



Said v Kinoru (Sued as the Administratrix of the Estate the Late Lucas Mwicigi Kinoru) (Environmental and Land Originating Summons 3 of 2021) [2025] KEELC 4107 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEELC 4107 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 3 OF 2021**

**AE DENA, J
MAY 29, 2025**

BETWEEN

NASSORO SAID PLAINTIFF

AND

TERESIA NYAMBURA KINORU DEFENDANT

**SUED AS THE ADMINISTRATRIX OF THE ESTATE THE LATE LUCAS
MWICIGI KINORU**

JUDGMENT

1. Nassoro Said commenced the present proceedings by way of Originating Summons against the Respondent for a claim of adverse possession over Title No. Kwale/Shimba Hills/1X5 (herein suit property) seeking: -
 - a. A declaration that he is the proprietor of the parcel known as Kwale/Shimba Hills/1X5 by virtue of adverse possession
 - b. An order to be directed to the Land Registrar Kwale Lands Registry to register a transfer of the parcel of land known as title Kwale/Shimba Hills/1X5 from the defendant to the plaintiff
 - c. A restraining order against the defendant from entering, harassing, evicting or in any other way, interfering with the plaintiff occupation and possession of the parcel of land known as title Kwale/Shimba Hills/1X5
 - d. Costs.
2. The suit is defended. The defendant avers he purchased the suit property from an auction conducted by Kenya Commercial Bank and transfer transferred in favor of the defendant. That since then he has had exclusive possession and occupation to the exclusion of the plaintiff.



Evidence Of The Parties.

3. The suit was heard viva voce. The plaintiff gave evidence and also called two additional witnesses.

Plaintiffs Case.

4. PW1 was the plaintiff. The witness adopted his affidavit sworn on 28/2/22 and 30/01/23 as evidence in chief and the annexures thereto as the documents in proof. It is the witness evidence that he was recorded as initial owner at adjudication and registered as proprietor on 28/05/1976. That in 1982 he gave the original title to Ahmed Juma Mwasharifu to help the plaintiff secure a bank loan for his business. However the said Mwasharifu fraudulently created a power of attorney in his favor and using the same used the title to secure a loan of Kshs.40,000/- in favor of Kassim Hamadi Said. The property was charged accordingly. Mwasharifu never returned the title despite efforts by the plaintiffs. That on a visit to the suit property and later to the Kwale land registry in 1985 PW1 discovered the land had been auctioned by the bank and transferred to the defendant in February 1986.
5. That later Mwasharifu was charged with forgery in Kwale SRM Ct. Case No.1154 of 2005, convicted and acquitted on technicality appeal in 2007. That he also filed HC. Constitutional Petition No. 24 of 2013 Nassoro Said Vs Ahmed Juma Mwasharifu & 7 Others which he withdrew with leave of the court. It was also asserted that there was also a charge registered in favor of Barclays Bank which has since been discharged upon full payment of the loan advanced to Mr. Mwicigi as confirmed by the Bank. That it is upon this information that a petition filed by the plaintiff against the said bank was also withdrawn.
6. The witness asserted that at all material times the plaintiff has remained in open, continuous, peaceful, occupation and use of the suit property with workers and his family even after the registration of the defendant as owner of the same for over 24 years. That he has never been evicted. His occupation was adverse to the interest of the registered owner and without his consent.
7. According to PW1 neither Lucas Mwicigi Kinoru nor his heirs have developed or stepped into the suit property. That the 12 years limitation period expired on 3/02/1998 and Kinorus title was extinguished.
8. On cross examination the witness agreed he did not institute a civil claim against Mwasharufu for the forgery of the power of attorney. That during the period 2013 to 2020 he filed and withdrew the Constitutional Petition against Kinoru. He admitted he did not recognise Kinoru as owner and thus lodged the caution in 2002. That between the caution and the petition was a period of 12 years. The witness also admitted that the photos adduced in evidence show a small area of occupation of the 25 acres while the rest of the land was like a forest with old trees like coconuts which existed before the dispute. The witness admitted he filed this suit after failing to succeed in the suits that were based on fraud.
9. PW1 clarified in re examination that those living in the land were Mohamed Mwatsahu and his family who were put there by him to look after the land.
10. PW2 was Peter Kioko Nzioki. He told the court he was a farmer and a village elder at Lukore Mkandi 1 village where he has lived since 1983. That his plot is adjacent to the plaintiffs land. He has seen the plaintiff visiting the same. That a worker by the name Mohamed Mwatsahu lives in a structure within the farm. On the land were coconut trees, cashew, mango and Bixa. The farming has been going on since 1983.
11. Cross examined PW2 told the court he was 17 years old in 1983. That the plaintiff was not residing in the land then but he had workers such as Nyale Mumbo, Beja Kamanza, Mangale and Dalu That Dalu



Mwatsahu is the caretaker at the suit property. The witness heard about the sale of the land by a bank from the plaintiff. He had no document to show he was village elder.

