



**Chepkwony v Terer (Enviromental and Land Originating Summons
E005 of 2023) [2025] KEELC 3188 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3188 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2023**

A OMBWAYO, J

APRIL 8, 2025

BETWEEN

BENARD CHEPKWONY PLAINTIFF

AND

JONAH KIBET TERER DEFENDANT

JUDGMENT

Plaintiffs Case

1. Benard Chepkwony, (hereinafter referred to as the plaintiff) has sued Jonah Kibet Terer (hereinafter referred to as defendant) claiming that the plaintiff be declared to have acquired title by adverse possession the suit land known as Nakuru/Tinet/Sotik/Settlement Scheme/2102: -
2. The Honorable Court be pleased to issue a vesting order on account of adverse possession in respect to parcel land known as Nakuru/Tinet/Sotik Settlement Scheme/ 2102.
3. The registration of Johan Kibet Terer as proprietor of Nakuru/Sotik/ Settlement Scheme/2102 and or any other persons deriving title from Jonah Kibet Terer or claiming through the Defendant based on the land be cancelled forthwith and the District Land Registrar Nakuru do rectify the register to enter the name of the Plaintiff as registered proprietor of the said property in place of the Defendant or anyone deriving title from the Defendant. The District Land Registrar upon registering the name of the plaintiff do issue a title to the plaintiff. The costs of these proceedings be borne by the Defendant
4. The plaintiff relies on grounds that he has settled on the above named parcel of land continuously and without any interference from the Defendant since the year 1994. The plaintiff has been in an actual, open, physical and uninterrupted possession of the suit premises. The Plaintiff has fully developed the said parcel of land and continues to practice small subsistence farming.



5. The originating Summons is supported by the affidavit of the plaintiff who states that he has residing within Parcel No. Nakuru/Tinet/Sotik Settlement Scheme / 2102 since the year 1994 for a period of 28 years and has constructed his home thereon. The defendant has had the title of the said land being Nakuru/ Tinet/ Sotik Settlement Scheme / 2102 since the year 2005. All along he has been in actual occupation of the suit land has been practicing small scale farming on the said land for the period which he has been on the said land and has enjoyed peaceful and quiet enjoyment of the said parcel of land since the year 1994. He has not at any time been evicted from the suit land. The Defendant has not at any time been in possession of the land.
6. He states that his occupation of the parcel of land has not been subject to any approval or license by the Defendant.
7. He believes that the defendant intends to dispose the land, evict him and render him homeless, grabbing what legally and rightfully belongs to the plaintiff. He has been erroneously threatened with eviction from a different suit not relevant to the land in question. He stands to suffer irreparably should he be forcefully evicted since the suit land herein is what he has called his home for all his life. He believes that he has acquired the title to the suit premises by way of adverse possession as he has been on the property for over 28 years to date and that any claims to title over the same by the Defendant has been extinguished by the fact of his acquisition of such title by adverse possession .
8. When the matter came for hearing, the plaintiff stated that adopted his supporting affidavit as his evidence in chief. He reiterated that he has lived on the land since 1994 since when he born whereas the defendant has never lived on the land. On cross examination by Mr Wanjir Counsel for the defendant, his evidence that he has been on the land since 1994 was not shaken. He states that he does not live in parcel number 2104 but on 2102.

Defence Case

9. John Kibet Terer filed his defence on the 14th October 2024 whose import is that the plaintiff has never been in actual possession of the suit property adversely against the interest or rights of the defendant. He testified as DW1 that he was allocated the land by the Government of Kenya the same year with the other members of Tinet scheme. That the surveyor came in year 2003 and surveyed the land in the said locality and were issued with title deed in the year 2005 in his name. That all along he has been in actual, peaceful and uninterrupted possession of the stated parcel since the year 1997 up-to 2017 and has undertaken some development and was equally farming on the said parcel. It is in the year 2017 when one Alice Too in cohorts with Reuben Koech and Edwin Rotich forcefully and illegally with the aid of hired goons evicted him and interfered with his peaceful occupation of the suit land. It is at this point that he sought the intervention of various investigating authorities, where upon being summoned the above three persons agreed to voluntarily vacate the suit property which wasn't done. He took another step and finally moved to court to seek a remedy. The court in Molo in MCELC 39 OF 2018 determined the dispute in his favour and ordered for the eviction of the three who were in occupation namely: Alice Too, Reuben Koech and Edwin Rotich. That however Alice Too is still the one in actual occupation of the suit land as of now in utter disregard to the court order. The Plaintiff herein has never occupied the said parcel of land at any point and that he has another piece of land Nakuru/Tinet Sotik Settlement Scheme LR 2104 far away from the suit parcel, where he and his family have been residing at all material times. He states that the rightful owner of the suit parcel and has neither abandoned it nor disposed it off at any point. He has remained vigilant and pursued this matter ever since the illegal actions took place on his parcel. Neither the Plaintiff nor any other person can legitimately therefore claim adverse possession over his property in the circumstances. The Plaintiff is not coming to court with clean hands. He prays that his claim be disallowed.



