



**Musikoyo v Musikoyo (Land Case 1 of 2023)  
[2025] KEELC 1321 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1321 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
LAND CASE 1 OF 2023  
EC CHERONO, J  
MARCH 13, 2025**

**IN THE MATTER OF SECTION 5,7 & 17 OF THE LIMITATION OF ACTIONS ACT  
CAP 22 LAWS OF KENYA AND ORDER 36 & 38 OF THE CIVIL PROCEDURE RULES  
AND IN THE MATTER OF LAND PARCEL NO. LR NO. E.BUKUSU/N.SANG'ALO/4517**

**BETWEEN**

**JANE PENINAH MUSIKOYO ..... APPLICANT**

**AND**

**ESTHER MUSIKOYO ..... RESPONDENT**

**JUDGMENT**

1. The Applicant commenced these proceedings vide an Originating Summons dated 17/07/2023 seeking the determination of the following questions;
  - a. That the applicant be declared the owner of a parcel of land measuring approximately 2 ½ acres to be carved out of land parcel no. E.Bukusu/S.Sang'alo/4517 which she has been in adverse possession having occupied the same for a period of over 45 years.
  - b. That an order that the applicant has become entitled to and should be registered as the owner of a piece of land measuring 2 ½ acres to be comprised in land parcel no. E.Bukusu/S.Sang'alo/4517 respectively by operation of the law to viz section 7,17 and 38 of the *Limitation of actions Act* (Cap 22 Laws of Kenya) in place of the respondent
  - c. That the respondent's name on the said parcel of land be removed and cancelled on the said land parcel measuring 2 ½ acres and be registered in the name of the applicant and the rest to remain in the name of the respondent herein.
  - d. That the respondents transfer of ownership of the suit land from Vincent Mukhebi in the year 2008 did not affect the applicant's right to the land by way of adverse possession.



- e. That in the alternative and without prejudice to para 1,2,3 &4 above (questions to be determined) a declaration that the respondent holds title to 2 ½ acres to be carved out of land parcel no. E.Bukusu/S.Sang'alo/4517 in trust for and for the benefit of the applicant.
  - f. That costs of this originating summons be provided for and be borne by the respondent.
  - g. That this court to grant any other relief that it may deem proper and fit to grant.
2. The summons is premised on grounds on the face of the said application Supported by the Affidavit of the Applicant sworn on 12/07/2023.
  3. The Applicant contends that the Respondent is her co-wife and the registered proprietor of land parcel no. E.Bukusu/N.Salango/4517 (hereinafter referred to as "the suit land"). That their husband, now deceased was one Cleophas Kayobia Musikoyo who died in the year 1995. That their deceased husband purchased the suit land from one Vincent Mukhebi in the year 1976 and put her in possession of 2 ½ acres of the land. That she has extensively developed her portion of land by constructing permanent buildings including a school and cultivated crop. That she has stayed on the land openly for over 45 years. That she discovered in the year 2009 that the Respondent had transferred the entire suit land in her name.
  4. The Respondent filed a replying affidavit sworn on 27/07/2023 where she averred that she is the first registered owner and proprietor of the suit property. That she acquired the suit land together with her deceased husband in the year 1974. That the deceased married the applicant in the year 1978 and since she was not blessed with any child, her deceased husband could not purchase land for her. That on humanitarian grounds, she agreed to host the Applicant in the 2 ½ acres of the suit land and as such, her occupation was by way of licence. That the Applicant did not enter the land forcefully but by virtue of her permission as she is a family member. She denied the allegations that she had acquired the suit land fraudulently and urged the court to dismiss the suit.
  5. During the hearing, the Applicant called three witnesses. PW1 Jane Peninah Musikonyo adopted her witness statement as her testimony-in-chief dated 01/12/2023. She also referred to her list of documents dated 09/12/2023 which she produced in evidence as P-Exhibit 1,2,3,4(a), 4(b)(c),(d), € & (f) and 5 respectively. On cross-examination, she stated that she was born in Uganda but was married in Kenya on 20/03/1978 as the 3<sup>rd</sup> wife of Cleophas Kayobi Musikoyo (deceased) and has resided there since then to date. That she worked as a teacher and holder of ID card no.30691057. That the suit land was acquired by her late husband and one Hellen Nekesa Musikoyo who was the 1<sup>st</sup> wife. That she was allocated 1.6 acres in a meeting chaired by the area chief where she lives and has established a school.
  6. PW2 Pius Nekesa Buyoma adopted his witness statement dated 01/12/2023 as his testimony-in-chief. On cross-examination, he stated that he was a colleague to the parties' deceased husband. It was his evidence that the suit land measures 4.04ha (13 acres) which the late husband of the parties' herein bought in the year 1977 after his ancestral land was compulsorily acquired by Nzoia Sugar Company. That the Applicant was married in the year 1978 and at that time, the Respondent was already living in the suit land with their deceased husband. That the Applicant was allowed to utilize 2 ½ acres and beacons were placed to separate and/or set aside her portion from the rest part of the suit land. That his homestead is about half a kilometre from the suit land.
  7. PW3 Simon Mukwana Musikoyo adopted his witness statement dated 01/12/2023 as his testimony-in-chief. On cross examination, he stated that Cleophas Musikonyo was his elder brother and that he bought the suit land after he was compensated by Nzoia Sugar Company for the acquisition of their



