



REPUBLIC OF KENYA



**Litu & 26 others v Bomet (Enviromental and Land Originating Summons  
E010 of 2022) [2025] KEELC 4043 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4043 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E010 OF 2022  
GMA ONGONDO, J  
MAY 28, 2025**

**BETWEEN**

**KENNEDY ANGANO LITU ..... 1<sup>ST</sup> PLAINTIFF**  
**MILTON MUNG'ASIA ..... 2<sup>ND</sup> PLAINTIFF**  
**MESHACK KIMANYANO ..... 3<sup>RD</sup> PLAINTIFF**  
**ISAAC LIVUMBAZE ..... 4<sup>TH</sup> PLAINTIFF**  
**GRACE MUDANYA ..... 5<sup>TH</sup> PLAINTIFF**  
**JACKSON MALUNGU INDIASI ..... 6<sup>TH</sup> PLAINTIFF**  
**KEVIN OGWANDA EREGWA ..... 7<sup>TH</sup> PLAINTIFF**  
**JASTO LIANZIKHA ..... 8<sup>TH</sup> PLAINTIFF**  
**THOMAS MWAMI OGOLI ..... 9<sup>TH</sup> PLAINTIFF**  
**MARIKO MAHUGU MAJANGA ..... 10<sup>TH</sup> PLAINTIFF**  
**JOTHAM ISIDUA ASAVA ..... 11<sup>TH</sup> PLAINTIFF**  
**MARGARET KISIVULI IMBWAGA ..... 12<sup>TH</sup> PLAINTIFF**  
**EZEKIEL MAYOGA MAYODI ..... 13<sup>TH</sup> PLAINTIFF**  
**WAYNE MAGANI SHIKUVU ..... 14<sup>TH</sup> PLAINTIFF**  
**VINCENT MUSINDE ..... 15<sup>TH</sup> PLAINTIFF**  
**EMMANUEL MWAVALI ..... 16<sup>TH</sup> PLAINTIFF**  
**FRANCES ONGAJI ..... 17<sup>TH</sup> PLAINTIFF**  
**JOHN MISIGO ..... 18<sup>TH</sup> PLAINTIFF**  
**JAPHET AFUNDI ILAVUNA ..... 19<sup>TH</sup> PLAINTIFF**



ROSE J MUGIVANE .....	20 <sup>TH</sup> PLAINTIFF
ESTER ARIVIZA .....	21 <sup>ST</sup> PLAINTIFF
GILBERT NDALE .....	22 <sup>ND</sup> PLAINTIFF
SAMWEL AGENYA .....	23 <sup>RD</sup> PLAINTIFF
WYCLIFFE MZEMBI .....	24 <sup>TH</sup> PLAINTIFF
PETER MAGOMERE JUMBA .....	25 <sup>TH</sup> PLAINTIFF
WILSON SIMWA MAGOMERE .....	26 <sup>TH</sup> PLAINTIFF
MAKISI MALESO MKASIA .....	27 <sup>TH</sup> PLAINTIFF

AND

KUCHWA ARAP BOMET .....	DEFENDANT
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### JUDGMENT

1. On 31<sup>st</sup> March 2022, the plaintiffs who are represented by Lagat Joshua and Company Advocates, initiated the instant suit by way of an Originating Summons dated 25<sup>th</sup> March 2022, pursuant to Articles 40 and 66 of *the Constitution*, Sections 17 and 38 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya, Order 37 Rule 7 of the Civil Procedure Rules 2010 as read with Sections 1A, 1 B and 3A of the *Civil Procedure Act* Chapter 21 Laws of Kenya seeking the orders infra:
  - a. A declaration that the title of the defendant in land registration no. Nandi/Kapkangani/657 (the suit land herein) has been extinguished by the plaintiffs' adverse possession.
  - b. A declaration that the plaintiffs have acquired freehold interest in the suit land by their adverse possession thereof for a period of more than 12 years which is from the year 1983 to date.
  - c. An order do issue requiring and directing the Land Registrar Nandi County to register the plaintiffs in place of the defendant on the suit land.
  - d. Any other relief that this Honourable Court deems fit to award.
  - e. Costs of this summons be provided for.
2. The originating summons is anchored on a twenty (20) paragraphed supporting affidavit of the 1<sup>st</sup> plaintiff sworn on even date and a copy of the authority to act (KAL 1), a copy of the official search certificate in respect to the suit land (KAL 2), a copy of the Chief's letter dated 30<sup>th</sup> June 2021 (KAL 3) and a copy of the 1<sup>st</sup> plaintiff's National Identification Card (KAL 4) annexed to the affidavit. The 1<sup>st</sup> plaintiff deposed, inter alia, that the defendant is the registered proprietor of the suit land. That the plaintiffs' parents purchased the suit land from the defendant herein who delivered vacant possession of the same. That thereafter, the said parents took possession of their respective shares and established their matrimonial homes thereon. That however, the defendant relocated to a different place together with his entire family, without executing the transfer documents. That the plaintiffs were born and brought up on the suit land where they have interred the remains of their parents and grandparents.
3. That furthermore, the plaintiffs have been in peaceful, actual physical occupation and possession of the suit land herein continuously and uninterrupted for a period in excess of 12 years. That the suit