10. DW2 David Kiprono Terer testified that the Defendant has always been his neighbor within Tinet Settlement scheme in Keringet. That he is the registered owner of land parcel referenced no. Nakuru/Tinet Sotik Settlement Scheme LR 2069 situate at the same locality with the Defendant's land referenced no. Nakuru/Tinet Sotik Settlement Scheme LR 2102. That they were allocated the land by the Government of Kenya the same year with the defendant and have known the Defendant herein to be registered owner of land parcel no. Nakuru/Tinet Sotik Settlement Scheme/LR 2102 . That the surveyor came in year 2003 and surveyed the land in the said locality and were issued with title deeds in the year 2005 together with the defendant. That all along it is the Defendant who was in actual and uninterrupted possession of the stated parcel since the year 1997 upto 2017 when one Alice Too in cohorts with Reuben Koech and Edwin Rotich forcefully and illegally interfered with the Defendant's peaceful occupation of the suit land.
11. It is at this point that the Defendant sought the intervention of various investigating authorities, where the three agreed to voluntarily vacate the suit property. The Defendant finally moved to court to seek a remedy. The court in Molo in MCELC 39 OF 2018 determined the matter in the Defendant's favour and ordered for the eviction of the three who were in occupation namely: Alice Too, Reuben Koech and Edwin Rotich. The witness restates that as a neighbor to the Defendant, that the Plaintiff herein has never occupied the said parcel of land at any point and that he has another piece of land that is i.e Nakuru/Tinet Sotik Settlement Scheme/LR 2104 where he and his family resides far away from the suit parcel. The Defendant is the rightful owner of the said parcel and has never seen him dispose off the same at any point. The Plaintiff is not coming to court with clean hands.
12. DW3 Francis Kiplagat Sigilei testified that he is the registered owner of land parcel referenced no. Nakuru/Tinet Sotik Settlement Scheme LR 2134 situate at the same locality with the Defendant's land referenced no. Nakuru/Tinet Sotik Settlement Scheme LR 2102. That they were allocated the land by the Government of Kenya the same year with the defendant and have known the Defendant herein to be registered owner of land parcel no. Nakuru/Tinet Sotik Settlement Scheme/LR 2102. That the surveyor came in year 2003 and surveyed the land in the said locality and were issued with title deeds in the year 2005 together with the defendant.
13. That all along it is the Defendant who was in actual and uninterrupted possession of the stated parcel since the year 1997 upto 2017 when one Alice Too in cohorts with Reuben Koech and Edwin Rotich forcefully and illegally interfered with the Defendant's peaceful occupation of the suit land. It is at this point that the Defendant sought the intervention of various investigating authorities, where the three agreed to voluntarily vacate the suit property. The Defendant finally moved to court to seek a remedy. The court in Molo in MCELC 39 OF 2018 determined the matter in the Defendant's favour and ordered for the eviction of the three who were in occupation namely: Alice Too, Reuben Koech and Edwin Rotich. That as a neighbor to the Defendant, the Plaintiff herein has never occupied the said parcel of land at any point and that he has another piece of land that is Nakuru/Tinet Sotik Settlement Scheme/LR 2104 where he and his family resides far away from the suit parcel. The Defendant is the rightful owner of the said parcel and he has never witnessed him dispose the same at any point. The Plaintiff is not coming to court with clean hands.

Rival Submissions

14. The plaintiffs submissions are not on record. The defendant submits that . Section 26 of the [Land Registration Act, Act No.3 of 2012](#) provide that the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or



endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally procedurally or through a corrupt scheme.

15. He submits that there is evidence in the form of a certificate of title that Nakuru/Tinet/Sotik/Settlement Scheme/ 2102 is registered in the name of Jonah Kibet Terer and the same is undisputed and remains unchallenged to date. The allotment letter and payment receipt were also adduced as evidence of the process of acquisition of the suit parcel. We humbly submit that it should therefore be taken as prima facie evidence that Jonah Kibet Terer, the Defendant herein therefore remains the absolute and indefeasible proprietor of the subject parcel.