12. PW3 was Mwamadi Mwatsahu. He told the court he was a caretaker in the suit property. That Lukore is his home of origin though he has a mud house he constructed in the plaintiffs land where he has lived together with his wife and children since 1997. That all his 8 children were born in the said land. That he is in the land with the plaintiffs permission. He found coconut trees, cashew and bixa. He named Beja Nyale, Mangale as previous caretakers. That he has never been chased away by an outsider, he has never seen Lucas Kinoru on the suit property. He is not on salary but is compensated with what he farms and denied the land is leased to him. He has heard about the dispute with Kinoru who he did not know.
13. Cross examined PW3 testified that the plaintiff has never lived on the land since he was employed in 1997. That he only cultivates on a portion and don't live on the entire land.
14. With the above evidence the plaintiffs case was closed.

Defendants Case.

15. DW1 was Monica Ngina Mwicigi the daughter of Teresia Nyambura Kinoru. She informed the court that the mother was 90 years old and adopted the affidavit sworn on 12/11/2022. DW1 testified she did not know the plaintiff in person. That her father Lucas Mwicigi Kinoru bought the suit property in 1984 through a public auction by KCB and issued with a title in 1986, and was in her custody. That since acquisition they had never found anyone living in the suit property. That there are no houses nor workers in the suit property. Referring to the plaintiffs depositions on his release of his title to Mwasharafu and what transpired thereafter the witness asserted that there is no deposition that the Plaintiff paid back the banks debt. The witness was not aware if the plaintiff challenged the legality of the public auction. The witness reiterated that Kinorus title was genuine and acquired legally.
16. Upon being cross examined the witness indicated she was 10 years old in 1984 when Kinoru acquired the land. That she was not involved in the acquisition. That she visited the land in 1985/6 and 2008. He has never met the plaintiff. She saw coconut and cashew trees and some dilapidated structures on the land. She has never been to the land since 2008. The witness confirmed she does not live in the Lukore area.
17. DW1 clarified in re-examination that there was no sign of anyone living in the dilapidated houses.
18. The defendants case was closed at this juncture.

Submissions.

19. Both parties filed and exchanged final submissions for their cases. The plaintiffs' submissions are dated 11/10/2024 and the defendants 18/10/2024. The court has considered the submissions.

Analysis And Determination.

20. Upon considering the pleadings, the facts, evidence led both oral and documentary as well as the rival submissions of the parties the issues that arise for consideration is; -
 - a. Whether the Plaintiffs claim has satisfied the ingredients or threshold of adverse possession
 - b. If the answer to a) above is yes, whether the plaintiff is entitled to the orders sought
 - c. Costs



21. The plaintiff's claim is hinged upon the doctrine of adverse possession. I find it pertinent to highlight the legal basis of the doctrine of adverse possession based on statutory provisions as well as judicial pronouncements on the concept.
22. The *Limitation of Actions Act* Chapter 22 of the Laws of Kenya underpins the doctrine of adverse possession in the undernoted provisions;
23. Section 7 states 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”
24. Section 13 states that;-
 - “(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.
25. Section 17 goes on to state;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.
26. Finally, Section 38(1) and (2) states;
 - “(1) 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.
 - (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.
27. I will now look at various pronouncements on the doctrine of adverse possession.
28. The Court of Appeal in the case of *Mtana Lewa v Kahindi Ngala Mwagandi* Civil Appeal No. 56 of 2014 [2015]eKLR thus;



‘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.’

29. The Court of Appeal in the case of *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR stated as follows:-

“At the expiration of the twelve-year period the proprietor’s title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College* (1900)1 Ch.19, 21.”

30. The Court of Appeal in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR had this to say

30. The law and requirements for adverse possession was reiterated in the case of *Mbira –v- Gachuhi*, (2002) IEALR 137 where it was held 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 statutory prescribed period without interruption....”

31. The court in addition to the above has also read the cases of *Wambugu Vs. Njuguna* (1983) KLR 172, The court of appeal in *Benson Mukuwa Wachira Vs Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR. I picked a number of elements to be met by a party claiming adverse possession. The suit property must have a known owner; That the said known owner must have lost his right to the land by being dispossessed by the applicant; That the applicant’s possession of the land was without the true owner’s permission; That the discontinuance by possession has been open for a continuous period of 12 years; The defendant has not taken any action against the plaintiff to extinguish their occupation of the suit land or interrupt the same over the minimum statutory period of 12 years and that the applicant has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it.