land has an encumbrance, to wit, a charge to Industrial and Commercial Development Corporation which was registered against the title thereof in the year 1989. That the instant suit has been lodged in time, good faith and in the interest of justice and fairness.

4. The defendant did not enter appearance or defend the suit, despite service being effected on him by way of substituted service through the Daily Nation Newspaper of 20<sup>th</sup> January 2023. Therefore, this court directed that hearing of the suit be by way of formal proof.
5. PW1, Kennedy Angano Litu, relied on his statement dated 25<sup>th</sup> March 2022, which was adopted as part of his evidence. He further relied on his list of documents of even date serial numbers 1 to 3 to wit, a copy of the official search certificate in respect to the suit land, a copy of the Chief's letter dated 30<sup>th</sup> June 2021 and a copy of PW1's National Identification Card (PExhibits 1 to 3 respectively) as well as authority to swear (PExhibit 4) and Gazette Notice dated 20<sup>th</sup> January 2023 (PExhibit 5). He averred that he has lived on the suit land for 20 years.
6. The plaintiffs' counsel filed submissions dated 23<sup>rd</sup> April 2025 and identified three issues for determination thus: whether the defendant was duly served, whether the Honourable Court should grant the orders sought and who should bear the costs of the application? Learned Counsel submitted that the defendant was duly served via a Notice in the Daily Nation Newspaper dated 20<sup>th</sup> January 2023 but failed to enter appearance or defend the suit. That hence, the plaintiffs' claim remains uncontroverted.
7. Furthermore, Counsel stated that the plaintiffs' have been in open, notorious and exclusive possession of the suit land for a period in excess of 12 years. That the plaintiffs have proved their case on a balance of probabilities. Reliance was placed on various authorities including *Mweu v Kiu Ranching & Farming Co-operative Society Ltd.* [1985] KLR 430, *Samson S. Maitai & Anor v African Safari Club Ltd. & Anor.* [2010] eKLR, among others, to buttress the submissions.
8. I have duly considered the plaintiffs' pleadings, evidence and written submissions. The issue for determination is whether the plaintiffs have acquired the suit land by way of adverse possession and have thus, met the threshold for the orders set out on the face of the originating summons.
9. Notably, Section 28 of the *Land Registration Act*, 2016 (2012) provides that unless the contrary is expressed in the register, all registered land is subject to specified overriding interests. One of the overriding interests recognised by Section 28(h) of the *Land Registration Act* (supra) are "rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription."
10. Further, Section 7 of the *Land Act*, No. 6 of 2012 stipulates the methods of acquisition of title to land in Kenya. By Section 7(d) thereof, it is provided that title to land may be acquired through prescription.
11. As observed in the case of *Wilson Kazungu Katana and 101 others v Alim Abdalla Bakshein and another* (2015) eKLR, adverse possession dictates thus;
  - a. The parcel of land in dispute must be registered in the name of a person other than the applicant,
  - b. The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner,
  - c. The applicant must be in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.