On whether the plaintiff has been in adverse possession of

16. The defendant submits that the Principle of Adverse possession is well settled under the Limitations of Action Act Section 7 of the Act places a bar on action to recover land after 12 years from the date on which the right accrued. Section 13 of the same Act provides that adverse possession is the exception to this limitation.

17. That 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."

18. According to the defendant, the principle of adverse possession was more elaborately set out in the case of *Wambugu v Niuguo* [1983] KLR 172, where the Court held that:

"In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it." And that:"

19. He submits that the proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.

20. He cites the decision of this court in *Ongyien & another v Keya & another* (Environment & Land Case E027 of 2021) [2023] KEELC 279 (KLR), where the court stated that, '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 nor under the licence of the owner, It must be adequate in continuui57, in publicity and in extent to show that possession is adverse to the title owner. Further, in the case Mbira U Gachuh1(2002) 1 EALR 137 cited in Ongwen & another v Keya & another, the court stated that a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, 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.

21. The defendant contends that to determine whether the Applicant's rights accrued the Court in Ongwen's case sought to answer such as how the Applicant took possession of the suit property, when did he take possession and occupation of the suit property, what was the nature of his possession and occupation and how long has the Applicant been in possession.
22. The court directed a visit by the Deputy Registrar to the suit parcel to ascertain the status quo on the ground. The exercise was conducted and a report was filed. The findings were that the plaintiff had settled on a different parcel from that of the Defendant and that there was confusion on the parcel numbers which the parties had settled on. The Plaintiff was claiming that the parcel which he had settled on was parcel number 2102 while the Defendant was of the view that his parcel was number 2102 while that which the Plaintiff had settled on was parcel 2104.
23. The evidence on record shows that the parcels occupied by the parties are distinct, have different numbers and different owners and therefore the burden was then on the Plaintiff to prove that the parcel he was Claiming Adverse Possession On Was Nakuru/Tinet/Sotik/ Settlement Scheme/ 2102. No proof either expert evidence or proof of other form was provided by the Plaintiff that he had actually settled on 2102 and not 2104. No survey report on ground position was tendered to ascertain the actual parcel number claimed. To the contrary the Defendant provided letter of allocation for parcel 2105 certificate of title, called witnesses to prove his possession and an eviction order against the trespassers on his parcel 2102.
24. On how the Applicant took possession, the defendant submits t that there is no evidence on how the Plaintiff took over possession of the parcel he is claiming. We further submit that the Plaintiff did not adduce any material to demonstrate that he took possession of the said parcel in 1994.
25. With regard to the nature of his possession, it was not demonstrated that it was not exclusive, open or uninterrupted as the Defendant has constantly fought his possession of this parcel upon encroachment of his land by the 'Defendants in Molo MCELC 39 OF 2018', through lodging complaints in various authorities and instituting a suit to assert his fights. Regarding the period within which the Applicant has been in possession of the said portion, no proof was tendered.
26. The plaintiff has failed to meet the test for adverse possession of the Defendant's parcel no. 2101. He has not demonstrated that the land he is in active possession of is actually Nakuru/Tinet/sotik/ Settlement Scheme/ 2102 with the knowledge of the defendant. He has failed to demonstrate non-permissive or nonconsensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption.
27. The Defendant on his part immediately moved to court to assert his land fights when he learnt encroachment by the defendants in Molo court case where the court pronounced itself on the matter. This demonstrates vigilance on the part of the Defendant.
28. The Court in Mtana Lewa vs Kahindi Ngala Mwangadi (2015) eKLR cited in Ongwen's case, the court held, 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 nor 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 tide owner.

29. The ultimate Submission is that the Plaintiff is undeserving of the orders sought, for he has come with unclean hands and further engaging the court in an academic exercise. His claim was only a ploy devised Of conjured to facilitate unjust enrichment pretenses and encroachment by himself and proxies. The Plaintiff has totally failed to discharge the burden of proof on claim for Adverse possession on the Defendant's parcel Nakuru/Tinet/Sotik/ Settlement Scheme/ 2102. On who is entitled to costs, the defendant submits that the general rule as to costs is provided for in section 27 of the *Civil Procedure Act* which provides provide that cost shall follow the event. The successful party shall ordinarily have costs,

Analysis And Determination

30. Courts have time and again adjudicated the issue of adverse possession.
31. In *Kimani Ruchine & Another v. Swift, Rutherford Co. Ltd. & another* [1977] KLR 10, Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, necpencario (no force, no secrecy, no evasion)...The possession must be continuous. It must not be broken for any temporary purposes or by any endeavors to interrupt it or by any recurrent consideration.”