ancestral land. That when the Applicant was married, she was shown her portion of the suit land and later when the chief visited the land, he placed beacons/boundaries.

8. The on her part, the Respondent called three witnesses in defence of the plaintiff's claim; DW1 Mary Musikoyo who substituted the Respondent Esther Musikoyo adopted the replying affidavit sworn on 27/7/2023 and the witness statement dated 23/11/2023 and 17/11/2023 as her testimony-in-chief. It was her testimony that the Applicant settled on the suit land since 1978 to date where she has constructed a home and a school. She stated that the Applicant utilizes ½ an acre with the permission of the registered owner. That the chief visited the suit land and gave the Applicant 1.6 acres and placed boundaries. On re-examination, she testified that the suit land was bought by her grandfather.
9. DW2 Francis Musikoyo adopted his witness statement dated 23/11/2023 as his testimony-in-chief. He testified that the suit land was sold to the Respondent by her father Joseph Saiti who had bought the land from one Vincent Mukhebi. He testified that the Applicant occupies ½ acre of the suit land.
10. DW3 Tilus Musikoyo adopted his witness statement dated 23/11/2023 as his testimony-in-chief. On cross-examination, he reiterated his testimony-in-chief.
11. When this matter came up for directions, the parties agreed to sum up the hearing with written submissions. The Applicant filed her submissions through the Firm of M/S Were & Co. Advocates dated 28/01/2025 while the Respondent filed her submissions through the firm of Amani Wekesa & Associates Advocates dated 31/01/2025.

#### **Analysis and determination.**

12. I have carefully read and considered the pleadings, the evidence adduced, submissions, authorities cited and the relevant provisions of law and find the singular issue for determination in this suit is whether the Applicant has established the principles to be registered as owner of the portion measuring Approximately 1.6 acres of the suit land by the doctrine of adverse possession.
13. The principles of adverse possession are well settled under *Limitation of Actions Act*. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further section 13 of the same Act, provides that adverse possession is the exception to this limitation. Section 7 provides thus;
  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 of this Act 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) of this Act, the land in reversion is taken to be adverse possession of the land.”



14. Section 38 of the Act provides that:

“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.”

15. Asike-Makhandia, JA described adverse possession in *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR as follows:

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, which is in these terms:-

“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.”

16. Further, in the case *Mbira v. Gachuhi* (2002) 1 EALR 137: the court stated as follows;

“... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period twelve (12) years, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”

17. It is not in contention that the land in question is registered in the name of Esther Musikoyo who is the Respondent herein. That the said Esther mukikoyo was registered as proprietor on 08/07/2008 and a certificate of title subsequently issued. It is also not in doubt that the parties herein are co-wives and wives to one Cleophas Musikiyo who is deceased. It is also common knowledge that the said Cleophas Musikoyo(deceased) lived in the suit land from the year 1975 to 1995 when he died. It is not in contention that the Applicant’s mode of entry into the suit land is as a result of being a wife to the said Cleophas Musikiyo.

18. It is imperative to note that the pleadings and the oral evidence of the Respondent are at cross-purposes. In her replying affidavit, the Respondent stated that she and her late husband purchased the suit land in the year 1975 before the Applicant was married and as such, the Applicant had no claim over that land as she is there as a licensee. At the same time, the Respondent in her testimony stated that her father, one Joseph Saiti bought for her the suit land. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* (2018) Eklr, the Court held in part:

“that any evidence adduced in a matter must be in consonance with the pleadings, any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.”