12. Furthermore, the applicant must show that such possession was without the permission of the owner; see *Richard Wefwafwa Songoi v Ben Munyitwa Songoi* [2020] eKLR.
13. It is noteworthy that the plaintiffs' claim is for land parcel number Nandi/Kap Kangani/657 (the suit land herein) measuring approximately nine decimal eight hectares (9.8 Ha) in area. So, the plaintiffs' claim is over a definite portion of land as held in *Muthuita v Wanoe & 2 others* [2008] 1KLR (G&F) 1024.
14. In connection with the first dictate or element, the suit land is registered in the name of Kuchwa Arap Bomet who is the defendant herein. This is evidenced by a copy of the official search certificate dated 6<sup>th</sup> April 2021 attached to the plaintiffs' Supporting Affidavit and produced herein as PExhibit 1.
15. Concerning the issue of open and exclusive possession, the plaintiffs contend that their parents purchased the suit land from the defendant herein who delivered vacant possession of the same. That thereafter, the said parents took possession of their respective shares and established their matrimonial homes thereon. This was corroborated by the letter of the Chief Kaptuiya Location dated 30<sup>th</sup> June 2021 (PExhibit 4), wherein he confirmed that the plaintiffs reside on the suit land. The same remains uncontroverted.
16. It is established law that possession can take different forms such as fencing or cultivation of the land in dispute; see *Titus Ong'ang'a Nyachio v Martin Okioma Nyauma & 3 others* [2017] eKLR.
17. Indeed, a purchaser whose possession is based on a contract of sale can only justify a claim for adverse possession if the contract of sale had been repudiated or rescinded. Alternatively, there is such justification upon the purchaser's payment of the last installment of the purchase price. In the present case, no evidence has been produced in court as proof of purchase.
18. On that score, this court subscribes to the decision of the Court of Appeal in *Wambugu v Njuguna* [1983] KLR 173 wherein it was stated that:

“Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist.”
19. Besides, the plaintiffs have not attached grants of letters of administration to the estates of their parents hence, lack locus standi to institute and prosecute this suit on behalf of their respective Estates. It is settled law that a litigant is clothed with locus standi upon obtaining a limited or full grant of letters of administration in case of intestate succession; see *Rajesh Pranjivan Chudasamavailesh Pranjivan Chudasama* [2014] eKLR.
20. As regards the period of possession and having dispossessed the owner, the plaintiffs averred that they have been in peaceful, actual physical occupation and possession of the suit land herein continuously and uninterrupted since 1983, a period in excess of 12 years. Further, PW1 testified that he has lived on the suit land for twenty years. Clearly, the same was not disputed by the defendant.
21. Moreover, I have examined the proprietorship section of the Official Search Certificate in respect to the suit land herein and note that there exists a charge over the suit land by Industrial and Commercial Development Corporation to secure a sum of Kshs. 200,000/-. The same was registered against the title on 25<sup>th</sup> September 1989. Further, there exists a caution registered in favour of one Musa Luvisia



- and others claiming purchasers' interest thereof. The said caution was registered on 29<sup>th</sup> November 1989 and is still in effect to date. Notably, the said Musa Luvisa is not a party to this suit.
22. Under Section 28 (g) of the *Land Registration Act* (supra), a charge is an overriding interest over land. With respect to cautions, Section 72(2) of the *Land Registration Act* (supra) provides that:
- “ A disposition that is inconsistent with the caution shall not be registered while the caution is still registered except with the consent of the cautioner or by the order of the court.”
23. In *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR, the Court of Appeal found that a charge does not constitute use of land within the meaning of Article 162(2) (b) of *the Constitution* of Kenya 2010.
24. It is trite law that where a proprietor charges or mortgages land occupied by a trespasser adversely to the title of the proprietor, regardless of whether the trespasser is aware of such transaction, the act of charging or mortgaging the land does not interrupt time from running in adverse possession; see *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* (2016) eKLR, where the Court of Appeal cited with approval the finding by the High Court in *Kipkoech Arap Langat & Another v Kipngeno Arap Laboso, Kericho HCCC No 124 of 2004* (OS).
25. In the instant case, it is not clear whether the plaintiffs were already in possession of the suit land at the time of registration of the charge against its title. Whilst the plaintiffs asserted that they have been in actual, physical occupation and possession of the suit land continuously and uninterrupted since 1983, PW1 testified that he has lived on the suit land for twenty years. Going by PW1's testimony, it would appear that the charge against the title to the suit land was registered way before possession of the same by the plaintiffs herein. Also, I take into account the fact that there exists a caution over the suit land registered in favour of one Musa Luvisa, who is not a party to this suit. Such caution has not been lifted and is thus, still in force. `
26. I subscribe to the Court of Appeal decision in *Kirugi and another v Kabiya and 3 others* [1987] KLR 347, where it was held that the burden was always on the plaintiff to prove his case on the balance of probabilities even if the case is heard by way of formal proof.
27. To that end, I hold that the plaintiffs' capacity to lodge this suit and the court's jurisdiction over this claim touching on a charge, arise and/or are in question. The suit is therefore, incompetent.
28. Accordingly, the instant suit generated by way of Originating Summons dated 25<sup>th</sup> March 2022 is hereby struck out with no orders as to costs.
29. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAPSABET THIS 28<sup>TH</sup> DAY OF MAY 2025.**

**G.M.A ONG'ONDO**

**JUDGE**

Present

Mr. Lawi Sang', Learned Counsel for the plaintiffs

Walter, Court Assistant