32. In *Wambugu v. Njuguna* [1983] KLR 172 the court stated as follows:

“First in order to acquire by the Statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The *Limitation of Actions Act* (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

33. In *Mombasa Teachers Co-operative Savings & Credit Society Limited v. Robert Muhambi Katana & 15 others* [2018] eKLR, the Court of Appeal stated as follows:

“18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, nec vi nec clam nec precario. See *Jandu vs. Kirplal & Another* (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court's decision in *Wambugu vs. Njuguna* [1983] KLR 173. Did the respondents discharge this burden?...” In *Githu v. Ndeete* [1984] KLR 776 it was held that:



“1. The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession.2.Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.3.A title by adverse possession can be acquired under the Limitation of Actions Act to a part of the parcel of land which the owner holds title.”

34. In *Kairu v. Gacheru* [1988]2 KAR 111, it was held that,

“The law relating to prescription affects not only present holders of the title but their predecessor (57, Limitation of Actions Act).”

35. I have considered the evidence on record and do find that the plaintiff has proved on a balance of probability that he is in possession of the suit property. He produced photos of his home on the suit land. DW3 appeared to admit that the plaintiff is in possession but made an about turn immediately but it was already on record. The evidence by the plaintiff was consistent whereas the witnesses of the defendant appeared inconsistent like dw3 who stated that the plaintiff was in possession of 2102 but changed immediately. The defendant is not in possession of the suit property, who is ?. The site visit by the deputy registrar did not yield much but the plaintiff was consistent that he was in occupation of Nakuru/Tinet / Sotik Settlement Scheme/2102. The defendant alleged that the plaintiff was in occupation of 2104 but did not call a surveyor to demonstrate that the plaintiff was in occupation of 2104. Alice Too who is alleged to be in occupation of 2102 was not called as a witness. The plaintiff was not a party in the lower court suit. I do find that the plaintiff has proved that he has been in possession since he was born and started working and on the land in 1994. Title was issued to the defendant in 2003 and therefore had upto to year 2017 to sue the plaintiff for eviction but did not do so. Adverse Possession requires at a minimum five basic conditions being met to perfect the title of the adverse party. These are namely:

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- A. open and notorious use of the property. For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about. The plaintiff has demonstrated that he is in open and notorious use of the land because he has put his home on the land.
- B. continuous use of the property – The adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor’s time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and



the date on which he returned. The defendant has never interfered with the plaintiff's use of land in issue.

- C. exclusive use of the property – The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met. The plaintiff is in exclusive possession as he appears to be utilizing the land alone.
- D. actual possession of the property – The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession. The plaintiff is on the land and utilizing the same for more than 12 years.
- E. non permissive possession of the property-The adverse party must be in possession without the consent of the owner. The defendant has not allowed the plaintiff on the land. The possession by the plaintiff is non –permissive.

36. In conclusion:-

- 1. I do find that the plaintiff has demonstrated to be in adverse possession of the suit land has met the 5 basic minimums..
- 2. I do grant the orders that the plaintiff be declared to have acquired title by adverse possession the suit land known as Nakuru/Tinet/Sotik/Settlement Scheme/2102: -
- 3. I do grant a vesting order on account of adverse possession in respect to parcel land known as Nakuru/Tinet/Sotik Settlement Scheme/ 2102.
- 4. The registration of Johan Kibet Terer as proprietor of Nakuru/Sotik/ Settlement Scheme/2102 and or any other persons deriving title from Jonah Kibet Terer or claiming through the Defendant based on the land be and is hereby cancelled forthwith and the District Land Registrar Nakuru do rectify the register to enter the name of the Plaintiff as registered proprietor of the said property in place of the Defendant or anyone deriving title from the Defendant.
- 5. The District Land Registrar upon registering the name of the plaintiff do issue a title to the plaintiff.
- 6. The costs of these proceedings be borne by the Defendant. Orders Accordingly.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

THE JUDICIARY OF KENYA.

NAKURU ENVIRONMENT AND LAND COURT

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