19. Further, although the Respondent contends that she and her deceased husband bought the suit land jointly, she has not tendered any evidence to support that claim. Having said that and from the totality of the evidence on record, it is not correct to say that the Applicant was an adverse possessor between 1978 and 1995 when she lived on the suit property as the 2nd wife of the late Cleophas Musikoyo. She lived there as an invitee of the parties' mutual husband. In my view, the Applicant's claim for adverse possession can only be considered to have commenced upon the demise of Cleophas Musikoyo who brought her into the suit land.
20. From the record, it emerges that the Respondent was registered as the proprietor/owner of the suit land on 08/07/2008 in accordance with the green card produced in evidence. While this court questions how the Respondent acquired registration as the owner of the suit land, given the assertions in the pleadings, I will not address this matter as it is not an issue in this case. The court will proceed on the assumption that the Respondent is the indefeasible registered owner of the suit land, observing that this does not relieve her of the duty to prove that her acquisition of title to the suit land was beyond any reproach.
21. It is trite that adverse possession accrues on land and not title. The Court of Appeal in Civil Appeal No 164 of 2011 Gachuma Gacheru VS Maina Kabuchwa [2016] eKLR, while citing the case of; Maweu VS Liu Ranching & Farming Cooperative Society [1985] eKLR held: "Adverse possession is a fact to be observed upon the land. It is not to be seen in a title..."

From the foregoing, it is my considered opinion that for purposes of adverse possession, time started running from the year 1995 when the applicants husband died. This translates to a period of 28 years. Even if the court were to consider time to have started to run when the Respondent acquired title to the suit land which was in the year 2008 to the time of filing this suit, a period of 14 years has since passed.

22. In the case of; Francis Gicharu Kariri - v- Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi), the Court of Appeal approved the decision of the High Court in the case of Kimani Ruchire -v - Swift Rutherfords & Co. Ltd. (1980) KLR 10 where Kneller J, held that:

"The applicants have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)".

23. It is trite that one of the ingredients for adverse possession is that the Applicant must show that the Respondent had knowledge (or the means of knowing actual or constructive) of the possession or occupation by the adverse possessor. The possession must also be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it. In applying these principles to the present case, it has not been denied by the Respondents that the Applicant has been on the suit land and has established her home and a school. This is a clear indication that the Respondent has for the entire period been aware of the Applicant's occupation of a portion of the suit land measuring 1.6 acres. I am therefore persuaded that the Applicant's possession and occupation has been peaceful, open, continuous and uninterrupted.
24. The other issue for determination is whether the portion claimed by the Applicant as being in adverse possession can clearly be identified from the suit land? In the Case of Wilson Kazungu Katana & 101 Others -vs- Salim Abdalla Bakshwein & Another (2015) eKLR the Court underscored the importance of clear identification of land in adverse possession cases. The Court stated thus:-

"The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was stated by this Court in the Case of Githu -vs- Ndele (1984) KLR 776. The applicants did not discharge the burden



of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them."

25. In the present case, the Applicant in her oral testimony seems to state that she occupies 1.6 acres although in her pleadings she claims for 2 ½ acres. The Respondent in her pleadings and through oral evidence claimed that the Applicant is in possession and occupation of ½ an acre. From the evidence of both parties, it emerges that the area chief in a meeting resolved to have the Applicant occupy 1.6 acres. The reasoning behind this was not disclosed. However, this court is inclined to believe on the wisdom of the area chief in awarding 1.6 acres to the Applicant since the Applicant herself stated that she shall only take/occupy the 1.6 acres and gift the other portion to another member of the family.
26. The Applicant in the alternative had pleaded for a declaration that the Respondent holds title to 2 ½ acres to be carved out of land parcel no. E.Bukusu/S.Sang'alo/4517 in trust for and for the benefit of the Applicant. Having found that the case of adverse possession has been proven to the required standard, see no need to delve into this prayer, either way no evidence was led to this effect.
27. Lastly on costs, this Court is of the view that due to the nature of the relationship between the parties, each party shall bear their own costs of this suit.
28. In the end, I find the Applicants originating summons dated 17/07/2023 merited and I make the following consequential declarations;
  - a. The applicant has become entitled to and should be registered as the owner of a piece of land measuring 1.6 acres comprised in land parcel no. E.Bukusu/S.Sang'alo/4517 by adverse possession.
  - b. The Respondent to execute the mutation forms for subdivision, transfer forms and all statutory documents for purposes of transferring a portion of land measuring 1.6 acres comprised in land parcel no. E.Bukusu/S.Sang'alo/4517 in favour of the Applicant.
  - c. In default of paragraph (b) above, the Deputy Registrar of this Court to execute the transfer forms and the Land Registrar Bungoma County to dispense with the production of the original title and all statutory documents and facilitate the registration of the Applicant herein as proprietor of a portion she is currently in possession measuring 1.6 acres out of L.R NO. E.Bukusu/n.sang'alo/4517.
  - d. Each part shall bear their own costs.
29. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 13TH DAY OF MARCH, 2025.**

.....

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

Mr. Juma Waswa H/B for Mr. Were for the Plaintiff/Applicant.

Wekesa H/B for Amani Wekesa for the Defendant/Respondent.

Bett C/A.