32. My task is to review the plaintiffs claim guided by the above requirements. Section 107 of the [Evidence Act](#) Cap 80 (Laws of Kenya) states that:-

‘Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exists’.

33. It is not in dispute that there is a known registered owner to the suit property. PW1 evidence is that the land was auctioned by the Kenya Commercial Bank and transferred to Lucas Mwicigi Kinoru in February 1986. PW1 tendered in evidence a copy of green card for title Kwale/Shimba Hills/1X5



certified a true copy of the original by the Kwale Land Registry on 29/07/2020. Entry No. 6 thereof reveals Lucas Mwicigi Kinoru was registered as proprietor on 4/02/1986. Title was issued as per entry No. 7 on 6/02/1986. This is admitted by the defendant. The title was issued under the Registered Land thus also meeting requirements of section 37 as to registration under any of the Acts therein and to a third party who is not the plaintiff.

34. The claimant must prove the limitation period of 12 years. PW1 alleges he has been in occupation of the suit property for over 24 years even after the registration of Mr. Kinoru as proprietor of the suit property. Based on the authorities cited time will start running for purposes of section 7 of the Act from the point of registration to the 3rd party which was in the year 1986 and the filing of the present proceedings in March 2022. Counsel for the defendants has submitted that it is not clear whether the plaintiff is seeking an order for adverse possession claim pre-1986 before the suit property was registered in favor of the defendant or post 1986.
35. My view on the above is that based on the guidelines above and the law any period before registration in the name of the third party being the defendant in my view is immaterial for purposes of adverse possession. I therefore agree with counsel for the plaintiff who submitted the critical timeline for purposes of this case is 4th February 1986 when Lucas became registered proprietor. My calculations therefore return a period of 36 years.
36. However there is the contention that the plaintiff has never recognised Lucas Mwicigi Kinoru's title as the registered owner by challenging the title. It is submitted on behalf of the plaintiff that the evidence adduced by the defendant showed otherwise. The court was referred to a letter dated 12/11/2008 (DEx. 1a) where it is alleged the plaintiff offered to buy the suit property from Kinoru; letter dated 6/3/2008(Dex 1q) by S.P Master advocate for the plaintiff noting that the defendant was the new owner and proposing to buy the suit property. The court has seen this correspondence annexed to the replying affidavit of Monica Ngina Mwicigi sworn on 12/11/2022. While I agree that the content reveals the plaintiff acknowledging the defendants registration, my view is that section 37 only requires registration under statute. I see no requirement for a person claiming adverse possession to acknowledge the title, since the relevant entry of the green card suffices.
37. It is trite that the limitation period per se is not enough it must go in tandem with entry and possession. The defendants' case is that the plaintiff has never resided, has never been in occupation and or possession of the suit property. That the plaintiff has not been personally in occupation but the land was leased to 3rd parties to cultivate. It was incumbent upon the plaintiff to prove possession from February 1986.
38. It is pertinent to address at this juncture the attributes of entry and possession under the doctrine. The Court of Appeal in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] supra stated;-
33. The next issue is whether the appellant's possession and occupation of the suit property was adverse to the respondent's title and proprietary interest. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It must start with a wrongful dispossession of the rightful owner. (See comparative Indian cases of *S. M. Kenni alias Tamanna Sabebe – v- Mst Bibi Sakina* AIR 1964 SC 1254; and *Parsimi – v- Sukhi*, 1993 4 SCC 375).
34. In the instant matter, the appellant contends that the respondent has never been in possession of the suit property. In a claim for adverse possession, the non-use of the property by the owner even for a long period of time will not affect his title. The position will only be altered when another person takes possession of the property and asserts a right over it.



35. In Alfred Welimo -v- Mulaa Sumba Barasa, [*CA No 186 of 2011*](#), this Court expressed itself thus:

“It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it; for as Robert Megarry aptly observed in his Megarry’s manual of the Law of Property, 5th ed. page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So the mere fact that the appellant abandoned possession of the suit property and went to live at Ndalú scheme by and of itself does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with *animus possidendi* (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land....”

