/Defendants

No attendance by the Applicant/Plaintiff