39. The plaintiff in the present case discovered the registration of Mr. Kinoru as proprietor. He then ought to have handed over vacant possession to the new owner which he did not and which then rendered his occupation hostile in my view. PW1 evidence is that even post this discovery he continued occupation by undertaking farming through caretakers. PW3 gave evidence as one of these caretakers who testified he lives on the land with his family since 1997 and that before this there were other caretakers whom he described by names. Though he was not on any salary what he produced served as his compensation. PW3 categorically stated that the land is not leased to him. The defendant did not tender any evidence to prove the land is leased.
40. Additionally PW2 a village elder who has lived in Mkanda village where the suit property is situate corroborated the evidence that the plaintiff has had workers on the suit property since 1983 when he PW2 came to live in the village. The plaintiff also explained the circumstances why he does not himself physically reside in the suit property due to ill health and advance age . It was not enough for DW1 to assert that there were dilapidated houses that were incapable of occupation. DW1 confirmed in cross examination that there were cashew nut trees in the shamba. She also admitted she does not live in the Lukore area which in my view did not help her case considering the witnesses presented by the plaintiff.
41. Before I make a determination on the issue of possession I will also interrogate the other aspects being uninterrupted occupation and action against the plaintiff by the defendant to extinguish the plaintiff’s occupation of the suit land. The above analysis largely speaks to this point and I will not over emphasise on the issue. PW3 testified he has never been chased away by a third party and he has never seen the defendant on the suit property. DW1 never led evidence in proof of their actual action to physically regain possession from the plaintiff. It is not clear from DW1 evidence why they visited the property as alleged.
42. The defendant title owner also did not file any independent suit against the plaintiff. this would have interrupted time as well as possession- see *James Maina Kinya v Gerald Kwendaka* [2018] eKLR
43. Based on the foregoing I think the plaintiff has proved possession post 1986 to the required standard of a balance of probabilities.
44. But having made the above findings what is the place of the defendants purchase of the suit property by auction within the context of the present claim for adverse possession. It was submitted on behalf of the defendant that the plaintiff’s possession has been illegal since 1986 for failing to give vacant possession of the suit property to the defendant as a bonafide purchaser for value with consideration. I have already made my observation that the failure to give vacant possession amounted to the hostile/ adverse occupation. It has been urged that the grant of the KCB loan and transfer to the defendant



disturbed the elements of clam,nec vi,nec precario. I have already made a finding that time started running upon the registration of the third party defendant.

45. It has been further contended that the plaintiff is attempting to usurp the power to exercise statutory sale exercise effected by KCB and that the claim herein was an abuse of the court process. Reliance was placed on the case of Joseph Macharia Kairu v Kenneth Kimani Muiruri [2021] KEELC 522 (KLR). I have keenly read the judgement of Justice L. Gacheru. Faced with a claim for adverse possession where the respondent purchased land at an auction and never took possession. I noted that the claim for adverse possession was dismissed on this point on the basis that there was a lot of legal intricacies that emanated from the said suit which the Applicant opted not to furnish the Court with adequate evidence. The Court was therefore persuaded that the Applicant was attempting to usurp the effect of the Orders in Nairobi Civ No. 436 of 1998. The orders therein were for vacant possession arising out of a suit contesting the auction.
46. In the present case the auction by KCB has not been contested and there was no court determination on the same. I say so because the petition filed in Nassoro Said Vs. Ahmed Juma Mwasharifu & 7 Others Constitutional Petition No. 24 of 2013 was withdrawn before it was determined, the plaintiff led in evidence a Notice of Withdrawal of suit dated 28/08/2020. In any event the claim herein is a claim for adverse possession and not for nullification of the title based on the auction by KCB.
47. It is the finding of this court that the plaintiff has proved the claim of adverse possession to the required standard of a balance of probabilities and is entitled to the orders sought in the Originating Summons. The following orders issue to dispose of this suit THAT;-
- a. A declaration hereby issues that the Plaintiff is the proprietor of the parcel known as Kwale/Shimba Hills/1X5 by virtue of adverse possession
 - b. An order be and is hereby directed to the Land Registrar Kwale Lands Registry to register a transfer of the parcel of land known as title Kwale/Shimba Hills/1X5 from the defendant to the plaintiff
 - c. A restraining order hereby issues against the defendant from entering, harassing, evicting or in any other way, interfering with the plaintiff occupation and possession of the parcel of land known as title Kwale/Shimba Hills/1X5
 - d. Each party to bear its own costs of the suit.

Orders accordingly

JUDGEMENT DATED SIGNED AND DELIVERED THIS 29TH DAY OF MAY 2025.

HON. LADY JUSTICE A.E DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -

Ms. Katisya for the Plaintiff

No appearance for the Defendant.

Ms. Asmaa Muftah Court Assistant

